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

Sexual harassment claim under Title IX does not preclude equal protection claim under 42 U.S.C. 1983. Fitzgerald v. Barnstable School Committee, 555 U.S. ___ (2009).

Facts: After investigation, both the Barnstable (Mass.) School Committee (the Committee) and the local police department concluded there was insufficient evidence to further pursue the complaints of a female kindergarten student that sexual harassment was taking place on the school bus. The parents of this student, Lisa and Robert Fitzgerald, felt that the ideas put forward by Barnstable school officials to stop whatever was taking place on the bus unfairly punished their daughter. They made alternative suggestions that focused on the boy whose alleged behavior created the problem. School officials did not act on the Fitzgeralds' suggestions, and they began driving their daughter to school.

Nevertheless, the Fitzgeralds continued to hear from their daughter about harassment at school, and during that school year she had an unusual number of absences. They reported each incident to school officials but ultimately filed suit in federal court alleging that the Committee's response to their allegations of sexual harassment had been inadequate and had allowed further harassment of their daughter. In addition to claiming a Title IX violation, the Fitzgeralds also presented a claim under 42 U.S.C. 1983, alleging violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The federal trial court dismissed the Section 1983 claim, holding that Title IX provided the sole avenue for addressing gender discrimination in educational institutions. The court granted judgment before trial to the Committee on the Fitzgeralds' Title IX claim.

The Court of Appeals for the First Circuit affirmed the trial court ruling. Judgment for the Committee on the Title IX claim was appropriate, the court found, because the response of the Committee to the reported harassment had been objectively reasonable. The court also agreed that the Title IX claim precluded the Section 1983 equal protection claim. The Fitzgeralds appealed again, and the U.S. Supreme Court granted review.

Holding: The Supreme Court reversed the ruling of the First Circuit Court of Appeals.

Whether Title IX precludes the use of Section 1983 to address gender discrimination in the schools has been an issue of conflict among the nation's federal circuits. Earlier Supreme Court cases have held that other federal statutory schemes, such as the Water Pollution Control Act, the Education of the Handicapped Act, and the Telecommunications Act of 1996, preclude the remedy of suits brought under Section 1983. However, these statutes all have extensive and detailed remedial schemes that are mandatory: allowing a claimant to circumvent these procedures and go straight to court with a Section 1983 claim would frustrate congressional intent that these "carefully tailored" schemes be followed. Title IX, conversely, has only one express enforcement mechanism: an administrative procedure by which the federal government can determine whether an institution is in violation of Title IX and whether to withdraw federal funds. The Court also recognized that Title IX has been found to have an implied right of private action, under which a complainant can file directly in court. Thus, allowing a Section 1983 action in conjunction with Title IX does not circumvent any remedial scheme.

In addition, the substantive rights protected by Title IX and the Equal Protection Clause diverge. Title IX exempts from its purview certain activities that could constitute violations of the Equal Protection Clause. For example, Title IX does not apply to military service schools or traditionally single-sex colleges, but the admissions policies of such institutions have been challenged successfully under the Equal Protection Clause. [See, e.g., digest of *United States v. Virginia* in "Clearinghouse," *School Law Bulletin* 37 (Spring

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2006): 2, 5–6—holding that the all-male admission policy at the Virginia Military Institute violated the Equal Protection Clause].

Burdens of proof also differ under the statutes. Under Title IX, an entire school district can be found liable on proof that even one of its administrators acted with deliberate indifference to a sexual harassment claim; under Section 1983, however, the complainant must show that the indifference was a systemwide policy before the district could be held liable.

Finally, when Congress enacted Title IX in 1972 it was with the explicit understanding that it would be interpreted in accordance with Title VI of the Civil Rights Act of 1964. Title VI has been found to allow concurrent Section 1983 claims.

Former employee who revealed sexual harassment during the course of an internal investigation is protected from retaliatory employment action by Title VII. Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 555 U.S. ___ (2009).

Facts: The Metropolitan Government of Nashville and Davidson County, Tennessee (Metro), initiated an internal investigation into rumors of sexual harassment by the Metro School District's director of employee relations, Gene Hughes. When an investigator asked Vicky Crawford, a thirty-year Metro employee, whether she had seen any inappropriate behavior by Hughes, Crawford related several instances of sexually harassing behavior. Two other employees also discussed sexually harassing behavior by Hughes.

Although Metro took no adverse employment action against Hughes, shortly after the investigation ended it terminated the two other employees who spoke out as well as Crawford. Metro terminated Crawford, it said, because of embezzlement. Crawford filed suit under Title VII's antiretaliation clause. Under this statute, it is illegal to retaliate against an employee for (1) opposing sexual harassment or (2) participating in an investigation concerning sexual harassment. These two clauses are called the "opposition" clause and the "participation" clause, respectively.

Metro successfully argued that Crawford's conduct was not protected activity under Title VII's antiretaliation provision. The opposition clause, it asserted, required more than just answering questions in an investigation, and the participation clause did not apply to internal investigations that were not part of a pending Equal Employment Opportunity Commission (EEOC) charge. Both the federal trial court and the Sixth Circuit Court of Appeals found these arguments persuasive and dismissed Crawford's case.

As these rulings conflicted with rulings from other federal judicial circuits, the U.S. Supreme Court granted review to set a clear standard.

Holding: The U.S. Supreme Court reversed the lower court rulings and remanded Crawford's case to the trial court for hearing on its merits.

The interpretation of Title VII's antiretaliation clause put forth by Metro and accepted by the Sixth Circuit thwarts the intent of that provision: to prevent employee harm and eliminate sexually harassing behavior from the workplace. It places such stringent conditions on the opposition and participation clauses that most employees would surely keep their mouths closed when asked about sexual harassment rather than risk punishment without recourse.

While the active opposition described by the Sixth Circuit as protected under Title VII certainly does constitute opposition, it does not cover all the ground it should. In ordinary discourse, opposition has a less active meaning as well. For example, there are people who oppose abortion or capital punishment yet take no action to stop them and may not even speak their views aloud. There is no reason for a rule that protects an employee who reports sexual harassment of her own initiative but not one who, when asked, reports the same thing using the same words.

The lower court rulings must be reversed because of their mistaken reading of the opposition clause; therefore, the Court declined to rule on the issue of whether the lower court holding on the participation clause also was mistaken.

Court weighs claims that school's gang-related activity policy is illegal. Copper v. Denlinger, ___ N.C. App. ___, 667 S.E.2d 470 (2008).

Facts: Plaintiffs in this action were individual students in the Durham County school system who had been subject to either short- or long-term suspensions on the basis that they were involved in gang-related activity. Plaintiffs asserted that the application of the gang-related activity policy to them violated their rights to procedural due process and equal protection under both the state and the federal constitution. They also sought a declaratory judgment that the policy itself was unconstitutional. This group of students was never certified as a class, meaning that the plaintiffs were required to prove their individual claims rather than try to make a case for the group as a whole.

The trial court dismissed their claims before trial, and plaintiffs appealed. Again the defendants, the Durham Public School Board of Education and Ann Denlinger, superintendent of the Durham Public Schools, moved to dismiss these claims before trial.

Holding: The North Carolina Court of Appeals granted the defendants' motion in part and denied it in part. For most of the claims dismissed, the court found that the plaintiffs had failed to make specific allegations relating to each student—that is, they attacked the case as though the students were a certified class rather than individual plaintiffs.

But first, the court refused to dismiss the plaintiffs' claim for failure to timely file the record on appeal in violation of the North Carolina Rules of Appellate Procedure. The court found that this violation was not so substantial or egregious as to significantly impair the court's ability to review the merits of the case or to damage the adversarial process. It was, however, serious enough to charge plaintiffs' attorney with the printing costs of this appeal.

The court next addressed the plaintiffs' federal and state claims concerning short-term suspensions. Defendants charged that the court lacked jurisdiction over these claims because the plaintiffs had failed to exhaust their administrative remedies before going to court. Plaintiffs countered by arguing that under the board's policy, students do not have the right to appeal short-term suspensions to the board. The court concluded that the plaintiffs had sufficiently alleged that the pursuit of administrative remedies would have been futile and refused to dismiss the short-term suspension claims on this basis.

Ultimately, however, the court did dismiss the short-term suspension claims because of the plaintiffs' failure to sufficiently allege: (1) that Denlinger had actual or constructive knowledge of the behavior of the principals in individual schools (under federal law she cannot be held liable merely because her employees acted wrongly); (2) that the board had taken any particular action at all with respect to short-term suspensions; and (3) that, although the complaint alleged that the principals failed to follow board regulations on short-term suspensions, this behavior violated their right to procedural due process.

The long-term suspension claims came next, and the court dismissed all but one. The court found that only with regard to one student, Todd Douglas (now deceased), did the plaintiffs complaint contain allegations adequate to allege deprivation of due process. Douglas was suspended for thirteen days, long enough to entitle him to an appeal. However, on the day he was to return to school, October 14, he received a letter from Denlinger dated October 8 authorizing his transfer to another school on October 9th. The plaintiffs allege that Denlinger intentionally delayed the delivery of this letter to cut off Douglas's right to appeal his suspension and that Douglas's mother was told she could not appeal because it was a short-term suspension.

This set of facts is enough to establish that, for Douglas, pursuit of administrative remedies would have been futile. As to the other plaintiffs, however, each complaint either makes no specific arguments about futility or provides facts that actually rebut their contention that administrative remedies would have been futile. For example, when Desmond Johnson was suspended for the rest of the school year in January, his father received notice that he had the right to appeal before January 28. However, due to illness, Johnson missed the deadline. Nonetheless, the board heard Johnson's late appeal (in May) and retroactively reduced his suspension to ten days.

Having addressed the issue of exhaustion of administrative remedies, the court went on to assess the adequacy of Douglas's procedural due process claims. The defendants failed to show that Douglas had a state remedy other than that provided by the administrative review he was denied: therefore, he is entitled to bring a due process claim under the North Carolina Constitution. The court dismissed the federal claim against the school board for failure to allege any specific actions taken by the board regarding long-term suspensions. The court retained the federal due process claim against Denlinger in her individual capacity because the recitation of the facts concerning Douglas's transfer letter were sufficient to state a claim against her. The court also declined to rule whether Denlinger was entitled to qualified immunity, stating that it needed more facts than the pleadings before it provided.

In concluding its analysis of the procedural due process claims, the court noted that neither party had addressed the issue of whether the one surviving claim was still valid in light of Douglas's death.

The court dismissed the equal protection claims in their entirety, finding that the plaintiffs had failed to allege that any action was taken against any individual student on the basis of race, relying instead on allegations of racial bias in the Durham schools generally. Once again, because this group of student plaintiffs was never certified as a "class," this lack of specificity is fatal.

Finally, the court addressed the plaintiffs' argument that the trial court had erroneously dismissed their claim that the board's gang policy is unconstitutionally vague. After reviewing the policy itself, in conjunction with the plaintiffs' allegations, the court agreed that the claim should not have been dismissed. There are many instances within the policy where terms are undefined: What "clothing, jewelry, emblems, badges, symbols, signs or other items" may be evidence of gang membership? Which "gestures, handshakes, slogans, drawings, etc." will be deemed evidence of gang affiliation? The board countered that a list detailing these items exists and is required to be included in every student handbook and in every principal's office. However, as no copy of the list was contained in the record of appeal, the court could not address whether this list cured the deficiencies evident on the face of the policy.

Special education teacher was not a "public official" entitled to immunity. Farrell v. Transylvania County Board of Education, ___ N.C. App. ___ , 668 S.E.2d 905 (2008).

Facts: The parents of Sean Farrell, a student with special needs in the Transylvania County school system, brought

suit against the school board and several of its representatives in both their official and individual capacities. The suit charged that Sean had been the victim of severe physical and emotional mistreatment in the self-contained special-needs classroom of Donna Garvin at the hands of her aid, Jane Wohlers. The details of the case are discussed in an earlier digest ["Clearinghouse," *School Law Bulletin* 36 (Fall 2005): 16–17].

This digest concerns Garvin's appeal of the trial court's refusal to dismiss the claims against her (negligent infliction of emotional distress and federal civil rights violations) in her individual capacity. Garvin asserted that she qualified as a public official entitled to immunity from suit against her personally. The trial court ruled that as a classroom teacher, Garvin was not entitled to immunity.

Holding: The North Carolina Court of Appeals affirmed the trial court ruling.

Under well-established case law, a public official is someone who holds a position created by the state's constitution or statutes, exercises a portion of the sovereign power, and performs duties that require the use of discretion (i.e., that are not merely "ministerial"). The court found that despite Garvin's contentions to the contrary, the position of public school teacher is not one created by statute. G.S. 115C-307, which she cited, defines the *duties* of a teacher, and 115C-325, which governs the system of employment for public school teachers, merely defines the terms used in that section. The court concluded its analysis by noting that although the role of public school teacher is vital to the education of the state's children, it is not one that entails the exercise of discretion in the carrying out of the sovereign's power. Because Garvin is not a public official, she is not entitled to immunity for negligence in the performance of her job; neither is she entitled to qualified immunity for federal civil rights violations.

Central Piedmont Community College is an arm of the state and entitled to Eleventh Amendment immunity from suit. Davis v. Central Piedmont Community College, 2008 WL 5120616 (W.D.N.C.).

Facts: Mary Helen Davis brought suit against Central Piedmont Community College (CPCC) alleging that its move to ban her from campus violated various of her federally protected constitutional rights. CPCC moved for judgment before trial, arguing that it was immune from suit under the Eleventh Amendment.

Holding: The federal court for the Western District of North Carolina granted judgment for CPCC. The Eleventh Amendment bars suits in federal court brought by citizens against states. Entities that are "arms of the state" share this immunity. One factor in determining whether an entity qualifies as an arm of the state is whether a judgment against it would be paid with state funds. CPCC is part of the statutorily established North Carolina Community College System, which is governed by the State Board of Community Colleges and receives a large portion of its budget from the state treasury. This alone would be sufficient to entitle CPCC to Eleventh Amendment immunity. However, the court went on to find additionally that the community college system as established in the North Carolina General Statutes operates largely under the direction and governance of the state or state officials. It would frustrate the purpose of Eleventh Amendment immunity to allow an entity so tightly bound to the state to be forced into court by a private citizen. Therefore, concluded the court, as CPCC has not waived its immunity, the suit must be dismissed.

Court rejects former employee's Whistleblower Act claim. Helm v. Appalachian State University, 2008 WL 5212394 (N.C App.).

Facts: In May 2006 James Deal Jr. served on the board of trustees for Appalachian State University (ASU). A friend of Deal's, Michael Cash, apparently low on funds, asked Deal whether ASU would be interested in buying an eleven-acre plot of land he owned. Deal apparently spoke, or referred Cash to, someone in ASU's business affairs department.

Jane Helm served as vice-chancellor for business affairs at ASU from 1994 to 2006. Her supervisor was Kenneth Peacock. In May 2006 Peacock asked Helm to issue a $10,000 check from the university endowment fund made out to Michael Cash in exchange for an option to purchase real property for $475,000 on or before September 1, 2006.

Helm informed Peacock that the endowment fund did not, and would not, have enough money to exercise the option by September 1. Peacock told her to issue the check anyway, informing her that Cash needed the money to pay his mortgage. Helm refused because she believed that the use of endowment funds for this purpose was inappropriate. She later complained to a university attorney about the matter.

Ultimately the endowment committee of the ASU board of trustees voted to approve the purchase of the option for $10,000. Helm abstained. Peacock asked her to resign that afternoon; she retired rather than resign. She then filed suit in state court asserting claims under North Carolina's Whistleblower Act (among other things). The trial court dismissed her claims before trial, and she then appealed.

Holding: The North Carolina Court of Appeals affirmed the dismissal of Helm's claims. None of Helm's assertions—concerning inappropriate use of university funds, her discussion with the university lawyer, or her refusal to issue the check Peacock requested—qualify as protected activity under the Whistleblower Act. Where Helm went wrong, found the court, was in characterizing the option as worthless and, thus, its purchase as a misappropriation of state funds. As a matter of law, the court continued, an option

to purchase land has an intrinsic value regardless of the purchaser's ultimate ability to exercise it. Therefore Peacock engaged in no misconduct, and Helm's activities in opposition to the option were not protected.

Court dismisses racial discrimination claim by professor denied tenure. Weathers v. University of North Carolina at Chapel Hill, 2008 WL 5110952 (M.D.N.C.).

Facts: In 2001 Andrea Weathers became an assistant professor on the tenure track in the University of North Carolina's (UNC–CH) Department of Maternal and Child Health. She was the department's only African American faculty member on tenure track. In 2007 Herbert Peterson, her supervisor, informed Weathers that at the end of her employment term in November 2008 she would not be promoted to tenured professor in the department or reappointed as an assistant professor. Peterson's reasons were: (1) the failure of Weathers to timely submit her tenure package to the department by the named deadline (despite reminders and requests from appointment committee members) and (2) substandard performance, particularly in terms of the number of her publications. Weathers began appealing the decision through UNC–CH administrative channels; that process was still ongoing at the time of the opinion here digested.

After Weathers had been notified of her nonreappointment status, she was designated as principal investigator on a grant from the National Institutes of Health (NIH), which she had procured on behalf of UNC. Shortly before her employment with UNC–CH ended, the university informed her that it would release the NIH grant to another qualifying institution and, in order to allow her time to try to coordinate transfer of the grant to another institution, would delay telling the NIH about her separation from UNC for thirty days following her last day of employment. Although Weathers did not obtain another tenure-track position elsewhere, she did locate an unpaid visiting scholar position at John Hopkins University, where she might have been allowed to continue work on the NIH grant.

At the end of her employment term Weathers filed suit in the federal court for the Middle District of North Carolina charging that her nonreappointment was due to racial discrimination and seeking a preliminary injunction to prevent UNC–CH from ending her employment. For the reasons discussed below, the court denied her motion for a preliminary injunction.

Holding: The court began by noting that a preliminary injunction is an extraordinary remedy granted only in rare circumstances. In determining whether to grant this remedy, courts engage in balancing four factors: (1) the likelihood of irreparable harm to the plaintiff if the injunction is denied, (2) the likelihood of irreparable harm to the defendant if the injunction is granted, (3) the likelihood that the plaintiff will prevail on the merits of his or her claim at trial, and (4) whether the public interest is served by granting an injunction. The plaintiff bears the burden of showing that each of these factors weighs in favor of an injunction.

Weathers failed to show, first, that she would suffer irreparable harm if the court did not enjoin UNC–CH from ending her employment. For one thing, her loss of income is reparable: if she is able to prove her discrimination claim at trial (which the court doubted), appropriate remedies could include back pay as well as reinstatement. For another, the potential damage to Weathers's reputation stemming from her inability to complete work on the NIH grant is speculative. Her failure to get tenure and, as Weathers argued, her subsequent inability to continue her NIH work at UNC–CH do not, under well-established case law, constitute irreparable damage to her reputation: numerous factors (e.g., curricular needs and budgetary concerns) other than the quality of Weathers's work *could* account for nonrenewal. In addition, Weathers herself introduced evidence showing that Johns Hopkins University might be a possible venue for continuing work on the NIH grant. She cannot complain of irreparable damage if she herself has not done what she could to remedy the situation. Finally, at the time Weathers accepted the role of principal investigator, she already knew that her relationship with UNC–CH would soon end and that her work on the NIH grant could be interrupted or discontinued.

In addition to failing to show irreparable harm, Weathers also failed to show that she was likely to succeed in her racial discrimination claim. The court opined that there was little likelihood that Weathers could show she was qualified for a tenured position in her department at UNC–CH. Even if she were successful, continued the court, UNC–CH forecasted ample evidence in support of her nonreappointment. Beyond failing to submit her tenure package in a timely manner or to publish a sufficient number of peer-reviewed articles, Weathers had poor relations with her colleagues, which several UNC–CH employees testified stemmed from her unprofessional and discourteous behavior, not racial animus.

The Industrial Commission refuses to find a change in the condition of a former employee whom it earlier had found not to be permanently and totally disabled as a result of a work-related injury; court affirms decision. Hunt v. North Carolina State, 2009 WL 21055 (N.C. App.).

Facts: Dorothy Hunt injured her right wrist and lower back when she fell on a wet floor during the course of her employment with North Carolina State University (NCSU). In a February 2002 opinion, the Industrial Commission (the Commission) found that Hunt was not permanently and totally disabled as a result of the accident.

In 2007 Hunt returned to the Commission seeking an order to compel medical treatment (or payment for medical treatment) as a result of a change in her condition relating to the initial injury. The Commission denied Hunt's motion; Hunt appealed.

Holding: The North Carolina Court of Appeals affirmed the Commission's ruling.

Hunt's first assertion was that the Commission erred in not making specific findings of fact concerning the vocational report upon which her two doctors relied in forming their opinions concerning her condition. The court declined to require findings of fact concerning the various sources used by experts testifying before the Commission.

Hunt also asserted that the Commission had erred in not finding that she had suffered a change of condition. Under G.S. 97-47 an interested party may apply to the Commission to review and increase an earlier award because a change in condition occurring after the final compensation award has caused a substantial change in one's physical capacity to earn wages. To show a change in her condition justifying the modification of the first award (which found her not permanently and totally disabled), Hunt would have to show by the greater weight of the evidence that a new condition exists and that it is causally related to the initial injury.

The Commission, however, gave little weight to the testimony of Ms. Hunt's doctors that she was totally disabled. Their testimony was based, stated the court, on Hunt's subjective recitation of her history and her current feelings. In addition, much of their testimony raised the issue of causation: it was unclear whether Hunt's condition changed because of her injury or because of the less active lifestyle she assumed upon her retirement two or three years previous. In any event, Hunt fell short of proving her case by the greater weight of the evidence.

Finally, the court affirmed the Commission's use of an unsworn report in concluding that the medications prescribed by Hunt's doctor for her injury were not reasonably required for treatment of that injury. When this report was introduced into evidence, Hunt's lawyer stated that they had no objection to it. Further, there appears no reason why they could not have deposed the report's author to discredit the report. It seems they simply chose not to. Thus, the Commission did not err on relying on this report.

Other Cases

Court affirms judgment for teacher who sued her school board to recover damages for injuries she sustained while trying to protect one student from another; the attacking student was known to be dangerously aggressive. Dinardo v. City of New York, 2008 WL 5333239 (N.Y.A.D. 1 Dept.).

Facts: Zelinda Dinardo was a special education teacher. Several times she asked her supervisor, her principal, and her assistant principal to transfer a particular student out of her classroom. She said the situation had become impossible and was becoming unsafe. The administration initiated the paperwork to transfer the student, which could have taken as long as sixty days. Dinardo continued to seek assistance in removing the student from her classroom. At one point while the transfer was pending, Dinardo's principal wrote a letter to the district supervisor of special education "urgently requesting an alternative site for the student." In the meantime, Dinardo was told to "hang in there" because "things were happening."

Before the student was removed, unfortunately, he attacked another student. While trying to protect the victim, Dinardo was injured by the student she feared. She then sued the board to recover damages for her injury. After trial, the court granted Dinardo damages in the amount of $512,465. The board appealed, arguing that the trial court had erred in its refusal to grant the board judgment as a matter of law.

Holding: The New York Supreme Court, Appellate Division, First Department, rejected the board's argument.

Based on the facts at trial, a jury could reasonably have found: (1) that the board (through its agents at Dinardo's school) had formed a special relationship with Dinardo; (2) that the board had assumed an affirmative duty to act on her behalf; (3) that the board knew that the student had a history of aggressive and disruptive behavior, that Dinardo was afraid of him, and that its own inaction could result in harm to Dinardo; and (4) that Dinardo had justifiably relied on the board's undertaking. ■