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

The Individuals with Disabilities Education Act does not authorize prevailing parents to obtain expert fees. Arlington Central School District Board of Education v. Murphy, 126 S. Ct. 2455 (2006).

Facts: On behalf of their son Joseph, the Murphys successfully sued the Arlington (N.Y.) Central School District Board of Education for reimbursement of the costs of private school tuition. Section 1415(i)(3)(B) of the Individuals with Disabilities Education Act (IDEA), under which the Murphys sued the board, allows courts to award "reasonable attorneys' fees as part of the costs" to prevailing parents. Citing this provision, the Murphys sought payment for the fees of an educational consultant they used during court proceedings. The trial court granted their motion in part, awarding them less than $9,000 of the approximately $30,000 they requested. The board appealed this ruling, and the Second Circuit Court of Appeals affirmed it. The board appealed next to the U.S. Supreme Court.

Holding: The U.S. Supreme Court reversed the ruling, finding that the IDEA does not authorize payment of expert fees.

Congress enacted the IDEA pursuant to its constitutional spending power. Although Congress has broad power to attach conditions to the disbursement of federal funds, these conditions must be clear and unambiguous to recipients of the funds. No language in the IDEA requires states to reimburse parents who prevail in court for experts' fees. Although Section 1415 specifically lists "reasonable attorneys' fees" as *part* of the costs courts may award, in judicial proceedings the term *costs* has a special meaning that is more limited than its common meaning: it is generally interpreted to refer to the list of recoverable costs set out in 28 U.S.C. §1920, the federal statute governing the issue. Section 1920 does not include expert fees as recoverable costs. Therefore, the IDEA neither explicitly nor implicitly provides the clear notice the Court would need to require states to pay these fees.

Durham County's school impact fee is illegal. Durham Land Owners v. County of Durham, 177 N.C. App. 629, 630 S.E.2d 200 (2006).

Facts: Developers and homebuilders in Durham County (the plaintiffs) alleged that the county had imposed a school impact fee without authorization from the General Assembly. The fee imposed on new residential construction was intended to defray the cost of school facilities required by new residents. The plaintiffs sought a declaration that the fee was illegal. The county answered that it was authorized to impose the fee either under certain statutes dealing with county administration (Chapter 153A) or by the common law. The trial court granted judgment to the plaintiffs before trial and ordered the county to refund their fees, with interest. The county appealed.

Holding: The North Carolina Court of Appeals affirmed the trial court's judgment but not the award of interest on the judgment.

After the General Assembly for years rejected the county's request for legislation enabling it to impose a school impact fee, the county enacted its own ordinance for that purpose. As authority for the ordinance, the county cited G.S. 153A-102 (among other statutes from this same chapter), which provides that the board of county commissioners may fix the fees and commissions charged by county officers and employees for performing services or duties permitted or required by law.

The court found that G.S. 153A-102 did not give the county the authority necessary to impose the impact fee. Rather, the statute's language indicates the legislature's intent to allow counties to set fees for over-the-counter-

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type services county officers and employees provide to the public. In other words, the statute is not a broad revenue-generating law enacted to help the county defray the costs of every service it provides; it addresses only services a county employee provides directly to a member of the public.

Nor does the common law (that is, law not created by the legislature) assist the county. As a county cannot act at all without some form of statutory authority, the specific power to generate revenue from the public necessarily requires a legislative action.

Finally, for more than sixty years courts have held that postjudgment interest may not be awarded against the state. As the county is an arm of the state, that prohibition applies here and that portion of the trial court's order awarding such interest is overruled.

School system's policy governing access to its take-home flyer forum violates the free speech rights of religious group. Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools, 457 F.3d 376 (4th Cir. 2006).

Facts: The Child Evangelism Fellowship (CEF), an organization committed to evangelizing boys and girls according to the Christian gospel, brought suit against the Montgomery County Public Schools (MCPS), alleging that the policy governing access to its take-home flyer forum violated CEF's right to free speech. When the suit began, MCPS had no actual policy governing access to the flyer forum but argued that it had denied CEF access—concededly in violation of CEF's free speech rights—because it feared that distribution of CEF flyers would violate the Establishment Clause's prohibition of governmental activity that promotes religion. The Fourth Circuit Court of Appeals found no potential Establishment Clause violation and ordered the MCPS to allow CEF access to the flyer forum. [See digest in "Clearinghouse," *School Law Bulletin* 35 (Spring 2004): 26.]

Shortly after this ruling, the MCPS instituted a policy governing access to the take-home flyer forum. Its purpose was to distribute information from various community groups and governmental agencies to parents without disrupting the educational environment. The policy authorized five categories of groups (MCPS, governmental agencies, PTAs, licensed daycare providers on school campuses, and nonprofit organized youth sports leagues) to submit flyers directly to MCPS; it also allowed these groups to sponsor or endorse flyers from other groups. The policy gave MCPS the authority to approve for distribution any flyer submitted or endorsed by a listed group. In addition, MCPS had the power to withdraw any approved flyer before its distribution if school officials determined that it could cause substantial disruption of school activities.

CEF argued that this policy did not rectify the free speech violation.

Holding: The Fourth Circuit Court of Appeals agreed with CEF.

A governmental body such as MCPS need not permit every form of speech on its property. However, even in the most tightly controlled venues, speech restrictions must be reasonable *and* viewpoint neutral. Viewpoint neutrality requires not only that officials refrain from explicit viewpoint discrimination, but also that they provide sufficient safeguards to protect against the improper exclusion of disfavored viewpoints. On this last point, MCPS's policy fails. Nothing in the policy prohibits viewpoint discrimination, requires viewpoint neutrality, or prevents MCPS from excluding a flyer based on the viewpoint it expresses: The policy gives MCPS unlimited discretion to approve or disapprove distribution of any flyer, as well as essentially unlimited power to withdraw from distribution a flyer that has already been approved. The danger of this unbridled discretion is that MCPS officials could deny access to the flyer forum because of viewpoint discrimination while hiding this suppression of viewpoint behind some other stated motive. The policy cannot constitutionally be enforced.

MCPS is, of course, entitled to place some limits on access to its take-home flyer forum. For example, it could limit the number of flyers any one group could distribute during the school year. It could also restrict access to the forum to certain groups of speakers. The important point is that these restrictions must be truly viewpoint neutral.

Court addresses the meaning of priority consideration for employees whose positions are eliminated because of reductions in force. Wilkins v. North Carolina State University, 178 N.C. App. 377, 631 S.E.2d 221 (2006).

Facts: Pearl Wilkins worked for North Carolina State University (NCSU) from 1979 to 1990, and again from 1993 to 2002. During the latter period, she worked in the Communication Technologies Department, eventually achieving the position of telecom analyst II. In June 2002, Wilkins's position was eliminated as the result of a reduction in force (RIF). In December 2002 Wilkins, along with another RIF'd employee, applied for a vacant telecom analyst I position; the position was given to the other RIF'd employee. Wilkins had more than ten years of general service to the state at the time she applied for the position, but less than that in the position of telecom analyst; the hired applicant had four years of state service at the time of his RIF.

Wilkins filed suit, alleging that NCSU's failure to rehire her violated her right to priority consideration under G.S. 126-7.1(c2). That statute provides that

> [if] the applicants for reemployment for a position include current State employees, a State employee with more than 10 years of service shall receive priority

consideration over a State employee having less than 10 years of service in the same or related position classification.

The trial court ruled in favor of Wilkins, and NCSU appealed.

Holding: The North Carolina Court of Appeals reversed the trial court's judgment.

Wilkins argued that G.S. 126-7.1(c2) should be interpreted as though the "same or related position classification" language did not appear at all. That is, employers should make a straight year-to-year comparison and hire the applicant with longer state service. NCSU argued that the legislature meant the "same or related position classification" language to apply both to employees with more and employees with less than ten years of service. Under NCSU's interpretation, Wilkins was not entitled to priority consideration because she had less than ten years' experience as a telecom analyst, the position for which she was applying. The court found NCSU's argument more persuasive; if the legislature intended employees with more than ten years' service to receive priority over those with less than ten years' service in every case, it could have eliminated the "same or related position classification" language altogether and obtained the same effect.

University administrators are not entitled to qualified immunity against former athletic director's constitutional claims. Ridpath v. Board of Governors of Marshall University, 447 F.3d 292 (4th Cir. 2006).

Facts: David Ridpath served as an assistant athletic director and NCAA compliance director at Marshall University; he also performed adjunct teaching duties in the Exercise and Sports Science Department (ESSD). In his capacity as compliance director, Ridpath learned that several Marshall football players had engaged in academic fraud and that members of the coaching staff had offered improper incentives to "props"—students seeking academic eligibility to join athletic teams. Ridpath said he had no previous knowledge of the infractions, although members of the coaching staff suggested he was to blame for them. University administrators, legal counsel, and the football coach excluded Ridpath from most of the university's internal investigation of the improprieties but nonetheless encouraged him to vigorously defend the university at a hearing before the NCAA Committee on Infractions. The NCAA did not find Ridpath's defense persuasive. Thereafter, he alleges, he became a convenient scapegoat for the university.

Ridpath subsequently agreed to be transferred from his position as the university's compliance director to a position as director of its judicial programs—a job for which he lacked the necessary training and education but for which he was paid $15,000 more than his predecessor. He assented to the transfer, in part, because university administrators and the coaching staff agreed to inform the NCAA and the public that his transfer was not the result of any wrongdoing as compliance director.

Despite this agreement, the university labeled the transfer a "corrective action," a designation that—according to Ridpath—in the world of athletics administration suggests that he had engaged in dishonest or immoral behavior as director of compliance. When Ridpath protested this designation at a meeting, administrators threatened his family and his personal and professional well-being and ordered him not to speak publicly about the NCAA infractions. At a later public meeting, concern was voiced over Ridpath's desire to clear his name, and the university president warned him that if he spoke publicly about the issue, he would be fired on the spot.

Thereafter Ridpath retained an attorney. He was then relieved of his duties as an adjunct professor in the ESSD (though not of his judicial directorship). Ridpath tried to obtain employment in his chosen field of athletics administration at other colleges and universities but was unable to do so.

Ridpath's suit against the university and several administrators (the defendants) alleged (1) that they had violated his right to due process before they destroyed his reputation and made it impossible for him to obtain a job in the field of his choice, and (2) that they had deprived him of his right to free speech in two ways: first, by threatening him and so preventing him from immediately and publicly challenging the "corrective action" label; and second, by removing him from the ESSD in retaliation for hiring a lawyer and seeking judicial redress of his grievances.

The defendants alleged that they were protected from suit by qualified immunity and asked the court to dismiss Ridpath's claims.

Holding: The Fourth Circuit Court of Appeals denied the defendants' motion.

Qualified immunity shields government officials from being held personally liable for civil damages, so long as their behavior does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The court continued that as the university's board of directors was designated as a public institution in these proceedings, it had no personal capacity in which to be held liable. Because any case against it is necessarily an "official capacity" case, the board is not entitled to the qualified immunity defense.

The court next turned to the administrators in their personal capacities. It found that they were not entitled to qualified immunity because Ridpath's allegations, taken at face value at this point in the proceedings, establish First and Fourteenth Amendment violations, and a reasonable person would have known that they were violations. Ridpath

alleged, first, that the defendants denied him his constitutional right to procedural due process before depriving him of a protected liberty interest—that is, the defendants failed to give him any opportunity to defend himself before they placed the "corrective action" label on his reassignment and destroyed his reputation within the field of intercollegiate athletics administration. The defendants countered that they had not deprived Ridpath of a constitutionally protected liberty interest for several reasons: (1) the "corrective action" label did not imply a serious character defect; (2) because Ridpath was only transferred, not demoted or discharged, the label did not damage his career; (3) the label was not made public; and (4) the label was not false.

The court rejected each of these arguments. First, the corrective action label did imply a serious character defect, as opposed to mere incompetence. Making Ridpath the scapegoat for the university's NCAA violations insinuated that he was responsible for allowing academic fraud and impermissible employment while serving as compliance director. Second, because of the seriousness of this charge, it does not matter that Ridpath was not demoted: it is sufficient that he was effectively foreclosed from pursuing a career in his chosen field of university-level athletics administration. Third, Ridpath's complaint clearly contends that the label was communicated to the NCAA and the public. Finally, the claim that the label was false is the very basis for Ridpath's suit.

Having found that Ridpath successfully alleged deprivation of a constitutionally protected right, the court turned next to whether it was a clearly established right of which the defendants should have known. The court stated that notice and opportunity to be heard are essential when a public employee's liberty interest is infringed by a charge implying serious character defects made in the course of an injury such as a significant demotion or discharge. When a transfer effectively excludes the injured person from his or her chosen trade, it is a significant demotion, as several courts have held. The law on this matter is well established, and the defendants should have been aware of it.

The court similarly found that Ridpath sufficiently alleged the unconstitutional deprivation of his right to free speech in that the defendants chilled his willingness to protest the corrective action label immediately, and in that they retaliated against him by relieving him of his teaching duties within the ESSD when he finally did speak out in protest. The subject of Ridpath's speech—the university's NCAA violations and how it handled them—is speech on a matter of public interest made by a citizen in his personal capacity. The defendants threatened Ridpath's job and well-being if he protested his treatment within that context, and they removed him from one of his jobs when he did. The defendants reasonably should have known that these actions were constitutionally prohibited.

Principal who injured student is protected from suit by governmental immunity. Webb v. Nicholson, 178 N.C. App. 362, 634 S.E.2d 545 (2006).

Facts: During a dance at Smokey Mountain High School, Principal Kenneth Nicholson observed student Michael Webb apparently trying to enter the dance through a window rather than paying for admission. Nicholson went outside, pulled Webb from the window, and pushed him up against the exterior wall. As a result of this incident, Webb, who suffered from osteonecrosis—a condition that had required previous hip surgeries and left his hip in need of protection—required medical treatment and further surgery.

Webb brought suit against Nicholson individually and against the Jackson County Board of Education, alleging that they negligently caused him injury. The trial court granted Nicholson's motion to dismiss the claims against him because of public official immunity. Webb appealed.

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

Public officials are immune from suits for negligence when they are performing a governmental function of discretionary nature. Webb contended that chaperoning the school dance was not a governmental function and that Nicholson was not a public official—only a public employee. The court disagreed. A principal, as an agent of the school board, is statutorily entrusted with the responsibility to supervise extracurricular activities, including dances (North Carolina General Statute 115C-47, hereinafter G.S.). Supervision requires the exercise of discretion, making it a governmental task. Previous case law has held that principals are public officials, not employees.

In order to hold a public official personally liable for the performance of a governmental function, the court must find that the alleged conduct falls into one of the three following categories: (1) malicious conduct; (2) corrupt conduct; or (3) conduct outside the scope of official authority. G.S. 115C-390 specifically addresses corporal punishment and authorizes principals to use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order. As Webb's complaint gives no indication of maliciousness or corruption and Nicholson's exercise of discretion was fully authorized by G.S. 115C-390, he is immune from Webb's suit.

Court refuses to hear university's appeal. McClennahan v. North Carolina School of the Arts, 177 N.C. App. 806, 630 S.E.2d 197 (2006).

Facts: Charles McClennahan, a former professor at the North Carolina School of the Arts (NCSA), filed suit against NCSA and its dean, Dale Pollack (hereinafter the defendants), arguing that they had deprived him of his right to free speech, as guaranteed by Article I, Section 14 of the

North Carolina Constitution. Specifically, he contended that Pollack did not renew his teaching contract in retaliation for reports by McClennahan alleging racial harassment, an inappropriate relationship between a colleague and a student, and job intimidation.

The defendants sought dismissal of McClennahan's suit. North Carolina case law holds that a complainant may not bring a claim under the state constitution when an adequate statutory remedy exists. The defendants argued that because McClennahan had adequate statutory remedies for his complaint (under the Administrative Procedures Act and the Whistleblower Protection Act), he was not entitled to pursue a state constitutional claim. This argument was important to the defendants because, although they would not be entitled to sovereign immunity against a constitutional claim, they would be immune from statutory claims. If the court accepted the first part of the argument, it must conclude that they were immune and dismiss McClennahan's complaint. The trial court rejected the argument, and the defendants appealed.

Holding: The North Carolina Court of Appeals dismissed the defendants' appeal as untimely (in legal terms, *interlocutory*).

Appeals are interlocutory when they concern an order made during the pendency of a trial that does not dispose of or settle the entire controversy. Generally, courts dismiss interlocutory appeals, but they will hear those that concern substantial rights that would be lost without immediate review. Appeals raising issues of sovereign immunity fall into this category. But the issue raised by the defendants in this case was *not* whether they are entitled to sovereign immunity, it was whether McClennahan can sue directly under the state constitution. This issue does not directly affect a substantial right.

In an unpublished decision, court rules that professor's termination was appropriate. Mahmoud v. University of North Carolina Board of Governors, 176 N.C. App. 408, 626 S.E.2d 877 (2006).

Facts: Shah Mahmoud, a former professor at Appalachian State University (ASU), was terminated for exposing his genitals to faculty and staff on at least two occasions. Having exhausted his appeals within the university grievance system, he sought judicial review of his termination. He argued that the termination violated his due process rights and was not supported by the evidence.

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

As a tenured faculty member at ASU, Mahmoud had a constitutionally protected property interest in continued employment and was thus entitled to due process protection. He argued that he did not receive this protection for three reasons: (1) the chancellor did not actually look at the facts of the case but only reviewed the decision of the faculty grievance committee for error (in other words, he acted as an appellate reviewer rather than a fact-finder); (2) the chancellor based his decision on an incomplete transcript of the hearing; and (3) the chancellor was not an impartial decision maker.

The court disagreed. As to the first allegation, the chancellor's report makes clear that he reviewed the facts in the record and found that his conclusions corresponded with the committee's. As to the second allegation, Mahmoud failed to show that the incomplete transcript prejudiced his case, especially as he refused to assist in reconstructing the missing portions. Finally, his third contention is simply unsupported.

The court also found unpersuasive Mahmoud's contention that the evidence did not support his termination. Mahmoud admitted that his genitals could have been exposed on the two occasions in question. The issue remaining, therefore, was whether this exposure was intentional. The chancellor determined that it was, and the court's job is only to determine whether that decision was supportable under the record, not to re-decide the issue based on what it thinks of the evidence. The court determined that there was sufficient evidence to support the chancellor's finding that the exposure was intentional and went on to state that the intentional exposure of his genitals was just cause for terminating Mahmoud.

State review officer's ruling on the validity of an individualized education plan about which no hearing had been held may not constitute a final administrative ruling and therefore may deprive the federal court of jurisdiction. Wittenberg v. Winston-Salem/Forsyth County Board of Education, 2006 WL 1932672 (M.D.N.C. 2006).

Facts: Michael and Debbie Wittenberg contested the validity of a state administrative review officer's ruling on individualized education plans (IEPs) prepared for their son, J.W., by the Winston-Salem/Forsyth County Board of Education (FCB).

The dispute between the Wittenbergs and FCB concerned the characterization of J.W.'s disability: if J.W. was found to be autistic, as the Wittenbergs believed him to be, he qualified for FCB-funded home-based services. However, FCB categorized J.W. as developmentally delayed and did not include home-based services in his IEP for the 2003–2004 school year. The Wittenbergs requested a due process hearing to contest the IEP's sufficiency.

While that action was pending, FCB created J.W.'s IEP for the 2004–2005 school year; again, the IEP did not contain home-based services. The Wittenbergs requested a due process hearing on this IEP as well. An administrative law judge (ALJ) stayed proceedings on the second IEP until the

validity of the first could be decided, although he did admit some evidence from the second IEP as relevant to this first issue. Ultimately, the ALJ determined that the 2003 IEP did not provide J.W. an appropriate education and ordered FCB to reimburse the Wittenbergs for the cost of providing home-based programming to J.W.

FCB appealed this ruling to a state review officer (SRO), who not only overruled the ALJ's decision concerning the 2003 IEP, but also ruled that the 2004 IEP was valid—although the ALJ had held no hearing on that IEP or reached a decision on its adequacy. The Wittenbergs asked the court to vacate the SRO's ruling on the 2004 IEP, arguing that they had not exhausted their administrative remedies concerning it. The Individuals with Disabilities Education Act (IDEA) provides that parties aggrieved by an IDEA decision are entitled to bring a court action only *after* completing an administrative due process (there are three exceptions to this rule, not relevant here). The Wittenbergs contended that the SRO's ruling on the 2004 IEP without a hearing was a violation of this rule.

Holding: The federal court for the Middle District of North Carolina denied the Wittenberg's motion to vacate.

Because the IDEA's exhaustion requirement does not provide courts with an instrument by which to judge the adequacy of state administrative processes, the court refused to vacate the SRO's ruling. However, noted the court, failure to exhaust administrative remedies does deprive a court of jurisdiction to hear the merits of an IDEA claim. The court refused to predict how the state Office of Administrative Hearings (OAH) would treat the SRO's ruling. The ALJ to whom the case of the 2004 IEP was assigned still had not closed the matter and had not indicated whether he would hold a hearing on it. The OAH made no statement on whether it considered the SRO's ruling the final say in the matter. Until the Wittenbergs had a formal final ruling from the OAH, the court concluded, it did not have jurisdiction to hear their claim about the disputed IEPs and so dismissed it.

In a separate opinion, court rules on "stay-put" dispute in the case above. Wittenberg v. Winston-Salem/Forsyth County Board of Education, 2006 WL 2568937 (M.D.N.C. 2006).

Facts: Pending the resolution of the issue above, the Wittenbergs asked the court to issue an order allowing J.W. to stay in his then-current educational setting at the state's expense. The Individuals with Disabilities Education Act (IDEA) provides that during proceedings concerning a disputed IEP, unless the parents and state or local education agency agree otherwise, the child shall remain in his or her then-current placement. An administrative ruling in favor of the parents can be the basis of the parent-state agreement required to change a child's placement; in such a case, the new placement becomes the then-current placement (the "stay put" placement). The Wittenbergs argued that the administrative law judge's (ALJ) ruling that FCB's IEP was inadequate established his home-based program as his then-current placement; FCB argued that the state review officer's (SRO) reversal of the ALJ's decision meant that there was no agreement between the state and the Wittenbergs concerning J.W.'s current placement and that therefore the FCB program was his placement.

Holding: The court agreed with FCB and refused to issue a stay-put order.

The IDEA's language discusses state administrative proceedings and the potential effect of decisions from such proceedings on a child's current educational placement. It does not, however, address a situation in which a state has a two-tiered system of state administrative review. In North Carolina, which has a two-tier system, it is possible in cases like the Wittenberg's to have one component of a state agency in disagreement with another component. Neither component is, under the IDEA, necessarily incapable of creating a state-parent agreement on placement; but under state law, the SRO has the authority to issue the agency's definitive opinion. Because the SRO ruled in favor of FCB, no agreement to change J.W.'s placement was made.

Court addresses former principal's discrimination claims. Locklear v. Person County Board of Education, 2006 WL 1743460 (M.D.N.C. 2006).

Facts: Jennifer Locklear, a Native American, was principal of the Stories Creek Elementary School from June 2001 until her resignation in June 2004. Stories Creek, which is located in Person County (N.C.), houses a special four-class program designed for students who travel there from their own schools within the county. In May 2003 Locklear received an oral offer for a four-year contract extension.

However, at that same time, the school board changed its policy regarding the allocation of end-of-year test scores. This change allocated test scores for students who participated in the Stories Creek program to Stories Creek, instead of to the students' home schools. When school superintendent Ronnie Bugnar announced this policy, Locklear privately expressed her concern that this would lower her school's overall test scores and reflect badly on its students and staff. In a later staff meeting, Locklear expressed these concerns but noted that as it was Bugnar's decision, it would stand.

One week later, Locklear's four-year extension offer was rescinded and replaced with a two-year offer. Bugnar explained this change to the board by saying that Locklear was domineering—a trait he attributed to her identity as a Native American woman—and that she shared information with her staff inappropriately.

In June 2003 Bugnar questioned Locklear about an answer sheet for a Stories Creek student that allegedly had been changed during end-of-year testing. Locklear responded that she did not know who was responsible for the incident. Bugnar then told her that he had heard other concerns from Stories Creek teachers (though he refused to divulge what these were) and said she could choose either to resign or to be suspended with pay while an investigation occurred. Locklear resigned.

She filed suit against the Person County School Board and against Bugnar (the defendants) in his personal and professional capacities, alleging race and sex discrimination claims under Title VII; violation of her rights under the First and Fourteenth Amendments to the U.S. Constitution; and claims of intentional and negligent infliction of emotional distress under state law. The defendants asked the trial court to either make a judgment on the pleadings or dismiss Locklear's suit.

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

The defendants first argued that they were entitled to judgment on the pleadings (that is, a ruling in their favor based only on the papers filed to date in the case) because the resignation letter signed by Locklear, which Bugnar had prepared for her immediate signature, contained a release of liability clause relinquishing any and all claims arising out of her Person County employment. In North Carolina, such releases are treated as contracts, and valid contracts have three requisite elements: offer, acceptance, and consideration. Consideration can be anything of value to the person accepting the offer. In this case, the court found, there is no evidence that Locklear received anything in exchange for releasing her claims against defendant, so no valid contract existed. This argument thus could not form the basis for a judgment on the pleadings.

Nonetheless, the court did find reason to dismiss many of Locklear's claims. First the court dismissed her race and sex discrimination claims under Title VII. A key component of a successful Title VII claim is the complainant's showing that he or she suffered adverse employment action. Locklear alleged that the rescission of the four-year extension offer and the suspension/resignation choice put to her by Bugnar constituted adverse employment actions, but the court disagreed. Although reduction in the length of an employee's contract extension has been held to constitute an adverse employment action in a limited number of cases, those cases involved employees who suffered accompanying salary reductions or lower-than-usual annual raises. In addition, those cases involved employees who, through force of custom, had reasonable expectations concerning the length of their contract extensions. Locklear, on the other hand, suffered no reduction in pay and, as this was her first contract extension, could not show that she had any expectation concerning its length (except during the week in which the four-year extension offer stood).

Nor, the court found, was the suspension/resignation option presented by Bugnar an adverse employment action. The proffered suspension was with pay and no accompanying reduction in rank. Moreover, the suspension she was offered is part of the disciplinary procedures that Locklear and her colleagues are subject to under North Carolina law (N.C.G.S. 115C-325(f)). She countered by asserting that her resignation was effectively a coerced discharge. The court disagreed, finding no evidence to show that Bugnar had made Locklear's working conditions intolerable in an effort to force her to leave. As she had shown no adverse employment action, Locklear's Title VII claims were dismissed.

The court also dismissed Locklear's equal protection and due process claims under the Fourteenth Amendment. These claims relied for support on the same set of facts and allegations as her Title VII claims. Case law has established that a complainant cannot establish a Fourteenth Amendment violation for claims that could or should be brought under Title VII.

The court refused to dismiss, however, Locklear's claim that the defendants unconstitutionally retaliated against her for exercising her right to free speech under the First Amendment. The defendants alleged that Locklear's speech did not satisfy the requirement that it be on a matter of public concern; her interest, they alleged, was purely personal insofar as it related to her reputation and compensation. But the court, viewing the facts in the light most favorable to Locklear, disagreed, finding that test scores and their reflection of educational quality were of concern to teachers, students, and parents of Stories Creek—that is, the public. The court also could find no evidence to support the defendants' allegation that Locklear's speech disrupted the efficient running of the school by damaging Bugnar's relationship with other employees, or that the defendants' interest in efficiency outweighed Locklear's interest in speaking. Finally, the court found evidence to support the contention that Locklear did suffer adverse employment action. The requirement for showing adverse employment action under the First Amendment is less stringent than it is under Title VII: the First Amendment requires only that the employment action complained of be sufficient to chill the exercise of free speech. The knowledge that she could lose her four-year contract extension offer could have so chilled Locklear's speech.

Locklear's First Amendment claim was not universally successful, though. The court maintained her claim against the board because it found that the board had final decision-making authority over her contract extension,

but it dismissed her claims against Bugnar. Suing Bugnar in his official capacity, found the court, was essentially the same as suing the board itself—as any award would come from its coffers. Because the board itself is already being sued, Bugnar, as its employee, may be released from this claim. The claim against Bugnar in his personal capacity must also be dismissed, found the court, on the basis of qualified immunity. Bugnar was unsure about whether Locklear's speech concerned a matter of public concern; further, a reasonable person in Bugnar's position probably would not have known that reducing the length of her contract extension violated her free speech rights.

In conclusion, the court dismissed Locklear's state law claims, finding that she failed to show that the defendants engaged in extreme and outrageous behavior and that she had not alleged that any of their conduct was unintentional—thus eliminating any possible claim of negligence.

Earlier state court judgment prevents former principal from relitigating his employment discrimination claims in federal court. Cooper v. Charlotte-Mecklenburg Board of Education, 2006 WL 2620315 (W.D.N.C. 2006).

Facts: West Mecklenburg High School Assistant Principal Wendell Cooper was accused of inappropriately touching a student. Although he was cleared of the accusation by the school board, he requested a transfer. The Charlotte-Mecklenburg Board of Education (CMBE) transferred Cooper, to his displeasure, to Berryhill Elementary School as an "extra" principal. He was dissatisfied at Berryhill and, after several performance evaluations, CMBE decided not renew his contract.

Cooper brought suit against CMBE, alleging a state-law-based racial discrimination claim. On the morning of his hearing, Cooper filed a petition for voluntary dismissal (which means he wanted to withdraw his claim and maintain the possibility of filing it, or some facsimile of it, later). Two weeks later the court denied his motion for voluntary dismissal, holding that CMBE had presented substantial evidence that his non-renewal was due to his poor job performance, not his race. The court granted judgment to CMBE, and Cooper did not appeal the ruling in a timely manner.

Thereafter Cooper filed a Title VII claim that was removed to the federal court for the Western District of North Carolina. There, CMBE argued that this claim was barred, and should be dismissed, because he had already litigated the issues underlying his claim in state court.

Holding: The court agreed with CMBE and dismissed Cooper's claim.

A final judgment bars not only all matters actually determined or litigated in an earlier proceeding, but also all relevant matters that should have been raised and determined in the exercise of reasonable diligence by the parties. In addition, a party cannot, after final judgment, pursue a cause of action that involves the same parties and same issues as the earlier action. In both his state law claim and his Title VII claim, Cooper's claims about race and job performance were central and both named CMBE as defendant. Cooper cannot take a second bite of the apple in federal court.

Federal court sends former professor's employment-related claims back to state court. Googerdy v. North Carolina Agricultural and Technical State University, 2006 WL 2568906 (M.D.N.C. 2006).

Facts: Earlier in Ashgar Googerdy's suit against North Carolina Agricultural and Technical State University (A&T) concerning his termination, the federal court for the Middle District of North Carolina dismissed the parts of his claim alleging Title VII violations and wrongful discharge. [See digest in "Clearinghouse," *School Law Bulletin* 36 (Summer 2005): 28]. Googerdy also claimed that his termination violated rights guaranteed to him by the North Carolina Constitution and that his termination constituted a breach of contract. A&T moved to have these remaining claims dismissed.

Holding: The federal court for the Middle District of North Carolina did not address A&T's motion but remanded the case to state court because there were no remaining federal law claims.

Court dismisses all of former employee's claims against non–school board defendants. Roach v. Rockingham County Schools, 2006 WL 2051895 (M.D.N.C. 2006).

Facts: Warren Roach filed an employment discrimination claim against the Rockingham County Schools, Rockingham County Middle School, Rockingham County High School, and the Rockingham County Schools' Transportation Department, among others. These entities (the "school defendants") moved to dismiss his claims on the basis that the Rockingham County School Board—which had filed an answer in the matter—was the appropriate entity against whom to bring suit; in fact, they argued that they did not have the capacity to be sued under state law.

Holding: The federal court for the Middle District of North Carolina agreed that the school board was the proper entity to be sued and dismissed all Roach's claims against the school defendants.

Other Cases

Court orders university to officially recognize all-male fraternity. Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York, 443 F.Supp.2d 374 (E.D.N.Y. 2006).

Facts: Chi Iota Colony of Alpha Epsilon Pi (AEPi) is a Jewish, all-male fraternity at the College of State Island (CSI), a branch of the City University of New York. Among the fraternity's primary purposes is the attainment of "a lifelong interpersonal bond termed brotherhood," which "results in deep attachments and commitments to the other members of the Fraternity among whom is shared a community of thoughts, experiences, beliefs, and distinctly personal aspects of their lives." In March 2004 the fraternity applied to CSI for official recognition. Such recognition confers, among many benefits, use of college facilities, opportunities to apply for special funding, and inclusion of the organization's events in a monthly calendar. CSI officials denied the fraternity's application, noting that, as an all-male group, it contravened CSI's nondiscrimination policy, specifically the part prohibiting gender discrimination.

AEPi filed suit in the federal court for the Eastern District of New York, seeking a preliminary injunction requiring CSI to grant them official recognition. The fraternity alleged that CSI's failure to do so violated fraternity members' constitutional rights to free association and equal protection, as well as Title IX.

Holding: The court granted the fraternity a preliminary injunction, but only on the basis of its free association claim.

To obtain a preliminary injunction that changes the status quo, a party must show both irreparable harm if the injunction is not granted and a substantial likelihood of success when the merits of the claim are ultimately addressed at trial. The fraternity established that it would suffer irreparable harm because CSI's action directly limited one of their constitutional rights. In addition, it established a substantial likelihood of success on the merits of its freedom of intimate association claim.

Freedom of intimate association claims generally concern choices to enter into and maintain certain intimate human relationships and their infringement by the state. Courts have most frequently found the right to freedom of intimate association when groups are relatively small, have a high degree of selectivity in membership decisions, and are secluded from others in critical aspects of the relationship—typically, that is, when relationships revolve around family, marriage, and childrearing. AEPi, although not identical to such groups, resembles them more closely than it does the large business organizations to which courts have generally denied the right. The fraternity has only eighteen members on a campus with 4,500 males and a total of 11,000 students. It selects members from a small group of men who have affirmed commitment to Jewish ideals, and a candidate's membership is denied if even one member voices substantial opposition. Further, social activities to which nonmembers are invited are not the focus of the group's activities; interactions during weekly members-only meetings and shared rituals are more central to its purpose. Under the totality of the circumstances, said the court, The fraternity has established a substantial likelihood that it will prevail on its claim that it is an intimate association.

The court next examined whether CSI could trump the fraternity's right to freedom of intimate association with a showing of a compelling state interest and a narrowly tailored means of achieving it. Eliminating discrimination is certainly a compelling state interest, the court began. However, fraternities and sororities have a history of single-sex membership across the country, and organizations like these were specifically excluded from Title IX's nondiscrimination mandate. Given these facts, it is unlikely that CSI will be able to justify its violation of the fraternity's right to freedom of intimate association. The fraternity is therefore entitled to a preliminary injunction requiring CSI to recognize it as an official university organization.

The fraternity failed to show a substantial likelihood of success on its other claims, however. The U.S. Constitution provides that no person shall be denied equal protection of the laws; in other words, all persons similarly situated should be treated alike. A party may show a violation of the right to equal protection by pointing to (1) similar groups that received different treatment; (2) selective treatment based on such impermissible considerations as race, gender, or religion; or (3) malicious or bad faith intent to injure a person. The fraternity failed to name any other similar university organization that was treated differently; it is not—as a fraternity—a member of a protected class; and finally, it presented no evidence that CSI acted maliciously, with bad faith, or with the intent to injure it. There appears to be no substantial likelihood of success on this claim.

Title IX conditions receipt of government funding by educational institutions on their agreement not to discriminate on the basis of sex. The fraternity alleges that CSI violated Title IX by refusing to recognize it, an all-male group, because it did not comply with CSI's nondiscrimination policy. This argument does not work, the court said: AEPi is essentially arguing that Title IX prohibits coed Greek organizations. This it clearly does not do. ■