

# Clearinghouse

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

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## Cases and Opinions That Directly Affect North Carolina

**Board's immunity waived by intermediary's purchase of liability insurance covering board.** *Lucas v. Swain County Board of Education*, 154 N.C. App. 357, 573 S.E.2d 538 (2002).

**Facts:** After falling down the concrete steps at the Swain County (N.C.) high school football stadium, Sharon Lucas filed a negligence suit against the Swain County Board of Education. At issue was whether the board waived its immunity from suit by purchasing liability insurance. At the time of the suit, the board was party to a general liability trust fund agreement with the North Carolina School Boards Trust (the Trust) for bodily injury claims up to \$100,000. The agreement provided excess insurance coverage, purchased from a commercial insurance provider, for claims between \$100,000 and \$1 million.

The Swain County superior court granted Lucas's motion for summary judgment (judgment before trial) on the issue of immunity, finding that the board had waived its immunity for claims of as much as \$1 million. The board appealed.

**Holding:** The North Carolina Court of Appeals reversed in part and affirmed in part the superior court's ruling.

As a general rule, county boards of education are immune from negligence suits unless they waive their immunity. Under North Carolina General Statute 115C-42 (hereinafter G.S.), a waiver occurs when a board obtains insurance through (1) an entity licensed and authorized to issue insurance in North Carolina or (2) a qualified insurer as determined by the Department of Insurance. The board presented three affidavits in support of its argument that the Department of Insurance did not consider the Trust an insurer, and

Lucas did not argue that the Trust was licensed or authorized to issue insurance. Thus, the board's agreement with the Trust does not constitute the purchase of insurance and does not waive the board's immunity for claims of up to \$100,000.

However, the board's excess coverage does come from a commercial insurer that meets the criteria of G.S. 115C-42. The court rejected the board's argument that this coverage did not waive immunity because it was the Trust, not the board, that actually dealt with the excess insurance provider. The board knew this coverage came from a commercial provider, and the presence of an intermediary does not change the board's procurement of insurance coverage for claims between \$100,000 and \$1 million.

**State's delegation of law enforcement power to religious university's police corps violates the Establishment Clause of the U.S. Constitution.** *State of North Carolina v. Jordan*, \_\_\_ N.C.App. \_\_\_, 574 S.E.2d 166 (2002), *review denied*, 356 N.C. 687, 578 S.E.2d 321 (2003).

**Facts:** A Pfeiffer University police officer stopped Andrew Jordan while driving on university grounds and charged him with driving while impaired and driving with a revoked license. Jordan filed a motion to dismiss the charges, arguing that permitting a Pfeiffer University police officer to enforce North Carolina law violated the Establishment Clause of the Constitution because the university is a religious institution. The Establishment Clause prohibits governmental action that endorses, or appears to endorse, religion.

**Holding:** The North Carolina Court of Appeals agreed with Jordan.

The court first reviewed the statute under which the university's police force was empowered: G.S. Ch. 74E authorizes the state attorney general to certify on-site university security personnel (among others) as "company police officers." Company police officers have the same power as municipal and county police officers to make arrests and charge infractions—within their limited jurisdictions.

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In order to determine whether G.S. Ch. 74E was unconstitutionally applied in the case of Pfeiffer University's police force, the court engaged in a two-part inquiry. First, it found that the police power delegated by G.S. Ch. 74E constituted an important discretionary governmental function that the state could not share with a religious institution. Next, the court found that Pfeiffer University did constitute a religious institution and that the state's delegation of police power to the university created an excessive entanglement of government with religion. The court noted that (1) the university is affiliated with and sponsored by the Western Carolina Conference of the United Methodist Church; (2) its mission is to prepare church servants for lifelong learning and encourage Christian values within the context of its educational goals; (3) several members of the university's board of trustees must come from the Western Carolina Conference of the United Methodist Church; and (4) the university closes its administrative offices every Wednesday morning so employees can attend chapel services. Having made these findings, the court ruled the application of G.S. Ch. 74E to Pfeiffer University unconstitutional.

**In an unpublished opinion, court vacates \$2 million punitive damage award to female place kicker.** Mercer v. Duke University, 50 Fed. App. 643 (4th Cir. 2002).

**Facts:** In 2001 a jury awarded Heather Sue Mercer \$2 million in punitive damages on her claim that Duke University discriminated against her on the basis of gender, in violation of Title IX, by denying her a position as place-kicker on its football team. The federal court for the Middle District of North Carolina upheld the award on appeal and granted Mercer attorney fees and costs. [See digest in "Clearinghouse," in *School Law Bulletin* 33 (Spring 2002): 18.] The university appealed.

**Holding:** In an unpublished opinion (an opinion without precedential value), the Fourth Circuit Court of Appeals vacated the punitive damage award and remanded the case to the district court on the issue of attorney fees.

In light of a recent U.S. Supreme Court opinion holding that punitive damages are not available in private actions brought under Title VI of the Civil Rights Act of 1964, the court found that punitive damages are not available in private actions to enforce Title IX, which is interpreted and applied in the same manner as Title VI.

Without the punitive damage award, Mercer was left with the \$1 in compensatory damages the jury awarded her. This award, Duke argued, was insufficient to support an award of attorney fees to Mercer as the prevailing party. The court disagreed, finding that as Mercer's case was the first of its kind

and might serve as guidance to other schools, a court could find that she was still entitled to attorney fees. The district court, the appeals court said, should hold hearings to determine the appropriate amount, if any, of attorney fees for Mercer.

**State university immune from federal suit on wrongful termination claim brought under North Carolina's Equal Employment Practices Act.** Doran v. Elizabeth City State University, No. 2:02-CV-32-H(1), \_\_\_ F. Supp. 2d \_\_\_ (E.D.N.C. November 12, 2002).

**Facts:** Crystal Doran alleged that she was sexually harassed by her supervisor at Elizabeth City State University (ECSU). After several complaints to ECSU officials yielded no action, she filed a formal complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC found that Doran had been subjected to sexual harassment; that ECSU had failed to take reasonable steps to prevent it; and that ECSU retaliated against her by terminating her employment after she filed her EEOC complaint. The EEOC issued Doran a right-to-sue letter.

Doran filed suit in federal court for the Eastern District of North Carolina, bringing discrimination and harassment claims under Title VII of the Civil Rights Act of 1964 and a wrongful termination in violation of public policy claim under North Carolina's Equal Employment Practices Act (EEPA), G.S. 143-422.2. ECSU moved to dismiss the EEPA claim on the ground that the Eleventh Amendment barred it.

**Holding:** The federal court for the Eastern District of North Carolina granted ECSU's motion. The Eleventh Amendment prohibits federal courts from exercising jurisdiction over claims against state officials for violating state law; it further prohibits federal courts from awarding damages against state officials that would be paid from the state treasury. Doran presented no evidence that ECSU, as a state institution, had waived its Eleventh Amendment immunity, therefore the court lacked jurisdiction to hear her EEPA claim.

**Board not liable for suicide of special education student on school premises.** Joyner v. Wake County Board of Education, No. 5:02-CV-209-BO(3), \_\_\_ F. Supp. 2d \_\_\_ (E.D.N.C. November 6, 2002).

**Facts:** Christopher Joyner was a special education student at Zebulon Middle School in Wake County (N.C.) who suffered from bullying and harassment by his schoolmates. In March 2000 his physical education teacher permitted him to go to the boys' locker room by himself, an action that, according to the complaint filed by Christopher's mother

(hereinafter Joyner), was specifically prohibited by Christopher's individualized education plan (IEP). Christopher then went into the school's equipment room, found a rope, and hanged himself in the shower. Joyner filed suit against the Wake County School Board and school officials (the defendants), alleging claims under Title IX, the Eighth and the Fourteenth Amendments to the U.S. Constitution, and negligence under state law. The defendants moved to dismiss Joyner's complaint.

**Holding:** The federal court for the Eastern District of North Carolina granted the defendants' motion to dismiss.

Title IX prohibits gender discrimination in educational programs receiving federal funds. Joyner alleged that the defendants' indifference to the student-on-student harassment suffered by Christopher violated this statute. But because Joyner failed to allege any instance of *sexual* harassment, she has no claim under Title IX. The court also dismissed Joyner's Eighth Amendment claim, in which she argued that the defendants failed to protect Christopher from cruel and unusual punishment by allowing other students to bully him. The Eighth Amendment, stated the court, only protects persons convicted of crimes.

Joyner's final federal claim was that the defendants violated Christopher's liberty interest under the Fourteenth Amendment by failing to protect him from harm caused by himself and other students while at school. As a general rule, school officials do not have an affirmative constitutional duty to protect students from harm. Two exceptions to this rule exist: (1) the special relationship exception, and (2) the state-created danger exception. The court cited case law holding that there is generally no special relationship between school officials and their students. The court went on to note that the receipt of special education services does not create such a relationship.

The court also found the state-created danger exception inapplicable to Christopher's case. This exception requires more than evidence that a defendant did nothing in the face of danger. A defendant must have created a dangerous environment, been aware of its danger, and used his or her authority to create an opportunity for a third party's crime that would not otherwise have existed. So, for example, even when school officials had actual knowledge that a student was being assaulted by other students, promised to protect the student, and then failed to do so, they were not liable for a constitutional violation because they did not create the danger. Similarly, in this case, school officials did nothing to create a danger for Christopher.

Finally, the court rejected Joyner's claim that the defendants, by violating the terms of Christopher's IEP, created a situation that fell under the state-created danger exception.

The statute under which Christopher's IEP was developed, the Individuals with Disabilities Education Act, assures students with disabilities access to appropriate public education but does not allow tort-like damage claims.

The court concluded by dismissing Joyner's state law negligence claim—without prejudice. Although she may refile this claim in state court, the federal court declined to exercise jurisdiction over it because it had dismissed all of her federal law claims.

**Court appropriately allowed woman injured by school board employee to withdraw her complaint without prejudice.** Williams v. Poland, \_\_\_ N.C. App. \_\_\_, 573 S.E.2d 230 (2002).

**Facts:** Angela Williams suffered injuries and car damage in an automobile collision with Wayne Poland, an employee of the Nash–Rocky Mount Board of Education. She filed suit against Poland and the board (the defendants). After the defendants moved to dismiss her suit, Williams also asked the court to dismiss her suit—without prejudice, so that she could refile it later. The court granted Williams's motion, and the defendants appealed.

**Holding:** The North Carolina Court of Appeals affirmed the lower court's judgment. The defendants had argued that Williams was not entitled to dismissal without prejudice because it defeated their right to affirmative relief (in other words, the defendants' right to have the case dismissed on substantive grounds, which would have prevented Williams from refileing it). The court disagreed, finding that the right to affirmative relief must be of a kind that allows a defendant to maintain an action independently of a plaintiff's claim. In this case, the defendants' right to have Williams's claim dismissed did not exist without her action.

**University grievance committee properly performed review of professor's complaint.** Sack v. North Carolina State University, \_\_\_ N.C. App. \_\_\_, 574 S.E.2d 120 (2002).

**Facts:** Ronald Sack, a history professor at North Carolina State University (NCSU) since 1971, filed a complaint with the university faculty grievance committee alleging that Dr. Riddle, the chair of the history department, acted with personal animosity toward him with regard to scheduling classes and in failing to recommend him for a discretionary pay increase. The committee determined that Riddle had treated Sack fairly. In so doing, the committee declined to hear certain evidence proffered by Sack: (1) testimony on class scheduling; and (2) documents showing that, in evaluating faculty members for pay increases, Riddle had recommended some faculty members whose publication records did not seem to qualify them for increases.

NCSU Chancellor Fox stated her intention to ratify the committee's conclusion but asked the committee to clarify its reasons for rejecting the two pieces of evidence. First, the committee responded, the testimony on class scheduling was from a witness not privy to the scheduling process. Second, the documents offered were irrelevant and immaterial to determining whether Riddle had treated Sack unfairly because of the instructions Riddle was following in making recommendations for discretionary pay increases. Riddle had been told to make a judgment about whether a given faculty member was likely to be lured away from NCSU and was worth retaining; thus a faculty member's publications record was only one of the factors he considered. Fox accepted the committee's findings.

Sack then appealed to the university president, who affirmed the decision, and then to the Board of Governors, which also affirmed the decision. Sack next sought review in court. Without making findings of fact, the trial court vacated the board's decision not to order Fox to review Sack's complaint and sent Sack's complaint back to the grievance committee with specific instructions on how to evaluate it. The trial court also apparently found that the grievance procedure had violated Sack's due process rights. NCSU appealed these rulings.

**Holding:** The North Carolina Court of Appeals reversed the trial court's ruling, finding that the grievance committee had properly performed its review.

A reviewing court may not override the decision of an administrative review agency unless it was made in bad faith or was contrary to law. The trial court in this case never specified what error it found in the committee's process, and the court of appeals could find none itself. The committee required Sack to prove his grievance by a preponderance of the evidence, as was appropriate, and it made evidentiary determinations that were reasonable and within the scope of its authority.

Even had there been some defect in the grievance process, the court said, Sack would not have been deprived of his due process rights under the U.S. Constitution because his grievance implicated no constitutionally protected property right. A desire for a discretionary salary increase is simply not the kind of interest the due process clause protects.

**Court addresses motion to dismiss claims of former University of North Carolina soccer players.** Jennings v. University of North Carolina at Chapel Hill, 240 F. Supp. 2d 492 (M.D.N.C. 2002).

**Facts:** Melissa Jennings and Debbie Keller played soccer for the University of North Carolina at Chapel Hill (Carolina). Anson Dorrance was the team's head coach; William

Palladino, Chris Ducar, and Tracy Ducar were assistant coaches. Jennings and Keller filed suit against these individuals (among others), several administrative officers of Carolina, and the university itself concerning incidents that occurred while they were playing for Carolina. Specifically, Jennings and Keller alleged that: (1) Dorrance repeatedly interrogated them about their sexual activities, placed unwanted telephone calls to Keller, made unwanted physical contact with and sexual advances to Keller, encouraged Jennings (a minor) to ingest alcohol and fraudulently induced her to spend \$400 of her own money to purchase team supplies; (2) the other members of the coaching staff witnessed Dorrance's behavior and failed to report it to the university; (3) university administrative officials received numerous complaints about Dorrance on their behalf but failed to intervene or prohibit his actions; and (4) in retaliation for these complaints, Dorrance released Jennings from Carolina's soccer team and induced the coach of the women's national soccer team to exclude Keller from that team.

On the basis of these incidents, Jennings and Keller brought numerous claims, not all of which will be discussed in this digest. Against all the defendants they brought a claim under 42 U.S.C. § 1983 alleging violations of their constitutional rights under the First, Fourth, Fifth, and Fourteenth Amendments. Also against all defendants, they alleged a violation of Title IX. And, finally, Jennings and Keller charged the university with negligence for retaining Dorrance as coach of the soccer team.

The defendants moved to dismiss all the claims.

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

**Section 1983 Claims:** The court dismissed the Section 1983 claims against Carolina and against each of the defendants in his or her official capacity, finding them barred by the Eleventh Amendment. The court then addressed the defense motion to dismiss the Section 1983 claims against defendants acting in their individual capacities.

The court found that the claims were pleaded with sufficient specificity to satisfy the Federal Rules of Civil Procedure. The claim that Dorrance intentionally and systematically sexually harassed Jennings and Keller and created a hostile environment, coupled with the factual details set forth in the complaint, gives Dorrance adequate notice of the claim against him. As to the administrative officials, Jennings and Keller alleged misconduct sufficient to apprise them of the grounds for the claim of supervisory liability in that: (1) the administration received numerous complaints about Dorrance's behavior; (2) the administration took no action with respect to this behavior; and (3) as a direct result

of this failure to intervene, Dorrance's unconstitutional conduct continued. The court noted, however, that the failure-to-report charges against the assistant coaching staff did not make out viable Section 1983 claims because none of these individuals were Dorrance's supervisors and none had authority over his behavior. The court dismissed these claims.

The court next rejected the claim that the Section 1983 claims against the defendants in their individual capacities should be dismissed because they were entitled to qualified immunity. To overcome a Section 1983 qualified-immunity claim, a plaintiff must show deprivation of a constitutional right that was clearly established and of which a reasonable person would have known. Jennings and Keller adequately alleged that the behavior of the individual defendants deprived them of constitutional rights: specifically, the right to privacy (in not divulging the details of their sexual activity) and the right to be free from sexual harassment. These rights were clearly established, and reasonable persons in the defendants' positions would have known of them.

*Title IX Claims:* Jennings and Keller conceded that only a funding recipient can be liable under Title IX and thus voluntarily accepted dismissal of their Title IX claims against all defendants but Carolina. To claim university liability under Title IX, Jennings and Keller were required to show (among other things) that Carolina had actual knowledge that (1) they were subjected to sexual harassment so severe and pervasive as to deprive them of educational benefit, and (2) Carolina was deliberately indifferent to the abusive conditions. The university then put forth several, ultimately unsuccessful, reasons why the Title IX claim against it should be dismissed.

First, it argued that even if it had notice of Dorrance's inappropriate conduct, it did not know that this conduct was *sexually harassing* conduct. The court found that Carolina could have inferred that the conduct described constituted sexual harassment and further stated that the facts were unclear as to whether Jennings and Keller did in fact complain of sexual harassment to the university.

Second, Carolina argued that it did not receive notice of the harassment until after Jennings and Keller were no longer on the soccer team—too late for the university to demonstrate deliberate indifference in its response to the complaint. Taking the plaintiffs' allegations as true, as the court is obligated to do at this stage of the proceedings, the court found sufficient indication that Carolina had notice of the conduct and failed to intervene.

Finally, the court rejected the university's argument that the harassing conduct alleged was not sufficiently severe and that its actions did not deprive the plaintiffs of educational benefit. The court found that the allegations in the complaint, if true, satisfied these requirements.

*Negligent Retention Claim:* The court dismissed this claim against Carolina on the basis of Eleventh Amendment immunity.

**In an unpublished opinion, former employee's gender discrimination claim is dismissed for lack of evidence.**

*Spain v. Mecklenburg County School Board*, 54 Fed. App. 129 (4th Cir. 2002).

**Facts:** Steven Spain served as director of special education for Mecklenburg County (Va.) from 1995 until 1999, when he was reassigned to the position of supervisor of special education. Spain had no training in special education or experience teaching in that area and, under Virginia law, was allowed to hold the director position only because the Virginia Department of Education granted him a waiver of the required postgraduate professional license. During Spain's tenure as director, the U.S. Department of Education, Office of Civil Rights, investigated Mecklenburg's department of special education and found that African-American students were disproportionately assigned to special education curricula.

In 1998 Rebecca Perry became superintendent of the Mecklenburg County school system. In one meeting, Spain contends, Perry stated a preference for female administrators because they were more organized than males. Later, during an administrative reorganization, Spain was informed that he was being reassigned.

His position was given to Cecelia Coleman, who held a B.S. in special education and an M.E. degree in preschool handicapped education. She had certification for teaching special education, which she had done from 1976 to 1996, and in 1987 she had received the Virginia Teacher of the Year Award. Since 1994 she had held high-ranking administrative positions with the county special education department.

**Holding:** In an unpublished opinion, the Fourth Circuit Court of Appeals found that Spain failed to show evidence of discrimination. The board stated that it reassigned Spain because Coleman was better qualified for the position than he was. Spain failed to rebut this argument.

**In an unpublished decision, employee's discrimination claim is dismissed for failure to show that she suffered adverse employment action.**

*Richardson v. Richland County School District*, 52 Fed. App. 615 (4th Cir. 2002).

**Facts:** Mary Richardson claimed that the Richland County (S.C.) School District discriminated against her on the basis of race and age, in violation of Title VII and the Age Discrimination in Employment Act (ADEA). The district did so, she claimed, by giving her an undesirable classroom assignment, not giving her keys to this classroom, not giving her a new

computer during the first round of distribution, and by assigning her the task of correcting over 350 records. The district moved to dismiss her claims before trial.

**Holding:** The Fourth Circuit Court of Appeals dismissed Richardson's claims. Under both statutory schemes,

Richardson had to show that she suffered adverse employment action. Her allegations failed to satisfy this requirement. ■