School Law Bulletin
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and attorney general's
opinions.

Clearinghouse

edited by
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Cases and Opinions That Directly Affect North Carolina

Superior court issues partial ruling in *Leandro* case, holding that the current state education delivery system is constitutionally sufficient to provide students a sound basic education but that it is unconstitutionally deficient in its lack of prekindergarten opportunities for at-risk preschoolers. Hoke County Board of Education v. State of North Carolina, No. 95 CVS 1158 (Wake County Sup. Ct., Oct. 12, 2000).

Facts: In 1997 the North Carolina Supreme Court held that the state constitution guarantees all children the opportunity to receive a "sound basic education." [See "Clearinghouse," *School Law Bulletin* 28 (Fall 1997): 35–36.] In so ruling, it reinstated the *Leandro* case in which poor rural school systems and wealthy urban systems contended that the state's educational funding system denied their students a constitutionally adequate education. The supreme court sent the case back to the trial court to receive evidence on whether the state's funding system allows students to meet this standard. The lower court conducted a trial and issued a partial ruling.

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Holding: The Wake County Superior Court established a method for handling the case, set the baseline for determining what constitutes a sound basic education, and held that the state's educational delivery system is *capable* of delivering that level of education. Whether the system does so in individual counties and with respect to at-risk prekindergarten children the court will address in future rulings.

Method for handling the case. Because of the massive amount of evidence to be considered in this case, the court broke the case into two parts for trial—one addressing the claims brought by the small school systems, and the second addressing the claims of the large systems. For each part, the court selected one school system to be representative of all the plaintiff systems. The court selected Hoke County as representative of the small system plaintiffs, and the first trial focused on evidence related to state educational practices and local practices in Hoke County. The trial on the large system claims has not yet been held, and the respresentative school system has not yet been chosen. In this opinion, the judge ruled only on the general constitutionality of state educational practices. He reserved judgment on the constitutionality of the practices as applied to Hoke County for a later time.

Baseline for determining a sound basic education. The court rejected the state's argument that all *Leandro* requires is that the state provide an educational system that is sufficient to offer children the opportunity to obtain a sound basic education, and that it is up to each

child to take advantage of this opportunity. The court characterized the state's argument this way: "If the school doors are open and qualified teachers are in the classrooms teaching the standard course of study, then the State has provided all children that come to the school with an opportunity to obtain a sound basic education." That obligation is met, the state argued, if students are performing at Level II on end-of-grade (EOG) tests. Level II students "demonstrate inconsistent mastery of knowledge and skills in these subject areas and are minimally prepared to be successful at the next grade level." The court rejected the state's characterization of its obligation and held that *Leandro* requires considering the needs of each child.

The plaintiffs advanced the more compelling argument, the court believed, in urging Level III performance on EOG tests as the standard. Level III students "consistently demonstrate mastery of grade level subject matter and skills and are well prepared for the next grade level," which shows that the children's individual needs have been considered.

Sufficiency of statewide educational delivery system. The court concluded, after an extensive review of several components, that the statewide educational delivery system is capable of providing all students the opportunity for a sound basic education in all areas, except for the lack of prekindergarten opportunities for at-risk children. (1) The curriculum, as provided in the Standard Course of Study prepared by the Department of Public Instruction, meets the court's standard, with the caveat that it must be properly implemented and taught by competent qualified teachers. (2) The standards and structure for licensing and certifying teachers also meet constitutional standards. (3) The funding allocation system is constitutionally sufficient, especially in terms of its flexibility to meet new funding needs. (4) The ABC program ("Accountability, Basics, and local Control") is a valid mechanism for analyzing student performance, as are end-of-grade and end-of-course tests.

Unconstitutional lack of opportunity for at-risk prekindergarten children. The court concluded that early childhood intervention is necessary for at-risk children to be afforded an equal opportunity to obtain a sound basic education. It cited the following risk factors: (1) low-income families, (2) lack of parental education, (3) racial and/or ethnic background, (4) limited English proficiency, (5) health, (6) single parenthood, (7) adequacy of housing, (8) exposure to crime, and (9) labor force participation of parents. The more factors present in a child's situation, the court held, the greater the child's likelihood of school failure. The schools, through early intervention, can reverse some of the effect of the risk factors. The right of every child to the opportunity to receive a sound basic education cannot be conditioned on age, but should instead be conditioned on the needs of the individual child. Accordingly, the court held that at-risk children should be provided the opportunity to attend a quality prekindergarten education-based program that aims to prepare at-risk children for kindergarten.

Three-member appeals court panel holds that the Charlotte-Mecklenburg school system has not achieved "unitary status" and that its use of race-based initiatives is constitutional. Full appeals court vacates the panel opinion and agrees to hear the case again. Belk v. Charlotte-Mecklenburg Board of Education, 233 F.3d 232 (4th Cir. 2000).

Facts: The Charlotte-Mecklenburg Board of Education (CMBE) had been operating under federal court supervision since 1965 because it maintained a system of "dual," or segregated, schools. In 1992, as an integration measure, CMBE created a magnet school program that employed racial enrollment quotas. Five years later the plaintiffs—parents of white students within the school district—filed suit against CMBE, arguing that the quotas violated their children's right to equal consideration for admission to a magnet school.

In a 1999 ruling in the case, the federal court for the Western District of North Carolina held that the CMBE had achieved unitary racial status in its school system and that therefore the thirty-four-year-old desegregation order should be dissolved. It found the magnet school program unconstitutional and prohibited the future use of initiatives that allocated educational benefits on the basis of race [see "Clearinghouse," *School Law Bulletin* 30 (Fall 1999): 21–22]. CMBE appealed.

Appeals court panel holding: A three-judge panel of the Fourth Circuit Court of Appeals reversed the district court order, finding that CMBE had not in fact achieved unitary status in all respects and that its race-based student assignments for magnet schools was constitutional.

Legal errors made by the lower court. The court began by pointing out important legal errors in the lower court's decision. First, because CMBE was operating under federal court supervision, the lower court should have presumed that existing racial imbalances in the school system were vestiges of past discrimination.

Therefore, the court should not have required CMBE to prove that the imbalances *were* related to past discrimination, but should have required the plaintiffs to show that current racial imbalances *were not* causally linked to past discrimination. So, for example, it was inappropriate for the lower court to determine that racial imbalances within CMBE were due to demographic factors, when it did not require the plaintiffs to present any evidence that these demographic factors were not somehow linked with past CMBE discrimination.

Second, the lower court applied the wrong standard for determining whether CMBE had reached unitary status. A school system reaches unitary status when a court holds that it has eliminated the vestiges of past discrimination to the extent practicable. The lower court, in accord with the plaintiffs' arguments, believed that this standard required it only to determine whether CMBE's past actions had achieved practical elimination of the vestiges of past discrimination. This erroneous belief led the court to exclude from evidence a remedial plan developed by CMBE that not only addressed the remaining vestiges of discrimination within the system but also proposed future steps to remedy them. The correct standard assesses a school system's compliance with prior court orders *and* what the system may do in the future to eliminate racial imbalance. Under this standard the lower court should have considered CMBE's plan. In addition, CMBE's admission that it had not complied with desegregation orders should have been accorded greater weight.

School system not unitary. Because of these legal errors, the court of appeals found that the lower court had reached an erroneous conclusion on the school system's unitary status. The court found that in the areas of student assignment, physical facilities, transportation, and student achievement, CMBE had not achieved unitary status. On remand, the court of appeals ordered, the lower court must determine whether CMBE did fulfill its constitutional and court-ordered obligations. If the answer to this question is "no," the court must then ask whether these failures contributed to the present racial imbalance. If the answer to this question is "yes," the court must then assess whether there are practicable remedies. With respect to this last question, the court must work to give proper deference to the opinion of CMBE officials. The court of appeals found that despite applying the wrong legal standard, the lower court had appropriately held that CMBE had achieved unitary status in the areas of faculty and staff, extracurricular activities, and student discipline.

Consideration of race not unconstitutional. The court of appeals next addressed the lower court ruling that the CMBE magnet school plan's race-based assignments were unconstitutional. It noted that court orders governing CMBE up to the date of the lower court's opinion authorized every significant aspect of the magnet school program, including the use of race in student assignments. While under court order, CMBE was required to treat racial isolation as a vestige of past discrimination, not make its own determination that it was due to demographic changes or other nondiscriminatory factors. Court-ordered remedial action cannot be found unconstitutional, said the court.

Because CMBE had not achieved unitary status and had not violated the Constitution with its magnet school program, the court of appeals vacated the lower court's injunction prohibiting the use of race in the allocation of educational benefits. For these same reasons, the court vacated the lower court's award of nominal damages and attorney fees to the plaintiffs.

Rehearing. On January 17, 2001, the entire Fourth Circuit Court of Appeals vacated the opinion above and agreed to rehear the case *en banc*, which means that the full court will hear the matter anew and will not be bound by the panel's ruling.

Employee may be fired for refusing to give Social Security number, even if refusal is for religious reasons. Gossett v. Duke University Medical Center, No. 1:99CV00985, ___ F. Supp. 2d ___ (M.D.N.C. Aug. 14, 2000).

Facts: In his Duke University employment application, John Gossett wrote "religious objection" in the space provided for his Social Security number (SSN). Duke hired Gossett anyway but told him that the Internal Revenue Service required Duke to report his SSN before paying him wages. Gossett still refused to provide his SSN, stating his belief that the SSN was a "universal identifier which is a reflection of the 'mark of the beast' as described in the Holy Bible." Duke fired him.

Gossett filed suit in the federal court for the Middle District of North Carolina, alleging that Duke's actions constituted religious discrimination prohibited by both Title VII of the Civil Rights Act of 1964 and the public policy provision of North Carolina's Equal Employment Practices Act (EEPA), G.S. 143-422.2. Duke moved to dismiss Gossett's claims before trial.

Holding: The court granted Duke's motion, dismissing Gossett's claims. Under Title VII, when an employee shows that he or she suffered adverse em-

ployment action because of a failure to meet an employment requirement that conflicted with a bona fide religious belief, the employer must show that it could not accommodate the employee's religious belief without undue hardship. Courts have held that accommodations that require an employer to violate the law create undue hardship. Providing an SSN is not an employment requirement imposed by Duke but one imposed by federal law. Duke could not have avoided this rule without violating the law and thus was not required to accommodate Gossett's refusal to provide the SSN.

North Carolina's EEPA evaluates claims using Title VII's evidentiary standards. Since Gossett relied on the same information for both claims, the EEPA claim was also properly dismissed.

School board cannot be held liable under Section 1983 for personnel decisions made by superintendent and principal. Riddick v. School Board of the City of Portsmouth, 230 F.3d 1353 (4th Cir. 2000) (unpub.).

Facts: In July 1995 school personnel discovered a video camera that Portsmouth (Va.) Wilson High School track coach John Crute had hidden in a storage room adjoining the girls' locker room. He had been secretly videotaping members of the girls' track team in various states of undress. This was the second videotaping incident involving Crute. The first was a 1989 incident in which the superintendent and the principal had investigated complaints against Crute arising from his videotaping of a track team member posing in different track uniforms. The 1989 tape allegedly "zoom[ed] in on her crotch, [and] zoomed in on her rear," and contained "a lot of moaning and groaning" by Crute. The superintendent and the principal determined that Crute's behavior was not objectionable and took no disciplinary action. Because that had been the first complaint against Crute, no record of the incident was placed in his personnel file.

After the hidden camera was discovered in 1995, several members of the team filed suit against the school board, asserting that the board was liable for Crute's harassment under Title 42 of the United States Code, Section 1983, because the board knew of Crute's propensity to behave inappropriately toward female students and was deliberately indifferent to it.

The board moved to have the complaint dismissed, arguing that it could not be held liable for Crute's actions or the superintendent's or principal's response to them. The federal court for the Eastern District of Virginia agreed and dismissed the complaint against the board before trial. The team members appealed.

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

Under Section 1983, a school board cannot be held liable for the actions of its employees merely because they are the board's employees. For liability to attach, the employees in question must possess final authority to establish official board policy with respect to the action taken or not taken. Virginia law places final authority on personnel matters in the school board. In this case there was no showing that the board delegated this authority to the superintendent or principal, so their actions could not constitute official board policy for which the board could be held liable. Further, even assuming that the superintendent and the principal had final authority to make the decision they made, the team members failed to establish that the decision not to discipline Crute for inappropriately taping clothed track members was deliberately indifferent to the risk that Crute would later secretly videotape team members naked.

Delay in seeking an injunction to stop school board's construction plans unjustly prejudiced the board. Save Our Schools of Bladen County, Inc. v. Bladen County Board of Education, No. COA99-1290, 140 N.C. App. 233, 535 S.E.2d 906 (N.C. App. 2000).

Facts: In February 1997, at a retreat open to the public, the Bladen County (N.C.) school board decided to proceed with a plan for school construction and consolidation, and in May 1997 formally voted to begin that process. In June 1997 the board held a public meeting to discuss its proposed plan for school construction. The local newspaper published three articles and one editorial discussing the plan. Few people attended the public hearing, and in July the board voted to approve the plan. A county bond referendum was set for September 1998 in order raise $25 million needed for the plan. Opponents of the plan campaigned actively before the referendum, but the referendum passed nonetheless.

Save Our Schools of Bladen County (SOS), a group composed of Bladen County citizens and taxpayers, filed suit in March 1999 seeking an injunction to prevent the board from proceeding further with its plans. By this date, the board had already entered into contracts in furtherance of the plan. The board moved to dismiss the SOS claim before trial, claiming that it was

barred by *laches.* Laches is a legal doctrine that is used to dismiss suits in circumstances where delay in filing them has resulted in some change of conditions that would make it unjust to permit their prosecution. The trial court granted the board's request.

Holding: The North Carolina Court of Appeals affirmed the dismissal based on laches.

The court addressed three questions concerning the board's laches defense: (1) Did the pleadings show any dispute about the facts on which the board relied to show laches on SOS's part? (2) If not, did the undisputed facts establish laches? And (3) if so, was it inappropriate for the trial court to grant the board's request to dismiss SOS's complaint before trial? The court found that the facts were undisputed and that they did establish laches. There was ample evidence to show that the plan was a matter of controversy in the community of which SOS members must have known. (For example, one of SOS's members was married to a school board member.) SOS could have brought suit as early as July 1997 when the plan received final approval. Taking a calculated risk, SOS waited to see the results of the September 1998 referendum and then waited another six months after that to file its claim. By that time, the board had taken actions in reliance on the referendum results.

Parent's unilateral placement of disabled child in private school precluded tuition reimbursement claim against public school. L.K. v. Board of Education for Transylvania County, 113 F. Supp. 2d 856 (W.D.N.C. 2000).

Facts: L.K., parent of J.H., sued the Transylvania County (N.C.) board of education for almost $35,000 in tuition and transportation costs for a private school in which she unilaterally enrolled J.H. J.H. had attended Transylvania public schools from kindergarten through fifth grade, with one brief interruption. Throughout this period he suffered behavioral problems and poor grades.

J.H. began taking Ritalin in the second grade at the suggestion of his teacher and with the concurrence of his pediatrician, but L.K. stopped the medication because she felt the teacher was using it for behavior control. In the third grade, L.K. asked J.H.'s teacher to have him tested for disabilities, but before the testing could be done she transferred him to a different school. J.H. attended summer school after third grade and was referred for testing at an organization that was performing testing for public schools with inadequate staff to perform the tests themselves. This organization said it would not test J.H. and told L.K. to seek testing at the school. L.K. apparently never transmitted this request to school personnel. In fifth grade, J.H. was tested for disabilities, but the only result of the evaluation was a recommendation that J.H. receive occupational therapy. L.K. pursued the matter no further.

After fifth grade, L.K. moved J.H. to a private school. After J.H. attended that school for two years, L.K.'s attorney sent a letter to the Transylvania school board demanding approximately $35,000 reimbursement for tuition and transportation expenses there. When the board did not make payment within ten days of the request, L.K. filed a petition for a contested case hearing.

Administrative review officers dismissed L.K.'s claim, finding that a petition filed two years after a child was unilaterally withdrawn from a school was untimely. In addition, they refused to address the issue of whether the board improperly refused to identify J.H. as eligible for special education services (and thus whether he was entitled to compensatory education) because L.K. had not raised it in her complaint. L.K. appealed to the federal court for the Western District of North Carolina.

Holding: The court concurred in the judgment of the administrative officers. The remedy of tuition costs under the Individuals with Disabilities Education Act (IDEA) is available only if a student has been denied a free appropriate public education, certain due process reviews have been completed, and the school has been notified of the parent's intention to transfer the child to a private school. L.K. satisfied none of these conditions. Because the board was never given the opportunity to prepare an individualized education plan for J.H., there was no basis for assessing whether his education in the public schools was inappropriate.

Sexual harassment suit against university dismissed for untimely filing; infliction of emotional distress claims dismissed because of sovereign immunity. Weston v. University of North Carolina, No. 5:99CV500BO(3), ___ F. Supp. 2d ___ (E.D.N.C. Aug. 9, 2000).

Facts: Monique Weston, who worked in the radiology department at North Carolina State University (NCSU), complained that her supervisor, Paul Fisher, sexually harassed her. After an investigation NCSU assigned Weston a new supervisor and warned Fisher that further harassment would lead to termination. Weston

alleged that Fisher continued to harass her until she was forced to take leave to seek medical assistance for emotional distress, though it is unclear whether she voiced her renewed complaint to anyone.

On November 10, 1996, Weston's immediate supervisor phoned to warn Weston that she must return to work on December 9, 1996, and that failure to respond by December 2 would be deemed voluntary resignation. Weston attempted to speak to her supervisor once on December 6 to say that she wanted to continue her employment and to apply for leave under the Family and Medical Leave Act. NCSU terminated Weston.

Weston filed a sex discrimination charge, and the Equal Employment Opportunity Commission (EEOC) issued her a right-to-sue letter on April 29, 1999. On August 2, 1999, Weston filed suit against NCSU and Fisher alleging Title VII violations, infliction of emotional distress, and wrongful discharge. NCSU and Fisher moved to dismiss her claims.

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

The court found that Weston's Title VII claims were filed too late. That statute requires that a complaint be filed within ninety days of the EEOC's notice of the right to sue. Weston's right-to-sue letter was dated April 28, 1999, *ninety-five* days before she filed her complaint. Weston offered no explanation as to why she could not file her complaint in a timely manner, so the court dismissed this claim.

The court went on to hold that it had no jurisdiction over Weston's remaining claims because the Eleventh Amendment to the United States Constitution bars most state law claims against the state in federal court. Because NCSU is a state agency and Fisher an official of that agency, Weston's suit is barred.

Former employee whose compensable injury made him incapable of finding work at wages equal to or greater than those he had made before the injury is entitled to continuing disability payments and vocational rehabilitation services. Lusk v. Hickory Public Schools, In the North Carolina Industrial Commission, I.C. No. 248161 (Aug. 8, 2000).

Facts: Billy Gene Lusk, a seasonal employee of the Hickory (N.C.) public school system, permanently injured his knee when a lawnmower he was riding overturned. Lusk was gainfully employed for two years after reaching maximum medical improvement with a 20 percent permanent partial disability rating for his knee. At that time, his knee condition worsened; after surgery his disability rating increased to 25 percent, and his physician indicated that he needed work with minimal kneeling, squatting, and climbing. Lusk was briefly employed thereafter until his new employer changed his job to include duties he could not perform. Despite seeking assistance from the North Carolina Vocational Rehabilitation Service, the Employment Security Commission, and numerous companies, Lusk was unable to find employment. Lusk had an eighth grade education.

Lusk asked the North Carolina Industrial Commission to order the Hickory public school system to reinstate disability payments, pay for medical expenses arising from his injury, and pay for vocational rehabilitation services.

Holding: The commission granted Lusk's request, finding that he had suffered a substantial change in condition that caused him to lose the ability to earn income. The school system was ordered to continue paying benefits until further order.

Employee's heart attack and depression were not caused by job-related stress. Carter v. Stonewall Jackson School, In the North Carolina Industrial Commission, I.C. No. 745095 (Oct. 19, 2000).

Facts: Robert Carter worked at the Stonewall Jackson School as personnel manager. The school's director was Charles Newton. Carter told an employee he could tape record a conference with Newton, even though Newton had refused the request. After this incident, Newton stormed into Carter's office and threatened his job. Carter stated that subsequent fear about losing his job caused him to lose sleep and experience job-related stress. He suffered a heart attack caused, according to Carter, by the stress arising from the incident. He later abandoned this claim, alleging instead that job-related stress caused him to develop the occupational disease of major depressive disorder. Carter sought workers' compensation benefits for his injury.

Holding: The North Carolina Industrial Commission denied Carter's claim. His physicians believed two blocked arteries caused his heart attack, not a condition related to his employment. Further, the commission found insufficient evidence to prove that Carter's job subjected him to an increased risk of developing depression as compared to the general public not so employed. The commission believed that the evidence showed Carter's stress and depression arose from his inability to perform the duties of his job.

Former employee's disability and race discrimination claims fail. Shore v. Martin, No. 1:99CV00543, ___ F. Supp. 2d ___ (M.D.N.C. Sept. 11, 2000).

Facts: Chlories Shore, an African-American woman, sought a transfer from her position as assistant principal at Mineral Springs Elementary School in the Winston-Salem/Forsyth County (N.C.) school system because conditions in the school building aggravated her sinusitis and rhinitis. Three months later, the transfer was granted after she threatened to bring legal action to enforce her request for "reasonable accommodation." After indicating that she had no preference among five options, she was moved to a temporary grant-writing position in the school system's central administration building.

After her transfer to the central administration building, Shore alleged that: (1) her working space at this building was humiliatingly near the men's restroom; (2) there was a dead bug on the floor; and (3) black particles fell from the air system. Despite these conditions, Shore applied for the position on a permanent basis, but was passed over for a white woman with better writing skills and more grant-writing experience. Thereafter, the board reassigned Shore to her former position as assistant principal but at Lewisville Elementary School—a school with no known air quality problems.

One week later Shore went on temporary medical disability leave because of severe depression. Shore never returned to work, retiring three months later, three years short of retiring with full benefits. She then filed suit against school superintendent Donald Martin and the board. The suit alleged that the board's delay in granting her transfer request violated a duty under the Americans with Disabilities Act (ADA) to make a reasonable accommodation of her disability (the sinusitis/rhinitis), and that her working conditions after the transfer were retaliation for making the reasonable accommodation request, as was her final reassignment to Lewisville Elementary. She also alleged that the board discriminated against her on the basis of race, in violation of Title VII, in denying her the permanent grant-writing position. These actions caused her depression, loss of earnings, and loss of enjoyment of life. Martin and the board sought to have her claims dismissed before trial.

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

The ADA claims fail first and foremost, began the court, because Shore is not disabled under that statute's definition of disability. She was not limited in any substantial life activity by her sinusitis/rhinitis, and her doctor believed that she was fully able to perform her job duties even under the conditions existing at Mineral Springs, the school from which she first sought a transfer. Shore's depression did not qualify as a disability under the statute because she produced no evidence that the board knew of it and failed to accommodate her. In any event, the court concluded, the board did reasonably accommodate her nondisabling condition: delay in granting her requested accommodation of a transfer did not establish an ADA violation, and Shore produced no evidence to show that the delay was motivated by disability discrimination. Her ADA retaliation claims fail because of her failure to show that she was disabled, but also because she failed to show that Martin or the board took any adverse employment action against her.

Shore's claim that she was discriminated against on the basis of her race in terms of her working conditions and in not being hired for the permanent grant-writing position failed because the board took no adverse employment action against her and simply hired a better qualified person for the position.

Faculty member's claim that he was denied tenure on the basis of gender, national origin, and religion was not timely filed. Edelman v. Lynchburg College, 228 F.3d 503 (4th Cir. 2000).

Facts: Leonard Edelman, a white Polish-Jewish male biology professor at Lynchburg (Va.) College, was denied tenure on June 6, 1997. On November 14, 1997, he sent a letter to the Equal Employment Opportunity Commission (EEOC) alleging that the decision constituted discrimination against him on the basis of gender, national origin, and religion. Edelman and his attorney apparently believed that this letter constituted a charge of discrimination as required under Title VII, even though it was not sworn under oath. On March 18, 1998, after an interview with Edelman, the EEOC sent him a draft charge to sign. He did not return the charge until April 15, 1998—313 days after the date of the alleged discrimination.

Lynchburg College moved to have his claim dismissed for failure to timely file it. The federal court for the Western District of Virginia granted the motion to dismiss. Edelman appealed.

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

In states that have their own agencies to handle employment discrimination claims, as Virginia does, Title VII establishes a 300-day limitation period for filing a claim. Title VII provides that discrimination charges shall be in writing "under oath or affirmation." However, regulations implementing Title VII allow for a charge to be amended to cure a failure to verify the charge, and further provide that the amendments will date back to the date the charge was first received. Edelman relied on this regulation in protesting the dismissal of his complaint.

The court found that Title VII unambiguously stated Congress's intention that the charge be verified within the statutory 300-day limit, the regulation to the contrary notwithstanding. Regulations are administrative constructions of statutes, and when they are inconsistent with the actual statutes they interpret, courts must refuse to adhere to them.

Former student's claims against dentistry school and its dean are dismissed for failure to serve the defendants, failure to timely file, and failure to state a claim entitled to relief. Melton v. University of North Carolina at Chapel Hill, No. 1:00CV00045, ___ F. Supp. 2d ___ (M.D.N.C. July 24, 2000).

Facts: In 1993 Kim Melton received a fellowship through The University of North Carolina at Chapel Hill (UNC) to pursue graduate studies at the School of Dentistry. In August 1996 Melton was dismissed from the fellowship program. According to Melton she was dismissed after a secret meeting and was given no opportunity to defend herself. Thereafter the dean of the School of Dentistry, John Stamm, sent a letter to faculty stating that Melton was on medical leave and that it was unclear whether she would return.

Melton filed suit in the federal court for the Middle District of North Carolina against UNC and Stamm alleging several causes of action. Both UNC and Stamm moved to have her claims dismissed.

Holding: The court granted the motions to dismiss.

The court dismissed Melton's charges against UNC (which included breach of contract, conversion, breach of fiduciary obligation, constructive fraud, and violations of Title IX and Section 1983) because it found that she had failed to serve UNC with her complaint. The court dismissed Melton's federal charge and one state charge against Stamm for failing to timely file them. Melton's claim that Stamm violated Section 1983 by depriving her of a property interest in continuing her studies and a liberty interest in her reputation was filed more than three years after she was dismissed from the School of Dentistry. The statute of limitations on such claims is three years. Likewise, the statute of limitations on a tortious interference with contract claim is three years.

The court dismissed Melton's state law claims against Stamm because they presented no grounds on which she was entitled to relief. Melton's claim that Stamm breached her privacy by sending the letter that incorrectly stated that she was on medical leave was inadequate. To rise to the level of a tort, the privacy invasion must be one that would be highly offensive to a reasonable person. These facts do not meet that standard. Melton's claim that Stamm's letter was defamatory was meritless because the letter contained no statements that impugned her personal or professional reputation.

Other Cases and Opinions

University of Michigan's consideration of race in undergraduate admissions is constitutional. Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

Facts: Rejected white applicants (hereinafter the plaintiffs) for admission to the University of Michigan filed a class action suit against the university and various university officials (hereinafter the defendants) alleging that they had violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by considering race as a factor in admissions.

The plaintiffs challenged two different policies: (1) the 1995–98 admissions scheme, which reserved a specific number of seats for minorities, and used separate scoring grids for minority and white applicants; and (2) the 1999–2000 scheme, which granted points to the score of underrepresented minority candidates and allowed admission counselors to "flag" for further consideration the files of certain students who would not otherwise have passed the first round of selection. Both the plaintiffs and the defendants moved to have the other party's claims dismissed before trial.

Holding: The federal court for the Eastern District of Michigan granted judgment for the plaintiffs on

their claim concerning the 1995–98 admission scheme and for the defendants on the 1999–2000 scheme.

To justify the use of race-based distinctions, the court said, the university was required to show that they (1) served a compelling governmental interest and (2) were narrowly tailored to serve that interest. The issue of primary dispute in this case (as in most other cases concerning the use of race in admissions) was whether achieving diversity constitutes a compelling governmental interest. The court found that in the context of higher education, diversity is a compelling interest that can justify the use of racial classifications. This holding is contrary to holdings by other federal courts, which have found that the only compelling interest justifying the use of racial classifications is remedying the effects of past discrimination. [See, for example, digest of *Hopwood v. Texas* in "Clearinghouse," *School Law Bulletin* 27 (Summer 1996): 47–48.] This split of opinion ultimately will have to be resolved by the United States Supreme Court.

The court considered—and found convincing—evidence from educational institutions across the country to the effect that diversity created educational benefits for both minority and nonminority students. The plaintiffs presented no evidence to contradict this conclusion, instead arguing only that diversity could not be a compelling interest because it was too amorphous, limitless, timeless, and scopeless. Because the diversity rationale has no logical stopping point, the plaintiffs argued, the racial classifications used to serve it can never be sufficiently narrowly tailored to satisfy constitutional scrutiny. In reference to the university's 1995–98 scheme, the court found this argument of the plaintiffs persuasive.

The 1995–98 scheme reserved a particular number of seats for minority applicants. These slots, therefore, were screened from competition by applicants from nonprotected groups; in other words, certain applicants from nonprotected groups were excluded from competing for these seats solely on the basis of their race. The court found this scheme plainly overbroad.

But the 1999–2000 scheme did not suffer from this problem, according to the court. This policy deemed race or ethnic background a "plus" factor, but did not insulate any minority applicant from competition against any other applicant. The court noted that universities commonly give plus factors for all kinds of criteria, ranging from geographic factors, to alumni relations, to athletic ability. Possessing any of these factors gives an applicant an advantage over other applicants who do not possess them. Plus factors accorded for race could not be isolated as pernicious in such a scheme.

The policy of allowing admission counselors to "flag" an applicant's file if the candidate possessed a quality important to the composition of the incoming class, including underrepresented minority status, was also sufficiently narrowly tailored. Counselors were not required to flag the file of every minority applicant, and furthermore, applicants other than underrepresented minority applicants could also be flagged. Such a system did not protect minorities at the expense of other groups.

The court accepted the defendants' evidence that other, race-neutral programs would not be successful in obtaining the diversity so important to the university's mission. Therefore, the 1999–2000 program was tailored narrowly enough to survive constitutional review.

Sixth Circuit Court of Appeals finds that Ohio's school voucher program violates the Establishment Clause of the United States Constitution. Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000).

Facts: Ohio's school voucher program paid full or partial tuition at participating private schools for students whose family incomes were less than 200 percent of the poverty line. Participating private schools were required to cap their tuition at $2,500 per year. The program placed no limits on how schools could use funds received from the program. For the 1999–2000 school year, 82 percent of the participating private schools were sectarian, and 96 percent of the students participating in the program were enrolled in sectarian schools. Parents of some Ohio schoolchildren and other concerned citizens (hereinafter the plaintiffs) filed suit against the superintendent of public instruction for the Ohio Department of Education and others (hereinafter the defendants), alleging that the voucher program violated the Establishment Clause of the United States Constitution.

The federal court for the Northern District of Ohio granted judgment for the plaintiffs before trial.

Holding: The Sixth Circuit Court of Appeals affirmed judgment for the plaintiffs. The court found the program to be unconstitutional, because it had the effect of advancing religion—which is prohibited by the Establishment Clause.

First, the program made no attempt to guarantee that sectarian schools receiving program funds used them only for secular purposes. Second, by granting

funds only to schools participating in the program—as opposed to all private schools—the program skewed its aid toward sectarian institutions: this was so, found the court, because the tuition cap of $2,500 approximated the tuition level set at sectarian schools that have lower overhead and are supported by religious institutions and private donations. Nonsectarian private schools cannot generally afford to set their tuitions so low. According to the court, the statistic that 82 percent of the schools participating in the program are sectarian supported this conclusion.

Finally, although in other cases the fact that it was a student's parents who chose to send their child to a sectarian school served to break the nexus between government and religion, that factor does not apply to a program like Ohio's, which has already limited the parents' choices—by the way it structured the program—to overwhelmingly sectarian options. ■

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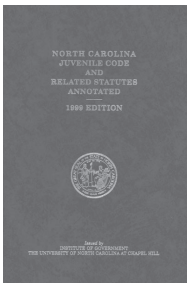

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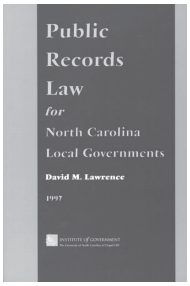

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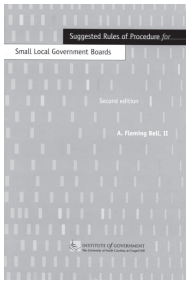

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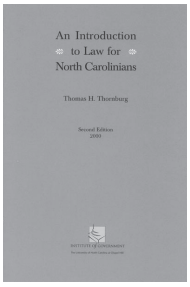

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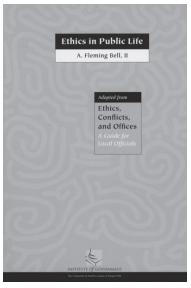

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