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

Arbitration agreement in university's employment application is binding on terminated employee raising discrimination claims. Armstrong v. Duke University, 2006 WL 213952 (M.D.N.C. 2006).

Facts: Corwin Armstrong, an African American, worked for six years in various technology-management positions at Duke University's Fuqua School of Business. When he first applied for a position at Duke, Armstrong signed an "applicant's certification," which contained an agreement to submit any employment-related dispute to Duke's dispute resolution procedure (DRP). This procedure, as outlined in pamphlets widely distributed to employees and available online, requires that disputes not solved within the university's grievance system are subject to binding arbitration.

In 2004 Armstrong filed suit in the federal court for the Middle District of North Carolina, alleging that he had been wrongfully terminated by Duke on the basis of his race and in retaliation for revealing allegedly discriminatory employment practices there. He did not submit his claims for arbitration, and Duke filed a motion to stay his lawsuit and compel arbitration.

Holding: The court granted Duke's motion.

The Federal Arbitration Act, 9 U.S.C. § 2 (1925), requires courts to compel arbitration wherever a valid arbitration agreement exists. The court noted that because of the federal policy encouraging arbitration agreements, any doubts concerning the scope of an arbitration agreement should be resolved in favor of arbitration. Armstrong argued that the DRP agreement was unenforceable for two main reasons.

First, he argued that he did not agree to the DRP because it was essentially unnoticeable in the employment application and did not explicitly mention arbitration. The court disagreed, noting the legal presumption that a person who signs a paper has ascertained its contents and signed with full knowledge of, and assent to, them. Further, the DRP agreement contained in the application referred readers to the Human Resources Department for a copy of the actual DRP pamphlet. Armstrong never sought it out.

Second, Armstrong argued that the DRP agreement was unenforceable because its vague and nonexplicit language lured unsuspecting applicants into signing away significant rights; in short, he argued that it was unconscionable. The court found the language of the DRP agreement clear enough to allow Armstrong to make a meaningful choice. Further, in agreeing to the DRP, Armstrong did not forfeit any substantive rights: he merely agreed to assert his rights in a forum other than a court of law.

Trial court erred in refusing to dismiss claims against school administrator on the basis of public official and qualified immunity. Farrell v. Transylvania County Board of Education, 625 S.E.2d 128 (N.C. App. 2006).

Facts: Sean Farrell was a student receiving special education services at Brevard Elementary School in Transylvania County. His parents filed a complaint against the school board and various school personnel in both their official and individual capacities, alleging that Sean received abusive treatment at the hands of a teacher's aide. Based on this treatment, they alleged claims of negligent supervision, hiring, and retention; negligent infliction of emotional distress; and violation of 42 U.S.C. § 1983.

The court dismissed all the claims against defendants in their official capacities but refused to dismiss claims against two of the defendants in their individual capacities. One of the latter, Kathy Haehnel, director of federal programs at Transylvania County schools, appealed the court's refusal to dismiss the claims against her for negligence and violation of Section 1983.

Holding: The North Carolina Court of Appeals reversed the trial court ruling and dismissed the claims against Haehnel.

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Under North Carolina law, public officials—as opposed to public employees—sued in their personal capacities are entitled to immunity from negligence claims. Under existing case law, superintendents and school principals are public officials. But what about other administrators serving in supervisory roles? The court found that Haehnel's position as director of federal programs made her a public official because the job involves supervising the teaching and other services of the special education program. In this role, which is created by state statute, she exercises discretion and judgment. Therefore she meets the definition of *public official* and is entitled to immunity.

The court also found that Haehnel is entitled to qualified immunity from the Section 1983 claim. Qualified immunity protects public officials from personal liability for conduct that does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Without going into the details contained in the complaint, the court found that the Farrells did not allege any clearly established rights on behalf of Sean.

School board failed to assert a direct claim against architectural firm, asking only for indemnity or contribution in case it was held liable for mold-related injuries. Zizzo v. Pender County Board of Education v. Little Diversified Architectural Consulting, 623 S.E.2d 328 (N.C. App. 2006).

Facts: The Zizzo family sued the Pender County Board of Education, alleging that they suffered mold-related injuries at North Topsail Elementary School. Pender County filed a third-party complaint against Little Diversified Architectural Consulting, the firm that designed and supervised construction of the school. The complaint requested that the court—if it found the board liable to the Zizzos—order Little to indemnify or contribute to the judgment against the board and pay for remediation of the building.

The trial court dismissed the board's complaint against Little, and the board appealed the dismissal. Before the appeal was heard, the Zizzos withdrew their complaint against the board; the court then granted Little's motion to dismiss the board's appeal. Again, the board appealed.

Holding: The North Carolina Court of Appeals affirmed dismissal of the board's complaint against Little.

Under Rule 14(a) of the North Carolina Rules of Civil Procedure, a defendant, as a third-party plaintiff, may file a complaint against a person or party not named in the original suit who may be liable for all or part of the plaintiff's claim against the defendant. This is why the board brought Little into the Zizzos' action. Because the Zizzos withdrew their complaint against the board, the board is not liable to them and Little is not, therefore, liable to the board.

The situation would be different, noted the court, if the board had joined its claim against Little to the original suit, as allowed by Rule 18(a). In that case, the board would have its own, direct cause of action against Little, not a derivative cause that could be rendered moot by the Zizzos' withdrawal.

Former student who sought reimbursement under the Individuals with Disabilities Education Act for private educational expenses paid by his parents has no standing. Emery v. Roanoke City School Board, 432 F.3d 294 (4th Cir. 2005).

Facts: Robert Emery attended the Roanoke City Schools (RCS) as a student with special needs. During the 1991–1992 school year he attended two different schools, in succession, but neither turned out to be an appropriate placement. According to Emery's father, an RCS representative told him that the schools would not recommend a placement for his son for the 1992–1993 school year and that he himself would have to find a placement for the boy. He placed his son at the Cumberland Hospital for Children and Adolescents, where he attended school for approximately six months.

Robert Emery's spell at Cumberland cost more than $200,000 and was covered by his father's medical insurance, which provided $350,000 in lifetime benefits. Throughout the 1990s the Emerys attempted to get reimbursement from RCS for the Cumberland costs, but they never requested a due process hearing. In 1999, in response to a request from one of their lawyers, RCS rejected another request for reimbursement, noting that the statute of limitations on the claim had run out.

Many years later Robert Emery himself filed a legal action to obtain his father's money from RCS. The federal district court dismissed his claim as time-barred. Emery appealed.

Holding: The Fourth Circuit Court of Appeals affirmed the dismissal, but on different grounds.

Robert Emery, the court held, did not have standing to seek reimbursement of the Cumberland expenses. *Standing* is a legal doctrine that requires plaintiffs, before they may have their claims judicially resolved, to show that they have suffered an injury in fact—not just a speculative or remote injury. Under the IDEA, the child with a disability suffers a real injury when a school district fails to provide him or her with a free, appropriate public education (FAPE). But Robert Emery does not, and could not, seek redress of that injury, because he is now too old to qualify for FAPE.

Instead, Emery sought reimbursement for the cost of the school he attended in lieu of receiving an FAPE from RCS. However, standing doctrine requires that any such reimbursement go only to those who actually expended the funds—in this case, Emery's father. Emery failed to show that he suffered any out-of-pocket loss or, for example, that he failed to obtain appropriate care as a result of the

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diminution of his father's insurance benefits. Moreover, the reduction in lifetime benefits no longer has the potential to harm Emery because he is now insured on his own.

Neither participating in the North Carolina School Board Trust Fund nor operating a basketball game for which admission is charged deprives a school board of governmental immunity. Willett v. Chatham County Board of Education, 625 S.E.2d 900 (N.C. App. 2006).

Facts: Robert Willett injured himself when he fell in the bleachers at a basketball game at Moncure Elementary School (in Chatham County). He sought damages from the Chatham County school board and argued that the board had waived its governmental immunity—either by participating in the North Carolina School Board Trust Fund or by operating a basketball game for which admission was charged. Willett also argued that G.S. 115C-524(b), which requires boards to maintain school buildings in good repair, gave him a statutory claim not barred by immunity. The trial court granted judgment to the board of education before trial.

Holding: The North Carolina Court of Appeals affirmed.

The court began by summarily rejecting Willett's claim that the board had waived its immunity by participating in the North Carolina School Board Trust Fund: past cases had already concluded that this is not so.

The court next addressed Willett's claim that the basketball game was a proprietary function. Governmental immunity shields a state entity in the performance of a governmental function, but not a proprietary one. Proprietary functions are those that any corporation, individual, or group of individuals could perform. Engaging in activities with a profit motive is one factor courts have pointed to in determining that an action is proprietary. More generally, though, courts look to see whether the activity in question is one that government units traditionally provide.

Willett argued that operating a basketball team and charging admission for its games didn't meet the test of a traditionally provided activity. The court disagreed, citing G.S. 115C-47(4), which provides that local boards are authorized to regulate extracurricular activities, including a program of athletics, without assuming liability for them.

In conclusion, the court rejected Willett's argument that G.S. 115C-524(b), which governs school building maintenance, gave him a cause of action. Governmental immunity can be abrogated by a statute, noted the court, but the statute cited by Willett does not serve that purpose. In fact, it explicitly states that school boards are charged with maintaining school property in good condition *in order to safeguard the investment made in public schools.* Willett and others in his situation were not the intended beneficiaries of this statute.

Plumbing subcontractor's claim against school board is barred by statute of limitations. ABL Plumbing and Heating Corp. v. Bladen County Board of Education, 623 S.E.2d 57 (N.C. App. 2005).

Facts: In 1999 ABL Plumbing signed a contract with the Bladen County Board of Education to work on a construction project. Sigma Construction Company was the general contractor, and Shuller Ferris Lindstrom and Associates (Shuller) was the architect and school board representative on the project.

Sigma defaulted on its obligations as general contractor in March 2001. On April 24, ABL submitted a claim to the board for more than $220,000 for damages suffered as a result of Sigma's default. The board made no response. On August 31, 2001, ABL submitted another claim, which the board rejected. On August 26, 2003, ABL filed a complaint alleging that the board breached its contract with ABL by failing to adequately monitor Sigma, by failing to pay ABL's damage claim, and by failing to ensure that Shuller had provided adequate contract drawings and specifications.

The trial court granted judgment for the board before trial, finding that the statute of limitations had run on ABL's claim. ABL appealed.

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

The parties agreed that the applicable statute of limitations on the breach of contract claim was two years. A breach of contract claim accrues, and the statute of limitations begins to run, as soon as the injury becomes apparent, or should reasonably have become apparent. Thus ABL should have become aware of its injury when Sigma defaulted in March 2001—or in any event, certainly by the time ABL submitted its claim on April 24, 2001. Any further damage ABL may have suffered only aggravated the injury; it did not constitute an ongoing course of conduct. Therefore ABL's claim was filed outside the two-year window applicable to this action.

Employee's shoulder injury arose out of and in the course of her employment and so is compensable. Davis v. Columbus County Schools, 622 S.E.2d 671 (N.C. App. 2005).

Facts: Mamie Davis, a social worker in the Columbus County Schools, suffered an aggravation of an existing shoulder injury when a colleague grabbed her by the arm and spun her around to ask a question. Columbus County paid her medical bills while investigating the incident but refused her subsequent request for workers' compensation. The full Industrial Commission found that Davis's shoulder injury did arise out of, and in the course of, her employment and was thus compensable. The school board appealed.

Holding: The North Carolina Court of Appeals affirmed the compensation award. In reviewing an Industrial Commission decision, the court must determine (1) whether

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there is *any* competent evidence to support the commission's findings of fact and (2) whether these findings support the legal conclusions the commission drew from them. Davis was grabbed by a colleague who wanted to ask a question, a situation that had its origin in her employment. The court agreed that there was evidence to support the commission's decision.

Other Cases

School district's policy of questioning Darwinism and proposing intelligent design as an alternative explanation of life's origins violates the Establishment Clause. Kitzmiller v. Dover Area School District, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

Facts: In October 2004 the Dover (Pa.) Area school board adopted a resolution calling for students to be made aware of problems with Darwinism and encouraged to explore the theory of intelligent design. The resolution required that, beginning in January 2005, teachers read the following statement to students in the ninth-grade biology class:

> The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually take a standardized test of which evolution is a part. Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations. Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, Of Pandas and People, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves. With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.

The plaintiffs, parents of students in the Dover Area school district, filed suit, arguing that the intelligent design (ID) policy violated the Establishment Clause.

Holding: After a lengthy trial, the federal court for the Middle District of Pennsylvania ruled in favor of the plaintiffs.

In so finding, the court applied both the "endorsement" test and the *Lemon* test to the ID policy. The endorsement test asks whether a reasonable observer acquainted with the text, history, and implementation of a government policy would perceive it as an endorsement of religion. The *Lemon* test has three prongs, and violation of any one of them is sufficient for a policy to be found unconstitutional: (1) Does the policy have the purpose of endorsing religion? (2) Does the policy have the primary effect of endorsing religion? (3) Does the policy create an excessive entanglement of government with religion?

Intelligent design is based on the belief that the existence of complex design is evidence of a designer. Because nature is complex, it must therefore have been conceived by an intelligent designer. Although ID proponents decline to identify this designer, the plaintiffs' experts testified that this argument can be traced back at least to the thirteenth century, when Thomas Aquinas used it as an argument for the existence of God.

Under the endorsement test, the court found that both the students (the policy's intended audience) and reasonable adult observers would perceive the policy as an endorsement of religion. Any reasonable observer would know that the intelligent designer in question is God. The court also cited numerous statements by ID supporters that revealed the religious nature of the policy. Another indication of religious endorsement is ID's striking similarity to creationism (a religious explanation of the origins of life that the U.S. Supreme Court has ruled cannot be taught in the public schools). The only significant difference between the two theories is that the words *God*, *creationism*, and *Genesis* do not appear in ID explanations. Further, because ID involves a supernatural designer, it is not a scientific theory, but rather a religious one.

In the context of the classroom, the court found, it is particularly clear that the school board's ID policy was a religious endorsement. Darwin's theory was the only topic in the entire curriculum singled out for this kind of attention—that is, the statement that students are taught evolution because it is required for a standardized test. The policy's insistence that Darwinism is just a "theory" plays to the popular understanding of the term suggesting that it is no more than a questionable opinion or hunch. This theory is then contrasted with ID, which is presented as an "explanation," and is the only alternative to Darwinian evolution that students are encouraged to explore.

Finally, in reviewing the social context of the ID policy, the court concluded that a reasonable observer would know that the board advocated for the ID policy in expressly religious terms, that the proposed change created significant community debate about the board's attempt to inject religion into the curriculum, and that the board adopted the ID policy in furtherance of a religious agenda.

As for the *Lemon* test, the court found explicit evidence that school board members intended the ID policy to bring creationism into the classroom. The board asserted that the purpose behind the ID policy was to promote critical

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thinking and improve science education, but statements made openly by individual board members during meetings and interviews with the media spoke in favor of teaching creationism and disparaged Darwinism on religious grounds. The board consulted no scientific materials nor any person or organization with scientific expertise about the curriculum change; in fact, they ignored the unsolicited advice of the district's biology teachers who opposed the ID policy. The board relied solely on legal advice from two organizations with religious missions. Finally, despite their professed intention to improve science education, several board members conceded that they still do not know precisely what ID is.

Given that a reasonable observer would perceive the ID policy as an endorsement of religion and that the motivation behind its enactment was religious, the court ruled that it could not survive under the constitution's prohibition of government conduct that establishes religion.

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