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

Clearinghouse

edited by
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Cases and Opinions That Directly Affect North Carolina

Assistant principal's search of student's book bag was reasonable and constitutional. *In re* Murray, ___ N.C. App. ___, 525 S.E.2d 496 (2000).

Facts: A student at a middle school in New Hanover County (N.C.) approached assistant principal LaChawn Smith and told her that Jason Murray had "something in his book bag that he should not have at school." Smith found Murray in an empty classroom, a book bag within arm's reach. When Smith asked Murray if he had a book bag, he said no, but she then asked him if the nearby book bag was his, and he said yes. After Murray refused to give Smith permission to search the bag, Smith called the dean of students and the school resource officer (SRO), a law enforcement officer. Murray was again told that the bag needed to be searched, and again Murray refused to release it. The SRO then held Murray and, after he began to struggle, handcuffed him. Smith meanwhile searched the bag, inside of which was a pellet gun.

At the resulting delinquency hearing, Murray's attorney filed a motion to suppress the evidence from the search, arguing that it violated his right under both the federal and state constitutions to be free from unreasonable searches. The trial court denied the motion and Murray was adjudicated delinquent. Murray appealed.

Holding: The North Carolina Court of Appeals rejected Murray's claim and found the search reasonable and therefore constitutional.

The first issue to be resolved was whether a school official or a law enforcement officer had conducted the search, because different legal standards for determining whether or not a search is reasonable apply according to which type of official conducts the search. The standard is strict in cases where the search is conducted by a law enforcement officer. Here the court found that the search had been conducted by a school official. Although the SRO was present and restrained Murray during the search, Smith had tried to obtain Murray's consent to search the bag before the SRO arrived and had called the SRO only to help restrain Murray while she searched the bag over his objections. The SRO did no investigation of his own and did not conduct the search.

A less-stringent legal standard governs searches by school officials. The search need be reasonable only under all of the circumstances (as opposed to being based on probable cause). For a search to be reasonable, it must have been (1) justified at its inception by a reasonable belief that the search would turn up evidence that the student violated a school rule or law and (2) reasonably related in scope to the circumstances that justified the search. Smith received a tip from another student about Murray, and when she approached Murray about his book bag, he denied having one; the tip followed by the lie provided sufficient grounds for a

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reasonable belief that a search of the bag would reveal a rule violation. The court also found that the search was reasonable in scope. Because Murray refused to turn over the bag, protected it when Smith tried to reach for it, and struggled with the SRO, the restraint and pursuant search were reasonable in scope.

State university and other state entities cannot be sued by individuals for violations of the Age Discrimination in Employment Act. Kimel v. Florida Board of Regents, Nos. 98-791, 98-796, ___ U.S. ___, 120 S. Ct. 631, 68 U.S.L.W. 4016 (2000).

Facts: A group of current and former faculty members and librarians (hereinafter the plaintiffs) at Florida State University (FSU) filed suit against the FSU board of regents alleging that the regents had failed to require FSU to allocate funds for market adjustments to the salaries of eligible FSU employees and that this failure had a disparate impact on older employees with longer records of service, in violation of the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 *et seq*.). The ADEA makes it unlawful for an employer, including the state, to discriminate in the terms of a person's employment because of age.

The suit reached the United States Supreme Court on the issue of whether the ADEA validly revoked state immunity from suit in federal court under the Eleventh Amendment to the United States Constitution.

Holding: The Court held that the ADEA did not validly revoke state immunity under the Eleventh Amendment and dismissed the plaintiffs' suit. Because of this immunity, individuals may not sue states for ADEA violations.

The Eleventh Amendment prohibits the federal government from exercising jurisdiction over lawsuits against nonconsenting states. Congress can limit this immunity in legislation enforcing the Fourteenth Amendment to the United States Constitution, which provides that no state may deny any person equal protection of the laws. Such legislation, however, must express unequivocally its intent to abrogate immunity and be enacted pursuant to a valid grant of constitutional authority. The judiciary, not Congress, decides whether legislation meets these tests.

Here the Court concluded that the ADEA did not effect a constitutionally valid waiver of state immunity. The ADEA protects employees aged forty and older from age discrimination by employers, including public agencies, and it gives employees who have been discriminated against the right to sue for remedies. This legislative scheme, found the Court, was out of all proportion to any wrong that could be said to fall under the Fourteenth Amendment. In cases where a state discriminates against a person on the basis of race or gender (the so-called "suspect classifications"), the Fourteenth Amendment guarantee of equal protection of the laws has real bite. However, in cases where the alleged discrimination is not based on one of these suspect classifications, states may discriminate so long as the basis for that discrimination is rationally related to serving a legitimate state interest. Age is not a suspect classification and under the Constitution, can rationally be used as a proxy for other qualities, abilities, and characteristics that are relevant to a state's legitimate interests: For example, it is constitutional for states to require police officers to retire before the age of fifty because of concerns about decreasing physical fitness or to require judges to retire by age seventy because of concerns about failing mental acuity. The ADEA, the Court concluded, prohibits very little conduct encompassed by the Fourteenth Amendment and therefore does not come under the Fourteenth Amendment exception to Eleventh Amendment immunity.

In addition, the Court found, the ADEA's legislative history included no evidence to indicate that age discrimination by states was either persistent or systemic. Briefly put, the Court found the ADEA to be an indiscriminate tool to address a minor problem. Thus the ADEA was not enacted pursuant to valid constitutional authority and so did not abrogate state immunity under the Eleventh Amendment. The Court noted, in conclusion, that although individuals may not sue states under the ADEA, most states have their own age discrimination laws.

Court refuses to dismiss guardian's claim that school uniform policy violates her right to free exercise of religion and her right to direct the upbringing of her great-grandson. Hicks v. Halifax County Board of Education, No. 5:98-CV-981-BR(2) (E.D.N.C. Dec. 15, 1999).

Facts: Catherine Hicks filed suit against the Halifax County Board of Education alleging that its mandatory school uniform policy violated her right to free exercise of religion and to direct the upbringing of her great-grandson, Aaron Ganues, a third grader in the Halifax county school system. Hicks had legal custody of Aaron. Hicks believed that wearing a uniform demonstrated an allegiance to the anti-Christ, who requires uniformity, sameness, and enforced conformity. Aaron was placed on long-term suspension for his failure to comply with the uniform policy.

The federal court for the Eastern District of North Carolina denied Hicks's request for a preliminary injunction prohibiting the board from applying the uniform policy to Aaron pending trial. [See "Clearinghouse," *School Law Bulletin* 30 (Summer 1999): 27–28.] Thereafter the board moved to have Hicks's claims dismissed before trial.

Holding: The court refused to dismiss all of Hicks's claims but did dismiss some of them.

Claims dismissed. Among those dismissed was Hicks's claim that the uniform policy exceeded the authority granted to the board by Section 115-16 of the North Carolina General Statutes, which allows the State Board of Education (SBE) to implement a pilot uniform policy. The court found that the SBE had delegated its authority under this statute to local boards and that Halifax County had adopted its uniform policy within this authority. The court also dismissed Hicks's claim that Aaron's suspension violated his rights to procedural due process and equal protection. The board had granted Aaron several days of school attendance to comply with the uniform policy and enforced the long-term suspension only after it became clear that Hicks would never allow him to comply with the policy. Aaron was not singled out for suspension from among other similarly situated students because no other student's guardian indicated an intention never to comply with the policy. The county superintendent and the school board reviewed the suspension decision at Hicks's request. The suspension process itself violated no constitutional rights.

Finally, the board dismissed Hicks's claims against county school officials in their individual capacities to the extent that those claims sought monetary damages. Government officials are entitled to qualified immunity from liability for damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. As the court explained in its discussion of Hicks's main claim (below), the law with respect to the right to free exercise of religion in the context of a facially neutral school uniform policy is anything but clear. School officials thus could not be held monetarily liable for the violation of this right. To the extent that the suit sought a declaration that the uniform policy was unconstitutional and an order prohibiting its enforcement in the future, the claims were allowed to stand.

Claims not dismissed. The court refused to dismiss the heart of Hicks's claim, that the uniform policy violated her rights to free exercise of religion and to direct Aaron's upbringing. The general rule in free exercise cases, the court began, is that neutral laws of general applicability that have the incidental effect of prohibiting the exercise of religion do not infringe the right of free exercise. However, the United States Supreme Court has muddied that general rule by holding that such laws may be unconstitutional when they implicate *another* fundamental right *in addition to* free exercise. This exception to the general rule is known as the *hybrid rule*. A guardian's right to direct the upbringing of his or her child is such a fundamental right, and because Hicks sufficiently pled both of these rights, the court refused to dismiss her claim before trial.

Notably, the court also discussed the difficulty of deciphering the Supreme Court's hybrid rule. Questions that remain unclear under the rule include: What must a plaintiff show to justify application of the hybrid rule? Must he or she plead the infringement of an independently viable constitutional right, or must that claim be merely colorable (i.e., within the realm of possibility)? Does the combination of the two potential infringements act to create a constitutional violation where neither violation, standing alone, would? What standard of review applies to hybrid claims?

Court dismisses under Eleventh Amendment immunity some of employee's race discrimination claims against state university. Nemecek v. The University of North Carolina, No. 2:98-CV-62-BO(2) (E.D.N.C. Dec. 13, 1999).

Facts: Steven Nemecek, a white male, did not receive tenure at Elizabeth City State University (ECSU), a historically African-American institution. He subsequently filed several discrimination claims against ECSU and its officials (hereinafter the defendants), including claims under Section 1981 and Section 1983 of Title 42 of the United States Code and under Title VI and Title VII of the Civil Rights Act of 1964 as well as state law claims of wrongful employment practices and breach of contract. The defendants moved to have his claims dismissed before trial.

Holding: The federal district court for the Eastern District of North Carolina dismissed some of Nemecek's claims and refused to dismiss others.

Section 1981 claims: Claims for damages against the state (or its entities) under Section 1981 are barred by the Eleventh Amendment to the United States Constitution, unless the state has waived its immunity. No such waiver of immunity occurred in this case, concluded the court, so Nemecek's claim for monetary damages against ECSU was dismissed. However, the court noted an exception to Eleventh Amendment immunity, when

a claim seeks prospective equitable relief, that is, when it seeks to have the state do, or refrain from doing, some specific thing in the future rather than seeking a money award for past wrongs. Nemecek's Section 1981 claim seeking to prohibit ECSU from engaging in certain employment practices in the future survives.

Section 1983 claims: The Eleventh Amendment also bars Section 1983 claims for monetary damages against the state, and the court dismissed this part of Nemecek's claim as well. Insofar as he requested equitable relief and made claims against ECSU officials in their individual capacities, the court retains jurisdiction.

Title VI claims: Title VI prohibits employment discrimination by programs that receive federal funds. Because Nemecek filed an employment discrimination claim, he was required to show that ECSU received federal funds earmarked for providing employment and that it used those funds to perpetuate discrimination. Nemecek made no such allegations, and this claim was dismissed.

Title VII claims: Title VII, which also prohibits discrimination in employment, only allows suits against employers. Therefore Nemecek's claims against ECSU officials in their individual capacities were dismissed. The claim against ECSU remains.

State law claims: All of Nemecek's claims under state law were dismissed because the Eleventh Amendment bars suits in federal court against states when those suits are brought under state law.

Arrest of visitors to high school because of their display of the Confederate flag may have been unconstitutional. Wilson v. Rockingham County Consolidated Schools, No. 1:97CV0155 (M.D.N.C. Sept. 2, 1999).

Facts: Shane Wilson, Casey Allen, and Bruce Shelton (hereinafter the plaintiffs) were arrested for trespassing while waiting to pick up a friend in the parking lot of the Rockingham County (N.C.) Senior High School (RCSHS). They alleged that the arrest was motivated by their display of the Confederate flag from their car window. According to their complaint, Steve Hall, the RCSHS assistant principal, stopped the plaintiffs in the parking lot and told the Rockingham County sheriff's deputies who accompanied him to arrest the "punks," "dropouts," and "troublemakers" "with their Confederate flag."

The plaintiffs brought suit in federal court for the Middle District of North Carolina alleging—among other things—that Hall, the school board, and various other county school officials (hereinafter the defendants) had violated their First and Fourteenth Amendment rights to free speech and that their arrest had violated their Fourth Amendment right to be free of unreasonable seizure. The defendants moved to have the claims dismissed before trial.

Holding: The court denied the motion to dismiss, allowing the free speech and improper arrest claims to go to trial.

In reviewing motions to dismiss, the court looks at the allegations in the complaint in the light most favorable to the plaintiffs, accepting the allegations as true. If a complaint survives this review, it means only that the claims will be allowed to proceed to trial, not necessarily that the plaintiffs will prevail.

The free speech claims. The plaintiffs alleged that they were arrested because of their display of the Confederate flag and that this amounted to unconstitutional discrimination against them based on the viewpoint expressed by flying the flag. The defendants responded that the plaintiffs were in a non-public forum (the parking lot), which school officials had the right to reserve for its intended purpose, and that First Amendment free speech protections do not apply in such a place. The court agreed that the parking lot was a non-public forum but held that even in such a forum, government suppression of speech based solely on viewpoint discrimination is unconstitutional. Further the court cited case law providing that a non-public forum can nonetheless serve as a forum for free speech, if the speech is appropriate for the property and not incompatible with the normal activity that occurs there. Accepting the plaintiffs' claims as true, the court found that their free speech rights might have been violated.

The court went on to note, however, that in some circumstances, speech that otherwise would be protected can be controlled. At trial, the defendants in this case will have the opportunity to present evidence that the display of the flag reasonably led them to conclude that a material and substantial disruption was about to occur. If the defendants can prove that the plaintiffs' display was aggressive and disruptive, the defendants were justified in controlling it.

The improper arrest claims. The Fourth Amendment protects against unreasonable seizures. For an arrest—that is, the seizure of a person—to be reasonable, it must be based on probable cause to believe that an offense has been or is being committed by the person or persons arrested. The plaintiffs in this case alleged that they were authorized to be on school premises,

that they had not been asked to leave, and that they were arrested solely for the purpose of interfering with their rights to free speech. Based on these allegations, the court found that the claim must be allowed to proceed. Again the court noted, however, that at trial the defendants will have the opportunity to present evidence of probable cause.

School board immunity. The court went on to address the defendants' claim that they were protected from suit by sovereign immunity. The plaintiffs brought their constitutional claims under Section 1983 of Title 42 of the United States Code, which provides a cause of action when a government official acting under the color of law behaves in a way that violates a plaintiff's rights under federal law or the United States Constitution. Case law has established a byzantine set of rules concerning whom can be sued under Section 1983 and in what circumstances. In brief, school boards (and other municipal entities) and their officials are not immune from Section 1983 suits (they are not liable for punitive damages, however). To make a successful claim against a board, the plaintiff must allege a direct causal link between the action of the official who violated the plaintiff's rights and a policy or practice maintained by the school board. The plaintiffs in this case alleged that the board had a de facto policy of banning the Confederate flag and that this policy caused Hall to instigate their arrest. This claim was sufficient to survive the motion to dismiss.

Immunity of individual officials. Under Section 1983, individual school board personnel sued in their personal or individual capacities are entitled to qualified immunity, which protects them from suit in cases where their conduct has not violated clearly established constitutional rights about which a reasonable person would have known. The court held that the allegations of the plaintiffs in this suit—that individual school personnel violated the plaintiffs' right to engage in symbolic speech free of content-based restrictions and to be free of unreasonable arrest—were sufficient to survive the motion to dismiss.

Lower court erred in holding university liable for applying racial criteria in an admission decision where university would have made the same decision even without the impermissible criteria. Texas v. Lesage, No. 98-1111, ___ U.S. ___, 120 S. Ct. 467, 68 U.S.L.W. 3345 (1999).

Facts: Francois Daniel Lesage, a male Caucasian, was one of approximately two hundred applicants denied admission to the education school at the University of Texas; twenty applicants were accepted. In federal district court, he charged that the department's admission process, which at that time was admittedly race-conscious, violated his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The department presented evidence that Lesage would not have been admitted even under a color-blind admission policy. His grade point average was lower than that of at least 80 other applicants; 152 applicants had higher Graduate Record Examination (GRE) scores; and 73 applicants had higher GPAs *and* GRE scores. In addition, his personal statement was poorly written and his letters of recommendation were, according to the department, weak. The district court granted judgment for the university before trial.

Lesage appealed to the Fifth Circuit Court of Appeals. That court reinstated his suit, finding that it was irrelevant whether he would have been admitted under a color-blind policy. So long as he was rejected in the course of a racially discriminatory admission process, he had suffered an implied injury. The university sought review in the United States Supreme Court.

Holding: The Supreme Court agreed with the first ruling, stating that where a plaintiff challenges a governmental decision as being based on an impermissible criterion and where it is undisputed that the government would have made the same decision regardless, there is no cognizable injury. The case would have been different, the Court noted, if Lesage had maintained a claim that the department continued to use a racially discriminatory policy and had sought prospective relief prohibiting the further use of that policy. In that situation, the injury would be the inability to compete on an equal footing.

General Assembly can assign taxing authority to North Carolina school boards. Attorney General's Advisory Opinion to Ed Dunlap, Executive Director of the North Carolina School Boards Association, May 17, 1999.

Question: Can the General Assembly, consistent with the North Carolina Constitution, (1) authorize all local boards of education, as opposed to the boards of county commissioners, to levy taxes in their respective school districts or (2) authorize a "local option" whereby the voters in each county would determine whether they wanted the board of county commissioners or the local school board to levy taxes to support schools?

Answer: Yes to both questions. The state constitution requires the General Assembly to "provide by taxation and otherwise for a general and uniform system of free public schools" and provides that that the General Assembly "may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate." The General Assembly, under the current scheme, has assigned the responsibility for local support of the schools to the county commissioners, but it could, if it wished, make the assignment to the local boards of education because the board of education is just as much a "unit of local government" as is the board of county commissioners.

University owed no duty to student cheerleader injured in fall from top of human pyramid. Davidson v. University of North Carolina at Chapel Hill, In the North Carolina Industrial Commission, I.C. No. TA-13609 (Sept. 29, 1999).

Facts: Robin Davidson suffered permanent brain damage and serious bodily injury as a result of a fall from a human pyramid during practice of the junior varsity cheerleading squad at the University of North Carolina at Chapel Hill (UNC). At the time of her fall, the squad was practicing the pyramid without the presence of a coach and with no protective mats on the floor. Davidson brought suit against UNC under the state Tort Claims Act, alleging that the university was negligent in its failure to provide faculty or coaching supervision to monitor the squad and in its failure to prevent the human pyramid stunt.

Holding: The North Carolina Industrial Commission found that UNC owed Davidson no duty of care with respect to her cheerleading activities and therefore was not negligent with respect to her injuries. This absence of duty, the commission concluded, was reasonable not only in terms of UNC's legal responsibilities, but also in terms of student autonomy.

Student deprived of a degree through university error is entitled to relief. Johnson v. North Carolina A&T State University, In the North Carolina Industrial Commission, I.C. No. TA-13727 (Sept. 17, 1999).

Facts: North Carolina A&T State University (A&T) recruited Jerrilyn Johnson to participate in a graduate program designed to attract into the field of special education members of minority groups who wanted to obtain an educational specialist degree in administration (Ed.S.). Johnson joined the program and completed the required coursework with a 4.0 grade point average. At the time Johnson completed the program, A&T learned that it did not have authority to issue the Ed.S. degree. A&T offered Johnson alternative degrees that she found unacceptable. As a result of not obtaining the Ed.S. degree, Johnson alleged, she was not qualified for jobs in which she was interested, stress caused her diabetes to worsen, and she required psychological treatment. She brought suit against A&T under the state Tort Claims Act seeking compensation for these damages. A&T admitted that it was negligent in enrolling Johnson for a program it was not authorized to offer.

Holding: The North Carolina Industrial Commission awarded Johnson $7,787 in damages: $3,700 for medical and psychological treatment; $1,437 in lost wages; $650 in costs to bring the action before the commission; and $2,000 for additional psychological counseling. The commission found Johnson's claims concerning missed job opportunities to be unpersuasive because she failed to present evidence that but for her lack of the Ed.S. degree she would have been otherwise qualified for the jobs in which she was interested. Thus the commission awarded no damages for this part of her action.

School board is liable under Tort Claims Act for employee's negligence in running into a child while driving a school bus repair vehicle. Poteat v. Orange County Board of Education, In the North Carolina Industrial Commission, I.C. Nos. TA-13563, TA-13564 (Feb. 16, 1999).

Facts: David Ingold, a school bus mechanic for the Orange County school board, was driving a school transportation service vehicle owned by the board to the location of a broken-down school bus to make repairs when he hit seven-year-old Rachel Harris. Ingold saw Rachel at the side of the road as he approached but did not slow down, and as Harris attempted to cross the road, Ingold ran into her. Rachel suffered broken legs, cuts, bruises, and some scarring. Rachel's mother, Cassandra Poteat, sued the school board under the state Tort Claims Act, applicable under Section 143-300.1 of the North Carolina General Statutes to incidents involving the operation of school buses and school transportation service vehicles.

Holding: The North Carolina Industrial Commission found Ingold negligent and ordered the board to pay for medical and care expenses for Rachel and for her pain and suffering. North Carolina law provides that every driver must exercise due care to avoid collid-

ing with any pedestrian and especially upon observing any child upon the roadway. Ingold testified that he had seen Rachel on the side of the road, yet he failed to reduce his speed. The evidence showed that Rachel looked both ways when she began to cross the street and thus was not guilty of contributory negligence. In any event, a seven-year-old is presumed by law to be incapable of negligence.

Court reverses holding that negligence by a university electrician caused light to fall on and injure the plaintiff. Robinson v. State of North Carolina, 351 N.C. 38, 519 S.E.2d 315 (1999).

Facts: Delores Robinson was injured while working in an East Carolina University (ECU) office when a light fixture fell from the ceiling onto her head. The North Carolina Court of Appeals held that she was entitled to damages for the injury based on a showing that an ECU electrician had recently replaced the light bulbs in some fixtures around the building (though he could not recall whether he had replaced that particular bulb) and his testimony that the fixture would not be likely to fall unless someone had tampered with it. [See "Clearinghouse," *School Law Bulletin* 30 (Summer 1999): 29–30.] ECU appealed.

Holding: The North Carolina Supreme Court reversed the court of appeals decision. Robinson failed to show two key elements of a negligence action: breach of duty and proximate cause. There was no evidence that the electrician acted negligently and no evidence that even had he done so, that his negligence was the cause of her injury. Robinson presented no evidence to indicate how much time had passed between the electrician's repairs and her injury or to establish that during that period no one else had come into the office and tampered with the fixture.

School employee's preexisting leg condition was aggravated in accident suffered during the course of his employment and thus is compensable under the Workers' Compensation Act. Green v. Charlotte-Mecklenburg Board of Education, In the North Carolina Industrial Commission, I.C. No. 697303 (Sept. 21, 1999).

Facts: When Levander Green was sixteen, doctors diagnosed a malignant tumor in his left femur and replaced the femur with a metal rod that was fused to the lower end of his tibia. Although this treatment resulted in Green not being able to bend his left leg, he was able to lead an active life. Many years later, in the course of his job as a behavioral modification technician at J.H. Gunn Elementary School in Mecklenburg County (N.C.), Green lost his balance while removing a kicking, screaming student from a classroom, and his left leg landed with hard impact on the step below him. At the time of impact, he noticed a jolt and a tingling sensation accompanied by a little bit of pain. He ignored it until a couple of days later, when the pain became excruciating.

Green consulted several physicians and was out of work for approximately two months. Ultimately one physician concluded that the rod in Green's leg should be removed; after it was removed, Green began to heal. The school board denied his claim for workers' compensation for the time he was away from work, arguing that his injury was the result of a preexisting condition and not the accident at work.

Holding: The North Carolina Industrial Commission disagreed with the board. Although the medical testimony was not definitive, leaving some room for the conclusion that Green's condition was just the normal result of the wear and tear of the rod in his leg, the commission found that the accident aggravated that normal wear and tear and that Green was entitled to compensation.

University's outdoor discovery program met reasonable standards for safety and leadership training; student leaders on trip where camper was injured were not negligent. Mote v. The University of North Carolina at Wilmington, In the North Carolina Industrial Commission, I.C. No. TA-14394 (Nov. 12, 1999).

Facts: Elmer Mote was seriously injured when a tree fell on his tent during a camping trip sponsored by the Outdoor Discovery Center at the University of North Carolina at Wilmington (UNC–W). The trip was led by two students, Gus Hemmer and Jessica Classen, both of whom had completed a one-semester training program at UNC–W that conformed to standards set by the Association of Experiential Education (AEE) and other universities that conduct outdoor programs.

On the last night of the camping trip, the UNC–W group set up camp in a low, bowl-shaped area with hard-packed soil. Weather conditions were clear. Hemmer surveyed the site for hazards, such as dead tree limbs or damaged trees around the tents, and found none. During the night, however, heavy winds developed and a tree fell across Mote's tent, fracturing his pelvis and severing his urethra. Hemmer crafted a stretcher, and the students carried Mote to their van and drove him to the hospital.

Mote sued UNC–W under the state Tort Claims Act for negligence in its outdoor discovery program.

Holding: The North Carolina Industrial Commission found that UNC–W's outdoor discovery program met safety standards for accredited university outdoor programs and that Hemmer and Classen's training, site inspection, and other behavior also met these safety standards. They could not have foreseen that a living tree adjacent to Mote's tent would break and fall.

Federal court dismisses sex discrimination claim. Bell v. Flannigan, No. 5:99-CV-36-BR(3) (E.D.N.C. Nov. 15, 1999).

Facts: On October 4, 1994, Katrina Bell filed a charge of discrimination with the federal Equal Employment Opportunity Commission (EEOC) and the state Office of Administrative Hearings (OAH) alleging that her discharge in February of that year from the Fayetteville State University (FSU) police department violated Title VII of the Civil Rights Act of 1964. She received a right-to-sue letter from the EEOC in 1998 and filed a lawsuit in federal court in 1999, alleging violations of Title VII and of Title IX of the Education Amendments of 1972 and of Section 1981 and Section 1983 of Title 42 of the United States Code. FSU and the other individually named defendants sought to have Bell's suit dismissed for failure to file them within the applicable statutes of limitations.

Holding: The federal court for the Eastern District of North Carolina granted FSU's motion and dismissed Bell's claims. As to the Title VII claims, the court found that her initial filing of a charge back in 1994 had been untimely. Generally a charge must be filed with the EEOC within 180 days after an alleged unlawful employment practice. This period is extended to 300 days when the aggrieved employee first seeks relief through a state agency authorized to grant relief. Bell argued that she was entitled to the longer period because she sought relief from the OAH under the State Personnel Act (N.C. GEN. STAT. §§ 126-16, -17). The court rejected this claim, finding that because Bell had not been a state employee for twenty-four months before her termination, she was not protected by the State Personnel Act and thus that the OAH had no jurisdiction to hear her grievance and was not an agency authorized to grant relief.

Bell's other claims were subject to a three-year statute of limitations; thus the court dismissed them for failure to be timely filed.

Court upholds jury award to former community college employee who was discriminated against on the basis of her race. Page v. Trustees of Sandhills Community College, No. 3:96CV00358 (M.D.N.C. Aug. 31, 1999).

Facts: Carol Page, a black female, had been a staff member of the Basic Skills Education (BSE) department at Sandhills Community College for almost fifteen years when she was passed over for promotion to director of BSE in favor of a white woman. Page then filed suit alleging that the college had discriminated against her on the basis of race. Several months after filing the suit, Page was relieved of her duties and placed on "leave-with-pay" status, for the remainder of her yearly contract, and informed that her contract would not be renewed. She added a charge of retaliation to her racial discrimination complaint.

A jury awarded Page $446,000, but the trial judge found the amount to be excessive and gave Page the choice of either a new trial or accepting an award of $83,747. Page chose the new trial and at the close of evidence was awarded $276,580. The college filed a motion for a new trial, to alter the judgment, or to stay enforcement of the judgment. Page filed a motion to collect attorney fees and costs.

Holding: The federal court for the Middle District of North Carolina denied the college's motions and granted Page $134,445 in attorney fees and costs.

The evidence at trial was sufficient to support the jury's verdict, stated the court. Evidence supporting Page's claim that she was retaliated against after filing her first claim of racial discrimination included testimony that once her claim became common knowledge, people shunned and ostracized her. Page's performance evaluations went from rankings primarily of "excellent" and "good" to primarily "needs improvement." She was excluded from staff meetings, retreats, and workshops. The dean of her department more than once shouted at and belittled Page in meetings. When Page complained about these incidents to the director of human resources (who, it turned out, created the college's response to her racial discrimination claim), she was told that she was responsible for resolving her "communication problems" to the complete satisfaction of her supervisors.

Nor could the court find a reason to grant the college's request to reduce the amount of Page's award. The severity of Page's suffering was well supported by the evidence. She was diagnosed with irritable bowel syndrome, anxiety disorder, and chronic pain, all related to her stress. She sought counsel from her pastor.

Co-workers testified that she became distant and distrustful, lost weight, and no longer cared about her appearance. Further, the award in this case was not disproportionate to awards in other, similar cases.

Finally the court concluded that as the prevailing party, Page was entitled to reimbursement for attorney fees and costs. This is so even though her attorneys were compensated pursuant to a contingency fee agreement.

Sex discrimination and retaliation claims by university employee and her husband, a former university employee, found to be largely without merit. Sligh v. St. Augustine's College, No. 5:99-CV-286-BR(2) (E.D.N.C. Dec. 22, 1999).

Facts: Angeline Sligh, an employee of St. Augustine's College, filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging sexual harassment by her supervisor, Maurice Taylor. She later filed suit in federal court alleging that the college and its employees discriminated against her on the basis of sex. Her husband also brought claims against the college, alleging that he was discharged from his position at the college in retaliation for his wife's EEOC complaint. The college and its officials (hereinafter the defendants) moved to dismiss the Sligh's' complaints before trial.

Holding: The federal court for the Eastern District of North Carolina dismissed most of Angeline Sligh's claims and all of her husband's claims.

The court dismissed: (1) Sligh's claim under Section 1981 of Title 42 of the United States Code because that statute governs race discrimination only, and although the complaint indicated that Sligh is African American, her only allegation was of sex discrimination; (2) Sligh's claim under Section 1985 of Title 42 of the United States Code, alleging that college officials conspired to deprive her of her equal rights, because she failed to show that the defendants had any sort of agreement or "meeting of the minds" to violate Sligh's rights; (3) Sligh's claim that the college had violated her rights under the Wage Discrimination and Equal Pay Act of 1963 because she presented no evidence that her job was substantially similar to those of her higher-paid male colleagues; (4) Sligh's state law claim for intentional infliction of emotional distress because she failed to allege that any of defendants' actions caused her severe emotional distress; (5) Sligh's Title VII claims against college officials in their individual capacities because Title VII claims can only be brought against employers; and finally (6) Sligh's Title VII claim that she suffered retaliatory job action after filing her EEOC complaint because she failed to show that she suffered discrimination in an ultimate employment decision such as hiring, granting leave, discharging, promoting, or compensation.

The court refused, however, to dismiss Sligh's claim that the sexual harassment and the defendants' behavior in the wake of her harassment complaint created a hostile work environment (HWE) forbidden under Title VII. To be successful, an HWE complaint has to establish four elements: (1) that the conduct in question was unwelcome, (2) that the harassment was based on sex, (3) that the harassment was sufficiently pervasive or severe to create an abusive working environment, and (4) that there is some basis for imputing liability to the employer. Sligh alleged that her supervisor, Taylor, made sexual advances to her, which she rebuffed and reported to his supervisors. This was sufficient evidence to support elements (1), (2), and (4). As to element (3), Sligh alleged that after she rejected Taylor's advances, he leered at her and took a variety of nonsexual retaliatory acts that made her job more difficult to perform. For example, he instituted spurious oversight requirements, reduced her staff while increasing her departmental obligations, undermined her authority by questioning the appropriateness of her decisions, and recommended her demotion after she advised him of an employee's submission of a false report concerning federal money. These pleadings, in addition to others, indicated that Sligh may have some basis for her HEW claim and that it should not be dismissed.

The court also declined to dismiss Sligh's state law claim against the college for negligent supervision. Her complaint shows that Taylor's acts caused her injury and that she reported these acts to college officials. Therefore her claim for negligent supervision should be heard, determined the court.

The court concluded by dismissing all claims made by Sligh's husband. His claim for intentional infliction of emotional distress was necessarily dismissed, as it was based on the same conduct alleged in his wife's emotional distress claim. His Title VII claim of retaliatory discharge was dismissed because he did not allege that his termination was due to his sex or race but because of Taylor's interest in his wife. This is not a cognizable Title VII claim.

Former employee's disability discrimination claim found to be without merit. Wright v. North Carolina State University, No. 5:98-CV-644-BR3 (E.D.N.C. Jan. 6, 2000).

Facts: Leslie Wright, a woman with a hearing impairment, worked at North Carolina State University (NCSU) as a housekeeper for six years. Approximately nine months before her termination she filed a claim with the Equal Employment Opportunity Commission (EEOC) alleging that NCSU had failed to make reasonable accommodations for her hearing impairment, insofar as it had refused to grant her the specific work location and shift transfers she requested. NCSU officials had suggested alternative transfers and also offered to have Wright's hearing aid tested to determine whether it was functioning at capacity, but Wright rejected these proposals.

Beginning a year before Wright's termination, and three months before she filed the EEOC complaint, NCSU officials expressed concern about her job performance and absenteeism. Wright apparently believed that the expression of these concerns about her job performance constituted retaliation for her EEOC complaint, even though some of these concerns were raised before the EEOC complaint. After an unexcused absence, NSCU terminated Wright, and Wright filed suit in federal court for the Eastern District of North Carolina alleging that NCSU's failure to accommodate her hearing impairment violated the Americans with Disabilities Act (42 U.S.C. §§ 12101 *et seq.*). NCSU moved to have her claim dismissed before trial.

Holding: The court granted NCSU's motion and dismissed Wright's claim.

The ADA requires an employer to make reasonable accommodations for the known physical limitations of an employee; it does not require the employer to make the specific accommodations an employee requests or prefers. Here NCSU offered Wright the opportunity to transfer the location of her job and its hours, although the transfers were not the ones requested by Wright. NCSU also offered to have her hearing aid evaluated to determine whether it was working properly. These attempted accommodations were reasonable and met the ADA requirements. Wright's claim that NCSU officials retaliated against her for filing an EEOC complaint failed because she did not demonstrate any causal connection between the complaint and the officials' actions. She did not show that any of her supervisors were even aware of her complaint, and the alleged retaliatory conduct—the complaints about her performance—began before the complaint was filed.

Court affirms sixty-day statute of limitations on filing administrative due process hearing request under the Individuals with Disabilities Education Act. M.E. v. Board of Education for Buncombe County, No. 1:99CV3 (W.D.N.C. Dec. 17, 1999).

Facts: On behalf of his autistic son C.E., M.E. filed an action under the Individuals with Disabilities Education Act (IDEA) alleging that the Buncombe County Board of Education failed to provide C.E. with a free appropriate public education, essentially because the board refused to provide C.E. with Lovaas therapy or to reimburse M.E. for that therapy. The board offered several individualized education plans (IEPs) based on the Treatment and Education of Autistic and Related Communication Handicapped Children (TEACCH) program, but M.E. rejected them—either directly or through a failure to respond.

Ultimately the board determined that C.E. no longer needed special education services and notified M.E. of this determination. M.E. then, in July of 1997, renewed his request for reimbursement for the Lovaas therapy and informed the board that if he did not receive a response within ten days he would initiate a due process hearing. On August 7, 1997, the board's attorney responded with a letter in which he stated: "You, of course, have the right to file a due process petition at any time, however, the reality of the school systems requires that the governing board be consulted and that process takes time."

After M.E. finally filed his petition, in April 1998, the board moved to dismiss it for failure to file within the sixty-day statute of limitations provided by the North Carolina Administrative Procedure Act (APA).

Holding: The federal court for the Western District of North Carolina agreed with the board and dismissed M.E.'s suit as untimely filed.

M.E. argued that the board's letter, which stated that M.E. was entitled to "file a due process petition *at any time*," relieved him of the obligation to file within the sixty-day limit. The court found this proposition meritless and went on to address whether the APA's sixty-day statute of limitations was the appropriate one to apply to requests for administrative due process hearings under the IDEA. Balancing the parents' interest in participating in their child's education, the child's interest in receiving education, and the school's interest

in the speedy resolution of disputes, the court concluded that the sixty-day limitation was appropriate.

School board ordered to pay attorney fees under Individuals with Disabilities Education Act. Valdina v. Harnett County Board of Education, No. 5:98-CV-973-BO(2) (E.D.N.C. Nov. 30, 1999).

Facts: Through her mother, Roxana Valdina filed a petition for a contested case hearing in the North Carolina Office of Administrative Hearings concerning the failure of the Western Harnett (N.C.) Middle School to follow through on various commitments it made to deal with her disabilities. Thereafter the school evaluated Roxana and developed an individualized education plan (IEP) for her under the Individuals with Disabilities Education Act (IDEA). Valdina and the Harnett County school board entered into a written agreement settling all of the remaining issues in her claim, except for the matter of attorney fees and costs. Valdina filed suit seeking to recover these fees and costs as the prevailing party.

Holding: The federal court for the Eastern District of North Carolina held that Valdina was clearly a prevailing party under the IDEA, insofar as she succeeded in obtaining almost all the relief she sought from the board, including an evaluation, an IEP, and increased notice concerning her daughter's progress. The court determined that $100 per hour was a reasonable hourly attorney fee and found 200 hours to be a reasonable amount of time to have spent obtaining Valdina's relief. The court ordered the board to pay $20,000 in legal fees.

Court awards attorney fees to parents with successful special education claim but reduces the amount because of their overreaching. A.D. v. Board of Public Education of the City of Asheville, No. 1:99CV87 (W.D.N.C. Oct. 6, 1999).

Facts: After the settlement of their Individuals with Disabilities Education Act (IDEA) claim against the Asheville (N.C.) board of education, the parents of A.D. (hereinafter the plaintiffs) sought attorney fees in the amount of $3,500, billing attorney time at $125 per hour, paralegal time at $25 per hour, and secretarial time at $18.75 per hour. The board responded with an offer of $2,000, which the plaintiffs summarily rejected. Instead of responding to the offer, the plaintiffs filed suit seeking reimbursement for attorney time billed at $175 to $225 an hour, paralegal time billed at $25 to $40 per hour, and secretarial time billed at $18.75 to $30 per hour. In total, the plaintiffs sought $8,016.55 in recovery of attorney fees and costs.

Holding: The federal court for the Western District of North Carolina agreed that as the prevailing party, the plaintiffs were entitled to reimbursement for fees and costs. The court disagreed, however, as to the amount of these fees and costs. Looking to the prevailing rates for legal work in the Asheville community, the reasonable number of hours that should have been spent on the case, and other factors, the court concluded that the plaintiffs had inflated the amount of the fees beyond reasonable bounds and had extended the length of the litigation by refusing to engage in negotiations with the board concerning its $2,000 offer. Therefore the court brought the award down to $3,047. The court then further reduced this amount by 10 percent because the plaintiffs overreached by seeking excessive attorney fees in a simple matter that could have been quickly resolved.

Board offered autistic child a free appropriate public education. C.M. v. Board of Education of Henderson County, No. 1:98CV66 (W.D.N.C. Oct. 12, 1999).

Facts: Through her parents, C.M., a child with autism, brought suit against the Henderson County (N.C.) Board of Education under the Individuals with Disabilities Education Act (IDEA) alleging that the board had failed to provide her with a free, appropriate public education as required by federal and state law. The dispute concerned whether C.M. could be more appropriately educated in the Lovaas program or in the Treatment and Education of Autistic and Related Communication Handicapped Children (TEACCH) program, with her parents arguing for the former and the board the latter. More particularly, though, C.M.'s parents refused the board's proposal that C.M. should spend part of the school day in the autistic classroom and that she should be returned to that classroom if she experienced tantrums while in other classrooms, or that her "shadow" (her assistant) should be a different person at different times.

Both sides of the dispute had many evaluations of C.M. performed, with differing results. Nonetheless, commonalities in the evaluations included observations that C.M. showed little sign of having learned how to give spontaneous responses, instead depending on prompts from her parents or aide, and that she seemed to be regressing educationally in that she was experiencing more frequent and more severe tantrums.

C.M. petitioned for a contested case hearing, at which the administrative law judge found that the individualized education plan proposed by the board, using the TEACCH method, did provide a free appropriate education for C.M. but that to optimize C.M.'s educational benefit, the board should provide her with a one-on-one aide trained in the Lovaas program. C.M. appealed.

Holding: The federal court for the Western District of North Carolina affirmed the ruling below. The IDEA does not require school boards to furnish every special service necessary to maximize a child's potential, only to provide individualized instruction and related services sufficient to confer some educational benefit. The IEP proposed by the board met this standard, even without the addition of the one-on-one aide trained in the Lovaas method. ■