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opinions.

Clearinghouse

edited by
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Cases and Opinions That Directly Affect North Carolina

Federal court, finding that the Charlotte-Mecklenburg school system has achieved "unitary status," dissolves thirty-four-year-old desegregation order and prospectively prohibits the use of initiatives that allocate educational benefits on the basis of race. Capacchione v. Charlotte-Mecklenburg Board of Education, 57 F. Supp. 2d 228 (W.D.N.C. 1999).

Facts: In 1965 the federal court for the Western District of North Carolina determined that the Charlotte-Mecklenburg Board of Education (CMBE) had been maintaining a system of "dual," or segregated, schools. Thereafter, and until the time the current opinion was issued, CMBE operated under the federal court's supervision; this supervision became dormant in 1975, however, when the court found that CMBE was making progress toward the goal of achieving desegregation. Under court supervision CMBE adopted measures that involved, among other things, busing and rezoning school districts in order to create racially integrated schools.

As an integration measure, in 1992 CMBE created magnet schools with rigid racial enrollment quotas. The enrollment policy, in brief, allotted spaces in the magnet schools according to the percentage of black students in the entire CMBE system—specifically, 40 percent. This percentage was strictly maintained; so strictly maintained, in fact, that slots reserved for students of one race could not be filled by students of another race, even if one race was under-enrolled.

In 1997 William Capacchione, a white parent (later joined by other white parents), filed suit against CMBE charging that his daughter was unconstitutionally denied admission to a magnet school because of the racial enrollment quotas. CMBE argued in response that the quotas were a necessary means of complying with the federal court's 1965 desegregation order. Capacchione, in turn, responded in two ways. First, he charged that the quota system unconstitutionally exceeded the requirements of the desegregation order. Second, he argued that CMBE had long ago achieved racial integration sufficient to satisfy the desegregation order, thus making the quotas unnecessary. If the court was persuaded by Capacchione's second point (that CMBE had achieved racial integration under the law—known specifically as reaching "unitary status"), CMBE would as a result be released from federal court supervision and would probably lose any legal justification for continuing race-based policies within its school district. CMBE thus attempted to convince the court that it had not complied with the court's 1965 desegregation mandate.

Holding: The federal court for the Western District of North Carolina ruled in Capacchione's favor, holding that (1) the magnet school racial enrollment policy unconstitutionally exceededed the terms of the

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desegregation order, (2) CMBE had achieved "unitary status," and (3) CMBE could no longer legally justify assigning students and allocating educational benefits based on race. The court also ordered CMBE to pay the attorney fees of Capacchione and his fellow plaintiffs.

Racial Enrollment Quotas. Under the Fourteenth Amendment to the United States Constitution, a governmental unit's use of race-based classifications must meet the legal standard of *strict scrutiny*. That means that such classifications may be used only if they (1) serve a compelling governmental interest and (2) are narrowly tailored to that end. The court held that CMBE met the first strict scrutiny requirement. Because of the desegregation order and the court supervision under which it had been operating, CMBE had a compelling interest in using race-based classifications in student assignment to ensure compliance. However, the court held that CMBE failed to satisfy the second requirement, in that its quotas were not a sufficiently narrow method of serving that compelling interest.

The court gave three reasons for its holding. First, the quotas went far beyond the guidelines set forth in the federal desegregation order. The court's early guidelines in this case explicitly rejected rigid racial quotas and always allowed for flexibility in racial balancing. Second, the court found the strictness of the racial quotas particularly troubling. Denying students slots reserved for another race, even when those slots were otherwise unfilled, did not serve the interest of racial balancing and unjustifiably infringed on the rights of the individual students, said the court. Third, the magnet school enrollment quotas appeared to have no sunset provision; that is, they were not limited in scope to the time necessary to remedy the discrimination that necessitated their implementation in the first place.

Despite the fact that the magnet schools' enrollment quotas were held unconstitutional because they were overbroad, the court awarded Capacchione and his fellow plaintiffs only nominal damages, as the injury suffered by those children denied the right to compete on equal footing for magnet school slots was not susceptible to measurement. In other words, their injury was too speculative to base an award upon.

Unitary Status. The court went on to find that CMBE has become a racially unitary school district. It dissolved all existing court orders concerning desegregation and released CMBE from federal supervision. CMBE has achieved "unitary status," said the court, by eliminating the vestiges of its past discrimination to the extent practicable and by complying in good faith with the 1965 desegregation plan. In so finding, the court concluded that any remaining imbalances in student assignment were attributable to factors other than CMBE discrimination—in particular, demographic trends. Also, the court rejected CMBE's argument that continuing disparities in achievement between black and non-black students were vestiges of past discrimination. Because the disparities remained despite the elimination of the segregated system, they could not be causally linked to CMBE's past discrimination. Since CMBE had eliminated the vestiges of its discrimination to the extent feasible, the court found that CMBE was no longer obligated to use race-conscious methods of achieving racial balance in its district.

Future use of race-based initiatives. The court did not merely absolve CMBE of the *need* to use race-based methods in making student assignments or in allocating other educational opportunities or benefits; it also *prohibited* CMBE from using such methods in the future. The court took this move because once it found that CMBE had, to the extent feasible, remedied the effects of its past discrimination, CMBE no longer had a compelling governmental interest in achieving or maintaining racial balance in its school system. Racial diversity, the compelling interest advanced by CMBE in favor of continuing its race-conscious policies, the court found uncompelling.

[Editor's Note: As the next two case digests indicate, this last part of the court's opinion—that diversity is not a compelling governmental interest justifying the use of race-based measures—is a point of significant contention. The Fourth Circuit Court of Appeals, a court of higher authority than the federal court for the Western District of North Carolina, has twice explicitly refused to rule on the issue. The question of whether diversity can satisfy the compelling interest test most likely will be resolved by the United States Supreme Court in the near future, owing to a pressing split of opinion among the federal circuits. Until that time, or until the Fourth Circuit Court of Appeals rules definitively on the issue, it seems safe to say that courts will continue to be skeptical about diversity serving as a compelling governmental interest that justifies the use of race-conscious initiatives.]

Race-weighted lottery for admission to special public kindergarten found to be unconstitutional. Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir.), *superceding* 189 F.3d 431 (1999).

Facts: The parents of Grace Tuttle and Rachel Sechler applied through a lottery for their children's admission to the Arlington (Va.) Traditional School (ATS)

and lost. They then sought a court order prohibiting the ATS from using an admissions policy that gave special weight in the lottery to race. Specifically, ATS used three weighted factors to boost the chances of certain under-represented groups in the admissions lottery and thereby boost the presence of these groups in its student body: (1) whether the applicant was from a low-income or special family background; (2) whether English was the applicant's first or second language; and (3) the racial or ethnic group to which the applicant belonged. The policy's purpose was to obtain a student body at ATS that approximated the distribution of students from the three groups mentioned in the factors listed above in the district's student population as a whole. Whenever the applicant pool for ATS did not reflect the makeup of the district's entire student population, ATS implemented a lottery in which each applicant's lottery number was weighted, as appropriate, to reflect membership in one or more of the three under-represented groups. Thus applicants who belonged to these groups had a higher probability of admission to ATS than applicants—like the Tuttle and Sechler children—who did not.

The federal court for the Eastern District of Virginia held that the policy violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and ordered that the school board implement a double-blind random lottery without the use of any of the weighted factors—not just the racial or ethnic background factor—that ATS had previously used. ATS appealed.

Holding: The Fourth Circuit Court of Appeals affirmed the district court's judgment that the admissions policy was unconstitutional but held that the court was wrong in ordering particular admissions practices.

When a governmental entity makes classifications based on race, they will be found unconstitutional unless they (1) serve a compelling governmental interest and (2) are narrowly tailored to achieve that interest. ATS asserted racial diversity as its compelling governmental interest, prompting the court to note that the question of whether diversity can be a governmental interest compelling enough to justify race-based classifications has not yet been decided by the Fourth Circuit or by the United States Supreme Court. Nor need it be decided in this case, the court continued, because even if it is assumed that diversity can be the compelling interest here, ATS's race-weighted lottery violates the second requirement of constitutionality, that a race-based classification be narrowly tailored.

The court held that the use of racial and ethnic identity as a weighted factor in admissions is an unconstitutionally broad method of achieving diversity for several reasons. First, race-neutral alternatives for increasing student body diversity were available to ATS and were identified by a special committee that reported on the issue to the county's superintendent. Second, the weighted lottery contained no logical stopping point, having been instituted for "the 1999–2000 school year and thereafter." Finally, the court found the impact on white applicants to be too great.

Although the court held the policy to be unconstitutional, it found that the district court had abused its discretion in mandating that ATS use a specific admission policy and abandon all of the weighted factors instead of just the race or ethnic background factor. The court sent the case back to the district court for an evidentiary hearing at which ATS could present its alternative admission policies for review.

Race-based student transfer policy is unconstitutional. Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999).

Facts: The Montgomery County (Md.) board of education denied Jacob Eisenberg's request to transfer from the Glen Haven Elementary School to the math and science magnet program at Rosemary Hills Elementary School on the basis of his race. Under the board's student transfer policy, each school within the district was categorized according to how closely its racial makeup reflected the racial makeup of the district's student body as a whole. Absent some personal hardship, a student's transfer request would be denied if the racial balance at either the school from which the student sought to transfer or the school to which the student wanted to transfer would be negatively affected. The board reviewed each school's diversity profile annually. Jacob was denied a transfer because Glen Haven's percentage of white students was below the districtwide percentage. Glen Haven's student body was 24.1 percent white; the county's, 53.4 percent.

After making unsuccessful appeals to school officials, the Eisenbergs filed suit in federal court for the District of Maryland, seeking to enjoin the use of race as a basis for deciding student transfer requests and to obtain the right to transfer Jacob. The district court denied their motion, finding that the board's asserted interests in maintaining student body diversity and avoiding segregative enrollment patterns were sufficiently compelling, and the policy itself narrowly enough tailored, to be valid under the Equal Protection Clause of the United States Constitution. The Eisenbergs appealed.

Holding: The Fourth Circuit Court of Appeals reversed the holding of the district court.

Governmental policies or actions that are based on racial classifications are presumptively unconstitutional, the court began. To overcome this presumption the government must meet the requirements of *strict scrutiny*, showing that the policy is justified by a compelling interest and is narrowly tailored to serve that interest. The board in this case faced an especially high burden under this standard, since its school district had never been under court order to remedy past discrimination, having voluntarily—without a lawsuit—desegregated long ago. A court order may create both a compelling interest and a standard by which to judge how effectively tailored a remedy is to that end. But when a governmental entity's race-based policy cannot be linked to past discrimination by that entity, in using the policy the governmental entity is responding to the effects of discrimination for which it was not itself responsible. That is unconstitutional. As in the *Tuttle* case, discussed on pages 22–23, the court declined to decide whether diversity is a compelling governmental interest in the public school context. The absence of past discriminatory conduct upon which to justify a race-based policy in the first instance was found to be a sufficient basis for the court's decision.

The court ordered the board to grant Jacob's transfer request and to discontinue the use of race in its transfer policy.

Where female student was allowed to try out for a university football team and was, for a time, a member of the team, Title IX prohibits the team from discriminating against her on the basis of sex. Mercer v. Duke University, 190 F.3d 643 (4th Cir. 1999).

Facts: Heather Mercer sued Duke University for sex discrimination under Title IX of the Education Amendments of 1972 (20 U.S.C.A. § 1681 et seq.), claiming that Duke discriminated against her during her participation in its football program. The federal district court held that Title IX's prohibition against sex discrimination does not apply at all to contact sports such as football [see "Clearinghouse," *School Law Bulletin* 30 (Spring 1999): 20]. Mercer appealed.

Holding: The Fourth Circuit Court of Appeals reinstated Mercer's claim and remanded the case for further proceedings in the district court.

In reaching its decision, the district court had relied on language in Title IX, which provides that notwithstanding the statute's general prohibition on sex discrimination in athletic programs, a "recipient may operate or sponsor separate teams for members of each sex where . . . the activity involved is a contact sport." The district court concluded that this language in effect *authorized* sex discrimination in contact sports.

The court of appeals found the pivotal language inapplicable to Mercer's situation. The cited language does not mean, as the district court had reasoned, that contact sports are entirely beyond the ambit of Title IX's anti-discrimination provisions. It means instead, said the court, that educational institutions may choose to limit membership on such teams to persons of one sex and that the institutions need not let persons of the other sex try out for them. However, when members of the other, excluded sex *are* allowed to try out for what was formerly a single-sex contact sport team—as Heather Mercer was allowed to try out for Duke's football team—then the usual Title IX prohibition on sex discrimination applies. Therefore Mercer stated a valid claim under Title IX.

Scheduling of public school Easter holidays does not violate the Establishment Clause. Koenick v. Felton, 190 F.3d 259 (4th Cir. 1999).

Facts: Judith Koenick, a former public school teacher, filed suit alleging that the Montgomery County (Md.) board of education and its officials violated the Establishment Clause of the First Amendment to the United States Constitution by following a state statute that set school holidays around Easter Sunday. Setting school breaks around a religious holiday amounted to an establishment of that religion, Koenick claimed. The federal court for the District of Maryland granted judgment for the defendants before trial, holding that scheduling of the Easter holidays did not violate the Establishment Clause. Koenick appealed.

Holding: The Fourth Circuit Court of Appeals affirmed the district court judgment in favor of the defendants. There was no constitutional violation.

Under the United States Supreme Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), governmental action does not violate the Establishment Clause so long as it (1) has a secular purpose, (2) does not have the primary effect of advancing religion, and (3) does not create an excessive entanglement between government and religion. The Maryland statute satisfies this test, the court held.

In arguing that the statute serves a secular purpose, the defendants stated that the reason for closing the public schools for the "Easter holiday" was the high rate of

absenteeism among both students and teachers on those days. Holding classes on these days wasted educational resources because of the need to hire substitute teachers, required additional monetary outlay, and disrupted the continuity of instruction. For this same reason, the defendants noted, the system closes its schools during the Jewish holidays of Rosh Hashanah and Yom Kippur. The court found this argument sufficient to prove that the statute serves a secular purpose.

The court next rejected Koenick's argument that the Easter holidays as set by the board had the effect of promoting Christianity over other religions. The statute grants the holidays to all students and teachers, not just to those practicing Christianity. Further, the statute contains nothing implying that the days off should be spent attending religious services. And though the statute makes it possible for students and teachers to attend religious services around Easter, this is an incidental benefit—the statute did nothing to affirmatively promote it.

Finally, the court dismissed Koenick's weakest argument, that the statute excessively entangled the defendants with religion by embroiling them in an ongoing intra-faith controversy over the actual date on which Easter was to be celebrated. The school system simply consulted a commercial calendar to determine the date of the Easter holidays.

Court reinstates student's disability discrimination claim and her claim for intentional infliction of emotional distress. Baird v. Rose, 192 F.3d 462 (4th Cir. 1999).

Facts: Kristen Baird, a seventh grader in the Fairfax County (Va.) schools, auditioned for and was accepted to participate in a "show choir" at her school. The choir was led by Susan Rose. Baird frequently missed rehearsals because of sinusitis, but her parents assured Rose that her absences would not affect her performance. The following year Baird auditioned for a lead role in her school's spring play, but Rose informed her that she would not consider her for a lead role because of her past frequent absences. Rose then assigned Baird a minor role singing alto, although Baird was a soprano.

Two days later, Baird attempted suicide. Thereafter she was diagnosed as suffering from severe depression. Baird's parents informed school personnel of the diagnosis. When Baird returned to school, Rose announced to her class that Baird would not be allowed to participate in the next show choir (she did not rule out the play) performance and assigned her part to another student. When confronted by Baird's mother, Rose stated that Baird did not know the routines well enough because of her absences. Rose refused to allow Baird to demonstrate her knowledge of the routines, stating that it would be best for Baird not to perform because of her depression and that persons who suffer from depression could not be counted on to meet their responsibilities.

After Baird's mother complained to the principal, Inez Cohen, Cohen told Rose that she must either allow all students to participate in the show or uniformly enforce her written—though previously unenforced—policy prohibiting students with a certain number of absences from performing. Rose then announced to the entire class that Baird was prohibited from performing, as were several other students who had "legitimate" absences. Rose made clear to the students why the rule was being enforced. Baird left the classroom in tears and ultimately had to be sedated upon her arrival home.

Rose did not allow Baird to participate in rehearsals for the next show choir and did not allow her to participate fully in the show itself. Baird suffered sleeplessness, loss of appetite, exhaustion, difficulty concentrating, fear of humiliation by other students or by Rose, and a dramatic increase in physical illnesses. Her grades dropped precipitously, and her mother took a leave of absence from work because she was concerned that Baird might again attempt suicide.

Baird, through her mother, brought suit against the school board and against Rose and Cohen in their official as well as individual capacities, alleging a violation of the Americans with Disabilities Act (ADA) (42 U.S.C.A. § 12132) and intentional infliction of emotional distress. The federal court for the Eastern District of Virginia granted the defendants' request to dismiss Baird's claims before trial, finding that she had stated no claim upon which relief could be granted. Baird appealed.

Holding: The Fourth Circuit Court of Appeals reinstated both (1) Baird's ADA claim against the board and against Rose and Cohen *in their official capacities* and (2) her claim for intentional infliction of emotional distress. The court affirmed the district court's dismissal of Baird's ADA claim against Rose and Cohen *in their individual capacities.*

The ADA prohibits public entities from discriminating against qualified individuals with disabilities on the basis of those disabilities. The defendants did not dispute that Baird suffered from a disability—depres-

sion—or that she was otherwise qualified to participate in the show choir. The disagreement instead centered on whether she had been prohibited from participating because of her absences or because of discrimination against her based on her depression. The evidence showed that Baird's depression *was* a motivating factor in denying her participation. Baird's exclusion from the show did not occur until *after* Rose had been informed of her depression. Despite frequent absences before her diagnosis of depression, Baird had never before been removed from a show. Further, Rose had never enforced her absenteeism policy before using it to exclude Baird and did not uniformly enforce it thereafter until made to do so by Cohen. That Baird's depression was *a* motivating factor in her exclusion—if not the *sole* factor—seems clear and was sufficient to state a claim under the ADA. The ADA, however, allows suit only against public entities, not private individuals. Thus Baird's claim against Rose and Cohen in their individual capacities was properly dismissed.

Baird also made allegations sufficient to support a claim of intentional infliction of emotional distress. Under Virginia law this claim requires that: (1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous or intolerable in that it offends generally accepted standards of decency and morality; (3) the conduct caused emotional distress; and (4) the distress was severe. The only issue in dispute here was whether Rose's conduct was sufficiently outrageous. The court found that Rose's conduct could be characterized as so outrageous as to exceed the bounds of decent society: As succinctly alleged by Baird, Rose—in her capacity as Baird's teacher and during a class to which Baird was assigned—intentionally attempted to humiliate Baird, a child, knowing that she suffered from clinical depression.

Non-teaching school employee is entitled to judicial review of school board termination decision that reflected on her character; court finds employee was properly terminated. Cooper v. Board of Education for Nash–Rocky Mount Schools, ___ N.C. App. ___, 519 S.E.2d 536 (1999).

Facts: Gloria Cooper, an African American, was a bus driver and teacher's assistant in the Nash–Rocky Mount schools. One day she told an unruly black male student on her bus to "act your age and not your skin color." The uproar that followed from the students on the bus required her to immediately turn the bus around and return to the school to get help in controlling the students. The school board, in a public meeting that Cooper did not attend upon the recommendation of the superintendent, voted to terminate Cooper's employment. She was then granted a hearing before a three-member panel of the board assembled to review its termination decision. The panel upheld the termination. Cooper then filed suit in superior court. The court held that Cooper had failed to state a claim upon which the court could grant relief. Cooper appealed.

Holding: The North Carolina Court of Appeals affirmed the superior court's decision.

The court first found that a non-teaching employee has the right, under Chapter 115C, Section 45, of the North Carolina General Statutes (hereinafter G.S.), to judicial review of a school board decision that reflects upon his or her character. The court next found that the decision in Cooper's case did indeed reflect upon her character. Being dismissed from a job for making a racial comment—a comment that the board characterized as being "totally unacceptable for an employee in a school setting"—certainly impugned Cooper's character. Thus Cooper was entitled to judicial review of her termination.

The court found the merits of Cooper's appeal insufficient. Cooper alleged that the procedure by which she was terminated was deficient because (1) the board considered evidence of problems she had as a cafeteria worker some years before the current incident and (2) she was not present before the board when it considered her termination. The court noted, however, that Cooper was an at-will employee who could be terminated for any reason not illegal or contrary to public policy. In light of the seriousness of the racial comment incident, the board's consideration of the evidence from earlier in Cooper's career was, at worst, irrelevant. As to the allegation that Cooper's absence from the first board meeting invalidated her termination, the court found that although the procedure followed in this case did not strictly mirror that set out in G.S. 115C-45, Cooper did obtain a board review of her termination that compensated for any procedural flaws in the board's earlier actions.

Finally, the court rejected Cooper's claim that the board's decision was arbitrary, an abuse of discretion, and unsupported by the evidence. That Cooper made the statement while driving a school bus and so inflamed the passengers that she had to return to school immediately for help in controlling them amply supported her termination.

Superintendent's order prohibiting a threatening and disruptive father from entering school property did not violate the father's constitutional rights. Lovern v. Edwards, 190 F.3d 648 (4th Cir. 1999).

Facts: Michael Lovern, the noncustodial father of three children attending Henrico County (Va.) public schools, had numerous confrontations with personnel and board members at his children's schools, particularly at J.R. Tucker High School. In the first incident, Lovern disagreed with the ejection of his son's junior varsity basketball coach from a game. He called the principal at Tucker to demand that he appeal the ejection; when the principal did not appeal the ejection, Lovern called the superintendent's office and demanded that someone there handle his complaint. In the second incident, Lovern's son was not selected for the varsity basketball team at Tucker. Lovern called the coach both at work and at home to protest the decision, then phoned the principal several times to register his opposition. Finally he showed up at a team practice, where he spent twenty-five minutes trying to address the issue with the coach. After this last incident, Tucker's principal wrote Lovern a letter in which he explained that Lovern would need to schedule such meetings in advance and should otherwise limit his entry onto school property to events that were open to the public. Lovern obtained the name of the employee who drafted this letter and then phoned her several times at home and at work.

Shortly after receiving the letter, Lovern attended a meeting of the Henrico County Board of Supervisors and there alleged that the Henrico County public school system was misusing public funds by paying for the litigation costs of its board members and school officials. He later made the same allegation at a county school board meeting. Thereafter he contacted county superintendent Mark Edwards and several other school system officials about his accusations. Edwards informed Lovern that, due to his continual verbal abuse and threatening behavior toward school personnel, he was barred from entering school property.

Lovern then began a wide-ranging letter writing campaign asserting, in effect, that there was a county-wide conspiracy to deprive him of his constitutional rights of free speech, right to petition, and parental rights. He threatened to file a lawsuit against potential defendants including Edwards, an FBI agent, county police officials, and an assistant United States attorney in Richmond. Ultimately Lovern did file a federal lawsuit against Edwards. The federal court for the Eastern District of Virginia dismissed the suit, finding it without merit. Lovern appealed.

Holding: The Fourth Circuit Court of Appeals affirmed the dismissal, agreeing with the district court that Lovern's case was so obviously without merit that the court was precluded from exercising jurisdiction over it. School officials have the authority to regulate the behavior of persons on school property in order to assure that the academic process is not disrupted and safety is not compromised. Lovern was not entitled to unlimited access to school property.

In an unpublished opinion, the North Carolina Court of Appeals holds that school was not negligent in the injury of a student at school-sponsored pep rally. Dukes v. Winston-Salem/Forsyth County Board of Education, No. COA98-892 (N.C. App. July 20, 1999).

Facts: Richard Dukes, Jr., suffered a severe knee injury in a slam-dunk competition at a school-sponsored pep rally. Before the competition, some students trying to win the votes of their fellow students to become school mascot threw candy into the audience to garner support. Dukes alleged that a stray piece of candy, which school personnel negligently failed to remove from the gymnasium floor, caused him to slip and fall, thus injuring his knee. He sued the Winston-Salem/Forsyth County Board of Education on this negligence claim, but before trial the court granted summary judgment in favor of the board (that is, it ruled for the board). Dukes appealed.

Holding: In an unpublished opinion (creating no binding legal precedent), the North Carolina Court of Appeals affirmed the judgment in favor of the board.

The board owed Dukes a duty to take reasonable care to protect his safety. However, Dukes presented no evidence upon which the court could find that the board breached this duty. Dukes himself could not say that he saw a piece of candy on the floor and admitted in his deposition that it was only in the emergency room after the fall that he came to the opinion that he slipped on a piece of candy. The board presented nine eyewitness affidavits all stating that there was no object on the floor in the area of Dukes's fall. Furthermore, several other participants in the slam-dunk contest preceded Dukes without incident.

Complaint filed by "Jane Doe" who later was ordered to reveal her identity dated back to the time of the original filing and was not barred by the statute of limitations. Tate v. North Carolina Central University, No. 1:98CV01095 (M.D.N.C. June 21, 1999).

Facts: Under the name "Jane Doe," Audrey Tate filed suit against North Carolina Central University

(NCCU), alleging that NCCU employees retaliated against her—in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e)—after she reported that her supervisor had raped her. NCCU sought to have her claim dismissed because she did not file it under her real name. The federal court for the Middle District of North Carolina denied NCCU's motion to dismiss but ordered Tate to file an amended complaint using her real name within ten days of the court's order [see "Clearinghouse," *School Law Bulletin* 30 (Summer 1999): 34–35].

Tate did as the court ordered, and then NCCU moved to have her claim dismissed because the amended complaint was not filed within the ninety-day period provided by Title VII for filing a civil action after receiving a "right-to-sue" letter from the Equal Employment Opportunity Commission (EEOC).

Holding: The district court rejected NCCU's argument, finding that Tate's claim legally commenced when she filed the Jane Doe complaint; this was done within the ninety-day time limitation.

In its order requiring Tate to reveal her identity, the court found that her claim had already *commenced* but stated that in order for the claim to *continue*, she would have to amend the complaint to include her name. Tate complied with this order. In any event, NCCU was well aware of Tate's identity despite the fact that she filed her original complaint under a pseudonym. She identified herself in the complaint by reference to her EEOC charge number, which NCCU had received and which identified Tate by name. Further, the facts alleged in the complaint made clear Tate's identity and the exact nature of her complaint. Thus the amendment did not affect the substance of Tate's original claim or prejudice NCCU in any way.

Board was entitled to immunity for its operation of an after-school enrichment program. Schmidt v. Breeden, ___ N.C. App. ___, 517 S.E.2d 171 (1999).

Facts: Joy Schmidt, mother of six-year-old Michael Schmidt, sued the Charlotte-Mecklenburg Board of Education (CMBE) and two of its employees, Laurie Breeden and Jennifer Owens. On January 15, 1992, Michael suffered a head injury while participating in a voluntary after-school enrichment program operated by the CMBE, but no one from the program informed Schmidt of the injury. At home that evening Michael developed a headache and began vomiting; because Schmidt did not know of Michael's earlier injury, however, she did not realize the significance of these symptoms. The delay in medical treatment exacerbated Michael's condition, ultimately leaving him with permanent brain damage and vision impairment.

The CMBE, on behalf of itself and its employees, asserted that it was shielded from suit by governmental immunity and moved to have Schmidt's claim dismissed before trial. The trial court rejected the CMBE motion, and CMBE appealed.

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

CMBE, like other governmental units, is immune from tort suits for injuries caused by its employees while carrying out "governmental" functions; this rule is inapplicable, however, to the extent that the unit has waived that immunity through the purchase of liability insurance. CMBE, like other governmental units, is not immune from suit for injuries caused by employees while carrying out "proprietary" functions.

Thus the issue in this case was whether the after-school enrichment program constituted a governmental function or a proprietary one. *Governmental* functions are those functions that may be conducted only by governmental agencies and that are characterized by their promotion of the health, safety, security, or general welfare of the state's citizens. Functions that do not qualify under this definition of governmental are called *proprietary* functions. Proprietary functions are those undertaken for the benefit of more isolated communities (for example, operating a parking ramp or a golf course), often with a profit motive.

With these factors in mind, the court had determined in an earlier case that the after-school program involved in that case constituted a supplemental educational experience within the board's power and authority and thus was a governmental function. The court found unpersuasive Schmidt's argument that CMBE's after-school program was, in essence, a daycare center, unlike the program in the earlier case. First, the after-school program, which operated from 2:00 P.M. to 6:00 P.M. each day, did not meet the statutory definition of a daycare center insofar as it did not operate for more than four hours a day. In addition, the fact that the program cost $35 a week did not prove that it was profit-driven; this fee, when broken down, amounted to less than $2 per hour, per child, to cover activity fees, staff compensation, and refreshments.

The court next addressed CMBE's claim that Breeden and Owens were entitled to immunity along with the school unit. To the extent that Breeden and

Owens were being sued by Schmidt in their official capacities—that is, as public officials of CMBE—they are entitled to share the board's immunity. However, Schmidt's suit made clear that she maintained claims against Breeden and Owens as individuals. Because they were public *employees*, and not public *officials*, they were not entitled to immunity. The suit against them as individuals may go on.

North Carolina Supreme Court finds that school crossing guard was not entitled to immunity from suit because a crossing guard is a public employee, not a public official. Isenhour v. Hutto, 350 N.C. 601, 517 S.E.2d 121 (1999).

Facts: Anita Isenhour's son was struck by a car while crossing a street under the supervision of Robbie Morrison, a crossing guard employed by the city of Charlotte (N.C.). The boy subsequently died as a result of injuries sustained in that accident, and Isenhour brought suit against both the city and Morrison. In 1998 the North Carolina Court of Appeals addressed immunity claims put forward by the city and by Morrison [see "Clearinghouse," *School Law Bulletin* 30 (Spring 1999): 22–23].

The first claim concerned governmental immunity. The city asserted that it was shielded from suit by the public duty doctrine, which grants governmental entities immunity for negligently caused harm that occurs in the course of performing a duty owed to the public at large. Morrison also asserted immunity under the public duty doctrine. Insofar as Isenhour sued Morrison in her official capacity, Morrison was entitled to share the city's immunity because damages sought from Morrison as the city's agent would come from city coffers. The court of appeals rejected these arguments, finding the public duty doctrine inapplicable to Isenhour's case. Morrison was not acting to fulfill a duty owed to the public at large but, rather, to fulfill a duty to specific individuals—namely, the children crossing the street under the guard's supervision.

The second claim concerned Morrison's entitlement to individual immunity. Morrison argued that as a public *official* engaged in the performance of governmental duties requiring the exercise of her judgment and discretion, she was entitled to immunity from negligence suits brought against her personally. She argued that she was not a mere public *employee* who could be held individually liable for negligence. The court of appeals agreed, finding that the job of a crossing guard closely resembles that of a police officer; since the courts have held that police officers are public officials, the court said that crossing guards also should be regarded as public officials.

The city and Morrison appealed the court's denial of governmental/public duty immunity; Isenhour appealed the court's holding on Morrison's right to public official immunity.

Holding: The North Carolina Supreme Court affirmed in part and reversed in part. The supreme court held that the court of appeals had correctly ruled that governmental immunity did not shield the city and Morrison from suit but had incorrectly ruled that Morrison was entitled to public official immunity.

Morrison was a public *employee*, not a public *official*, the court found. Three basic factors differentiate public officials from public employees. Public officials: (1) have positions created by the constitution or by statute; (2) are endowed with a portion of the state's sovereign power; and (3) exercise discretion in the performance of their jobs. Police officers, for example, are appointed pursuant to statutory authority, and their enforcement of the criminal laws involves the discretionary exercise of some sovereign power. School crossing guards, on the other hand, are not specifically authorized by statute and do not exercise a significant level of discretion or sovereign power. Morrison's duties were instead specific duties arising from a fixed set of circumstances.

University's acceptance of federal funds under Title IX constituted a knowing waiver of its Eleventh Amendment immunity. Litman v. George Mason University, 186 F.3d 544 (4th Cir. 1999).

Facts: Annette Litman, a former student at George Mason University (GMU), sued GMU for sex discrimination under Title IX of the Education Amendments of 1972. Title IX, which prohibits sex discrimination in educational programs receiving federal funds, provides in relevant part that state institutions receiving Title IX funds are not immune under the Eleventh Amendment to the United States Constitution from suit in federal court for violations of Title IX. Nonetheless GMU contended that it maintained its immunity from suit in federal court because the language of Title IX's immunity waiver was ambiguous.

Holding: The Fourth Circuit Court of Appeals disagreed with GMU. The university is thus not immune from suit.

The Eleventh Amendment precludes citizens from bringing suits in federal court against their own states.

However, a state may waive this immunity by consenting to be sued in federal court. Frequently states consent to such suits by voluntarily participating in a federal spending program—such as Title IX—when Congress expresses a clear intent to condition participation in the program on the state's waiver of immunity. Even in these circumstances, however, Congress must declare this condition in clear and unequivocal language. The language conditioning receipt of Title IX funds on a waiver of immunity (providing that a state "shall not be immune under the Eleventh Amendment from suit in Federal court") was insufficiently clear, GMU argued, to effect a waiver. The statutory language nowhere explicitly used the terms "condition" or "waiver."

The court found this point unimportant. The only difference between the actual statutory language and the language argued for by GMU was that the former was phrased in the negative (i.e., "a state shall not be immune") and the latter was phrased in the affirmative (i.e., "a state waives its immunity as a condition of receiving Title IX funds").

Former university employee's claims of sexual harassment and retaliation are without merit. Mayo v. East Carolina University, 4:98-CV-54-BO(3) (E.D.N.C. July 13, 1999).

Facts: Lauren Mayo, a former program assistant in the dean of student's office at East Carolina University (ECU), filed a sexual harassment and retaliation claim against ECU, several of its officials, and Ronald Speier, its dean of students. Beginning in July 1991, Mayo worked directly for Speier; she received one promotion and outstanding performance evaluations. In early 1996 Speier was in the process of attempting to have Mayo's position reclassified upward when Mayo requested a transfer to a position outside of Speier's office. She informed Gregory Miller, the director of employee relations, of various incidents of a sexual nature between Speier and herself but said that she did not intend to file a sexual harassment claim against Speier. Miller ultimately convinced Mayo to file a complaint.

Mayo and Speier were placed on paid administrative leave for approximately three weeks while ECU investigated the charge. Speier completely denied the allegations, and none of the nineteen people ECU interviewed could provide any evidence of sexual harassment. Ultimately ECU could not conclude that its sexual harassment policy had been violated, Speier maintained his job, and Mayo obtained a transfer to employment as a program assistant at ECU's Eastern Area Health Education Center (AHEC).

Although Mayo performed many of her AHEC duties well, she received counseling on different occasions for things such as taking leave without consulting her supervisors, engaging in lengthy personal phone calls on the job, and discussing intimate personal matters with her co-workers. Six months after assuming her position with AHEC, Mayo left on sick leave, did not give a return date, and eventually was placed on leave under the Family and Medical Leave Act (29 U.S.C.A. § 2611 et seq.). Two months into Mayo's leave, an AHEC employee reported that she had seen Mayo working at a local restaurant the previous evening. Because Mayo had represented that she was unable to perform her AHEC job due to illness, she was discharged for unacceptable personal conduct.

Mayo then filed suit, alleging claims of sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964. The defendants moved to have her claims dismissed before trial.

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

First, the court dismissed Mayo's Title VII claims against Speier in his individual capacity. Title VII does not allow for claims against private individuals.

Next, the court addressed Mayo's claim against ECU for sexual harassment. The court noted that Mayo's allegation was of sexual harassment by her supervisor. An employer is directly liable when a supervisor's sexual harassment causes the victim a tangible job detriment. Here there was no tangible job detriment. In fact, Mayo had gotten raises when under Speier's supervision.

However, an employer may be liable for permitting an unlawfully hostile environment through sexual harassment even if there is no tangible job detriment. In such a case, though, the employer is entitled to assert an affirmative defense consisting of two elements: (1) that it exercised reasonable care to prevent and promptly correct sexually harassing behavior and (2) that the allegedly harassed employee unreasonably failed to take advantage of the mechanisms the employer provided to prevent the harm. Here, the court held that ECU met the terms of the affirmative defense.

Since 1981 ECU has had a policy prohibiting sexual harassment. It was posted in over seventy-five locations on the campus and was included in the employee handbook mailed to every ECU employee. Mayo testified that she knew where and how to lodge a sexual

harassment complaint at ECU. When Mayo did make her complaint, ECU began an immediate and intensive investigation. Both Mayo and Speier were placed on administrative leave, and ECU did not require Mayo to return to her position working with Speier. ECU took reasonable care to prevent and correct the sexual harassment Mayo alleged. For her part, Mayo unreasonably failed to take advantage of ECU's protective mechanisms. Even when she finally did reveal her claim to Miller in the human relations department, she said she did not intend to file a sexual harassment claim. It was only at his insistence that she finally did so.

As to Mayo's claim that she lost her AHEC job in retaliation for her sexual harassment claim, she presented no evidence to show that her new employers were even aware of any of the details of her harassment charge. That the termination occurred more than a year after Mayo made the sexual harassment complaint and that it was attributable to undisputed job performance problems further confirmed that the termination was not linked to her harassment claim.

Full panel of the Fourth Circuit Court of Appeals vacates earlier panel's grant of new trials on sex discrimination claims by former university police officers. Taylor v. Virginia Union University, 193 F.3d 219 (4th Cir. 1999).

Facts: Lynne Taylor and Keisha Johnson, former police officers for Virginia Union University (VUU), sued VUU, alleging that on the basis of their sex they had not received promotions, had not been sent to the police academy, and had been discriminatorily discharged. Johnson also alleged that she had been sexually harassed. The federal court for the Eastern District of Virginia dismissed Johnson's sexual harassment claim before trial and granted VUU judgment as a matter of law on all of Taylor's claims after trial. A jury returned a verdict in favor of VUU on Johnson's remaining claims. Taylor and Johnson appealed the court's judgments in favor of VUU as well as certain evidentiary rulings that they believed led to the jury verdict in favor of VUU.

In February 1999 a three-member panel of the Fourth Circuit Court of Appeals granted Johnson and Taylor a new trial on their sex discrimination claims and ordered the district court to admit the excluded evidence from the first trial. The court also reinstated Johnson's sexual harassment claim [see "Clearinghouse," *School Law Bulletin* 30 (Spring 1999): 28–29]. VUU moved to have the full Fourth Circuit Court of Appeals vacate the three-member panel's decision and rehear the case.

Holding: The full Fourth Circuit Court of Appeals granted VUU's request, reinstated the original district court judgments in favor of VUU, and affirmed its dismissal of Johnson's sexual harassment claim.

The court first addressed Taylor's claims. Taylor simply failed to proffer sufficient evidence to show that she was qualified for promotion and thus failed to make out a prima facie case of sex discrimination. Her performance ratings were marginal, and testimony at trial indicated that she had problems "getting the job done" and showed a "lackadaisical attitude." Similarly, Taylor's claim that she was discriminated against in not being allowed to attend the police academy failed because she could not show that males with qualifications that were inferior or comparable to hers were allowed to go. Finally, Taylor's claim that she was discharged because of her sex—rather than for engaging in the prohibited conduct of fraternizing with VUU students, as was shown—failed because she presented no evidence that male officers who engaged in similar conduct were treated more leniently than she.

Johnson's claim that she was entitled to a new trial because the district court had abused its discretion in excluding evidence that had a substantial chance of swaying the jury's judgment was also unsuccessful. The evidence in question—that her supervisor had referred to a female employee as having a "good pussy" and looked down the blouse of another female employee—would not have swayed the jury, the court here found, and its exclusion was thus harmless error. Like Taylor, Johnson failed to submit evidence showing she was as qualified as male officers who were promoted or sent to the police academy, and she thus failed to make out a basic element of a sex discrimination claim. In the face of this basic failure, it is unlikely that the excluded evidence would have convinced a jury to rule in Johnson's favor. Her sexual harassment claim suffered from a lack of evidence as well.

East Carolina University employees were not legally responsible for emotional suffering of former employee. Georgalis v. East Carolina University, In the North Carolina Industrial Commission, Nos. TA-14045-14046 (June 17, 1999).

Facts: Elaine Georgalis, formerly employed as a research technician at East Carolina University (ECU), sued various ECU employees under the state Tort Claims Act, alleging that their negligence, during a time

when she was suffering from depression, in handling her requests for reduced work hours, disability benefits, and insurance benefits, caused her to suffer severe emotional damage.

Holding: The North Carolina Industrial Commission found no causal link between the behavior of the ECU employees and Georgalis's emotional state. ECU employees behaved reasonably and within the scope of their duties. They had no reason to predict that any of their actions would result in emotional harm to Georgalis. ■