

# Update on Civil Cases Affecting State or Local Government in North Carolina

Public Law for the Public's Lawyer  
UNC School of Government  
October 21, 2021

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## EMPLOYMENT LAW CASES

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### Kirshnan vs NC Dept. of Health and Human Services-COA-Nov. 2020

- Plaintiff was suspended for unacceptable personal conduct/unsatisfactory job performance, she resigned, filed a pro se complaint alleging retaliation/harassment
- She received a letter from DHHS denying her grievance on May 17, 2019 and filed contested case petition June 17.
- ALJ dismissed the petition on its own motion without a hearing based on NCGS § 150B-23 (30 days after notice by mailing).
- COA reversed saying that the time for appeal to OAH is 30 days of receipt of final agency decision as provided in NC Human Resources Act NCGS § 126-34.02(a).
- In ordinary usage, one would not have notice of something unless one actually knows about it.
- Since there was a conflict in statutes, the more specific one dealing with employee grievances applies
- State DHHS agreed with petitioner.

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### Core v. NC Division of Park and Recreation – COA – April 2021

- Tort Claims case of swimmer and Lake Waccamaw after suffering broken spine from a dive into lake with dark water on unknown depth
- 2<sup>nd</sup> time case has been to COA
- Commission found plaintiff contributorily negligent twice (deputy commissioner awarded \$ 300,000 initially)
- The Commission's findings of fact are "conclusive on appeal when supported by competent evidence, even though there [may] be evidence that would support findings to the contrary"
- Court of Appeals went through findings and disagreed

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### Ayers v. Currituck County Social Ser. –COA- Oct. 2021

#### 1<sup>st</sup> Appeal by defendant

- Plaintiff was career state employee
- Ayers was asked about a racial demarcation on a client intake form
- Ayers I the ALJ reversed termination and COA reversed instructed the ALJ to "make new findings of fact supported by the evidence in the record and continue its analysis under Warren of whether [Ayers] engaged in unacceptable conduct constituting just cause for her dismissal or for the imposition of other discipline (1<sup>st</sup> Warren factor)

#### 2<sup>nd</sup> Appeal

- ALJ concluded that whether DSS had just cause for the disciplinary action taken under NCGS 126-35(a) and found lesser disciplinary measure was warranted
- ALJ focused on 10 history with no prior discipline, this comment was not harassment of specific person and no harm to the agency. A career State employee may be disciplined for two reasons: unsatisfactory job performance or unacceptable personal conduct.
- Review is whole record on the findings of fact and de novo on the conclusions of law. COA reversed and remanded.

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### Ayers, cont'd

- DSS's failure to consider the resulting harm to the agency from Ayers's Unacceptable Personal Conduct was a failure to fully exercise its discretionary review under Wetherington I.
- DSS did not make such a necessary consideration in its disciplinary investigation, rendering the investigation incomplete and the ALJ's findings regarding whether such harm occurred too speculative
- Third time is a charm

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## Constitutional Case Law

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### Cooper v. Berger –SC –Dec. 2020

- Separation of Powers case
- General Assembly has the authority to determine the manner in which monies derived from three specific federal block grant programs should be distributed to specific programs. General Assembly did not overstep its constitutional authority by appropriating the relevant federal block grant money in a manner that differs from the Governor's preferred method for distributing the funds in question.
- Justice Earls dissented

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### Mole v Durham-COA-Oct. 2021

- Sergeant Mole, hostage negotiator, was fired after offering a suspect a marijuana cigarette once in custody.
- Sergeant Mole' promised suspect that if he disarmed and peacefully surrendered, he would be allowed to smoke the blunt. Mole's immediate supervisors recommended that he be reprimanded. But Durham terminated him
- Article I, Section 1 (added in 1868 at a time when formerly enslaved persons were newly able to work for their own benefit) of the North Carolina Constitution, in a provision unique to that document as compared to the federal constitution, protects the people's rights to enjoy the fruits of their own labor.
- Supreme Court has extended application of the fruits of one's labor clause beyond licensing restrictions to other state actions that interfere with one's right to earn a livelihood.
- COA held that equal protection claim, and property interest failed. But fruits of labor claim survived.

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## Deminski v State Board of Ed.-SC-June 2021

- Students brought claim under state constitution for deliberate indifference to harassment of special needs students.
- *Corum* - individual may bring a direct claim under the North Carolina Constitution where her rights have been abridged but she is without an adequate state law remedy
- Article I, Section 15 of the North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." Where a government entity with control over the school is deliberately indifferent to ongoing harassment that prevents a student from accessing his constitutionally guaranteed right to a sound basic education, the student has a colorable claim under the North Carolina Constitution. Thus, governmental immunity does not bar the claim.

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## DiCesare v Charlotte Meck- Hosp. Auth. –SC- Dec. 2020

- Plaintiffs sued authority for restraint of trade, unfair practices/monopoly statutes over restriction in its contracts to prohibit the insurers from "steering" their insureds to lower cost providers of medical care services and to forbid the insurers from allowing the Hospital Authority's competitors to place similar restrictions in their contracts with the insurers.
- A quasi-municipal corporation, the Hospital Authority is not a "person, firm, or corporation" for purposes of N.C.G.S. § 75-16
- Supreme Court upheld dismissal of Chapter 75 claims
- And found Art. 1, Sec. 34 claim should also be dismissed. "Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."
- Hospital Authority does not possess "so large a portion" of that market that it risks causing the sort of harm to the public that N.C. Const. art. I, § 34, is designed to prevent

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## Osborne vs. Yadkin Valley Economic Development District, et al –COA-Aug. 2021

- Negligence, Title IX and 42 USC 1983 claims against Stokes County Board of Education arising from sexual assault of special needs student on bus.
- Board contracted with Yadkin to provide transportation
- Board required the transportation company to comply with its approved safety plan, provide a well-trained driver, conduct preemployment criminal background checks and drug testing of drivers, and to conduct random drug testing.
- On substantive due process, COA reiterated that a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause
- Negligence was barred because of independent contractor rule. BOE was statutorily authorized to engage services of contractors to transport students. This was delegable.
- Title IX requires knowledge or deliberate indifference.
- Summary judgment proper for County BOE.

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## IMMUNITY AND SUIT CAPACITY CASES

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### Fox v. City of Greensboro – COA-Sept 2021

- Plaintiffs were police officers assigned to "special intelligence Section" (investigating police misconduct, gangs, organized crime, etc)
- NAACP complained that GPD was targeting African American police officers and that the Chief was leading this.
- Alleged "black book" contained photos of African American officers and males. After internal investigations, Chief resigned but plaintiffs were charged and acquitted of felony access of government computer. Plaintiff sued Manager and others for malicious prosecution, abuse of process and civil conspiracy
- COA held that malicious prosecution claims in official capacity were barred by governmental immunity
- Court corrected dismissed civil conspiracy
- COA reversed dismissal of the abuse of process claim on SOL grounds "the limitations period commences upon the last tortious act about which Plaintiffs complained"
- Dissent was on the issue of statute of limitations
- This case goes back to 2005

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### Cline v. Gaston County , et al – COA-June 2021

- Health Department and Health Department Administrator approved septic system permit for new home. After raw sewerage bubbled in the year, they sued both for negligence.
- Defendant unsuccessfully argued that the Industrial Commissioner had sole jurisdiction
- An appeal granting governmental immunity affects a substantial right.
- Immunity not waived by insurance.
- County was entitled to immunity, but Hopper was employee, not official, so he was not entitled to public official immunity.
- An employee is personally liable for negligence in the performance of his or her duties proximately causing an injury. "Public officials receive immunity because it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be personally liable for acts or omissions involved in exercising their discretion." Our courts have recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties

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### Capps v. Cumberland County Board of Ed.- COA-Oct. 2021 (unpublished)

- Student sued School Board after an attack at school for negligence
- Governmental immunity issue was raised as a result of insurance
- Immunity is waived only to the extent that the county is indemnified by the insurance contract from liability for the acts alleged
- Retention or deductible is not a waiver
- Trial court erred in denying summary judgment

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### Est. of Long v. Fowler, SC- Aug. 2021

- Plaintiff was killed when a "chiller" pipe exploded
- Suit against 5 employees who alleged worked on chiller months before accident.
- Suit was in their individual capacities.
- Defendants were not entitled to the defense of sovereign immunity merely because they are State employees, even when the tortious conduct is alleged to have occurred during the scope of their employment.
- The obvious intention of the General Assembly in enacting the Tort Claims Act was to enlarge the rights and remedies of a person injured by the actionable negligence of an employee of a State agency while acting in the course of his employment.
- A suit against State employees is not subject to the doctrine of sovereign immunity when brought against the employees in their individual capacities.
- Upon request of an employee or former employee, the State may provide for the defense of any civil or criminal action or proceeding brought against him in his official or individual capacity, or both, on account of an act done or omission made in the scope and course of his employment as a State employee." N.C.G.S. § 143-300.3 (2019)
- Decision was 4 to 3

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### Green v. Howell – COA-November 2020

- Plaintiff sued defendant city manager for libel per se arising out of emails defendant sent city council
- Plaintiff was former "NFL star" and businessman who proposed public-private partnership with City of Shelby for development of a sports complex on property owned by plaintiff.
- Plaintiff alleges defendant and its Mayor led him to believe they were for the project; however, in emails defendant discourage city counsel from going forward by saying plaintiff did not have the financial means and that plaintiff was trying to use public funds to develop Holly Oak Park
- Plaintiff alleged these statements were malicious, corrupt and beyond the scope of defendant's official duties.
- Defendant moved to dismiss attaching the entire email at issue based on Public Official Immunity under 12(b)(1), (2) and (6). COA dismissed appeal under (1)
- Denial of Motion to dismiss on Public Official Immunity is immediately appealable
- Absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence.
- A conclusory allegation that a public official acted maliciously or corruptly is not sufficient, by itself, to withstand a motion to dismiss.

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## Farmer v. Troy University- COA-March. 2021

- Case involved Interstate sovereign Immunity. Suit by employee for harassment against university which had recruitment office in Fayetteville
- Case was decided based on US Supreme Court holding in 2019 in Franchise Tax Bd. Of California v Hyatt that "States retain their sovereign immunity from private suits brought in the courts of other States."
- Court defined governmental immunity and sovereign immunity. Found defendant did not "waive" immunity
- Hyatt was not to be construed prospectively
- *Corum* claims fail because of interstate (not intrastate immunity). Adequate remedy analysis did not apply.

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## Wynn v. Frederick – COA-July 2021

- Defendant was an Orange County Magistrate who received an involuntary commitment affidavit and petition. Defendant issued findings and custody order that day and faxed it to UNC hospitals, but not the Sheriff.
- The attesting doctor called the next morning and inquired about why the patient had not been picked up.
- Magistrate said his mistakenly thought patient was at UNC, requested Doctor re-fax petition and affidavit.
- Before Order could be re-issued and served, patient entered home of his mother and shot her with a cross bow in the neck.
- N.C. Gen. Stat. § 58-76-5 provides "or other officer, may institute a suit . . . upon their respective bonds." Magistrate contends he was not "other officer." COA disagreed.
- Sovereign immunity applies when the government or a public official are sued in their official capacity while judicial immunity is an available defense for judicial officers sued as individuals. Here, Plaintiff only sued Defendant in his official capacity. Therefore, judicial immunity is not applicable in this cause of action

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## Butterfield v Grey –COA- Oct. 2021

- Plaintiff's decedent died of dehydration and malnutrition while in the jail and sued county sheriff, detention officers and contractor providing medical care to jail
- Trial court denied MSJ on immunity
- Appeal can be taken on immunity but denial of summary judgment as to Plaintiffs' direct constitutional claim is not immediately appealable
- Governmental immunity is not only an affirmative defense, "It is a complete immunity from being sued in court."
- Court upheld endorsement where "this policy is not intended by the insured to waive its governmental immunity as allowed by North Carolina"

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## Interlocal Agreements/Impact Fees

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## Anderson Creek v. County of Harnett –COA- Dec. 2020

- Development fees case involving water and sewer service "to be furnished" to developers for real estate projects.
- County prevailed because it had authority from interlocal agreement
- Public contracts such as interlocal agreement are subject to judicial notice
- When the plaintiff references or even incorporates contract into complaint, judgment on the pleadings can be appropriate
- Water and sewer districts had authority to collect prospective fees though county did not, and county and district can contract to allow county to collect fees
- (JVC Enterprises v Concord, March 2021) is a Supreme Court cases discussing local acts giving municipalities authority to levy water connection fees,

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## Absolute Immunity

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## Bouvier v. McCrory Committee-COA-Oct. 2021

- Libel case filed by voters in Guilford and Brunswick County who were subject of election protests “falsely, accusing Plaintiffs of double-voting against McCrory committee and law firm and attorneys.
- Plan was “to challenge known instances of votes being cast by dead people, felons or individuals who voted more than once”
- Attorneys were not licensed in NC and took position that this work was not the practice of law because they were not “entering appearances before any judicial bodies.”
- Denial of absolute privilege is immediately appealable like sovereign immunity (immunity from suit)
- COA concluded that while Porter—who was a party to a quasi-judicial election protest proceeding—is entitled to absolute privilege, the remaining Defendants—who did not make their allegedly defamatory statements while participating in election protest proceedings in any capacity (e.g., as parties, witnesses, or attorneys), and thus, did not make allegedly defamatory statements in the course of a quasi-judicial proceeding—are not entitled to the defense of absolute privilege.

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## Bouvier , continued

- “Our courts have held that statements are ‘made in due course of a judicial proceeding’ if they are submitted to the court presiding over litigation or to the government agency presiding over an administrative hearing and are relevant or pertinent to the litigation or hearing.”
- encompasses quasi-judicial proceedings
- Protests before local board are quasi-judicial
- Absolute privilege, like sovereign immunity, affects a substantial right

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## Administrative Law

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## Aetna et al v NC Dept. of Health and Human Services – COA-Sept. 2021

- Aetna and two others were unsuccessful bidders on statewide contracts for Medicaid managed care services under NC Medicaid Transformation Act.
  - Plaintiff timely sought administrative review and DHHS won that on summary judgment.
  - Plaintiff timely filed petition for judicial review but did not serve petition on DHHS's designated agent.
- § 150B-45(a) articulates the filing requirement for judicial review in the superior court: "the person seeking review must file a petition within 30 days after the person is served with a written copy of the decision. . . in the county where the contested case which resulted in the final decision was filed." N.C. Gen. Stat. § 150B-45(a) (2019) N.C. Gen. Stat. § 150B-46 provides the mandatory service requirement: "Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings."
- No statutory authority to allow superior court judge to extend time to serve petition.

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## MISCELLANEOUS

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## Quaicoe, by GAL Moses Cone Hospital, et al — COA-Nov. 2020

- Lien by NC State Health Plan from settlement in minor's med mal case. Medicaid lien was settled.
- Plaintiff filed motion to reduce lien and trial court dismissed based on "there is no case law or statutory authority for an equitable reduction or waiver of the Plan's lien under NCGS 135-48.37."
- The Plan shall have the right of subrogation upon all proceeds whether recovered by litigation, arbitration, mediation, settlement, or otherwise but limited to 50% of total damages.
- Court cannot reduce lien on principles of equity. Plaintiff's recourse is with the General Assembly because the judiciary should avoid ingrafting upon a law something that has been omitted which it believes ought to have been embraced.

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## New Hanover v Stein – COA- December 2020

- At issue was the Environmental Enhancement Grant Program grew out of settlement from lawsuits over swine waste
- AG retains discretion to award grants.
- Plaintiff contends that this is civil penalty and forfeiture fund under NC Const.
- Upon remand from NC Supreme Court the COA ordered the money deposited into the treasurer.
- Judge Bryant dissented.

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## NC State Treasurer v Riddick-COA –Nov. 2020

- Plaintiff 20 years in LGERS, 6 years transferred from TSERS and 2.5 years sick, for total of 29.08 years.
- N.C. Gen. Stat. § 128-38.4A(a) mandates a member of LGERS, who is convicted of a felony, must forfeit retirement benefits from LGERS, if the offense is committed while the "member is in service" and the felonious act is "directly related to the member's office or employment." N.C. Gen. Stat. § 128-38.4A(a) (2019).
- COA held that forfeiture statute was unambiguous, the ALJ and Superior Court did not err as to forfeiture issue but reversed as to conversion of sick leave.
- Plaintiff did not forfeit rights to RDSPF.
- COA found plaintiff forfeited all of her unused sick leave.

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## United Daughters of Confederacy v. City of Winston Salem, et al – COA-Dec. 2020

- Plaintiff placed a confederate monument. City ordered it moved to Salem Cemetery. Suit sought declaratory ruling as to ownership and preliminary injunction to return monument.
- Trial court concluded that plaintiff's membership requirement of genealogical relationship to a Confederate soldier was insufficient to convey standing, that plaintiff did not allege ownership or any "other legally enforceable right" to the statue sufficient to convey standing.
- COA affirmed based on lack of standing
- Judge Tyson dissented.
- COA majority said the dissent makes arguments for the plaintiff and dissent also cites to biblical passages that were not a part of the record nor presented to this Court on appeal.

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### Umstead Coal. V RDU Airport Authority- COA- Dec. 2020

- Deals with Airport authority's authority to lease land to private corporation for operation of stone quarry
- General Assembly over years expanded airport's authority to lease its lands without joining the governing bodies who created it. Plaintiff contended that authority exceeded its power by leasing without approval from governing bodies and violated state and federal law by not getting FAA approval.
- Plaintiff also contended that opens meeting law was violated by "private negotiations" and 48 hour notice and no public comment
- COA affirmed the trial court on all issue, finding 30 days notice does not apply because RDUAA is an entity created by public local laws

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### PUBLIC RECORD CASE

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### SELC v NC Railroad –SC–August 2021

- Public Records case arising out of light rail project between Durham and Chapel Hill
- Issue was whether the NC Railroad was a state agency subject to the public records act.
- State bought out all remaining shares in 1997 and is sole shareholder since 2006.
- Thirteen directors, seven of whom are appointed by the Governor, three of whom are appointed by the Speaker of the House of Representatives, and three of whom are appointed by the President Pro Tempore of the Senate
- Supreme Court held that the Railroad has been an independent, private corporation since it was chartered in 1849 and that, while the State does exert a considerable degree of control over the Railroad, it primarily exercises this authority in its capacity as the Railroad's sole shareholder rather than in its capacity as a sovereign.
- Railroad not subject to State ethics Act.

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