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

Clearinghouse

edited by
Ingrid M. Johansen

Cases and Opinions That Directly Affect North Carolina

State employees cannot sue their employers for monetary damages under the employment discrimination provisions of the Americans with Disabilities Act. Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).

Facts: The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117, generally prohibits employers—including state employers—from discriminating against qualified individuals on the basis of disability. It also requires employers to make reasonable accommodations for applicants and employees with disabilities, so long as the accommodations do not impose an undue hardship on the employer's business. Patricia Garrett, a registered nurse, filed an ADA claim against the University of Alabama after she lost her position at the university hospital because she took substantial leave time due to breast cancer.

The university moved to dismiss the suit, claiming immunity under the Eleventh Amendment to the United States Constitution. The Eleventh Amendment grants the states immunity from citizens' suits for monetary damages in federal court; however, Congress can statutorily waive this immunity under certain circumstances. Although the ADA contains an explicit immunity waiver, the university argued that Congress exceeded its authority in enacting this waiver. The case reached the United States Supreme Court.

Holding: The Court agreed with the university's position. The university (as well as other state entities) is immune from suits by individuals for monetary damages under the employment provisions of the ADA.

Congress may waive a state's Eleventh Amendment immunity from suit when Congress acts pursuant to a valid grant of constitutional authority. Section 1 of the Fourteenth Amendment to the United States Constitution prohibits state action that denies any citizen the equal protection of the laws. Section 5 of that Amendment grants Congress the authority to enact appropriate legislation to enforce the Amendment. Determining the scope of the authority granted by Section 5 is the role of the judiciary.

The Court has developed three standards for interpreting whether the Fourteenth Amendment's guarantee of equal protection has been violated in a given case. Which standard applies depends on the categorization of the group suffering discrimination. One standard applies when the government uses race-based classifications. Such classifications are inherently suspect and are subject to the strictest scrutiny; the Court will find them unconstitutional unless they serve a compelling governmental interest and are sufficiently narrowly tailored. A second standard applies to gender-based classifications. They are quasi-suspect and subject to intermediate scrutiny; the Court will find state action

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unconstitutional unless it is substantially related to an important governmental interest.

The third, and most common, standard is the one the Court uses to review discrimination by the government that is not directed against a suspect or quasi-suspect group. It is the least stringent standard, known as rational basis review. Under rational basis review, governmental discrimination against a nonsuspect group is constitutional so long as there is a rational relationship between the discrimination and some legitimate governmental purpose. Discrimination against persons with disabilities, the Court concluded, belongs to this last group. States are not required by the Fourteenth Amendment to make special accommodations for persons with disabilities so long as state actions are rational. Therefore, the Court continued, a state could rationally and constitutionally decide to conserve scarce financial resources by hiring employees who are able to use existing facilities without any accommodations.

In order for Congress' waiver of state immunity in the ADA to be constitutional, Congress must have found a pattern of unconstitutional state discrimination against persons with disabilities, and the remedies imposed by the ADA must be congruent with and proportional to the problem. However, the Court found that the legislative record supporting the ADA contained no evidence of a pattern of state Fourteenth Amendment violations. Furthermore, the ADA's remedy—requiring reasonable accommodations for qualified persons with disabilities—was disproportionate to the supposed problem.

The Court concluded by noting that its ruling did not leave persons with disabilities entirely without recourse against state discrimination. First, the ADA employment discrimination standards may still be enforced by the United States in actions for money damages against the state, and individuals may still enforce ADA employment discrimination provisions in actions for injunctive relief. In addition, state laws protecting persons with disabilities provide another avenue of relief.

North Carolina's sixty-day limitations period on filing a request for a due process hearing under the Individuals with Disabilities Education Act is acceptable so long as the party seeking the hearing receives the required statutory notice. C.M. v. The Board of Education of Henderson County, 241 F.3d 374 (4th Cir. 2001).

Facts: The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1412, requires public schools to provide a free appropriate public education (FAPE) to students with disabilities. The IDEA also gives students and their parents a variety of due process rights to protect this entitlement. These include the parents' right to request an administrative due process hearing (called a *contested case hearing* in North Carolina) when they and an educational agency cannot agree on an FAPE. Chapter 115C, Section 116, of the North Carolina General Statutes (hereinafter G.S.) and G.S. 150B-23 require that parents file a request for a contested case hearing within sixty days of receiving written notice of final agency action. The notice of final agency action must be accompanied by notice concerning the right to a contested case hearing, the procedures involved in the hearing, and the time limit for filing the hearing request.

On appeal to the Fourth Circuit Court of Appeals, two special education cases concerning this sixty-day limitations period were consolidated. Because the facts in each case are so similar, this digest treats only one case, *M.E. v. Buncombe County* [previously discussed in "Clearinghouse," *School Law Bulletin* 31 (Winter 2000): 38–39].

In *M.E. v. Buncombe County*, the parents of C.E., a student with autism, sought reimbursement from the Buncombe County (N.C.) school board for Lovaas therapy. The parents had secured Lovaas therapy for C.E. outside of the county school system because the board had offered only the TEACCH program in its proposed individualized education plan (IEP). C.E.'s parents and the board exchanged several letters concerning the reimbursement, but in none of these letters did the board provide the parents notice of its final decision to deny reimbursement or inform them that the sixty-day limitations period for filing a contested case petition was beginning. The board did, however, forward a copy of the current IDEA notice and attorneys' fees provisions.

When C.E.'s parents filed a petition for hearing in April 1998, the administrative law judge found that an August 1997 letter from the board constituted a final rejection of their claim, and thus the sixty-day limitations period barred it. A state review officer and the federal court for the Western District of North Carolina affirmed this ruling. C.E.'s parents appealed to the Fourth Circuit Court of Appeals, arguing that North Carolina's sixty-day limitations period was inconsistent with the goals of the IDEA, or, in the alternative, that they had never received notice of the board's final decision sufficient to trigger the running of the limitations period.

Holding: The appeals court held, with some reservation, that the sixty-day limitations period is consistent with IDEA goals, but agreed that C.E.'s parents had not received notice adequate to trigger the running of that period.

The IDEA itself sets no time limit on the request for a contested case hearing, leaving it to the states to choose one that is not inconsistent with IDEA goals. North Carolina law provides that IDEA contested case hearings be conducted in accordance with the state Administrative Procedure Act, which provides the sixty-day limit (G.S. 150B-23). This brief limitations period brings into focus two primary goals of the IDEA that are somewhat in tension. On the one hand, the IDEA seeks to ensure that students with disabilities receive their statutorily guaranteed FAPEs in a timely manner, and too long a limitations period could thwart this goal. On the other hand, the IDEA emphasizes the importance of parental participation at every stage of the process, and too short a limitations period could restrict cooperation and discussion between parents and school officials.

The court discussed cases from its own and other jurisdictions that have addressed the limitations issue in the IDEA context. The court noted that the most well-reasoned cases upheld short limitations periods only when they were accompanied by features—particularly adequate notice to the parents—that significantly mitigated the infringement on the due process rights of parents. In this respect, the court found North Carolina's statute unique in that it explicitly requires school officials to clearly and fully notify parents of the limitations period.

Although still concerned about the shortness of the sixty-day period, the court found another factor in its favor. Unlike most states, in which the IDEA limitations period is borrowed from a more general or analogous statutory setting (e.g., the statute of limitations for civil actions), the North Carolina legislature specifically mandated the sixty-day period in its own implementation of the IDEA. Therefore the limitations period is entitled to more deference from the court. Under these circumstances, the court found the limitations period acceptable.

Although the court found that North Carolina's sixty-day limitations period does not violate the IDEA, it found in the particulars of the *M.E.* case that the school system did not satisfy the statutory notice requirements. The system and C.E.'s parents had lengthy correspondence, and nothing in any of the letters indicated that one letter had any more significance or finality than the others. Nor did the board's inclusion of the IDEA handbook in one of the letters satisfy the notice requirement. Notice must be clear and explicit, stating that (1) the board has reached a final decision triggering the limitations period, (2) the limitations period is sixty days, and (3) the procedure for filing a contested case petition is as set forth in the handbook. C.E.'s parents are entitled to go forward with their claim.

Statewide interscholastic athletic association's enforcement of its rules constituted state action. Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S 288 (2001).

Facts: The Tennessee Secondary School Athletic Association (TSSAA) is a membership group organized to regulate interscholastic athletics among the Tennessee public and private high schools that belong to it. The TSSAA found Brentwood Academy, a private parochial high school and TSSAA member, guilty of exerting undue influence in recruiting athletes. The TSSAA placed Brentwood's athletic program on probation for four years, imposed a $3,000 fine, and declared its football and boys' basketball teams ineligible for the playoffs for two years. Brentwood filed suit alleging that the TSSAA's action violated the First and Fourteenth Amendments to the United States Constitution.

The federal court for the Middle District of Tennessee agreed with Brentwood, finding that the TSSAA's rule enforcement constituted governmental action or "state action" subject to constitutional restrictions; the court also found TSSAA's actions in violation of the First Amendment. On appeal, the Sixth Circuit Court of Appeals reversed, finding that the TSSAA was a private actor whose actions were not governed by the United States Constitution. Brentwood appealed to the United States Supreme Court.

Holding: The Supreme Court found that the TSSAA is a state actor subject to federal constitutional scrutiny.

The First through Eighth and the Fourteenth Amendments to the United States Constitution are applicable only to state action, not to private action. This distinction is not always as clear-cut as it sounds, however. State action may be found in actions performed by individuals or organizations acting outside of the government if there is such a close connection between the government and the challenged action that seemingly private behavior may fairly be attributed to the

government. What is fairly attributable to the government varies from case to case and no fixed criteria are used to make the judgment.

In this case, the pervasive intertwinement of public institutions and public officials in TSSAA functions convinced the Court that the TSSAA could fairly be called a state actor and held to constitutional standards. Although membership in the TSSAA is voluntary, 290 public schools and 55 private schools belong; public school membership constitutes 84 percent of the total membership. The TSSAA is controlled by a board elected from a pool of high school principals, assistant principals, and superintendents. TSSAA staff members are not paid by the state, but are eligible to join the state's public employee retirement system. The bulk of TSSAA revenues come from gate receipts at member teams' football and basketball tournaments.

Furthermore, since the TSSAA's establishment in 1925, the Tennessee State Board of Education has acknowledged its role in regulating athletic competition in the state's public schools and expressly enacted a rule designating the TSSAA as the organization so empowered. The rule granted the TSSAA this authority until revoked and ordered the state board's chairman to designate a person to serve in an ex officio capacity on the TSSAA's board. The rule also stated that the board would review, approve, and affirm TSSAA rules and regulations. In 1996, the board dropped this rule, but continued its relationship with the TSSAA without change.

With this degree of intertwinement, the Court found no considerations that would warrant treating the TSSAA as anything other than a state actor.

At-will employee has no due process rights. McCallum v. North Carolina Cooperative Extension Service of North Carolina State University, ___N.C. App.___, 542 S.E.2d 227 (2001).

Facts: The North Carolina Cooperative Extension Service of North Carolina State University discharged Benjamin F. McCallum from his job as an agricultural extension agent. McCallum filed suit alleging racial discrimination and retaliatory discharge in violation of both the United States Constitution and the North Carolina Constitution. He also filed a due process claim under the state constitution.

The federal court for the Middle District of North Carolina dismissed all of McCallum's federal law claims before trial, but when the matter moved to state court, the state court refused to dismiss McCallum's due process claim. The university appealed, arguing that as an at-will employee, McCallum had no due process rights upon termination and that therefore the court should have dismissed this claim as well.

Holding: The North Carolina Court of Appeals agreed that McCallum had no viable due process claim.

McCallum's due process claim was based on his contention that he had a mutual understanding with the university that gave him a property right to continued employment, thus entitling him to due process safeguards before his discharge. The court said that as an employee exempt from the State Personnel Act, McCallum had no statutory basis for claiming that he was other than an at-will employee. Nor was the court convinced by McCallum's evidence that the university had expressed an unqualified intention to change McCallum's at-will status. The court said that as an employee at will, McCallum had no property right in his employment and therefore no due process protection in his job.

Bus accident and student injuries arising from it were not caused by employee negligence. Stokes, Amerson, and Howard v. Johnston County Board of Education, In the North Carolina Industrial Commission, I.C. Nos. TA-15872, TA-15840, TA-15839 (Nov. 29, 2000).

Facts: On April 20, 1998, Linda Harris, a bus driver for the Johnston County (N.C.) Board of Education, picked up students from Johnston High School for the ride home. The regular route for the trip included Sunny Hill Road, a short dirt road connecting two paved roads. On this day the road appeared dry and had no visible puddles. Nonetheless, as Harris pulled to the left side of the road to avoid a parked tractor-trailer, the bus began sliding until the left tires were stuck up to the axles in mud. The right side of the bus then tilted upward, causing some students to fall toward the left.

School officials arriving at the scene found that only one student indicated that she was hurt, and she declined immediate medical treatment. They pulled the bus from the mud and followed it along the rest of the route. There were no further incidents. After the accident, three students, Taquila Stokes, Latreya Amerson, and Shanika Howard claimed (in separate suits) that they suffered injuries arising from Harris's negligent handling of the bus. A deputy commissioner of the Industrial Commission found that there was no negligence on the part of Harris or any other agent of the board and dismissed each of the students' claims. The students appealed.

Holding: The full Industrial Commission affirmed the ruling, finding no negligence in the bus accident.

Court of appeals affirms dismissal of former employee's age discrimination claim, finding that she voluntarily resigned her position. Browne v. Winston-Salem State University, No. COA99-1480 (N.C. App. Dec. 29, 2000) (unpublished).

Facts: Elaine Browne worked at Winston-Salem State University for twenty-two years, serving as director of student activities beginning in 1986. In 1996, a new vice-chancellor of student activities sent Browne a letter stating that she would be dismissed in two weeks because of her job performance. This letter contained notice of her right to appeal the termination through university procedures.

Instead of appealing, Browne requested that she be allowed to take early retirement. Browne's request was granted and she submitted a letter of resignation. Thereafter she filed a petition in the Office of Administrative Hearings claiming age discrimination. The claim was dismissed because Browne had voluntarily resigned. Browne appealed this ruling in superior court, arguing that she was constructively discharged from her position. In effect, she argued, the choice between resigning with benefits and dismissal was no choice at all. The court affirmed the earlier judgment, and Browne appealed to the North Carolina Court of Appeals.

Holding: The court affirmed the lower court ruling, holding that since Browne voluntarily resigned she could not pursue her claim.

Two factors weighed heavily in the court's analysis. First, the fact that Browne received notice of her appeal rights and chose not to appeal spoke to the voluntariness of her resignation. So, too, did her resignation letter. In addition, Browne's contention that she was forced to choose between resignation with benefits or dismissal was incorrect. Even if she had been dismissed, she would have been entitled—at the very least—to the return of her accumulated contributions to the retirement system, plus interest.

Race discrimination claim fails; university's employee handbook is not a contract. Gaither v. Wake Forest University, 129 F. Supp. 2d 863 (M.D.N.C. 2000).

Facts: Johnny Gaither worked for Wake Forest University as a groundskeeper for twenty years, until his discharge in 1998. According to the university, Gaither was discharged for failure to adhere to safety policies and procedures, careless performance of his duties, and continued failure to maintain established standards of workmanship and productivity. The university produced Gaither's personnel file in support of this contention. The file showed fourteen different policy infractions between 1992 and 1998, including one three-day suspension for removing university property without authorization.

Gaither claimed that his discharge was racially discriminatory and constituted a breach of contract. He filed suit in the federal court for the Middle District of North Carolina. The university moved to have his suit dismissed before trial.

Holding: The court dismissed Gaither's claim.

To prove his racial discrimination claim, Gaither was required to show that (1) he was a member of a protected group, (2) he was qualified for his position and performed it satisfactorily, (3) he was discharged in spite of his qualifications and performance, and (4) following his termination, the position remained open to similarly qualified applicants. Based on his record, the court found that Gaither failed to prove that his job performance was satisfactory. Because Gaither presented no evidence that racial discrimination, as opposed to job performance, was the real reason for his termination, the court dismissed this claim.

The court also dismissed Gaither's breach of contract claim, which was based on the university's employee handbook. Gaither believed that this handbook entitled him to notice and certain procedures before his termination. The court found, to the contrary, that the handbook contained explicit language stating that it created no contract between the university and its employees and that the employment relationship could be terminated by either party at any time for any reason.

Employee's knee injury did not arise out of or in the course of her duties as a nurse's assistant. Spease v. Wake Forest University School of Medicine, In the North Carolina Industrial Commission, I.C. No. 919908 (Oct. 25, 2000).

Facts: Bonnie Spease worked as a nursing assistant at the Wake Forest University School of Medicine. Her normal duties included measuring patients' height by placing her measuring tape on the top of a patient's head and squatting down to bring the tape to the floor. While performing this duty on November 16, 1998, Spease experienced pain in her left knee and was unable to return to a standing position. Her physician found a medial meniscus tear in her left knee. She had success-

ful surgery on the knee in March 1999 and returned to work a month later.

A deputy commissioner of the Industrial Commission found that Pease's knee injury arose out of and during the course of her normal duties and awarded her workers' compensation benefits. Wake Forest appealed the ruling.

Holding: The full Industrial Commission reversed the ruling. Pease was performing her duties in the usual and customary way at the time she was injured. No evidence revealed that she suffered a twisting injury to her left knee. Therefore Pease was not entitled to disability benefits.

Industrial Commission sets disability award based on fairness to the parties; authorizes school board credit for past overpayments. Scott v. Moore County Board of Education, In the North Carolina Industrial Commission, I.C. No. 712256 (Nov. 16, 2000).

Facts: Sandra Scott worked as a substitute teacher and athletic coach for the Moore County Board of Education. In December 1996 she suffered a compensable injury while coaching a basketball game and did not return to work after the eighteenth day of that month. The board paid her medical benefits, but did not begin paying disability benefits until August 1997. The Form 21 Agreement filed by the board contained several errors, including the setting of Scott's weekly compensation rate at $360.61, and listing the date of her injury as May 19, 1997. Benefits under this Form 21 did not begin until August 19, 1997. Scott contacted the board upon receiving her first check because the amount seemed too high, but the board indicated that the rate was correct. The board continued to pay at this rate until September 29, 1998.

Only when an attorney became involved was the error in weekly benefits discovered. Thereafter the board began paying Scott at the rate of $30 per week. Scott refused the board's request that she sign a letter agreeing to this modification. The board continued to pay the $30 weekly until the hearing before the Industrial Commission.

Holding: The Industrial Commission determined that the usual method of determining weekly disability benefits was inappropriate in this case. On the one hand, using Scott's average weekly wage based on the fifteen weeks she worked during the fall of 1996 was unfair to the board because it did not take into account the fluctuating nature of substitute teaching. On the other hand, averaging out those weeks over the year yielded a result unfair to Scott because it did not take into account that in the fall of 1996, she was available to teach and coach more than she had been in the past. Therefore the commission arrived at a compromise weekly rate of $62.48.

Although the board should have paid Scott benefits for the period between December 18, 1996, and August 19, 1997, and although it underpaid Scott from September 29, 1998, until the present date, the commission did not order the board to make up these payments because of the significant overpayment that Scott received between August 19, 1997, and September 29, 1998 (when the weekly rate was $360.61). The commission ordered the board to begin paying Scott the $62.48 weekly rate until she was able to work again, but noted that the board was not estopped from seeking credit for the overpayments to offset these payments.

Other Cases and Opinions

School district's antiharassment policy is unconstitutionally overbroad. Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001).

Facts: Students and their legal guardians (the plaintiffs) challenged the antiharassment policy of the State College (Pa.) Area School District (SCASD), claiming it violated the First Amendment. The policy defined harassment as "unwelcome verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile, or offensive environment." The policy also defined each kind of harassment. For example, it defined "other harassment" as harassment on the basis of characteristics such as "clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies, or values."

The plaintiffs identified themselves as Christians who feared that they would be subject to punishment under the policy for speaking out against homosexuality and other moral issues, as they said their religious beliefs compelled them to do.

The federal court for the Middle District of Pennsylvania granted the SCASD's motion to dismiss the plaintiffs' claim before trial, finding that the policy was

constitutional. The court believed that the policy prohibited nothing that was not already prohibited by federal and state antiharassment laws (e.g., Title VII, Title IX, and the Pennsylvania Human Relations Act) and therefore could not be unconstitutional. The plaintiffs appealed.

Holding: The United States Court of Appeals for the Third Circuit reversed the district court, finding the court wrong on all points and holding the policy unconstitutionally overbroad.

First, the court said, there is no categorical rule excluding harassing speech from the protection of the First Amendment. Some harassing speech may be prohibited within the limits of the Constitution because it facilitates a threat of discriminatory conduct—for example, a teacher saying to a student, "Sleep with me, or you fail this class." Other speech that meets the definition of harassment under the SCASD policy, such as "All Republicans are evil," might have a harassing purpose, but does nothing more than possibly elicit an emotional response in the hearer. Prohibiting speech based solely on its emotive impact is clearly unconstitutional; this speech is protected by the First Amendment.

Even assuming that the lower court had been correct in its ruling that harassing speech as defined by the federal antiharassment statutes was never entitled to First Amendment protection, the SCASD's policy exceeds the scope of federal antiharassment statutes such as Title VII and Title IX. Title VII is not violated by the utterance of an epithet or phrase that engenders offended feelings, or by mere discourtesy or rudeness, unless the utterances are so severe or pervasive as to constitute an objective change in the conditions of employment. Title IX requires utterances to be so severe, pervasive, and objectively offensive that they undermine and detract from the victim's educational experience and effectively deny the victim equal access to the institution's resources and opportunities. The SCASD's policy, however, punishes not only behavior that has the *effect* of substantially interfering with a student's educational experience but also behavior that has that *purpose*. In addition, neither Title VII nor Title IX prohibits harassment based on "other personal characteristics."

The court went on to examine whether the SCASD's policy could be justified as permissible speech regulation within the schools and concluded that it could not. Three primary Supreme Court cases set standards for speech regulation in the school context. The first, *Tinker v. Des Moines Independent Community School District* [393 U.S. 503 (1969)], held that regulation of student speech generally is permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students. This standard requires a specific or significant fear of disruption, not just a remote apprehension of a disturbance. The next two cases qualified *Tinker's* rule. *Bethel School District No. 403 v. Fraser* [478 U.S. 675 (1986)] ruled that there is no First Amendment protection for lewd, vulgar, indecent, and plainly offensive speech in school. *Hazelwood School District v. Kuhlmeier*, [484 U.S. 258 (1988)], ruled that a school may regulate school-sponsored speech (e.g., the school newspaper or intercom announcements) on the basis of a legitimate pedagogical concern.

Under these cases, the SCASD's antiharassment policy fails to meet First Amendment muster. Speech regulation is constitutionally overbroad when there is a likelihood that its very existence will inhibit free expression even by third parties who are not before the court complaining of it. The SCASD policy prohibits unwelcome verbal conduct that offends an individual because of some personal characteristic. This prohibition not only falls afoul of but also strikes at the heart of the First Amendment's guarantee of free speech. It is axiomatic that a school may not prohibit the expression of an idea merely because it may cause discomfort or be offensive or disagreeable. How could students have a political or religious discussion in these conditions?

Further, the speech prohibited by the SCASD policy is not only speech that threatens actual disruption, but also speech made with the purpose of causing such disruption—whether it does so or not. The policy's "hostile environment" prong does not require any threshold showing of severity or pervasiveness. Again, this leads to prohibition of speech that offends one person. Unless such speech threatens an actual disruption, is lewd, vulgar, indecent, plainly offensive, or school-sponsored, it is simply beyond the reach of the SCASD's regulatory powers. ■

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1999, by Ingrid M. Johansen

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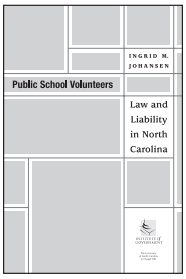

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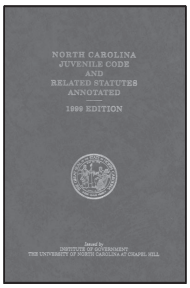

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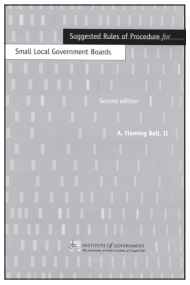

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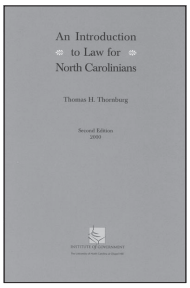

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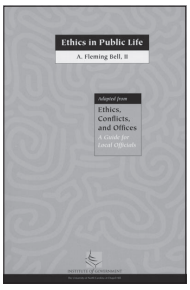

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