

# EDUCATION LAW

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NORTH CAROLINA  
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## Faculty, Staff and Students, Oh My!

BY JEN PALANCIA SHIPP

### The Chair's Comments

"She's a lawyer's lawyer."

We've all heard the phrase, and even possibly used it when referring to a colleague. The phrase evokes images of an Atticus Finch fighting for justice or the District Court lawyer representing 15 different clients in three different



Christopher Z. Campbell

Like the popular marketing catch phrase suggests: "Our strength is our people."

As my term as chair comes to a close, I want to thank the section council for all their hard work and friendship. Again, a special thanks to Phil Dixon and Doug Pungert for arranging and hosting our meetings in Greenville and Winston-Salem.

However, I would be remiss if I didn't give a very big THANK YOU to Jacquelyn Terrell-Fountain for her guidance and support. Our N.C. Bar Association is incredibly user-friendly for section leaders because of the talented staff and liaisons. Jacquelyn, serving as chair has been very enjoyable in large measure thanks to your assistance and guidance.

Finally, our Section CLE on May 12, 2006, will be outstanding thanks to the hard work of Jennifer Palancia Shipp and Carolyn Waller. We are thrilled to have LeRoy Rooker from the U.S. Department of Education, Family Policy Compliance Office coming to speak on student records issues and the Federal Educational

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*Editor's Note: The following article is part of a Young Lawyers Division initiative to provide practical, practice-specific assistance to new lawyers and to promote section involvement among young lawyers. Such articles will be published this year in nearly all of the NCBA's section and division newsletters.*

I always knew what I didn't want to do when I grew up. I didn't want a monotonous desk job. I didn't want my work to be my life. I didn't want to be resigned in a job I endured just to pay the bills. Fortunately, I discovered a professional position I love and I can honestly say mediocrity is not a word I have contemplated over the last five years. My law practice is in the public sector; in fact, I am a state employee. I accepted an in-house counsel position in a very small legal office at The University of North Carolina at Greensboro, a mid-major doctoral research institution and constituent member of the University of North Carolina System. My "job" offers the intellectual stimulation of a general legal practice, a single client comprised of a wonderfully diverse community, and the perfect opportunity to foster a balance of personal and professional quality of life.

When the Young Lawyers Division contacted me and asked me to write an article on my experience in an education law practice, I didn't know where to begin. My mind began to race with the myriad of entities and regulations to whom and within which a higher education institution reports and operates: federal and state courts and legislative bodies, UNC Office of the President, University Board of Trustees and chancellor, NCAA and Athletic Conference compliance, SACS accreditation, attorney general, Industrial Commission, Office of State Personnel, EEOC, U.S. Department of Education Office of Civil Rights and Federal Policy Compliance Office, and the list continues. However, there are some fundamental aspects of education law I have come to appreciate and upon which I focus to keep grounded in the fast-paced higher education environment. Effective legal practice in a higher education institution requires

an understanding of both the culture of a university community, including the diversity of the campus community and educational mission, and the politics within the institution and with the state, as well as knowledge and definition of the client, which are critical to a proactive, relationship-oriented practice essential to education law.

### Education

The sole purpose of the university is education, regardless of whether one's role is teaching, research or service. It is common for a higher education community to be addressed as a collective whole among greater society. We are proudly and affectionately known as "UNCG" and athletically, the "Spartans." The mission and common goal of the community is to foster intellectual discourse, understanding and growth for holistic development. University employees are also exposed to continuous learning opportunities in the dynamic educational environment, not only our students. The entire community is impacted personally and professionally by the transformational leadership possibilities in higher education. We learn and grow through the effort to make a difference in the lives of students and the greater community through, for example, student academic advising, development of patentable tech-

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## Comments *from page 1*

Rights Privacy Act. Rooker is renowned for his knowledge on the subject and will focus on recent changes to the law impacting secondary and post-secondary institutions. The program also includes presentations on hot topics such as the "Increasing Incidence of Student Psychological Needs" and "E-Discovery, Litigation Preservation and Conflicts of Interest in the Representation of a Diverse Client," just to name a couple. To close out the program, and back by popular demand, is Brian Shaw with his "Education Case Law Update."

In short, it's a lawyer's program!

I encourage everyone to stay active in our section. Our effectiveness as education lawyers depends on staying current with the law and on our ability to achieve positive outcomes for our clients. The contacts and professional relationships that you form among the diverse group of lawyers in our section will prove invaluable in your work life . . . and provide you with some wonderful friends in your personal life. ■

## 2006-07 NCBA Committee Service

Much of the work of the N.C. Bar Association is accomplished through its committees, and it will soon be time to begin the committee appointment process for 2006-07.

NCBA committee participation affords an excellent opportunity to meet and work with attorneys across our state and to make a significant contribution to the legal profession. The number of members on each committee is obviously limited, but we try to place as many people as possible.

If you would like to serve on an NCBA committee for the coming year, click on [www.ncbar.org/about/committees/memberForm.pdf](http://www.ncbar.org/about/committees/memberForm.pdf) to download an NCBA Committee Preference Form and committee description list.

Please complete and return the Committee Preference Form by April 14, 2006.

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## News to Note

### N.C. Attorney General Education Division Adds New Attorney

John Mann, formerly of the Raleigh office of Smith Moore LLP, has joined the Education Division of the North Carolina Attorney General's Office.

## Faculty *from page 1*

nology, or fostering student extracurricular leadership in athletics, service learning or student organizations. For university counsel, education may be defined as outreach as well as competence.

### Outreach

The Office of University Counsel at UNCG performs outreach to the campus community in a variety of media. Primarily, we espouse an open door policy and engage in campus events to create relationships with our clients. Fostering relationships creates positive interaction between our office and the campus which supports our vision for collaborative and proactive legal involvement. We conduct annual two-day seminars to identify, explain, and provide practical legal advice on current and recurrent legal issues impacting the campus community. We publish articles in frequently asked question format on hot topics and new or revised laws in the campus faculty and staff newsletter and on our website. We post helpful forms and our power point presentations on our website as additional resources to our clients. We frequently speak with departments and student classes and advise campus committees on various legal topics. Additionally, I hold an adjunct faculty appointment, informally advise students interested in a legal career, and teach a graduate Law of Higher Education course in the School of Education.

### Competence

Continuing education and awareness of case law and regulatory updates are critical to an effective education law practice. Not only do we educate the campus community about legal issues, but the inherent pre-requisite is the extent to which we must constantly create time to remain competent in the growing body of legislation and evolving judicial opinions that shape the practice of education law. Some higher education institutions retain law firms for legal advice; some institutions have a solo practitioner or a couple of attorneys on staff; other institutions have a large office with as many as nine staff attorneys. The number of campus attorneys dictates the ability of each counsel to specialize in one or more particular fields of law. At UNCG, we have an office of two attorneys who must both remain current on all areas of law. This is both exciting to engage in a general practice and yet a challenge to allocate time to maintain competence in a plethora of possible legal issues affecting the institution. I cannot honestly recall any two days of work that were alike. This is what I referred to earlier as the avoidance of monotony, and sometimes high volume and higher priority matters arise that cause me to throw my "to do" list under a pile; flexibility and multi-tasking become imperative.

A general practice in higher education includes working with and advising several institutional divisions which share the oversight of institutional governance. The following is a typical hierarchy of management at a higher education institution:

♦**Academic affairs:** faculty governance, promotion and tenure, research, enrollment management, undergraduate admissions, financial aid, academic support services, graduate school, registrar, continual learning, academic schools and curriculum, international programs, institutional review board, research institutes and centers. Library, student success center, study abroad, technology transfer, teaching and learning center

♦**Business affairs:** campus police, office of safety, purchasing, risk management, physical plant, payroll, auxiliary services, facilities design and construction, controller, internal auditor, human resource services, affirmative action, buildings and grounds, accounting services, foundations, graphics printing and postal services, finance, cashier and student accounts, contracts and grants, housekeeping, motor pool, parking

♦**Advancement:** development, planned giving, annual giving, capital campaign, public relations, media relations, marketing and promotions, publications, alumni affairs

♦**Information technology:** networks, management information systems, security, regulatory compliance, telecommunications, systems, data services, data management, project management, technical support, client services, tele-learning and teleconference center

♦**Student affairs:** student conduct, student organizations, student life, disability services, housing and residence life, career services, student health services, wellness center, counseling and testing center, orientation, campus recreation, student employment, leadership and service learning, multicultural affairs, student government, student media

♦**Intercollegiate athletics:** student-athlete welfare, coaches, NCAA and conference compliance, academic enhancement, athletic training, drug testing, athletic facilities, camps, athletic booster club

The breadth of the educational units identified above raises potential practice matters in multiple fields of law, including federal and state regulatory compliance, nonprofit law, taxation, constitutional law, corporate, intellectual property, disability, employment, discrimination, tort, real property, construction, contracts, wills, trusts and estates, international law, civil rights, health law, and litigation. In the five years I have been practicing education law there were significant legislative and court holdings that impact higher education including, but not limited to:

- ♦Health care practice and human subjects research (HIPAA);
- ♦Employment law (FLSA);
- ♦Information technology (DMCA and CALEA);
- ♦Intellectual property (Teach Act and Bayh Dole Act);
- ♦Nonprofit governance (Gram Leach Bliley and Sarbanes Oxley);
- ♦Athletic marketing and business auxiliary services (UBIT);
- ♦Construction (N.C. state laws);
- ♦Records management (FERPA, **Enron**, **Arthur Andersen**, NC Public Records Act and **McCormick v. Hanson**);
- ♦Academic freedom and affirmative action (**Grutter and Gratz v. Bollinger**);
- ♦International students (SEVIS and USA Patriot Act);
- ♦Research materials (USA Patriot Act);
- ♦International employee eligibility to work (USCIS formerly BCIS or INS); and
- ♦Athletic eligibility (NCAA).

One fundamental principle we all learned in law school was awareness of what resources are available and where to find them. With the genesis of the Internet and computers, practicing education law is facilitated by online research accessibility for case law, federal regulations and general statutes, national and state legal association resources, collegial colleagues, electronic mail LISTSERVs, and institutional policies and procedures. The key is to recognize the legal issue and know where and how to find the resources necessary to become competent and appropriately advise the client accordingly. Finally, it is critical that we do not forget common sense and practical logic amid our thorough research and delving into the cobwebs of our experience and legal training. Often, a conflict or issue is not truly a legal quagmire but more aptly defined as a difficult situation, perhaps political, for which a client requests counsel. I am mindful of my law professors who reminded us that this is a profession and our role is often both as "attorney and counselor at law."

### Politics

Politics permeates higher education, particularly when the university was created by the state legislature, as is the case of the UNC System. I learned early in my previous professional career as a student affairs administrator that politics is an inherent component of any university. A university operates almost as a city in and of itself. There are multiple and diverse divisions of the community including faculty, staff and students, relationships with the greater city community ("town-gown relations"),

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## Faculty *from page 3*

and relationships with the state including the legislature upon which we rely for financial support as well as legal compliance as an agency of the state. Political pressures swell and relationships are most critical to effective practice when resources are scarce, particularly in a decentralized institution. The key is to remember that we are all “on the same team” and want the best quality education for our students. Ultimately, it is ALL about relationships. Reasonable minds may differ and often do in an environment proud of its tradition as “the free marketplace of ideas” coined by the U.S. Supreme Court in **Lamb’s Chapel v. Moriches**, but it is comforting in an educational setting to experience the quintessential aspects of a higher education community, such as collegiality, committees, collaborative decision making, and acceptance for the fundamental principles of the community. At UNCG, these fundamental principles are “honesty, trust, fairness, respect and responsibility.” These principles are addressed in the Student Code of Conduct in the context of integrity to ensure “a campus environment conducive to a peaceful and productive living and study.” It is in this context that university counsel are often asked to advise committees and individuals as “counselor.” I am ever mindful of the fact that legal requirements are minimum requirements and often “doing the right thing” means doing more than the law requires. It is important, however, to remain mindful of the limitations of our position as legal counsel; as with any other legal practice, the policy and other decisions remain those of our client.

## Conflicts of Interest

One of the greatest challenges about which I am conscious is that my sole client is the university. The inherent dilemma is that the client does not operate but for the employees and students who work for and attend the institution. University counsel can neither provide legal advice to students and employees regarding a personal matter nor can counsel provide legal advice to employees in a matter which the employee maintains an adversarial claim or conflict with the university. It is good practice to ask students and employees if they are performing the function or are seeking advice on behalf of the university because otherwise I cannot provide legal advice, and they may be sharing information with opposing counsel if they file a complaint. Additionally, there is the potential for many conflicts of interest and commitment with respect to privately created nonprofit entities created for the sole purpose of supporting the university. These entities may be an athletic booster club, a foundation, or a corporate spinoff created from institutional intellectual property consistent with the Bayh Dole Act. There are cases when it is helpful to have at least two staff attorneys. In such cases, we create a firewall consistent with the Rules of Professional Conduct so that one of us may properly advise the Chancellor with respect to a final decision while the other may advise a hearing or investigative body on policy and procedural matters who will provide a recommendation to the Chancellor. A good example of such a situation is in an appeals process for a faculty non-reappointment or denial of tenure proceeding.

## Conclusion

Conducting a legal practice in higher education requires flexibility in a fast-paced, high-volume, and diverse, general practice environment. In-house counsel in a higher education institution is a unique setting in which to practice law. It is also the most rewarding professional opportunity I can imagine. This article is a small porthole providing a glimpse of education law on a college campus, but I hope it is interesting and informative for law students and other young lawyers interested in education law. ■

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# Confidential Personnel Information

## Civil and Criminal Liability

BY NEAL A. RAMEE

As attorney for a board of education, you sit in closed session as the board conducts the superintendent's annual evaluation. During the evaluation, a newly elected board member, who had campaigned on a platform of firing the superintendent now under review, angrily charges that the superintendent has failed to adequately monitor the condition of the county's schools.

"Some of these schools are literally falling apart," the board member exclaims. "They're not safe. We're hearing from parents; we're hearing from principals—why aren't we hearing anything from the superintendent?"

Following some discussion, the board agrees to ask the superintendent for a supplemental report on the physical condition of all schools in the county. The board then considers other aspects of the superintendent's performance, and, for various reasons, assigns the superintendent a substandard composite rating.

Two days later, you open the newspaper to discover the following headline: "Board of Education Gives Superintendent Failing Marks for Deteriorating Schools." The article discusses in detail information contained in the superintendent's personnel file, including her cumulative ratings for the past four years. At the office, your phone is ringing off the hook. Board members are concerned about the apparent leak, and the superintendent is incensed.

"My job evaluations are confidential personnel information," she fumes. "It's obvious that a board member leaked them to the press, and it's pretty obvious who that is. I'm going to talk to a lawyer about this—this is a clear violation of the law."

After fielding a few more phone calls, you close your door and survey the situation. It seems clear that one or more board members must have disclosed confidential personnel information to the press. And you know that Article 21A of Chapter 115C generally prohibits disclosures of confidential personnel information. But are individual board members subject to civil or criminal liability for prohibited disclosures? Is the board as an entity potentially liable?

### Privacy of Employee Personnel Records

Article 21A of Chapter 115C protects the confidentiality of information contained in the "personnel files" of former employees, current employees, and applicants for employment with local boards of education. N.C.G.S. § 115C-319. A "personnel file" is defined as "any information gathered by the local board of education which . . . relates to the individual's application, selection or nonselection, promotion, demotion, transfer, leave, salary, suspension, performance evaluation, disciplinary action, or termination of employment wherever located and in whatever form." *Id.* Apart from the employee's name, title, current position and salary, and the dates of certain recent personnel actions, any information contained in such a "personnel file" is exempted from the Public Records Act and is deemed "confidential and not . . . open for inspection or examination" except to (1) the employee or his agent, (2) the superintendent or other supervisory personnel, (3) members of the board or the board's attorney, and (4) a party by authority of a subpoena or court order. N.C.G.S. §§ 115C-320, 321. As an exception to this general rule of nondisclosure, a superintendent or board may "inform any person or corporation of any promotion, demotion, suspension, reinstatement, transfer, separation, dismissal, employment or nonemployment of any applicant, employee or former employee . . . provided that the board has determined that the release of the information or the inspection and examination of the file or any portion is essential to maintaining the integrity of the board or to maintaining the level or quality of services provided by the board." N.C.G.S. § 115C-321(b). In such a case, the superintendent must, prior to the release of the otherwise confidential information, prepare a memorandum explaining why this exception is applicable. *Id.* This memorandum must be retained as a public record. *Id.*

Article 21A of Chapter 115C is modeled after Article 7 of Chapter 126 and Article 7 of Chapter 160A, which protect the confidentiality of information in the personnel files of state and local government employees, respectively. N.C.G.S. §§ 126-24 to 126-29; N.C.G.S. §§ 153A-98, 160A-168. All three statutes expressly exempt confidential personnel files from the Public Records Act. N.C.G.S. §§ 115C-319; 126-22; 160A-168(a). Moreover, the statutes contain virtually identical definitions of "personnel files" and exceptions permitting the

disclosure of confidential information to protect the integrity or maintain the quality of services of the relevant government entity. *Compare* N.C.G.S. § 115C-319 to 115C-321 *with* N.C.G.S. §§ 126-22 to 126-29 *and* N.C.G.S. § 160A-168. Given the nearly identical purpose, structure, and language of these three statutes, courts will almost certainly construe them consistently.

### Criminal Liability for Certain Unauthorized Disclosures

On Aug. 16, 2005, the General Assembly amended section 115C-321 by adding subsections (c) and (d), which provide for criminal penalties for intentional violations of the statute. N.C. Sess. L. 2005-321. These amendments became effective on Dec. 1, 2005, and apply to offenses committed on or after that date. *Id.* Under new subsection 115C-321(c), a "public official or employee" is guilty of a Class 3 misdemeanor punishable by a fine of up to \$500 if that person "knowingly, willfully, and with malice permits any person to have access to information contained in a personnel file" in violation of the statute. N.C.G.S. § 115C-321(c). Under new subsection (d), any "person," whether employed by the school system or not, is guilty of Class 3 misdemeanor punishable by a fine of up to \$500 if that person "knowingly and willfully examine[s] in its filing place, remove[s], or cop[ies] any portion of a personnel file" without statutory authorization. It is worth noting that the new subsections impose criminal liability on *individuals* who intentionally breach the privacy of personnel records. They do not purport to create any new burdens or liabilities on local boards of education as entities.

The recent amendments bring section 115C-321 into even greater conformity with Article 7 of Chapter 160A, by adopting the latter's criminal penalty provisions nearly verbatim. To date, however, neither statute's criminal provisions have been definitively construed by a North Carolina appellate court, and there are certainly some unanswered questions about their scope.

For example, under sections 115C-321 and 160A-168, unauthorized disclosures by public officials or employees must be made "knowingly, willfully, and with malice" before criminal liability will attach, whereas the unauthorized examination, removal, or copying of personnel files need

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only be “knowing[] and willfull[.]” N.C.G.S. § 115C-321(c), (d). (By contrast, the criminal penalty provisions in section 126-27 omit the “malice” requirement for disclosures by public officials or employees and impose a unitary “knowing[] and willfull[.]” standard for both types of violations.) While it should therefore be assumed that there is a significant difference in the *scienter* requirements for unauthorized disclosures of personnel files and unauthorized *examination, removal, or copying* of such files, no North Carolina appellate court has construed the meaning of the term “malice” as used in either statute. Because definitions of “malice” vary greatly across legal contexts, it is an open question how courts will construe the term as an element of a criminal action brought under N.C.G.S. § 115C-321. Compare **Brown v. Dodson**, 166 N.C. App. 279, 603 S.E.2d 167 (2004) (unpublished) (in applying the public official immunity doctrine, a “[public official] acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another.”) with **Williams v. Boylan-Pearce, Inc.**, 69 N.C. App. 315, 319, 317 S.E.2d 17, 20 (1984), *aff’d per curiam*, 313 N.C. 321, 327 S.E.2d 870 (1985) (defining “actual malice” standard in malicious prosecution claim as “ill-will, spite, or desire for revenge, or under circumstances of insult, rudeness or oppression, or in a manner evidencing a reckless and wanton disregard of [plaintiff’s] rights”) with **State v. Wilkerson**, 295 N.C. 559, 247 S.E.2d 905 (1978) (defining “malice” element of second-degree murder as “wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief”) with **State v. Conrad**, 275 N.C. 342, 168 S.E.2d 39 (1969) (noting that the word “maliciously” in a criminal statute proscribing malicious damage to an occupied building “connotes a feeling of animosity, hatred or ill will toward the owner, the possessor, or the occupant”).

In any event, school board attorneys would be well-advised to inform their clients about the new criminal provisions. Indeed, informing school system employees that they may be subject to criminal sanctions for violations of the statute may be an attorney’s most effective means of communicating the importance of maintaining confidentiality in personnel records.

## **No Private Right of Action Under N.C.G.S. § 115C-321**

Apart from the criminal penalties described

above, are boards of education or school officials potentially liable for monetary damages under section § 115C-321? Although no North Carolina appellate court has expressly addressed this particular question, the answer almost certainly is “no.”

The North Carolina Court of Appeals has stated that “our case law generally holds that a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute.” **Vanasek v. Duke Power Co.**, 132 N.C. App. 335, 339, 511 S.E.2d 41, 44 (1999). Section 115C-321 contains no such language. Moreover, North Carolina courts have recognized that the purpose of laws limiting access to the personnel records of other public employees is to protect the privacy of personnel records by creating specific exemptions to the North Carolina Public Records Act. See **News and Observer Pub. Co., Inc. v. Poole**, 330 N.C. 465, 476, 412 S.E.2d 7, 14 (1992) (interpreting N.C.G.S. ch. 126, art. 7); **Knight Pub. Co. v. Charlotte-Mecklenburg Hosp. Authority**, \_\_\_ N.C. App. \_\_\_, 616 S.E.2d 602 (2005) (applying statutory provisions related to public hospital employees). Article 21A of chapter 115C, entitled “Privacy of Employee Personnel Records,” should likewise be construed as creating an exception to the Public Records Act.

In **Houpe v. City of Statesville**, a former city employee brought suit against the city and named city officials, in their individual and official capacities, seeking monetary damages for, among other things, an alleged violation of section 160A-168. 128 N.C. App. 334, 497 S.E.2d 82 (1998). The plaintiff, a former police officer, claimed that the police chief and one other officer had published information in his confidential personnel file to other police officers without statutory authorization. *Id.* at 351, 497 S.E.2d at 93. Noting that the statute “specifies violation thereof to be criminal, *i.e.*, a ‘misdemeanor’” and “authorizes fines of no more than \$500” upon conviction, the Court held that the statute did not create a private right of action. *Id.* In rejecting plaintiff’s arguments to the contrary, the Court reasoned that “neither the language of the statute nor any case law cited by plaintiff interpreting the statute” supported his contention that the statute “creates a civil right of action.” *Id.* In further support of this holding, the Court cited **Lenzer v. Flaherty**, 106 N.C. App. 496, 514, 418 S.E.2d 276, 287, which held that section 122C-66(b), a statute providing that failure to report certain forms of patient abuse is a misdemeanor, “is criminal in nature” and will not support a civil claim for damages. *Id.*

In light of **Houpe**, any lingering question as to whether section 115C-321 creates a private right of

action was definitely settled by its recent amendments. Like section 160A-168, section 115C-321 does not contain any language to suggest that the General Assembly intended to create civil liability. Indeed, since the recent amendments, the statute specifically provides that unauthorized disclosures of confidential personnel information are *misdemeanors* punishable by fines up to \$500. As noted above, section 115C-321 is virtually identical to section 160A-168 in structure, purpose, and effect. Thus, it seems clear that Article 21A of Chapter 115C does not support a civil claim for damages.

## **Other Possible Causes of Action**

Although **Houpe** forecloses a civil lawsuit brought directly under Article 21A of Chapter 115C, school board attorneys should be aware that violations of that Article may support civil claims predicated on other, non-statutory, theories of recovery. The remainder of this article briefly discusses some of these potential theories.

### **Breach of Contract**

Statutory provisions may become terms of an employment contract if they are expressly incorporated by reference therein. See, *e.g.*, **Still v. Lance**, 279 N.C. 254, 182 S.E.2d 403 (1971) (statutory provisions concerning termination of public school teachers were expressly referenced in teacher’s employment contract and thereby became terms of the contract); cf. **Walker v. Westinghouse Elec. Corp.**, 77 N.C. App. 253, 335 S.E.2d 79 (1985) (unilaterally promulgated employment manuals or policies are not part of an employment contract unless expressly incorporated therein). Thus, an employment contract that *expressly references* section 115C-321 could arguably create a private right of action for breach of contract in the event of unauthorized disclosures of confidential personnel information. No court, however, has recognized an *implied* contractual right to seek damages under section 115C-321 or its counterparts in Article 7 of Chapter 126 and Article 7 of Chapter 160A.

### **Substantive Due Process Claims**

In **Toomer v. Garret**, 155 N.C. App. 462, 574 S.E.2d 76 (2002), the plaintiff, a former employee of the state Departments of Correction and Transportation, filed suit against both departments, alleging that public officials had released highly personal information in his personnel records to news media in retaliation for plaintiff’s assertion of employment discrimination claims against them. Plaintiff alleged that the information disclosed included his photograph, home address, Social

Security number, educational history, credit history, retirement data, financial information, names and addresses of his family members, and other highly personal and private information. *Id.* He also alleged that the disclosures were made “outside the scope of [defendants’] authority, maliciously, and in bad faith.” *Id.* Among his many claims for relief, plaintiff asserted § 1983 claims against the departments and named officials in their official capacities, arguing that the disclosure of this information violated his substantive due process right to privacy in highly personal information. *Id.*

On appeal, the Court of Appeals reversed the trial court’s dismissal of this claim. *Id.* Declining to decide whether plaintiff had a fundamental right in the privacy of such information, the court held that the facts alleged in plaintiff’s complaint were “so egregious, so outrageous, that [they] may fairly be said to shock the contemporary conscience” and therefore that plaintiff had stated a cognizable due process claim under the state and federal constitutions. *Id.* at 470, 574 S.E.2d at 84 (quoting **Hawkins v. Freeman**, 195 F.3d 732, 738 (4th Cir. 1999)). However, the court sustained the trial court’s dismissal of all plaintiff’s Section 1983 claims for monetary damages, holding that plaintiff was limited to injunctive relief for those claims. *Id.* (citing **Corum v. University of North Carolina**, 330 N.C. 761, 413 S.E.2d 276 (1992)). Thus, **Toomer** establishes that the intentional disclosure of highly personal information in a personnel file may sustain a constitutional due process claim, at least where the information disclosed is so personal and the state action so “egregious” as to “shock the conscience,” but that such a claim will not result in an award of monetary damages.

### Procedural Due Process

The plaintiff in **Toomer** further argued that he was not provided with procedural due process protections with regard to the disclosure of information in his personnel file. In upholding the trial court’s dismissal of this claim, the Court of Appeals held that although section 126-22 gives plaintiff a “legitimate expectation of continued confidentiality for his state personnel file,” that interest was “not the kind of ‘monetizable’ property interest generally protected by procedural due process.” *Id.* Thus, **Toomer** effectively closes the door on procedural due process claims premised on the unauthorized disclosure of confidential personnel information.

### Equal Protection

The plaintiff in **Toomer** also brought section 1983 claims premised on alleged violations of his state and federal constitutional rights to equal protection under the law. In support of these claims, plaintiff alleged that his confidential personnel files

were released arbitrarily, capriciously, intentionally, and without justification, whereas “the files of similarly situated employees were not released.” *Id.* In reversing the trial court’s dismissal of this claim, the Court of Appeals held that plaintiff had stated a valid section 1983 claim for violation of the Equal Protection Clause under the “class of one” theory. *Id.* Emphasizing that the egregious facts alleged in the complaint failed to evince any rational basis for the defendants’ allegedly differential treatment of plaintiff, the court held that plaintiff had stated a claim under the state and federal constitutions and section 1983. It should be emphasized, however, that this holding is limited to the unusual situation presented in **Toomer**, in which the “intentional and unjustified disclosure of the entire contents of [plaintiff’s] personnel file” for retaliatory reasons “over[came] the high level of deference accorded to governmental action on rational basis review.” *Id.*

### Tortious Invasion of Privacy

Next, the **Toomer** court examined plaintiff’s claim that the intentional and retaliatory disclosure of his personnel records constituted tortious invasion of privacy under the “intrusion into seclusion” theory. *Id.* To recover under this tort theory, a plaintiff must show that the defendant’s intrusion into his private affairs was (1) intentional and (2) “highly offensive to a reasonable person.” **Smith v. Jack Eckerd Corp.**, 101 N.C. App. 566, 400 S.E.2d 99 (1991), Recognized forms of intrusion include “physically invading a person’s home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another.” **Hall v. Post**, 85 N.C. App. 610, 615, 355 S.E.2d 819, 823 (1988). Comparing plaintiff’s allegations to such recognized forms of intrusion, the Court concluded that the intentional disclosure of plaintiff’s entire personnel file, “especially where it includes sensitive information such as medical diagnoses and financial information” would be “highly offensive to a reasonable person” and therefore stated a claim for relief. Thus, **Toomer** suggests that courts may be receptive to invasion of privacy claims based on the unauthorized release of personnel files, at least where the disclosure was intentional and the information released included highly personal information such as “medical diagnoses” and “financial information.”

### Negligence

Finally, the **Toomer** court reversed the trial court’s dismissal of plaintiff’s claim against the defendants for “gross negligence,” a heightened form of negligence which requires proof of the elements of ordinary negligence in addition to a

showing of “conscious or reckless disregard for the rights and safety of others.” *Id.* In applying traditional negligence principles, the court held that the personnel record privacy provisions of sections 126-22 and 126-24 established a duty on the part of the defendants “to keep the information in [plaintiff’s] file confidential” and therefore that plaintiff had stated a cognizable claim. The court did not, however, suggest that violation of the statute constituted negligence *per se*. See *id.*

Arguably, **Toomer**’s recognition of a negligence claim predicated on violation of section 126-22 is inconsistent with **Houpe**’s holding that section 160A-168, a virtually identical statute, does not create a private right of action. Given that there is no right to seek monetary damages under the act itself, it makes little sense to permit a claim for monetary damages for negligent failure to comply with the statute. Such a principle, taken to the extreme, would effectively permit courts to usurp the General Assembly’s prerogative to create or not create private rights of action under particular statutes. Moreover, there is a strong internal inconsistency in the notion that a *criminal* law proscribing *intentional* unauthorized disclosures will support a *civil* claim for *negligent* unauthorized disclosures. Thus, the viability of negligence claims based on alleged violations of section 115C-321 is questionable at best.

### Conclusion

Sections 319, 320, and 321 of the North Carolina General Statutes impose a duty on boards of education and school administrators to maintain the confidentiality of personnel files except as expressly provided by statute. As recently amended, section 115C-321 provides for criminal penalties, punishable by fines up to \$500, for knowing, willful, and malicious unauthorized disclosures. It also provides for criminal sanctions for knowing and willful inspection, copying, or removal of confidential personnel records by “any person” without statutory authorization. Although the statute does not create a private right of action, unauthorized disclosures may potentially subject boards or individual school officials to liability under various constitutional and common law theories of recovery. Although principles of sovereign, public official, and qualified immunity may bar many such claims, school board attorneys should bear these alternative theories of recovery in mind as they advise their clients with respect to the statutory confidentiality provisions. ■

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