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Miscellaneous

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MISCELLANEOUS

I. PRIORITY OF ATTORNEY FEES

Standard Savings & Loan Association v. Evans[1] was an action by a first mortgagee against the mortgagor and the United States, as second mortgagee, to foreclose a mortgage. The Richland County Common Pleas Court held that the first mortgagee's attorney fees should be paid before the second mortgage debt. The United States, representing the Small Business Administration, appealed, and the decision was affirmed by the South Carolina Supreme Court.

The United States argued that the mortgage lien against the property was a prior claim to the attorney's fee and that the Federal common law rule of "first-in-time, first-in-right" was applicable.[2] The court stated that the cases cited by the government were decided prior to the Federal Tax Lien Act[3] which makes local law applicable as to priorities. In interpreting this Act the lower court held:

> The new Federal Tax Lien Act, which became effective November 2, 1966, extends the priority of plaintiff's mortgage to include not only the debt and interest, but also taxes, attorneys' fees, cost of property insurance and costs of the action. The local law now prevails as to priority.[4]

The court's ruling was consistent with *Ault v. Harris*[5] which applied the rule established by Congress in tax cases to a similar situation. *Ault* found that local law prevails, and "[t]here is no question but under local South Carolina law[6] the first mortgage attorney fee ranks prior to the second mortgage debt."[7]

II. HAIR LENGTH REGULATIONS

Rumler v. Board of School Trustees[8] was an action instituted to obtain a preliminary injunction with respect to school district regula-

1. 255 S.C. 207, 178 S.E.2d 145 (1970).
2. United States v. Equitable Life Assurance Soc'y, 384 U.S. 323 (1966); United States v. Pioneer Am. Ins. Co., 374 U.S. 84 (1963).
3. 26 U.S.C. 6323 (1967).
4. 255 S.C. at 210, 178 S.E.2d at 146.
5. 317 F. Supp. 373, *aff'd*, 432 F.2d 441 (9th Cir. 1970).
6. S.C. CODE ANN. § 45-55 (1962).
7. 255 S.C. at 210, 178 S.E.2d at 147.
8. 437 F.2d 953 (4th Cir. 1971).

tions regarding hair length of male students. The Fourth Circuit Court of Appeals stated that since the students had cut their hair and had been readmitted to school, they did not show a case of irreparable injury necessary for granting an injunction. Without reaching the merits of the restrictive regulation, the court affirmed the district court's denial of injunction.

This was the first hair length case to reach the Fourth Circuit, and it came before the court factually undeveloped. It seems inevitable that in the future this court will have the opportunity to decide whether a student's decision as to hair length is a fundamental, constitutionally protected right that need not yield to school regulation. This question has been presented to four circuit courts[9] across the nation and the results are divided.

The primary determinations which had to be made by the courts were whether a student's decision to wear his hair long is a constitutionally protected right, and secondly, whether the state presents sufficient evidentiary justification to infringe on that right. In considering these questions, only *Jackson v. Dorrier*[10] rejected completely the proposition that students have a constitutionally protected right to wear their hair at any length or in any manner. In *Richards v. Thurston*[11] the court found this right to be one of personal liberty established by the Due Process Clause of the fourteenth amendment, believing that:

> '[l]iberty' seems . . . an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty.[12]

The opinion of the court in *Crews v. Cloncs*[13] stated it was an ingredient of personal freedom because it is one of those additional constitutional rights not specifically mentioned in the Bill of Rights. The *Crews* court found justification for its position in history, quoting the Supreme Court:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the

9. Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969); Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir. 1968).

10. 424 F.2d 213 (6th Cir. 1970).

11. 424 F.2d 1281 (1st Cir. 1970).

12. *Id.* at 1284-85.

13. 432 F.2d 1259 (7th Cir. 1970).

> possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.[14]

After a personal right has been determined to exist, the school board must show a state interest justifying its intrusion on this right. The nature of the liberty and the context in which it is asserted must be considered along with the extent to which the intrusion is confined to legitimate public interest to be served. To satisfy this substantial burden of justification, school boards have presented various reasons for their regulations, which include: 1) Long hair distracts fellow students from their work; 2) Students whose appearance conforms to community standards perform better in school; and 3) Long hair is a health and safety problem.

> It is interesting to note that . . . virtually no school board has placed reliance on the educational per se function as a justification for such regulations. . . . This undoubtedly reflects the general distaste in our society for coercive education per se rules except those regulating affirmative student conduct that takes place on school grounds, conduct for which there is a sense of immediate school board responsibility. . . .[15]

Several of the courts, as in *Ferrell v. Dallas Independent School District*,[16] which have found the school board justification sufficient, relied on prior disturbances and problems during school hours caused by unusual hair styles. The courts standing against the restrictive regulations have held either explicitly or implicitly that school authorities failed to carry their burden of substantial justification. In *Crews* the court stated that action should be taken to punish those students who cause disruptions, and in *Breen v. Kahl*[17] the court agreed, choosing to align itself with Judge Tuttle's dissenting opinion in *Ferrell*:

> [w]e find courts too prone to permit a curtailment of a constitutional right of a dissenter, because of the likelihood that it will bring disorder, resistance or improper and even violent action by those supporting the status quo. . . . [c]onstitutional rights of an

14. *Id.* at 1264, *quoting from* Union Pacific Ry. v. Botsford, 141 U.S. 250, 251 (1891).

15. Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non-Constitutional Analysis*, 117 U. PA. L. REV. 373, 399-401 (1969).

16. 392 F.2d 697 (5th Cir. 1968). The majority seemed to rest its affirmance partly on availability of wigs for these students who were in a band.

17. 419 F.2d 1034 (7th Cir. 1969).

> individual cannot be denied him because his exercise of them produces violent reaction by those who would deprive him of the very rights he seeks to assert.[18]

In similar cases in the future, the Fourth Circuit will have the opportunity to decide whether the hair length regulations are a justifiable intrusion on a student's personal liberty. It seems that only if the regulation in question is backed by a substantial justification, can it stand as an adequate countervailing interest. A regulation should not stand just to compel conformity to conventional standards because as stated by the *Breen* court: "Discipline for the sake of discipline and uniformity is indeed not compatible with the melting pot formula which brought this country to greatness."[19]

III. GRANTING OF CERTIFICATE OF PUBLIC CONVENIENCE

Carolina Pipeline Co. v. South Carolina Public Service Commission[20] was an action brought by South Carolina Electric and Gas Company on application for a certificate of public convenience and necessity to supply natural gas throughout Georgetown county. The Commission granted a certificate to the applicant and revoked Carolina's prior certificate, upon its finding that Carolina was both unable and unwilling to provide the necessary service. Carolina appealed to the district court[21] claiming confiscation of property without due process of law and the court reversed the Commission's decision concluding that Carolina did have the capability to provide gas service in that area.

The Commission had granted a certificate to Carolina Pipeline in 1958, but they have never extended service to the county because management found it economically infeasible to do so without a large industrial consumer requiring service. In 1969, Midland-Ross of Toledo, Ohio discussed the possibility of building a forty million dollar iron ore plant in Georgetown. The results of meetings with Carolina indicated it was unwilling to serve the potential industrial user on acceptable terms, and lacked capability for meeting the industry's requirements for interruptible gas service.

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18. 393 F.2d at 705.
19. 419 F.2d at 1038.
20. 255 S.C. 324, 178 S.E.2d 669 (1971).
21. Appeal authorized under S.C. CODE ANN. § 58-124 (1962).

Carolina was entitled to independent judicial review of issues of confiscation and due process, but the action of the circuit court in substituting its judgment for that of the Commission was in opposition to the opinion of the supreme court.[22] The action by the Commission was authorized[23] and "[t]he virtually undisputed facts which have been stated required that it exercise this authority in the public interest."[24] The court held there was no evidence that the Commission's action would render Carolina's plant worthless; so accordingly, the order appealed from was reversed and that of the Commission was reinstated.

IV. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Graniteville Co. (Sibley Division) v. Equal Employment Opportunity Commission[25] was an action to set aside a "demand for access to evidence" and on the Commission's cross petition for enforcement of its demand. After receiving sworn charges of racial discrimination by two employees against the petitioner, the Commission obtained information from Granitville with regard to the department in which the employees worked. When the Commission requested evidence with respect to all the departments at the Sibley Mill, the petitioner refused and was served with the Demand. The district court held[26] that the information sought by the EEOC was beyond the scope of their investigatory powers, but on appeal the circuit court reversed and remanded.

Two main issues on which the majority differed with the district court and the dissent were 1) the specificity of the employees' charge and 2) the scope of the EEOC investigation. The petitioner contended the charge was deficient since it contained no specific information. Since the facts alleged were of a general and unspecified nature, the district court held there were no specific components to which the evidence demanded was relevant, and called for a hearing to determine if the employee was aggrieved in terms of the Civil Rights Act of 1964. In conducting the hearing, the court required the EEOC to show reasonable cause to believe the charge was true, as a *prerequisite* to the enforcement of their demand. Since the commission's investigation is

22. *See* Board of Bank Control v. Thomason, 236 S.C. 158, 113 S.E.2d 544 (1960).
23. *See* S.C. CODE ANN. § 58-122 (1962).
24. 255 S.C. at 334-35, 178 S.E.2d at 674.
25. 438 F.2d 32 (4th Cir. 1971).
26. 316 F. Supp. 1177 (S.C. 1969).

seeking only to determine the existence of reasonable cause, the majority held the district court's action to be in error. The majority reasoned that the allegations need only be sufficient to put the respondent on notice of the practice or violation with which it is charged; therefore, a hearing was unnecessary.

The dispute over the scope of the EEOC's investigatory powers was centered around the reading of the legislative history of two sections of Title VII of the Civil Rights Actof 1964.[27] The majority contended that these sections granted the EEOC investigatory powers equal in scope to those granted the N.L.R.B. under the Taft-Hartley Act.[28] The court reasoned that the changes in language from the original bill were only to emphasize the inability of the EEOC to undertake an investigation in the absence of a previously filed charge. In contrast to N.L.R.B. proceedings where both sides are represented by lawyers, the EEOC has to carry the full burden of investigating minimally informative charges filed by unrepresented lay complaintants. This fact also persuaded the court that these broad powers of investigation were essential to the Commission.

The dissent and district court asserted that its reading of the legislative history of the Act indicated Congress carefully intended to deny the Commission broad investigatory powers. They contended that the original intention to conform these sections to the language of the Taft-Hartley Act was irrelevant since that version of the Act was not passed by Congress. The dissent was firm in its opinion that ". . . the statute leaves much to be desired in clarity and precision,"[29] but the sections mean what they say, thereby significantly restricting the powers of the EEOC.

In effect, the holding of the court allowed the EEOC to investigate the existence of general policies and patterns of racial discrimination in job classifications or hiring situations other than those specifically charged by the complaintant. Since a narrow interpretation was not given to the Act, the Commission will be able to provide relief that is not limited to the individual interests of the charging party.[30]

27. The sections in dispute were Sections 709 and 710 of theAct. 42 U.S.C. §§ 2000e (1964).

28. 29 U.S.C. § 161(a) (1964).

29. 438 F.2d at 43, *quoting from*, Cunningham v. Litton Indus., 413 F.2d 887, 889 (9th Cir. 1969).

30. 438 F.2d at 42.

V. INTEGRATION THROUGH FREEDOM OF CHOICE PLAN

Brunson v. Board of Trustees[31] was a desegregation case instituted to determine if the school board's Freedom of Choice Plan was an adequate system of determining admission to public schools on a non-racial basis. In September 1969, there were 2408 black students and 256 white students enrolled in four all black schools with two other schools remaining virtually all-white. The Fourth Circuit Court of Appeals concluded that the school board's freedom of choice plan had resulted in only token desegregation; therefore, it held the plan inadequate and ineffective to dismantle the dual school system and establish a unitary one. The court affirmed the district court and its approval of the plan proposed by the Department of Health, Education, and Welfare.

The dissent agreed that the plan was ineffective, but disapproved of the proposed HEW plan, contending that it attempted too much. Due to the ten to one ratio of black to white students and the serious problem of white flight in this district, they felt the plan might accomplish "desegregation," but the result would not be "integration."[32] The dissent would have remanded the case to the district court and have required the school board to submit a plan to provide for an undiscriminating racial mix in one high school and one elementary school.

In a concurring opinion, Circuit Judge Sobeloff, found his colleagues' (dissent) solution to be legally unfounded and fraught with injurious consequences. He recognized their exposition was mainly in connection with the "white flight" problem, but stated that ". . . the Supreme Court has held over and over that courts must not permit community hostility to intrude on the application of constitutional principles."[33] It was the intent of the dissent to restrict their proposal to this particular district where white flight was a problem, but Judge Sobeloff did not believe the model could be so confined, stating:

> The purported restriction of the thesis to extreme white minority-white flight situations is really no limitation at all. Rather it offers a premium for community resistance. More to be feared than white flight . . . would be any judicial countenancing of the

31. 429 F.2d 820 (4th Cir. 1970).
32. *Id.* at 821.
33. *Id.* at 827.

suggestion that abandoning or qualifying a desegregation program is a legally acceptable way to discourage flight. For once this tactic were sanctioned . . . , its insidious example would be followed by other school boards hostile to desegregation, with resulting widespread frustration of the unitary school principle.[34]

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34. *Id.*