

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:07-CV-00953**

RYAN MCFADYEN, *et al.*,

Plaintiffs,

v.

DUKE UNIVERSITY, *et al.*,

Defendants.

MOTION TO MODIFY INITIAL PRETRIAL SCHEDULING ORDER

NOW COMES Defendant the City of Durham, North Carolina (the "City"), herein by and through its counsel of record, and respectfully moves the Court to modify the dates set forth in the Court's Order dated March 17, 2014 (Doc. no. 352) (the "Initial Pretrial Order").

In support of this Motion, the City respectfully shows the Court the following:

1. On March 14, 2014, the Court conducted a simultaneous status conference in this case and *Evans v. The City of Durham, North Carolina et al.*, No. 1:07-CV-00739.
2. At the status conference, the Court informed the parties that all matters would be held in abeyance for 60 days, except briefing on dispositive motions, which the Court stated would be heard at a further status conference to be conducted in approximately 60 days, depending on the Court's schedule.

3. This announcement was confirmed by the minutes from the status conference entered in the Court's CM/ECF system, which stated:

Minute Entry for proceedings held before JUDGE JAMES A. BEATY, JR: Status Conference held on 3/14/2014. For the reasons stated in open court, the parties are advised that this matter shall be held in abeyance for a period of sixty (60) days and shall be placed back on the Court's calendar for Status Conference after the expiration of sixty (60) days; the parties are further advised that the Court will consider all pending motions that are presently before the Court.

4. Based on what the Court informed the parties at the status conference and the minutes entry for the same, counsel for the City understood that all matters would be held in abeyance, save briefing on dispositive motions.

5. Notwithstanding the foregoing, the Court, at 12:36 p.m. on March 17, 2014, issued the Initial Pretrial Order, setting this matter for a pretrial scheduling conference on March 28, 2014, and ordering the parties to meet and confer by March 21, 2014 and to submit Rule 26(f) reports by March 25, 2014. (Doc. no. 352)

6. Counsel for the City did not anticipate that, on March 17, 2014, the Initial Pretrial Order or any other order would be entered requiring commencement of the initial pretrial conference within four days.

7. Thus, counsel was not able to rearrange preexisting obligations owed to other clients as well as a hearing in another case to free up time to prepare adequately for the commencement of the initial pretrial process four days later, on March 21, 2014.

8. But even had such rearrangement been possible, counsel would have needed and still needs substantial additional time to prepare for and participate meaningfully in the initial pretrial process, for the following reasons, among others.

9. As to the City, this case has been stayed since June 9, 2011 (see Order granting motions to stay proceedings, Doc. no. 218), pending the City Defendants' successful appeal to the United States Court of Appeals, following which, and after denial of Plaintiffs' petition to the United States Supreme Court, only one of the multiple claims asserted against the City (which claim was not addressed substantively on appeal) remains pending.

10. By reason of the stay, no discovery whatsoever has been conducted by or obtained from the City.

11. However, counsel for the City is informed and believes that since June 2011, while the action was stayed as to the City Defendants pending appeal (of which the City is now the sole remaining City Defendant and is a defendant only as to one claim as a result of the successful appeal¹), numerous depositions and voluminous written discovery has been conducted. In particular, the undersigned counsel understands that at least 38 deposition have been taken and at least 45,000 pages of documents have been produced, in addition to interrogatories and answers thereto.

12. The City has not had access to and still does not have access to some or all of such discovery, including deposition transcripts, and the undersigned has been informed that some or all of those transcripts cannot be provided due to contractual obligations owed to the court reporter transcribing such depositions.

¹ As noted above, the Court of Appeals did not address the merits of the appeal as to the sole claim remaining as to the City.

13. Consequently, the City has insufficient knowledge or understanding of what has occurred in discovery or the relevance, if any, that such discovery may have to the defense of the claim asserted against the City or to the need for and timing and scheduling of depositions, the need for and timing of written discovery, and any need for and timing of expert discovery.

14. Based on the City's understanding of the volume of the substantial discovery that has occurred during the past 33 months, counsel for the City need more time than the four to eleven days provided in the Court's Order dated March 17, 2014, to acquire the from that voluminous discovery and otherwise the necessary background, information, and understanding to participate meaningfully in the initial pretrial process and protect the City's interests.

15. Based on the City's understanding of the volume of the substantial discovery that has occurred during the past 33 months, counsel for the City respectfully submits that 60 days is a minimally reasonable, and certainly ambitious, expectation of the time necessary to acquire access to and obtain copies of, and to analyze, the 38+ depositions and 45,000+ pages of written discovery heretofore generated, and to prepare for the commencement of, and to participate meaningfully and protect the City's interests in, the initial pretrial process. (With respect to access to and obtainment of such discovery, the undersigned plans to discuss that subject with counsel for Plaintiffs and the Duke Defendants at a conference scheduled for Friday, March 21, 2014.)

16. To the end that counsel for the City participate meaningfully and protect the City's interests in the initial pretrial process, the City requests that the Court modify the

dates in the Initial Pretrial Order, so that those dates will commence 10 days after the next Status Conference at the conclusion of the 60-day abeyance period.

17. Counsel for Plaintiffs has informed the undersigned that Plaintiffs consent to the modification of the Initial Pretrial Order that is set forth in the preceding paragraph 16.

18. Defendant Linwood Wilson has informed the undersigned that he consents to the modification of the Initial Pretrial Order as herein requested. In fact, Defendant Wilson previously filed a motion of his own requesting essentially the same relief. (See Doc. no. 353)

19. Counsel for the Duke Defendants has informed the undersigned that the Duke Defendants take no position on the motion or the modification of the Initial Pretrial Order herein requested, and further that the Duke Defendants do not wish to be heard on this motion and do not intend to file any response to this motion, unless directed to do so by the Court.

20. The undersigned respectfully submit that the modification of the Initial Pretrial Order herein requested will not result in prejudice to any of the parties.

WHEREFORE, Defendant the City of Durham, North Carolina prays that the Court modify the dates in the March 17, 2014 Initial Pretrial Order (Doc. no. 352), so that those dates will commence 10 days after the next Status Conference at the conclusion of the 60-day abeyance period.

Respectfully submitted, this the 20th day of March, 2014.

WILSON & RATLEDGE, PLLC

OFFICE OF THE CITY ATTORNEY, CITY
OF DURHAM, NORTH CAROLINA

By: /s/ Reginald B. Gillespie, Jr.

Reginald B. Gillespie, Jr.
North Carolina State Bar No. 10895
4600 Marriott Drive, Suite 400
Raleigh, North Carolina 27612
Telephone: (919) 787-7711
Fax: (919) 787-7710
E-mail: rgillespie@w-rlaw.com

By: /s/ Kimberly M. Rehberg

Kimberly M. Rehberg
North Carolina State Bar No. 21004
101 City Hall Plaza
Durham, North Carolina 27701
Telephone: (919) 560-4158
Fax: (919) 560-4660
E-mail:
Kimberly.Rehberg@durhamnc.gov

Attorneys for Defendant City of Durham, North Carolina

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

The undersigned hereby certifies that, pursuant to Rule 5 of the Federal Rules of Civil Procedure and LR5.3 and LR5.4, MDNC, the foregoing pleading, motion, affidavit, notice, or other document/paper has been electronically filed with the Clerk of Court using the CM/ECF system, which system will automatically generate and send a Notice of Electronic Filing (NEF) to the undersigned filing user and registered users of record, and that the Court's electronic records show that each party to this action is represented by at least one registered user of record (or that the party is a registered user of record), to each of whom the NEF will be transmitted.

This the 20th day of March, 2014.

WILSON & RATLEDGE, PLLC

By: /s/ Reginald B. Gillespie, Jr.

Reginald B. Gillespie, Jr.

North Carolina State Bar No. 10895