

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA

RYAN McFADYEN, *et al.*,  
*Plaintiffs*,  
v.  
DUKE UNIVERSITY, *et al.*,  
*Defendants*.

1:07-CV-953-JAB-JEP

**PLAINTIFFS' RULE 26(f) REPORT & PROPOSED  
SCHEDULING ORDER**

**Conference of the Parties**

Pursuant to Fed. R. Civ. P. 26(f) and LR16.1(b), a meeting was held on May 16, 2014 and was attended by Robert C. Ekstrand for Plaintiffs; Dixie T. Wells, Dan J. McLamb, and Paul K. Sun Jr. for the Duke Defendants; Reginald B. Gillespie, Jr., and Kimberly Rehberg for the City of Durham, and Linwood Wilson, *pro se*.<sup>1</sup> Agreement was not reached by the parties except as noted below; however, Plaintiffs' counsel intends to continue to confer with opposing counsel to resolve the parties' differences prior to the hearing on this matter.

**Discovery Plan**

1. Discovery will be needed on the subjects set out in the pleadings relating to the remaining claims on which discovery has not yet been conducted, as set out in the Court's orders on the Defendants Rule 12 motions and summarized in the chart below.

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<sup>1</sup> Linwood Wilson has since been dismissed from this action.

Claim	Defendants
<b>Count 18: Common Law Obstruction of Justice and Conspiracy</b>	<b>Steel, Brodhead, Dzau, Burness, and Duke University</b>
<b>Count 41: Violations of Article I and Article IX of the North Carolina Constitution and Conspiracy</b>	<b>City of Durham, North Carolina</b>

2. The parties agreed that the protective order entered in the first phase of discovery in this case should continue to govern discovery in the upcoming second phase, except that the City and the Duke Defendants expressed their belief that the protective order should include a specific provision authorizing the parties to disclose materials that are otherwise protected by HIPAA and by North Carolina statutes governing disclosure of personnel records. Plaintiffs believe that the existing protective order is sufficient to address the requirements of those statutes, however, Plaintiffs do not object to supplementing the existing protective order with specific provisions authorizing the disclosure of personnel records and protected health information, so long doing so does not delay discovery of those materials. In that regard, discovery should not be delayed by any party's belief that any protective order beyond the existing protective order is required in connection with any discovery request. Rather, to protect any such interest in confidentiality without delaying discovery, Plaintiffs propose that the Court adopt

the provisions of LR 102.2 to govern discovery of any matter that any party believes is not sufficiently addressed by the existing protective order.

3. Plaintiffs propose the discovery plan set out below.

a. The appropriate plan for this case with the modifications set out below is that designated in LR 26.1(a) as: Exceptional.

b. Modifications to the case management track include:

i. Duration of Discovery Period: June 2, 2014-September 1, 2014.

ii. Number of Depositions: Each side is authorized to depose a total of 60 persons, with entities counting as one person for purposes of this provision, regardless of the number of individuals the entity designates to testify on its behalf.

iii. All other discovery shall be governed by the Federal Rules of Civil Procedure.

c. Initial disclosures required pursuant to Fed. R. Civ. P. 26(a)(1) shall be made within 10 days of the entry of this order.

d. The date to complete all discovery (general and expert) is: September 1, 2014.

e. Reports from retained experts under Rule 26(a)(2) are due from Plaintiffs by July 29, 2014, and from Defendants by August 12, 2014.

f. Supplementations will be as provided in Rule 26(e) or as otherwise ordered by the Court.

g. The use of interrogatories should be governed by the Federal Rules of Civil Procedure.

h. The use of requests for admission should be governed by the Federal Rules of Civil Procedure.

i. For purposes of determining how many depositions have been taken, each Rule 30(b)(6) deposition shall be counted as a single deposition, without regard to the number of witnesses who are designated to testify on behalf of the corporation and/or municipality.

j. The Parties agree that depositions may be taken at any time during the discovery period and Plaintiffs propose that all depositions be conducted in North Carolina.

### **Summary Judgment**

Motions for Summary Judgment shall be filed by September 2, 2014, with the notice of intent to file motion for summary judgment due on or before August 15, 2014. Responses shall be filed by September 16, 2014. Replies shall be filed by September 23, 2014.

### **Mediation**

Mediation should be conducted as early in the discovery process as practicable. Plaintiffs propose that the mediator be John Harkavy.

### **Electronically Stored Information (ESI) Protocol**

Plaintiffs propose that issues concerning ESI not be addressed in the Court's Order, as the parties have discussed concerns and

proposals concerning ESI and have agreed to try to resolve them by agreement. Issues concerning ESI may be raised by the Parties in due course to the extent that becomes necessary or in the event that an agreement resolving all of the existing concerns of the parties cannot be reached in this matter.

### **Other Items**

The parties should be permitted to join additional parties or amend the pleadings upon the Court's determination of, *inter alia*, whether the granting of leave would delay trial.

The parties have discussed special procedures for managing this case, including reference of the case to a Magistrate Judge on consent of the parties under 28 U.S.C. §§636(c), or appointment of a master. The parties did not come to any agreement as a result of those discussions.

A jury trial has been demanded. The parties discussed and have agreed that the trial of the action is expected to take approximately 15 business days.

The parties agree that they should be permitted to modify this Initial Pretrial Order without the consent of the Court, except that the close of discovery and deadlines relating to any summary judgment motions may not be changed without the consent of the Court. The Parties shall, however, provide notice to the Court of any agreement to modify any of the other terms.

Respectfully submitted.

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**CERTIFICATE OF SERVICE**

I certify that on the date stamped below, the foregoing Plaintiffs' Rule 26(f) Report & Proposed Scheduling Order was electronically filed with the Court's CM/ECF System, which will issue a Notice of Electronic Filing (NEF) to counsel of record for every party registered to receive NEFs through the Court's CM/ECF System. I further certify that every party to this action has at least one counsel of record registered to receive NEFs in this action.

/s/ Robert C. Ekstrand  
Robert C. Ekstrand  
*Counsel for Plaintiffs*