

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

<p>RYAN MCFADYEN, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>DUKE UNIVERSITY, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p style="text-align: center;"><i>EXPEDITED CONSIDERATION TO BE REQUESTED</i></p> <p style="text-align: center;"><u>DEFENDANT CITY OF DURHAM'S MOTION TO DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION AS TO PLAINTIFFS' CLAIM UNDER THE NORTH CAROLINA CONSTITUTION (COUNT 41 OF SECOND AMENDED COMPLAINT)</u></p>
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NOW COMES Defendant the City of Durham, North Carolina (the "City"), herein by and through its attorneys, and pursuant to 28 U.S.C. § 1367(c)(3), Rules 12(b)(1), 12(b)(6) and/or 12(c) of the Federal Rules of Civil Procedure, and Rule 7.3 of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina, and in the event the Court does not grant the City's pending motion for judgment on the pleadings (Doc. 385), the City moves the Court to decline to exercise supplemental jurisdiction as to Plaintiffs' claim against the City under the North Carolina Constitution, and to dismiss said claim and this action as against the City, without prejudice.

IN SUPPORT WHEREOF, the City respectfully shows the Court the following:

1. On February 23, 2010, two years and two months after commencing this action, Plaintiffs amended their complaint to include a claim against the City, alleging that the City had violated their rights under the North Carolina Constitution.

2. That additional claim appears at ¶¶ 1382 - 1385 of Plaintiffs' second amended complaint (Doc. 136), and has been denominated by this Court as, and is referred to herein as, "Count 41".

3. This case was stayed as to the City beginning on June 9, 2011 (see Order granting motions to stay proceedings, Doc. 218), pending the City's and other Defendants' successful appeal to the United States Court of Appeals for the Fourth Circuit.

4. Following that appeal and denial of Plaintiffs' petition to the United States Supreme Court, only Count 41 (which claim was not addressed substantively on appeal) remains pending against the City.

5. By reason of the stay, no other proceedings have transpired as to Count 41, except for the following:

(a) On April 22, 2014, the City moved for judgment on the pleadings. (See Doc. 385.) The motion has been fully briefed (Docs. 386, 399, 400) and is ready for determination.

(b) On May 6, 2014, the City moved to sever count 41 from the remainder of this action. (See Doc. 395). The City respectfully submits that severance is necessary to minimize risks of unfair prejudice and confusion, based on Watkins v. Hospitality Group Management, Inc., No. 1:02-CV-897, 2003 U.S.

Dist. LEXIS 22291 (M.D.N.C. Dec. 1, 2003), and additional authorities cited in the City's brief in support of its motion to sever (Doc. 396).

(c) On May 23, 2014, this Court conducted the initial pretrial conference and on May 27, 2014, entered the initial pretrial and scheduling order. (See Doc. 409.) In the initial pretrial and scheduling order, this Court ordered the parties to make the initial disclosures required by Rule 26(a)(1)(A), by May 30, 2014, and the parties have made their disclosures. (See Doc. 409, pp. 3, 5.)

6. In particular, by reason of the stay, no discovery whatsoever has been conducted by or obtained from the City with respect to Count 41.

7. As a result of this Court's decision on March 31, 2011, the United States Court of Appeals decision on December 17, 2012, and the Supreme Court's denial of Plaintiffs' petition for writ of certiorari on November 12, 2013, all federal and all state claims against the City have been dismissed. (See Doc. 186; Evans v. Chalmers, 703 F.3d 636 (4th Cir. 2012), cert. denied, 134 S. Ct. 98 and 134 S. Ct. 617 (2013).)

8. However, although all federal claims against the City were dismissed by this Court and the Court of Appeals, there still remained pending federal claims against other Defendants in this action until May 20, 2014, when this Court dismissed those claims. (See Order granting motions to dismiss and for judgment on the pleadings as to Duke Defendants and Linwood Wilson, May 20, 2014, Doc. 401.)

9. Consequently, it was not until May 20, 2014, that all remaining federal claims were dismissed from this action.

10. According to ¶ 79 of Plaintiffs' Second Amended Complaint (Doc. 136) original jurisdiction in this Court is based solely on 28 U.S.C. §§ 1331 and 1343 (federal question).

11. According to ¶ 80 of Plaintiffs' Second Amended Complaint, this Court has supplemental jurisdiction over Count 41 pursuant to 28 U.S.C. § 1367(a).

12. Plaintiffs allege that this Court has supplemental jurisdiction over Count 41 based on 28 U.S.C. § 1367(a); however, 28 U.S.C. § 1367(c)(3) provides that, "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it has original jurisdiction".

13. Because this Court has now (as of May 20, 2014) dismissed all claims against all Defendants as to which it had original jurisdiction, and there are no remaining claims as to which this Court has original jurisdiction, this Court should decline to exercise supplemental jurisdiction as to Count 41, pursuant to 28 U.S.C. § 1367(c)(3).

14. As an alternative to dismissing Count 41 as requested by the City in its pending motion for judgment on the pleadings, or in the event the Court denies such motion, this Court should, pursuant to 28 U.S.C. § 1367(c)(3), decline to exercise supplemental jurisdiction as to Count 41 and then dismiss Count 41, without prejudice.

WHEREFORE, Defendant the City of Durham, North Carolina prays that the Court decline to exercise supplemental jurisdiction as to Count 41, and dismiss Count 41, without prejudice.

Respectfully submitted, this the 5th day of June, 2014.

WILSON & RATLEDGE, PLLC

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

*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 5th day of June, 2014.

WILSON & RATLEDGE, PLLC

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

Reginald B. Gillespie, Jr.
North Carolina State Bar No. 10895