

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:08-CV-119**

EDWARD CARRINGTON, et al.,

Plaintiffs,

v.

DUKE UNIVERSITY, et al.,

Defendants.

**THE CITY OF DURHAM, NORTH CAROLINA’S RESPONSE TO
PLAINTIFFS’ MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

Plaintiffs have filed a motion for leave to amend their Complaint (Doc. No. 140). However, such a motion is unnecessary as to all but one of the Defendants, as Plaintiffs have not previously amended their Complaint, and only Defendant J. Wesley Covington has served an Answer.¹ Under Federal Rule of Civil Procedure 15(a)(1), “A party may amend its pleading once as a matter of course . . . before being served with a responsive pleading.” *See Dominion Healthcare Servs. v. Value Options, Inc.*, No. 1:08CV134, at *2 (M.D.N.C. May 5, 2009) (Beaty Jr., J.) (“By its terms, the Rule leaves no place for the exercise of discretion by a district court, and thus, the Court has no discretion to reject an amended pleading filed before a responsive pleading is served.”).

¹ *See* Doc. No. 70 (Answer of Defendant Covington).

Where, as here, “the action involves more than one defendant, and not all defendants have filed responsive pleadings, the plaintiff may amend the complaint once as a matter of course with regard to those defendants that have not filed a responsive pleading.” *Id.* (citation omitted); *see also Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1068 n.1 (4th Cir. 1993) (“A motion to dismiss is not a responsive pleading for the purposes of Rule 15(a). Thus, [the defendant’s] motion to dismiss did not preclude the Company from amending its complaint without leave of court.”) (citations omitted).

Accordingly, except as to Defendant Covington, the proposed First Amended Complaint (Doc. No. 140-2) attached to Plaintiffs’ motion should be accepted for filing and entered on the docket as Plaintiffs’ First Amended Complaint.

Because the proposed First Amended Complaint includes a new claim against the City, the City respectfully requests leave to file a further motion to dismiss and a supporting memorandum not to exceed 20 pages. However, since this new claim is directed solely against the City, there is no need to require responsive briefing from any other Defendant at this time.²

² A proposed order to this effect is filed as an attachment to this response.

This the 24th day of September, 2009.

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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 24th day of September, 2009.

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