IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Case No. 5:07-CV-231-F

Pamela L. Hensley, Plaintiff, vs. Johnston County Board of Education, and Anthony L. Parker, in his capacity as Superintendent of the Johnston County Schools and in his individual capacity, Defendants.	)	**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY DISCOVERY** Local Civil Rules 7.1(d) and 26.1(d), E.D.N.C.

NOW COME defendants Johnston County Board of Education and Anthony L. Parker, by and through counsel and pursuant to Rules 7.1(d) and 26.1(d) of the Local Rules of Practice and Procedure of the United States District Court for the Eastern District of North Carolina, submitting this memorandum of law in support of their Motion to Stay Discovery pending the Court's resolution of defendants' Motion to Dismiss this action. For the following reasons, defendants respectfully request that the motion should be GRANTED.

STATEMENT OF THE CASE

On May 24, 2007, plaintiff Pamela L. Hensley filed a Complaint and Demand for Jury Trial in the Johnston County Superior Court alleging violations of the First and Fourteenth Amendments of the United States Constitution, violations of the North Carolina Constitution, and violations of Title VII and the Americans With Disabilities Act. The Complaint sought an injunction, recovery of compensatory and punitive damages, and reassignment to a particular

teaching position from which she had been transferred. On June 20, 2007, defendants filed a Notice of Removal to the United States District Court for the Eastern District of North Carolina. On June 25, 2007, the Court granted the defendants an extension of time to respond to the Complaint up to and including July 30, 2007. On July 30, 2007, defendants filed a Motion to Dismiss all the claims in this action with a supporting memorandum. On August 21, 2007, plaintiff filed a Memorandum of Law In Opposition to Defendants' Motion to Dismiss.

This matter is now before the Court on defendants' Motion to Stay Discovery, pending a ruling on Defendants' Motion to Dismiss. Plaintiff's counsel has been contacted and does not consent to defendants' motion.

STATEMENT OF THE FACTS

Plaintiff's Complaint stems from her assignment to a teaching position at South Campus Community School in Johnston County. Prior to her South Campus assignment, she had been assigned to teach science at North Johnston Middle School. (Complaint, ¶¶1, 42)(Paragraph references are to the Complaint.)

According to the facts alleged in the Complaint, in January 2005, the parent of a student at North Johnston Middle School (NJMS) complained to Ms. Hensley about her daughter's grade in Ms. Hensley's science class. (¶13). The student's parents (hereafter "the Does") then met with the NJMS Principal Ray Stott. During that meeting, the parents complained: (1) that Ms. Hensley had derogated her students' religious beliefs during a November 2004 classroom discussion of evolution and (2) that Ms. Hensley had lowered their daughter's grade in retaliation for comments their daughter had made during the discussion. (¶¶13-15).

In response to the parental complaints, the school system conducted an investigation, led by its attorney. (¶16). In an April 2005 letter from Principal Stott to Ms. Hensley, Mr. Stott stated that there was no support for the second allegation regarding a retaliatory lowering of grades. (¶17). However, the letter also addressed the nature of the classroom discussion on evolution and issues related to grading and the curriculum. (¶18).

After the investigation concluded, the Does, with the assistance of counsel, continued to press their concerns regarding Ms. Hensley's behavior during the November 2004 evolution discussion. Plaintiff alleges that John Doe engaged in public communication and together with his agents communicated with mass media outlets about her teaching. (¶¶19-20). Over a period of several months, the school system negotiated with the Does' attorney to resolve their complaints about Ms. Hensley and to attempt to diffuse the tensions and distractions occasioned by the ongoing discontent. (¶¶21-24).

As part of the proposed resolution, Ms. Hensley was asked whether she would be willing to sign a letter to the parents of students in her eighth grade science class. On August 12, 2005, Plaintiff met with her representatives from the North Carolina Association of Educators (NCAE) who presented her with a draft of the proposed letter. (¶¶24-25). One of the NCAE representatives was an attorney appointed to represent plaintiff's interests. (¶25). The NCAE representatives recommended that plaintiff agree to sign the letter and she agreed to do so. (¶25). In her Complaint, Plaintiff admits that after reviewing the draft and obtaining the advice of her appointed counsel and other NCAE representatives, she "agreed to comply with the school's request." (¶25). In turn, the Does agreed to accept the letter as part of the resolution of their complaint. (¶27).

After the Does agreed to accept the letter, Ms. Hensley reneged on her commitment to sign the letter. (¶28). "The NCAE attorney told Ms. Hensley that she would explore alternatives to this draft of the letter. . . . She was even told that she might be putting her 'career in jeopardy for insubordination.' " Ms. Hensley does not identify the person making these statements, but refers to them in the context of discussions with her own representatives, including her attorney, with the NCAE. (¶27).

Given the setback that Ms. Hensley's reversal posed to the resolution of the Does' complaints, the renewed controversy stemming from the reversal of her position and the continuing tensions and distraction tied to the circumstances, Superintendent Anthony Parker decided to transfer Ms. Hensley to South Campus Community School. Ms. Hensley was informed of this decision at a meeting on December 1, 2005. (¶34). The letter given to plaintiff, "which outlined his reasons for the transfer," stated that her reversal of position on signing the letter "sparked additional complaints" and that the "matter still remains a source of tension and distraction within the school system and has diminished your credibility at North Johnston Middle School." (¶¶34-35).

Upon learning of her transfer, plaintiff sent email messages to a wide array of colleagues and parents explaining her transfer and castigating Dr. Parker. (¶37). Ms. Hensley was assigned to teach language arts remediation at South Campus. Upon learning of her new assignment, plaintiff asked to be re-assigned, raising her hearing impairment as a basis for a reassignment. (¶41). Ms. Hensley, who had taught science for some five years without any accommodation (¶8), does not allege that she sought any accommodations for her position at South Campus Community School, other than her preference for re-assignment. (¶41). Plaintiff eventually reported to her assigned

position at South Campus and alleges no complaints about reduction in salary or benefits, as she has experienced neither. Instead, her Complaint is centered on the school system's refusal to adopt plaintiff's own reassignment plan for herself. (¶¶41-43). Plaintiff subsequently filed an EEOC charge alleging discrimination based on religion and disability and received a Right-to-Sue letter. (¶45). Plaintiff alleges she left the reassigned position at South Campus for a new position outside the JCS system which will result in lower wages and fewer employee benefits than her position at South Campus. (¶47).

ARGUMENT

"A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined." *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987). Good cause to stay discovery may be shown "where a party has filed a dispositive motion, the stay is for a short period of time, and the opposing party will not be prejudiced by the stay." *Spencer Trask Software and Info. Servs. v. Rpost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (granting stay of discovery where defendants had "substantial arguments for dismissal of many, if not all, of the claims asserted in this lawsuit" and where a stay would "neither unnecessarily delay the action nor prejudice the plaintiffs thereby"). "In deciding whether to stay discovery pending resolution of a pending motion, the Court inevitably must balance the harm produced by a delay in discovery against the possibility that the motion will be granted and entirely eliminate the need for such discovery." *Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988). The court may "peek" at the merits of the dispositive motion, and if it appears that there is an "immediate and clear possibility that it will be granted," then an order staying discovery is appropriate. *Id.*

Defendants have asserted sound reasons for granting their motion to dismiss. First, plaintiff fails to state a claim under the First Amendment, Equal Protection Clause or other constitutional provisions inaccurately invoked in the Complaint. Plaintiff was not re-assigned as the result of any speech, but because she agreed and then reneged on her agreement to sign a letter to students' parents, upsetting months of negotiation and exacerbating an already difficult situation. To the extent that the Complaint describes speech of any kind, none of the issues about which Ms. Hensley alleges that she spoke were matters of public concern, but instead concerned school curriculum and a private dispute between Ms. Hensley and her employer. Turning to her Equal Protection claim, the facts alleged in the Complaint describe a rational basis for defendants' conduct that defeats that claim. The school system had a rational interest in resolving allegations of unconstitutional conduct by a teacher without resort to litigation; transferring Ms. Hensley when she reneged on an agreement to sign the letter to students' parents, exacerbating the situation, furthers that rational interest.

Nor do plaintiff's allegations support claims under the North Carolina Constitution. First, Ms. Hensley alleges no violation of her religious liberty under Article I, Section 13 of the North Carolina Constitution because she alleges no religious beliefs. Instead, she alleges a change of mind about signing the letter to students' parents. The letter itself does not espouse religious beliefs either; to the contrary, it summarizes the position of religious neutrality that the government is required to assume. Because her allegations demonstrate that her change of mind was not motivated by religious conviction, or lack thereof, Ms. Hensley states no claim under Article I, Section 13 of the North Carolina Constitution. Second, the facts alleged fail to support any of the elements of a religious liberty claim, which states analyze according to Establishment

Clause jurisprudence. *Heritage Village Church and Missionary Fellowship v. State*, 299 N.C. 399, 406 263 S. E. 2d 726, 730 (1980). Ms. Hensley's re-assignment after reneging on an agreement to sign the letter to students' parents neither lacked a secular purpose, had the affect of advancing religion, or fostered excessive governmental entanglement with religion, each of which is required to show a violation of the Establishment Clause. Ms. Hensley's remaining state constitutional claims warrant dismissal because she has no property interest in a particular employment position and all her state constitutional claims warrant dismissal because state law provides an adequate state remedy.

Plaintiff's religious discrimination claim likewise fails to allege facts sufficient to support any of the elements of a claim, including a religious belief or facts identifying adverse employment action. Plaintiff's religious discrimination claim also diverges fatally from the EEOC charges upon which it is based. Plaintiff's claims under the Americans With Disabilities Act fail to identify the limitations on her ability to perform essential functions of her job or requests for reasonable accommodations tied to such limitations. Instead, the plaintiff alleges that the failure to adopt her preferred reassignment violated the Act. Again, the Complaint fails to allege facts sufficient to support the elements of the claims and demonstrates the absence of such a claim.

Defendants' arguments for dismissal of all plaintiffs' claims are detailed more fully in their Memorandum of Law in Support of Motion to Dismiss. Plaintiff's Memorandum in Opposition to Motion to Dismiss apparently abandons her claims under Article I, Section 13 of the North Carolina Constitution for violation of religious liberty and her claim under Title VII for religious discrimination. This obviates the need for discovery on these issues and signals the efficacy of the stay requested with respect to discovery on claims that may not survive defendants' motion. The

Court may review the motion to dismiss and supporting memorandum as it considers this motion to stay discovery. *Simpson*, 121 F.R.D. at 263.

These arguments demonstrate an "immediate and clear possibility" that plaintiffs' Complaint will be dismissed in its entirety. Therefore, it would be inappropriate to require defendants to proceed with the burden and expense of discovery while the motion to dismiss is pending. One of the main purposes of a motion to dismiss is to allow the parties to avoid the time and expense involved in discovery if the complaint does not state a cause of action. In this case, to allow discovery to proceed prior to a ruling on the pending motion to dismiss would frustrate this purpose and, defendants contend, subject them to a needless and wasteful expenditure of public resources. The Court also should consider that nothing that the parties would learn through discovery will affect the resolution of defendants' pending motion. *Petrus*, 833 F.2d at 583. The parties would be saved the effort and expense of discovery, without prejudice to either party, by the Court's issuing a stay pending resolution of defendants' motion to dismiss.

Finally, no prejudice will result by granting a stay of discovery until resolution defendants' motion to dismiss.

CONCLUSION

For the foregoing reasons, defendants' respectfully request the following:

1. that the Court GRANT defendants' motion to stay discovery; and

2. that the Court ORDER that the initial pretrial conference and discovery plan required by Rule 26(f) of the Federal Rules of Civil Procedure and the onset of any and all discovery requirements including initial disclosures required by Rule 26(a), be stayed until after the Court has ruled on the defendants' pending motion to dismiss.

Respectfully submitted this 22nd day of August, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2007, I electronically filed the foregoing Memorandum Of Law in Support of Motion to Stay Discovery with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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This the 22nd day of August, 2007.

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