



## ARGUMENT

Plaintiff opposes defendants' motion to stay because defendants' motion to dismiss plaintiff's claims under the First and Fourteenth Amendments, against defendant Parker, individually, under the Americans with Disabilities Act, and, under the North Carolina Constitution require the Court to interpret the factual circumstances out of which each of plaintiff's claims arise. Although a district court has the inherent discretion to stay proceedings, the Fourth Circuit has observed that this power "is not . . . without limitation." *Williford v. Armstrong World Indus., Inc.* 715 F.2d 124, 127 (4<sup>th</sup> Cir. 1983). The party seeking a stay must justify it by "clear and convincing circumstances," making a "clear case of hardship or inequity in being required to go forward." *Id.* Otherwise a stay is not merited.

Initially, defendants have not presented the court with "clear and convincing circumstances" to justify their motion for a stay of discovery proceedings. They allege there is an "immediate and clear possibility" that their motion pursuant to Rule 12b(6) will be granted in its entirety. *Defs' Memorandum of Law*, p. 5. Plaintiff respectfully contends that the Court should not be persuaded by Defendants' argument for two, related, reasons. First, the standard for evaluating whether defendants' motion to dismiss, favors the nonmoving party and plaintiff will be given the benefit of all reasonable inferences from facts alleged. The motion will be denied unless defendants can show that plaintiff cannot plead any set of facts which would support her claims for relief. *Mylan Labs. Inc. v. Markari*, 7 F.3d 130, 1134 (4<sup>th</sup> Cir. 1993).

Significantly, at least with respect to the plaintiff's claims under the First and Fourteenth Amendments to the U.S. Constitution, the defendants arguments depend solely upon their interpretations of factual circumstances necessary to support the legal elements of plaintiff's

claims. Plaintiff has alleged facts in her complaint which she contends support the legal elements of her claims. Defendants have denied that the facts alleged by plaintiff support her claims. Hence, if one were simply assessing probabilities without the benefit of a “peek” at the merits of the dispositive motion, one would have to conclude that the probabilities favor the plaintiff’s, rather than the defendants’, likelihood of prevailing on the Rule 12 motion.

Second, however, a perusal of the grounds for the dispositive motion, as well as plaintiff’s refutation of those grounds, should suggest quite clearly that there are significant factual issues in dispute and that even the Court’s ability to decide questions of law will depend upon a more fully developed evidentiary record. Specifically, defendants’ primary arguments against plaintiff’s First and Fourteenth Amendment claims focus on the following issues: (1) whether plaintiff’s speech was a matter of public concern; (2) whether plaintiff’s speech was a substantial factor in defendants’ employment decision; and (3) whether defendants’ motive for its employment decision was not based upon illegal animus. Early in its justification for its motion to stay discovery, defendants’ memorandum of law attempts to offer support for their contention that there is a “clear possibility” that their motion will be granted. However, this argument is limited to reliance upon defendants’ interpretation of facts. *Def’s Mem. of Law*, p. 6, ¶1. On the other hand, plaintiff’s response to defendants’ motion to dismiss provides specific grounds as to why plaintiff should be given the opportunity to develop the evidentiary record with respect to each of the aforementioned issues.

Nor have the defendants presented the court with a case for “clear hardship or inequity” if discovery is not stayed. Defendants have made no such argument in their memorandum of law supporting their motion. In addition, the statements of the case presented to this court via the pleadings and the parties’ memoranda of law make it clear that this has been a matter in dispute

between the parties for some time, and, that both parties have already undertaken significant investigation of the facts. Hence, to begin the process of discovery, whereby the parties could start the exchange of information, governed by the rules of this Court, while defendants' motion is pending would not pose an undue burden upon the defendants. However, given the probability that defendants will not prevail on their motion in its entirety, the plaintiff would be prejudiced by the delay which defendants seek in these proceedings. The plaintiff has the burden of proving her claims. Since delay inherently increases the risk that witnesses relocate or may otherwise be unavailable or that other evidence is inadvertently spoiled, the impact of delay is much more likely to negatively impact the plaintiff's case than the defendants'.

For the reasons stated herein, the plaintiff respectfully requests that:

(1) This Court deny defendants' motion to stay discovery because defendants have not met their burden either to show with "clear and convincing circumstances" that a stay is justified nor have they made a case that defendants would be subject to hardship or inequity if the process of discovery were to proceed while this Court undertook a considered examination of the parties' arguments with respect to defendants' motions to dismiss plaintiff's claims;

(2) That, in the alternative, if, in the interest of judicial economy, the Court concludes that some stay of discovery is appropriate, the Court order the parties to submit a discovery plan and allow the use of certain discovery procedures, which, in the Court's opinion would not unduly burden nor prejudice either party.

Respectfully submitted, this the 6<sup>th</sup> day of September 2007,

By:

/s/ Mary-Ann Leon  
NC State Bar No. 26476

The LeonLaw Firm, P.C.  
PO Box 20338  
Greenville, NC  
252/830-5366  
252/830-9366  
[maleon@leonlaw.org](mailto:maleon@leonlaw.org)

CERTIFICATE OF SERVICE

I, Mary-Ann Leon, hereby certify that on this date I electronically filed the foregoing Memorandum of Law with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Daniel W. Clark, [dclark@tharringtonsmith.com](mailto:dclark@tharringtonsmith.com) and Christine Scheef, [cscheef@tharringtonsmith.com](mailto:cscheef@tharringtonsmith.com).

This the 6th day of September 2007.

/s/ Mary-Ann Leon

Mary-Ann Leon  
N.C. State Bar No. 26476  
P.O. Box 20338  
Greenville, NC 27858  
Tel: 252/830-5366  
Fax: 252/830-9366  
Email: [maleon@leonlaw.org](mailto:maleon@leonlaw.org)