

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

MAXWELL KADEL, *et al.*,

Plaintiffs,

v.

DALE FOLWELL, *et al.*,

Defendants.

No. 1:19-cv-00272-LCB-LPA

**BRIEF IN SUPPORT OF PLAINTIFFS’
UNOPPOSED MOTION FOR ENTRY OF TOLLING STIPULATION**

Plaintiffs Maxwell Kadel; Julia McKeown; Jason Fleck; Connor Thonen-Fleck, by his next friends and parents, Jason Fleck and Alexis Thonen; Michael D. Bunting; C.B., by his next friends and parents, Michael D. Bunting, Jr. and Shelley K. Bunting; and Sam Silvaine respectfully move the Court to approve and enter their stipulation with Defendants University of North Carolina at Chapel Hill, University of North Carolina at Greensboro, and North Carolina State University (collectively, “University Defendants”). The stipulation tolls certain plaintiffs’ claims under Title VII of the Civil Rights Act of 1964 against University Defendants during the pendency of a case before the Supreme Court which may impact those claims. *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp’t Opportunity Comm’n*, No. 18-107 (U.S. argued Oct. 8, 2019). The University Defendants do not object to this motion, and Defendants Dale Folwell, Dee Jones, and

the North Carolina State Health Plan for Teachers and State Employees take no position on the tolling agreement and do not intend to file a brief regarding it.

Plaintiffs filed the present lawsuit against Defendants on March 3, 2019, challenging the discriminatory exclusion of gender-confirming health care in the North Carolina State Health Plan for Teachers and State Employees. ECF No. 1. Plaintiffs raised claims under the Equal Protection Clause of the U.S. Constitution, 42 U.S.C. § 1983, Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, *et. seq.*, and Section 1557 of the Affordable Care Act, 42 U.S.C. §18116.

Plaintiffs Maxwell Kadel, Julia McKeown, and Sam Silvaine, who are current or former employees of the University Defendants, timely filed charges alleging violations of the Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq.* Mr. Kadel, Ms. McKeown, and Mr. Silvaine did not raise those claims in the complaint before this Court because they were still exhausting administrative remedies with the U.S. Equal Employment Opportunity Commission (“EEOC”) at the time suit was filed.

Mr. Kadel, Ms. McKeown, and Mr. Silvaine have now exhausted Title VII’s administrative requirements, received Dismissals and Notices of Suit Rights from the EEOC, and are entitled to sue in a United States District Court. Dismissals and Notices of Suit Rights issued by the EEOC are effective and confer the right to bring suit under Title VII against government defendants. *See Moore v. City of Charlotte*, 754 F.2d 1100, 1104 n.1 (4th Cir. 1985) (finding that issuance of letter by EEOC satisfies exhaustion requirements); *Perdue v. Roy Stone Transfer Corp.*, 690 F.2d 1091, 1093 (4th Cir. 1982) (finding that entitlement to notice of right to sue, even without its actual issuance or

receipt, satisfies exhaustion requirements); *O'Mara v. Va. Dep't of Corr.*, No. 2:16-cv-489, 2017 WL 724338, at *3 (E.D. Va. Feb. 2, 2017) (holding that EEOC was proper entity to issue right to sue letter against government respondent after dismissal of charge).

The Supreme Court, however, granted review and has heard argument in *Harris Funeral Homes*, which involves a Title VII claim by a woman terminated from her job because she is transgender. *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp't Opportunity Comm'n*, No. 18-107 (U.S. argued Oct. 8, 2019). Plaintiffs and University Defendants, recognizing that the pending decision in *Harris Funeral Homes* may affect Plaintiffs' prospective Title VII claims, entered into a tolling agreement on February 11, 2020, which tolls the limitations period for the Title VII claims of Mr. Kadel, Ms. McKeown, and Mr. Silvaine during the pendency of *Harris Funeral Homes*. That agreement is attached to this brief as Exhibit A. This tolling agreement is intended to preserve Plaintiffs' prospective Title VII claims against University Defendants—and to allow Plaintiffs to plead those claims, and University Defendants to formulate a responsive pleading—with the benefit of the Supreme Court's ruling in *Harris Funeral Homes*. Proceeding in that way will maximize party and judicial economy by avoiding potentially duplicative briefing, delay, and associated costs. The parties agree that Plaintiffs' current deadline to amend the present action and add Title VII claims, which is March 2, 2020, will likely expire prior to the Supreme Court's decision in *Harris Funeral Homes*. The tolling agreement provides that Plaintiffs will have twenty additional days after the decision to file their claims. *See* Ex. A ¶ 5.

Because statutory time limits under Title VII are not jurisdictional, it is well-established that courts have authority to equitably toll them. *See, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (“[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.”); *Gayle v. United Parcel Serv., Inc.*, 401 F.3d 222, 226 (4th Cir. 2005) (determining that the 180-day time limit under Title VII was subject to equitable tolling); *cf. James v. Circuit City Stores, Inc.*, 370 F.3d 417, 421–22 (4th Cir. 2004) (interpreting and enforcing parties’ tolling agreement under 42 U.S.C. § 1981). Such agreements “are not unusual and are generally upheld.” *Derrickson v. Circuit City Stores, Inc.*, 84 F. Supp. 2d 679, 685 (D. Md. 2000) (collecting opinions by the Fourth Circuit). Accordingly, Plaintiffs respectfully request that the Court approve and enter the tolling stipulation attached as Exhibit A.

Dated: February 21, 2020

Respectfully submitted,

/s/ Amy E. Richardson

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* Appearing by special appearance pursuant to L.R. 83.1(d)

CERTIFICATE OF WORD COUNT

Pursuant to L.R. 7.3(d)(1), the undersigned certifies that this Brief complies with the word limit contained in L.R. 7.3(d)(1), using the word count feature of the word processing software in making this certification.

Dated: February 21, 2020

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all registered users.

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

MAXWELL KADEL; JASON FLECK;
CONNOR THONEN-FLECK, by his next
friends and parents, JASON FLECK and
ALEXIS THONEN; JULIA MCKEOWN;
MICHAEL D. BUNTING, JR.; C.B., by his
next friends and parents, MICHAEL D.
BUNTING, JR. and SHELLEY K. BUNTING;
and SAM SILVAINE,

Plaintiffs,

v.

DALE FOLWELL, in his official capacity as
State Treasurer of North Carolina; DEE
JONES, in her official capacity as Executive
Administrator of the North Carolina State
Health Plan for Teachers and State Employees;
UNIVERSITY OF NORTH CAROLINA AT
CHAPEL HILL; NORTH CAROLINA
STATE UNIVERSITY; UNIVERSITY OF
NORTH CAROLINA AT GREENSBORO;
and NORTH CAROLINA STATE HEALTH
PLAN FOR TEACHERS AND STATE
EMPLOYEES,

Defendants.

Case No. 1:19-cv-00272-LCB-LPA

**STIPULATION TO TOLL LIMITATIONS PERIOD FOR
PLAINTIFFS' TITLE VII CLAIMS**

**STIPULATION TO TOLL LIMITATIONS PERIOD FOR
PLAINTIFFS' TITLE VII CLAIMS**

THIS stipulation (“Stipulation”) is entered into, and effective as of, February 11, 2020, between Plaintiffs Maxwell Kadel, Julia McKeown, and Sam Silvaine (“Plaintiffs”) and their undersigned counsel and the University of North Carolina at Chapel Hill, the University of North Carolina at Greensboro, and North Carolina State University (“University Defendants”), collectively referred to as the “Parties.”

WHEREAS the Parties are in active litigation concerning the exclusion of gender-confirming health care in the North Carolina State Health Plan for Teachers and State Employees (“NCSHP”);

WHEREAS Plaintiffs filed charges regarding the exclusion under Title VII of the Civil Rights Act of 1964 (“Title VII”) against their respective employers, University Defendants, with the Equal Employment Opportunity Commission (“EEOC”);

WHEREAS the Plaintiffs received their Notices of Suit Rights issued by the EEOC on December 3, 2019;

WHEREAS Title VII affords Plaintiffs 90 days from receipt of their Notices of Suit Rights from the EEOC to file suit, the Parties agree that in order to timely bring Title VII claims against University Defendants, Plaintiffs must amend their present lawsuit on or before March 2, 2020;

WHEREAS the Parties agree that Plaintiffs’ prospective Title VII claims concern questions that may be significantly impacted by the pending ruling of the Supreme Court of the United States in *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp’t*

Opportunity Comm'n, No. 18-107, 2019 U.S. LEXIS 2846 (U.S. Apr. 22, 2019) (granting certiorari to address whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989));

WHEREAS oral argument was presented in *R.G. Harris & G.R. Harris Funeral Homes* on October 8, 2019 and the Parties expect a decision no later than June 2020;

1. THEREFORE, in order to preserve Plaintiffs' Title VII claims and avoid duplicative and unnecessary briefing on a claim that may be significantly impacted by a pending case before the Supreme Court of the United States, the Parties stipulate to the following: The Parties agree that Plaintiffs' prospective Title VII claims will be tolled beginning with the effective date of this Stipulation and will remain tolled until 30 days after the ruling in *R.G. Harris & G.R. Harris Funeral Homes*.

2. The Parties agree that during the duration of this tolling agreement, Plaintiffs and their counsel will refrain from amending the present lawsuit to add Title VII claims against University Defendants.

3. The Parties agree that this tolling Stipulation is only applicable to the Title VII claims that became ripe upon receipt of the Notice of Suit Rights from the EEOC on December 3, 2019 and that this agreement does not preclude Plaintiffs from amending the present lawsuit to add additional claims that could or may arise during the tolling period.

4. The Parties agree that this tolling Stipulation and its terms apply to any subsequent Notice of Suit Rights issued by the United States Department of Justice

concerning the 2018 EEOC charges of discrimination filed by Plaintiffs against University Defendants.

5. The Parties agree that this Stipulation stops (but does not reset) the running of the 90-day statute of limitations, and restarts the running of the 90-day limitations period thirty days after the ruling in *R.G. Harris & G.R. Harris Funeral Homes*, as set forth in paragraph. Plaintiffs had 20 days remaining to file their Title VII claims as of this Stipulation's effective date on February 10, 2020. The parties accordingly agree that after 30 days has passed from the ruling in *R.G. Harris & G.R. Harris Funeral Homes*, Plaintiffs will have 20 additional days to file their Title VII claims.

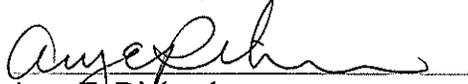
6. Except as specifically provided by this Stipulation, this Stipulation shall not constitute a waiver of any rights, claims, or defenses of the University Defendants regarding any claims of Plaintiffs, including but not limited to any statute of limitations or timing defenses that may otherwise apply to Plaintiffs' claims.

7. This stipulation does not waive any defenses, arguments, or grounds for dismissal presented in University Defendants' pending Motion to Dismiss for the claims alleged in the Complaint, or any future claims brought against University Defendants.

8. The Parties stipulate that if any part, term, or provision of this tolling Stipulation shall be found illegal or in conflict with any valid controlling law by a court of competent jurisdiction, the validity of the remaining provisions shall not be affected.

STIPULATED TO BY AND BETWEEN:

Dated: February 11, 2020



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ORDER

Upon consideration of the unopposed motion by Plaintiffs Maxwell Kadel; Julia McKeown; Jason Fleck; Connor Thonen-Fleck, by his next friends and parents, Jason Fleck and Alexis Thonen; Michael D. Bunting; C.B., by his next friends and parents, Michael D. Bunting, Jr. and Shelley K. Bunting; and Sam Silvaine for approval and entry of their stipulation with Defendants University of North Carolina at Chapel Hill, University of North Carolina at Greensboro, and North Carolina State University, to toll the limitations period for the claims of Plaintiffs Max Kadel, Julia McKeown, and Sam Silvaine under Title VII of the Civil Rights Act of 1964 (the “Tolling Stipulation”), it is hereby

ORDERED, that the motion for approval and entry of the Tolling Stipulation is **GRANTED**. The Tolling Stipulation, entered on the docket as ECF No. 42-1, shall be deemed filed as of the date of this order.

Dated: _____

Loretta C. Biggs
U.S. District Court Judge for the
Middle District of North Carolina