

**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.*

**PLAINTIFFS' REPLY IN FURTHER  
SUPPORT OF MOTION FOR LEAVE  
TO FILE FIRST AMENDED  
COMPLAINT**

## BACKGROUND

Plaintiffs, by and through counsel, submit Plaintiffs' Reply to the Opposition to Plaintiffs' Motion for Leave to Amend submitted by Defendants North Carolina State Health Plan for Teachers and State Employees (the "NCSHP"), Dale Follwell, and Dee Jones (collectively, "State Defendants"). Plaintiffs' proposed First Amended Complaint ("Amended Complaint") would add to the present case claims arising under Title VII of the Civil Rights Act of 1964 ("Title VII"), now that the Supreme Court has decided *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020). See ECF 62 ¶ 3. The existing plaintiffs, all employees (or their beneficiaries) of the University Defendants, seek to add their Title VII claims against those defendants. A new plaintiff, Sgt. Dana Caraway, also seeks to bring Title VII claims against her employer, the State of North Carolina, Department of Public Safety; and against the NCSHP.

The University Defendants do not oppose these additions. State Defendants' opposition is narrow, and as explained below, unfounded. Most of the amendments Plaintiffs propose are uncontested: for example, the new claims against the University Defendants is not opposed; nor is there an objection to Sgt. Caraway's new Title VII claim against the State of North Carolina, Department of Public Safety. State Defendants object only to Sgt. Caraway's Title VII claim against the NCSHP. For the reasons explained below, their objections are both improper on this posture, and wrong on the merits. Plaintiffs' motion to amend the complaint should be granted.

## ARGUMENT

### **I. State Defendants Ignore the Standard for a Motion for Leave to Amend**

Rule 15 directs courts to "freely give leave [to amend a complaint] when justice so requires." Fed. R. Civ. P. 15(a)(2). Courts generally give leave to amend unless "good reason exists" to deny it, "such as prejudice to the defendants." *Franks v. Ross*, 313 F.3d 184, 198 n.15 (4th Cir. 2002) (internal alterations and quotations omitted). State Defendants do not argue that

they would be prejudiced by the amendment here. Nor do they provide any other “good reason” to deny the motion. Instead, they spend the bulk of their response arguing jurisdictional and merits issues. The Court should reject this effort to shoehorn points best made in a motion to dismiss into an argument on a motion for leave to amend. The amendment will not unduly prejudice State Defendants: it will not delay the proceedings, and discovery has only just begun. Moreover, the addition of a new plaintiff, with claims arising from similar conduct to that alleged by existing plaintiffs, is not prejudicial. 16A Fed. Prac. & Proc. (“Wright & Miller”) § 1501 (3d ed. 2016); *cf. Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (noting that a defendant is not prejudiced by an amendment adding new claims based on same actions giving rise to original claims). Thus, State Defendants have failed to show any reason to deny leave to amend.

## **II. The Court Has Jurisdiction to Grant Plaintiffs’ Motion**

State Defendants’ argument that their appeal has deprived this Court of jurisdiction over *any* claims against NCSHP is incorrect. An appeal “divests the district court of its control *over those aspects of the case involved in the appeal.*” *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (emphasis added); *accord Doe v. Pub. Citizen*, 749 F.3d 246, 258 (4th Cir. 2014).

State Defendants err in applying the holding in *Griggs* to *all aspects* of the case involved in the appeal. But the plain text of *Griggs* belies this—and Plaintiffs’ claims under Title VII, raised for the first time in the Amended Complaint, plainly are not part of the appeal. Consistent with *Griggs*, where a party has taken an interlocutory appeal, the district court retains jurisdiction over “matters outside the scope of the appeal.” *Price v. Dunn*, 139 S. Ct. 1533, 1537 (2019) (Thomas, J., concurring). Here, on grounds specific to Plaintiffs’ Patient Protection and Affordable Care Act (“ACA”) claim, State Defendants have taken an interlocutory appeal under

the collateral order doctrine, *see Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). “[U]nder the ‘collateral order doctrine,’ the fact that the issues on appeal are separate from the merits of the case may mean that the pendency of the appeal does not oust the district court’s jurisdiction to proceed with the case.” Wright & Miller, *Juris.* § 3949.1. *See also Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) (“Appeals based on the ‘collateral order doctrine’ . . . present issues separate from the merits . . . and the court of appeals can consider these segregable issues while the district court presses ahead with the case.”). Thus, a collateral appeal on immunity grounds does not deprive the district court of jurisdiction over all the other claims in the same case to which the immunity defense could not apply. *Swint v. Chambers Cty. Comm’n*, 514 U.S. 35, 51 (1995); *see also Adams v. Ferguson*, 884 F.3d 219, 224 (4th Cir. 2018) (refusing to exercise jurisdiction over claims not subject to sovereign immunity in collateral appeal from denial of sovereign immunity defense); *Robinson v. Miller*, 802 Fed. App’x 741, 749 (4th Cir. 2020) (unpublished) (same as to qualified immunity); *Richardson v. Orangeburg Sch. Dist. No. 1*, 53 F.3d 329 n.2 (4th Cir. 1995) (unpublished) (same).

Sgt. Caraway’s Title VII claim is plainly outside the scope of NCSHP’s appeal, which asserts sovereign immunity only as to Plaintiffs’ ACA claim. Moreover, State Defendants do not argue that NCSHP would have a sovereign immunity defense as to Sgt. Caraway’s Title VII claim. Indeed, they could not make such an argument, because states do not have sovereign immunity under Title VII. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that Title VII abrogates state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment); *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000) (reaffirming Congress’s authority to abrogate the States’ sovereign immunity).

The present case is thus the same as *Swint, Adams, Robinson, and Richardson*: NCSHP's collateral appeal of a single claim on sovereign immunity grounds does not deprive this Court of jurisdiction to consider different claims from which there is and can be no sovereign immunity. *See also Apostol*, 870 F.2d at 1339 ("If the claim of immunity is a sham . . . the notice of appeal does not transfer jurisdiction to the court of appeals . . .").

Further, as State Defendants' correctly observe, the collateral order doctrine is intended to avoid "the costs and general consequences of subjecting public officials to the risks of discovery and trial." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143–44 (1993). But because NCSHP's appeal does not (and cannot) address its sovereign immunity from a Title VII claim, no matter how the Court of Appeals decides the appeal, that decision will not prevent NCSHP from being subject to a potential trial on that claim. Granting State Defendants' motion would thus merely pointlessly delay proceedings on Sgt. Caraway's Title VII claim until after the appeal is over; or, alternatively, it would pointlessly require her to file a second, separate action asserting only that claim—which State Defendants could not argue is jurisdictionally foreclosed by NCSHP's appeal in this case—which would then likely be joined to this case in any event, *see United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966) ("the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged"). Neither course of action would protect NCSHP against discovery and trial on the Title VII claim, and neither is consistent with judicial economy or the interests of justice.

At any rate, the question at issue *in this motion* plainly does not relate to issues "involved in the appeal." The question here is whether to grant Plaintiffs leave to amend the Complaint to add claims entirely separate from the one on appeal. Contrary to State Defendants' suggestions,

as explained above, the standard for a motion for leave to amend is whether good reason exists to deny leave. Even if a claim of sovereign immunity to as Title VII were not frivolous, which it is, Rule 15 does not require courts to consider a defendant's potential immunity from suit; therefore, Plaintiffs' motion does not raise the issue involved in State Defendants' interlocutory appeal.

### **III. Plaintiffs' Motion Is Not Futile**

State Defendants argue Plaintiffs' motion should be denied as "futile" because Plaintiffs fail to state a Title VII claim adequate to satisfy Rule 12(b)(6). Opp. at 8-10.<sup>1</sup> The argument appears to be based on a misreading of the Amended Complaint: namely that Sgt. Caraway seeks to bring claims against the University Defendants, while the current plaintiffs seek to add Title VII claims against State Defendants. Neither is true.

State Defendants' contention that Plaintiffs' Title VII claims are "untimely," Opp. at 8, appears to be based on their first misreading. Their concern about the tolling stipulation being only with the University Defendants, Opp. at 8, could be relevant if any of the current plaintiffs had brought Title VII claims against any of the State Defendants, but they have not. The stipulation is thus irrelevant to any Title VII claims against any State Defendants. Only Sgt. Caraway, a new plaintiff, brings Title VII claims against any of the State Defendants (specifically, against NCSHP).<sup>2</sup> Amend. Compl. at 42. That claim is subject to a ninety-day statute of limitations, *see* 42 U.S.C. § 2000e-5(f)(1), which began running when she received her

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<sup>1</sup> State Defendants' brief also states in a heading that Plaintiffs' motion is "prejudicial," Opp. at 8, but does not present any argument. This argument is therefore waived. *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012).

<sup>2</sup> She also brings claims against a new defendant: her employer, the State of North Carolina, Department of Public Safety. State Defendants do not mention this claim in their brief, let alone argue that it is improper.

Notice of Right to Sue, on July 30, 2020. *See* Appendix A; *see also* Amend. Compl. at ¶ 177.<sup>3</sup>

The Amended Complaint, filed four days later, was therefore timely. State Defendants’ argument that Sgt. Caraway never received that Notice, Opp. at 8, is incorrect.<sup>4</sup>

State Defendants’ argument that Plaintiffs’ theory of their Title VII liability depends on NCSHP being an “agent” of the University Defendants, Opp. at 9, appears to be based on their second misreading. Sgt. Caraway is not an employee of any of the University Defendants and her Title VII claim has nothing to do with the relationship between them and NCSHP. State Defendants’ argument is a non sequitur.

Moreover, even as to the relevant co-defendant, State Defendants’ argument that as a matter of law NSCHP cannot be liable under Title VII is wrong. Title VII uses the word “agent” in its definition of “employer.” 42 U.S.C. § 2000e(b). The Supreme Court has long rejected the argument that State Defendants seek to make here; it held nearly half a century ago that a government administrative board that implements a discriminatory fringe benefit may be sued under Title VII as the “agent” of the government agency that provides the benefit to its employees. *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 718 n. 33 (1978). Indeed, in a case essentially identical to the present, a different district court has already ruled that the state agencies charged with adopting and administering the terms of a state

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<sup>3</sup> 42 U.S.C. § 2000e-5(f)(1) also provides that, where a respondent is a state or local government entity, the Attorney General, not EEOC, issues the Notice of Right to Sue—as happened here. For completeness’ sake, Appendix A comprises the final Notices issued to Sgt. Caraway by the Department of Justice; the earlier Notices issued by EEOC, which the Department of Justice’s Notices superseded; and Sgt. Caraway’s original Charge. The EEOC file number of Sgt. Caraway’s claim against NCSHP is 433-2020-02566. *See* Appendix A at 2, 6.

<sup>4</sup> Plaintiffs’ Title VII claims against University Defendants are also timely. Plaintiffs had fifty days from the Supreme Court’s decision in *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (June 15, 2020) to add Title VII claims against them. *See* Opp. at 9. Plaintiffs’ motion was filed forty-nine days later.

employee health plan containing a transgender exclusion are proper “agent” defendants in a Title VII suit by state employees. *Boyden v. Conlin*, 341 F. Supp. 3d 979, 998 (W.D. Wis. 2018) (granting plaintiffs summary judgment on their argument that an employee trust fund administering health coverage is “liable for sex discrimination under Title VII” as “an agent of the State and the ultimate employer”); *see also Boyden v. Conlin*, No. 17-CV-264-WMC, 2018 WL 2191733, at \*8 (W.D. Wis. May 11, 2018) (further analyzing employee trust fund’s liability as an agent of employer).<sup>5</sup> Nor do State Defendants cite any authority foreclosing Plaintiffs’ joint employer theory of liability. Any dispute about application of the Fourth Circuit’s multi-factor analysis for joint employer relationships, *Opp.* at 9-10, is properly considered on a motion to dismiss, not here. Thus, State Defendants cannot make the required showing that Plaintiffs’ amendment would be futile pursuant to Rule 15.

### CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs’ Motion for Leave to Amend.

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<sup>5</sup> *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994), cited by the State Defendants, stands only for the simple proposition that “as an unremarkable expression of respondeat superior” Title VII’s use of the word “agent” doesn’t generally provide for individual liability by a defendant’s supervisory employees. *Accord Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 180 (4th Cir. 1998). That doesn’t mean the Fourth Circuit has simply read “agent” liability out of Title VII—nor could it.

Dated: September 8, 2020

Respectfully submitted,

/s/ Amy E. Richardson

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*Counsel for Plaintiffs*

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

### **CERTIFICATE OF WORD COUNT**

I hereby certify that the foregoing PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT is in compliance with Local Rule 7.3(d)(1) in that the body of this brief, including headings and footnotes, does not exceed 3,125 words as indicated by the word processing software used to prepare this document.

Dated: September 8, 2020

/s/ Amy E. Richardson

Amy E. Richardson

*Counsel for Plaintiffs*

## CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, the foregoing PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT was filed electronically with the Clerk of Court using the CM/ECF electronic filing system which will send notification of such filing to all registered users.

/s/ Amy E. Richardson  
Amy E. Richardson

*Counsel for Plaintiffs*

# Appendix A



U.S. Department of Justice  
Civil Rights Division  
NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

VIA EMAIL

950 Pennsylvania Avenue, N.W.  
Karen Ferguson, EMP, PHB, Room 4701  
Washington, DC 20530

July 30, 2020

Ms. Dana Emily Caraway (Dowd Caraway)  
c/o David Brown, Esquire  
TLDEF  
520 8th Ave., Suite 2204  
New York, NY 10018

Re: EEOC Charge Against State of North Carolina, North Carolina Dept. of Public Safety, et al.  
No. 433202002566

Dear Ms. Caraway (Dowd Caraway):

Because you filed the above charge with the Equal Employment Opportunity Commission, and the Commission has determined that it will not be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over the charge and the Department has determined that it will not file any lawsuit(s) based thereon within that time, and because you through your attorney have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate Court within 90 days of your receipt of this Notice.

The investigative file pertaining to your case is located in the EEOC Raleigh Area Office, Raleigh, NC.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

Sincerely,

Eric S. Dreiband  
Assistant Attorney General  
Civil Rights Division

by /s/ Karen L. Ferguson  
Karen L. Ferguson  
Supervisory Civil Rights Analyst  
Employment Litigation Section

cc: Raleigh Area Office, EEOC  
State of North Carolina, North Carolina Dept. of Public Safety, et al.



U.S. Department of Justice  
Civil Rights Division  
NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

VIA EMAIL

950 Pennsylvania Avenue, N.W.  
Karen Ferguson, EMP, PHB, Room 4701  
Washington, DC 20530

July 30, 2020

Ms. Dana Emily Caraway (Dowd Caraway)  
c/o David Brown, Esquire  
TLDEF  
520 8th Ave., Suite 2204  
New York, NY 10018

Re: EEOC Charge Against State of North Carolina, Dept. of Public Safety, et al.  
No. 433202002564

Dear Ms. Caraway (Dowd Caraway):

Because you filed the above charge with the Equal Employment Opportunity Commission, and the Commission has determined that it will not be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over the charge and the Department has determined that it will not file any lawsuit(s) based thereon within that time, and because you through your attorney have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., against the above-named respondent.

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This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

Sincerely,

Eric S. Dreiband  
Assistant Attorney General  
Civil Rights Division

by /s/ Karen L. Ferguson  
Karen L. Ferguson  
Supervisory Civil Rights Analyst  
Employment Litigation Section

cc: Raleigh Area Office, EEOC  
State of North Carolina, Dept. of Public Safety, et al.



U.S. Department of Justice  
Civil Rights Division  
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VIA EMAIL

950 Pennsylvania Avenue, N.W.  
Karen Ferguson, EMP, PHB, Room 4701  
Washington, DC 20530

July 30, 2020

Ms. Dana Emily Caraway (Dowd Caraway)  
c/o David Brown, Esquire  
TLDEF  
520 8th Ave., Suite 2204  
New York, NY 10018

Re: EEOC Charge Against State of North Carolina, Dept. of Public Safety, et al.  
No. 433202002563

Dear Ms. Caraway (Dowd Caraway):

Because you filed the above charge with the Equal Employment Opportunity Commission, and the Commission has determined that it will not be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over the charge and the Department has determined that it will not file any lawsuit(s) based thereon within that time, and because you through your attorney have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate Court within 90 days of your receipt of this Notice.

The investigative file pertaining to your case is located in the EEOC Raleigh Area Office, Raleigh, NC.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

Sincerely,

Eric S. Dreiband  
Assistant Attorney General  
Civil Rights Division

by /s/ Karen L. Ferguson  
Karen L. Ferguson  
Supervisory Civil Rights Analyst  
Employment Litigation Section

cc: Raleigh Area Office, EEOC  
State of North Carolina, Dept. of Public Safety, et al.



U.S. Department of Justice  
Civil Rights Division  
NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

VIA EMAIL

950 Pennsylvania Avenue, N.W.  
Karen Ferguson, EMP, PHB, Room 4701  
Washington, DC 20530

July 30, 2020

Ms. Dana Emily Caraway (Dowd Caraway)  
c/o David Brown, Esquire  
TLDEF  
520 8th Ave., Suite 2204  
New York, NY 10018

Re: EEOC Charge Against State of North Carolina, Dept. of Public Safety, et al.  
No. 433202002560

Dear Ms. Caraway (Dowd Caraway):

Because you filed the above charge with the Equal Employment Opportunity Commission, and the Commission has determined that it will not be able to investigate and conciliate that charge within 180 days of the date the Commission assumed jurisdiction over the charge and the Department has determined that it will not file any lawsuit(s) based thereon within that time, and because you through your attorney have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate Court within 90 days of your receipt of this Notice.

The investigative file pertaining to your case is located in the EEOC Raleigh Area Office, Raleigh, NC.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

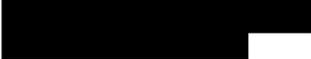
Sincerely,

Eric S. Dreiband  
Assistant Attorney General  
Civil Rights Division

by /s/ Karen L. Ferguson  
Karen L. Ferguson  
Supervisory Civil Rights Analyst  
Employment Litigation Section

cc: Raleigh Area Office, EEOC  
State of North Carolina, Dept. of Public Safety, et al.

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)**

To: **Dana Aka Dowd Caraway**  
From: **Raleigh Area Office**  
**434 Fayetteville Street, Suite 700**  
**Raleigh, NC 27601**

On behalf of person(s) aggrieved whose identity is  
 CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.

EEOC Representative

Telephone No.

**433-2020-02566**

**Tonya A. Lennox,**  
**Enforcement Supervisor**

**(919) 856-4714**

(See also the additional information enclosed with this form.)

**NOTICE TO THE PERSON AGGRIEVED:**

**Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), or the Genetic Information Nondiscrimination Act (GINA):** This is your Notice of Right to Sue, issued under Title VII, the ADA or GINA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII, the ADA or GINA **must be filed in a federal or state court WITHIN 90 DAYS of your receipt of this notice;** or your right to sue based on this charge will be lost. (The time limit for filing suit based on a claim under state law may be different.)

More than 180 days have passed since the filing of this charge.

Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of this charge.

The EEOC is terminating its processing of this charge.

The EEOC will continue to process this charge.

**Age Discrimination in Employment Act (ADEA):** You may sue under the ADEA at any time from 60 days after the charge was filed until 90 days after you receive notice that we have completed action on the charge. In this regard, **the paragraph marked below applies to your case:**

The EEOC is closing your case. Therefore, your lawsuit under the ADEA **must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice.** Otherwise, your right to sue based on the above-numbered charge will be lost.

The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of the charge, you may file suit in federal or state court under the ADEA at this time.

**Equal Pay Act (EPA):** You already have the right to sue under the EPA (filing an EEOC charge is not required.) EPA suits must be brought in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that **backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.**

If you file suit, based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission



**Glory Gervacio Saure,**  
**Area Office Director**

**07/21/2020**

(Date Mailed)

Enclosures(s)

cc:

**NC STATE HEALTH PLAN FOR TEACHERS & STATE  
 EMPLOYEES**  
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 New York, NY 10018

## INFORMATION RELATED TO FILING SUIT UNDER THE LAWS ENFORCED BY THE EEOC

*(This information relates to filing suit in Federal or State court under Federal law.  
If you also plan to sue claiming violations of State law, please be aware that time limits and other  
provisions of State law may be shorter or more limited than those described below.)*

**PRIVATE SUIT RIGHTS -- Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA),  
the Genetic Information Nondiscrimination Act (GINA), or the Age  
Discrimination in Employment Act (ADEA):**

In order to pursue this matter further, you must file a lawsuit against the respondent(s) named in the charge **within 90 days of the date you receive this Notice**. Therefore, you should **keep a record of this date**. Once this 90-day period is over, your right to sue based on the charge referred to in this Notice will be lost. If you intend to consult an attorney, you should do so promptly. Give your attorney a copy of this Notice, and its envelope, and tell him or her the date you received it. Furthermore, in order to avoid any question that you did not act in a timely manner, it is prudent that your suit be filed **within 90 days of the date this Notice was mailed to you** (as indicated where the Notice is signed) or the date of the postmark, if later.

Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. (Usually, the appropriate State court is the general civil trial court.) Whether you file in Federal or State court is a matter for you to decide after talking to your attorney. Filing this Notice is not enough. You must file a "complaint" that contains a short statement of the facts of your case which shows that you are entitled to relief. Courts often require that a copy of your charge must be attached to the complaint you file in court. If so, you should remove your birth date from the charge. Some courts will not accept your complaint where the charge includes a date of birth. Your suit may include any matter alleged in the charge or, to the extent permitted by court decisions, matters like or related to the matters alleged in the charge. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office. If you have simple questions, you usually can get answers from the office of the clerk of the court where you are bringing suit, but do not expect that office to write your complaint or make legal strategy decisions for you.

**PRIVATE SUIT RIGHTS -- Equal Pay Act (EPA):**

EPA suits must be filed in court within 2 years (3 years for willful violations) of the alleged EPA underpayment: back pay due for violations that occurred **more than 2 years (3 years) before you file suit** may not be collectible. For example, if you were underpaid under the EPA for work performed from 7/1/08 to 12/1/08, you should file suit **before 7/1/10** – not 12/1/10 -- in order to recover unpaid wages due for July 2008. This time limit for filing an EPA suit is separate from the 90-day filing period under Title VII, the ADA, GINA or the ADEA referred to above. Therefore, if you also plan to sue under Title VII, the ADA, GINA or the ADEA, in addition to suing on the EPA claim, suit must be filed within 90 days of this Notice and within the 2- or 3-year EPA back pay recovery period.

**ATTORNEY REPRESENTATION -- Title VII, the ADA or GINA:**

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**ATTORNEY REFERRAL AND EEOC ASSISTANCE -- All Statutes:**

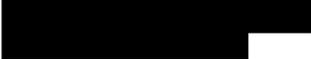
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Enclosures(s)

cc: **BEN GARNER, Esq.**  
**DEPARTMENT OF STATE TREASURER**  
**3200 Atlantic Ave**  
**Raleigh, NC 27604**

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)**

To: **Dana Aka Dowd Caraway**  
From: **Raleigh Area Office**  
**434 Fayetteville Street, Suite 700**  
**Raleigh, NC 27601**
 On behalf of person(s) aggrieved whose identity is  
 CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
<b>433-2020-02564</b>	<b>Tonya A. Lennox, Enforcement Supervisor</b>	<b>(919) 856-4714</b>

(See also the additional information enclosed with this form.)

**NOTICE TO THE PERSON AGGRIEVED:**

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- More than 180 days have passed since the filing of this charge.
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- The EEOC will continue to process this charge.

**Age Discrimination in Employment Act (ADEA):** You may sue under the ADEA at any time from 60 days after the charge was filed until 90 days after you receive notice that we have completed action on the charge. In this regard, **the paragraph marked below applies to your case:**

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On behalf of the Commission



**Glory Gervacio Saure,**  
**Area Office Director**

07/21/2020

(Date Mailed)

Enclosures(s)

cc:

**BOARD OF TRUSTEES OF THE STATE HEALTH PLAN  
 FOR TEACHERS AND STATE EMPLOYEES (agent of  
 employer)**  
 3200 Atlantic Ave  
 Raleigh, NC 27604

**DAVID BROWN, Esq.**  
**TRANSGENDER LEGAL DEFENSE & EDUCATION  
 FUND, INC**  
 520 8TH AVE  
 STE 2204  
 New York, NY 10018

**INFORMATION RELATED TO FILING SUIT  
UNDER THE LAWS ENFORCED BY THE EEOC**

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Enclosures(s)

cc: **BEN GARNER, Esq.**  
**DEPARTMENT OF STATE TREASURER**  
**3200 ATLANTIC AVE**  
**Raleigh, NC 27604**

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**NOTICE OF RIGHT TO SUE (ISSUED ON REQUEST)**

To: **Dana Aka Dowd Caraway**  
[REDACTED]From: **Raleigh Area Office**  
**434 Fayetteville Street, Suite 700**  
**Raleigh, NC 27601**
 On behalf of person(s) aggrieved whose identity is  
 CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
<b>433-2020-02563</b>	<b>Tonya A. Lennox, Enforcement Supervisor</b>	<b>(919) 856-4714</b>

(See also the additional information enclosed with this form.)

**NOTICE TO THE PERSON AGGRIEVED:**

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On behalf of the Commission



**Glory Gervacio Saure,**  
**Area Office Director**

07/21/2020

(Date Mailed)

Enclosures(s)

cc: **MONIQUE EDWARDS**  
**EEO OFFICER-EMPLOYEE RELATIONS**  
**STATE OF NORTH CAROLINA**

**DAVID BROWN, Esq.**  
**TRANSGENDER LEGAL DEFENSE & EDUCATION**  
**FUND, INC**  
**520 8TH AVE**  
**STE 2204**  
**New York, NY 10018**

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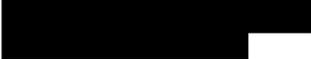
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Enclosures(s)

cc:

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To: **Dana Aka Dowd Caraway**  
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**Raleigh, NC 27601**
 On behalf of person(s) aggrieved whose identity is  
 CONFIDENTIAL (29 CFR §1601.7(a))

EEOC Charge No.	EEOC Representative	Telephone No.
<b>433-2020-02560</b>	<b>Tonya A. Lennox, Enforcement Supervisor</b>	<b>(919) 856-4714</b>

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On behalf of the Commission




---

**Glory Gervacio Saure,**  
**Area Office Director**
**07/21/2020***(Date Mailed)*

Enclosures(s)

cc:

**NC DEPARTMENT OF PUBLIC SAFETY**  
 512 N. Salisbury Street  
 4204 Mail Service Center  
 Raleigh, NC 27699

**DAVID BROWN, Esq.**  
**TRANSGENDER LEGAL DEFENSE & EDUCATION**  
**FUND, INC**  
 520 8TH AVE  
 STE 2204  
 New York, NY 10018

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Enclosures(s)

cc:

EEOC Form 5 (11/08)

### CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

FEPA  
 EEOC

**N.C. Office of Administrative Hearings, Civil Rights Division**

and EEOC

State or local Agency, if any

Name (Indicate Mr., Ms., Mrs.)

**Ms. Dana Emily Caraway, also known as Dowd Caraway**

Home Phone (Incl. Area Code)

Date of Birth

Street Address

City, State and ZIP Code

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name

**North Carolina Department of Public Safety**

No. Employees, Members

**More than 15**

Phone No. (Include Area Code)

**(919) 733-2126**

Street Address

**512 North Salisbury Street**

City, State and ZIP Code

**Raleigh, NC 28655**

Name

**State of North Carolina**

No. Employees, Members

**More than 15**

Phone No. (Include Area Code)

**(919) 733-2913**

Street Address

**1425 Mail Service Center**

City, State and ZIP Code

**Raleigh, NC 28655**

DISCRIMINATION BASED ON (Check appropriate box(es))

RACE  COLOR  SEX  RELIGION  NATIONAL ORIGIN  
 RETALIATION  AGE  DISABILITY  GENETIC INFORMATION  
 OTHER (Specify)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest

**01/01/2017**

Latest

CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

Additional employers listed here. Please see attached statement for narrative of particulars.

Board of Trustees of the State Health Plan for Teachers and State Employees (agent of employer)  
3200 Atlantic Ave Raleigh, NC 27604 More than 15 employees (855) 859-0966

North Carolina State Health Plan for Teachers and State Employees (agent of employer)  
3200 Atlantic Ave Raleigh, NC 27604 More than 15 employees (855) 859-0966

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

NOTARY - When necessary for State and Local Agency Requirements

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.  
SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME (month, day, year)



7-17-20

Date

Dana Emily Caraway  
Charging Party Signature

07/17/20

**Attached Statement**  
EEOC Charge of Discrimination  
Charging Party Dana Caraway

**The particulars are:**

1. I am a 50-year-old transgender woman, and I am currently a resident of Morganton, North Carolina.
2. I have worked as an officer of the North Carolina Department of Public Safety since 1994.
3. I have been very successful in my position. I have been promoted to the position of supervisor in the Division of Adult Correction and Juvenile Justice. I currently hold the rank of Sergeant.
4. As a North Carolina state employee, I participate in the North Carolina State Health Plan for Teachers and State Employees 80/20 PPO Plan ("Health Plan") administered by Blue Cross and Blue Shield of North Carolina ("BCBSNC"). The Health Plan is a division of the North Carolina Department of State Treasurer. It is governed by a Board of Trustees ("Board"), which has the authority to remove exclusions in the Health Plan.
5. I receive part of my compensation in the form of health care benefits, and I contribute \$50 per month to my Health Plan.
6. BCBSNC uses internal corporate medical policies to make medical necessity determinations when evaluating claims. Since at least 2011, BCBSNC has generally recognized the medical necessity of gender-confirmation surgeries in its medical policy on Gender Confirmation Surgery and Hormone Therapy,<sup>1</sup> which outlines the clinical criteria for when it considers such care to be medically necessary.
7. The Health Plan covers, among other things, laboratory testing, mental health treatment, and physician services.
8. Yet the Health Plan explicitly singles out and excludes: "[p]sychological assessment and psychotherapy treatment in conjunction with proposed gender transformation," and

---

<sup>1</sup>

[https://www.bluecrossnc.com/sites/default/files/document/attachment/services/public/pdfs/medicalpolicy/gender\\_confirmation\\_surgery\\_and\\_hormone\\_therapy.pdf](https://www.bluecrossnc.com/sites/default/files/document/attachment/services/public/pdfs/medicalpolicy/gender_confirmation_surgery_and_hormone_therapy.pdf).

“[t]reatment or studies to or in connection with sex changes or modifications and related care” (the Exclusions).<sup>2</sup>

9. Despite contributing the same amount from each paycheck as my co-workers, I receive in return unequal health care benefits, and, therefore lesser compensation, because the Health Plan explicitly excludes all treatments for gender dysphoria and other treatments related to “gender transformation” or “sex changes.” The Health Plan has no legitimate, nondiscriminatory basis to single out transgender-related care for the Exclusions.
10. As outlined below, the Health Plan’s discriminatory exclusion has subjected me to sex discrimination by denying me access to medically necessary care because of sex.

### **Gender Dysphoria**

11. I have a serious medical condition called gender dysphoria, which arises when the sex of the brain develops on a divergent path from the external sex characteristics of the body.
12. This well-established medical condition is typically alleviated by hormonal and surgical treatment to align external sex characteristics with the brain. When left untreated, gender dysphoria can result in serious psychological debilitation, including depression, anxiety, substance use, suicidality, and other mental health issues. Therefore, such medically necessary treatments are widely covered under health insurance plans.
13. I was diagnosed with gender dysphoria in 2017.
14. I now live openly, rather than secretly, as a woman; and I use the name Dana Emily Caraway, rather than the traditionally-male-sounding name my parents gave me at birth. Earlier this year, I filed a petition for a court-ordered change of name to confirm my common-law name change, but my petition has not yet been granted due to court closures caused by the COVID-19 pandemic.
15. As part of my treatment, I have taken a course of hormone replacement therapy for several years, which feminized my appearance, up to a point.
16. As my appearance has changed, it has caused me more distress to continue to have a male chest, genitalia, and a voice. It is also a safety issue to appear female but to have a male-sounding voice, especially given the prison environment that I work in.

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<sup>2</sup> <https://files.nc.gov/ncshp/documents/open-enrollment-documents/2020/BenefitBooks/80-20BenBookFinal4.1.20.pdf>.

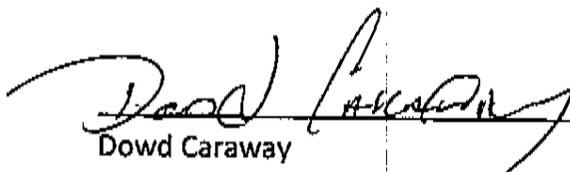
17. I need gender reassignment surgery which my therapist and psychologist have both recommended, to treat my gender dysphoria. I am currently seeking surgery for my chest, genitalia, face, and voice.
18. I am scheduled to have chest and genital reassignment surgery on August 5, 2020, with Dr. Keelee MacPhee in Durham. I am also scheduled to have voice feminization surgery on September 8, 2020. I intend to seek facial gender-confirmation surgery next year.

#### **Denial of Coverage on the Basis of Sex**

19. The Health Plan covers laboratory testing, mental health treatment and surgery, including physician services, anesthesia, and hospital expenses.
20. Yet the plan explicitly singles out and excludes: “[p]sychological assessment and psychotherapy treatment in conjunction with proposed gender transformation,” and “[t]reatment or studies to or in connection with sex changes or modifications and related care.”
21. The exclusion for treatments of gender dysphoria singles out transgender employees. By definition, only transgender people have a need to access mental health treatment for “gender transformation” or treatments relating to “sex changes or modifications.” Because I am unable to fully enjoy my benefits of employment, I have received lesser compensation than other, non-transgender, employees.
22. BCBSNC uses internal corporate medical policies to make medical necessity determinations when evaluating claims. BCBSNC generally recognizes the medical necessity of transgender-related surgeries in its medical policy on Gender Confirmation Surgery and Hormone Therapy, which outlines the clinical criteria for when it considers such surgeries to be medically necessary.
23. To alleviate my gender dysphoria, I urgently require medically necessary surgery. I experience distress on a daily basis due to the incongruity between my body and brain. Yet, because of the Exclusions, the Health Plan will not cover my surgery.
24. My surgeon, Dr. MacPhee, sought preauthorization from BCBSNC for my upcoming chest and genital surgeries. On June 19, 2020, BCBSNC denied coverage, for the stated reason that “the requested service is not a covered benefit” because of the exclusion for “treatments . . . in connection with sex changes or modifications.”

**Charge**

- 25. I am aware that the Exclusions are the subject of an ongoing federal lawsuit, *Kadel v. Folwell*, No. 1:19-CV-272, in the Middle District of North Carolina, brought by other transgender participants in the Health Plans who, like me, have been denied coverage of treatments for gender dysphoria. My counsel are the same as the counsel for the plaintiffs in that suit. I am aware that the plaintiffs in *Kadel* intend to file an Amended Complaint on August 4, 2020, to reflect that the United States Supreme Court affirmed last month in *Bostock v. Clayton County, Georgia*, No. 17-1618, that discrimination against transgender employees due to their transgender status is unlawful discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964.
- 26. On the advice of counsel, I seek to exhaust the jurisdictional prerequisites to filing suit under Title VII by obtaining a Notice of Right to Sue before August 4, 2020. I do not seek investigation, conciliation, or legal action by the EEOC.
- 27. I believe that the Board of Trustees of the Health Plan and the North Carolina Department of State Treasurer participated in discriminatory employment practices with respect to compensation, terms, conditions, or privileges of employment. Offering or adopting a plan with a gender dysphoria exclusion treats transgender employees worse by providing lesser compensation and benefits than non-transgender employees. This pattern or practice of discrimination constitutes intentional discrimination and disparate treatment under Title VII.
- 28. As a direct result of the discrimination on the basis of sex described above, I have suffered damages including, but not limited to, lost compensation, benefits, healthcare, emotional distress and mental anguish, and attorneys' fees.



Dowd Caraway  
better known as Dana Emily Caraway

Sworn to before me this

17 day of July, 2020

  
NOTARY PUBLIC

