UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

ALLEN L. LANCASTER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:19-cv-95**
	)	
THE SECRETARY OF THE NAVY, et al.,	)	
	)	
	)	
Defendants.	)	

OPINION & ORDER

This matter is before the Court on Defendants' motion to transfer venue. Doc. 9. The Court held a hearing on June 13, 2019, and ordered supplemental briefing, particularly on how the District for the District of Columbia ("D.D.C.") recently disposed of related litigation. In short, Defendants argue that Plaintiffs in this case are mis-joined, that the Plaintiffs violated an order from the D.D.C. severing claims of individualized discrimination, and that the Plaintiffs attempt to resurrect already-decided claims and issues. Plaintiffs argue that they have complied with the D.D.C.'s order and that this Court is an appropriate venue to hear the all of the claims of individualized discrimination in a single action. For reasons stated herein, the Court **GRANTS** the motion **IN PART** and **DENIES** the motion **IN PART**.

I. BACKGROUND

A. IN RE: NAVY CHAPLAINCY

This matter stems from nearly twenty (20) years of litigation in the D.D.C. In that litigation, three (3) cases were consolidated under the caption In Re: Navy Chaplaincy. All parties before this Court were also parties to that litigation.

The D.D.C. granted summary judgment to Defendants on Plaintiffs' "systemic claims" on August 30, 2018. In that order, the D.D.C. awarded judgment to Defendants on (1) Plaintiffs' claim that the Navy had a policy of keeping one Roman Catholic chaplain on all selection boards, Mem. Opp., 1:07-mc-269, Doc. 336 at 23; (2) Plaintiffs' challenges to the selection board procedures, id. at 34; (3) Plaintiffs' constitutional challenge to the "discovery ban" of 10 U.S.C. § 613a, id. at 37; and (4) denied Plaintiffs' requests for additional discovery, id. at 38.[1] That order – by its own terms – did not reach retaliation, constructive discharge, or interference with prayer claims. See id. Those three (3) claims were collectively referred to as the "ad hoc" claims, and reserved for a future time. See id.

On November 2, 2018, all parties moved for the D.D.C. to sever the remaining "ad hoc" claims, arguing that those claims were improperly joined. Jt. Mot., 1:07-mc-269, Doc. 342 (Nov. 2, 2018). The parties represented that the ad hoc claims involved different Plaintiffs, different events, occurred in different places, and would involve different witnesses. Id. On November 8, 2018, the D.D.C. granted the motion to sever and ordered that every Plaintiff who wished to pursue ad hoc claims do so "in any appropriate venue." Order, 1:07-mc-269, Doc. 344.

B. THE INSTANT LANCASTER LITIGATION

Plaintiffs filed this case on March 1, 2019. Doc. 1. This is the first significant motion brought before the Court in this litigation.

Defendant filed this motion to transfer the instant case to the D.D.C., alleging that Plaintiffs are forum shopping, attempting to re-package decided claims as ad hoc claims, and filing this case

[1] The extent of discovery in the prior litigation was point of discussion at the hearing on the instant motion. The D.D.C.'s summary judgment opinion discussed that matter in detail and concluded that sufficient discovery had taken place and "Plaintiffs March and September 2017 motions to lift the discovery stay will therefore be denied, and no further discovery will be permitted." 1:07-mc-269, Doc. 336, at 43 (D.D.C. Aug. 30, 2018).

in this Court in violation of the D.D.C.'s severance order. Defendants argue that section 1404's convenience and justice principles counsel in favor of transferring this case back to the D.D.C., so that court can determine the proper disposition of the instant claims.

II. DISCUSSION

A. JOINDER

Whether the ad hoc claims are properly joined together in a single action was the subject of a motion and order in Chaplaincy, the initial and supplemental briefs related to this motion, and the hearing on this motion to transfer. Thus, the Court will first address whether the claims are mis-joined.

Rule 21 provides:

> Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

Fed. R. Civ. P. 21. Whether to drop a party is within the district court's discretion. Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683, 692 (4th Cir. 1978); Lampliter Dinner Theater, Inc. v. Liberty Mut. Ins. Co., 792 F.2d 1036, 1045-45 (11th Cir. 1986).

When deciding whether to sever under rule 21, courts apply the joinder provisions of rules 19 and 20. Rule 20 provides:

> Persons may join in one action as plaintiffs if:
>
> > (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
> >
> > (B) any question of law or fact common to all plaintiffs will arise in the action.

Fed. R. Civ. P. 20(a)(1). Rule 20 gives a court "wide discretion" concerning permissive joinder. Aleman v. Chugach Support Services, Inc., 485 F.3d 206, 218 n.5 (4th Cir. 2007). The transaction or occurrence test is applied on a case by case basis, and absolute identity of the events is not

necessary. Saval v. BL Ltd., 710 F.2d 1027, 1031 (4th Cir. 1983). The rule should be read in light of the its purpose – to promote trial convenience and expedite the final determination of disputes. Id. Although rule 20 contemplates broad joinder principles, "merely committing the same type of violation in the same way" generally does not support joinder under the transaction or occurrence test. See Cell Film Holdings, LLC v. Does, 2016 WL 7494319, at * 3 (E.D. Va. Dec. 30, 2016). If permitting joinder would result in prejudice, expense, or delay, the district court may deny joinder. Aleman, 485 F.3d at 218 n.5. Where a district court finds, exercising its discretion, that the requirements of the rule and its purposes are not met, it may sever parties. Saval, 710 F.2d at 1031.

Defendants argue that both parties represented to the D.D.C. that the ad hoc claims – retaliation, constructive discharge, and interference with prayer – were separate claims that "do not satisfy either prong of rule 20(a)." Doc. 22-1. Plaintiffs and Defendants represented to the D.D.C. Judge that:

> the ad hoc claims concern varying discrete instances of conduct that involve different plaintiffs, different witnesses, different events, in different locations, and at different times . . . . Moreover, given that these claims necessarily would involve substantially different evidence and would likely involve different defenses, there is no reason to believe that consolidating them would promote trial convenience or expedite their resolution.
>
> Similarly, shorn of the systemic claims[, on which the D.C. court granted summary judgment to Defendants], Plaintiffs' remaining ad hoc claims do not share any common factual or legal nucleus.

Id. at 3-4. With that understanding, the D.D.C. Judge granted the requested relief and severed the ad hoc claims. See Doc. 22-2.

A judicial admission is a representation to a court that is "conclusive in the case," unless the court permits it to be withdrawn. Meyer v. Berkshire Life Ins. Co., 372 F.3d 261, 264-65 (4th Cir. 2004); VIA Design Architects v. U.S. Dev. Co., LLC, 2014 WL 5685550, at *8 (E.D. Va.

Nov. 4, 2014) (granting summary judgment given a judicial admission, even though the admission came in a brief, not a pleading). A judicial admission is not evidence; rather, it is a formal, binding concession that removes a fact from contention. Keller v. United States, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995), see also Meyer, 372 F.3d at 264 (4th Cir. 2004). They include "intentional and unambiguous waivers" as to factual matters that "release the opposing party from its burden to prove the facts necessary to established the waived conclusion of law." Everett v. Pitt Cty. Bd. Of Educ., 788 F.3d 132, 141 (4th Cir. 2015). Whether a statement constitutes a judicial admission is within the district court's discretion. Meyer, 372 F.3d at 264.

Plaintiffs and Defendants made several "fact representations" to the D.D.C. Judge in requesting severance, specifically that the ad hoc claims concerned "varying discrete instances of conduct that involve different plaintiffs, different witnesses, difference events, in different locations, and at different times" and that because the ad hoc claims will "involve[] substantially different evidence and would likely involve different defenses, there is no reason to believe that consolidating them would promote trial convenience or expedite their resolution." Doc. 22-1 at 3-4. Based on these fact representations, the D.D.C. severed those claims. Therefore, the Court **FINDS** that the Plaintiffs made judicial admissions as to the substance of their claims, and that Plaintiffs are bound by those admissions.

Even if the Court did not hold the Plaintiffs to their admissions, joinder is not appropriate here. Plaintiffs argue that joinder is appropriate because of "common themes," i.e., that some Plaintiffs suffered different instances of discrimination in the same place, or at the hands of the same individual. See Compl. ¶¶ 6-9, Compl. Ex. A. That does not justify joining all Plaintiffs into a single action, because their claims do not arise out of the same transaction or occurrence. Although each claim asserts some breed or instance of discrimination, each Plaintiff allegedly

suffered a different case of discrimination. Accord, e.g., Gregory v. FedEx Ground Package Systems, 2012 WL 2396873, at *11 (E.D. Va. May 9, 2012), report and recommendation adopted by 2012 WL 2396861 (E.D. Va. June 25, 2012); Bailey v. Northern Trust Co., 196 F.R.D. 513 (N.D. Ill. 2000) (finding no joinder where five plaintiffs alleged discrimination in the same department but at the hands of different supervisors); Maclin v. Northern Telecom, Inc., 1996 WL 495558, at * (N.D. Ill. Aug. 28, 1996) (severing claims because the alleged discrimination occurred during different periods of time); Smith v. N. Am. Rockwell Corp., 50 F.R.D. 515, 521-24 (N.D. Okla. 1970) (denying joinder where plaintiffs alleged discriminatory policy because discrimination occurred at different times and was allegedly committed by different actors). Thus, joining all twenty-seven (27) Plaintiffs together in one action is inappropriate.

Furthermore, trying all of Plaintiffs' claims together will not further the purposes of rule 20. As the Joint Motion conceded, "given that these claims necessarily would involve substantially different evidence and would likely involve different defenses, there is no reason to believe that consolidating them would promote trial convenience or expedite their resolution." Doc. 22-1 at 4. In Saval, the Fourth Circuit affirmed the district court's decision to sever plaintiffs, where each plaintiff alleged a similar breach of warranty pertaining to each of their own similar cars. The Saval court recognized:

> The district court did not err in determining that the allegedly similar problems did not satisfy the transaction or occurrence test. The cars were purchased at different times, were driven differently, and had different service histories. Quite probably, severance would have been required in order to keep straight the facts pertaining to the separate automobiles. At least as to the warranty claims, the similarity of defects is irrelevant; each complainant need only demonstrate what warranties were made, and the extent to which the products differed therefrom.

Saval, 710 F.3d at 1031. Here, Plaintiffs allege many different, individualized instances of discrimination that allegedly took place from California to Italy. E.g., Doc. 1 ¶ 7. Even if all some

claims were at the hands of the same Defendant, that does not mean that the instances of discrimination were the same occurrence. Keeping all of those allegations and occurrences straight would call for severance as well, or perhaps separate trials.

Although Defendants have not specifically moved for severance, they have put the issue before the Court, and, in any event, Rule 21 allows the Court to "drop any party" on its own on just terms. The Court **FINDS** just terms to do so, for reasons discussed supra at 3-7. Plaintiff-Lancaster lives in Suffolk and Plaintiff-Wilson lives in Virginia Beach. Compl. at 1. Accordingly, the Court **SEVERS** these Plaintiffs.

B. TRANSFER

Defendants here ask this Court to transfer all Plaintiffs to the D.D.C. Defendants argue that because the ad hoc claims were severed, each Plaintiff should have filed their claims in Districts with appropriate venue. As described herein, the Court **GRANTS** that request **IN PART**.

Generally, when proper venue is lacking, the court may transfer the case to another court if transfer is in the interest of justice. 28 U.S.C. § 1406. "Interests of justice" in the context of section 1406 calls for "removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits." The Hipage Co., Inc. v. Access2Go, Inc., 589 F. Supp. 2d 602, 613-14 (E.D. Va. 2008) (quoting Goldwar, Inc. v. Heiman, 369 U.S. 463, 466-67 (1962)).

A court may also transfer a case when it finds, in its discretion, that convenience and justice principles call for a transfer, even if venue is appropriate in the transferor court. 28 U.S.C. § 1404(a). This requires a two-step inquiry: (1) the court must determine whether the action "might have been brought" in the proposed transferee forum, and (2) the court should weigh several factors, including the plaintiff's chosen forum, the convenience of the witnesses, the convenience

of the parties, and the interests of justice. Trustees of the Plumbers and Pipefitters Nat. Pension Fund v. Plumbing Services, Inc., 791 F.3d 436, 444 (4th Cir. 2015). Courts consider a variety of factors in assessing the "interests of justice," including the court's familiarity with the applicable law, docket conditions, the possibility of unfair trial, the ability to join other parties, and the possibility of harassment. Agilent Tech., Inc. v. Micromuse, Inc., 316 F. Supp. 2d 322, 329 (E.D. Va. 2004). The movant bears the burden of proving that transfer is proper. E.g., Symbology Innovations, LLC v. Lego Systems, Inc., 282 F. Supp. 3d 916, 925 (E.D. Va. 2017).

Plaintiffs attempt to justify venue in this Court, because "defendants are a federal agency and its officials and [sic] are located in this District's territory along with some plaintiffs." Compl. ¶ 3. However, just because the Navy has facilities and officials in this District does not confer venue under section 1391(e). A federal agency sued in its own name "resides" in the District of Columbia and a federal official "resides" where he or she performs his or her official duties. South Carolina Coastal Conservation League v. Pruitt, 2018 WL 2184395, at *4 (D.S.C. May 11, 2018) (citing Reuben H. Donnelley Corp. v. F.T.C., 580 F.2d 264, 267 (7th Cir. 1978) and Archuleta v. Sullivan, 725 F. Supp. 602, 605 (D.D.C. 1989)). Thus, the D.D.C. would be an appropriate venue, because that is where the Defendants "reside." Defendants even concede that the D.D.C. would be an appropriate venue for this litigation. Doc. 10 at 8 ("There is no doubt that Plaintiffs could have originally brought this action in the [D.D.C.].").[2]

No actions or omissions are alleged to take place in this District and only Plaintiff-Lancaster and Plaintiff-Wilson reside in this District. Even taking Defendants' arguments as completely correct, Plaintiff-Lancaster and Plaintiff-Wilson complied with the D.D.C.'s order.

[2] Plaintiffs dispute this conclusion, citing the Rules of Professional Conduct for the proposition that the probability of a lack of success would preclude counsel from bringing the action in the D.D.C. Doc. 18 at 16-17, 22. However, the "could have been brought" language of section 1406(a) only requires personal jurisdiction over the defendant and proper venue. See 17 MOORE'S FEDERAL PRACTICE – CIVIL § 111.12 [1.b.].

Accordingly, venue as to those two (2) Plaintiffs is appropriate in this Court. Defendants have not given a persuasive reason as to why those two (2) Plaintiffs should be transferred to D.D.C. Indeed, under Defendants' own argument, those two (2) Plaintiffs re-filed their claims in "an appropriate venue," consistent with the D.D.C.'s order. Thus, the Court **FINDS** that Plaintiffs Lancaster and Wilson are appropriately before this Court and **DENIES** the motion with respect to them. However, the remaining Plaintiffs cannot establish proper venue; accordingly, the Court **GRANTS** the motion with respect to the remaining Plaintiffs, under section 1406.

The Court would also make the same finding under section 1404. As described herein, the D.D.C. is a district in which the case might have been brought, because it would have personal jurisdiction and proper venue over the allegations. Here, only two (2) Plaintiffs have contact with this District, and Plaintiffs have suggested that one of their motivations to file in this District was to avoid further adjudication in the D.D.C. Doc. 18 at 3, 16, see also Order, Gibson v. The United States Navy, 3:06-cv-187, doc. 33, 2006 U.S. Dist. LEXIS 103033, at **9-11 (N.D. Fla. Aug. 17, 2006). Thus, except for Plaintiffs Lancaster and Wilson, Plaintiffs' decision to file in this District should be accorded little weight. The D.D.C. has a deep familiarity with the facts of this case, having supervised the Navy Chaplaincy litigation for nearly twenty years. Furthermore, the Plaintiffs appear to have filed this case in this District in a manner inconsistent with their agreed, joint motion and the D.D.C.'s severance order. Therefore, principles of justice counsel in favor of transferring the case to the D.D.C. There is no indication that this District is any more or less convenient for the parties or witnesses; therefore, convenience considerations are neutral with respect to transfer.

Accordingly, venue is not proper with respect to the other twenty-five (25) Plaintiffs. The Court therefore **GRANTS** the motion insofar as it seeks to transfer those twenty-five (25) Plaintiffs.

For the foregoing reasons, the Court **GRANTS** Defendants' motion to transfer **IN PART** and **DENIES** it **IN PART**.

The Clerk is **REQUESTED** to distribute a copy of this Opinion and Order to counsel of record.

It is **SO ORDERED**.

/s/
Henry Coke Morgan, Jr.
Senior United States District Judge

Norfolk, Virginia
September 12, 2019

HENRY COKE MORGAN, JR.
SENIOR UNITED STATES DISTRICT JUDGE