

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

EEOC, et al.,

Plaintiffs,

v.

Jeff Wyler Eastgate, Inc.,

Defendant.

Case No. 1:03cv662

District Judge Michael H. Watson

**ORDER GRANTING IN PART AND DENYING IN PART THE APRIL 4, 2004
MOTION OF PLAINTIFF FOR CONSOLIDATION OF ACTIONS**

Before the Court is the April 4, 2004 Motion of Plaintiff Patricia Cameron Lytle (hereinafter "Plaintiff") for Consolidation of Actions (Doc. 18). Defendant Jeff Wyler Chevrolet, Inc. (hereinafter "Defendant") filed a Memorandum in Opposition on April 26, 2004 (Doc. 20). Plaintiff filed a Reply Memorandum on May 7, 2004 (Doc. 21). Defendant filed a Supplemental Memorandum in Opposition on September 23, 2004 (Doc. 44). Plaintiff filed a Response on September 29, 2004 (Doc. 45). Plaintiff Equal Employment Opportunity Commission (hereinafter "EEOC") does not oppose Plaintiff's request for consolidation.

Plaintiff seeks, pursuant to Fed. Civ. R. Pro. 42(a), consolidation of this matter with *Higgins v. Jeff Wyler Eastgate, Inc.*, Case No. 1:04cv84 (hereinafter "*Higgins*"), which is also pending before this Court. Plaintiff asserts the cases involve common questions of law and fact and consolidation is necessary for judicial economy, to avoid duplication of evidence, and unnecessary costs and delay.

The instant action involves a Complaint filed by the EEOC alleging Defendant

engaged in unlawful employment practices at its facilities in Batavia, Ohio by failing to hire women, including Plaintiff, as salespersons because of their sex. Subsequently, Plaintiff intervened and filed a Complaint asserting state law claims of discrimination under O.R.C. §§4112.02(a) and 4112.99.

Higgins involves a Complaint filed by Richard W. Higgins alleging he was terminated by Defendant for refusing to participate in Defendant's discriminatory practice of refusing to hire women as salespersons. The *Higgins* Complaint alleges the discriminatory practice began in 1997 after a woman salesperson employed at Defendant's Batavia, Ohio facility made complaints of sexual harassment and subsequently quit her job. After she left, Mr. Higgins was instructed not to hire any women to sell cars and anyone who did would be fired. Mr. Higgins was fired by Defendant one month after hiring a woman salesperson.

Plaintiff contends the instant action and *Higgins* involve related legal and factual issues, witnesses and evidence. The cases present around a common central issue: whether Defendant maintained an unlawful policy of refusing to hire women for sales positions. Each case presents a different aspect of the operation of the alleged discriminatory practice; whether women applicants, including Plaintiff, were denied employment due to the policy and whether Mr. Higgins was terminated because he opposed this policy by hiring a woman to sell cars.

Failing to consolidate both matters, Plaintiff asserts, will result in the presentation of testimony from Mr. Higgins and other managers concerning Defendant's exclusionary hiring policy in both cases. Additionally, it will be necessary to present documentary and statistical information about hiring practices in both proceedings. Further, two

different jury panels may consider the common issues after the conclusion of the evidence and, possibly, reach inconsistent verdicts.

In support, Plaintiff relies upon *EEOC v. HBE Corp.*, 135 F.3d 543 (8th Cir. 1998). The *HBE* court consolidated a race discrimination action brought by a terminated employment manager with a retaliatory discharge action brought by the terminated personnel director who was fired for refusing to fire the employment manager. The *HBE* court concluded consolidation was appropriate as the former employees sought to present similar evidence about a climate of racial hostility at the hotel and the events immediately preceding and following the discharge of the employment manager. The evidence was relevant to establish (1) why the employment manager was fired and (2) why the personnel director had a reasonable belief it was because of racial discrimination.

In response, Defendant maintains Plaintiff ignores the profound legal difference between a gender discrimination case and a retaliation case. The *prima facie* case for each claim is different along with the Defendant's legal burden. Additionally, the pretext elements are different for each claim. Accordingly, as no one legal question in either case, if answered, would necessarily answer a question in the other, consolidation should not occur.

Furthermore, Defendant asserts the two cases involve disparate questions of fact, which are unique to each case. The resolution of one in either case will not automatically resolve any question in the other case. Defendant contends case law counsels trial courts to avoid this precise situation.

As such, Defendant asserts, contrary to Plaintiff's position, the factual and legal

showing Mr. Higgins must make is vastly different from the evidence Plaintiff must present. Defendant contends these profound differences, coupled with the other attendant factual differences requires denial of consolidation.

Furthermore, Defendant maintains consolidation will result in unfair prejudice to it. Plaintiff's claim is being prosecuted by the EEOC, who declined to pursue Mr. Higgin's claim, consolidation of the two cases will give the appearance that the EEOC was placing its imprimatur on both cases. Additionally, Defendant asserts prejudice will result from a single jury being forced to decipher what evidence is relevant to both the separate claims and separate cases.

However, Defendant contends prejudice will not result if consolidation does not occur. Plaintiff's concern that inconsistent verdicts may be reached by two separate juries is unfounded as the *prima facie* elements for the claims in each case are entirely different. Moreover, Defendant opines there is no appreciable gain in judicial economy or greater convenience to the parties or witnesses. While some witnesses may be called in both cases, the scope of the testimony will be different because of the differences in the underlying facts and law.

Upon consideration of the arguments advanced by the parties, consolidation of the cases for discovery is appropriate. This will allow the parties and counsel to conduct discovery in as efficient a manner as possible. However, at this time, the Court is unwilling to consolidate the cases for trial. Instead, the Court believes this issue is better resolved upon completion of discovery. The completion of discovery will allow the Court a more developed and accurate understanding of the related factual issues, which witnesses will testify in both actions and how their testimony may or may not be

related to each action. Moreover, the Court will be better able to determine what prejudice, if any, may result to Defendant if the matters are consolidated for trial.

Accordingly, Plaintiff may, if she chooses, again raise the issue of consolidation at that time.

Therefore, the April 4, 2004 Motion of Plaintiff for Consolidation of Actions (Doc. 18) is **GRANTED IN PART** and **DENIED IN PART**.

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT