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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

JAMES LEWIS,)	No. CV-F-08-1062 OWW/GSA
)	No. CV-F-09-304 LJO/SMS
)	
Plaintiff,)	MEMORANDUM DECISION GRANTING
)	IN PART PLAINTIFF'S MOTION
vs.)	TO CONSOLIDATE ACTIONS
)	(Docs. 29 & 22)
)	
CITY OF FRESNO, et al.,)	
)	
Defendants.)	
)	
)	

Plaintiff moves to consolidate the *Miller, et al. v. City of Fresno, et al.*, No. CV-F-09-304 LJO/SMS with this action pursuant to Rule 42(a), Federal Rules of Civil Procedure.

The motion to consolidate is opposed by Defendants.

A. Governing Standards.

Rule 42 provides:

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;

1 (2) consolidate the actions; or

2 (3) issue any other orders to avoid
3 unnecessary cost or delay.

4 (b) Separate Trials. For convenience, to
5 avoid prejudice, or to expedite and
6 economize, the court may order a separate
7 trial of one or more separate issues, claims,
8 crossclaims, counterclaims, or third-party
9 claims. When ordering a separate trial, the
10 court must preserve any federal right to a
11 jury trial.

12 Once a common question has been established, "consolidation is
13 within the broad discretion of the district court." *Paxonet
14 Communs., Inc. v. Transwitch Corp.*, 303 F.Supp.2d 1027, 1028-1029
15 (N.D.Cal.2003). But "even where cases involve some common issues
16 of law or fact, consolidation may be inappropriate where
17 individual issues predominate." See *In re Consol. Parlodel
18 Litig.*, 182 F.R.D. 441, 447 (D.N.J.1998). To determine whether
19 to consolidate, the interest of judicial convenience is weighed
20 against the potential for delay, confusion, and prejudice caused
21 by consolidation. *Id.* Factors such as differing trial dates or
22 stages of discovery usually weigh against consolidation. 9
23 *Wright & Miller, Federal Practice and Procedure* § 2383 (2006).
24 As explained in *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285
25 (2nd Cir.), *cert. denied*, 498 U.S. 920 (1990):

26 Considerations of convenience and economy
must yield to a paramount concern for a fair
and impartial trial ... When exercising its
discretion, the court must consider:

[W]hether the specific risks of
prejudice and possible confusion
[are] overcome by the risk of
inconsistent adjudications of

1 common factual and legal issues,
2 the burden on parties, witnesses,
3 and available judicial resources
4 posed by multiple lawsuits, the
5 length of time required to conclude
6 multiple suits as against a single
7 one, and the relative expense of
8 all concerned of the single-trial,
9 multiple-trial alternatives.

10 ... When considering consolidation, a court
11 should also note that the risks of prejudice
12 and confusion may be reduced by the use of
13 cautionary instructions to the jury and
14 verdict sheets outlining the claims of each
15 plaintiff.

16 The moving party bears the burden of showing consolidation is
17 appropriate. *In re Consol. Parlodel Litig.*, 182 F.R.D. at 447.

18 B. Merits of Motion.

19 Plaintiffs assert that all of them have alleged, "in one way
20 or another," a hostile work environment in that each has been
21 subjected to and heard insensitive remarks, stereotypical
22 comments and disparate treatment on the basis of race and/or
23 color, that Defendant Dyer was aware of the racial motivations of
24 the individual defendants and the resulting disparate impact upon
25 Plaintiffs, but failed and refused to correct such conduct,
26 thereby ratifying it:

The thread that runs throughout the claims of
the four Plaintiffs is that of racial
discrimination and retaliation. This is true
not only of the legal theories pled but the
factual contentions. Each Plaintiff has put
forth facts evincing circumstances in which
he personally was involved and a victim of
such discrimination. Additionally, each
Plaintiff is contending that the practices of
the Police Department under the reign of
Chief Dyer and the work place environment is
racially hostile to African Americans.

1 Further, it has been alleged that under Chief
2 Dyer, opportunities for hiring, training,
3 retention and promotion for African Americans
4 are less advantageous and that disciplinary
5 actions are likewise more onerous or likely
6 to result in discipline or more severe
7 discipline than other similarly situated
8 officers who are not African-American.

9 Defendants argue that Plaintiff has not demonstrated a
10 common question of law or fact. Although conceding that all of
11 the Plaintiffs allege racial discrimination in employment,
12 Plaintiff Lewis's claim of discrimination is also based on his
13 sex, marital status and union activity. Defendants further
14 contend that none of the individual claims have any factual
15 overlap and that not all Defendants are sued in connection with
16 each of the claims (other than Defendant Dyer). To the contrary,
17 all claims concern the alleged racial discrimination, hostile
18 work environment, and adverse employment actions taken against
19 all Plaintiffs, who are African-American police officers.

20 Defendants cite *Coughlin v. Rogers*, 130 F.3d 1348 (9th
21 Cir.1997), a case involving joinder under Rule 20, Federal Rules
22 of Civil Procedure, in which an action was brought for a writ of
23 mandamus to compel INS officials to adjudicate 49 pending
24 petitions or applications. In affirming the District Court's
25 conclusion that the plaintiffs failed to meet the requirements
26 for joinder, the Ninth Circuit stated in pertinent part:

[A]lthough Plaintiffs' claims are all brought
under the Constitution and the Administrative
Procedure Act, the mere fact that all
Plaintiffs' claims arise under the same
general law does not necessarily establish a
common question of law or fact. Clearly,

1 each Plaintiff's claim is discrete, and
2 involves different legal issues, standards,
3 and procedures. Indeed, even if Plaintiffs'
4 claims were not severed, the Court would
5 still have to give each claim individualized
6 attention. Therefore, the claims do not
7 involve common questions of law or fact.

8 130 F.3d at 1351.

9 Defendants further argue that, even if Plaintiffs establish
10 a common question of law or fact, consolidation should be denied.
11 Defendants concede that consolidation does not create a risk of
12 delaying the trial because both actions are at a similar
13 procedural stage, i.e., no scheduling conference has taken place
14 in either case. However, Defendants argue, the risk of prejudice
15 to Defendants and confusion of the jury weigh against
16 consolidation:

17 The joining together of disparate claims of
18 discrimination in the Lewis case with the
19 claims of racial discrimination in the Miller
20 Action will require the City to defend four
21 factually distinct claims together before the
22 same jury. In that event, even if one or
23 more of the individual Plaintiffs were unable
24 to meet their burden of proof in support of
25 their individual claims, a jury could be
26 influenced by the mere numerosity of the
claims presented at trial. In such
circumstances, although the jury would be
instructed to examine each claim
individually, it would be difficult, if not
impossible, to separate each claim from
Plaintiffs' repetitive exhortations that the
City and individual defendants practice
and/or condone racial discrimination. In a
similar sense, a finding of liability in one
case could be unfairly extrapolated into
adverse findings in all cases. Such a result
would be extremely prejudicial to the City,
as well as to the seventeen ... individually
named Defendants, each of whom face personal
exposure and punitive damages.

1 Defendants argue that denial of consolidation will not expose the
2 parties in the two actions to inconsistent adjudications:

3 Each of the four ... cases is fact specific,
4 and will succeed or fail upon the strengths
5 or weakness of the divergent facts presented
6 in each specific case.

7 Defendants further argue that the burden on the parties,
8 witnesses and available judicial resources weigh against
9 consolidation:

10 At best, Plaintiffs' diverse claims present a
11 common allegation of racial discrimination.
12 However, the claims arise in completely
13 distinct factual situations, involve uniquely
14 different groups of alleged conspirators, and
15 completely different percipient witnesses.
16 With the exception of Chief Dyer, the only
17 overlap between the sixteen ... remaining
18 individual defendants involve the naming of
19 Deputy Chief Robert Nevarez and Captain Greg
20 Garner in two ... of the four claims.

21 Defendants contend that consolidation will involve the seventeen
22 individual defendants to attend a protracted trial involving four
23 separate claims in which the majority of defendants play only a
24 small role in a single claim. Any suggestion that each
25 individual defendant need not attend the entire trial is,
26 Defendants contend, "untenable in a case which asserts that the
individual defendants engaged in morally reprehensible conduct
and which seeks to impose punitive damages against the
individual." Defendants argue that, except for the time saved in
picking a jury, consolidation of the two actions will not enhance
court efficiency and will substantially complicate and expand the
trial.

1 Plaintiff's motion to consolidate is GRANTED IN PART. The
2 actions involve essentially common questions of law and, to some
3 extent, common questions of fact regarding operation and command
4 of the Fresno Police Department, its policies and practices, and
5 how African-American officers are treated in the workforce.
6 Judicial economy and conservation of the parties' resources weigh
7 heavily in favor of consolidation for purposes of discovery in
8 both cases, for case management, and non-dispositive and
9 dispositive motions. No prejudice to Defendants results from
10 this partial consolidation. Any privacy concerns relative to
11 internal affairs investigations of individual parties may be
12 addressed by appropriate protective orders. A decision whether
13 and/or to what extent these cases will be consolidated for trial
14 is deferred. All parties to these consolidated actions shall
15 appear at the Scheduling Conference set for September 4, 2009 at
16 8:15 a.m. in Courtroom 3.

17 These cases are ordered partially consolidated for the
18 purposes described above, including dispositive motions. At that
19 juncture the parties and the Court will be able to ascertain and
20 evaluate the merits of advantages and disadvantages of discovery.

21 IT IS SO ORDERED.

22 Dated: July 6, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE