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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAJAMES JENKINS, *et al.*,

No. C-08-3401 EMC

Plaintiffs,

v.

**ORDER (1) DENYING MOTION TO
SEVER, AND (2) BIFURCATING TRIAL**

CITY OF RICHMOND,

Defendant.

The claims of Plaintiff Pickett and Plaintiff Threats are currently set for a jury trial to begin January 14, 2013. In a joint case management statement filed October 31, 2012, Plaintiff Threats renewed a motion to sever trial for his claims from the trial for Plaintiff Pickett's claims. Plaintiff Threats argues that a joint trial would cause substantial prejudice, and that the only factual overlap between the two cases is a 2008 incident where both Plaintiffs allege that they should have gotten a promotion to Captain.

Defendant objects, arguing that there is extensive overlap in the evidence to be presented in the two cases, and that severing the trial would create a risk of inconsistent verdicts with respect to the promotion to Captain, as both Plaintiffs are alleging that they would have gotten the same job absent retaliation.

Where the number of plaintiffs alleging discrimination exceeds the number of actual job openings, the court must fashion any remedy in a way that does not overcompensate the discriminated against group as a whole. *See U.S. v. City of Miami*, 195 F.3d 1292, 1300 (11th Cir. 1999) (rejecting remedy in class action that assumed each discriminated against plaintiff would have

1 received the job, when in fact the number of plaintiffs far exceeded the number of openings). When
2 possible, courts finding discrimination against a group of employees should do an individualized
3 determination of the position each plaintiff would have been in absent the discrimination. *See*
4 *International Brotherhood of Teamsters*, 431 U.S. 324, 371-72 (1977) (rejecting remedy that would
5 have provided a remedy to all plaintiffs regardless of whether they could show actual harm, and
6 remanding the case with directions “to make . . . individual determinations in deciding which of the
7 minority employees were actual victims of the company’s discriminatory practices.”); *Shipes v.*
8 *Trinity Industries*, 987 F.2d 311, 318, 319 (5th Cir. 1993) (“If the class is small, the time period
9 short, or if the effect of the discrimination is straightforward, [a court should generally make] an
10 individual-by-individual determination of what each claimant’s position would have been but for the
11 discrimination”). As Defendant points out, in cases where two employees alleging discrimination
12 were passed over for the same promotion, the court should deny requests to sever trial in order “to
13 avoid the potential problem of inconsistent verdicts.” *Lutz v. Buono*, 05 CIV. 4879 (GAY), 2009
14 WL 3364032 (S.D.N.Y. Oct. 16, 2009).

15 Plaintiff Threats points to the possible prejudice and conflict of interest from trying the cases
16 together, as counsel for both Plaintiffs used to represent the other. When each Plaintiff is called
17 upon to show that he would have received the promotion to Captain rather than the other, there may
18 be danger that counsel would use confidential information obtained during the representation of the
19 other Plaintiff.

20 Given the danger of inconsistent verdicts, however, this Court declines to sever the trials of
21 Plaintiff Threats and Plaintiff Picket. Instead, to avoid the potential conflict, this Court will hold a
22 joint trial for both Plaintiffs, but bifurcate the trial. Phase one will address all claims including the
23 question of whether either or both of the Plaintiffs were subjected to retaliation in regard to the
24 Captain promotion and whether either Plaintiff (without specifying which) would have received the
25 promotion absent the complained of retaliation. Thus, on the question of the Captain promotion, the
26 Court intends to ask the jury to return special verdicts on the following questions:

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For the foregoing reasons, the Court **DENIES** Plaintiff Threats's motion to sever, and orders the trial bifurcated in the manner described above.

IT IS SO ORDERED.

Dated: November 5, 2012


EDWARD M. CHEN
United States District Judge