IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

KARL MINTER, *et al.* Plaintiff, v. UNITED AIRLINES, INC., *et al.* Defendants.	C.A. No. 1:16cv01012 (AJT/TCB)
GLEN ROANE, Plaintiff, v. UNITED AIRLINES, INC., *et al.*, Defendants,	C.A. No. 1:16cv01004 (AJT/TCB)
DAVID RICKETTS, Plaintiff, v. UNITED AIRLINES, INC., *et al.*, Defendants,	C.A. No. 1:16cv01005 (AJT/TCB)
ANTHONY MANSWELL, Plaintiff, v. UNITED AIRLINES, INC., *et al.*, Defendants,	C.A. No. 1:16cv01006 (AJT/TCB)

PLAINTIFFS MINTER, ROANE, MANSWELL, AND RICKETTS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SEPARATE TRIALS

Plaintiffs Karl Minter, Glen Roane, Anthony Manswell, and David Ricketts, through their respective counsels of record, hereby submit the following Memorandum in Opposition to Defendants' Motion for Separate Trials.

I. INTRODUCTION

It is undisputed that United Airlines has a long and well- documented history of discriminating against African Americans in hiring and promotions. Four current African-American Captains, Karl Minter, Anthony Manswell, David Ricketts, and Glenn Roane, brought race discrimination claims against United Airlines related to denial of promotional opportunities by a control group identified by United Airlines in discovery and pre-trial filings.

Defendants have filed a motion for separate trials. Rule 42(b) provides that a district court may order separate trials to expedite and economize, for convenience, or to avoid prejudice. Whether to conduct separate trials under the Rule is "a matter left to the sound discretion of the trial court on the basis of circumstances of the litigation before it." As set forth below, the circumstances of the litigation indicate that separate trials would use more judicial resources, involve substantial duplication of evidence, and costs the parties substantially more in time and money.

The majority of United's motion[1] is based upon the erroneous legal argument that a prior procedural ruling by a federal district court in California severing the Plaintiffs' cases from 17 other plaintiffs and transferring the instant action to Federal Court in Virginia resolved questions of law. As

[1] In their memorandum, Defendants suggest that there would be some issue or problem with consolidation of the cases for trial due to the fact that Plaintiffs Manswell, Ricketts, and Roane changed their attorney in 2015 from attorney Dow Patten, counsel for Minter. There are no issues between these Plaintiffs and attorney Patten that would in any way cause difficulties for a consolidated trial in this case. Each of said Plaintiffs prefers a consolidated trial and has directed their current counsel, Brian Mildenberg, who is a signatory to this memorandum, to pursue same.

the Supreme Court has held, these determinations are not "questions of law;" instead, they are procedural, trial management decisions that are within the court's discretion. *See Mohawk Indus., Inc. v. Carpenter*, (2009) 558 U.S. 100, 106.

The Court can easily dispose of United's remaining arguments which are based on the false premise that Plaintiffs intend to introduce prohibited "me too" evidence during the trial. All of the Plaintiff's' claims center on allegations of continuous race discrimination involving promotions controlled by the same group of managers over a short period of time. Each plaintiff will submit overlapping evidence and testimony that to demonstrate a common plan, motive, or absence of mistake by this control group. Accordingly, each Plaintiff's claim and evidence presented is relevant to the others' allegations, while prejudice to the defendant, if any, is minimal.

II. STATEMENT OF RELEVANT FACTS

United Airlines was forced by an EEOC consent decree commencing in 1976 through 1987 to hire African-Americans (and females) into its ranks of pilots.[2] This case presents four of those current African American Captains, Karl Minter, Anthony Manswell, David Ricketts, and Glenn Roane, who having been hired as pilots, each sought to promote out of the cockpit and into management. Each has brought race discrimination claims against United Airlines related to denial of promotional opportunities. As part of the discovery and pretrial process, for each of Plaintiffs Minter, Manswell, Ricketts and Roane, Defendant United identified an overlapping control group of employees who have information regarding the promotions at issue in the instant action. The control group identified by the Defendant in the October 24, 2016 Ricketts and Manswell "Initial Disclosures, First Supplement" is as follows:

[2] *See*, *Minter v. United Air Lines, Inc.*, Case No. 1:16cv01012 (AJT/TCB) Plaintiff's Pretrial Disclosures (Dkt # 233), p. 23, Plaintiff's Exhibit No. 86.

- **James Simons:** Information regarding the claims and defenses in this case; operations and relevant issues as they relate to pilots domiciled at Dulles International Airport, particularly Plaintiff; supervision of and interaction with Plaintiff; facts and circumstances relating to relevant special assignments and positions within the flight offices and Flight Operations division; and Plaintiff's qualifications for certain relevant positions, job performance, conduct, employment history, and facts and circumstances related thereto.

- **Walter Clark:** Information regarding the claims and defenses in this case, including the allegations against him in Plaintiff's operative complaint; operations and relevant issues as they relate to pilots domiciled at Dulles International Airport, particularly Plaintiff; supervision of and interaction with Plaintiff; facts and circumstances relating to relevant special assignments and positions within the flight offices and Flight Operations division; and Plaintiff's qualifications for certain relevant positions, job performance, conduct, employment history, and facts and circumstances related thereto.

- **Lawrence Ellis:** Information regarding the claims and defenses in this case, including, but not limited to, operations and relevant issues as they relate to pilots in the Flight Operations Division; and facts and circumstances relating to relevant special assignments and positions within the flight offices and Flight Operations division.

- **Chad Melby:** Information regarding Defendants' equal opportunity, harassment, and discrimination policies and procedures, as well as information concerning specific screening and selection procedures and special assignments. Information regarding relevant issues as they relate to bankruptcy and the merger process.

- **Gregory Jones:** Information regarding Defendants' diversity and inclusion at United, including but not limited to philosophy, Diversity and Inclusion engagement events, Awards and recognitions, Community and business partnerships, Executive Diversity Council, Supplier diversity, Business resource groups, diversity initiatives and programs.

- **Robin Murdoch:** Information regarding the claims and defenses in this case, including regarding talent selection throughout the merger process; and the screening and selection procedures and protocol for positions and assignments posted on Taleo during the relevant time period.

- **Fred Abbott:** Information regarding some of the claims and defenses in this case, including the structure and organization of the Flight Operations Division during and subsequent to the merger, and the allegations against him in Plaintiff's operative complaint.

(Attachments "A" and "B"). As to plaintiff Roane, Defendant's October 24, 2016 "Initial Disclosures, First Supplement" identified five additional witnesses with relevant information regarding Roane's claims:

- **Keith Rimer:** Information regarding the claims and defenses in this case, including the allegations against him in Plaintiff's operative complaint; facts and circumstances relating to the hiring decision with respect to Senior Manager—Fleet Training position.

- **John Weigand:** Information regarding the claims and defenses in this case, including the allegations against him in Plaintiff's operative complaint; facts and circumstances relating to the hiring decision with respect to Senior Manager Fleet Standards and Fleet Tech Manager positions.

- **Gary Peterson:** Information regarding the claims and defenses in this case, including facts and circumstances relating to the hiring decision with respect to 778 Line Training Manager position.

- **Bryan Quigley:** Information regarding the claims and defenses in this case, including facts and circumstances relating to the hiring decision with respect to Flight Operations—Duty Manager position.

- **Emil Lassen:** Information regarding the claims and defenses in this case, including the allegations against him in Plaintiff's operative complaint; facts and circumstances relating to the hiring decision with respect to Job Share Standards Captain position.

(Attachment "C") Defendants make no argument that these five additional witnesses will result in prejudice to Defendant or will result in jury confusion[3].

In terms of documentary evidence, it is not unreasonable to expect that United will disclose as trial exhibits many of the same documents it has identified in its Pretrial Disclosures in the Minter matter, for example, a number of policies, which it will claim support its purported *Ellerth-Faragher* defense designed to limit damages in instances in which United can prove that it has a policy that successfully addresses claims of race discrimination. (*See, Minter v. United Air Lines, Inc.,* Case No.

[3] As set forth in Plaintiff Minter's Pretrial Disclosures (Attachment "D") and those of Defendants for the *Minter* case, (Dkt# 232), the common core of witnesses identified in all four cases are the "will call" witnesses that Defendants will use in each case.

Case No. 1:16cv01012 (AJT/TCB) Defendant's Pretrial Disclosures (Dkt. # 232), p. 4 Exhibit Nos. 4-13). Similarly, it is not unreasonable to expect that United will attempt to introduce evidence of its participation in the Organization for Black Aerospace Professionals as evidence that it does not discriminate against African-Americans in promotions. (*See, Minter v. United Air Lines, Inc.,* Case No. Case No. 1:16cv01012 (AJT/TCB) Defendant's Pretrial Disclosures (Dkt # 232), pp. 4-5 Exhibit Nos.14-23, 25-29). Similarly, United will likely attempt to offer its promotional video prominently featuring selected African-American pilots at United to convince the jury that it does not discriminate (*See, Minter v. United Air Lines, Inc.,* Case No. Case No. 1:16cv01012 (AJT/TCB) Defendant's Pretrial Disclosures (Dkt # 232), p. 4 Exhibit No. 24).

III. LAW AND ARGUMENT

Federal Rule of Civil Procedure 42(b) provides that a district court may order separate trials to expedite and economize, for convenience, or to avoid prejudice. Whether to conduct separate trials under the Rule is "a matter left to the sound discretion of the trial court on the basis of circumstances of the litigation before it." While United's motion acknowledges the potential for jury confusion in this case, United fails to assert that this potential for jury confusion is outweighed by considerations of judicial economy. Conspicuously absent from United's moving papers are any allegations that United will suffer real prejudice given the similarities between these cases. All of the Plaintiff's' claims center on allegations of continuous race discrimination involving the same modus operandi by the same control group over a relatively short time span. Accordingly, each Plaintiff's claim and evidence presented is relevant to the others' allegations, while prejudice to the defendant, if any, is minimal.

A. The California District Court's Rule 20 Ruling Did Not Establish Law of The Case

The thrust of the present motion is that separate trials are necessary because a previous court severed the cases. This argument is ignores the entire procedural history of the last two years and relevant case law.

1. Discovery Has Borne Out Economies To Be Achieved By Joint Trial.

Since January of 2015, when these cases were severed from 17 others by Order of the United States District Court for the Northern District of California (Hon. Maxine Chesney, presiding), Defendant sought to transfer the venue of these four cases to the Eastern District of Virginia at the same time. When the California court severed the cases, it did so *before* the parties exchanged Fed. R. Civ. P. 26(a) disclosures, *before* any fact discovery, while the case remained at the pleading stage.

Since these matters were transferred, the parties have engaged in depositions and written discovery, much of which will be re-used by the Plaintiffs and the Defendants with respect to each of the Plaintiff's claims and the defenses of United. (*See discussion above under II. STATEMENT OF RELEVANT FACTS*).

2. The Order Severing The Cases Is Not Law of the Case.

Pursuant to Federal Rule of Civil Procedure 54(b) "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action . . . and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

Whether to apply the doctrine to a prior decision in the same case rests in the discretion of the court. However, the law of the case doctrine is not implicated at all by a judge's reconsideration of a prior interlocutory order. *See American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (4th Cir. 2003) (district court's power to reconsider and modify an earlier interlocutory order is committed to the discretion of the court and not limited by the law of the case doctrine).

Furthermore, as framed in Defendant's moving papers, the issues the Defendant believes are controlling are determinations on the procedural methods Plaintiffs may use to present their case, in particular, the use of 21 separate trials. These determinations are not "questions of law," however, they

are procedural, trial management decisions that are within the court's discretion. *See Mohawk Indus., Inc. v. Carpenter*, (2009) 558 U.S. 100, 106, ("Permitting piecemeal, prejudgment appeals, we have recognized, undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation. (*quoting Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, (1981)). Moreover, they are not "controlling" because "litigation will 'necessarily continue regardless of how [these procedural] questions [are] decided.'" *LaFleur v. Dollar Tree Stores, Inc*., No. 2:12-CI-00363, 2014 U.S. Dist. LEXIS 69892, 2014 WL 2121721, at *2 (E.D.Va. May 20, 2014) (*quoting North Carolina v. ex rel. Howes v. W.R. Peele, Sr. Trust*, 889 F.Supp. 849, 853 (E.D.N.C. 1995)).

To the extent Defendants are challenging the underlying determination that Plaintiffs are "similarly situated" and may proceed in one trial, this is also not a pure "question of law" but is more appropriately characterized as the application of a legal standard to a set of facts. Ultimately, whether a one trial is appropriate for multiple plaintiffs depends largely on the factual question of whether the plaintiff employees are similarly situated to one another. Moreover, the court's determination regarding the propriety of letting this case proceed as one trial is particularly not a candidate for interlocutory review many of the issues identified in Defendant's moving papers propose questions that are not pure questions of law.

B. Defendant Has Not Attempted To And Cannot Articulate Any Prejudice.

As stated above United argues that the District Court's failure to order separate the trials will Plaintiff's--by testifying about their own circumstances--to subvert 404(b), which prohibits the introduction of evidence of other alleged acts of discrimination to prove that the plaintiff was also discriminated against. This argument is based upon pure speculation.

The Federal Rules of Evidence do not allow the introduction of "character evidence"--evidence of other "crimes, wrongs, or acts"--"to show action in conformity therewith." But, evidence of prior

bad acts is admissible for other purposes, including proof of intent, plan, motive, knowledge, and absence of mistake or accident. This rule is equally applicable to discrimination cases.

Evidence that United discriminated against other parties is admissible for purposes other than "propensity." At trial Plaintiffs will submit evidence that the same core group of management employees had a particular modus operandi in making decisions that discriminate against African Americans in promotions. This evidence is admissible to demonstrate a common plan, motive, or absence of mistake.

The evidence of United's discrimination against other parties is highly probative in demonstrating a systemic pattern of discrimination at United and relevant to all Plaintiffs. Accordingly, the proper procedure is for the court to weigh the relevant considerations and determining that the probative value of the evidence submitted by the Plaintiffs outweighs any potential of unfair prejudice, not to order separate trials in the instant action.

Furthermore, even if the Court were to speculate as what the Plaintiffs would testify about as any so-called me-too evidence would be the kind of anecdotal evidence that establishes a sufficient connection to a particular plaintiff to warrant an inference of discrimination as to that particular plaintiff, because these positions were influenced and/or determined by the same employees. *See Calobrisi v. Booz Allen Hamilton, Inc.*, Civil Action No. 1:14-996 (AJT/MSN), 2015 U.S. Dist. LEXIS 37014, 2015 WL 1349627 (E.D. Va. 2015), [citing] *Spulak v. K Mart Corp*., 894 F.2d 1150 (10th Cir. 1990) and *Polanco v. City of Austin*, 78 F.3d 968 (5th Cir. 1996), where witnesses worked in the same positions and departments, or who could testify directly to the discriminatory behaviors of the plaintiff's supervisors.

C. To The Extent That The Four Plaintiffs' Testimony is Deemed "Me Too" Testimony, Such Testimony Is Admissible And Will Cause No Jury Confusion.

Although Plaintiffs may offer testimony in this matter concerning their own experiences with discrimination at United for the purpose of demonstrating a common purpose, plan, intent and motive on the part of the core group identified by Defendants in their *Minter* Pretrial Disclosure, to the extent that the Court considers such evidence as so-called "me-too" evidence, the Plaintiffs submit that such evidence is admissible and non-prejudicial[4].

Federal courts have consistently held, despite defendants' claims to the contrary, that testimony and evidence concerning discrimination against other employees is relevant, admissible, and discoverable. *See, e.g. Hurley v. The Atlantic City Police Department,* 933 F. Supp. 396, 412, fn. 11 (D.N.J. 1996), aff'd in pertinent part, 1999 U.S. App. LEXIS 4582 (3d. Cir. 1999).

In *Hurley,* the Court found that Plaintiff could present evidence that other women employed by Defendant suffered discrimination, in light of the fact that an employee's work environment is impacted by both actions taken against that employee, but also by actions taken against others in the workplace. *Hurley v. The Atlantic City Police Department,* supra, at 412. (citing *Lehmann v. Toys 'R' Us,* 132 N.J. 587, 611 (1993)). The *Hurley* Court found that this evidence can be admitted under Fed. R. Evid. 404 to show that a defendant harbors discriminatory intent towards a particular group. *See also Garvey v. Dickenson College,* 763 F. Supp. 799 (M.D. Pa. 1991); *West v. Philadelphia Elec. Co.,* 45 F. 3d 744, 757 (3d Cir. 1995) ("evidence of harassment of others will support a finding of discriminatory intent with regard to a later incident.")

Moreover, it has been held that evidence of prior and other acts of discrimination are relevant to a defendant's motive, despite insufficient direct evidence to establish discriminatory animus. *See, e.g.,*

[4] For example, in each Motion to transfer venue filed in the *Minter, Ricketts, Roane, and Manswell* cases, Defendants proffered to the Court and sought transfer to this judicial district, in part because " Most of the people and events relevant to this lawsuit are indisputably in the Eastern District of Virginia." *Minter v. United*, (Dkt #104, 9:9-10).

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1104 (8th Cir. 1988); *Heyne v. Caruso,* 69 F.3d 1475, 1480 (9th Cir. 1995); *EEOC v. Caruso,* 69 F.3d 1475, 1480 (9th Cir. 1994).

Further, in a race discrimination case, it was held that "the court may also consider as circumstantial evidence the atmosphere in which the company made its employment decisions. One could infer from employees' remarks and the racially derogatory notes [plaintiff] received that management permitted an atmosphere of racial prejudice to infect the workplace." *Josey v. John R. Hollingsworth Corp.,* 996 F.2d 632 (3d Cir. 1993).

In *Morgan v. Hertz Corp.,* 542 F. Supp. 123 (W.D. Tenn. 1981), the court admitted evidence of a "history of vulgar and indecent language tolerated by management and directed toward women employees," finding that such evidence was probative of hostility towards the protected group. *See also Hawkins v. Hennepin Technical Center,* 900 F.2d 153, 155 (8th Cir. 1990) (holding that the district court abused its discretion in barring plaintiff from introducing evidence of sexual harassment of other employees in an action alleging unfair employment decisions based on sex), *Hunter v. Allis-Chalmers Corp.,* 797 F.2d 1417, 1421 (7th Cir. 1986) (affirming district court's decision to admit plaintiff's evidence of discrimination against other black workers in case alleging racially discriminatory discharge because "evidence was relevant both in showing that Allis Chalmers condoned racial harassment by its workers and in rebutting Allis Chalmers' defense that it had fired Hunter for cause."); *Hicks v. Gates Rubber Co.,* 833 F.2d 1406 (10th Cir. 1987), ("evidence of a general work atmosphere therefore -- as well as evidence of specific hostility directed toward the plaintiff -- is an important factor in evaluating the claim." *Id.* at 1415.)

Many other courts have found that testimony by other members of the plaintiff's protected class is admissible in determining the discrimination claim. *See, e.g., Vinson v. Taylor,* 243 U.S. App. D.C. 323, 753 F.2d 141 (D.C. Cir. 1985), aff'd in part and rev'd. in part sub nom, *Meritor Svg. Bank v. Vinson,* 477 U.S. 57, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986); *Hall v. Gus Const. Co. Inc.,* 842 F.2d

1010, 1015 (8th Cir. 1988); *Phillips v. Smalley Maintenance Services, Inc.,* 711 F.2d 1524, 1532 (11th Cir. 1983); *Webb v. Hyman,* 861 F. Supp. 1094, 1111 (D.D.C. 1994); *Bundy v. Jackson,* 205 U.S. App. D.C. 444, 641 F.2d 934 (D.C. Cir. 1981).

IV. CONLCUSION

Defendants have offered nothing to demonstrate that any judicial economy will result in separate trials; quite the contrary. By forcing the same witnesses to travel to Alexandria at least four times runs counter to the very arguments made by United when it sought a protective order seeking to prohibit the deposition of Fred Abbott[5]. Defendants have not even attempted to articulate any prejudice that would result from a single trial. Lastly, any potential jury confusion can easily be remedied through a limiting instruction. Plaintiffs request that the motion be denied.

February 1, 2017 */S/ CARLA D. BROWN*

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[5] *See, Minter v. United Air Lines, Inc.*, Case No. Case No. 1:16cv01012 (AJT/TCB) (Dkt # 178).

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CERTIFICATE OF SERVICE

I hereby certify on the 1st day of February 2017 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send a notification of such filing to the following:

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