

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

vs.

LABOR READY, INC.,

Defendant.

Case No. C05-5671RBL

**LABOR READY, INC.'S
MOTION TO CONSOLIDATE ACTIONS**

Note on Motion Calendar:
December 2, 2005

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

vs.

IFA NURSERIES, INC.

Defendant.

NOTICE OF RELATED CASE FILING:
Case No. 05-5641 RBL

I. RELIEF REQUESTED

Labor Ready, Inc. ("Labor Ready") respectfully moves this Court for an order consolidating for all purposes the actions captioned above: *Equal Employment Opportunity Commission v. Labor Ready, Inc.*, Case No. C05-5671 RBL and *Equal Employment Opportunity v. IFA Nurseries, Inc.*, Case No. CV05-5641 RBL. As detailed below, the EEOC has filed nearly identical complaints against Labor Ready and IFA Nurseries, Inc. ("IFA") based on the same allegations of sexual harassment of a temporary employee of Labor Ready dispatched to its

1 client, IFA. The EEOC did so without indicating to the Court the related nature of the
2 proceedings.

3 Maintaining separate actions would waste the Court's resources, would cause the
4 Defendants to needlessly incur additional fees, would create the risk of inconsistent outcomes,
5 and would potentially result in a double recovery for the same alleged injuries. Labor Ready
6 does not know if the EEOC undertook this procedural gamesmanship to obtain two bites at the
7 same apple, to judge shop, or to try to obtain a double recovery, but no reasons justify a
8 governmental agency burdening the Court and the Defendants with wholly redundant litigation.
9 Consolidation is therefore proper.

10 II. FACTUAL BACKGROUND

11 Labor Ready is the nation's leading provider of temporary workers to businesses. It
12 provides, through its subsidiaries, temporary job opportunities to over 600,000 people per year,
13 many of whom would otherwise be without work. Persons desiring work register with Labor
14 Ready and are provided information regarding its process and policies, including its anti-
15 harassment policy. They then can elect to show up at a Labor Ready office early in the morning
16 to be dispatched based on a match of their skill sets with the daily needs of that office's clients.
17 The dispatched employees are employed by Labor Ready, which is responsible for wages and
18 maintaining required insurance. The client has control and supervision over the employee during
19 the day, and has an option of requesting that the employee return on subsequent days. Decl. of
20 Danielle Covarrubias ¶ 3. If the employee returns to Labor Ready, the employee has the option
21 of returning to the client's jobsite or going to any other site as available. At the end of each day,
22 the employee returns to Labor Ready to receive his or her pay.

23 Labor Ready Northwest, Inc. has an office in Longview, Washington. *Id.* ¶ 6. One of its
24 clients is IFA Nurseries ("IFA"), which frequently requests manual laborers to work in its tree
25 nursery. *Id.* ¶ 7. In December 2003, Labor Ready dispatched Janice Lowell to IFA, where she
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1 worked for 9 days through January 15, 2004. *Id.* Ms. Lowell had worked sporadically for Labor
2 Ready in various locations, and had earned a total of less than \$5,000 over 4 years. *Id.* ¶ 8.

3 On January 15th Ms. Lowell went to work at IFA but left before her shift ended.
4 Declaration of Teresa Hiatt ¶ 5. She complained to an employee at the Labor Ready office that
5 she had been sexually harassed that day by an employee of IFA. *Id.* ¶ 6. The Labor Ready
6 employee reported the alleged harassment to Labor Ready's branch manager, Teresa Hiatt, who
7 then met with Ms. Lowell. *Id.* Ms. Lowell was interviewed by Ms. Hiatt and given the number
8 for Labor Ready's toll-free "CareLine" for employee complaints. *Id.* She was asked to prepare a
9 written statement and bring it in the following day, which she did. *Id.* However, the written
10 statement was largely illegible, so the branch manager, Ms. Hiatt, retyped it for her. *Id.* Ms.
11 Lowell was also informed that Ms. Hiatt had contacted IFA, that Labor Ready and IFA were
12 investigating her complaint, and Ms. Lowell was again provided the number of the employee
13 CareLine, which she never contacted. *Id.* ¶¶ 7-9.

14 Ms. Lowell contacted Ms. Hiatt later the same day and was informed Ms. Hiatt had
15 spoken to the other Labor Ready employees who were working at IFA on the day in question,
16 that IFA had interviewed its employees, and that the witnesses were unable to corroborate her
17 complaint of sex harassment alleging that she had been inappropriately touched (though one
18 employee did indicate that the IFA employee in question had paid more attention to Ms. Lowell
19 than to other workers). *Id.* ¶¶ 7-10 (and attached statements). Labor Ready never terminated
20 Ms. Lowell's employment. *Id.* ¶ 11. Ms. Lowell never returned to the Longview office to seek
21 dispatch to another client.

22 Ms. Lowell subsequently filed EEOC charges against Labor Ready and IFA.
23 Covarrubias Declaration ¶ 9. She alleged she was sexually harassed by the IFA employee and
24 that IFA and Labor Ready were therefore liable, and alleged that she was retaliated against by
25 Labor Ready by being terminated. *Id.*

1 The EEOC conducted a perfunctory investigation in which it did not even interview Ms.
2 Hiatt, Labor Ready's branch manager who investigated the harassment and retyped Ms. Lowell's
3 statement. *Id.* ¶ 10. Labor Ready does not know which other potential witnesses were
4 interviewed because the EEOC has stonewalled completely Labor Ready's Freedom of
5 Information Act Request by making a blanket denial for any part of the investigation file -- in
6 disregard of its duty to produce non-exempt portions and a log of withheld documents. (Labor
7 Ready is pursuing its administrative appeal of the denial). Labor Ready anticipates seeking
8 summary dismissal of the instant case based on the EEOC's failure to fulfill its duty to
9 investigate and conciliate, and anticipates that IFA may have the same defense.

10 III. LEGAL AUTHORITY

11 FRCP 42(a) states:

12 When actions involving a common question of law or fact are pending
13 before the court, it may order a joint hearing or trial of any or all the
14 matters in issue in the actions; it may order all the actions consolidated;
15 and it may make such orders concerning proceedings therein as may tend
16 to avoid unnecessary costs or delay.

17 The district court has broad discretion under FRCP 42(a) to consolidate cases pending in
18 the same district. *Investors Research Co. v. United States Dist. Ct. for Cent. Dist. of California*,
19 877 F.2d 777 (9th Cir. 1989). The single essential requirement is that the cases to be
20 consolidated have common questions of law or fact. *Enterprise Bank v. Saettele*, 21 F.3d 233,
21 235 (8th Cir. 1994). The Court's decision to consolidate cases will be upheld unless there has
22 been a clear abuse of discretion. *EPA v. City of Green Forest, Arkansas*, 921 F.2d 1402 (8th Cir.
23 1990).

24 The rule is designed "to give the court broad discretion to decide how cases on its docket
25 are to be tried so that the business of the court may be dispatched with expedition and economy
26 while providing justice to the parties." *Miller Brewing Co. v. Meal Co.*, 177 F.R.D. 642, 643-44
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1 (E.D. Wis. 1998). "The proper solution to the problems created by the existence of two or more
2 cases involving the same parties and issues simultaneously pending in the same court is to
3 consolidate them." *Moore v. AT&T Commun., Inc.*, No. 85 Civ. 4028, 1990 U.S. Dist. LEXIS
4 17444 (S.D.N.Y. Dec. 21, 1990).

5 In *McCracken v. Grand Victoria Casino & Resort*, No. 02-143-C B/H, 2002 U.S. Dist.
6 LEXIS 21977 (S.D. Ind. Nov. 8, 2002), an employee filed two separate lawsuits against her
7 employer: the first action sounded in tort and the second action in contract. The employee's tort
8 claim was based on an alleged injury she had suffered during her employment, and her contract
9 claim was based on the employer's alleged failure to pay her the benefits she was due. The court
10 found that consolidation of the actions was warranted even though the cases were not precisely
11 duplicative, and despite the employee's different legal theories, because the two lawsuits arose
12 from the same set of facts.

13 **A. Common Issues of Law and Fact Predominate.** In this case and the IFA case, both
14 actions involve common questions of fact and law. The complaints are virtually identical except
15 for the named defendant and the allegation of retaliation in the Labor Ready complaint. Both
16 lawsuits arise out of the same set of facts involving Ms. Lowell's employment at Labor Ready
17 and her alleged harassment when dispatched to IFA. The witnesses regarding the alleged
18 harassment are identical. Ms. Lowell's alleged damages arising from the claimed harassment are
19 the same. Discovery regarding her compensatory damages claim will involve the same treatment
20 provider(s), if any. Both Labor Ready and IFA will have the same factual defenses as to whether
21 any actionable harassment actually occurred. Both Defendants will likely have the same
22 defenses regarding the EEOC's compliance with its statutory obligation to adequately investigate
23 a charge and engage in conciliation in good faith. Both Defendants will likely have the same
24 mitigation defenses. Finally, the EEOC has requested a jury and virtually the same relief in each
25 case. Although the Labor Ready case contains an allegation of retaliation and the IFA case does
26 not, this difference is minor in light of the overwhelming commonality of issues of law and fact.

1 **B. Maintaining Separate Suits Would Waste the Resources of the Court and the**
2 **Parties.** As noted above, the EEOC has requested a jury trial in both cases. Trying the cases
3 separately would thus require two separate jury trials and needlessly occupy the time of the
4 Court.¹ Of course, numerous other redundancies would exist in the pre-trial proceedings.

5 Consolidation would result in a single case. Discovery would be more efficient because
6 all or nearly all of the witnesses are identical in each case, and thus would have to be deposed
7 only once. Any discovery disputes as to the EEOC's duty to produce its files, which appear
8 likely based on its FOIA response, will be the same for both Defendants. Because the factual
9 and legal defenses of Labor Ready and IFA to the underlying harassment will at least largely be
10 the same, any appropriate motions on the issue can likely be brought together. In short,
11 consolidation is more efficient on all counts, including for the EEOC and thus for the U.S.
12 taxpayers.

13 **C. Separate Actions Could Result in Inconsistent Results.** The EEOC alleges in its
14 separate actions that both Labor Ready and IFA subjected Ms. Lowell to sexual harassment.
15 Any purported sexual harassment occurred while Ms. Lowell was on dispatch to IFA. If no
16 actionable harassment occurred, then neither Defendant could have liability. However, if the
17 cases are tried separately one jury could theoretically find that Ms. Lowell was not harassed, and
18 the other find that she was. Regardless of which Defendant was party to the case in which no
19 harassment was found, there would clearly be a miscarriage of justice. Consolidation removes
20 the risk of inconsistent outcomes, which would be unfair to the parties and unfortunate for the
21 justice system.

22 _____
23 ¹ The Court has already transferred the Labor Ready case from Judge Burgess to Judge Leighton,
24 to whom the IFA case was assigned. Labor Ready does not know if this transfer was at the
25 Court's initiative or if the EEOC belatedly gave notice of the related case. If the EEOC provided
26 a belated notice, Labor Ready can only speculate as to how the notice was provided and as to the
27 EEOC's motives in doing so.

D. Consolidation Eliminates the Risk of Double Recovery. Labor Ready denies that it has any liability for damages, and assumes that IFA also denies liability. However, if the cases proceed separately and the EEOC establishes liability, there is every likelihood of duplicative damages being awarded. The EEOC's prayer for relief in each complaint is *identical*, and in each case the EEOC requests back pay, pecuniary and non-pecuniary relief. Given that the alleged damages arise, at least in large part, from the identical allegation of harassment, the damages awarded in separate cases would by definition be duplicative. This would result in an unwarranted windfall to Ms. Lowell and unfairly penalize each Defendant, as the combined liability would be greater than the damages found by either jury. Consolidation eliminates this risk.

IV. CONCLUSION

Labor Ready can only speculate as to why the EEOC has elected to commence redundant legal proceedings. Certainly considerations of judicial efficiency, litigation economy and basic fairness were not its motivators, because all of these considerations warrant a single lawsuit. For the foregoing reasons, Labor Ready respectfully requests that this Court grant its Motion to Consolidate Actions.

DATED this 15th day of November, 2005.

SEBRIS BUSTO JAMES

/s/M. Edward Taylor

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1 **CERTIFICATE OF SERVICE**

2
3 I, M. Edward Taylor, certify under penalty of perjury under the laws of the United States
4 that, on November 15, 2005, I served, Defendant Labor Ready, Inc.'s **Motion to Consolidate** to
5 the party listed below in the manner shown:
6

7 A. Luis Lucero, Regional Attorney [] By United States Mail
Kathryn Olson, Supervisory Attorney [] By Legal Messenger
8 Teri Healy, Senior Trial Attorney [] By Facsimile
9 Equal Employment Opportunity Commission [] By Overnight Fed Ex Delivery
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