

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

SERGEANT JACK REYES and )  
SERGEANT JOSE ANTONIO )  
HERNANDEZ, )  
 )  
Plaintiffs, )

v. )

Civil Action No. 02-1283-KAJ

)  
SHERRY FREEBERY and COLONEL )  
JOHN L. CUNNINGHAM, both )  
individually and in their official capacity, )  
and NEW CASTLE COUNTY, a municipal )  
corporation, )  
 )  
Defendants. )

**MEMORANDUM ORDER**

I. INTRODUCTION

Plaintiffs Jack Reyes (“Reyes”) and Jose Antonio Hernandez (“Hernandez”) filed this employment discrimination case on July 10, 2002, alleging that they were discriminated against on the basis of their race by their employer New Castle County (“NCC”) and NCC officials Sherry Freebery (“Freebery”) and John L. Cunningham (“Cunningham”). (Docket Item [“D.I.”] 1, 6.) On May 26, 2004, Freebery was charged with racketeering, mail fraud, and wire fraud in an indictment in *United States v. Gordon et al.*, No. 04-CR-63-KAJ. On July 15, 2004, I asked the parties to submit briefing on the issue of whether this case should move forward, given that one of the defendants was under indictment in a criminal case. (Docket Item [“D.I.”] 131.) The parties have briefed the issue (see D.I. 138, 139, 140), and it is now ripe for decision.<sup>1</sup>

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<sup>1</sup>The Defendants have evidently chosen to not file a cross-reply. (See D.I. 131.)

## II. BACKGROUND<sup>2</sup>

### 1. The Parties

Reyes, a Hispanic-American, began working as a police officer for NCC in 1979. (*Id.* ¶ 6.) He claims that he was “constructively discharged on September 2, 2000 while holding the rank of sergeant.” (*Id.*) Reyes is currently an investigator with the Delaware Department of Justice. (*Id.* ¶ 38.) Hernandez, also a Hispanic-American, has been a police officer for NCC since 1984 and presently holds the rank of sergeant. (*Id.* ¶ 7.)

Freebery, who is currently the Chief Administrative Officer of NCC, was previously the colonel and Chief of Police for the NCC Police Department (“NCC PD”). (*Id.* ¶ 8.) At the time the complaint was filed, Cunningham was the colonel and Chief of Police for the NCC PD. (*Id.* ¶ 9.) Both Freebery and Cunningham are sued in their individual and official capacities. (*Id.*)

### 2. Alleged Facts Giving Rise to this Action

The Plaintiffs allege that this is a “case of continuing race and national origin discrimination in promotions, retaliation, and constructive discharge against Hispanic-American NCC police officers.” (D.I. 6 ¶ 1.) According to the Plaintiffs, the Defendants<sup>3</sup> “make all personnel and promotion decisions for the [NCC PD] in conjunction with the incumbent NCC Executive.” (*Id.* ¶ 11.) The Plaintiffs claim that, between April 1998 and the time they filed their complaint, “there were at least eleven (11) vacancies which

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<sup>2</sup>This background information is drawn primarily from the Plaintiffs’ amended complaint (D.I. 6) and does not reflect any finding of fact by the court.

<sup>3</sup>Any reference to “the Defendants” herein means Freebery and Cunningham, in their individual capacities only.

[the Defendants] filled for promotion from the rank of sergeant to that of lieutenant” in the NCC PD. (*Id.* ¶ 13.) The Plaintiffs say that, despite their being qualified for these promotions, “[e]ach vacancy was given to a non-Hispanic-American who was less qualified than plaintiffs by any objective measure.”<sup>4</sup> (*Id.* ¶ 16.)

Reyes states that, after his promotion to sergeant in 1989, he was “kept in dead end positions.”<sup>5</sup> (*Id.* ¶ 32.) In October 1998, Reyes was assigned to supervise the Traffic Unit. (*Id.*) Soon after, in December 1998, Reyes filed a Title VII charge against NCC because he was, he claims, denied five promotions that year, due to his race. (*Id.* ¶ 33.) Reyes also claims that, in retaliation for filing the Title VII charge, he was transferred back to patrol in September 1999, even though the Traffic Unit assignment customarily lasts two to three years. (*Id.* ¶ 34.) Subsequently, Reyes says that his conditions of employment became “intolerable,” because he alleges he was “passed over for six more promotions..., confined to patrol and shift work after 20 years on the force,” and “persons being promoted to lieutenant were more than ten years his junior, and had been trained by him.” (*Id.* ¶ 35.) Reyes claims that “[t]he defendants deliberately made conditions of his employment so intolerable that a reasonable person would resign,” which he did on September 2, 2000. (*Id.* ¶ 36.)

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<sup>4</sup>The Plaintiffs’ amended complaint also contains allegations about comments made and actions taken by Freebery that the Plaintiffs say prove that there is “a history of discriminatory action towards Hispanic American officers within the [NCC PD]....” (*See generally* D.I. 6 ¶¶ 24-28.)

<sup>5</sup>For example, Reyes was continuously assigned to the Patrol Division from 1989 to 1998, which he claims was “longer than any other supervisor” and was “passed over numerous times for transfer to specialized units.” (D.I. 6 ¶ 32.)

Hernandez says that, in the fall of 1999, he advised Captain Stu Snyder that “he and other Hispanic-Americans were being discriminated against and that he might have to speak with an attorney because two recently promoted lieutenants had made demeaning remarks about Hispanic-Americans.” (*Id.* ¶ 40.) Hernandez also claims that he met with Cunningham in January 2000 to “discuss the treatment of all Hispanic-American officers within the [NCC PD] and to petition for a redress of grievances,” and that Freebery “was advised of the substance of this meeting.” (*Id.* ¶ 39.) Hernandez claims that, in retaliation for these conversations, he was “transferred and given the supervisory duties which previously two sergeants had fulfilled” which “detrimentally affected his family life.” (*Id.* ¶ 43.) When he complained, he alleges that, “in further retaliation...he was assigned to patrol,” and he says that his previous duties “were redistributed back to two sergeants, not one....” (*Id.*) Hernandez also says that he “was denied any of the four promotion opportunities which were available in August of 2000 for which he was more qualified than the persons promoted.” (*Id.* ¶ 44.)

As previously noted, on May 26, 2004, Freebery was charged in an indictment in *United States v. Gordon et al.*, No. 04-CR-63-KAJ. After Freebery was indicted, I requested briefing from the parties on how to proceed with this case now that there were criminal and civil proceedings before me having a common defendant. (See D.I. 131.) The Defendants request a complete stay of this case pending the outcome of the criminal case against Freebery. (D.I. 139.) The Plaintiffs, on the other hand, do not believe a stay is appropriate. (D.I. 138.) For the reasons set forth below, this case will be stayed pending the outcome of the criminal case.

### III. DISCUSSION

“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with the economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936) (citations omitted); *see also Dentsply Int’l, Inc. v. Kerr Manufacturing Co.*, 734 F. Supp. 656, 658 (D. Del. 1990) (citations omitted). In deciding whether to stay a civil case pending the resolution of a criminal case, courts consider many factors, including (1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff’s interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest. *In re Adelpia Communs. Secs. Litig.*, 2003 U.S. Dist. LEXIS 9736 at \*7 (E.D. Pa. May 14, 2003); *Javier H. v. Garcia Botello*, 218 F.R.D. 72, 74 (W.D.N.Y. 2003); *Walsh Securities, Inc. v. Cristo Prop. Mgmt, Ltd.*, 7 F. Supp. 2d 523, 527 (D.N.J. 1998).<sup>6</sup> I will address each of these factors in turn.

1. The Extent to Which the Issues in the Civil and Criminal Cases Overlap

The similarity of the issues underlying the civil and criminal actions is considered the most important threshold issue in determining whether or not to grant a stay. *Walsh Securities*, 7 F. Supp. 2d at 527. “The strongest case for deferring civil proceedings

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<sup>6</sup> Both parties apply these factors to the facts of this case. (See D.I. 138 at 2; D.I. 139 at 2.) I recently addressed these six factors in a Memorandum Order issued in *Maloney et al. v. Gordon et al.* on July 27, 2004, and think it is also appropriate to apply them here. (See D.I. 66 in No. 03-CV-999-KAJ.)

until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil action involving the same matter.” *Javier H.*, 218 F.R.D. at 75 (internal quotation marks and citations omitted).

The Defendants state that it is uncertain to what extent “the issues in the criminal and civil matters may overlap since the parameters of the criminal proceeding are unclear and the admissibility of evidence in the civil case may be determined as the issues arise during the course of the trial.” (D.I. 139 at 2.) The Plaintiffs argue that there is no substantive overlap of issues between the criminal case and the civil case. (D.I. 138 at 4.) The Defendants also raise the issue that the pending criminal proceedings could substantially impact the jury in this case and deprive all of the Defendants of their right to a fair trial. (D.I. 139 at 3.)

Even if the civil and criminal cases against Freebery do not arise out of the same set of operative facts, certain acts alleged in the civil complaint and those alleged in the indictment took place during Freebery’s tenure as the Chief Administrative Officer of NCC. (See D.I. 1 ¶¶ 8; D.I. 1 in No. 04-CR-63-KAJ at 3.) The Plaintiffs themselves recognize that there may be common ground between the cases on the “subsidiary issue of Freebery exercising control over the [police] force” in her position as the Chief Administrative Officer of NCC. (D.I. 138 at 4.) Suffice it to say that the parties agree that there is some overlap between this case and the criminal case against Freebery, the exact contours of which are, as yet, unknown. (D.I. 138 at 4; D.I. 139 at 2.)

Civil proceedings, if not deferred, can undermine a defendant’s rights in a criminal case, including the privilege against self-incrimination under the Fifth Amendment of the United States Constitution. See *Javier H.*, 218 F.R.D. at 75 (citation

omitted). The Plaintiffs state that “[i]f self-incrimination concerns were to arise during a trial the Court certainly can craft a means of protecting any legitimate interest while also ensuring a fair presentation of plaintiffs’ case,” without setting forth any suggestion as to how I may do so. (D.I. 138 at 4.) Self-incrimination concerns are indeed present in this case with respect to Freebery. Since both parties have only speculated as to how this civil case will play itself out at trial, I think it is better to err on the side of caution and stay these proceedings in order to protect Freebery’s constitutional rights.

For example, if Freebery were called to the stand during the civil trial and invoked her Fifth Amendment right, it may unduly prejudice her in the eyes of the jury. The Plaintiffs suggest that skillful *voir dire* will avoid such a problem and ensure Freebery and her co-defendants a fair trial. (D.I. 138 at 3 (citing *U.S. v. Martin*, 746 F.2d 964, 970 (3d Cir. 1984).) However, I am more persuaded by the Defendants’ suggestion that “[o]nce the criminal matter is resolved, the civil trial can be conducted free of prejudice and undue restrictions on the scope and content of the testimony” (D.I. 139 at 3). Therefore, this factor weighs in favor of granting a stay.

## 2. The Status of the Criminal Proceedings

“In determining whether to grant a stay, a court must also consider the status of the related criminal proceedings, which can have a substantial effect on the balancing of the equities.” *In re Adelpia*, 2003 U.S. Dist. LEXIS 9736 at \*9. If criminal indictments are returned against the civil defendants, then a court should strongly consider staying the civil proceedings until the related criminal proceedings are resolved. *Id.*; see also *Walsh Securities*, 7 F. Supp. 2d at 527.

In this case, an indictment was returned against Freebery on May 26, 2004, charging her with racketeering, mail fraud, and wire fraud. There is no question that Freebery is a “key figure[] in both the civil and criminal cases.” *In re Adelpia*, 2003 U.S. Dist. LEXIS 9736 at \*14. Again, the Plaintiffs argue that “there is no material overlap” between the issues raised in this case and the issues raised in the criminal case. (D.I. 138 at 5.) However, the Defendants argue that a stay is appropriate where, as here, a defendant may be placed in a position where she has to choose between waiving her Fifth Amendment rights and defending herself in a civil lawsuit. (D.I. 139 at 3 (citing *Walsh Securities*, 7 F. Supp. 2d at 528).)

As previously discussed (*see supra* at p. 6-7), because the parties acknowledge that there may be some overlap between this civil case and the criminal case against Freebery, and because Freebery is currently under indictment, this factor also weighs in favor of staying this case pending resolution of the criminal proceedings against Freebery.

3. The Plaintiffs’ Interests in Expeditious Civil Proceedings Weighed Against the Prejudice to the Plaintiffs Caused by the Stay

When “evaluating the plaintiff’s burden resulting from the stay, courts may insist that the plaintiff establish more prejudice than simply a delay in her right to expeditiously pursue her claim.” *In re Adelpia*, 2003 U.S. Dist. LEXIS 9736 at \*10 (citation omitted). The Plaintiffs set forth several reasons why they will be prejudiced if this case is stayed. (D.I. 138 at 2.) First, they say that “a blanket stay of indeterminate length could last for years as the criminal process drags on through numerous appeals.” (*Id.*) Second, the Plaintiffs claim that, because they are being “deprived of the opportunity to...train and



educate younger officers” they are experiencing “an intangible injury for which an award of back pay cannot compensate them.” (*Id.*) Third, the Plaintiffs argue that staying this case “delays the vindication of fundamental constitutional rights” under the First and Fourteenth Amendments. (*Id.* at 2-3.) Fourth, the Plaintiffs say that staying this case will delay the resolution of a motion for sanctions against them filed by the Defendants that has “hung over their heads for far too long.”<sup>7</sup> (*Id.* at 3.) Finally, the Plaintiffs argue that delay may give rise to circumstances that will deprive plaintiffs of “their choice of legal counsel to vindicate their claims.”<sup>8</sup> (*Id.*)

At bottom, the Plaintiffs “have not shown any prejudice other than delay in pursuing their suits,” which is insufficient to prevent staying this case. *In re Adelphia*, 2003 U.S. Dist. LEXIS 9736 at \*9, \*11; *see also Walsh Securities*, 7 F. Supp. 2d at 528. That events may develop requiring a change of counsel, while certainly a matter of concern to the court, is at this point too speculative to weigh significantly against granting a stay. I am also unpersuaded by the Plaintiffs’ argument that they are suffering irreparable harm because they are being denied the right to train younger officers. As the Defendants point out, “[t]he employment laws provide for the equitable remedies of reinstatement and backpay with interest, if the Plaintiffs are successful.” (D.I. 139 at 3.) Presumably, at the time they filed this suit, the Plaintiffs were apprised

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<sup>7</sup>On July 29, 2004, the Plaintiffs filed their own motion for sanctions. (D.I. 141, 142.)

<sup>8</sup>The Plaintiffs’ attorney also argues that his personal interests weigh against a stay because he has been “prevented from responding to defendants’ retaliatory paid newspaper advertisements” in deprivation of his First Amendment rights. (*Id.*) Because the focus ought to be on the Plaintiffs’ interests, and not their attorney’s, I will not address this argument.

of the fact that they might not successfully litigate their claims against the Defendants, in which case they would never return to the NCC PD to train younger officers. The possibility that they might have a chance to return to work cannot outweigh the Defendants' existing rights to a fair trial in this matter and Freebery's right to fair criminal proceedings.

4. The Burden on the Defendants

Here, the Defendants "explicitly request that the court grant a stay" pending the outcome of the criminal proceedings against Freebery. *Javier H.*, 218 F.R.D. at 75. This factor also weighs in favor of staying the civil proceedings.

5. The Interests of the Court

"[A] court may decide in its discretion to stay civil proceedings when the interests of justice seem to require such action." *Javier H.*, 218 F.R.D at 74 (citing *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986)) (other citations omitted); see also *Dentsply Int'l*, 734 F. Supp. at 658 ("the decision to grant or deny a stay is within the court's broad range of discretionary powers"). Additionally, all district courts have an interest in efficiently managing their dockets. *In re Adelphia*, 2003 U.S. Dist LEXIS at \*15 (citation omitted); see also *Cognex Corp. v. National Instruments Corp.*, 2001 WL 3436828 at \*1 (D. Del. June 29, 2001) (court must analyze whether a stay would simplify the issues raised by the parties).

I find that staying this case promotes the interests of justice and judicial efficiency. As already noted, it protects Freebery's rights. It also eliminates any potential for the exercise of Fifth Amendment rights to frustrate the Plaintiffs' access to evidence in this case. That greater access to evidence also serves Cunningham's

interests. See *In re Adelpia*, 2003 U.S. Dist. LEXIS 9736 at \*14-\*15 (“If a stay is not issued, then remaining [unindicted] Defendants, who are not protected by the Fifth Amendment, may not be able to adequately defend themselves.”) Finally, staying the case will eliminate the need to wrestle with how to balance Fifth Amendment rights and open access to evidence in a way that does not taint either the jury in this matter or, potentially, the panel from which a criminal jury may be drawn. Thus, staying this case serves the interests of justice and is likely to preserve judicial resources. As a result, this factor also weighs in favor of granting a stay.

6. The Public Interest

“The public’s interest in the integrity of the criminal case is entitled to precedence over the civil litigant.” *Javier H.* 218 F.R.D. at 75 (citations omitted). Here, there is no harm to the public interest in granting a stay of the civil case. See *Walsh Securities*, 7 F. Supp. 2d at 529. Rather, a stay in this case would benefit the public by allowing the criminal prosecution of Freebery to proceed expeditiously and allow the Plaintiffs in this case the opportunity for a full and fair trial against Freebery after the conclusion of the criminal proceedings. Therefore, this factor weighs in favor of granting a stay.

IV. CONCLUSION

All of the factors listed above support staying this civil case pending resolution of the criminal proceedings. Accordingly, it is hereby ORDERED that all proceedings in this case are stayed until further order of this court.

Kent A. Jordan  
UNITED STATES DISTRICT JUDGE

July 30, 2004  
Wilmington, Delaware