UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARIN DAVENPORT

Plaintiff,

v.

SAGINAW VALLEY STATE UNIVERSITY; and ANN COBURN-COLLINS, in her individual and official capacity,

Defendants.
_____/

Case No. 2:16-cv-11289

Hon. Sean F. Cox

Mag. Judge David R. Grand

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PLAINTIFF'S RESPONSE TO DEFENDANTS'

MOTION TO CHANGE VENUE

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STATEMENT OF ISSUES

Is a change of venue to the Northern Division proper where it is not more convenient for Plaintiff or other third party witnesses to have this case heard in the Northern Division?

Plaintiff says: No

Defendants say: Yes

STATEMENT OF FACTS

Plaintiff Charin Davenport filed suit in April of 2016 against Defendants Saginaw Valley State University ("SVSU") and her former supervisor, Ann Coburn-Collins, asserting claims for sex discrimination under Title VII of the Civil Rights Act and Title IX of the Education Amendments, as well as for violations of the Equal Protection Clause of the United States Constitution. (Compl., Docket # 1). Davenport filed suit in the Eastern District of Michigan, where venue is appropriate.

Upon filing, this case was assigned by the Court to the Southern Division of the Eastern District of Michigan. The case was assigned to the Southern Division because the Court's local rules prioritize Plaintiff's county of residence when making case assignments to either the Northern or Southern Divisions. E.D. Mich. LR 83.10(b)(civil cases are assigned based on factors that include, in order of priority, first the county in which a plaintiff resides, and then the county where the claim arose or where defendant resides). Plaintiff resides in Hazel Park, Michigan in Oakland County.[1]

[1] Defendants point out that Plaintiff only recently moved to Hazel Park. Although the rules apply regardless of how long a plaintiff has resided in a particular county, it should be noted that Plaintiff's move came about when she had an opportunity to share space rent-free with a friend. (Davenport Decl., ¶1, Ex. A.) Although Davenport has taught part time at SVSU since 2007, her administrative position with SVSU was eliminated in 2013 and her adjunct course load at SVSU has declined such that she only taught one course last semester and is not currently scheduled to teach this fall. (*Id.*) Her decreased income combined with the anticipated expenses

Because Davenport teaches at SVSU, she does commute to Saginaw when teaching. However, as she is not currently teaching, and her future teaching load at SVSU will likely be minimal, her life is now centered in the southeast Michigan area. In addition, many of her friends and family members, including individuals who will be third party witnesses in this case on the topic of damages, live in the Southeast Michigan area in the Southern Division. (Ex. A at ¶3.)

ARGUMENT

Contrary to Defendants' position, the Northern Division is not a more convenient forum for this matter. Defendants have failed to meet their burden justifying a transfer, and Plaintiff's choice of forum should be honored.

I. Venue is Proper in the Southern Division and Defendants Fail to Meet Their Burden on the Question of Transfer

There is no legitimate dispute that venue in this matter is proper in the Eastern District, Southern Division. In civil actions, the proper venue is the judicial district (1) where any defendant resides if all defendants reside in the state where the district

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(and increased publicity and public scrutiny) associated with this litigation motivated her move into a rent-free living situation and to a location where she was not as widely known and visible. (*Id*. at ¶¶1-2.) Defendants' suggestion that Plaintiff's move was not legitimate because her home phone number "mysteriously remains the same…," (*see* Defendant's Brief at p. 3), is baseless. Davenport's home phone number is a cell phone, not a landline. That is why it remained the same upon her move. (*Id*. at ¶ 4.)

is located; (2) where a substantial part of the events or omissions giving rise to the claim occurred; or (3) where any defendant is subject to the court's personal jurisdiction. 28 U.S.C. § 1391(b).

Upon filing of a case in the Eastern District of Michigan, the Court assigns the case to either the Northern or Southern division based on the following factors set out in the local rules:

> (b) **Assignment of Cases**. Civil cases shall be assigned by the Clerk to a place of holding court by reference to the counties in the following order of priority:
>
> (1) If an action is removed from State Court, the county in which the case was pending in State Court.
>
> (2) If an action is local in nature, the county in which the real estate is located.
>
> (3) The county in which a plaintiff resides.
>
> (4) The county in which the claim arose.
>
> (5) In a case in which a defendant is an officer or employee of the United States or any agency thereof acting in his or her official capacity, or under color of legal authority, or an agency of the United States, the county in which an office of a defendant is located.
>
> (6) A county in which the defendant resides or has a place of business.
>
> (7) The place of holding court in which the case is filed.

E.D. Mich. LR 83.10(b).

Plaintiff resides within the Southern Division and thus based on the clear mandate of this Court's local rules this case was properly assigned to the Southern Division. While the Court may "[f]or the convenience of parties and witnesses, in the interest of justice…transfer any civil action to any other district or division where

it might have been brought or to any district or division to which all parties have consented," 28 U.S.C. § 1404(a), the moving party bears the burden on the issue of transfer. And the Court must give deference to the Plaintiff's choice of venue. Here, where the relevant factors on balance do not support a change of venue to the Northern Division, Defendants' motion to change venue should be denied.

A. The Court Should Give Deference to Plaintiff's Choice of Venue

It is within the discretion of the district court to grant or deny a motion to transfer. *See Phelps v. McClellan*, 30 F.2d 658, 663 (6th Cir. 1994). In making this determination, the court should give Plaintiff's choice of forum substantial deference. *See Thomas v. Home Depot U.S.A., Inc.*, 131 F.Supp.2d 934, 937 (E.D. Mich. 2001). In fact, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *See Fitts v. Burt*, 2008 U.S. Dist. LEXIS 24841, *5 (E.D. Mich. 2008).

The Defendants have "the burden of showing, by a preponderance of the evidence, that a change of venue is warranted." *Amphion, Inc. v. Buckeye Elec. Co.*, 285 F.Supp.2d 943, 946 (E.D. Mich. 2003); *see also Farrugia v. Novinium, Inc.*, 2015 U.S. Dist. LEXIS 23897, *6 (E.D. Mich. 2015).

B. The Relevant Factors Do Not Support a Change of Venue to the Northern Division

Courts consider the following factors when ruling on a motion to transfer under 28 U.S.C. § 1404(a): (1) the convenience of the parties; (2) the convenience

of the witnesses; (3) the relative ease of access to sources of proof; (4) the availability of process to compel attendance of unwilling witnesses; (5) the cost of obtaining willing witnesses; (6) the practical problems associated with trying the case most expeditiously and inexpensively; and (7) the interests of justice. *Sullivan v. Tribley*, 602 F. Supp. 2d 795, 797 (E.D. Mich. 2009) (*See* Ex. B).[2] Courts frequently combine the last two factors, as efficiency and justice are interrelated. *See, e.g., McKerchie v. Wis. Cent. Ltd.*, 2014 U.S. Dist. LEXIS 137004, *6-7 (W.D. Mich. 2014).

Based on an analysis of the above factors, the Northern Division is not a more convenient venue than the Southern Division and Defendants have not met their burden of showing that proceeding in this case in the Southern Division would be "unnecessarily burdensome." *Duha v. Agrium, Inc.*, 448 F.3d at 867, 873 (6th Cir. Mich. 2006).

[2] Defendants cite *United States v. PJ Dick, Inc.*, 79 F. Supp. 2d 803, 805-04 (E.D. Mich. 2000), for the relevant factors in a change of venue motion. In addition to the above factors, that case also lists "the locus of operative facts," the "relative means of the parties," and the "forum's familiarity with governing law" as additional relevant factors. Even if these additional factors are analyzed, however, these factors do not support transfer to the Northern Division. Both divisions are familiar with the relevant law; a public state institution of higher education certainly has the means for its employees to travel 100 miles to trial if necessary in this matter; and although the "locus of operative facts" may involve events that occurred in Saginaw, that factor alone does not support transfer to the Northern division given the relative proximity of Saginaw to Detroit and the fact that this Court's own local rules prioritize the Plaintiff's county of residence over the locus of operative facts in deciding the district to which a case should be assigned. *See* E.D. Mich. LR 83.10(b).

(1) Convenience of the Parties

Defendants argue that trial in the Northern Division would be more convenient for Defendants. However, Plaintiff resides in the Southern Division and having this case heard in the Northern Division would not be convenient for Plaintiff. "When analyzing party convenience, a plaintiff's choice of forum will be given substantial deference." *Watson v. Bortz Health Care of Rose City*, 2006 U.S. Dist. LEXIS 4852 (E.D. Mich. Jan. 20, 2006)[3] (*citing Audi AG & Volkswagen of America, Inc., v. Izumi*, 204 F. Supp. 2d 1014, 1023 (E.D. Mich. 2002)). Defendants bear the burden of showing that a change of venue will be more convenient for *all* the parties, including for the Plaintiff and for the third party witnesses who Plaintiff intends to call on her behalf. *See also Barnett v. MCI Serv. Parts, Inc.*, 2005 U.S. Dist. LEXIS 8850 at *7-8 (E.D. Mich. 2005) (finding that "Defendant only demonstrates that it and its employees will find it more convenient if this action is transferred to the Northern District of Illinois" and noting that "[a] transfer should not be granted where it only will shift the burden from one party to the other"). Defendants have not met this burdens on this factor.

[3] Although the court in *Watson* ultimately transferred venue, in that case the Plaintiff (unlike in this case), did not reside in the Southern Division. In *Watson* the Plaintiff had absolutely no connection to his chosen forum other than that his counsel was located there.

(2) Convenience of the Witnesses

Defendants also argue in support of their Motion that those witnesses they identify as central to this case all reside in the Northern Division. However, the fact that Defendants' witnesses (all of whom are employees of SVSU) reside in the Northern Division does not support a change of venue. Indeed, while convenience to the witnesses is often recognized as the most important factor to be considered in deciding a change of venue motion, "It is the convenience of *non-party witnesses*, rather than employee witnesses . . . that is the more important factor and is accorded greater weight." *Ghaith v. Rauschenberger*, 2010 U.S. Dist. LEXIS 6993 *7 (E.D. Mich. Jan. 28, 2010) (citations omitted)(emphasis added) (*See* Ex. C.) . Here, Defendants have not indicated that there are ***any*** third party witnesses who would be inconvenienced by trial in the Southern Division. In fact, the only third party witnesses likely to be called in this case are witnesses regarding Plaintiff's damages, many of whom reside in the Southern Division. (*See* Ex. A at ¶3.) Defendants therefore have not met their burden as to this most important factor.

Moreover, in supporting a motion for change of venue based on witness convenience, "The party seeking the transfer must clearly specify the essential witnesses to be called and must make a general statement of what their testimony will cover." *United States v. Real Prop. Located at 6001 N. Ocean Drive*, 2015 U.S. Dist. LEXIS 118254, *13 (E.D. Mich. 2015) (internal cites omitted) (emphasis

added); *Watson*, 2006 U.S. Dist LEXIS 4852 at *9-10 ("To substantiate a claim of inconvenience to witnesses, a party should provide each witness's name and a summary of the anticipated testimony to enable the court to assess the significance of the testimony."). Defendants in their Motion do not clearly specify the testimony of those they identify as essential witnesses. *See* Def. Motion at Docket #7. Only when a court is armed with each witness's name and an outline of the material testimony that witness would provide, can it properly assess the convenience of the witnesses. *United States v. Currency $41,180.97 in the Form of Charter One*, 2014 U.S. Dist. LEXIS 123604, *11-12 (E.D. Mich. 2014) (citations omitted).

Finally – and perhaps most significantly – given that only a small percentage of all civil cases even go to trial, the likelihood of any witness (or any party for that matter) having to ever travel to the federal courthouse in Detroit for trial is very small. Regardless of which division this case is heard in, the reality is that the defense witnesses will all be deposed in Saginaw. Moreover, if the case does go to trial, this will not be a lengthy trial and each witness's testimony should be limited to less than one day. A drive of less than two hours for a few hours of testimony would not necessitate overnight travel and would be no different than witnesses traveling from Jackson (which is within the boundaries of the Southern division) to trial in Detroit—a regular occurrence. In sum, Defendants' arguments with regard to convenience of the witnesses are not related to third party witnesses, are grossly

exaggerated and include concerns that likely will never come to pass. Defendants simply have not met their burden on this most important factor.

(3) Relative Ease of Access to Sources of Proof

Defendants argue that because the Plaintiff's employment records are located in the Northern division, this factor weighs in favor of transfer. But this court recently noted in analyzing a venue transfer request that "access to documents is a less significant factor in this era of electronic communication" and that "it is probable that witnesses will be deposed where they are located, regardless of venue." *Real Prop.,* 2015 U.S. Dist. LEXIS 118254 at *15. *See also Barnett v. MCI Serv. Parts, Inc.*, 2005 U.S. Dist. LEXIS 8850, *6 (E.D. Mich. 2005) (finding irrelevant the location of documents "given the ease of transporting documents from one state to another" and noting that "even if the case remains in this venue, depositions can be conducted where a witness works and/or resides"). *Duha*, 448 F.3d at 876. For these reasons, this factor does not weigh in favor of transfer.

(4) Availability of Compulsory Process/Cost of Obtaining Willing Witnesses

The Sixth Circuit has held that "although the availability of compulsory process is properly considered [in a change of venue request] when witnesses are unwilling, it is less weighty when it has not been alleged or shown that any witness would be unwilling to testify." *Duha*, 448 F.3d at 877. Defendants bear the burden of showing that compulsory process will be an issue, which they have not done in

this case. "When no witness's unwillingness has been alleged or shown, a district court should not attach much weight to the compulsory process factor." *Id.*

Here, Defendants make no argument that any witness is likely to be unwilling to testify. All of the essential witnesses listed by Defendants are employees of the University within Defendant's control. Nonetheless, Defendants argue that "the parties' ability to command the appearance of non-party witnesses at trial may also be impacted by the distance," and go on to talk about Rule 45, which provides that subpoenas may only be issued to witnesses within 100 miles of where the witness resides. (Defs' Br. at 8.) However, as the court pointed out in the *Ghaith* decision, Rule 45 "does not necessarily apply to an appearance for trial within Michigan . . ." and instead "would [only] apply to depositions of any non-party witnesses." 2010 U.S. Dist. LEXIS 6993 *14-15 (citing Fed. R. Civ. P. 45(c)(3)(A)(ii) and (B)(iii)).

In this case, depositions of all SVSU and third party witnesses located in the Northern Division will occur at SVSU's counsel's office in Saginaw, Rule 45 does not apply to trial testimony, and the Defendants fail to identify any witness unwilling to testify. Their argument about compulsory process of witnesses is thus a complete red-herring and this factor also does not weigh in favor of transfer.

(5) Trial Efficiency and the Interests of Justice

This Court has held that, "Basically, a court may consider any factor that may make a trial easy, expeditious, and inexpensive." *Grand Kensington, LLC v. Burger*

King Corp., 81 F. Supp. 2d 834, 836 (E.D. Mich. 2000). There is nothing about adjudicating this case in the Southern Division that would harass the parties or prove expensive or inconvenient for trial. Depositions will be held at the location where the witnesses reside and/or are employed. *See Barnett*, 2005 U.S. Dist. LEXIS 8850 at *5 (holding that "[w]ith respect to discovery, even if the case remains in this venue, depositions can be conducted where a witness works and/or resides"). Defendants have not demonstrated by a preponderance of the evidence that trial efficiency will be greatly promoted by transfer to the Northern Division. Plaintiffs' choice of forum should not be disturbed in the absence of such a showing. *See Fitts*, 2008 U.S. Dist. LEXIS 24841 at *5.

The interests of justice "include such concerns as ensuring speedy trials, trying related litigation together, and having a judge who is familiar with the applicable law try the case." *McKerchie*, 2014 U.S. Dist. LEXIS 137004 at *6-7. It is important to note that "[a] transfer is not appropriate if the result is simply to shift the inconvenience from one party to another." *See Sullivan*, 602 F. Supp. 2d at 800, *citing Evans Tempcon, Inc. v. Index Indus., Inc*., 778 F. Supp. 371, 377 (W.D. Mich. 1990). While the Defendants might find it more convenient if the action were transferred to the Northern Division, this does not merit overriding Plaintiff's choice of forum.

In sum, when all of the factors are considered, there is not a compelling reason to transfer this case to the Northern Division. Plaintiff brought this action in the Eastern District, and the Court assigned the case to the Southern Division, as was appropriate under 28 U.S.C. § 1391(b), and local rule 83.10(b). With respect to a transfer for convenience, a plaintiff's selection of a forum ordinarily is accorded deference. *See Thomas*, 131 F.Supp.2d at 937. Defendants have failed to meet their burden of demonstrating why Plaintiff's chosen forum is inconvenient and why transfer to another forum is necessary.

CONCLUSION

For the reasons articulated above, Defendants' Motion to Change Venue should be denied in its entirety.

Respectfully submitted,
SALVATORE PRESCOTT, PLLC

Dated: May 9, 2016

s/Jennifer B. Salvatore

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record.

s/ Jennifer B. Salvatore
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Index of Exhibits

Exhibit A	Declaration of Charin Davenport
Exhibit B	*Sullivan v. Tribley* 602 F. Supp. 2d 795, 797 (E.D. Mich. 2009)
Exhibit C	*Ghaith v. Rauschenberger* 2010 U.S. Dist. LEXIS 6993 *7 (E.D. Mich. Jan. 28, 2010)

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARIN DAVENPORT

Plaintiff,

v

SAGINAW VALLEY STATE UNIVERSITY; and ANN COBURN-COLLINS, in her individual and official capacity,

Defendants.

Case No. 2:16-cv-11289

Hon. Sean F. Cox

Mag. Judge David R. Grand

/

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/

DECLARATION OF CHARIN DAVENPORT

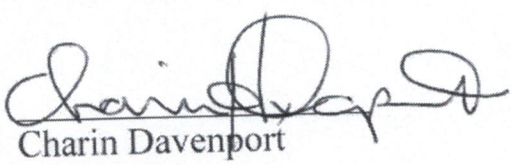
I, Charin Davenport, declare the following:

1. I moved to Hazel Park Michigan in March of 2016 when I was offered an opportunity to share space rent-free with a friend who lives there. Since my administrative position at SVSU was eliminated in 2013 and my

teaching load has decreased over the last several years, my financial situation has been difficult.

2. I also was facing increased expenses with this litigation and likely publicity about my case – both of which were motivating factors in my decision to move to Hazel Park.
3. I have a number of friends in the Southeast Michigan area (including my current house mate) and anticipate that several of them will be witnesses in this case with respect to the emotional impact of my job loss and discrimination.
4. The phone number listed in SVSU's records (989-891-7355) is a cell phone number, not a land line. I kept this same cell phone number when I relocated to Hazel Park.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



Charin Davenport

5/7/16

Date

EXHIBIT B

602 F.Supp.2d 795
United States District Court,
E.D. Michigan,
Southern Division.

Donald **SULLIVAN**, Jr., Plaintiff,
v.
Linda **TRIBLEY** and Rum Sprader, Defendants.

Civil No. 07–12218.
|
Feb. 18, 2009.

Synopsis

Background: State prisoner brought civil rights action against several corrections officials alleging that defendants were deliberately indifferent to the threats made against him, which led to a physical assault and a personal injury. After summary judgment was granted in favor of certain defendants, 2008 WL 2938092, remaining defendants moved to transfer venue.

[Holding:] The District Court, David M. Lawson, J., adopted the opinion of Virginia M. Morgan, United States Magistrate Judge, and held that convenience factors warranted transfer of venue to the district in which alleged assault occurred.

Motion granted.

West Headnotes (11)

[1] **United States Magistrate Judges**
Frivolous, conclusive, or general objections

Objections to a magistrate judge's report and recommendation must be clear enough to enable the district court to discern those issues that are dispositive and contentious. 28 U.S.C.A. § 636(b)(1).

Cases that cite this headnote

[2] **United States Magistrate Judges**
Frivolous, conclusive, or general objections

Objections disputing the correctness of the magistrate's recommendation but failing to specify the findings believed to be in error are too general. 28 U.S.C.A. § 636(b)(1).

Cases that cite this headnote

[3] **Federal Courts**
Timeliness issues

Because venue is assessed at the commencement of an action, complaints about improper venue must be raised promptly.

2 Cases that cite this headnote

[4] **Federal Courts**
Presumptions and burden of proof

The burden is on the moving party to establish the need for a change of forum. 28 U.S.C.A. § 1404(a).

1 Cases that cite this headnote

[5] **Federal Courts**
Plaintiff's choice of forum; forum shopping

Unless the balance is strongly in favor of the defendants on motion to transfer venue, the plaintiff's choice of forum should rarely be disturbed. 28 U.S.C.A. § 1404.

Cases that cite this headnote

[6] **Federal Courts**
Time for application

Motions for transfer of venue for the convenience of the parties and witnesses are not subject to the limitations of Federal Rule Of Civil Procedure requiring a defendant to raise the issue of improper venue by motion filed prior to filing a responsive pleading, or in the responsive pleading, and a delay in filing such a motion does not effect a waiver. 28 U.S.C.A. § 1404(a); Fed.Rules Civ.Proc.Rule 12(d), 28 U.S.C.A.

Cases that cite this headnote

[7] **Federal Courts**

Discretion of court

Courts have broad discretion to transfer an action to avoid unnecessary delay and to protect parties, witnesses, and the public from undue expenses and inconvenience. 28 U.S.C.A. § 1404.

Cases that cite this headnote

[8] **Federal Courts**

In general; convenience, fairness, and interest of justice

Courts consider the following factors when ruling on a motion to transfer venue: (1) the convenience of the parties; (2) the convenience of the witnesses; (3) the relative ease of access to sources of proof; (4) the availability of process to compel attendance of unwilling witnesses; (5) the cost of obtaining unwilling witnesses; (6) the practical problems associated with trying the case most expeditiously and inexpensively; and (7) the interest of justice. 28 U.S.C.A. § 1404(a).

4 Cases that cite this headnote

[9] **Federal Courts**

In general; convenience, fairness, and interest of justice

When ruling on motion to transfer venue, the court may consider the forum's familiarity with the governing law. 28 U.S.C.A. § 1404(a).

1 Cases that cite this headnote

[10] **Federal Courts**

In general; convenience, fairness, and interest of justice

Transfer of venue is not appropriate if the result is simply to shift the inconvenience from one party to another. 28 U.S.C.A. § 1404(a).

2 Cases that cite this headnote

[11] **Federal Courts**

Particular Determinations

Convenience factors warranted transfer of venue of state prisoner's civil rights action against corrections officials, alleging that officials were deliberately indifferent to the threats made against him, which led to a physical assault, to the district in which alleged assault occurred; although prisoner intended to call his mother, who resided in district where action was filed, as witness, prisoner had not indicated, and it was not readily apparent to the court, what she might contribute to the proofs in the case, all potential defense witnesses were located in transferee district, the officials resided in transferee district, prisoner was incarcerated in transferee district, and the records from the prison and private health care providers who treated prisoner after the incident would be more easily transported to the court in the transferee district. 28 U.S.C.A. § 1404(a).

1 Cases that cite this headnote

Attorneys and Law Firms

*796 Donald **Sullivan**, Jr., Kincheloe, MI, pro se.

*797 John L. Thurber, Michigan Department of Attorney General, Lansing, MI, for Defendants.

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND GRANTING DEFENDANTS' MOTION TO TRANSFER VENUE

DAVID M. LAWSON, District Judge.

The matter is before the Court on the plaintiff's objections to Magistrate Judge Virginia M. Morgan's report recommending that the defendants' motion for transfer of venue to the United States District Court for the Western District of Michigan be granted. The plaintiff is a prisoner presently confined in a Michigan Department of Corrections facility located in Michigan's Upper Peninsula, which is situated in the Western District of Michigan. He brought a civil rights action against several corrections officials, including some located at a prison near Detroit, where the plaintiff was housed previously. The case was referred to Judge Morgan to conduct all pretrial proceedings under 28 U.S.C. § 636(b)(1)(B). After the claims against the Detroit defendants were dismissed, the remaining defendants, also residents of the Upper Peninsula, moved to transfer venue to the district court there. On

September 19, 2008, 2008 WL 5661886, Judge Morgan filed a report recommending that the motion be granted and venue transferred to the Western District of Michigan. The plaintiff filed timely objections. The Court has reviewed the file, the report and recommendation, the plaintiff's objections, and has made a *de novo* review of the record. The Court concludes that the objections to the report and recommendation lack merit, the motion should be granted, and venue should be transferred to the Western District of Michigan, which includes the Upper Peninsula, for the convenience of the parties and witnesses.

I.

The plaintiff presently is a prisoner at the Kinross Correctional Facility in Kincheloe, Michigan, where he is serving a twenty-two-to-fifty-year sentence for a second-degree murder and a two-year consecutive sentence for a firearm offense. Initially, Mr. **Sullivan** was incarcerated at the Ryan Regional Facility in Detroit. He was later transferred to the Newberry Correctional Facility in Luce County in the Upper Peninsula, where the majority of events giving rise to his complaints occurred, and then to his present place of confinement at the Kinross Correctional Facility, also in the Upper Peninsula of Michigan.

Sullivan commenced his action in this Court against the Michigan Department of Corrections and seven of its employees for various violations of his constitutional rights. Many of the plaintiff's allegations concerned various officials' refusals to apply jail credits towards his firearm sentence and adjust his release date accordingly. Other claims alleged a conspiracy by certain defendants to transfer the plaintiff from Ryan to the Newberry Correctional Facility in retaliation for his filing a grievance against the Ryan facility warden. He also complained about the damage to his typewriter and other personal property that occurred when the plaintiff's belongings were transported from Newberry to the Kinross facility. Perhaps the most serious of the plaintiff's claims is the allegation that, despite his alerts to two designated officials (the remaining defendants) about threats of assault that he received from other inmates annoyed by his typing and keeping overhead lights on late into the night, these officers did nothing ***798** to prevent a rather brutal assault from happening.

The remaining counts of the complaint allege that the plaintiff received daily threats from other inmates who were irritated by the plaintiff's practice of using his typewriter late at night and interfering with the sleep of the others in his twelve-man cube. He says that he requested a transfer, and when that did not happen he wrote to assistant deputy warden (ADW) **Tribley**, informing her of the threats and the possibility of an altercation, and renewing his transfer request. The plaintiff alleges that **Tribley** ignored his request. The plaintiff alleges that he wrote a letter to Resident Unit Manager (RUM) Sprader, and he ignored the request as well. Then, about two weeks after the letter to Sprader, the plaintiff was assaulted from the back by an unknown assailant while in the prison yard. He claims that he was "bleeding profusely" and ran into health services.

The plaintiff claims that the attack left a six-and-a-half-inch slash across his back apparently inflicted by a razor. Although he received a tetanus shot, he claims to have contracted hepatitis C, which he attributes to the assault.

On July 28, 2008, 2008 WL 2938092, the Court dismissed claims against all defendants except a Resident Unit Manager at Newberry named Sprader, and Newberry's assistant deputy warden, Linda **Tribley**. As to these two defendants, the Court concluded that material issues of fact precluded summary determination of their liability for deliberate indifference as a matter of law. The defendants filed their motion to transfer venue to the Western District of Michigan shortly after the other defendants were dismissed from the case, contending that a district court in Marquette is a more convenient place to conduct the proceedings on the remaining claims.

Judge Morgan addressed the defendants' motion by applying factors under 28 U.S.C. § 1404(a), the transfer statute that applied when the original venue was properly laid. She stated that the burden falls on the defendants to prove that a transfer is warranted, and the defendants met that burden when considering that the claims arose in the Western District, which is also the parties' location "and the probable location of witnesses and sources of proof." R & R at 9. Judge Morgan acknowledged that the plaintiff's choice of forum is normally given substantial deference in choice-of-venue matters, and the convenience of witnesses is one of the most important factors in overcoming the preference for the plaintiff's choice. Although neither party has provided the names of the witnesses or an outline of their intended testimony, and the parties failed to analyze the remaining factors in detail, Judge Morgan inferred that the nature of the claim arising in an Upper Peninsula prison naturally would be proved by witnesses located there, which is a considerable

distance from the courthouse in Detroit. Therefore, she recommended that the transfer motion be granted.

The plaintiff objects to the recommendation and contends that the magistrate judge's analysis is flawed. He argues that the magistrate judge exaggerated the number of witnesses and exhibits that are located or reside in the Western District. To substantiate his claim, the plaintiff points out that some of his witnesses—like his mother—reside in the Eastern District of Michigan. He contends that since Sprader and **Tribley** have not supplied the list of witnesses of their own and have not identified whatever evidence would have to be transported from the facility to the court, as a non-moving party the plaintiff ***799** must prevail. Next, the plaintiff suggests that the defendants waived any venue objections by waiting for nine weeks until the resolution of their motion for summary judgment. Because the defendants did not preserve the improper venue objection by raising it in their first responsive filing, the plaintiff believes that the defendants have forfeited their transfer-of-venue arguments.

II.

[1] **[2]** Objections to a report and recommendation are reviewed *de novo.* 28 U.S.C. § 636(b)(1). The Sixth Circuit has stated that "[o]verly general objections do not satisfy the objection requirement." *Spencer v. Bouchard,* 449 F.3d 721, 725 (6th Cir.2006). "The objections must be clear enough to enable the district court to discern those issues that are dispositive and contentious." *Miller v. Currie,* 50 F.3d 373, 380 (6th Cir.1995). " '[O]bjections disput[ing] the correctness of the magistrate's recommendation but fail[ing] to specify the findings ... believed [to be] in error' are too general." *Spencer,* 449 F.3d at 725 (quoting *Miller,* 50 F.3d at 380).

[3] When the plaintiff filed his lawsuit, the complaint stated claims against defendants located at the Ryan Corrections facility in Detroit. Venue was proper in this district since it was "a judicial district where any defendant resides" and "all defendants reside[d] in the same State." 28 U.S.C. § 1391(b). And since venue was proper as to some of the defendants, it was proper as to all of them. 28 U.S.C. § 1406(d) ("If a civil action has been brought in a judicial district that is a proper venue with respect to at least one claim asserted against each defendant, that district is a proper venue for the entire civil action, subject to the discretion of the district court, in the interest of justice, upon timely and sufficient objection, to dismiss or to sever and transfer any claim as to which venue would be improper if sued upon alone."). Venue is assessed at the commencement of an action, and complaints about improper venue must be raised promptly. *See* 28 U.S.C. § 1406(a) (requiring a "timely and sufficient objection" to improper venue). Rule 12(b) requires a defendant to raise the issue of improper venue by motion filed prior to filing a responsive pleading, or in the responsive pleading. Under Rule 12(h)(1), if a defendant fails to object to venue in either of these two ways, he has waived the objection to improper venue. None of the defendant raised a timely objection to venue or sought a severance or transfer of claims.

[4] **[5]** **[6]** However, the motion by the present defendants was brought under 28 U.S.C. § 1404, which permits the Court to transfer venue to another district where it might have been brought if it is necessary for the convenience of the parties and witnesses or the interests of justice. 28 U.S.C. § 1404(a) (1993). The burden is on the moving party to establish the need for a change of forum. *Factors Etc., Inc. v. Pro Arts, Inc.,* 579 F.2d 215 (2d Cir.1978), *overruled on other grounds by Pirone v. MacMillan, Inc.,* 894 F.2d 579 (2d Cir.1990). "Unless the balance is strongly in favor of the defendants, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). Motions brought under section 1404 are not subject to the limitations of Rule 12, and a delay in filing such a motion does not effect a waiver. *Smith v. Kyphon, Inc.,* 578 F.Supp.2d 954, 957 (M.D.Tenn.2008) (citing *Blane v. Am. Inventors Corp.,* 934 F.Supp. 903, 905–06 (M.D.Tenn.1996); ***800** 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1352, at 272 (1990)). The defendants in this case filed their transfer motion promptly after the other defendants and claims were dismissed by motion.

[7] **[8]** **[9]** **[10]** Courts have broad discretion to transfer an action pursuant to section 1404 to avoid unnecessary delay and to protect parties, witnesses, and the public from undue expenses and inconvenience. *See generally Van Dusen v. Barrack,* 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964); *Norwood v. Kirkpatrick,* 349 U.S. 29, 75 S.Ct. 544, 99 L.Ed. 789 (1955). The Supreme Court instructs that "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.' " *Stewart Org., Inc. v. Ricoh Corp.,* 487 U.S. 22, 29, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988) (quoting *Van Dusen,* 376 U.S. at 622, 84 S.Ct. 805). Courts consider the

following factors when ruling on a motion to transfer under § 1404(a):

> (1) the convenience of the parties; (2) the convenience of the witnesses; (3) the relative ease of access to sources of proof; (4) the availability of process to compel attendance of unwilling witnesses; (5) the cost of obtaining unwilling witnesses; (6) the practical problems associated with trying the case most expeditiously and inexpensively; and (7) the interest of justice.

Grand Kensington, LLC v. Burger King Corp., 81 F.Supp.2d 834, 836 (E.D.Mich.2000); *Helder v. Hitachi Power Tools, USA Ltd.*, 764 F.Supp. 93, 96 (E.D.Mich.1991). *Accord, Moses v. Bus. Card Express, Inc.*, 929 F.2d 1131, 1137 (6th Cir.1991) (holding that a "court should consider the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the rubric of 'interests of justice.' ") (quoting *Stewart Organization, Inc.*, 487 U.S. at 30, 108 S.Ct. 2239). Additionally, the Court may consider the forum's familiarity with the governing law. *See Grand Kensington*, 81 F.Supp.2d at 836 (citing *Gulf Oil*, 330 U.S. at 508–09, 67 S.Ct. 839). Generally, a plaintiff's choice of forum will be given deference unless the defendant makes an appropriate showing. *See Grand Kensington*, 81 F.Supp.2d at 836 (citing *Gen. Motors Corp. v. Ignacio Lopez de Arriortua*, 948 F.Supp. 656, 668 (E.D.Mich.1996)). A transfer is not appropriate if the result is simply to shift the inconvenience from one party to another. *See Evans Tempcon, Inc. v. Index Indus., Inc.*, 778 F.Supp. 371, 377 (W.D.Mich.1990).

[11] After considering the relevant factors, the Court believes that the proper exercise of discretion calls for a transfer of the action to the Western District. Although the parties have not been particularly effusive in their description of the likely proofs at trial, the defendants have described the evidence categorically, permitting the Court to construct a general view of the evidence that will be presented.

The nature of this claim is that the defendants were deliberately indifferent to the threats made against the plaintiff, which in turn were generated by his perceived inconsiderate behavior among his unit mates. The danger detected by the plaintiff apparently matured into a physical assault and a personal injury. The seriousness of the injury is subject to dispute. All of these events occurred at the Newberry prison, which is located in Luce County, Michigan, situated in the Western District of Michigan. Any remnant connecting this case to the Eastern District has vanished with the summary dismissal of the other claims in the complaint. The ***801** defendants indicate that the potential witnesses for the remaining claim will be the nurses who treated the plaintiff at the Newberry facility, the prison custody staff who worked on the prison yard and in the plaintiff's housing unit, the prison shift command who worked in the prison's control center who would have reacted and authorized the plaintiff to be seen at the local hospital in response to the injury, the prison transportation officers who transported the plaintiff to and from the local hospital, the Newberry Correctional Facility records keepers, who maintain prison records, the Newberry Correctional Facility Grievance Coordinator, and the defendants themselves. The plaintiff suggests that he may want his mother to be a witness, and she is located in this district. However, the plaintiff has not indicated—and it is not readily apparent to the Court—what she might contribute to the proofs in the case. The defendants correctly note that the Western District has its Northern Division in Marquette, which is only 105 miles away from Newberry. The Detroit courthouse is more than 300 miles away from the facility.

Based on the practical observation compelled by the distances involved, it is apparent that the convenience of the parties, the convenience of the witnesses, the relative ease of access to sources of proof, and the availability of process to compel attendance of unwilling witnesses all favor the Western District's Northern Division. The Newberry Facility is located in Luce County, the two defendants remaining in the case reside in Luce County, and the plaintiff himself is incarcerated in the Upper Peninsula, which is also within the Western District. The records from the Newberry Correctional Facility and the records of the private health care providers who treated Mr. **Sullivan** after the incident at Newberry would be more easily transported to the court in the Western District. The court's subpoena power could be exercised more readily in the district. *See* Fed.R.Civ.P. 45(b)(2) (allowing service of a subpoena anywhere within a judicial district, but limiting service upon out-of-district witnesses residing beyond 100 miles from the place of the hearing).

For all of these reasons, the practical problems associated with trying the case most expeditiously and inexpensively, and, ultimately, the interest of justice, favor transfer of venue as well. The connection of the case to this district has all

but evaporated, and the expenses and inconvenience to the parties, witnesses, and even the plaintiff—who presently resides in the Northern Division of Michigan's Western District—of trying the case here in Detroit greatly outweigh the plaintiff's initial election of the present forum.

III.

The Court has conducted a *de novo* review of the transfer motion and finds that it must agree with the magistrate judge's conclusion.

Accordingly, it is **ORDERED** that the plaintiff's objections to the Report and Recommendation [dkt # 62] are **OVERRULED,** and the Magistrate Judge's Report and Recommendation [dkt # 61] is **ADOPTED.**

It is further **ORDERED** that the defendants' motion to transfer venue [dkt # 43] is **GRANTED.**

It is further **ORDERED** that the Clerk of the Court shall **TRANSFER** this case to the Northern Division of the United States District Court for the Western District of Michigan.

All Citations

602 F.Supp.2d 795

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EXHIBIT C

2010 WL 431596
Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
E.D. Michigan,
Southern Division.

Fawaz GHAITH, Plaintiff,
v.
Don RAUSCHENBERGER Jr., in his individual capacity, Marion Breasbois, Dawn Rose Porter Ghaith, Jerry Breasbois, Michael Newsham, in his individual capacity, Michael E. Burch, in his individual capacity, Richard I. Dresser, in his individual capacity, Scott Gordon, in his individual capacity, Sheriff John E. Miller, in his individual and official capacity, Bay County Sheriff's Department, and Bay County, jointly and severally, Defendants.

Civil Action No. 09-14336.
|
Jan. 28, 2010.

Attorneys and Law Firms

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OPINION AND ORDER GRANTING DEFENDANTS BURCH, NEWSHAM AND RAUSCHENBERGER'S MOTION TO CHANGE VENUE (DKT. NO. 9)

MARK A. RANDON, United States Magistrate Judge.

I. INTRODUCTION

***1** This matter is before the Court on the motion to change venue of Defendants Burch, Newsham and Rauschenberger ("the moving Defendants"). (Dkt. No. 9) Pursuant to 28 U.S.C. § 1404(a), the moving Defendants seek an order transferring this action from the Southern Division to the Northern Division of the Eastern District of Michigan. For the reasons discussed below, the motion to change venue is GRANTED. [1]

II. FACTS

Plaintiff, Fawaz M. Ghaith ("Plaintiff"), has brought suit against multiple defendants alleging that two or more of them conspired to have him arrested, jailed and prosecuted without probable cause. In his Complaint, Plaintiff, a United States citizen, alleges that before August 26, 2008, his wife (Defendant Dawn Ghaith) resided in the Country of Jordan with their four children. (Dkt. No. 1, ¶ 23) During this time, Plaintiff was employed as a long-haul truck driver in the United States and made frequent trips to Jordan to visit his family. (Dkt. No. 1, ¶¶ 22, 24)

At some point, Plaintiff believes his wife sought to end their marriage and move to the United States with the children. (Dkt. No. 1, ¶ 25) Plaintiff alleges that his wife's plan was frustrated because, under Jordanian law, she was unable, without Plaintiff's consent, to obtain a Jordanian passport for their youngest son-unless Plaintiff "was deceased or confined in prison." (Dkt. No. 1, ¶ 28) As a result, Plaintiff claims his wife and two other family members (Defendants Marion and Jerry Breasbois) conspired to have him falsely arrested, so his wife could obtain their son's passport without Plaintiff's permission. (Dkt. No. 1, ¶¶ 29, 32-34)

On September 2, 2008, Plaintiff alleges he was "lured" from the State of Indiana to the "Defendant Family's home" located within the Northern Division of Michigan ("Northern Division") to meet his daughter who, unbeknownst to him, had traveled to the United States. (Dkt. No. 1, ¶¶ 29, 36, 37, 58 and Dkt. No. 25, p. 2) Prior to his arrival at the family home, Plaintiff claims the family defendants dishonestly advised law enforcement that Plaintiff had threatened to take his daughter back to Jordan or kill the family. (Dkt. No. 1, ¶¶ 46-47) Consequently, Plaintiff alleges he was arrested, charged with extortion, and confined for 196 days; on the eve of his second trial [2] all charges against Plaintiff were dismissed and he was released from custody. (Dkt. No. 1, ¶¶ 75, 92-93)

There is no dispute that Plaintiff's arrest, detention, prosecution, and the alleged defamatory statements occurred in the Northern Division. Each of the Thirteen Counts in Plaintiff's Complaint (including his ancillary state law claims) are based on events that occurred entirely or substantially

within the Northern Division-none of which occurred in the Southern Division.[3] It is also undisputed that Plaintiff recently moved to the Southern Division where this action was, thus, properly filed. E.D. Mich. LR 83.10(b)(3).

*2 The Defendants are Dawn Ghaith, Marion Breasbois, Jerry Breasbois, Assistant Bay County Prosecutors Richard Dresser and Scott Gordon, Michigan State Detective Don Rauschenberger, Michigan State Troopers Michael Newsham and Mark Burch, Bay County Sheriff John Miller, the Bay County Sheriff's Department, and Bay County. The docket entries in this case indicate that all of the individual defendants reside in the Northern Division (Dkt.Nos.11-21)[4] and Bay County is located in the Northern Division.

On December 7, 2009, the moving Defendants filed the instant motion alleging that the Northern Division was the most convenient location for the parties, witnesses, and in the interest of justice. (Dkt. No. 9) Defendants Miller, Dresser, Gordon, Bay County and the Bay County Sheriff's Department concurred with the motion to change venue. (Dkt. No. 9, p. 3, ¶ 9) Plaintiff timely filed a brief in opposition to the motion, the moving Defendants replied thereto, and the Court held oral argument on January 12, 2009. Having reviewed the same, the Court finds the balance of factors strongly favor transfer to the Northern Division.

III. DISCUSSION

A. *Legal Standard*

"For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district **or division** where it might have been brought." 28 U.S.C. § 1404(a) (emphasis added). The decision whether to transfer a civil action is in the sound discretion of the trial court. *Duha v. Aqrim Inc.*, 448 F.3d 867, 886 (6th Cir.2006). The moving party bears the burden of proving that the court should transfer the action. *Steelcase v. Smart Technologies, Inc.*, 336 F.Supp.2d 714, 719 (W.D.Mich.2004).

As a threshold inquiry, the district or division to which transfer is proposed, must be one in which the case *might have been* brought. *Van Dusen v. Barrack*, 376 U.S. 612, 634, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964) ("This transfer power is, however, expressly limited by the final clause of Section 1404(a) restricting transfer to those federal districts in which the action 'might have been brought' "). The parties to this motion do not appear to dispute that venue is proper in this Court and would be proper in the Northern Division, where the moving Defendants seek to have the action transferred.[5] Instead, the dispute centers on which venue is most convenient, after balancing the following factors, which both parties agree are applicable: (1) the convenience of the witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of the operative facts; (5) availability of process; (6) the relative means of the parties; (7) the forum's familiarity with governing law; (8) the weight accorded plaintiff's choice of forum; and (9) trial efficiency and interests of justice, based upon the totality of the circumstances. *United States v. P.J. Dick, Inc.*, 79 F.Supp.2d 803, 805-06 (E.D.Mich.2000); *Overland, Inc. v. Taylor*, 79 F.Supp.2d 809 (E.D.Mich.2000). Each of these factors are discussed separately below.

1. Convenience of the witnesses

*3 "Convenience of witnesses is perhaps the most important factor in the transfer analysis." *Steelcase Inc. v. Smart Technologies Inc.*, 336 F.Supp.2d 714, at 720-21; *Meek & Assocs., Inc. v. First Union Ins. Group*, No. CIV. A. 99-2519-CM, 2001 WL 58839, at *4 (D.Kan. Jan.18, 2001); *Gerling Am. Ins. Co. v. FMC Corp.*, No. 97 Civ. 6473(LMM), 1998 WL 410898, at *3 (S.D.N.Y. July 22, 1998). However, while "convenience to the witnesses is often recognized as the most important factor to be considered" in deciding a change of venue motion, "[i]t is the convenience of non-party witnesses, rather than employee witnesses ... that is the more important factor and is accorded greater weight." *Id., citing Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co.*, 844 F.Supp. 1163, 1166 (S.D.Tex.1994). This is so, because it is reasonable to assume that a defendant's employees would testify in either division. *See, McEvily v. Sunbeam-Oster Co., Inc.*, 878 F.Supp. 337, 346 (D.R.I.1994).

During oral argument, the moving Defendants, without providing specific names, indicated that their potential non-party witnesses (such as jail employees, law enforcement employees, and keepers of the court records) live or work in the Northern Division.[6] Plaintiff responded that there are also potential witnesses who live in the State of Indiana or outside of the United States. Neither party identified potential non-party witnesses in the Southern Division.

While, the non-party witnesses indicated by the moving Defendants are employees of other named defendants, and

thus their convenience afforded less weight, Plaintiff's witnesses do not live in either division and need not be considered at all. Therefore, this factor weighs in favor of transfer but not heavily so.

2. Location of the Relevant Documents

While the impact of modern communication technology may have reduced the weight to be afforded the location of physical evidence, it remains a relevant factor. *Steelcase, Inc., v. Mar-Mol Co., Inc.,* 210 F.Supp.2d 920, 940 (W.D.Mich.2002); *In re Volkswagen of Am., Inc.,* 506 F.3d 376, 385 (5th Cir.2007), *reh'g en banc granted,* 2008 U.S.App. LEXIS 3322 (5th Cir. Feb 14, 2008) ("[T]hat access to some sources of proof presents a lesser inconvenience now than it might have absent recent developments does not render this factor superfluous.... The district court erred [in ignoring this factor] ... because it does weigh in favor of transfer, although its precise weight may be subject to debate.").

Here, Plaintiff does not dispute that the records related to his arrest, detention, and prosecution are located in the Northern Division. Thus, while there may be a small number of documents located outside either division, this factor favors transfer.

3. Convenience of the Parties

The obvious place to begin a discussion of relative convenience of the parties is Plaintiff's selected forum. However, while "a plaintiff's choice of forum should be given weight when deciding whether to grant a motion to change venue, this factor is not dispositive." *Lewis v. ACB Business Services, Inc.,* 135 F.3d 389, 413 (6th Cir.1998). Indeed, other courts have found that a plaintiff's choice of forum may be overcome when none of the conduct complained of happened in the plaintiff's chosen forum. *See, Dicken v. U.S.,* 862 F.Supp. 91, 92-93 (D.Md.1994); *Chedid v. Boardwalk Regency Corp.,* 756 F.Supp. 941, 944 (E.D.Va.1991).

***4** As discussed below, the operative facts in this case occurred in the Northern Division and none of the conduct complained of transpired in the Southern Division. In addition, Plaintiff is still employed as a truck driver, whose business requires him to travel outside the State of Michigan,[7] and he only recently moved to the Southern Division. In contrast, all of the individual defendants reside (and the vast majority are also employed) in the Northern Division (Dkt.Nos.11-21) and Bay County is located in the Northern Division. Therefore, this factor also favors transfer.[8]

4. The Locus of Operative Facts

Plaintiff's arrest, detention, prosecution and the alleged defamation occurred in the Northern Division-not a single articulable event occurred in the Southern Division. Although Plaintiff alleges that some events happened in the State of Indiana and the Country of Jordan, this does not change the analysis. The question is not where all of the facts occurred but where the *operative* facts occurred, typically where the wrongful acts took place or the injury happened. Specifically, as it relates to actions brought under 42 U.S.C. § 1983 asserting constitutional claims similar to those alleged herein, the operative event(s) is where the injury occurred:

> Section 1983 actions which contain allegations of constitutional deprivations caused by unlawful arrests and seizures are analogous to tort actions for false arrest and imprisonment. *See, Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Since § 1983 should be read against a background of tort law liability, *Pierson v. Ray,* 386 U.S. 547, 556-557, 87 S.Ct. 1213 [1218-1219], 18 L.Ed.2d 288 (1967); *Monroe v. Pape, supra,* 365 U.S. at 167, 81 S.Ct. 473 [at 484] law governing where tort law claims arise is highly relevant for determining where claims under § 1983 should be ruled to have arisen. The traditional rule is that the claim or cause of action arises where the injury occurs, since until there is an injury an essential element of the cause of action is missing. *See, Miller v. Cousins Properties, Inc.,* 378 F.Supp. 711 (D.Vt.1974); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.,* 291 F.Supp. 252, 260 (E.D.Pa.1968); *Rosen v. Savant Instruments, Inc.,* 264 F.Supp. 232 (E.D.N.Y.1967).

Williams v. Garcia, 569 F.Supp. 1452, 1458 (E.D.Mich.1983).

In this case, the location of Plaintiff's injury is evident from his Complaint allegations, which focus on his false arrest, detention, and prosecution. All of these events took place in the Northern Division. Therefore, this factor weighs heavily in favor of transfer.

5. Availability of Process

Under Federal Rule of Civil Procedure 45, a subpoena may be quashed that requires a non-party witness to "travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person ..." Fed.R.Civ.P. 45(c)(3)(A)(ii).[9] While this rule does not necessarily apply to an appearance for *trial* within Michigan (Fed.R.Civ.P. 45(c)(3)(A)(ii) and (B)(iii)), it would apply to depositions of any non-party witnesses. Thus, as discussed above, because every potential non-party witness in Michigan either resides, or is employed, in the Northern Division, this factor favors transfer.

6. Relative Means of the Parties.

***5** The Court finds this a neutral factor. While Defendants Marion and Jerry Breasbois are, at this time, proceeding without counsel, the Court is not persuaded that this fact is sufficient to find these defendants of lesser means than Plaintiff. Similarly, the Court is equally unpersuaded that, because Plaintiff is a truck driver or has *alleged* he is the victim of wrongdoing, he should be found of lesser means than the defendants in aggregate.[10]

7. The Forum's Familiarity with Governing Law

The Court finds this a neutral factor as both forums are equally familiar with the governing law alleged in Plaintiff's Complaint.

8. Plaintiff's Choice of Forum

As discussed earlier, while "a plaintiff's choice of forum should be given weight when deciding whether to grant a motion to change venue, this factor is not dispositive" *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 413 (6th Cir.1998) and may be overcome where the operative facts occurred outside his chosen forum. *See, Dicken v. U.S.*, 862 F.Supp. 91, 92-93 (D.Md.1994); *Chedid v. Boardwalk Regency Corp.*, 756 F.Supp. 941, 944 (E.D.Va.1991). This factor, thus, militates against transfer, but not heavily so.

9. Trial Efficacy

For the reasons outlined above, trial efficiency and interests of justice, based on the totality of the circumstances, favor transfer. *Overland*, 79 F.Supp. at 811.

IV. CONCLUSION

The Court finds that the moving Defendants have satisfied their burden of showing that the balance of factors weighs strongly in favor of transfer. *Steelcase, Inc. v. Smart Technologies, Inc.*, 336 F.Supp. at 719. Accordingly, IT IS ORDERED that the moving Defendants' motion to change venue is GRANTED and the matter is transferred to the Northern Division of the Eastern District of Michigan unless an appeal is made to the District Court within the time constraints set forth below.

The parties to this action may object to and seek review of this Order through an appeal to the district judge, but are required to act within fourteen (14) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1)(A) and Fed.R.Civ.P. 72(a). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505, 508 (6th Cir.1991); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir.1981). Pursuant to E.D. Mich. LR 72.1(d)(1), a copy of the appeal is to be served upon this magistrate judge.

Within fourteen (14) days of service of any objecting party's timely filed appeal, the opposing party may file a response. The response shall be not more than 20 pages in length unless by motion and order such page limit is extended by the court. The response shall address specifically, and in the same order raised, each issue raised in the appeal.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 431596

Footnotes

1 Motions to change venue are non-dispositive because they do not address the merits of the parties claims and should proceed by order rather than report and recommendation, subject to review under the 'clearly erroneous' standard. *PAOA v. Marati*, 2007 WL 45639338 (D.Haw. Dec. 28, 2007) and cases cited therein; *Holmes v. TV-3, Inc.*, 141 F.R.D. 697 (W.D.La.1991) ("Since [a Motion to Transfer Venue] is not one of the motions excepted in 28 U.S.C. § 636(b)(1)(A), nor is it dispositive of a claim on the merits within the meaning of Rule 72 of the Federal Rules of Civil Procedure, this ruling is issued under the authority thereof, and in accordance with the standing order of this court.")

2 Plaintiff's first trial ended in a mistrial.

3 For example, Count 2: "False Arrest, False Imprisonment, Malicious Prosecution, and Unreasonable Search and Seizure; Count 3: "Right to a Fair Trial"; Count 4: "Excessive Bail," etc. Indeed, all twelve counts relate in some way to Plaintiff's arrest, detention, prosecution, or alleged defamation by Assistant Bay County Prosecutor Dresser and transpired in the Northern Division.

4 Dawn Ghaith was served in a parking lot of the Midland Circuit Court in Midland, Michigan. (Dkt. No. 19) However, her Answer provides an address in the Northern Division.

5 With respect to the assignment of cases, the Local Rules of the Eastern District of Michigan provides as follows:

> **(b) Assignment of Cases.** Civil Cases shall be assigned by the Clerk to a place of holding court by reference to the counties in (a) in the following order of priority:
>
> (1) If an action is removed from State Court, the county in which the case was pending in State Court (28 U.S.C. § 1441(a)).
>
> (2) If an action is local in nature, the county in which the real estate is located.
>
> (3) The county in which a plaintiff resides.
>
> (4) The county in which the claim arose.
>
> (5) In a case in which a defendant is an officer or employee of the United States or any agency thereof acting in his or her official capacity, or under color of legal authority, or an agency of the United States, the county in which an office of a defendant is located.
>
> (6) A county in which the defendant resides or has a place of business.
>
> (7) The place of holding court in which the cases filed.

E.D. Mich. LR 83.10(b). Under this rule, while the case was properly assigned under subsection (3), it *could have been assigned* under (5), (6), or (7) had subsection (3) been inapplicable.

6 Plaintiff properly maintains that the moving Defendants *should have* provided names and proposed testimony of potential witnesses. See *Thomas v. Home Depot, U.S.A., Inc.*, 131 F.Supp.2d 934, 937 (E.D.Mich.2001). While they did not do so, the Court is not precluded from finding that every potential non-party witness in Michigan resides or is employed in the Northern Division.

7 Plaintiff alleges he was in the State of Indiana "hauling cargo as a trucker" when the "Defendant Family" lured him back to Michigan under the guise of having dinner at the "Defendant family's home" located in the Northern Division. (Dkt. No. 25, p. 3 and Dkt. No. 1, ¶¶ 36-38, 44)

8 Plaintiff argument that the moving Defendants may somehow be less inconvenienced because they seek an intra-district transfer is not well taken, since the statute contemplates intradistrict transfers.

9 Plaintiff's pleading indicates that the distance between Bay City and Detroit is 115 miles. (Dkt. No. 25, p. 9, n. 2)

10 The Court does note that the government defendants are likely of greater means than Plaintiff, however, when comparing the parties as a whole this factor remains neutral.

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