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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEFFREY ALEXANDER STERLING, Plaintiff, -versus- GEORGE TENET, Director, Central Intelligence Agency, JOHN DOE (1-10), Defendants.	01 Civ. 8073 (AGS) MEMORANDUM DECISION

ALLEN G. SCHWARTZ, DISTRICT JUDGE:

I. Introduction

Plaintiff Jeffrey Alexander Sterling, an African-American male, was employed by the Central Intelligence Agency ("CIA") as an operations officer. He alleges that during his tenure at the CIA, he was subjected to racial discrimination. He also alleges that he was retaliated against for pursuing a claim through the equal employment opportunity process. Defendant George Tenet moves to dismiss the complaint for improper venue or, in the alternative, to transfer venue to the Eastern District of Virginia. For the reasons set forth below, Tenet's motion to dismiss is denied and his motion to transfer venue is granted.

II. Factual Background[1]

As a preliminary matter, the Court notes that substantively speaking, this action is similar to many employment discrimination cases that have been before this Court. However, Sterling was not only employed by the CIA, but he worked as an operations officer—meaning he worked clandestinely. Thus, the factual details of the case, which

[1] Because this is a motion to dismiss, the Court must assume the truth of the facts set forth in the Complaint. *See, e.g., LaBounty v. Adler*, 933 F.2d 121, 123 (2d Cir. 1991).

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would otherwise be unremarkable, [redacted] potentially compromise the CIA's operations. The briefs on file in this case have been redacted by the CIA. The Court, however, has reviewed the original, unredacted briefs, as well as a classified declaration by Tenet. Thus, although the factual background outlined below is somewhat abbreviated, the Court is cognizant of all relevant facts, including facts set forth in sealed and confidential submissions.

Sterling joined the CIA as an operations officer in May 1993. See Complaint, at ¶ 5. After completing his training, he was certified as an operations officer in December 1994. *See id.*, at ¶ 5. Following his certification, he served in the Washington D.C. area, an overseas posting, [redacted] *See id.*, at ¶ 5. Sterling alleges that he was subjected to racially discriminatory treatment while working [redacted] *See id.*, at ¶ 5.

Sterling arrived in New York in January 1999. *See id.*, at ¶ 6. The CIA had trained Sterling as [redacted] specialist. *See id.*, at ¶ 6. While in New York, Sterling was to serve as the coordinator for the [redacted] activities. *See id.*, at ¶ 6. [redacted] According to Sterling, during the period [redacted] CIA management placed expectations on him "far above those required of non-African American [operations officers]." *Id.* at ¶ 7. Sterling claims that he was repeatedly passed over for operational opportunities and subjected to disparate treatment as the only African-American operations officer[1] [redacted] *See id.*, at ¶ 8. He also alleges that in April 2000, CIA management, motivated by a discriminatory animus, presented him with

[1] It is unclear whether other African-Americans worked [redacted] in non-operations capacities.

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an unrealistic and unjustified Advanced Work Plan that was considerably more demanding and "harsher" than any requirements placed on non-African-Americans. *See id.*, at ¶ 7.

Sterling further contends that he was retaliated against for utilizing the equal employment opportunity ("EEO") process. *See id.*, at ¶ 9. Specifically, he states that although he was not scheduled to undergo updated security processing until 2001, CIA management scheduled him to undergo security processing in May 2000. *See id.*, at ¶ 9. Sterling avers that security processing is an "arbitrary regime within the CIA that is utilized more for its nature as a tool of intimidation than any substantive security implications." *Id.* at ¶ 9. Sterling also claims that [redacted] management vandalized unspecified personal property. *See id.*, at ¶ 9.

According to Sterling, the discrimination he suffered while [redacted] was part of a pattern of discrimination he suffered during his career at the CIA. *See id.*, at ¶ 10. He alleges that he had been denied work opportunities and that CIA management told him that he could not be operationally inconspicuous based on his size, skin color, and use of a language not typically spoken by African-Americans.[3] *See id.*, at ¶ 10. The CIA taught Sterling the language. *See id.*, at ¶ 10. Sterling also contends that the CIA interfered with his right to an attorney. *See id.*, at ¶ 11. In particular, Sterling notes that his attorney was not granted a security clearance until four months after the initiation of the EEO process. *See id.*, at ¶ 11.

In light of the foregoing, Sterling has filed the instant action, seeking declaratory relief, damages, and costs and attorney's fees. Curiously, Sterling does not explicitly

[3] Sterling does not identify the language in question, but given Sterling's [redacted], the Court assumes the language is Farsi.

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state in his Complaint the legal basis for jurisdiction before this Court, stating merely that "The United States District Court for the Southern District of New York has jurisdiction over New York County, [redacted]" Complaint, at ¶ 4. The Court presumes that Sterling is bringing this action pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*). Tenet moves to dismiss the complaint for improper venue pursuant to FED. R. CIV. P. 12(b)(3). Alternatively, Tenet moves to transfer venue to the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a).

III. Legal Analysis

A. Tenet's Motion to Dismiss for Improper Venue

Tenet moves to dismiss the Complaint for improper venue. Tenet states that "in a Title VII case the Court must ordinarily determine the extent of the relationship between the alleged discrimination and the chosen venue". Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint for Improper Venue or in the Alternative to Transfer Venue ("Motion Brief"), at 6. In this case, however, Tenet contends that the state secrets privilege and other statutory privileges (in particular, Tenet's authority as Director of Central Intelligence to protect intelligence sources and methods) "prevent the Court from making that determination." *Id.* at 7.

In *Ellsberg v. Mitchell*, 709 F.2d 51, 56-57 (2d Cir. 1983), the Second Circuit set forth the contours of the state secrets privilege:

> The privilege may be asserted only by the government itself; neither a private party nor an individual official may seek its aid. Furthermore, in order to invoke it, "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." Possibly because the state secrets doctrine pertains generally to *national security* concerns, the privilege has

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> been viewed as both expansive and malleable. The various harms, against which protection is sought by invocation of the privilege, include impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments. When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege. However, because of the broad sweep of the privilege, the Supreme Court has made clear that "[i]t is not to be lightly invoked." Thus, the privilege may not be used to shield any material not strictly necessary to prevent injury to national security; and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.

(Internal citations omitted). Tenet argues that the assertion of the state secrets privilege can potentially lead to outright dismissal of an action. *See* Motion Brief, at 9.

The issue at hand, however, is not whether the state secrets privilege is expansive—both parties acknowledge that it is. Instead, the issue is whether it is properly being invoked in the instant case. Indeed, as *Ellsberg* makes clear, the "absolute" protection of the state secrets privilege is contingent upon it being "properly invoked." *Ellsberg*, 709 F.2d at 57. While Tenet contends that the decision to invoke the state secrets privilege should be given deference, he (correctly) stops short of arguing that its mere invocation mandates dismissal. Indeed, the Second Circuit has underlined the importance of judicial review in instances where the executive branch invokes the state secrets privilege:

> [T]he Supreme Court has declared that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." Thus, to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation.

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Ellsberg, 709 F.2d at 58 (internal citation omitted). Thus, before determining whether the instant action should be dismissed on the basis of state secrets, the Court must first determine whether the state secrets privilege has been properly invoked.

The gist of Tenet's argument is that [redacted] In response, Sterling argues that [redacted] and that the CIA is therefore precluded from invoking the state secrets privilege. In support of this contention, Sterling cites a number of facts. [redacted]

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The Court also notes that Tenet's invocation of the state secrets privilege in this case is somewhat unusual. For example, in support of its invocation of the state secrets privilege, Tenet relies upon *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991). In that case, the Second Circuit upheld the invocation of the privilege to block the revelation of "secret data and tactics concerning the weapons systems of the most technically advanced and heavily relied upon of our nation's warships [...]." *Id.* at 547. In contrast to *Zuckerbraun*, where the government, as intervening defendant, sought to prevent disclosure of certain highly technical information, here Tenet seeks to dismiss

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a case outright based on [redacted][4] *Zuckerbraun*, on its facts, does not support such a conclusion.[5] Defendants also rely upon *Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992). Like *Zuckerbraun*, *Bareford* implicated specific technical information relating to the "'design, manufacture, performance, functional characteristics, and testing of these systems.'" *Bareford*, 973 F.2d at 1142 (quoting *Zuckerbraun*, 935 F.2d at 547). While none of the factors enumerated by Sterling would, independently, justify denying Tenet the protection of the state secrets privilege, the Court finds that, considering all of these factors together, and in light of Tenet's classified declaration reviewed *in camera* by the Court, the invocation of the state secrets privilege is inappropriate in this case. Consequently, the Court declines to dismiss Sterling's case based on the state secrets privilege.

Similarly, the Court declines to dismiss the case based on other statutory privileges cited by Tenet. Sterling does not dispute the existence of the statutory authority. *See* Opposition Brief, at 16. Tenet cites no authority in his Motion Brief in which an action was dismissed at the outset based upon a statutory privilege. For substantially the same reasons as set forth above the Court declines to dismiss this action based on statutory privileges.

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[4] While the case in *Zuckerbraun* was dismissed, this was because the case could not proceed unless the material in question was disclosed to plaintiff.

[5] Indeed, as Sterling notes, the typical invocation of the state secrets doctrine normally applies to limit discovery rather than to dismiss the entire action from the outset.

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B. Tenet's Motion in the Alternative to Transfer Venue

In the alternative to his motion to dismiss, Tenet moves to transfer venue to the Eastern District of Virginia (the district in which CIA headquarters is located). Venue in a Title VII case is governed by 42 U.S.C. 2000e-5(f)(3):

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought [1] in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, [2] in the judicial district in which the employment records relevant to such practice are maintained and administered, or [3] in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, [4] but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.

Transfer of venue is governed by 28 U.S.C. § 1404 which states as follows:

> (a) For the convenience of 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.
>
> (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.
>
> [...]

Transfer of venue to the Eastern District of Virginia is potentially available because under 28 U.S.C. § 1404(a), the action could have been brought there originally, given that CIA headquarters is located there as are the relevant employment records. *See* Motion Brief, at 19. Sterling does not contest that the action could permissibly be transferred to the Eastern District of Virginia.

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Having determined that venue could be transferred to the Eastern District of Virginia, the Court examines whether transfer is appropriate. The starting place for analysis is the general rule that courts should ordinarily defer to a plaintiff's choice of venue. *See, e.g., Caesar v. Interoute Telecomms., Inc.*, No. 00 Civ. 8629, 2001 WL 648946, at *3 (S.D.N.Y. June 12, 2001). However, this deference is not absolute, and in any event is substantially reduced where "operative facts upon which the litigation is brought bear little material connection to the chosen forum." *Id.* at *3 (citations omitted). While the Court would be amiss in stating that there [redacted] in this case, doubts remain as to whether New York is the appropriate venue for this action. Specifically, Sterling alleges in his Complaint not only alleged discrimination [redacted], but discrimination throughout his CIA career. *See* Complaint, ¶ 10. The vast majority of Sterling's career was spent not in New York but in "Washington D.C." *See* Sterling Declaration, Exhibit 1. Thus, while the Court will give some deference to Sterling's choice of venue, the analysis does not end there. Instead, the Court will proceed to examine other relevant factors:

> (1) the convenience of witnesses, (2) the convenience of the parties, (3) the location of relevant documents and the relative ease of access to sources of proof, (4) the locus of operative facts, (5) the availability of process to compel the attendance of unwilling witnesses, (6) the relative means of the parties, (7) the forum's familiarity with the governing law, (8) the weight accorded the plaintiff's choice of forum, and (9) trial efficiency and the interest of justice, based on the totality of the circumstances.

Caesar v. Interoute Telecomms., Inc., No. 00 Civ. 8629, 2001 WL 648946, at *4 (S.D.N.Y. June 12, 2001).

With respect to the convenience of witnesses, Sterling concedes that some witnesses are present in the Eastern District of Virginia, but alleges that most [redacted]

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[redacted] However, as Tenet notes, Sterling's claims of the locations of several of these witnesses are speculative. Tenet states that the CIA cannot disclose the whereabouts of its employees who may be witnesses, but underlines that their presence in the Eastern District of Virginia would not be suspect because of the presence of CIA headquarters there. In light of these factors, the convenience of witnesses factor favors transfer of venue. The convenience of the parties factor also favors transfer, as the CIA is based in the Eastern District of Virginia and Sterling lives there.[6] Sterling's counsel's office is in the adjacent district of Washington, D.C.

The third factor, the location of relevant documents and relative ease of access to sources of proof also favors transfer, because the relevant documents are located at the CIA headquarters in the Eastern District of Virginia. The fourth factor, the locus of operative facts, [redacted] Sterling's claim in his Complaint that he suffered discrimination throughout his CIA career, [redacted] *See* Complaint, at ¶ 10. Thus, the locus of operative facts includes [redacted] the Eastern District of Virginia.

Compelling the attendance of witnesses is no more onerous in New York than in Virginia, neutralizing the fifth factor. The sixth factor, the relative means of the parties, would appear to militate in favor of Virginia, since both Sterling and his counsel reside in the area. However, since Sterling opted to file suit in New York, the Court will assume that either forum would be convenient. The seventh factor is also neutralized because Sterling's claims arise purely under federal law. A New York-based federal court is no

[6] Sterling argues that he only lives there because of the CIA's discriminatory practices. Tenet responds by stating that Sterling lived in the Eastern District of Virginia before he lived in New York. Whatever the reason, however, Sterling does currently live in the Eastern District of Virginia.

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more competent than a Virginia-based federal court in analyzing a Title VII claim. *See, e.g., Caesar v. Interoute Telecomms., Inc.*, No. 00 Civ. 8629, 2001 WL 648946, at *5 (S.D.N.Y. June 12, 2001). The eighth factor, plaintiff's choice of forum, is entitled to some deference, but, for the reasons set forth above, this deference is limited.

The ninth factor, trial efficiency and the interest of justice based on the totality of the circumstances, is a catch-all. After fully considering all of the submissions in this case, and in light of the other eight factors, the Court determines that the instant action should be transferred to the Eastern District of Virginia.

C. Sterling's Request to Review the Classified Tenet Declaration

In his Opposition Brief, Sterling argues that he and his counsel should be permitted to review the classified declaration submitted by Tenet. In light of the Court's determination that this action be transferred to the Eastern District of Virginia, the Court reserves decision on this question in order to permit the judge in the transferee jurisdiction to make this determination.

IV. Conclusion

For the reasons set forth above, Tenet's motion to dismiss the Complaint for improper venue is DENIED; his motion in the alternative to transfer venue to the Eastern District of Virginia is GRANTED. Judgment is reserved on Sterling's request to review the classified Tenet declaration.

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SO ORDERED.

ALLEN G. SCHWARTZ, U.S.D.J.

Dated: New York, New York
January 23, 2003