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United States District Court, N.D. Illinois.

Edith JONES, et al., Plaintiffs,
v.
R.R. DONNELLEY & SONS, a Delaware Corporation Defendant.

No. 96 C 7717. | Aug. 17, 1999.

Opinion

MEMORANDUM OPINION AND ORDER

WILLIAMS, J.

*1 Plaintiffs filed a class action lawsuit against defendant R.R. Donnelley & Sons Company (“Donnelley”) alleging race discrimination in violation of 42 U.S.C. § 1981. Donnelley filed a motion for partial summary judgment on plaintiffs’ § 1981 claims, arguing that they are barred by the statute of limitations. Plaintiffs responded by filing a motion to strike certain portions of Donnelley’s Statement of Undisputed Facts and Supplemental Appendix.

This court referred both motions to Magistrate Judge Levin, who issued a Report and Recommendation (“R & R”) recommending that the court grant Donnelley’s motion for summary judgment and deny plaintiffs’ motion to strike. Plaintiffs have now filed objections to the R & R and Donnelley has responded to those objections. After carefully reviewing the entire record, the court adopts Magistrate Judge Levin’s R & R in part and rejects it in part. Accordingly, for the following reasons, the court denies Donnelley’s motion for summary judgment and denies plaintiffs’ motion to strike.

Background

Plaintiffs are current and former African–American employees of Donnelley. For many years, Donnelley’s Chicago Manufacturing Division (“CMD”) printed Sears Roebuck & Co.’s catalogs and supplements, which accounted for approximately sixty percent of CMD’s production. (Def.12(M) ¶ 3). In February 1993, Donnelley announced that it would close its CMD because Sears decided to discontinue its catalog operations. (*Id.* ¶ 4). By March 1, 1993, Donnelley terminated or transferred all the CMD employees involved in the production of Sears’ work. (*Id.* ¶ 9).

Throughout the remainder of 1993 and early 1994, Donnelley transferred the remaining work for non-Sears customers to other Donnelley divisions. (*Id.* ¶ 10). Around July 31, 1994, CMD manufacturing operations ceased, and Donnelley either terminated or transferred all remaining CMD employees. (*Id.* ¶ 11). The CMD clearinghouse closed operations on September 30, 1994.¹ The CMD’s African–American employees believed that Donnelley did not allow anyone to transfer or “bump” into other positions at other divisions within the company. However, Donnelley actually transferred many of its white employees to other divisions and terminated its African–American employees. (Pl.12(N) ¶ 27). Plaintiffs filed this nationwide class action seeking damages for race discrimination in violation of 42 U.S.C. § 1981(b). Donnelley now moves for summary judgment on the grounds that plaintiffs’ complaint was filed outside the statute of limitations and plaintiffs ask the court to strike certain portions of Donnelley’s Statement of Undisputed Facts and Supplemental Appendix.

Analysis

I. Plaintiffs' Motion to Strike

Plaintiffs ask the court to strike certain portions of Donnelley's 12(M) Statement, portions of the affidavits of Robert Jewison² ("Jewison") and Brenda Garland³ ("Garland"), and the exhibits to those affidavits. Specifically, plaintiffs move to strike certain paragraphs of Donnelley's 12(M) Statement and the affidavits on the grounds that they are hearsay, without foundation, unsupported by the record, and immaterial. ® & R at 3). In the R & R, Magistrate Levin found that all these materials are admissible under the Federal Rules of Civil Procedure. The court agrees with Judge Levin's analysis and therefore fully adopts Magistrate Levin's recommendation and denies plaintiffs' motion to strike.

II. Donnelley's Motion for Partial Summary Judgment

*2 Donnelley moves for partial summary judgment on plaintiffs' § 1981 claims relating to the operation and shutdown of Donnelley's CMD and specified named plaintiffs terminated at the CMD. The CMD totally ceased operations on September 30, 1994, but plaintiffs did not file their § 1981 action until November 25, 1996—more than two years later. Therefore, Donnelley argues that all claims relating to the operation and shutdown of the CMD and all related employee transfers are untimely and barred by the statute of limitations.

Plaintiffs assert four separate theories in opposition to Donnelley's motion for partial summary judgment. Specifically, plaintiffs contend that their § 1981 claim is saved by (1) the continuing violation theory; (2) the four-year statute of limitations established by 28 U.S.C. § 1658; (3) the doctrine of equitable tolling; and (4) the doctrine of equitable estoppel. Magistrate Judge Levin considered each of these theories, rejected them all, and recommended that the court grant Donnelley's motion for summary judgment on plaintiffs' § 1981 claims. Because the court finds a genuine issue of material fact over whether the doctrines of equitable tolling and equitable estoppel apply to plaintiffs' § 1981 claims, the court rejects Magistrate Judge Levin's recommendation to grant Donnelley's motion for partial summary judgment.⁴

Plaintiffs maintain that the doctrine of equitable tolling preserves their § 1981 claim. "A plaintiff may toll the statute of limitations if, despite all due diligence, he is unable to obtain enough information to conclude that he may have a discrimination claim." *Thelen v. Marc's Big Boy Corp.*, 63 F.3d 264, 268 (7th Cir.1995); *see also Chakonas v. City of Chicago*, 42 F.3d 1132, 1135 (7th Cir.1994). Under the doctrine of equitable tolling, a person need not sue until he knows, or through reasonable diligence would have known, that he was injured by the unlawful acts of the defendant. *See Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 281 (7th Cir.1993) (statute of limitations began to run on the date the employer made it clear that it would not give the plaintiff suitable laboratory space.) In this case plaintiffs argue that they could not have reasonably known that Donnelley discriminated against them in the shutdown of the CMD. However, Donnelley maintains that Plaintiffs fail to show "due diligence."

Examining the facts of this case under the summary judgment standard and drawing all reasonable inferences in plaintiffs' favor, a reasonable juror could find that the doctrine of equitable tolling applies. Plaintiffs have submitted admissible evidence that Donnelley secretly transferred many of its white employees while terminating its African-American employees during the shutdown of the CMD. (Pl.'s App. Ex. 2–8). In an open letter announcing the shutdown, Donnelley stated: "This closure is permanent. There will be no opportunity for bumping to another position." (*Id.* Ex. 3).

*3 Similarly, plaintiffs have presented affidavits from nineteen former African-American employees stating that they were "told that there [were] no opportunities to transfer to other divisions." (*Id.* Ex. 7,8). Furthermore, all the affidavits uniformly state that the former African-American employees did not know that Donnelley was transferring its white employees. (*Id.*) In light of these facts, Donnelley's actions may be reasonably viewed as covert.

Moreover, plaintiffs only learned of the transfers after receiving documents from an age discrimination case against Donnelley.⁵ (Pl.'s Obj. at 41). An analysis of these documents revealed that Donnelley selected only white employees to transfer. (Pl.'s App. Ex. 5). Under these circumstances, a reasonable juror could conclude that plaintiffs could not have reasonably known that Donnelley discriminated against them in the closing of the CMD. Accordingly, because a reasonable jury could find that Donnelley's actions made it impossible for plaintiffs to realize that they had a discrimination claim, there is a genuine issue of material fact over whether the doctrine of equitable tolling applies.

Plaintiffs also maintain that the doctrine of equitable estoppel saves their § 1981 claim and the court agrees. Equitable estoppel "comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, such as by hiding evidence or promising not to plead the statute of limitations." *Hentosh v. Herman M. Finch University of Health Sciences/The Chicago Medical School*, 167 F.3d 1170, 1174 (7th Cir.1999); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450–51 (7th Cir.1990). "To prove estoppel successfully, the plaintiff must show that the defendant's conduct was improper,

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and that the plaintiff was harmed by such conduct.” *Wheeldon v. Monon Corp.*, 946 F.2d 533 (7th Cir.1991). Donnelley argues that plaintiffs present no evidence on the issue of equitable estoppel.

Applying the summary judgment standard, a reasonable juror could find that equitable estoppel applies in this case. Donnelley publicly informed its employees that it would not transfer any employees. (Pl.’s App. Ex. 2–8). It then transferred more than 24 percent of its white employees. (*Id.* Ex. 5–8). However, plaintiffs’ affidavits reveal that they relied on Donnelley’s public statements and had no idea that anyone was transferred. For example, one plaintiff states: “I was told that everyone would be terminated ... I truly believed that everyone at the facility was terminated (black and white alike) ... I did not know that Donnelley was secretly transferring its white employees to other divisions.” (*Id.* Ex. 7,8).

In contrast, Donnelley presents evidence that it publicly announced job opportunities within the company through its centralized clearinghouse. (Def.’s App.). “All job offers made to CMD employees by other Company divisions were posted on CMD bulletin boards.” (Jewison Aff. ¶ 7). Whether Donnelley publicly announced the available job transfers or kept those transfers a secret for its white employees is a disputed factual issue for a jury to resolve. In light of the conflicting evidence presented on this issue, a reasonable juror could find that Donnelley misled plaintiffs and estopped them from filing suit within the statute of limitations. The court therefore finds a genuine issue of material fact over whether the doctrine of equitable estoppel applies to plaintiffs’ § 1981 claims.

Conclusion

***4** The court denies Donnelley’s motion for partial summary judgment. The court also denies plaintiffs’ motion to strike. The parties should discuss settlement of this case before the next court date.

Footnotes

¹ In connection with the shutdown, Donnelley allegedly instituted a centralized clearinghouse at the CMD through which all company-wide openings in permanent jobs were to be posted. (Def.12(M) ¶ 5).

² Robert Jewison is a former employee of Donnelley. He served as the controller of CMD prior to his retirement at the end of 1994, and he helped supervise the shutdown. Jewison’s affidavit purports to set forth a variety of facts surrounding the shutdown, including the posting of job openings through a centralized clearinghouse, the process of transferring employees subsequent to the shutdown and the actual process of shutting down the CMD. (R & R at 3).

³ Brenda Garland is a Human Resources Representative for Donnelley. Her affidavit set forth the dates of separation of certain named plaintiffs.

⁴ Because the court resolves the statute of limitations issue under the doctrines of equitable tolling and equitable estoppel, the court expresses no opinion on the correctness of Judge Levin’s analysis of the continuing violation theory in this case or the applicability of 28 U.S.C. § 1658’s four-year statute of limitations to actions brought under 42 U.S.C. § 1981(b).

⁵ Plaintiffs received documents from an age discrimination case in the course of discovery, (*Gerlib v. R.R. Donnelley* 95 C 7401) which is still pending. This lawsuit was filed approximately five weeks after receipt of the documents from the *Gerlib* case.