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United States District Court, N.D. Illinois.

Edith JONES, et. al., Plaintiffs,
v.
R.R. DONNELLEY & SONS COMPANY, Defendants.

No. 96 C 7717. | Feb. 11, 1999.

Attorneys and Law Firms

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Opinion

REPORT AND RECOMMENDATION

LEVIN, United States Magistrate Judge.

***1** At issue before the court is Defendant R.R. Donnelley & Sons' ("Donnelley") Motion for Partial Summary Judgment, Plaintiffs' Edith Jones et. al. ("Plaintiffs") Motion to Strike certain portions of Defendant's Statement of Undisputed Material Facts (and portions of two supporting affidavits) and Plaintiffs' Motion to Strike Defendant's Supplemental Appendix and materials relying on the Supplemental Appendix.

FACTUAL BACKGROUND

The Plaintiffs are current and former employees of Donnelley, who have filed a nationwide class action seeking damages for race discrimination in violation of 42 U.S.C. § 1981(b). (Pl. Resp. at 1.) Plaintiffs initially filed this lawsuit on November 25, 1996. Defendant has filed a Motion for Partial Summary Judgment on Statute of Limitations grounds for those employees who were terminated at Donnelley's Chicago Manufacturing Division ("CMD") prior to November 25, 1994.

For many years, Donnelley's Chicago Manufacturing Division printed Sears Roebuck & Co.'s catalogs and supplements and that work constituted a majority of the CMD's total production. (Def.12(M) ¶ 3). On or about January 28, 1993, Donnelley announced that it would be shutting down CMD in the wake of Sears' decision to discontinue its own catalog operations. (Def.12(M) ¶ 4). By March 1, 1993, existing Sears work was completed and all CMD employees involved in its production were terminated or transferred. (Def.12(M) ¶ 9).

During the balance of 1993 and early 1994, remaining CMD work for other (non-Sears) customers was transferred to different Donnelley divisions elsewhere in the United States. These work transfers were allegedly completed by July 31, 1994. (Def.12(M) ¶ 10). At that time, CMD manufacturing operations ceased and any remaining CMD manufacturing employees either were terminated or transferred. (Def.12(M) ¶ 11).

The thrust of the dispute between the parties surrounds the actual date of the CMD shutdown, as it relates to the statute of limitations surrounding Plaintiffs' Section 1981(b) claim. In order to assess the evidence surrounding the shutdown, it is first necessary to decide Plaintiff's Motions to Strike before turning to Defendant's Motion for Partial Summary Judgment.[1]

ANALYSIS

I. PLAINTIFF'S MOTION TO STRIKE

A. Jewison Affidavit and Applicable Portions of Defendant's 12(M)

Plaintiffs have asked the court to strike certain portions of Defendant's 12(M) Statement, portions of the affidavits of Robert Jewison[2] ("Jewison") and Brenda Garland[3] ("Garland"), and the exhibits to those affidavits.

Specifically, Plaintiffs move to strike certain paragraphs of Defendant's 12(M) Statement and certain paragraphs of the Jewison affidavit on the grounds that they are hearsay, without foundation, unsupported by the record and immaterial.

Rule 56(e) of the Federal Rules of Civil Procedure provides that supporting affidavits "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Plaintiffs' primary objection to the Jewison affidavit is that it allegedly is based on inadmissible hearsay.

***2** Plaintiffs argue that Jewison impermissibly introduces hearsay in order to prove what Donnelley did, and decisions and actions taken by Sears, an unrelated third party customer of Donnelley, with respect to discontinuance of its catalog business. (Pl. Mot. at 4). Furthermore, Plaintiffs argue that Jewison's statement that Donnelley instituted a centralized clearinghouse at the CMD through which all openings in permanent jobs Company-wide were to be posted, and the Exhibits supporting this assertion, are inadmissible hearsay and are unauthenticated. *Id.* at 5.

Plaintiffs also move to strike paragraph 10 of the 12(M) statement and paragraph 12 of Jewison's affidavit to the extent they are based on Defendant's Exhibit F. *Id.* at 8. Paragraph 10 of the 12(M) statement states that "[a]ll remaining CMD manufacturing employees were separated or transferred on or before August 1, 1994 and all CMD manufacturing operations had ceased by that date." The paragraph cites Paragraph 12 of Jewison's affidavit and Exhibit F. Exhibit F is an announcement which was allegedly posted at the CMD notifying all CMD employees that "July 29, 1994 will be the last day for all except a few members of the Chicago Manufacturing Division." Plaintiffs argue that Exhibit F is an unauthenticated hearsay document offered to for the truth of the matter asserted, and not a record of regularly conducted business activity. *Id.*

Defendant asserts that Jewison does in fact have personal knowledge of the facts to which he attests and so stated in his affidavit and supplemental affidavit. (Def. Resp. at 2.) "An affiant is competent to testify when her opinions—and inferences drawn therefrom—are 'grounded in observation or other first-hand personal experience." ' *Grady v. Illinois Bell Tel. Co.,* 1996 WL 473567, *5 (N.D.Ill.1996) (*quoting Visser v. Packer Engineering Assocs., Inc.,* 924 F.2d 655, 659 (7th Cir.1991). "A qualified witness is not required... to have 'personally participated in or observed the creation of the document," ' *United States v. Franco,* 874 F.2d 1136, 1139 (7th Cir.1989) (*quoting United States v. Moore,* 791 F.2d 566, 574 (7th Cir.1986), "or know who actually recorded the information."[4] *Franco* at 1139; *See United States v. Dominguez,* 835 F.2d 694, 698 (7th Cir.1987).

Robert Jewison's supplemental affidavit sets forth the basis of his "personal knowledge" as to the statements in his first affidavit. He was responsible for maintaining the records of employees, dates of separations, transfers and other personnel matters related to the CMD employees. (Jewison Supp. Aff., ¶ 3). In his capacity as Controller, he attended meetings with other senior managers during the shut-down regarding the progress of closure and the operations of the clearinghouse. (Jewison Supp. Aff., ¶ 4). In July, 1994, he participated in the management of the cessation at the CMD and the lay-off of the remaining hourly CMD manufacturing employees on July 29, 1994, and he oversaw the posting of the afore described Exhibit F announcement on the CMD bulletin board. (Jewison Supp. Aff., ¶ 5). These statements are not conclusory and are based on personal knowledge of Jewison, and as such, they do not constitute hearsay and would be admissible in evidence.[5] Therefore, it is recommended that Plaintiffs' Motion to Strike portions of Defendant's 12(M) Statement in regards to Jewison (and applicable portions of the Jewison Affidavit and exhibits therein) should be denied.[6]

***3** Plaintiffs have also filed a Motion to Strike Defendant's Supplemental Appendix and those Portions of Defendant's Reply Brief or Response Brief which rely on the Supplemental Appendix. In support of their motion, Plaintiffs argue that Local Rule 12 contains no provision for the supplementing of an appendix in support of a Motion after a 12(m) statement has been

filed by the movant. (Pl. Mot. at 2.) Plaintiffs rely on this court's decision in *Viero v. Bufano,* 925 F.Supp. 1374 (N.D.Ill.1996), where the court ruled that assertions of fact and exhibits presented with a moving party's reply were "impermissible efforts to beef up the record that defendants had made (or failed to make) in their opening salvo." *Id.* at 1379. However, in *Baugh v. City of Milwaukee,* 823 F.Supp. 1452, 1456–57 (E.D.Wis.1993), the court said:

> [i]t seems absurd to say that reply briefs are allowed but that a party is proscribed from backing up its arguments in reply with the necessary evidentiary material. Such a rule would allow unfair advantage by submitting issues and evidentiary support that were unforeseen at the time the motion was first proffered. *See Litton Ind., Inc. v. Lehman Bros. Kuhn Loeb, Inc.* (S.D.N.Y.1991), *reversed on other grounds,* 967 F.2d 742 (2d Cir.1992).
>
> That is not to say that reply affidavits may raise new evidence. Where new evidence is presented in either party's reply brief or [supplemental] affidavit in further support of its summary judgment motion, the district court should permit the nonmoving party to respond to the new matters prior to disposition of the motion, or else strike that new evidence. But, where the reply affidavit merely responds to matters placed in issue by the opposition brief and does not spring upon the opposing party new reasons for the entry of summary judgment, reply papers-both briefs and affidavits-may properly address those issues. *See id.*

There is no question that Defendant's supplemental appendix does not introduce any new evidence concerning the summary judgment motion. For example, the major affidavit contained therein, Mr. Jewison's supplemental affidavit, simply lends further support to the assertion that his first affidavit and the facts set forth therein, as seen, are admissible in evidence. This affidavit evidence does not spring upon Plaintiffs any new reasons for the entry of summary judgment. In essence, the supplemental affidavit and appendix merely responds to matters placed in issue by the Plaintiffs in opposition to the Defendant's Partial Summary Judgment Motion. Accordingly, it is recommended that Plaintiffs Motion to Strike Defendant's Supplemental Appendix and those Portions of Defendant's Reply Brief or Response Brief which Rely on the Supplemental Appendix be denied.

B. Garland Affidavit and Applicable Portions of Defendant's 12(M)

Plaintiffs also move to strike the affidavit of Brenda Garland's Affidavit, Exhibits A and B to that affidavit and Paragraph 14 of Defendant's 12(M) Statement because, allegedly, they are not based on personal knowledge of the affiant and the attached heresay documents are not properly authenticated as records of regularly conducted business activity. (Pl. Mot. at 9–10).

***4** The Garland Affidavit states that she is employed by the Human Resources Department at Donnelley and that her duties include processing and updating employee payroll information. Exhibits A and B include reports setting forth the separation dates of the relevant named plaintiffs. (Garland Aff., ¶ 1).

Federal Rule of Evidence 803(6) provides an admissibility exception to the hearsay rule for "records of regularly conducted activity." The Rules define such business records as "[a] memorandum, report, record, or data compilation...made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

As stated, "[a]n affiant is competent to testify when her opinions—and inferences drawn therefrom—are 'grounded in observation or other first-hand personal experience." ' *Grady v. Illinois Bell Tel. Co.,* 1996 WL 473567 *5 (N.D.Ill.1996) (*quoting Visser v. Packer Engineering Assocs., Inc.,* 924 F.2d 655,659 (7th Cir.1991). "A qualified witness is not required...to have 'personally participated in or observed the creation of the document," ' *United States v. Franco,* 874 F.2d 1136, 1139 (7th Cir.1989) (*quoting United States v. Moore,* 791 F.2d 566, 574 (7th Cir.1986), "or know who actually recorded the information." *Franco* at 1139; *See United States v. Dominguez,* 835 F.2d 694, 698 (7th Cir.1987). Rather, the term "qualified witness" is broadly interpreted as requiring only someone who understands the procedure governing the creation and maintenance of the type of record sought to be admitted. *See, e.g., United States v. Muhammad,* 928 F.2d 1461, 1468–69 (7th Cir.1991); *United States v. Lawrence,* 934 F.2d 868, 870–71 (7th Cir.1991); *United States v. Franco,* 874 F.2d 1136, 1139 (7th Cir .1989).

Put otherwise, a witness authenticating business records is not required to have personally participated in or observed the creation of each or any document. *See, e.g., United States v. Muhammad,* 928 F.2d at 1468–69; *United States v. Franco,* 874 F.2d at 1139; *United States v. Moore,* 791 F.2d 566, 574 (7th Cir.1986). Moreover, the courts have regularly admitted

business records through witnesses without personal knowledge as to their creation, where, as here, their routine preparation itself provides indicia of reliability. *See, e.g., Coates v. Johnson & Johnson,* 756 F.2d 524 (7th Cir.1985); *Pritchard v. MacNeal Hosp.,* 960 F.Supp. 321 (N.D.Ill.1997) (both admitting copies of employees performance evaluations).

Garland's duties in her capacity as a Donnelley Human Resources Representative in the Human Resources Department include processing and updating employee payroll information for human resources information systems. (Garland Aff., ¶ 1). She attests to having personally reviewed copies of the separation, retirement and/or payroll reports of certain of the relevant named plaintiffs set out in the caption of Plaintiffs' Second Amended Complaint. (Garland Aff ., ¶ 2). Finally she attests that the reports included in Exhibits A and B are kept by Donnelley in the normal course of business and reflect the respective separation dates of the named Plaintiffs involved in this motion. (Garland Aff., ¶ 3; Garland Supp. Aff., ¶ 3).

***5** The statements set forth in Brenda Garland's Affidavit and Supplemental Affidavit are admissible in evidence herein. Despite the fact that she did not create the records in question, Exhibits A and B would not constitute inadmissible hearsay. Applicable case law supports the conclusion that the reports would be admissible as business records in accordance with Federal Rule of Evidence 803(6) based on their indicia of reliability. In *United States v. Franco,* 874 F.2d 1136, 1138 (7th Cir.1989), the court said that "[i]t is within the court's discretion to determine whether a proper foundation was laid for application of the business records exception and whether the circumstances of the document's preparation indicate trustworthiness." *See also United States v. Keplinger,* 776 F.2d 678, 693 (7th Cir.1985), *cert. denied,* 476 U.S. 1183, 106 S.Ct. 2919, 91 L.Ed.2d 548 (1986); *United States v. Zapata,* 871 F.2d 616, 625–26 (7th Cir.1989). There is no indication that the reports in issue here were anything but records or memoranda that were part of the systematic conduct of running a business. They were apparently kept according to a regular procedure and for a routine business purpose that tended to insure accuracy. Therefore, it is recommended that Plaintiffs' Motion to Strike portions of Brenda Garland's Affidavit and Exhibits A and B be denied.

II. DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant moves for partial summary judgment as to all claims relating to the operation and shutdown of Donnelley's Chicago Manufacturing Division ("CMD") and specified named plaintiffs terminated at the CMD relative thereto.

The initial Complaint in this suit was filed on November 25, 1996. An Amended Complaint was filed on December 2, 1996 and a Second Amended Complaint was filed on February 7, 1997, all of which allegedly violate 42 U.S.C. § 1981. Defendants argue that the applicable limitations period for claims brought under 42 U.S.C. § 1981 in Illinois is Illinois' two-year statute of limitations for personal injury claims. The court agrees.

Donnelley contends that the undisputed facts show that CMD's shutdown and all discrete separation or transfer procedures attendant to it were completed more than two years prior to the filing of the lawsuit on November 25, 1996. Specifically, Donnelley announced on January 28, 1993, that it would close the CMD in the wake of Sears Roebuck & Co.'s decision to discontinue its catalog operations, the printing of which comprised the bulk of CMD's work. The shutdown of CMD was staged over approximately the next 18 months. All production ceased and the last remaining manufacturing employees were terminated or transferred by August 1, 1994. In connection with the CMD shutdown, Donnelley alleges that it established a central clearing house through which job openings at other Donnelley divisions were posted. CMD employees were able to apply for such jobs through the clearing house. Donnelley contends that the clearing house ceased operations on September 30, 1994, which is more than two years prior to the filing of the Complaint herein, in November, 1996. Accordingly, Donnelley argues that all claims relating to the operation and/or shutdown of the CMD and all related employee transfers are untimely and barred by the applicable two-year statute of limitations.

***6** Donnelley further argues that 84 of the named plaintiffs terminated their employment with Donnelley more than two years prior to the filing of this lawsuit.[7] For the same reasons as cited above, Donnelly thus avers that the individual claims of those 84 plaintiffs are untimely and barred, thereby entitling Donnelley to summary judgment as to those 84 named plaintiffs.

Plaintiffs assert several theories in opposition to Defendant's Motion for Partial Summary Judgment: (1) the CMD shutdown is but one of many violations by Defendant of 42 U.S.C. § 1981(b) in its *systematic pattern and practice of discrimination* (i.e. "continuing violation") against its African–American employees which continues to this very day; (2) in the alternative, Plaintiffs argue that the appropriate statute of limitations for a Section 1981(b) claim is the four-year statute of limitations stipulated in 28 U.S.C. § 1658; (3) as a second alternative, Plaintiffs argue that the doctrines of equitable estoppel and/or equitable tolling apply for those Plaintiffs and class members who were terminated since, at least, November 1992; and therefore those Plaintiffs and class members terminated at CMD after November, 1992, should be allowed to remain in this

case.[8]

A. Continuing Violation Argument

Plaintiffs contend that their Complaint alleges a systematic pattern and practice of discrimination based on race in virtually every aspect of employment. They argue that affidavits of current and former African–American employees of Donnelley, as well as documents obtained from Donnelley confirm the systematic practice of race-based discrimination. According to Plaintiffs' Response Brief, the practice of race discrimination at Donnelley has resulted in African–American employees being placed in the lowest positions in the company with no opportunity for advancement despite education, experience and good work performance. These same employees are allegedly the first to be terminated in reductions in work force and are otherwise subjected to different policies and procedures than white employees. Included in this allegation is that Donnelley has maintained a policy of placing its African–American employees in special categories called "temporary" and "casual" or "intermittent."[9]

Plaintiffs argue specifically that the closing of the CMD was part of Donnelley's systematic company-wide practice of discriminating against its African–American employees, including using workforce reductions as a subterfuge for race discrimination. Plaintiffs cite to statistics and examples of concessions made for individual white employees in support of their claim.

In addition, Plaintiffs allege that Donnelley facilities across the nation have engaged in the systematic practice of discrimination against African–Americans solely because of their race. For example, in divisions across the country, Donnelley has allegedly refused and continues to refuse to train or promote its African–American employees despite repeated requests for training; Donnelley has paid and continues to pay its African–American employees less for the same work as performed by white employees despite the fact that the African–American employees had longer seniority and experience; and in Chicago and elsewhere, Donnelley has allegedly allowed the racial harassment of African–American employees, including racist graffiti, racist jokes and racist slurs.[10]

***7** As a result of the alleged systematic and ongoing practice of discrimination (i.e. the continuing violation), Plaintiffs contend that an individual plaintiff need not have suffered any discriminatory act within the filing period in order to remain a part of the case. The court disagrees.

"The continuing violation doctrine allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period." *Selan v. Kiley,* 969 F.2d 560, 564 (7th Cir.1992). In *Stewart v. CPC International, Inc.,* 679 F.2d 117 (7th Cir.1982), the court discussed three viable continuing violation theories or situations. The first stems from cases, usually involving hiring or promotion practices, where the employer's decision-making process takes place over a period of time, making it difficult to pinpoint the exact day the violation occurred. The second involves cases in which the employer has an express, openly espoused policy that is alleged to be discriminatory. The third arises from cases in which plaintiff charges that the employer has, for a period of time, followed a practice of discrimination, but has done so covertly, rather than by way of an open notorious policy. *Id.* at 120–121.

The problem with Plaintiffs' argument is that it fails to link the time-barred discrimination claims with any discriminatory act which affected them during the limitations period.[11] In *Jones v. Merchants Nat'l Bank & Trust Co. of Indianapolis,* 42 F.3d 1054, 1058 n. 4 (7th Cir.1994), the court said that plaintiff was unable to recover on a continuing violation theory because she could not point to a violation within the limitations period. The Ninth Circuit, in *Domingo v. New England Fish Co.,* 727 F.2d 1429, *modified on other grounds,* 742 F.2d 550 (9th Cir.1984), has also required a showing that Plaintiffs were treated discriminatorily within the limitations period. As one leading authority put it:

> The Ninth Circuit's ruling in *Domingo* is certainly the correct approach; the opposite rule would, so long as the policy or practice of the employer continued with respect to others, allow a plaintiff to sit on his or her rights almost indefinitely. There has been a certain amount of sloppy dicta by the courts on the issue: when no employer action within the charge-filing period adversely affects the plaintiff the instances in which continuing violation theory is allowed should be few and far between.
> *Larson, Employment Discrimination* 2d. Ed. Chpt. 72 § 72.08(4)(B) at 72–73.

Furthermore, "an untimely Title VII suit cannot be revived by pointing to effects within the limitations period of unlawful acts that occurred earlier." *Delaware State College v. Ricks,* 449 U.S. 250, 258, 101 S.Ct. 498, 504, 66 L.Ed.2d 431 (1980); *See also, Webb v. Indiana Nat'l Bank,* 931 F.2d 434, 437–38 (7th Cir.1991). "That would make employers pay compensation

for violations that were no longer actionable and would unravel the statute of limitations. It would be like allowing the losing party in a lawsuit to toll the period for appeal by filing a motion to reconsider eight years after judgment." *Dasgupta v. University of Wisconsin Bd. of Regents,* 121 F.3d 1138, 1140 (7th Cir.1997).

***8** In this case, therefore, the proper and only focus for statute of limitations purposes is the date when the CMD Plaintiffs were last allegedly discriminatorily treated. This simply was, at the latest, Plaintiffs' termination date (no later than July 29, 1994), which, as seen, is outside the limitations period.

Plaintiffs also assert that Donnelley was engaged in widespread discrimination in divisions across the country, such that Donnelley has refused and continues to refuse to train or promote African American employees despite requests for training. (Pl. Resp. at 10.) However, this argument, once again, fails to establish that any discriminatory actions were taken within the limitations period against the former CMD Plaintiffs terminated in the CMD shutdown. And it is only those Plaintiffs (and the CMD shutdown itself) against whom Defendant's Motion for Partial Summary Judgment is directed.

Plaintiffs also contend that Defendant granted special favors to white employees who were terminated, such that they were able to gain additional severance or retirement benefits that African American employees were not and that during the CMD shutdown, African–American employees were discriminatorily terminated while white employees were allowed to transfer to other divisions.. (Pl. Resp. at 8.) However, as previously noted, these acts took place outside of the limitations period and, again, do not allow Plaintiffs to rely on the "continuing violation" doctrine.

B. Appropriate Statue of Limitations

Plaintiffs alternatively argue that their Section 1981(b) claim is governed by a four-year statute of limitations under Section 1658 of the Judicial Improvements Act of 1990 and the Civil Rights Act of 1991. (Pl. Resp. at 14.) Thus, according to Plaintiffs, at a minimum, all employees with claims dating back to at least November 1992 should be allowed to proceed in this case.

Plaintiffs recite to the language of both Sections 1981(b) and 1658. *Id.* at 15. Most importantly, they note that Section 1981(b) is the result of a 1991 amendment to the Civil Rights Act of 1866, which was passed under the Civil Rights Act of 1991. Their argument goes on to state that under Section 1658, which was enacted on December 1, 1990, "a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than four years after the cause of action accrues." 28 U.S.C. § 1658 (emphasis added). They contend that "[t]he Supreme Court has explained that '[t]he expectation [of borrowing limitations from state law] is reversed for statutes passed after December 1, 1990, the effective date of 28 U.S.C. § 1658...which applies a general, four-year limitations period for any federal statute subsequently enacted without one of its own.' *North Star Steel Co. v. Thomas,* 515 U.S. 29, 34 fn. 1, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995)."

As the Section 1981(b) amendment here was enacted in 1991, Plaintiffs conclude that under the plain meaning of Section 1658, the four-year statute of limitations applies to a claim under Section 1981(b). (Pl. Resp. at 16–18.)

***9** Plaintiffs attempt to support their argument by pointing to Supreme Court and Circuit Court decisions which have addressed the plain meaning of statutes, as well as to the legislative history of Section 1658. However, substantially all of the decisions that have directly addressed the issue have rejected Plaintiffs' position. As decided in *Lane v. Ogden Entertainment,* 13 F.Supp.2d. 1261 (M.D.Ala.1998); *Mason v. Anadarko Petroleum Corp.,* No. 97–1051, 1998 WL 166562 (D.Kan. March 2, 1998); *Jackson v. Motel 6 Multipurposes, Inc.,* No. 96–72–CIL–FTM–17D, 1997 U.S. Dist. LEXIS 18534 (M.D.Fla. Nov. 6, 1997); *Davis v. California Dept. of Corrections,* No. S–93–13097DFL, 1996 WL 271001 (E.D.Cal. Feb.23, 1996), the court finds that the better reading of Section 1658 is that, by its own terms, it simply does not apply to Section 1981 claims. Section 1658's plain language provides that the four-year limitation period applies only to an act of Congress "enacted" after 1990, as distinguished from one "amended." *See, e.g., Lane,* 13 F.Supp.2d. at 1270 ("[i]f Congress had meant for section 1658 to apply to amendments, they could have said so."); *Mason,* 1998 WL 166562, at *5 ("the court agrees... that for purposes of Section 1658 there is a distinction between an act 'enacted' after 1990 and an amendment to an existing act after 1990. On the whole, the court considers the more persuasive view to be that Section 1658 does not apply to claims arising under Section 1981"); *Jackson,* 1997 U.S. Dist. LEXIS 18534, *8–9 (" 'an act of Congress enacted' after 1990...of course...is entirely different from 'an act of Congress amended." ') *Davis,* 1996 WL 271001, at *19 (noting distinction between statutory language "an act of Congress enacted: and rejecting interpretation urging application of § 1658 to "an act of Congress amended").[12]

As seen, the court finds that the four-year statute of limitations period applies only to acts of Congress enacted after Section 1658, not those amended after the enactment of Section 1658. The addition of Section 1981(b) was merely an amendment to Section 1981, which occurred after the enactment of Section 1658. Thus, the court recommends that the subject four-year statute of limitations should not apply to Section 1981(b) herein.

C. Equitable Estoppel and Equitable Tolling

Finally, Plaintiffs argue that "due to the clandestine nature of the discrimination practiced by the Defendant in the closing of the CMD and in the pay and special benefits for white employees which could only be discovered through documents produced in the age discrimination case[13], Plaintiffs can establish grounds to apply both of these principles (estoppel and tolling) to the present action." (Pl. Resp. at 24.)

1. Equitable Tolling

Plaintiffs contend that many of those who were the targets of the Defendant's motion could not reasonably have been expected to know that Donnelley was discriminating against its African–American employees in the shutdown of the CMD. Plaintiffs assert that such alleged discrimination was in no way obvious; ergo, Plaintiffs assert they have presented a classic case where equitable tolling should apply, thereby requiring denial of Defendant's motion.

***10** "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." (emphasis added) *Thelen v. Marc's Big Boy Corp.,* 63 F.3d 264, 268 (7th Cir.1995); *See Chakonas v. City of Chicago,* 42 F.3d 1132, 1135 (7th Cir.1994); *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 451 (7th Cir.1990). However, "[e]quitable tolling does not postpone the running of the statute of limitations until plaintiff is certain 'his rights had been violated" ' *Thelen,* 63 F.3d at 268 (*quoting Cada,* 920 F.3d at 451). "Rather the limitations period begins to run when a reasonable person would believe he *may* have a cause of action. This is especially true when the plaintiff need only file a charge with an administrative agency." (emphasis added) *Thelen,* 63 F.3d at 268.[14]

Plaintiffs claim that they could not reasonably have been expected to know that Defendant was discriminating against its African–American employees in the shutdown of the CMD. (Pl. Resp. at 26.) However, this court disagrees. It cannot reasonably be concluded that Plaintiffs did not know of or believe that they had a cause of action at the time of the CMD shutdown. The standard for equitable tolling requires that plaintiffs exercise "all due diligence" but, respectfully, Plaintiffs have made no showing whatsoever that such efforts were exerted. Rather, Plaintiffs merely conclusorily allege that they simply were unaware of the discriminatory acts at the time of the CMD shutdown. Accordingly, it is recommended that equitable tolling does not operate to save Plaintiffs' claims.

2. Equitable Estoppel

Plaintiffs allege that Donnelley publicly informed its employees that there would be no transfers upon the shutdown of the CMD, but in contrast to its statement, Donnelley secretly transferred nearly one-quarter of its white employees in a way that could only become apparent after a review of the corporate documents. Thus, they argue that they have raised a genuine issue of material fact as to whether Donnelley should be estopped from arguing the statute of limitations in defense of its motion. (Pl. Resp. at 26–27.)

"[E]quitable estoppel requires proof that '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." ' *Speer v. Rand McNally Co.,* 123 F.3d 658, 663 (7th Cir.1997); *Thelan v. Marc's Big Boy Corp.,* 64 F.3d 264, 267 (7th Cir.1995) This doctrine:

> addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forebearing suit within the applicable limitations period. It application is wholly independent of the limitations period and takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice.

***11** *Bomba v. W.L. Belvidere, Inc.,* 579 F.2d 1067, 1070 (7th Cir.1978). "The doctrine of equitable estoppel...is a more generous doctrine than the doctrine of equitable tolling....To prove estoppel successfully, the plaintiff must show that the

defendant's conduct was improper, and that the plaintiff was harmed by such conduct." *Smith,* 951 F.2d at 840 (*quoting Wheeldon v. Monon Corp.,* 946 F.2d 533 (7th Cir.1991).

Defendant argues that Plaintiffs have presented no evidence on the issue of equitable estoppel, nor could they. Defendant avers that, to the contrary, CMD's shutdown was public and open. Defendant points out that on or about January 28, 1993, in a series of meetings open to all CMD employees, Donnelley announced that it would close the CMD in the wake of Sears' decision to discontinue its catalog operations (Def.Resp.12(n) ¶ 45). At nearly the same time, and in connection with the CMD shutdown, Donnelley instituted a centralized clearinghouse for eligible CMD employees. Through it all, openings in permanent jobs Company-wide were posted (Def.12(m) ¶ 5). This initiative likewise was announced in the employee meetings (Def.Resp.12(n) ¶ 45). Subsequently, beginning in February, 1993, job openings at other Donnelley divisions, as well as the names of the employees who were offered jobs at other divisions, were posted on the CMD clearinghouse bulletin boards (Def.12(m) ¶ 7; Def. Resp. 12(n) ¶ 45).

In this context, and in any event, Plaintiffs have failed to produce evidence which shows that Donnelley "induced" them into forebearing suit within the applicable limitations period. The only support Plaintiffs offer for their claim is a number of identical affidavits from certain Plaintiffs generally asserting they were told there were no opportunities for them to transfer to other divisions. The court agrees with Donnelly's argument that these conclusory affidavits are "incapable of establishing grounds for the application of equitable estoppel or defeating Defendant's motion because they fail to offer any necessary foundational detail, including whether it was even Donnelley management employees who allegedly informed them that there would be no transfers." (Def. Reply at 8.) *See, e.g., Kemper/Prime Indus. Partners v. Montgomery Watson Amers. Inc.,* No. 97 C 4278, 1998 U.S. Dist. LEXIS 15748, at *10–*11 (N.D.Ill. Sept.30, 1998) (striking sections of an affidavit for lacking "information regarding when and where the conversation occurred, who was present during the conversation and who said what to whom") *See Houk v. Village of Oak Lawn,* No. 86 C 139, 1987 WL 7489, *4 (N.D.Ill. Feb. 26, 1987) Such conclusory affidavits without factual support in the record are insufficient to defeat a motion for summary judgment. *See, e.g., Slowiak v. Land O'Lakes,* 987 F.2d 1293, 1295 (7th Cir.1993); *Davis v. City of Chicago,* 841 F.2d 186, 189 (7th Cir.1988).

CONCLUSION

In view of the foregoing, it is recommended that Plaintiffs' Motion to Strike certain portions of Defendant's statement of material facts, etc. and Plaintiffs' Motion to Strike Defendant's Supplemental Appendix and materials relying on the supplemental appendix be denied.

***12** It is further recommended, no genuine issue of material fact existing, that Defendant's Motion for Partial Summary Judgment be granted with respect to all claims relating to the operation and shutdown of the CMD and all the named Plaintiffs identified and designated by the Defendant in such Motion.

Footnotes

[1] Defendant has also filed a Motion to Strike Portions of Plaintiff's 12(m) Statement. However, in view of the court's recommendation, *supra,* the court deems it unnecessary to reach this motion in resolving Plaintiffs' Motions to Strike and Defendant's Motion for Partial Summary Judgment.

[2] Robert Jewison is a former employee of Donnelley. He served as the controller of the CMD prior to his retirement at the end of 1994. He helped supervised the shutdown. His 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.

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

[4] Too, the term "qualified witness" is broadly interpreted as requiring only someone who understands the procedure governing the creation and maintenence of the type of record sought to be admitted. *See, e.g., United States v. Muhammad,* 928 F.2d 1461, 1468–69 (7th Cir.1991); *United States v. Lawrence,* 934 F.2d 868, 870–71 (7th Cir.1991); *United States v. Franco,* 874 F.2d 1136, 1139 (7th Cir.1989).

[5] It bears noting that Jewison affidavit Exhibit A, B, C, E, F, G also are admissible as business records of regularly conducted activity under Fed.R.Evid. 803(6).

[6] Plaintiffs also challenged a certain press release (Jewison Aff. Ex. D). The court has not relied on the press release in its determination. Parenthetically, though, Jewison attested, as discussed, to the closure and the reasons therefore based on his personal knowledge (Jewison Aff. ¶¶ 1, 2, 3, 8; Jewison Supp. Aff., ¶¶ 2, 4, 6), and the press release merely corroborates Jewison's knowledge, as opposed to seeking to substitute for such knowledge. Thus, even were Plaintiffs correct in their claim that the press release is inadmissible, the facts would still remain as attested to by Jewison.

[7] The original number in issue herein was 78 named plaintiffs. The Plaintiffs' Second Amended Complaint, however, added six more relevant named plaintiffs.

[8] As the District Judge is well aware of the summary judgment standard of review, and it's not an issue on this motion, it was deemed not necessary to recite same herein.

[9] Basically, Plaintiffs allege that Donnelley has maintained a practice of categorizing African–American employees as "temporary" or "casual" in an effort to keep them at a lower level within the company. A "temporary employee" is one who has less than two consecutive years of employment. Such employees receive substantially fewer benefits than permanent employees, and at the time of termination received substantially less severance pay with a reduced formula. Plaintiffs allege that Donnelley intentionally kept its African–American employees in temporary positions for their entire careers, laying them off each time they got close to making their two consecutive years. Plaintiffs refer to a variety of statistics in an effort to show that the actions by Donnelley in regards to the temporary status of most of the African–American employees was the result of racial discrimination.

[10] Plaintiffs contend that affidavits and documents attached to their brief confirm that Donnelley used and continues to use race for deciding the pay of its employees, which employees to transfer to other locations, to terminate or discharge in a reduction of workforce, to offer special severance or pension deals, to promote, which employees to train, to discipline and to hire.

[11] As seen, the CMD was closed down outside the limitations period and all the named plaintiffs targeted in this motion were employees of the CMD and terminated outside the limitations period.

[12] The court finds the single direct precedent cited by the Plaintiffs, *Alexander v. Precision Machinery,* 990 F.Supp. 1304 (D.Kan.1997), to be unpersuasive and rejected by the subsequent *Lane* and *Mason* decisions, *supra.*

[13] 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.

[14] *See also, Teumer v. General Motors Corp.,* 34 F.3d 542, 550 (7th Cir.1994) (rejecting plaintiff's contention "that the limitations clock should be equitably tolled for the time in which he was unable to determine that his injury (of which he was aware)—the layoff—was due to wrongdoing"); *Thelan,* 64 F.3d at 267 ("[a] plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful").