IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROBERT ALBRIGHT, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 02-304 GMS
	)	
W.L. GORE & ASSOCIATES, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On April 25, 2002, the plaintiffs filed a complaint against the defendant, W.L. Gore & Associates ("Gore") in the United States District Court for the District of Delaware. The complaint lists a total of eighteen plaintiffs, all of whom are former Gore employees. Each of the plaintiffs alleges that Gore engaged in a pattern and practice of discriminating against older employees in violation of the Age Discrimination in Employment Act of 1967, ("ADEA"), 29 U.S.C. § 621, *et seq*. Ten of the plaintiffs also allege that the defendant discriminated against them based on their disabilities in violation of the Americans with Disabilities Act of 1991, ("ADA"), 42 U.S.C. § 12101, *et seq*. Finally, one plaintiff also alleges that the defendant unlawfully discriminated against him based on his race in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2, *et seq*.

Presently before the court is the defendant's motion to dismiss for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3). The defendant contends that according to the relevant venue statutes, venue is improper in Delaware because the plaintiffs worked at Gore's Maryland facility, the allegedly discriminatory acts took place in Maryland, and in the absence of any discrimination, the plaintiffs would have remained employed in Maryland, not Delaware. The

plaintiffs counter by arguing that the defendant has waived any objection to venue in Delaware by participating in a mediation held in the District of Delaware. The plaintiffs also contend that waiver notwithstanding, venue is proper in Delaware because documents relevant to the plaintiffs' claims are located in Delaware. The defendant responds by stating that the defense of improper venue is waived only if not raised in a motion or responsive pleading. Gore therefore argues that it did not waive any objections to venue during the mediation because no complaint had been filed at that time, and therefore the obligation to file a motion or responsive pleading had not yet been triggered. Gore further asserts that the terms of the mediation dictated that neither party would waive any defenses by participating in the mediation. Finally, Gore argues that the Delaware documents are completely irrelevant to the plaintiffs' discrimination claims.

Upon review of the facts, the law, and the submissions of the parties, the court concludes that given the plain language of both Rule 12(b)(3) and the tolling agreement, the defendant did not waive its objections to venue. Additionally, the court concludes that under the venue provisions governing Title VII and ADA cases, venue is not proper in the District of Delaware. However, to prevent any prejudice or injustice to the plaintiffs, rather than dismissing this case outright, the court will transfer the case to the District of Maryland because the case could have (and should have) been brought there. The court will now explain the reasoning behind its decision.

II. FACTS

The defendant Gore is a Delaware corporation. Although Gore's corporate headquarters are located in Newark, Delaware, it also has offices and facilities in Maryland. Each of the eighteen plaintiffs were employed by Gore. Each plaintiff worked at Gore's facility in Elkton, Maryland.

The plaintiffs were terminated at various times between 1998 and 2000. The plaintiffs allege

they were terminated in violation of their rights under federal law. All eighteen of the plaintiffs allege that Gore engaged in a pattern and practice of age discrimination in violation of the ADEA because Gore had a tendency to fire older employees in favor of retaining more youthful employees. Additionally, ten plaintiffs allege that Gore discriminated against them by terminating them due to their various disabilities in violation of the ADA. Finally, one plaintiff, Gary Johnson, has alleged that he was unlawfully terminated by the defendant based on his race in violation of Title VII. The plaintiffs properly exhausted their administrative remedies at both the state and federal levels before filing the present suit. The plaintiffs filed claims with the Maryland Commission on Human Relations in 1999. The plaintiffs then filed claims with the Equal Employment Opportunity Commission ("EEOC") office in Baltimore, Maryland.

In December 2000, while the administrative claims were under consideration, Gore proposed that the parties participate in a mediation. The plaintiffs had been contemplating filing suit in the District of Delaware. Counsel for the plaintiffs wrote a letter to Magistrate Judge Mary Pat Thynge of the District of Delaware on March 2001. That letter expressed the plaintiffs' intent to file in the District of Delaware, but no complaint had yet been filed. Judge Thynge accepted the case for mediation. In anticipation of mediation, and in recognition of the statute of limitations on the plaintiffs' claims would expire if mediation was unsuccessful, the parties had previously entered into a tolling agreement in December 2000. The tolling agreement stated, "This Agreement shall not be considered a waiver of any claims or defenses by Gore or the Gore employees . . ." (D.I. 1, Ex. E.)

The mediation was held in September 2001 in Delaware. The plaintiffs and the defendant

participated fully in the mediation. However, the mediation was unsuccessful. The plaintiffs filed their complaint in April 2002.

In support of their contention that venue is appropriate in Delaware, the plaintiffs contend that important employment related documents, "including plaintiffs' payroll records and other personal information" are located at Gore's corporate headquarters in Newark, Delaware. More specifically, the plaintiffs assert that the following records are located in Delaware: (1) a letter concerning the accuracy of Gore's employee database; (2) documents regarding Gore's employee stock ownership plan; (3) a memo discussing Gary Jackson's pay and benefits at the time of separation; (4) Gary Jackson's separation paperwork; and (5) the plaintiffs' pay statements and W-2 forms. The defendant does not dispute that these documents are located in Delaware. Rather, Gore contends that all of the documents are irrelevant to the plaintiffs' discrimination claims. Further, the defendants note that all of the relevant documents and potential witnesses (i.e. supervisors, employees, etc.) are employed or located at Gore's Elkton, Maryland facility.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(3) allows a defendant make a motion to dismiss for improper venue. FED. R. CIV. P. 12(b)(3). Upon such a motion, the district court must determine whether venue is proper according the appropriate statutes. *See Reed v. Weeks Marine, Inc.*, 166 F.Supp.2d 1052, 1054 (E.D.Pa.,2001). *See also Kerobo v. Southwestern Clean Fuels Corp.*, 285 F.3d 531, 538 (6th Cir. 2002). The movant has the burden of proving that venue is improper in the selected forum. *See Myers v. American Dental Ass'n*, 695 F.2d 716, 724 (3d Cir. 1982).

IV. DISCUSSION

The court will first discuss the waiver issue. The court will next consider whether venue is proper in the District of Delaware. Finally, the court will discuss why it is appropriate to transfer the case to the District of Maryland.

A. Waiver of the Improper Venue Defense

The plaintiffs assert that the defendant has waived any improper venue defense by participating in the September 2001 mediation. The court disagrees for two reasons.

First, under a strict construction of the Federal Rules of Civil Procedure, Gore could not have waived its improper venue defense prior to the filing of the complaint. Federal Rule of Civil Procedure 12(h) governs waiver of defenses contained in Rule 12. Rule 12(h) states that the defense of improper venue is waived "if it is neither made by motion under this rule nor included in a responsive pleading . . ." . *See* FED. R. CIV. P. 12(h)(1).

The plain language of Rule 12(h) thus makes clear that the improper venue defense is waived only when the defense is not asserted in a Rule 12 motion to dismiss or a responsive pleading. It goes without saying, however, that the obligation to file a Rule 12 motion or a responsive pleading arises only *after* the complaint has been filed. *See* Fed. R. Civ. P. 12(a) (noting that answer or responsive pleading must be filed "within 20 days *after*" the complaint has been served).

In the present case, the September 2001 mediation took place nearly seven months prior to the filing of the plaintiffs' complaint in April 2002. Since the plain language of Rule 12(h) clearly implies that the defendant's obligation to raise the venue defense did not arise until the filing of the complaint, the court finds that the defendant did not waive the venue defense.

Statutory construction aside, as a matter of policy, it makes little sense to require defendants to assert the venue defense before a complaint has actually been filed in a specific judicial district. Granted, in the present case, Gore was notified of the plaintiffs' intention to file in Delaware. Nevertheless, in the seven months that passed between the mediation and the filing of the complaint, the plaintiffs could have changed their minds and decided to file elsewhere. Thus, adopting a rule that required defendants to raise venue objections prior to the actual filing of the complaint would require defendants to anticipate changes in their adversaries' litigation strategies. The court finds that such a rule is unnecessary and untenable. *See, e.g., Neifeld v. Steinberg*, 438 F.2d 423, 425 n.1(3d Cir. 1971) (noticing of deposition in improper forum did not consistute waiver).

The terms of the tolling agreement also compel the court to disagree with the plaintiffs' waiver arguments. The plaintiffs cite *Chrysler Capital Corp. v. Woehling*, 663 F. Supp. 478, 481 (D. Del. 1987), for the proposition that the defendant can waive venue prior to the filing of a complaint by voluntarily submitting to the jurisdiction of another court. Significantly, in *Chrysler,* the defendant signed a promissory note containing a forum selection clause. *Id*. at 481. However, just the opposite occurred in the present case. The terms of the tolling agreement specifically state that neither the plaintiff nor the defendant would waive any applicable defenses. The court therefore finds that the terms of the tolling agreement preserved any and all defenses, including improper venue, that Gore might later wish to assert. To hold otherwise would vitiate the terms of the tolling agreement and belatedly deprive the defendant of a defense that it had every right to believe was properly preserved.

For all of the above reasons, the court finds that the defendants did not waive the defense of improper venue.

B. Venue is Improper in the District of Delaware.

Although Rule 12(b)(3) permits a party to make a motion to dismiss where venue is improper, "the Rules of Civil Procedure do not contain any venue provisions or requirements." *Kerobo*, 285 F.3d at 538. Rather, "[t]he requirements for venue are set forth by statute." *See id*. The court must therefore examine the appropriate venue statutes to determine whether venue is appropriate in this district.

The plaintiffs assert causes of action under Title VII, the ADEA, and the ADA. Venue for Title VII and ADA claims is governed by 42 U.S.C. § 2002e-5(f)(3). Venue for ADEA claims is governed by the general venue statute, 28 U.S.C. § 1391. Although venue for the ADEA claims is covered by a different statute, courts have consistently held that when ADEA claims are presented simultaneously with an ADA or Title VII claim, the lawsuit must be filed in the judicial district where venue is proper for both claims. *See Kravitz v. Institute for Intn'l Research, Inc.,* 1993 WL 453457, at *3 (E.D.Pa. Nov. 5, 1993). Therefore, the court will focus its discussion on whether venue is appropriate for the Title VII and ADA claims pursuant to 42 U.S.C. § 2000e-5(f)(3). Section 2000e-5(f)(3) states that a Title VII case may be brought in:

> any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, 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.

42 U.S.C. 2000e-5(f)(3).

The plaintiffs do not dispute that the alleged discrimination took place in Maryland. Neither do the plaintiffs allege that in the absence of the alleged discrimination, they would have continued to work in Delaware. However, the plaintiffs contend that they can nevertheless establish venue in Delaware under 42 U.S.C. § 2000e-5(f)(3) because "employment records relevant to [the discriminatory] practice are maintained and administered" in Delaware. In support of their position, they note that documents relating to the plaintiffs' employment at Gore are located at Gore's corporate headquarters in Delaware. Specifically, the plaintiffs assert that the following records are located in Delaware: (1) a letter concerning the accuracy of Gore's employee database; (2) documents regarding Gore's employee stock ownership plan; (3) a memo discussing Gary Jackson's pay and benefits at the time of separation; (4) Gary Jackson's separation paperwork; (5) the plaintiffs' pay statements and W-2 forms.

Although Gore does not dispute that these documents are located in Delaware, it argues that none of the above mentioned documents are relevant to the plaintiffs' claims. The court is constrained to agree with this position. In order to prevail on their claims under Title VII, the ADA, and the ADEA, the plaintiffs must demonstrate that they were discriminated against based on their race, age, or disability. The accuracy of Gore's employee database has little, if any, relevance to whether the plaintiffs were discriminated against. Similarly, the existence of an employee stock ownership plan is not probative of any discrimination by Gore. The plaintiffs' W-2 forms and pay statements might be relevant if the plaintiffs asserted that they were paid less based on their age, race, or disability. However, the gravamen of the plaintiffs' claims is that they were terminated in violation of the applicable law. Therefore, the payroll documents are completely irrelevant as they do not demonstrate that the plaintiffs were wrongfully terminated for any reason.

Finally, the documents concerning the plaintiff Jackson's benefits at the time of separation and his other separation paperwork are relevant to demonstrate that he was terminated. Nevertheless,

the documents do little to demonstrate *why* Jackson was terminated. They do not prove that Jackson was terminated based on his race, age, or disability. Thus, the separation documents do not appear to be relevant to the plaintiffs' claims of discrimination.

The court concludes that no discrimination took place in Delaware and that the plaintiffs would not have worked in Delaware in the absence of the alleged discrimination. The court also finds that although certain documents tangentially related to the plaintiffs' employment are located in Delaware, these documents are not relevant to the plaintiffs' discrimination claims. For all of these reasons, the court finds that venue is improper in the District of Delaware pursuant to 42 U.S.C. § 2000e-5(f)(3).

C. Venue is Proper in the District of Maryland, and Transfer to that District is in the Interests of Justice.

Having decided that venue is improper in this district, the court must determine whether the plaintiffs' case will be dismissed or transferred. Where venue has been incorrectly chosen, a district court may dismiss the case, or it may transfer it to the appropriate district "in the interest of justice." 28 U.S.C. § 1406(a).

The court finds that although dismissal would be appropriate, transfer of this case is in the interest of justice. If this case is dismissed, the plaintiffs may face a substantial statute of limitations problem, as evidenced by the tolling agreement. The statute of limitations has run, and the plaintiffs will be unnecessarily prejudiced in pursuing their claim. Therefore, the court will transfer, rather than dismiss, the case.

Section 1406 states that if a transfer is made, it should be made "to any district or division in which [the case] could have been brought." *Id*. Turning again to the Title VII venue statute, the court finds that the District of Maryland meets all of the requirements set forth in the statute. The alleged discrimination occurred in Maryland. If the purported discriminatory acts had not occurred, the plaintiffs would have continued their employment in Maryland. Finally, the relevant records regarding the hiring, termination, and promotion practices at the Elkton facility are located in Elkton, Maryland. Consequently, it is clear that this case could have, and should have, been brought in the District of Maryland. Therefore, the court will order that this case be transferred to that district.[1]

V. CONCLUSION

For the foregoing reasons, the court concludes that the defendant did not waive the issue of improper waiver. Moreover, the court finds that venue is improper in the District of Delaware. However, the court finds that dismissal of the case is unwarranted and that transfer is in the interest of justice. Since the court finds that the case could have been brought in the District of Maryland,

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[1] The court will not accede to the plaintiffs' request to "transfer" the case back to the District of Delaware because Gore has its principal office in Delaware. Although 42 U.S.C. 2000e-5(f)(3) does state that venue is proper in the district where the defendant has its principal office, both the statute and case law imply that this provision is only triggered if venue cannot be found in any other district. *See* 42 U.S.C. 2000e-5(f)(3) ("[B]ut 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."); *Arrocha v. Panama Conal Comm'n,* 609 F. Supp. 231, 234 (E.D.N.Y. 1985) ("The court may look to the district in which the employer's principal office is located *only* if venue cannot be laid in one of the other three possible districts specified in the statute.")(emphasis in original). Since it is clear that this case could have been brought in Maryland, the court need not apply the "principal office provision." To rule otherwise would clearly disregard the intent of Congress' statutory scheme. *See id.* ("[T]he venue provision has been held to demonstrate Congress' clear intent 'to limit venue to the judicial districts concerned with the alleged discrimination'").

the court will order that this case be transferred to that district.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The defendant's Amended Motion to Dismiss for Improper Venue (D.I. 14) is GRANTED.

2. The above-captioned matter is hereby TRANSFERRED to the United States District Court for the District of Maryland.

3. The defendant's Original Motion to Dismiss for Improper Venue (D.I. 6) is DISMISSED as MOOT.

4. The defendant's Motion to Dismiss the Plaintiffs' Pattern or Practice Claims (D.I. 9) is DISMISSED as MOOT.

Dated: July 31, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE