IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DIANE BLAIR	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
SCOTT SPECIALTY GASES, THOMAS BARFORD, AND JERRY STUMP	:	
	:	
Defendants.	:	NO. 00-3865

M E M O R A N D U M

Newcomer, S.J. November , 2000

I. BACKGROUND

Plaintiff Diane Blair ("Blair") filed this Complaint against her former employer, Scott Specialty Gases ("Scott"), and two of its employees, Thomas Barford ("Barford") and Jerry Stump ("Stump"). In her Complaint, Blair alleges sexual discrimination under Title VII of the Civil Rights Act of 1964, sexual discrimination under the Pennsylvania Human Relations Act ("PHRA"), violation of Article I, Section 28 of the Pennsylvania Constitution, intentional infliction of emotional distress, defamation, breach of contract and negligent employment. Plaintiff's Title VII, PHRA, negligent employment and breach of contract were brought only against Scott. Blair alleged the emotional distress claim against Barford, while her defamation claims were brought against Barford and Stump. Plaintiff's Pennsylvania Constitutional claim was brought against each defendant.

Defendant Scott is a producer and supplier of specialty gas products. Blair was employed by Scott from 1995 until March 1999 as a troubleshooter and as a plant manager. In April 1997, Blair was offered a permanent position as Plant Manager at the Plumstead Medical Products Division. During the course of her employment at Scott, Blair alleges that she was subjected to discrimination and harassment because of her sex, which she claims caused her to resign on March 24, 1999.

More specifically, Blair's allegations include a claim that Barford demeaned her suggestions at meetings, made sexist comments on a routine basis, and made sexually derogatory comments to plaintiff. Barford also made comments to Blair about her appearance, telling her for example that if she wanted to get things done in the factory, she should hike up her skirt and show her legs. On at least one occasion, Barford even referred to himself as a "sexist pig." Blair further alleges that Stump spread a rumor that Blair and another female employee were having an affair, and that this rumor was spread in retaliation for Blair's internal complaints of sexual harassment.

In February, 1998, Scott published and distributed an updated employee handbook, entitled "Working With Scott," that included a mandatory, binding arbitration provision. The Arbitration section of the handbook provides as follows:

> 1. Mandatory Arbitration Procedures - The procedures for internal hearing and mediation are optional

procedures. Invocation of these procedures is not a prerequisite to arbitration. Arbitration, however is mandatory. Accordingly, if any dispute arises from your employment with Scott, you and Scott agree that final resolution of the dispute will occur exclusively in a final and binding arbitration proceeding. "Dispute" includes every kind or type of dispute, including without limitation any allegation of wrongful discharge, discrimination, sexual or any other claim of harassment, any injury to physical, mental, or economic interests, and unfair competitive practices or improper use of trade secrets by an employee. It includes claims you might bring that arise as a result of termination of employment. It also includes any claims that Scott could bring. This means that a neutral arbitrator, rather than a court, or jury, will decide the dispute.

2. Arbitration Procedures - Disputes will be resolved according to the provisions of the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA"). To start the arbitration process, either party must submit a written arbitration request to AAA within one (1) year of the date a cause of action accrues. A written arbitration request for a claim of wrongful or discriminatory termination must be filed within one (1) year of the date of termination. The arbitrator shall have full authority to award damages and other remedies as may be permitted under applicable law and, as the law permits, award costs and attorney's fees. Any failure to request arbitration within this time frame and according to the procedures set forth below shall constitute a waiver of all rights to raise any claims in any forum arising out of any dispute that was subject to arbitration. Either party's use of the optional mediation or internal hearing procedures shall not result in a tolling of the one-year period described above. Filing a claim within this period is considered a condition precedent to arbitration. The parties, however, may agree in writing to extend the time period within which one must submit his, her, or its written arbitration request to the AAA. Such agreement must be mutual.

3. Employment Arbitration Procedures - The details of the arbitration procedures are in a separate document called the National Rules for the Resolution of Employment Disputes, promulgated by the AAA, which Scott incorporates into this personal handbook by reference as if it were fully repeated here. At any time during or within one year after your employment, you may request a copy of the AAA National Rules from the local manager in charge of office administration.

4. Costs of Arbitration - In Order to make the arbitration procedure readily available to its employees, Scott will pay one hundred percent (100%) of any administrative fee required by the AAA to initiate the arbitration process. Other expenses will be paid by the parties as set forth in the applicable AAA rules. Unless otherwise ordered by the arbitrator under applicable law, each party will bear his, her, or its own expenses, such as attorneys' fees, costs, and expert witness fees.

Under the AAA's National Rules for the Resolution of Employment Disputes (the "National Rules"), the arbitrator's compensation "shall be borne equally by the parties unless they agree otherwise, or unless the law provides otherwise."

On February 27, 1998, Blair signed an acknowledgment stating that she had read the Arbitration provision of the handbook, and agreeing "that if there is any dispute arising out of [her] employment...[she] will submit it exclusively to final and binding arbitration." That acknowledgment also stated that "[o]nly the Executive Committee of Scott Specialty Gases can change this Handbook, and the change must be in writing. If Scott...makes any material changes, it will give me a copy of them, and by remaining employed by Scott Speciality Gases

thereafter I will be deemed to have accepted these changes."

As explained earlier, Blair resigned on March 24, 1999; however, Blair has never attempted to arbitrate her case. Instead, on September 20, 2000, Blair filed a Charge of Discrimination with the EEOC, and on July 31, 2000, Blair filed the present Complaint. Because Blair failed to arbitrate her case, the defendants now move to dismiss plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), or alternatively for summary judgment under Federal Rule of Civil Procedure 56.

II. DISCUSSION

A. Legal Standard

Defendants have filed the instant motion as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), or alternatively as a motion for summary judgment under Federal Rule of Civil Procedure 56. However, both parties have submitted exhibits other than the Complaint to the Court. If a defendant files a motion to dismiss for failure to state a claim upon which relief can be granted, see FED.R.CIV.P. 12(b)(6), and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56...". FED.R.CIV.P. 12(b). Accordingly, the Court will treat defendant's motion as one for summary judgment.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c) (1994). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324.

A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the non-movant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3rd Cir. 1992).

Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing

summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3rd Cir. 1992).

B. The Arbitration Agreement

The dispute in this case centers upon whether plaintiff's claim should be dismissed in accordance with the arbitration provision contained within Scott's employee handbook, "Working With Scott". The Federal Arbitration Act ("FAA") provides that written agreements to arbitrate controversies arising out of an existing contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Pursuant to the FAA, courts must embrace a "liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24 (1983). Indeed, "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," a concern which "requires that [the court] rigorously enforce agreements to arbitrate." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985). Thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial

Hosp., 460 U.S., at 24-25.

In the present case, the parties first dispute whether the parties formed a valid arbitration agreement. Under the FAA, state law governs the formation of contracts, see First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995), but courts must bear in mind the federal policy favoring arbitration. See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 475-76 (1989). Accordingly, to form a contract, there must be an offer, acceptance, and consideration. Aircraft Guar. Corp. v. Strato-Lift, Inc., 103 F. Supp.2d 830, 835 (E.D.Pa. 2000).

The plaintiff argues that the arbitration agreement was not supported by consideration. Consideration is an "an act, forbearance, or return promise bargained for and given in exchange for the original promise." Universal Computer Systems v. Medical Services Ass'n, 474 F. Supp. 472, 477 (M.D.Pa. 1979), aff'd, 628 F.2d 820 (3rd Cir. 1980). On the other hand, if the promise is entirely optional with the promisor, it is said to be illusory and, therefore, lacking consideration and unenforceable. See Best v. Realty Management Corp., 101 A.2d 438, 440 (Pa. Super. Ct. 1953).

The arbitration agreement between Scott and Blair makes clear that both parties are legally bound by the agreement: "[Y]ou and Scott agree that final resolution of the dispute will

occur exclusively in a final and binding arbitration proceeding." Furthermore, Blair acknowledged the parties' agreement to arbitrate through her signed written acknowledgment of February 27, 1998.

Nonetheless, in this case, Scott did retain the right to modify the agreement and courts have invalidated arbitration agreements because an employer retained the right to modify the agreement. For example, in Floss v. Ryan's Family Steak House, the employer asked the employees to sign an arbitration agreement, but the agreement was between the employees and EDSI, a provider of arbitration services. See Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 310 (6th Cir. 2000). The agreement gave EDSI the unlimited right to modify the rules without the employees' consent. See id. Additionally, though obligated to provide some type of arbitral forum, EDSI had "unfettered discretion in choosing the nature of that forum." See id. at 316. Because EDSI could modify the rules without the employees consent, and could choose the nature of the forum, the Floss Court held that the arbitration agreement was illusory and unenforceable. See id.

However, the facts of this case stand in contrast to those of Floss. The mere fact that Scott's Executive Committee could modify the Handbook does not render the arbitration agreement illusory. Indeed, even where the employer is the only

party permitted to alter or revoke an arbitration agreement, courts have enforced the agreement if the employer was required to provide notice to the employee of any modifications. See, e.g., Morrison v. Circuit City Stores, Inc., 70 F. Supp.2d 815, 823 (S.D.Ohio 1999); see also Kelly v. UHC Management Co., Inc., 967 F. Supp. 1240, 1260 (N.D.Ala. 1997) (finding consideration where employer, but not employee could modify arbitration agreement with or without notice).

The arbitration contract in this case is supported by sufficient consideration because Scott promised to put any change in writing, promised to provide Blair a copy of any material changes, and permitted Blair to accept material changes by staying employed with Scott. Further, because Blair could accept material changes by remaining employed with Scott, presumably she could reject these changes by resigning from Scott. Consequently, Scott was legally obligated to arbitrate all of its claims with Blair unless Blair accepted a modification of the agreement to the contrary. Thus, because both parties have relinquished their rights to file suit in Court, and have both instead agreed to arbitrate claims that arise under the agreement, the Court finds that the agreement to arbitrate is supported by sufficient consideration. See Michalski v. Circuit City Stores, Inc., 177 F.3d 634, 637 (7th Cir. 1999).

The Court next turns to plaintiff's argument that

plaintiff had no obligation to submit her claims to arbitration because defendant allegedly failed to perform a condition precedent. More specifically, plaintiff claims that Scott failed to notify AAA that Scott was going to institute a mandatory arbitration process as the AAA requires. Accordingly, she asserts that the arbitration agreement's requirement that Blair give notice of her intent to arbitrate to AAA cannot exist without AAA being informed of, and agreeing to oversee, the arbitration of the dispute.

A condition precedent is a condition that "must occur before a duty to perform under a contract arises." Chase Manhattan Bank v. Township of Bensalem, NO. CIV. A. 96-6804, 1997 WL 330384, *5 (E.D.Pa., Jun 05, 1997) (quoting Acme Markets v. Federal Armored Exp., 648 A.2d 1218, 1220 (Pa.Super.Ct. 1994)). Further, a condition precedent to an obligation must be expressed by clear language or it will be construed as a promise or covenant. See Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1016 (3rd Cir. 1980). "Language not clearly written as a condition precedent is presumed not to be, unless the contrary clearly appears to be the intention of the parties." Id.

Contrary to plaintiff's claim, it was not a necessary condition that Scott notify AAA of its intent to utilize AAA's

services before Blair could arbitrate her case.[1] The National Rules for Resolution of Employment Disputes, submitted by plaintiff as an exhibit, states: "If an employer does not comply with this [notice] requirement, the Association [AAA] reserves the right to decline its administrative services." When examining the plain language of the National Rules, it is simply not true that AAA must be notified before its services could be utilized, thus Scott's alleged failure to notify AAA cannot be a condition precedent.

Furthermore, Scott's obligation to notify AAA of its intent to use its services was not clearly expressed in the parties' arbitration agreement as a condition precedent. Plaintiff fails to point to any language in the contract that supports her position. Moreover, when explaining that a claim must be timely filed with AAA, the agreement expressly states that the timely filing of such a claim "is considered a condition precedent to arbitration." In light of the foregoing language, and because the agreement does not employ similar language when explaining Scott's duty to notify AAA, the Court cannot conclude that Scott's duty to notify AAA was a condition precedent.

Plaintiff's third argument is that even if the agreement is enforceable, not all of her claims arise under the

[1]To the extent Scott's duty to notify AAA was a condition precedent, there is evidence that Scott did notify AAA of its intent to utilize AAA's services.

agreement. First, she claims that her cause of action for violation of the Pennsylvania Constitution's Equal Rights Amendment, see Pa. CONST. art. I, § 28, should not be submitted to arbitration because she did not knowingly waive her state constitutional claim or her state constitutional right to a jury trial. See Pa. CONST. art. I, § 6. Accordingly, she submits that the analysis of her waiver of her right to a jury trial, and her right to bring an action before the court within the two year statute of limitations must be made in deference to Pennsylvania's Constitution. The Court disagrees.

The Third Circuit's decision in Great Western is dispositive here. In Great Western, the plaintiff argued that because the arbitration agreement would deprive her of a two-year statute of limitations, and to a jury trial under the New Jersey law against discrimination ("NJLAD"), the parties' arbitration agreement was not enforceable. See Great Western Mortg. Corp. v. Peacock, 110 F.3d 222, 225-226 (3rd Cir. 1997). First, the Court noted that under the FAA the district court must only decide whether there was an agreement to arbitrate, and if so, whether the agreement is valid. See id. at 228 (citing 9 U.S.C. § 2). The Court then upheld plaintiff's waiver of her right to jury trial explaining that the FAA is meant to have a preemptive effect, albeit a narrow one. See Great Western, 110 F.3d at 231. The Court reasoned that when Congress enacted the FAA, it

declared “a national policy favoring arbitration” and “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” Id. (quoting Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). Thus, the Court concluded that waiver of a state law right to a judicial forum for the resolution of state claims is enforceable under the FAA. See Great Western Mortg. Corp. v. Peacock, 110 F.3d 222, 231 (3rd Cir. 1997).

With respect to plaintiff’s statute of limitations argument, the Great Western Court explained that if the party challenges the waiver of state law rights unrelated to the provision of a judicial forum, “the party challenging the validity of such waivers must present her challenge to the arbitrator.” Great Western, 110 F.3d 231. Accordingly, the Court left it to the arbitrator to decide whether the plaintiff waived the two year statute of limitations.

In this case, the Court will likewise uphold plaintiff’s waiver of a jury trial as an enforceable waiver under the FAA. Plaintiff signed the acknowledgment form where she acknowledged that she read the Handbook and specifically agreed that she would arbitrate any dispute arising out her employment. Additionally, like the Court in Great Western, this Court will leave the decision of whether plaintiff waived the statute of

limitations to an arbitrator. The fact that plaintiff's waiver argument arises out of the Pennsylvania Constitution is of no import because the Supremacy Clause requires invalidation of any state constitutional or statutory provision that conflicts with federal law. See Elizabeth Blackwell Health Center for Women v. Knoll, 61 F.3d 170, 178 (3rd Cir. 1995).

Next, the Court finds plaintiff's argument that her retaliation claim under Title VII and the PHRA, and her common law defamation claim are not within the scope of the agreement unpersuasive. In light of the FAA's mandate to enforce arbitration clauses liberally, and because of the clear language contained in the arbitration agreement, the Court finds that all of plaintiff's claims are bound by the agreement.

Blair next contends that the agreement to arbitrate is unenforceable because under the agreement, Blair is required to pay half of the arbitrator's fees. The Tenth Circuit has invalidated an arbitration agreement where the employee is required to pay one half of the arbitrator's fees. See, e.g., Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230, 1236 (10th Cir. 1999). In Shankle, the Court explained that the arbitration agreement was unenforceable because the plaintiff could not afford the arbitrator's fees and therefore the fee sharing provision denied the plaintiff an accessible forum to resolve his rights. See Shankle, 163 F.3d at 1235.

Unlike the plaintiff's argument in Shankle, plaintiff's argument in this case is unavailing. First, plaintiff fails to submit any proper evidence that she could not afford to pay the arbitration fees. She does not submit any evidence that demonstrates the amount of an arbitrator's fee. Instead, to support her contention that she cannot afford to arbitrate her claim, plaintiff asserts in her own affidavit that "I can't afford to pay the costs of taking my case to arbitration." In that affidavit, plaintiff fails to assess why she cannot afford arbitration, whether it is or is not possible to cut back on her expenses to afford arbitration, and whether when she was eligible to file for arbitration, she could afford arbitration. Courts have repeatedly held that conclusory self serving affidavits are insufficient to withstand a motion for summary judgment. See Wells v. Shalala, 228 F.3d 1137, 1144 (10th Cir. 2000); Rose-Maston v. NME Hospitals, Inc., 133 F.3d 1104, 1109 (8th Cir. 1998); Taylor v. Monsanto Co., 150 F.3d 806, 809 (7th Cir. 1998); Lindemann v. Empress Casino Hammond Corp., NO. 97 C 8938, 1999 WL 59839, *4 (N.D.Ill., Jan 27, 1999). This Court agrees with those Courts.

Moreover, the fee splitting provision here states "[t]he arbitrator's compensation shall be borne equally by the parties unless they agree otherwise, or unless the law provides otherwise." Plaintiff has presented no evidence that she even

attempted to forge an agreement with Scott where Scott would pay the arbitrator's compensation. This Court cannot conclude that Blair has been denied a judicial forum when she has made no effort to use the judicial forum provided to her in the parties' agreement.[2]

The Court is also not persuaded by plaintiff's remaining arguments. Plaintiff claims that the FAA does not apply to employment contracts, however the Third Circuit has held that the FAA does apply to employment contracts. See Great Western, 110, F.3d at 226-27 (citing Tenney Eng'g, Inc. v. United Elec. Radio & Machine Workers, 207 F.2d 450, 453 (3rd Cir. 1953). Likewise, plaintiff's argument that passage of the Civil Rights Act of 1991 evidences Congress' intent that employees are not subject to mandatory arbitration of their statutory claims is contradicted by Third Circuit precedent. See Seus v. John Nuveen & Co., Inc., 146 F.3d 175, 183 (3rd Cir. 1998).

Because the Court finds that all of the plaintiff's claims are subject to arbitration, the Court shall dismiss

[2]Ironically, if this Court were to conclude that the arbitration agreement here is unlawful because it denies plaintiff a judicial forum, the agreement may still be enforceable; the fee splitting provision is only applicable "unless the law provides otherwise."

plaintiff’s case, see Seus,146 F.3d at 179, and grant defendant’s motion for summary judgment.

An appropriate Order will follow.

_____

Clarence C. Newcomer, S.J.