

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

UNITED STATES OF AMERICA,	:	CIVIL ACTION
ex. rel. MITCHELL NUDELMAN,	:	
M.D., et. al.	:	
	:	NO. 00-1837
vs.	:	
	:	
INTERNATIONAL REHABILITATION	:	
ASSOCIATES, INC., D/B/A	:	
INTRACORP.	:	

MEMORANDUM AND ORDER

JOYNER, J.

October 30, 2006

This *qui tam* action is once again before this Court for disposition of Defendant Intracorp's Motion to Compel Arbitration of Relator's Retaliation Claims. For the reasons discussed in the paragraphs which follow, the motion shall be granted.

Factual Background

Relator, Mitchell Nudelman, M.D. instituted this suit under the False Claims Act in April, 2000 claiming that Intracorp submitted more than \$100 million in false claims to the United States and California, Delaware, Florida, Nevada and Tennessee as the result of improperly performed contracts and fraudulent representations concerning the manner in which it performed utilization review services in those states. In mid-2003, following multiple mediation sessions with Magistrate Judge Rueter, the U.S and state governments negotiated a settlement

agreement with Intracorp under which Intracorp would pay the total sum of \$1,650,000 and would submit to a three-year monitoring agreement to be overseen by the U.S. through Health Advocate, Inc., an independent monitoring company. Relator objected to the proposed settlement and following a Fairness Hearing on June 13, 2005, the undersigned approved the settlement via Decision dated April 4, 2006. Relator has appealed that decision and it is currently pending before the United States Court of Appeals for the Third Circuit. In addition, Dr. Nudelman also claimed that Intracorp terminated him in 2000 in retaliation for his "whistleblowing" activities. As these claims did not involve the state or U.S. governmental entities, they were not subject to the settlement agreement. In September, 2003, Defendant had filed a motion to dismiss Relator's False Claims Act claims and to compel arbitration of Relator's retaliation claims. Via Order of October 1, 2003, that motion was denied without prejudice to Defendant's right to re-file it following the Fairness Hearing. Following the approval of the proposed settlement, Defendant re-filed its motion to refer Relator's remaining claims against it for his allegedly retaliatory termination to arbitration pursuant to the Intracorp/CIGNA Employment Dispute Mediation/Arbitration Policy. Relator again objects.

**Standards Governing Motions to Compel/Stay Pending Arbitration**

The Federal Arbitration Act, 9 U.S.C. §1, *et. seq.*, ("FAA") "provides two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U.S.C. §3, and an affirmative order to engage in arbitration, 9 U.S.C. §4." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S.C. 1, 23, 103 S.Ct. 927, 940, 74 L.Ed.2d 765 (1983); Kiesel v. Lehigh Valley Eye Center, P.C., Civ. A. No. 05-4796, 2006 U.S. Dist. LEXIS 47486 at \*6-\*7 (E.D.Pa. July 12, 2006) . Motions to compel arbitration under §4 are reviewed under the well-settled summary judgment standard set forth in Fed.R.Civ.P. 56(c). Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980); Ostroff v. Alterra Healthcare Corp., 433 F.Supp.2d 538, 541 (E.D.Pa. 2006); Berkery v. Cross-Country Bank, 256 F.Supp.2d 359, 364, n.3 (E.D.Pa. 2003). The court must consider all evidence presented by the party opposing arbitration and construe all reasonable inferences in that party's favor. Ostroff, supra., citing Bellevue Drug Co. v. Advance PCV, 333 F.Supp.2d 318, 322 (E.D.Pa. 2004). Thus, the moving party must prove through pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any,...that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Zimmer v. CooperNeff Advisors, Inc., Civ. A. No. 04-3816, 2004 U.S. Dist.

LEXIS 25465 at \*15 (E.D.Pa. Dec. 20, 2004). Courts have used a similar standard in determining whether to conduct an evidentiary hearing on a §3 motion. Kiesel, at \*8.

### **Discussion**

Defendant predicates this motion upon the Employment Dispute Mediation/Arbitration Policy which it alleges it first instituted on September 1, 1995. According to Intracorp, it provided a copy of the Policy and the Arbitration Rules and Procedures to all of its then-current employees, including Dr. Nudelman. The Relator, however, disputes that he ever received copies of the Intracorp policy during his employment with Intracorp. Thus he contends, a valid contract to arbitrate his remaining employment claims was never made.

The Federal Arbitration Act codifies Congress' desire to uphold private arbitration agreements that produce prompt and fair dispute resolution without involving the courts. Brentwood Medical Associates v. United Mine Workers of America, 396 F.3d 237, 239 (3d Cir. 2005). The FAA<sup>1</sup> has established a strong

---

<sup>1</sup> Specifically, Sections 2, 3 and 4 of the Arbitration Act provide as follows in relevant part:

**§2. Validity, irrevocability and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

policy in favor of arbitration requiring rigorous enforcement of arbitration agreements. Mintze v. American Financial Services, Inc., 434 F.3d 222, 229 (3d Cir. 2006). Thus, the FAA is pre-emptive of state laws that are hostile to arbitration. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 112, 121 S.Ct. 1302, 1307, 149 L.Ed.2d 234 (2001).

However, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." Howsam v. Dean Witter Reynolds, 537 U.S. 79, 83, 123 S.Ct. 588, 591, 154 L.Ed.2d 491, 496-497 (2002); AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648

---

**§3. Stay of proceedings where issue therein referable to arbitration**

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

**§4. Failure to arbitrate under agreement; petition to United States Court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement...The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement...

(1986), quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). Thus, the question whether the underlying contract contains a valid arbitration clause still precedes all others and the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985); Sandvik AB v. Advent International Corp., 220 F.3d 99, 105 (3d Cir. 2000). A court cannot direct parties to arbitration unless the agreement to arbitrate is valid. Ostroff, 433 F.Supp.2d at 542.

Once that determination has been made, the Court must next assess whether the issue sought to be arbitrated is arbitrable under the agreement and whether the party asserting the claims has failed or refused to arbitrate. See, Berkery v. Cross Country Bank, 256 F.Supp.2d 359, 364 (E.D.Pa. 2003); Lomax v. Woodmen of the World Life Insurance Society, 228 F.Supp.2d 1360, 1362 (N.D.Ga. 2002). The inquiry into whether the parties agreed to submit their disputes to arbitration, and the scope of any arbitration agreement is governed by "ordinary state law principles governing contract formation." Digital Signal, Inc. v. Voicestream Wireless Corp., No. 04-2696, 2005 U.S. App. LEXIS 26480 at \*6, 156 Fed. Appx. 485, 487 (3d Cir. Dec. 5, 2005), quoting Par-Knit Mills, 636 F.2d at 54. Furthermore, in

interpreting arbitration agreements, courts may also look to state law for generally applicable contract defenses, such as unconscionability. Doctor's Associates Inc. v. Casarotto, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); Alexander v. Anthony International, L.P., 341 F.3d 256, 264 (3d Cir. 2003); Harris v. Green Tree Financial Corp., 183 F.3d 173, 179 (3d Cir. 1999).

In this case, Relator submits that as he was at all times relevant a Georgia resident who worked out of Intracorp's Georgia office and because the places of the alleged contracting, negotiation, performance and subject matter of the contract were all in Georgia, it is the Georgia state law of contracts which should be applied here. Intracorp agrees that Georgia law governs the contract formation issues in this case and thus we shall look to the law of Georgia in resolving this issue. (See, e.g., footnote 3 of Intracorp's Reply Brief in Support of Motion to Compel Arbitration of Relator's Claims).

To constitute a valid contract under Georgia law, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract and a subject matter upon which it can operate. Rondale Bus Service Inc. v. American Casualty Co., 189 Ga. App. 869, 870, 377 S.E.2d 726 (1989), citing Associated Mutuals v. Pope Lumber Co., 200 Ga. 487, 37 S.E.2d 393 (1946) and O.C.G.A. §13-3-1. "It is

well-settled that an agreement between two parties will occur only when the minds of the parties meet at the same time, upon the same subject matter and in the same sense." Terry Hunt Construction, Inc. v. Aon Risk Services, Inc. Of Georgia, 272 Ga. App. 547, 551, 613 S.E.2d 165, 169 (2005), quoting Cox Broadcasting Corp. v. National Collegiate Athletic Assn., 250 Ga. 391, 395, 297 S.E.2d 733 (1982). As provided by Georgia statute, "the consent of the parties being essential to a contract, until each has assented to all of the terms, there is no binding contract; until assented to, each party may withdraw his bid or proposition." O.C.G.A. §13-3-2.

The requirement of certainty extends not only to the subject matter and purpose of the contract, but also to the parties, consideration and even the time and place of performance where time and place are essential. Peace v. Dominy Holdings, Inc., 251 Ga. App. 654, 655-656, 554 S.Ed.2d 314. 315 (2001). Thus, acceptance of an offer must be unconditional, unequivocal and without variance of any sort; otherwise, there can be no meeting of the minds and no mutual assent necessary to formation of a contract. Panfel v. Boyd, 187 Ga. App. 639, 645-646, 371 S.E.2d 222, 228 (1988).

Finally, it is the party alleging that a contract exists that bears the burden of proving its existence and its terms. Hunt Construction, 272 Ga. App. at 551, 613 S.E.2d at 169.

Although in some cases the only evidence of the parties' intent is the express language of the contract, in some cases, the circumstances surrounding the making of the contract, such as correspondence and discussions are relevant in deciding if there was a mutual assent to an agreement. Where such extrinsic evidence exists and is disputed, the question of whether a party has assented to the contract is generally a matter for the jury. Id., citing, *inter alia*, Legg v. Stovall Tire & Marine, 245 Ga. App. 594, 596, 538 S.E.2d 489 (2000).

As noted, at issue here is whether Intracorp in fact provided a copy of the Employment Dispute Mediation/Arbitration Policy and the Arbitration Rules and Procedures to the Relator and whether his continued employment with Intracorp constituted an acceptance of that policy thereby resulting in an agreement to arbitrate the remaining claims in this case. Although provisions in an employee manual relating to additional compensation plans of which an employee is aware may amount to a binding contract between the parties, an employee manual setting forth certain policies and information concerning employment is not necessarily viewed as a contract. Ellison v. DeKalb County, 236 Ga. App. 185, 186, 511 S.E.2d 284, 285 (1999), citing *inter alia*, Jones v. Chatham County, 223 Ga. App. 455, 459, 477 S.E.2d 889 (1996) and Burgess v. Decatur Federal Savings & Loan Assn., 178 Ga. App. 787, 788, 345 S.E.2d 45 (1986). The reasoning in these cases is

that the additional compensation plan set forth in the manual represents an offer by the employer which the employee implicitly accepts by remaining in employment. Id. Georgia law has been likewise applied by the 11<sup>th</sup> Circuit Court of Appeals to find that a company's adoption of a Dispute Resolution/Arbitration Policy constituted a binding contract under ordinary state law contract principles. See, e.g., Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1373 (11<sup>th</sup> Cir. 2005).<sup>2</sup>

In this case, the parties do not dispute that Dr. Nudelman first began working on a part-time basis as a Physician Advisor for Intracorp in 1992 and that his employment was terminated in July, 2000. According to the declaration of Intracorp's current-director of Human Resources, "[o]n September 1, 1995, Intracorp instituted the Intracorp Employment Dispute Mediation/Arbitration Policy and the Intracorp Employment Dispute Mediation/Arbitration Rules and Procedures" and that "as part of its normal business practices, Intracorp provided a copy of [those policies, rules and procedures] to all incumbent employees." (Declaration of

---

<sup>2</sup> The plaintiffs in Caley were current and former employees who sought to bring various discrimination claims against their employer Gulfstream in federal court. Several years before the filing of the complaints, Gulfstream had adopted a Dispute Resolution Policy requiring arbitration of all employment-related claims. Gulfstream filed and the district court granted its motion to dismiss and to compel arbitration despite the plaintiffs' claims that the DRP was unenforceable. The 11<sup>th</sup> Circuit Court of Appeals affirmed noting: (1) that the mailing of the proposed DRP to all employees constituted an offer (2) which Plaintiffs accepted by continuing in their employment; and (3) that because the DRP stated that Gulfstream gave reciprocal promises to arbitrate and to be bound by arbitration in covered claims, sufficient consideration was provided to support the contract.

Helen Tomlin, annexed to Defendant's Motion to Compel Arbitration of Relator's Retaliation Claims as Exhibit "A," at ¶10). Ms. Tomlin further declares that in November, 1996 and September, 1998, Intracorp updated its Employee Handbook to include the Arbitration Policy and that on November 3, 1998, Relator signed an Intracorp Employee Handbook receipt thereby acknowledging that he received a copy of the Employee Handbook, including the updates of September, 1998 and agreeing to take the time to review the materials. (Exhibit "A," ¶s12-14; Exhibit "C"). Thereafter, on January 2, 2000, Intracorp changed to the benefits programs and policies of the CHC Division, including CHC's Employment Dispute Resolution Program, which included an Arbitration Policy and Arbitration Rules and Procedures that were essentially the same as Intracorp's existing Arbitration Policy and Arbitration Rules and Procedures. In early, 2000, Intracorp distributed the 2000 "Cigna & You" Employee Handbook to all of its employees by desktop computer application. That handbook contained a summary of the company's dispute resolution policy and arbitration procedures, among other things. (Exhibit "A," ¶s15-17).

In his response in opposition to this motion, Dr. Nudelman has submitted his own declaration in which he denies receiving copies of the CIGNA Healthcare Division's Employment Dispute Arbitration Policy and Employment Dispute Arbitration Rules and

Procedures dated January 1, 2001 during his employment with Intracorp. Relator further denies receiving a copy of an Intracorp employee handbook on November 16, 1996. Relator admits, however, that on November 3, 1998, he received a copy of an Intracorp employee handbook from a Human Resources clerk, that he signed a receipt for those materials and that he reviewed the employee handbook descriptions of employee benefits. (See Exhibit "A" to Memorandum of Law in Support of Relator's Response to Defendant's Motion to Compel Arbitration of Relator's Retaliation Claims, ¶s5-6, 9-10). Under the heading "You and Cigna," the 1998 handbook provides, in relevant part:

This handbook applies to all U.S. based regular full-time and regular part-time employees of the CIGNA companies identified on the last page of this handbook. This handbook contains important information about your contract of employment as well as policies and programs that relate to you in your work at CIGNA and about benefits for which you may be eligible. *The terms of your employment mentioned in this handbook are legally binding, and you may wish to review these terms with your legal counsel.*

...

This handbook contains only two terms of your employment. They are very important. The first is that your employment is not for any fixed period of time. Just as you can terminate your employment, at any time for any reason, the Company can terminate your employment at any time for any reason. The second is that by accepting employment and being eligible to receive increases in compensation and benefits, you agree that you will not go to court or a government agency for a hearing to decide an employment-related claim. Instead, you will resolve all employment related legal disputes (except worker's compensation and unemployment compensation) by going to a neutral third party arbitrator...

(Emphasis in original)

Under Section E.2, the handbook discusses the Employment Dispute Resolution Program at length and in great detail, specifying that the agreement to arbitrate applies to serious employment-related agreements and problems, which are those that concern a right, privilege or interest recognized by applicable law including claims or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, The Civil Rights Act of 1991, the Equal Pay Act, the Age Discrimination in Employment Act, the Employee Retirement Security Act of 1974, the Fair Labor Standards Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Family and Medical Leave Act, and any other federal, state or local statute, regulation or common law doctrine regarding employment discrimination, conditions of employment or termination of employment. (Defendant's Exhibit "E", at pp. 28-31).

As observed by the 11<sup>th</sup> Circuit in Caley, supra., "Georgia courts have held that an employee can accept new terms of employment of which the employee is aware by remaining in employment." Caley, 428 F.3d at 1374, citing Fletcher v. Amax, Inc., 160 Ga. App. 692, 288 S.E.2d 49, 51 (1981). We thus find from this undisputed evidence that Dr. Nudelman was made aware of the arbitration agreement in 1998 and that he accepted it by continuing to work for Intracorp for another year and a half. As a valid agreement to arbitrate exists in this case and the

remaining retaliation claims are clearly employment-related and fall within its scope, we shall grant the defendant's motion to compel arbitration in accordance with the annexed order.

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

UNITED STATES OF AMERICA,	:	CIVIL ACTION
ex. rel. MITCHELL NUDELMAN,	:	
M.D., et. al.	:	
	:	NO. 00-1837
vs.	:	
	:	
INTERNATIONAL REHABILITATION	:	
ASSOCIATES, INC., D/B/A	:	
INTRACORP.	:	

**ORDER**

AND NOW, this 30th day of October, 2006, upon consideration of the Motion of Defendant International Rehabilitation Associates, Inc., d/b/a Intracorp to Compel Arbitration of Relator's Retaliation Claims and Relator's Response thereto, it is hereby ORDERED that the Motion is GRANTED for the reasons set forth in the preceding Memorandum Opinion and all proceedings on Counts IX-XV of the First Amended Complaint in this matter are STAYED pending arbitration.

BY THE COURT:

s/J. Curtis Joyner \_\_\_\_\_  
J. CURTIS JOYNER, J.