

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

JOAN N. VENUTO : CIVIL ACTION
: :
v. : :
: :
INSURANCE COMPANY OF NORTH AMERICA : NO. 98-96

MEMORANDUM

Giles, J. July , 1998

Joan N. Venuto was employed by Insurance Company of North America (“ICNA”), as an at-will employee. After being diagnosed with a medical disability, Venuto went on a leave of absence. While she was on leave, ICNA implemented a new policy requiring arbitration of certain disputes. Venuto received notice of that policy by mail and, when she returned to work, by interoffice mail. After returning from leave, Venuto was demoted and denied promotional and training opportunities. She then brought action against ICNA pursuant to the American with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, for discrimination, asserting that she was ultimately demoted and denied opportunities solely as a result of her disability and record of impairment.

Now before the court is ICNA’s Motion to Compel Arbitration and Stay Judicial Proceedings. Venuto contends that she is not bound by ICNA’s arbitration policy since it was unilaterally adopted and implemented by ICNA without her input or assent. For the reasons which follow, defendant’s Motion is GRANTED.

FACTUAL BACKGROUND

Joan N. Venuto was hired by ICNA as a temporary employee in 1989, and became a full-time employee in 1990. (Compl. ¶ 8.) She was a major claims technician, and was assigned to the Process Design Information management team. (Compl. ¶ 9.) In her position, Venuto worked with computer software designs and trained claims staff. (Compl. ¶ 9.) In July of 1994, she took a short-term disability/Family Medical leave of absence after she was diagnosed with depression. (Compl. ¶¶ 11-12). She alleges that while on leave, her immediate supervisor, Roberta Cooper, made discriminatory and derogatory remarks about her disability and ridiculed her ability to return to work. (Compl. ¶¶ 14-15.) When Venuto returned to ICNA on January 5, 1995, (Compl. ¶ 12), she was allegedly demoted to a clerical position and informed that she would not be permitted to apply for any promotional opportunities or advancement for one year, (Compl. ¶ 16). Venuto remains an employee of ICNA. (Compl. ¶ 8.)

During Venuto's leave of absence, ICNA adopted the CIGNA Property & Casualty Division Employment Dispute Mediation /Arbitration Policy. (Mot. to Compel at 2; see Pl. Reply Mem. at 5.)¹ The arbitration policy was sent to all company employees individually and was accompanied by a cover letter introducing it. Id. The cover letter,

¹ The relevant facts and dates cited to defendant's Motion to Compel are uncontested and deemed as admissions by plaintiff. Many of the affidavits and other documents referenced are attached to defendant's Motion to Compel. These documents were neither supplemented nor opposed by plaintiff.

dated September 26, 1994, stated, in part, “we are implementing a new mandatory process of mediation and arbitration. Beginning October 3, 1994, the Employee Dispute Resolution Program will be implemented to assist in resolving conflicts.” (Memo from Morrisey to Property & Casualty Employees of 9/26/94.) The policy stated that the company was instituting binding arbitration as “the required and final means for the resolution of any serious disagreements and problems not resolved by the Division’s internal dispute resolution policy.” (10/24/94 CIGNA Property & Casualty Division Employment Dispute Mediation/Arbitration Policy.) The company’s arbitration policy stated the following as its scope:

This policy covers only serious employment-related disagreements and problems, which are those that concern a right, privilege or interest recognized by applicable law. Such serious disputes include claims, demands 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 Income Security Act of 1974, the Fair Labor Standards Act, the Rehabilitation Act of 1973, the American with Disabilities Act, the Family 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.

Id.

Venuto has acknowledged that the arbitration policy was distributed by ICNA through regular and interoffice mail, (Pl. Reply Mem at 5), and that she initially received the policy via certified mail while on leave, (Letter from Venuto to Cardona of 10/26/94). In a letter addressed to Oscar Cardona of CIGNA Companies, Venuto stated that she believed she had been terminated and, therefore, had received the policy in error.

Id. According to ICNA, a Human Resources Department Representative responded to Venuto's letter on or about November 16, 1994; informing her that she had not been terminated but was on an unpaid leave of absence. (Letter from Cook to Venuto of 11/16/94.) ICNA states that on or about February 27, 1995 the arbitration policy and a cover letter introducing the policy was again sent to all employees by interoffice mail. (Mot. to Compel at 3.) ICNA also sent an amended policy to all employees in August 1996. (Compl. ¶ 12; 8/8/96 CIGNA Property & Casualty Division Employment Dispute Arbitration Policy.)²

Venuto filed the present action in federal court pursuant to the ADA, complaining that her subjection to discriminatory and harassing remarks and demotion created a hostile and offensive work environment. Additionally, Venuto asserts that her demotion and subsequent denial of promotional and training opportunities were the direct result of her disability and record of impairment.

ICNA now moves to compel arbitration and stay judicial proceedings pursuant to the Federal Arbitration Act. ICNA argues that the scope of the arbitration policy clearly covered claims brought pursuant to the ADA, and complains that Venuto failed to submit her ADA claims to arbitration as required. Because Venuto was employed by ICNA when its arbitration policy was implemented and continued to be

² This amendment did not significantly alter the language regarding the scope of ICNA's arbitration policy.

employed thereafter, ICNA asserts that its arbitration policy constitutes an enforceable agreement.

Venuto contends that since the arbitration policy was unilaterally issued, it lacks the requisite mutuality of assent required to constitute a legally enforceable contract. Venuto asserts that continuing to work for ICNA after receiving a copy of the arbitration policy, was not conduct sufficient to constitute acceptance of the policy.

ANALYSIS

The purpose of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 et seq.,³ was “to reverse the longstanding judicial hostility to arbitration agreements,” and “to place arbitration agreements upon the same footing as other contracts.” Gilmer v. Interstate /Johnson Lane Corp., 500 U.S. 20, 24 (1991). “By enacting this legislation, Congress intended to overrule the traditional refusal of courts to make arbitration agreements as enforceable as other contracts. . . .” Northwestern Nat’l Life Ins. Co. v. U.S. Healthcare, Inc., No. Civ. A. 96-4659, 1998 WL 252353, at *3 (E.D. Pa. May 11, 1998) (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985)).

³ The FAA applies to employment contracts, such as that in the present case, where the contract relates to interstate commerce and the relationship to interstate commerce is less than substantial. See Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 227 (3d Cir. 1997) (holding that “the only class of workers included within the exception to the FAA’s mandatory arbitration provision are those employed *directly* in the channels of commerce itself.”)

Subsequently, the Supreme Court has recognized a “liberal federal policy favoring arbitration agreements.” Gilmer, 500 U.S. at 25 (quoting Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. at 24).

“A party’s agreement to arbitrate is a matter of contract construction and whether a dispute is arbitrable is a question of law for the court.” International Union v. Exide Corp., 688 F. Supp. 174, 180 (E.D. Pa. 1998) (citing Morristown Daily Record v. Graphic Comm. Union Local 8N, 832 F.2d 31, 33 (3d Cir. 1987)); see Goodwin v. Elkins & Co., 730 F.2d 99, 108 (3d Cir. 1984) (holding that “arbitration . . . is purely a matter of contract.”)⁴ “[A] court is not permitted to examine or determine the merits of an underlying claim. Rather, the only issues presented are whether a valid agreement to arbitrate exists and if so, whether the particular claim or claims in question fall within the scope of the agreement.” BT Alex. Brown, Inc. v. Monahan, No. CIV.A. 97-7245, 1997 WL 773095, at *1 (E.D. Pa. Dec. 10, 1997) (citing Great Western Mortg. Corp. v. Peacock, 110 F.3d 222, 230 (3d Cir. 1997)); see Paine Webber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990) (holding that if the court determines that an agreement exists

⁴ In the third circuit, motions to compel arbitration have been viewed as summary judgment motions if the parties contest the making of the agreement. Par-Knit Mills, Inc. v. Stockbridge Fabrics Co. Ltd., 636 F.2d 51, 54 (3d Cir. 1980); Lepera v. ITT Corp., No. 97-1461, 1997 WL 535165 (E.D. Pa. Aug. 12, 1997). “Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement.” Par-Knit, 636 F.2d at 54. In the present case there are no contested issues of material fact concerning the existence of the arbitration agreement and, therefore, the motion is appropriate for the court to decide as a matter of law.

it then must refer the matter to arbitration without considering the merits of the dispute). Consequently, before a court may stay litigation and compel arbitration it must ensure (1) that a valid arbitration agreement exists between the parties and (2) that the agreement governs the dispute in question.

A. *Existence of an Enforceable Arbitration Agreement*

The FAA requires that an agreement to submit a dispute to arbitration “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. “Grounds for revocation include fraud or the use of overwhelming economic power resulting in an adhesion contract.” Sues v. Nuveen, No. CIV.A. 96-5971, 1997 WL 325792, at *3 (E.D. Pa. June 2, 1997); see Gilmer, 500 U.S. at 33. The Supreme Court has held that “[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” Id. Venuto argues that ICNA’s arbitration agreement was adhesive as she did receive the policy from ICNA, had no input as to its terms, and did not sign or verbally agree to it.

Venuto’s argument that she is not bound to the arbitration policy because she did not participate in drafting the agreement, verbally assent, or sign anything to demonstrate her agreement, misinterprets the law. The FAA requires an agreement to be in writing; “it does not require that the writing be signed by the parties.” Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1439 (9th Cir. 1994) (citing Genesco, Inc. v. T. KaKiuchi &

Co., 815 F.2d 840, 846 (2d Cir. 1987)); see 9 U.S.C. § 2. The purpose of the writing requirement is “intended to permit enforcement of arbitration agreements only in the face of competent evidence of the agreement’s existence and scope.” Durkin v. CIGNA Property & Cas. Corp., 942 F. Supp. 481, 487 (D. Kan. 1996). Consequently, a written policy, such as at issue here, is sufficient to satisfy the writing requirement. Venuto need not participate in the drafting of the policy or physically endorse the policy for it to be valid and enforceable.

This court also rejects Venuto’s argument that ICNA’s unilateral implementation of the arbitration policy makes it inherently unenforceable. In making her argument, Venuto relied on ninth and first circuit case law. Because such policies were not knowingly accepted by employees, those circuits have declined to find unilaterally promulgated arbitration policies placed in company forms and handbooks valid.

In Prudential Insurance Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994), the ninth circuit found that when the plaintiffs signed U-4 securities exchange registration forms they “did not knowingly agree to forego statutory remedies in favor of arbitration.” Lai, 42 F.3d at 1305. The U-4 forms contained an agreement to arbitrate any claims required to be arbitrated, under the rules of the organization with which plaintiffs registered. These forms neither described the type of the disputes that were the subject of arbitration nor referred to employment disputes. The plaintiffs subsequently

registered with the National Association of Security Dealers which required arbitration of disputes related to the business of its members. Due to the plaintiffs' lack of understanding of the U-4 forms, the ninth circuit held that they had no way of knowing when they signed the U-4 forms that they were waiving the right to arbitrate sexual discrimination suits.

Later citing Lai, the ninth circuit declined to uphold an arbitration policy contained within an employee handbook. In Nelson v. Cyprus Bagdad Cooper Corp., 119 F.3d 756 (1997), the plaintiff received an employee handbook which he signed agreeing to read and understand its provisions. The ninth circuit concluded, however, that "the unilateral promulgation by an employer of arbitration provisions in an Employee Handbook does not constitute a 'knowing agreement' on the part of an employee to waive a statutory remedy." Id. at 762.

Venuto also relied on the first circuit's opinion in Ramirez-de-Arellano v. American Airlines, Inc., 133 F.3d 89 (1st Cir. 1997). In that case, plaintiff received an employee handbook which contained an internal grievance resolution procedure. Id. at 89. While the case was upheld on other grounds, the first circuit held that "[g]iven the apparent unilateral and adhesive nature of American's employee handbook, we do not embrace the argument that [plaintiff] voluntarily waived his right to pursue his claims in federal court." Id. at 90-91.

The facts in the case at bar are distinguishable from those cited by Venuto.

Most importantly, it is undisputed that Venuto had knowledge of the existence of ICNA's arbitration policy. It was not buried in employee handbook or form, but instead was a separate and distinct document sent to each individual employee, accompanied by a cover letter introducing and explaining it. Further, the policy clearly stated that it was the required and final means of resolving many serious disagreements, and defined the claims within its scope. Federal courts have upheld unilaterally implemented arbitration policies where employees clearly had knowledge of their existence. See e.g. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997) (upholding an employee handbook arbitration provision where the arbitration clause was both separate and distinct from other provision and was introduced as important); Durkin, 942 F. Supp. at 488 (holding that where evidence established that an employee had actual notice of a company policy, the at-will employee was bound by its terms).

Venuto's argument that she is not bound by the arbitration agreement because she did not explicitly consent is likewise without merit. "The parties' intentions are generously construed as to issues of arbitrability." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). "An arbitration agreement, however, need not be express; it may be implied from the conduct of the parties." Teamsters Local Union No. 764 v. J.J. Merrit and Company, 770 F.2d 40, 42 (3d Cir. 1985) (citing Fortune, Alsweet & Eldridge, Inc. v. Daniel, 724 F.2d 1355, 1356-1357 (9th Cir. 1983)). Consequently, it follows that an employee's decision to continue working with an

employer for a substantial period of time after the imposition of new policy, demonstrates acceptance of its terms. See Kinnebrew v. Gulf Ins. Co., CA No. 3:94-CV-1517-R, 1994 WL 803508, at *2 (N.D. Tex. Nov. 28, 1994) (“[F]ederal courts do not hesitate to find an enforceable agreement to arbitrate when an arbitration policy is instituted during an employee’s employment and the employee continues to work for the employer thereafter.”); Durkin, 942 F. Supp. at 488 (holding that an at-will employees continued employment provided sufficient consideration for the arbitration provision).

Venuto acknowledged that she received a copy of the arbitration policy while she was out on leave, and does not dispute that she also received copies of the policy when she returned to work. Additionally, Venuto continues to work for ICNA, and a significant period of time has passed since the policy was first issued in October 1994. By her conduct in remaining an ICNA employee, the court finds that Venuto has indicated her acceptance of the arbitration policy.

B. *Scope of the Policy*

As the court has found that an enforceable arbitration policy exists between Venuto and ICNA, it must now determine whether her current claims pursuant to the ADA, fall within the scope of the policy. “[T]here is strong presumption in favor of arbitration, and doubts ‘concerning the scope of arbitrable issues should be resolved in favor of arbitration’.” Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 228 (3d Cir. 1997) (citing Moses H. Cone Memorial Hospital, 460 U.S. at 24-25 (1983)).

The policy at issue in this case describes claims within its scope and states that it applies to disputes brought under the ADA. Therefore, Venuto's claims fall within the scope of the arbitration policy.

CONCLUSION

Venuto's complaint pursuant to the ADA is subject to arbitration, and action before this court is stayed. ICNA unilaterally instituted an enforceable arbitration policy requiring binding arbitration of certain claims. Venuto, an at-will employee, was notified of this policy and, by her extended continued employment, accepted and became bound by this arbitration policy. Her current complaint, bringing claims pursuant to the ADA, falls within the scope of the policy.

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ORDER

AND NOW, this day of July 1998, upon consideration of defendant's Motion to Compel Arbitration and Stay Judicial Proceedings and plaintiff's response thereto, it is hereby ORDERED and DECREED that the Motion to Compel Arbitration is GRANTED. It is further ORDERED that this action is STAYED until arbitration is completed.

BY THE COURT:

JAMES T. GILES, J.