

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

JOSEPH N. LEPERA :
Plaintiff, :
 :
v. : Civil No. 97-1461
 :
ITT CORPORATION, ITT INDUSTRIES :
INC, and NORMAN PRATHER :
Defendants. :

MEMORANDUM AND ORDER

Cahn, C.J.

August ____, 1997

The issue before the court is whether Defendants can enforce an internal Mediation and Arbitration Policy against Plaintiff. Plaintiff disputes the formation of a binding contract to arbitrate, and argues that, even if a binding contract exists, certain of his claims are not arbitrable under the contract. The court finds that a binding contract does exist, but that Plaintiff's tort claims against his supervisor, Defendant Norman Prather, are not arbitrable because they do not arise from his employment. Therefore, the court will order Plaintiff to arbitrate his claims against Defendants ITT Corporation and ITT Industries (collectively "ITT"), but allow Plaintiff to proceed in this court with his claims against Defendant Prather.

BACKGROUND FACTS

Plaintiff Joseph N. Lepera ("Lepera") was employed by Defendant ITT as a private airline pilot from 1977 until 1995. Lepera was an at-will employee during his entire tenure with ITT.

As a pilot, Lepera's primary responsibility was to transport ITT executives throughout the world in planes from ITT's private fleet. Defendant Norman Prather ("Prather") was Director of Aviation for ITT, and Lepera's supervisor during Lepera's employment.

During the course of Lepera's employment, ITT promulgated the ITT Corporation Headquarters Mediation and Arbitration Policy (the "Policy"), which became effective February 1, 1994. The Policy is two pages long. It lists which claims are covered, describes mediation and arbitration, sets forth a fee structure, and includes provisions for governing law, changes to the Policy, and employee requests for further information. ITT also distributed a three page memorandum to all employees dated January 25, 1994 from R.W. Pausig, Senior Vice President and Director of Human Resources, describing the policy. Lepera acknowledged receipt of the Policy on April 5, 1994.

On July 27, 1994, three months after Lepera's receipt of the Policy, in ITT's Allentown, Pennsylvania location, Prather and Lepera had a confrontation that resulted in Prather demoting Lepera. Lepera does not describe the subject matter of that confrontation beyond alleging that Prather "sought to otherwise punish him for the personal and policy differences that had developed between defendant Prather and plaintiff over the years." Cmplnt. ¶ 17. That same evening, at about 5:30 p.m., Prather and Lepera had a second confrontation when Prather demanded that Lepera not tell Prather's wife of Prather's "moral indiscretions," and Lepera refused. Cmplnt. ¶¶ 18-19. This second confrontation took

place on a public roadway off of ITT's property. During the course of the confrontation, Prather struck Lepera twice with his fist, causing Lepera to suffer a broken nose and damage to his ear which resulted in incurable vertigo. Due to the vertigo, Lepera had to leave his employment as a pilot with ITT and cannot maintain any other employment as a pilot.

Lepera now sues Prather for battery, ITT for negligent retention of an incompetent and unfit employee, and both ITT and Prather for negligence, intentional infliction of emotional harm, and negligent infliction of emotional distress. Lepera seeks damages for past and future medical expenses, lost wages, embarrassment, physical and emotional pain and suffering, and loss of future employment. ITT has filed a Motion to Compel Arbitration pursuant to the Policy. Lepera objects.

DISCUSSION

I. CHOICE OF LAW

ITT's Policy contains a paragraph entitled "Governing Law," which states that "[i]mplementation of this Policy shall in all respects and at all locations be pursuant to the Federal Arbitration Act and the applicable laws of the State of New York." Policy at p. 2, Ex. 1 to Def. Motion to Compel. ITT contends that New York law applies. Lepera does not address the choice of law issue, but cites to both Pennsylvania and New York law in his submissions to this court.

Lepera's first argument is that ITT's promulgation of the

Policy did not create an enforceable contract between him and ITT. The choice of law provision is within the Policy; it is a part of the alleged agreement to arbitrate and is not a separate provision. This court cannot look to the choice of law provision within the Policy unless the court first determines that both parties agreed to be bound by the Policy. Thus, this court must initially make a choice of law determination just as it would in any other contract dispute when jurisdiction is based on diversity.

A federal court sitting in Pennsylvania must apply Pennsylvania choice of law rules. Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496 (1941). Pennsylvania uses a two-part test to determine choice-of-law in a contract dispute. Compagnie des Bauxites v. Arognaut-Midwest Ins. Co., 880 F.2d 685, 688-90 (3d Cir. 1989), citing, Griffith v. United Air Lines, Inc., 203 A.2d 796 (1964). First, the court looks to the factors in the Restatement (Second) of Conflict of Laws, § 188(2) (1971), in order to determine which state has the most significant relationship to the contract. Compagnie des Bauxites, 880 F.2d at 689. The factors are (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties. Id.

In this case, ITT promulgated the Policy from its headquarters in New York, and no negotiation took place between ITT and Lepera. According to the Policy, claims which arose between employees and

ITT were to be mediated or arbitrated by the American Arbitration Association's New York City Regional office. At the time of his employment with ITT, Lepera worked out of ITT's facility in Allentown, Pennsylvania, but lived in Massachusetts. The record does not reveal where Lepera received the Policy, but the court presumes that this happened at either his home in Massachusetts or his work site in Pennsylvania. Thus, although the confrontations in question took place in Pennsylvania, the state with the most significant relationship to the Policy is New York.¹

The second part of the choice of law analysis requires the court to perform a "government interest" analysis, in which the court looks to the interests and policies that may be validly asserted by each jurisdiction. Griffith, 203 A.2d at 805. In this case, neither party has presented evidence that either Pennsylvania or New York has a significant interest in the subject matter of this dispute (agreements to arbitrate) that is measurably different from the other state's. Both states require that a party's agreement to arbitrate be clear. Par-Knit Mills, Inc. v. Stockbridge Fabrics Co. Ltd., 636 F.2d 51, 54 (3d Cir. 1980);

¹For choice of law issues relating to torts, the Supreme Court of Pennsylvania has stated that "torts should be governed by the local law of the state which has the most significant relationship with the occurrence and the parties." Griffith, 203 A.2d at 802. Thus, there is a tendency in this case to weigh heavily the fact that the confrontations took place in Pennsylvania. However, the issue before the court is whether a contract was formed between ITT and Lepera, not Lepera's tort claims against ITT and Prather. The location of the altercation between Lepera and Prather has nothing to do with the formation of a contract between Lepera and ITT, and thus is not relevant in the choice of law determination.

Waldron v. Goddess, 461 N.E.2d 273 (N.Y. 1983). In addition, once it is established that an agreement to arbitrate exists, both states have a "healthy regard for the federal policy favoring arbitration." Moses H. Cone Memorial Hospital v. Mercury Constr. Co., 460 U.S. 1, 24 (1983). Thus, the government interest analysis does not disturb the court's initial inclination to apply New York law.

II. STANDARD OF REVIEW

In the Third Circuit, a motion to compel arbitration is viewed as a summary judgment motion if the parties contest the making of the agreement. Par-Knit, 636 F.2d at 54. In most cases, a party disputing the making of the agreement has a right to a jury trial on that issue. 9 U.S.C. § 4. "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. Because the court reviews the making of the agreement as a summary judgment motion, the court "should give to the opposing party the benefit of all reasonable doubts and inferences that may arise." Id.; Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 255 (1986).

In determining whether Lepera and ITT formed a binding contract to arbitrate, this court will apply New York's contract law principles in light of the summary judgment standard set by the Third Circuit Court of Appeals. It should be noted that the

standard for a motion to compel arbitration set by the Second Circuit Court of Appeals in Threlkeld & Co., Inc. v. Metallgesellschaft Ltd., 923 F.2d 245 (2d Cir. 1991), cert. dismissed, 501 U.S. 1267 (1991), differs from that in the Third Circuit.² However, this court believes that the use of the summary judgment standard is appropriate. Berger v. Cantor Fitzgerald Securities, 96 Civ. 2836 SAS, 1997 WL 217587, at *3 (S.D.N.Y. Apr. 30, 1997), citing, Manning Energy Conversion Devices, Inc., 833

² In Threlkeld, the Second Circuit Court of Appeals reversed a district court that had converted a motion to compel arbitration into a motion for summary judgment, because the resolution of all reasonable inferences in favor of the non-moving party caused the district court to "los[e] sight of [the] presumption of arbitrability." Threlkeld, 923 F.2d at 248. The court stated that traditional summary judgment standards were inapplicable to the motion to compel arbitration, and that the district court should have decided the motion in light of the presumption to arbitrate and "simply as one to compel arbitration." Id. at 248-49.

This court respectfully believes that the Threlkeld holding is limited to cases in which the making of the agreement is not in dispute. In 1995, the Supreme Court, in First Options of Chicago, Inc. v. Kaplan, 115 S.Ct. 1920, 1924 (1995), clarified that arbitration is "simply a matter of contract between the parties." Thus, "[w]hen deciding whether the parties agreed to arbitrate . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contract." Id. The Supreme Court then stated that it has added an important qualification when a court is called upon to determine the existence of a contract. This qualification is that "courts should not assume that the parties agreed to arbitrate [an issue] unless there is clear and unmistakable evidence that they did so." Id., at 1924 (internal quotations and citation omitted). Due to this qualification, a court's treatment of an agreement to arbitrate differs from a court's treatment of whether a particular dispute is within the scope of the agreement. The first issue requires clear and unmistakable evidence of agreement to arbitrate, but for the latter question "the law reverses the presumption" in favor of arbitrability. Id. Thus, this court does not find the imposition of the required inferences for the non-moving party in a summary judgment motion to be troubling when the formation of a binding agreement is at issue.

F.2d 1096, 1103 (2d Cir. 1987), Doctor's Associates, Inc. v. Stuart, 85 F.3d 975, 980 (2d Cir. 1996) (applying summary judgment standard to motion to compel arbitration).

III. THE EXISTENCE OF A BINDING AGREEMENT TO ARBITRATE

A. Acceptance

ITT's distributed the Policy to its employees in early 1994. All employees, including Lepera, were requested to sign an acknowledgment of the Policy. The acknowledgment, which Lepera signed on April 5, 1994, is on a separate sheet of paper from the Policy, and reads, in full, "I acknowledge that I have received a copy of and have read this Policy." Lepera Acknowledgement, Ex. 3 to Def. Mot. to Compel Arbitration. A party's agreement to arbitrate must be clear and unmistakable before the court can enforce the agreement. First Options, 115 S.Ct. at 1924, citing, AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986). Lepera argues that his acknowledgment and receipt of the Policy is insufficient to meet this requirement.³

³ Lepera argues that there was no "meeting of the minds" with respect to a contract to arbitrate. However, disputes about meeting of the minds are fundamentally disputes about the terms of the bargain. Horowitz v. Federal Kemper Life Assur. Co., 946 F.Supp. 384, 392 (E.D.Pa. 1996), citing Corbin §4.13; Williston §4.1. If there is no ambiguity in the terms of the agreement, the agreement cannot fail because of an alleged lack of a meeting of the minds. Pennsylvania Data Entry Inc. v. Nexdorf Computer Corp., 762 F.Supp. 96 (E.D.Pa. 1990), citing Unionmutual Stock Life Ins. Co. of America v. Ben. Life Ins. Co., 774 F.2d 524, 529 (1st Cir. 1985). As there is no ambiguity in the terms of the Policy, Lepera cannot claim that there was no meeting of the minds. Rather, the court presumes that Lepera is arguing that he never accepted ITT's offer, and thus no contract was formed.

ITT responds that the Policy states that "[a]ll employees who continue employment after February 28, 1994 will be deemed to have accepted this Policy as the exclusive method to resolve Claims . . . and, therefore, will not litigate Claims in court[.]" Policy, Ex. 1 to Def. Motion to Compel. According to ITT, it is Lepera's continuing to work, rather than his receipt of the Policy, that constitutes his acceptance and forms a binding contract.

Initially, the court notes that there are no contested issues of fact related to the existence of the agreement. The terms of the Policy and acknowledgment are before the court and are not disputed, and both parties agree that Lepera continued to work after his receipt of the Policy. Therefore, this issue is appropriate for the court to decide as a matter of law.

Lepera was an at-will employee of ITT. "The New York Court of Appeals has consistently adhered to its at-will employment law doctrine[.]" Frishberg v. Esprit de Corp, Inc., 778 F.Supp. 793, 801 n.6 (S.D.N.Y. 1991), aff'd 969 F.2d 1042 (2d Cir. 1992). Under this doctrine, "an employer's right at any time to terminate an employment at will [is] unimpaired" barring constitutionally impermissible purpose, a statutory proscription, or an express limitation in the contract. Id. at 801. None of the exceptions to at-will employment are at issue in this case. Therefore, ITT had the right, as did Lepera, to terminate the employment relationship at any time.

Under New York law, an at-will plaintiff's "decision to continue working with [defendant] after . . . unilateral changes in

the employment relationship indicate[s] his acceptance of the new terms of the relationship." Id. at 803; see also Bottini v. Lewis & Judge Co., Inc., 621 N.Y.S.2d 753, 754 (N.Y.App.Div. 1995) ("Having remained in defendant's employment . . . plaintiff is deemed to have assented to the modification and, in effect, commenced employment under a new contract.").

However, as noted by Lepera, although "it is settled that the validity of an arbitration agreement is to be determined by the law applicable to contracts generally," Sablosky v. Gordon Co., Inc., 535 N.E.2d 643, 646 (N.Y. 1989) (citation omitted), the "threshold for clarity of agreement to arbitrate is greater than with respect to other contractual terms." Waldron v. Goddess, 461 N.E.2d 273, 275-76 (N.Y. 1984), quoting, Matter of Doughboy Indus., Inc. [Pantasote Co.], 233 N.Y.2d 488, 492 (N.Y.App.Div. 1962); see also First Option, 115 S.Ct. at 1924 (there must be clear and unmistakable evidence that a party agreed to arbitrate before they are bound to do so).

It is clear that, had the Policy related to altered compensation or benefits, Lepera's continuing to work would have constituted acceptance and reformed his employment contract. Thus, the question becomes whether, in light of the higher threshold imposed on arbitration agreements, Lepera's otherwise valid acceptance is invalid.

This court finds that Lepera clearly agreed to arbitrate his disputes with ITT. Lepera clearly and unequivocally continued to work after receipt of the Policy and explanatory memorandum; he did

not vacillate between working and not working. The Policy and accompanying memorandum set forth in unambiguous terms that Lepera was agreeing to arbitrate by continuing to work, and Lepera received and read those documents. The Policy also made clear that all employees who continued working would "not litigate Claims . . . in court or in judicial type proceedings," a fact reaffirmed by the memorandum, which stated that employees would be "giving up the ability to present their case in court to a jury[.]" Policy, Ex. 1 to Def. Mot. to Compel; Memorandum, Ex. 2 to Def. Mot. to Compel. Thus, there is no suggestion that Lepera was not notified that his acceptance of the Policy constituted a waiver of his right to a judicial forum. Cf. Nelson v. Cyprus Bagdad Copper Corp., ___ F.3d ___, No. 95-17083, 1997 WL 381177 at *4 (9th Cir. July 10, 1997) (employer's unilateral promulgation of employee handbook containing arbitration clause that did not give notice of waiver of right to judicial forum was not accepted by employee's continuing to work and signing an acknowledgement that he had read the handbook.)

Essentially, Lepera is arguing that, although his actions were clear and his acceptance express in light of the provisions of the Policy and memorandum, he cannot be held to an agreement to arbitrate unless his agreement was in writing. New York imposes no such requirement on contracts to arbitrate. In re American News Co., Inc., 130 N.Y.S.2d 554, 557 (N.Y.S.Ct. 1954); Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc., 334 F.Supp.

1013, 1020 (S.D.N.Y. 1971).⁴ Therefore, I find that Lepera accepted ITT's offer of continued employment with a arbitration provision in his contract when he continued working after he received the Policy. See Kennebrew v. Gulf Ins., CA No. 3-94-CV-1517-R, 1994 WL 803508 at *2 (N.D.Tex. Nov. 28, 1994) (arbitration agreement instituted during an at-will employee's employment is accepted when employee continues to work); Lang v. Burlington N. RR Co., 835 F.Supp. 1104, 1106 (D.Minn. 1993) (employee accepted new arbitration clause in employee handbook when he continued to work with knowledge of new clause).

B. Consideration

Lepera next argues that no contract was formed because he received no consideration for his agreement to arbitrate. As Lepera was an at-will employee, his contract was re-formed upon ITT's modification. See Bottini, 621 N.Y.S.2d 753, 754 (N.Y.App.Div. 1995). Consideration was received when he was paid for his work, just as under his prior contract. Novack v. Bilnor

⁴ Joseph Muller and American News were both written before the Supreme Court explicitly stated that a party must "clearly and unmistakably" agree to arbitrate. AT&T Tech. v. Communications Workers, 475 U.S. 643, 648-49 (1986). However, the Supreme Court in AT&T relied on principles that were "not new" and, indeed, "were set out by this Court over 25 years ago in a series of cases" published in 1960. Id. at 648, citing Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). Although American News was published in 1954, this court finds its holding -- that agreements to arbitrate can be accepted by performance and are not required to be accepted in writing -- persuasive.

Corp., 271 N.Y.S.2d 117, 118 (N.Y.App.Div. 1966).

C. Contract of Adhesion

Finally, Lepera claims that the Policy was a contract of adhesion, and that he is therefore not bound by it. Claims of contracts of adhesion "are judged by whether the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties." Sablosky, 535 N.E.2d at 647 (citations omitted). Nothing in the record before this court suggests that Lepera was prevented from reading the agreement or asking for an explanation before he continued working, or that he was subject to deceptive or high pressure tactics. Without any such allegations, Lepera's argument that the contract is one of adhesion fails. Morris v. Snappy Car Rental, Inc., 637 N.E.2d 253, 256 (N.Y. 1994). In addition, Lepera's claim fails because it "relates almost exclusively to the fact that the employment agreement was prepared by the employer or the employer's attorney. As noted by the Supreme Court, however, almost all employment contracts are prepared by the employer; that circumstance cannot render the arbitration clause contained in the contract unconscionable." Sablosky, 535 N.E.2d at 647.

Because ITT made a valid offer, the offer was clearly accepted by Lepera, consideration was given, and there is no contract of adhesion, a binding contract to arbitrate was formed between the parties.

IV. FEDERAL ARBITRATION ACT

The Federal Arbitration Act ("FAA") "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]" Moses H. Cone Hospital v. Mercury Construction, 460 U.S. 1, 24-25 (1983); see also Smith Barney v. Luckie, 647 N.E.2d 1308, 1312 (N.Y. 1995) (internal quotations and citations omitted) (The FAA requires "rigorous judicial enforcement of arbitration agreements and . . . resolution of any ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration."). The FAA represents a congressional declaration of a liberal federal policy favoring arbitration. Moses H. Cone, 460 U.S. at 24.

Lepera, however, contends that the FAA does not apply to him, because the FAA explicitly exempts from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Lepera claims that he is a worker engaged in foreign or interstate commerce.

Every circuit court of appeals which has examined this issue has held that the exception in § 1 of the FAA applies only to those workers who are engaged in the actual movement of goods in interstate commerce. Cole v. Burns Int'l Sec. Services, 105 F.3d 1465, 1471 (D.C.Cir. 1997), citing Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Tenney Engineering, Inc. v. United Elec., Radio & Machine Workers of America, 207 F.2d 450,

452 (3d Cir. 1953); Rojas v. TK Communications, Inc., 87 F.3d 745, 748 (5th Cir. 1996); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 600-01 (6th Cir. 1995); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984). In addition, the Third Circuit Court of Appeals, in Great Western Mortgage Corp. v. Peacock, recently reiterated its narrow interpretation of the exception, stating 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." Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 227 (3d Cir. 1997) (emphasis in original).

There is a dearth of case law on the status of pilots under the FAA's § 1 exception. In Trans World Airlines, Inc. v. Sinicropi, 887 F.Supp. 595, 609 n.13 (S.D.N.Y. 1995), aff'd 84 F.3d 116 (2d Cir. 1996), cert. denied, 117 S.Ct. 360 (1996) (citation omitted), the court noted, citing § 1, that "[c]ontracts of airline employees, however, are exempted from the Federal Arbitration Act." Similarly, in Herring v. Delta Air Lines, Inc., 894 F.2d 1020, 1023 (9th Cir. 1990), cert. denied, 494 U.S. 1016 (1990), the court held that the FAA did not apply to an action brought by Western Airlines pilots because "the statute specifically excludes from coverage 'contracts of employment.'" On the other hand, in Hart v. Orion Ins. Co., 453 F.2d 1358, 1359-60 (10th Cir. 1971) and Miller v. Nat'l Fid. Life Ins. Co., 588 F.2d 185, 186-87 (5th Cir. 1979), the courts applied the FAA to actions brought by pilots without mention of the § 1 exemption.

This court finds that Lepera, as a pilot engaged in interstate transportation, is excluded from coverage by the FAA. It is simply nonsensical to exclude from coverage those workers engaged in the direct transportation of goods, but not those engaged in the direct transportation of persons. Such a holding would lead to the absurd result that Lepera, and pilots like him, would be covered by the FAA if they were carrying only ITT executives, but would not be covered if those same executives gave them goods to carry, but choose not to accompany those goods on the flight.

In addition, "railroad employees" are explicitly exempted from FAA coverage. 9 U.S.C. § 1. I find it difficult to believe that, though "railroad employees" fall within the provision of § 1, those railroad employees who work only in passenger cars would not also be so categorized. This same rationale applies to pilots. Under the prevailing interpretation of the § 1 exception, pilots carrying only goods -- for example, pilots working for Federal Express or any other shipping company -- are clearly exempted from the FAA because they transport goods directly in the chain of commerce. It does not make sense to stratify pilots by their type of cargo, especially as the § 1 exception "may have arisen from some relatively narrow concerns over certain classes of workers[.]" DiCrisci v. Lyndon Guaranty Bank of New York, 807 F.Supp. 947, 953 (W.D.N.Y. 1992). Though courts correctly interpret the § 1 exclusion in an extremely narrow manner, such an interpretation cannot be so narrow as to be unreasonable. Consequently, Lepera is excluded from FAA coverage, and the overriding federal presumption

of arbitrability will not guide the court in its analysis of the Policy.

However, ITT and Lepera have bound themselves to the law of New York,⁵ which also "favors and encourages arbitration[.]" Westinghouse Electric Corp. v. NYC Transit Authority, 82 N.Y.2d 47, 53 (N.Y. 1993). Thus, regardless of the applicability of the FAA, the court will decide whether the issues in Lepera's complaint are within the scope of the Policy in light of a preference for arbitration.

V. SCOPE OF ARBITRATION POLICY

The Policy provides that ITT employees are bound to arbitrate all claims "arising out of the Employee's employment or termination[.]" The claims covered by the Policy are further defined in a sub-paragraph entitled "Claims Covered by this Policy," which states that "claims for wages or other compensation due; claims for breach of any contract or covenant; tort claims; claims for discrimination; . . . claims for denial of benefits; claims for violation of any federal, state, or other governmental law, statute, regulation or ordinance; and any other claims arising under common law" are included. Lepera does not dispute that the

⁵ Since I have held that the Policy is a binding contract, the choice of law provision within the Policy is equally valid as long as the provision is reasonable. See Restatement (Second) of Conflict of Laws, § 187(2) (1971). The parties here contracted that New York law would govern implementation of this Policy in all respects and at all locations. As explained above, New York has a substantial relationship to the Policy. Therefore, the parties' choice of New York law is reasonable.

scope of the policy covers his claims against ITT.

Lepera argues, however, that his tort claims against Prather are not arbitrable because they do not arise out of his employment. Neither party has cited, and the court has not found, any elucidation of the "arising out of" requirement based in New York law. However, the court finds instructive the federal courts' interpretation of the "arising out of" language when construing agreements under the National Association of Securities Dealers ("NASD") rules and the New York Stock Exchange ("NYSE") rules.⁶ In these contexts, the federal courts have routinely held that "a variety of tort claims, including defamation claims, are arbitrable as claims 'arising out of the employment' relationship . . . [if] the tort claims involve significant aspects of the employment relationship or . . . will require an evaluation of either the employee's or the employer's performance in the course of the employment relationship." Stone v. Pennsylvania Merchant Group, Ltd., 949 F.Supp. 316, 324 (E.D.Pa. 1996) (citations omitted).⁷

⁶ The importance of the words chosen by the parties in their agreement was recently emphasized by the Third Circuit Court of Appeals in Wyeth v. Cigna Int'l Corporation, Civ. A. No. 96-1653, 1997 WL 409449, *13, (3d Cir. July 23, 1997). In Wyeth, the court of appeals interpreted an agreement that used the term "arising in relation to," emphasizing that analogies could not be made to cases in which the agreement at issue used different language. Thus, by implication, this court's analogy to the NASD cases is appropriate, as the language in the NASD agreements and the language in ITT's Policy is identical.

⁷ This test was adopted by the Second Circuit Court of Appeals in Fleck v. E.F.Hutton Group, Inc., 891 F.2d 1047, 1052 (2d Cir. 1989), but that case involved federal law only and did not require the interpretation of New York law.

In this case, Lepera alleges first that Prather committed a battery upon him. The alleged battery took place off of ITT's property and involved a dispute over Prather's personal life. This claim does not involve significant aspects of Lepera and Prather's employment relationship; neither's performance on the job need be an issue to adjudicate the battery charge. Therefore, Count One of the complaint does not fall within the scope of the Policy and is not arbitrable.⁸

Counts Two, Three and Four are less clear. Count Two is for negligence, Count Three is for intentional infliction of emotional harm, and Count Four is for negligent infliction of emotional distress. In all three Counts, Lepera claims that Prather acted in conformity with the practices, policies and procedures of ITT. Complaint ¶¶ 34, 40, 45. In Counts Two and Four, Lepera states that, in his confrontations with Prather on July 27, 1994, Prather acted as Director of Aviation for Defendant ITT. Complaint ¶¶ 33, 45-46. However, in his later submissions to this court, Lepera argues that all counts against Prather "are personal and are so wholly beyond the scope of employment that they could not be deemed to arise out of plaintiff's employment." Pl. Resp. to Motion to Compel Arbitration, p. 11.

This court views Lepera's later submissions as clarifying his original pleadings, and making clear that Plaintiff does not intend

⁸The fact that the Policy explicitly applies to "tort claims" is not relevant, because the Policy makes clear that all claims, of whatever type, must arise from the employment before they are arbitrable.

to litigate his or Prather's performance in the course of their employment relationship. Therefore, resolution of the dispute between Lepera and Prather will not involve significant aspects of the employment relationship. An action by an employer "cannot be said to arise from employment just because the employment relationship was a 'but for' cause of the employer's dislike of the employee." Fleck, 891 F.2d at 1052.

There appear to be multiple reasons for the clash between Lepera and Prather, but neither Lepera nor ITT claim that Lepera's employment performance is at issue. Rather, this is a tale of two men who disliked each other but were forced to work together, and of the unpleasant and physically violent end to their relationship. As distasteful as the situation is, it cannot be said to arise from Lepera's employment. Therefore, Lepera's claims against Prather are not arbitrable.⁹

CONCLUSION

This court has determined that the parties agreed to be bound by the arbitration Policy, and that certain of Lepera's claims are within the scope of the Policy. This court has no room for discretion over those claims that fall within the scope of the Policy, and must direct Lepera and ITT to proceed to arbitration.

⁹Because Lepera has voluntarily clarified and narrowed his complaint in his response to the motion to compel arbitration, this court believes that Lepera will be estopped from presenting issues that involve significant aspects of the employment relationship at a later point in the litigation.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-28 (1985); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). However, the parties dispute whether the claims against Prather should be stayed or allowed to proceed.

"Where significant overlap exists between parties and issues, courts generally stay the entire action pending arbitration." Leopold v. Delphi Internet Services Corp., No. 96-4475, 1996 WL 628593 at *6 (E.D.Pa. Oct. 24, 1996), citing, Tenneco Resins, Inc. v. Davy Intern., 770 F.2d 416 (5th Cir. 1985). At the same time, the fact that arbitrable and nonarbitrable claims are factually intertwined is insufficient to require that the nonarbitrable claims be stayed. McMahon v. RMS Electronics, Inc., 618 F.Supp. 189, 192 (S.D.N.Y. 1985); see also Dean Witter, 470 U.S. at 222. "Where the arbitrable claims overwhelm or will have some affect on the non-arbitrable claims, the power to stay the non-arbitrable claims should be exercised." Leopold, 1996 WL 628593 at *6, citing, Allied Fire & Safety Equip. v. Dick Enterprises, 886 F.Supp. 491, 498 (E.D.Pa. 1995). In this case, though all of Plaintiff's claims arise from the same incidents, I will not stay Plaintiff's claims against Prather. The battery claim is clearly separate from the claims against ITT, and there is no reason why that claim cannot proceed concurrently with the claims against ITT. The adjudication of the remaining claims against Prather - negligence, intentional and negligent emotional distress - will not significantly overlap with the adjudication of those same claims against ITT, as the duties and standard for Prather's and ITT's

actions differ. Therefore, this court will allow the claims against Prather to proceed forthwith.

An appropriate Order is attached.