EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
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MADISON, WISCONSIN

Walter Witten
c/o Attorney Jeff Olson
131 W Wilson St Ste 1200
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Complainant

vs.

Firestone Complete Auto Care
7105 Mineral Point Rd
Madison WI 53717

Respondent

REVIEW ON THE RESPONDENT'S MOTION TO DISMISS

CASE NO. 20092026

EEOC CASE NO. 26B200900023

BACKGROUND

This is a review on the Respondent's Motion to Dismiss the allegations of the complaint for a Lack of Subject Matter Jurisdiction. The Complainant is Walter Witten. On February 24, 2009, Witten filed a complaint with the Madison Department of Civil Rights, Equal Opportunities Division (EOD). The complaint charged that the Respondent, Firestone Complete Auto Care, discriminated against the Complainant on the basis of age and in retaliation for the exercise of a right protected by the ordinance in violation of Equal Opportunities Ordinance sec. 39.03(8) and (9), Mad. Gen Ord. The Respondent denies retaliating against the Complainant and it denies discriminating against the Complainant on the basis of age. The Respondent asserts that it terminated the Complainant's employment due to poor work performance.

The Respondent filed a motion to dismiss the allegations of discrimination in employment for lack of subject matter jurisdiction on January 29, 2010. The Respondent argued that the Federal Arbitration Act requires the EOD to either dismiss or stay the case and to order the parties to submit to mediation and arbitration pursuant to the Respondent's "Bridgestone Retail & Commercial Operations, LLC Employee Dispute Resolution Plan."

On January 29, 2010, this matter was transferred to the Hearing Examiner to determine the jurisdiction of the EOD. The Hearing Examiner provided the parties with the opportunity to submit additional written arguments and documentation with respect to their positions on jurisdiction.

MEMORANDUM DECISION

Generally, the EOD is required to yield to federal law regarding the enforcement of arbitration agreements in employment contracts. However, there is no such requirement where an arbitration agreement is invalid and unenforceable.

Both the Complainant and the Respondent agree on the applicable standard used to determine the validity of an arbitration agreement. Namely, to be enforceable, the arbitration agreement must constitute a valid contract and the subject of the dispute must be covered by the agreement. See Leitner v. Morgan Tire & Auto, Inc., d/b/a Tires Plus, ERD Case No. CR200603454 (Nov. 29, 2007) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985)).

The Respondent contends that the Complainant's age discrimination and retaliation claims are covered by the arbitration agreement on page 2, section 2(D) of the 2003 Bridgestone Retail & Commercial Operations, LLC Employee Dispute Resolution Plan [hereinafter referred to as "2003 Plan"]. The Complainant does not refute this contention. However, the parties dispute the validity of the arbitration agreement.

Courts draw upon state contract principles in determining the existence of an arbitration agreement. See Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir. 1997) ("In determining whether a valid agreement arose between the parties, a federal court should look to the state law that ordinarily governs the formation of contracts"). The required elements of a valid contract are offer, acceptance, and consideration. See Gustafson v. Physicians Ins. Co. of Wis., Inc., 588 N.W.2d 363, 367 (Wis. Ct. App. 1998).

The Respondent argues that it made an offer of continued employment to the Complainant in exchange for acceptance of its 2003 Plan which included an agreement to submit to arbitration to resolve employment disputes covered by the Plan. The Respondent contends that the Complainant's continued employment with the company coupled with the fact that the Complainant received numerous benefits over the course of his continued employment demonstrates the Complainant's acceptance of the 2003 Plan. The Respondent also argues that the parties' agreement is supported by consideration marked by a mutual promise by both parties to arbitrate their disputes under the 2003 Plan. Not only that, but the Respondent contends that the company's promise to employ the Complainant in exchange for the Complainant's agreement to arbitrate all future disputes is further evidence of consideration.

The Complainant, on the other hand, argues that the 2003 Plan represents an invalid contract between the Complainant and the Respondent. The Complainant asserts that he signed an application for employment and an Agreement and Acknowledgement form in 2001 ("2001 Plan"). Later, in 2003, the Complainant argues that he was presented with, but did not sign, an agreement form with respect to the 2003 version of the Plan. The Complainant argues that the Respondent decommissioned the 2001 Plan and the Complainant never agreed to the 2003 Plan. The Complainant maintains that, since he did not sign the agreement form, he essentially did not accept this newly offered contract, and therefore the Respondent cannot hold him to it. As for lack of consideration, the Complainant maintains that his employment continued even after he declined to sign the form indicating acceptance of the 2003 Plan. Therefore, the Complainant argues that his continuation of employment did not constitute consideration as the Respondent claims.

The Hearing Examiner finds, however, that case law relied upon by the Respondent paints a different picture. The Respondent cites seven cases spanning four circuits with most of the cases taking place in the Eighth Circuit. Each case cited by the Respondent involves employment actions against Bridgestone/Firestone and all of the cases concern the validity of its arbitration agreement contained in either its 1995 Plan or its amended 2003 version of the Plan. See, e.g., Winfrey v. Bridgestone/Firestone, Inc., 1999 U.S. App. LEXIS 33616 (8th Cir.

1999), *aff'd*, 2007 U.S. App. LEXIS 22437 (8th Cir. 2007); Carter v. Firestone, 2006 U.S. Dist. LEXIS 27874 (E.D. Mo. 2006). Each of the courts in the seven cases cited by the Respondent found that the plaintiffs entered into a valid arbitration agreement.

Of the cases cited by the Respondent, Carter v. Firestone is of particular interest as that case is quite similar to the Complainant's case. 2006 U.S. Dist. LEXIS 27874 (E.D. Mo. 2006). In Carter, the plaintiff-employee began working for Bridgestone/Firestone Retail & Commercial Operations (BSRO) in 2003. Id. at *1. The plaintiff received a copy of the "Employee Information for Associations Handbook" which discussed the Employee Dispute Resolution (EDR) Plan and states that "employees who accept or continue employment with [BSRO] agree to be bound by the terms of the EDR Plan." Id. at *3. The Plan included "a requirement to adhere to the EDR Plan's mediation and arbitration procedures." Id. The plaintiff also received a copy of the EDR Plan and signed an "Agreement and Acknowledgement of Bridgestone/Firestone, Inc. Employee Dispute Resolution Plan." Id. at *1.

Thereafter, the plaintiff received a copy of BSRO's amended 2003 EDR Plan, but refused to sign the form acknowledging receipt of the amended plan. Id. at *3. Instead, the plaintiff "noted on the acknowledgment form, 'Refuse to sign,' followed by his signature." Id. at *4. About a year later, BSRO terminated the plaintiff's employment and the plaintiff instituted a civil rights action alleging racial discrimination. Id. The defendant filed a Motion to Dismiss or in the Alternative to Stay Proceedings and Compel Mediation and Arbitration. Id. at *4-5.

As in the case at hand, the plaintiff in Carter argued that he could not be bound to a contract with which he did not agree and did not sign. Id. at *5. However, the court disagreed and applied Missouri law in its conclusion that the plaintiff's "awareness of the terms, notwithstanding any disagreement with them, is the relevant factor in determining whether there was a meeting of the minds." Id. at *11. The court further held that under Missouri law the plaintiff's continued employment manifested intent to abide by the contract terms of which he was fully aware. Id. at n.5. The court did not find that the 1995 Plan terms differed substantially from the 2003 amended Plan. Id. at *8.

The argument that continued employment signifies agreement to arbitrate is not idiosyncratic to the Eighth Circuit. The Seventh Circuit has upheld arbitration agreements based upon an employee's continued employment. See Geldermann v. Commodity Futures Trading Commission, 836 F.2d 310 (7th Cir. 1987) (finding that a commodity broker "voluntarily" accepted arbitration mandated by the federal government because he could have chosen a different career in order to avoid arbitration).

In the case at hand, the Complainant was aware of the terms of the 1995 Plan when he began employment in August 2001. Similar to the plaintiff in Carter, the Complainant signed a form entitled "Agreements and Acknowledgments by Applicant," in which he agreed to be bound by the EDR Plan. As in Carter, the Respondent presented the Complainant with the amended Plan in July 2003, but the Complainant refused to sign or otherwise acknowledge the document. The terms of the 1995 Plan do not differ substantially from the terms of the 2003 Plan, as Respondent notes that the 2003 Plan contains minor differences all of which favor employees. This information coupled with the fact that, despite his disagreement with the 2003 Plan, the Complainant continued to work for the Respondent and reap the benefits, creates an inference of acceptance. While the Hearing Examiner is somewhat skeptical about the Respondent's contention that all revisions favor the employees, there is insufficient evidence at this time to

find that the Complainant's refusal to sign represents anything more than an attempt to rewrite history with respect to the arbitration provisions.

The Respondent asserts that the Complainant is equitably estopped from arguing that he should not be subject to the EDR Plan. The Court in Phillips Petroleum Co. v. Taggart held that "by accepting benefits a person may be estopped from questioning the existence, validity, and effect of a contract. A party will not be allowed to assume the inconsistent position of affirming a contract in part by accepting or claiming its benefits, and disaffirming it in part by repudiating or avoiding its obligations." 73 N.W.2d 482, 188-89 (Wis. 1956). See also Carroll v. Stryker Corp., 670 F. Supp. 2d 891, 898 (W.D. Wis. 2009) (finding that, despite the absence of the employee's signature on the compensation plan, a binding contract can be established through the employee's acceptance of benefits derived from continued employment).

The Complainant argues that valid consideration entails a benefit to the promisor or a detriment to the promisee and that the 2003 Plan is not a benefit to the Complainant because it precludes him from bringing his claim in other forums such as before the EOD. However, while the Plan dictates the forum in which an employee's claims must be brought, the employee's rights and remedies are not fully abridged as a result. The Summary Explanation of the Plan states on page vii in the Common Questions and Answers section that "an arbitrator has the same authority as a court or an administrative agency to award damages, but may only award damages to the extent allowed by the applicable law." Further, the Complainant has, among other rights, the right to be represented by counsel and to conduct discovery.

Accordingly, the Respondent satisfactorily demonstrated that it made an offer of employment to the Complainant predicated on his agreement to be bound by the 1995 Plan. The Complainant accepted this offer by accepting and continuing employment with the Respondent, despite his refusal to sign the amended 2003 version of the Plan. Further, the Complainant received consideration in the form of continued employment, receipt of a salary, bonuses, and a promotion, despite his refusal to sign the 2003 Plan.

Finally, the Complainant argues via the doctrines of novation and waiver that the 2003 Plan is unenforceable because the Respondent waived the right to enforce the agreement. Novation is triggered when an existing obligation is substituted with a new agreement or obligation. See Navine v. Peltier, 180 N.W.2d 613, 615 (1970). Further, novation depends on two factors: "(1) whether the facts show consent by the parties, and (2) whether there was sufficient consideration to support the new obligation." Siva Truck Leasing, Inc. v. Kurman Distribs., 479 N.W.2d 542, 546 (Wis. Ct. App. 1991). The Complainant asserts that, in 2003, the Respondent withdrew its existing EDR Plan, promulgated another one, and asked its employees to sign a form acknowledging and accepting the new plan. The Complainant contends that the Respondent replaced its old 1995 Plan with the new 2003 Plan; the Complainant refused to sign the new Plan; and the Respondent knowingly allowed the Complainant to continue his employment. Essentially, the Complainant argues that this acquiescence on the Respondent's part conferred a benefit on the Complainant in that he continued to receive the benefits of employment without being bound by the 2003 Plan. Thus, for the purposes of novation, the requisite consent and consideration are present.

The Respondent, however, denies that novation occurred, and maintains that the 2003 Plan simply amended the 1995 Plan and that any differences existing between the two plans are minor at best. Under the facts presented, it appears that novation did in fact occur, as the 2003 Plan effectively replaced the 1995 Plan. Although the Respondent argues that the 2003

Plan only amended the 1995 Plan, the fact remains that the 2003 Plan added new language to the 1995 Plan thereby substituting an existing obligation with a new agreement or obligation. Nevertheless, the fact that the Complainant did not sign this new agreement does not support the argument that the agreement is unenforceable, because a binding contract can be established through the employee's acceptance of benefits derived from continued employment. See Carroll, 670 F. Supp. 2d at 898.

Next, the Complainant argues that the Hearing Examiner should, in the alternative, find that the Respondent waived its right to hold the Complainant to the 2003 Plan. The Complainant asserts that, when he refused to sign onto the 2003 Plan, the Respondent could have taken steps to ensure that the Complainant acknowledged and accepted the Plan terms. Instead, faced with the Complainant's refusal to sign, the Respondent chose to allow the Complainant to continue his employment. Thus, according to the Complainant, the Respondent "voluntary[ily] and intentional[ly] relinquished a known right." Christensen v. Equity Coop. Livestock Sale Ass'n, 396 N.W.2d 762, 763 (Wis. Ct. App. 1986). Essentially, the Respondent gave up the right to enforce the 2003 Plan against the Complainant. The Complainant points out that, in order to find that the Respondent waived the right to enforce the 2003 Plan, actual intent to waive is not required, "but rather proof that the waiving party acted intentionally and with knowledge of material facts." Nugent v. Slaght, 638 N.W.2d 594, 597 (Wis. Ct. App. 2001). The Respondent argues that it never waived the right to enforce the 2003 Plan against the Complainant because under Carroll v. Styker Corp. a signature is not necessary to demonstrate a meeting of the minds, and the language of the 2003 Plan is mandatory rather than permissive. 670 F. Supp. 2d at 898.

The Complainant's argument is compelling, but the Federal Arbitration Act (FAA) makes it clear that arbitration is to be favored even when there are doubts about arbitrability. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) ("The arbitration act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is . . . an allegation of waiver, delay, or a like defense to arbitrability"). Accordingly, the arbitration agreement in this case should not be unenforceable on the grounds of novation and waiver.

For the aforementioned reasons, the Hearing Examiner finds that the 2003 Plan contains a valid and enforceable arbitration agreement.

Next, the Complainant further asserts that the 2003 Plan is invalid because it is procedurally and substantively unconscionable. As for the Plan's procedural unconscionability, the Complainant contends that the Plan was (1) drafted solely by the Respondent, (2) the Plan was never explained to the Complainant, (3) the Plan was presented in a non-negotiable manner, and (4) the Plan contained critical omissions and numerous surprises.

The Complainant argues that the Respondent was in a position of comparatively greater bargaining power. However, this is often the case with contracts of adhesion and this fact alone does not render the 2003 Plan *per se* unconscionable. Further, while the Plan may be difficult to understand, as the Complainant asserts, the Complainant remained free to ask questions about the Plan. Nothing in the record demonstrates that the Complainant failed to understand the Plan. Rather, on August 27, 2001, the Complainant signed a form entitled "Employment Information for Associates" which states "I understand that it is my responsibility to become familiar with the material contained therein and to request clarification on areas that I don't fully understand."

The Complainant also asserts that the Plan contains surprises such as the surrender of the Complainant's right to litigate in two valuable forums: administrative agencies with special expertise and jury trials. However, courts recognize the validity of the values exchange that occurs in adhesion contracts. In other words, courts often permit a party to give up certain benefits, such as choice of litigation forum, in exchange for other benefits, such as employment. See Hawkins v. Aid Assoc. for Lutherans, 338 F.3d 801, 808 (7th Cir. 2003) (finding that there is no constitutional right to a civil jury trial and the Appellants waived their right to a trial by jury and agreed to resolve their dispute via arbitration when they acquiesced to the terms and conditions of their contract).

Finally, the Complainant argues that the Plan is procedurally unconscionable because it was presented as non-negotiable. However, as mentioned above, this is often the case with contracts of adhesion and this alone does not render the Plan *per se* unconscionable.

As for the Plan's substantive unconscionability, the Complainant asserts that (1) the Plan terms are unreasonable and unfair, (2) the Plan forces employees to waive their legal rights including rights available under the Madison Equal Opportunities Ordinance and (3) the arbitration rules prejudice the Complainant.

While the Complainant argues that the Plan is overly broad because it applies to all manner of claims that might arise against the Respondent, the breadth of the Plan's terms is not enough to render it per se unconscionable. See Carbajal v. H&R Block Tax Serv., Inc., 372 F.3d 903, 905-06 (7th Cir. 2004) (acknowledging the breadth of the arbitration clause, but refusing to find it unconscionable, because "[a]rbitration is just a forum; people may choose freely which forum will resolve their dispute . . . [and] [t]he cry of 'unconscionable!' just repackages the tired assertion that arbitration should be disparaged as second-class adjudication"). The Hearing Examiner finds that only venue is affected by the Plan. The Complainant is free to assert any and all claims he may have against the Respondent and there is no constitutional right to a civil jury trial. Finally, the Complainant asserts that the arbitration rules prejudice the Complainant because the arbitrator will be paid entirely by the Respondent and that this could produce a biased tribunal. However, the Plan delineates an arbitration process where both parties choose a neutral arbitrator in hopes of assuring a fair hearing.

Accordingly, the Hearing Examiner finds that the 2003 Plan is neither procedurally nor substantively unconscionable and it is enforceable.

While the Hearing Examiner is not unsympathetic with the position of the Complainant with respect to enforcement of the EDR Plan, the Hearing Examiner is troubled by the Complainant's continued acceptance of the benefits of employment despite his knowledge of the new plan. Even if the Complainant does not believe that he should be held to the terms of the 2003 plan, he does not adequately explain why he should not, in the alternative, be held to the requirements of the 1995 plan which he signed and to which he acquiesced.

Under section 3 of the FAA, "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…shall on application of one of the parties stay the trial of the action . . ." 9 U.S.C. §3. While the FAA's language seems to mandate a stay, courts have interpreted section 3 to grant a court the discretion to dismiss a case in the proper circumstances. See Tupper v. Bally Total Fitness Holding Corp., 186 F. Supp. 981, 992-93 (E.D.

Wis. 2002) (dismissing a case pursuant to a motion seeking to compel an arbitration agreement in an employment contract because all of the issues raised were arbitrable and therefore staying the case served no purpose); Third Wave Technologies v. Mack, 2004 U.S. Dist. LEXIS 7643 at *13-14 (W.D. Wis. 2004) (granting plaintiff's motion for a stay pending resolution of arbitration pursuant to an employment agreement because dismissal would prevent the plaintiff from petitioning the court for injunctive relief).

Generally, it is appropriate to dismiss a case where all of the issues raised are covered by the arbitration agreement. See Tupper, 186 F. Supp. at 992. However, it is permissible to stay a case "in order to have a forum available for review of the arbitrator's decision, consistent with the role of a reviewing court, as if the case were pending in federal district court." Leitner v. Morgan Tire & Auto, Inc. d/b/a Tires Plus, ERD Case No. CR200603454 (11/29/07).

The Hearing Examiner finds that, in this case, it is appropriate to stay rather than dismiss the allegations of the complaint in order to ensure that the Complainant has a forum available for review of the arbitrator's decision. As the ordinance was adopted to reflect local concerns and to address local problems, it is important that the Commission and the Hearing Examiner retain some degree of jurisdiction to assure that those local concerns are resolved in a manner consistent with the intent and purposes of the ordinance. The Commission and the Hearing Examiner are in particularly well suited positions to provide such a review.

ORDER

IT IS HEREBY ORDERED that the allegations of age discrimination and retaliation are stayed. It is further ordered that the parties shall submit the allegations of the complaint to arbitration as mandated by the Respondent's 2003 Plan. The parties are further ordered to inform the Hearing Examiner of any resolution of the complaint including the need, if any, for further proceedings before the Commission, within 15 days of that resolution.

Signed and dated this 8th day of September, 2010.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Jeff Scott Olson
Laura C Garofolo