

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

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MINGO COUNTY CIRCUIT CLERK

ANITA COLLINS
PLAINTIFF,

v.

Civ. Act. No.: 16-C-214
Hon. Miki Thompson

EMPLOYEE RESOURCE GROUP, LLC,
DAVID CURRY and JAMES MOLLETTE, individually,
DEFENDANTS.

ORDER DENYING DEFENDANTS' MOTION TO ENFORCE ARBITRATION

On November 2, 2017, came the Plaintiff, Anita Collins ("Plaintiff"), and the Defendants, Employee Resource Group, LLC, David Curry, and James Mollette (together, "Defendants"), by their respective counsel, for a Hearing on Defendants' Renewed Motion to Enforce Arbitration. The Court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff, Anita Collins, was employed by Defendant, ERG, from approximately April 24, 2016, until November 3, 2016. (*Pl. Compl.* ¶ 9). As part of her employment, Defendant asserts that Ms. Collins was required to sign its Arbitration Agreement to be considered for employment at Wendy's in Goody, Kentucky which ERG owned. Specifically, the Arbitration Agreement stated that it was a "Condition of your employment." Plaintiff's **Exhibit A**, p.1.

2. The Arbitration Agreement as presented by Defendant ERG indicates that Ms. Collins was to sign the Agreement to be bound by its terms. The Agreement provided a place for Ms. Collins to sign; however, there was no electronic signature. Rather, Ms. Collins' name was prestamped into the signature block which she indicates she did not provide. Defendants' agent, Teresa Johnson did sign the Agreement. Plaintiff's **Exhibit B**, p.2.

3. During the course and scope of her employment, Ms. Collins asserts that she was subject to sexual harassment at the hands of Defendant Mollette. Further, Ms. Collins asserts that she reported Defendant Mollette's behavior to Defendant Curry. Defendant Mollette was Ms. Collins' supervisor, while Defendant Curry was supervisor of both Ms. Collins and Defendant Mollette. Ms. Collins asserts that Defendant Curry took no action to protect her from the sexual harassment of Mollette. (*Complaint*, 9-21). Defendants dispute the facts as alleged by Plaintiffs.

3. On November 30, 2017, Plaintiff filed a Complaint against Defendants alleging two violations of the Kentucky Civil Rights Act, common law termination, extreme and outrageous conduct, and negligent supervision/retention of a supervisor. *See generally Complaint*.

4. Defendants answered Plaintiff's Complaint on December 19, 2016, and on February 14, 2017, filed the Motion to Enforce Arbitration.

5. On May 22, 2017, the Court denied Defendant's Motion to Enforce Arbitration; however, permitted Defendant to renew its arguments after meaningful discovery had been conducted by the parties.

6. After the May 22, 2017, hearing, the parties engaged in discovery whereby depositions of both the Plaintiff and ERG supervisor, Michael Ball occurred.

7. In her deposition, the Plaintiff maintained that although she sought and received employment from ERG, she never signed nor saw an Arbitration Agreement as part of that process.

8. In his deposition, Mr. Ball asserted that he routinely conducted orientation for new hires at ERG, at that as part of the process, once an individual is hired, ERG's program,

Talent Reef, generates new hire paperwork which is then emailed to the employee by Mr. Ball.

9. Ms. Collins provided her yahoo email account at the time of hire.

10. According to Mr. Ball, the employee is supposed complete the new hire paperwork at home. The employer provides little if any direction to the new hired employee as how to complete the paperwork.

11. As part of her deposition, Ms. Collins indicated that her yahoo email account had been inactive for nearly eight (8) months prior to the deposition.

12. In an attempt to prove that Ms. Collins did indeed receive and submit the subject arbitration agreement, ERG issued a subpoena to Yahoo to retrieve the relevant emails from Ms. Collins' account.

13. In an effort to help ERG in its search, Ms. Collins then signed a release from Yahoo allowing ERG access to the emails it sought and believed existed.

14. Although ERG had issued a subpoena and had a signed release, it failed to produce any email showing that Ms. Collins had received and submitted to the subject Arbitration Agreement.

15. ERG then attempted to retrieve the emails from its own hiring program, Talent Reef, and was unable to recover any emails showing that Ms. Collins had received or submitted to the Arbitration Agreement.

16. ERG did produce an Arbitration Agreement which had Ms. Collins' typed name in a digital signature box in seven (7) distinct locations all dated for April 24, 2016, and that the time of 1:12:25 PM EDT.

17. In his deposition, Mr. Ball indicated that Ms. Collins' digital signature was a mere pre-stamp of her name to the document by the Talent Reef Program.

CONCLUSIONS OF LAW

18. In its original motion, Defendant argues that arbitration agreements are subject to the Federal Arbitration Act, 9 U.S.C. §1, et seq. ("FAA"). Plaintiff is in agreement that valid arbitration agreements are subject to the FAA. Further, the parties are also in agreement that "under the FAA, whether a valid arbitration agreement exists between the parties is determined by the applicable state contract law which, in this case, is Kentucky."

19. The Kentucky Supreme Court has repeatedly held that arbitration agreements are not to be treated differently than any other contract. The validity of an arbitration clause is a matter of contract law and should be reviewed with reference to state law of contract formation. *Seawright v. Am. Gen. Fin. Servs.*, 507 F.3d 967, 972 (6th Cir.2007). Thus, in order to maintain an enforceable arbitration agreement there must first and foremost be an enforceable contract.

I. Defendants' Arbitration Agreement is not an Enforceable Contract

20. *"Not an Employment Contract:* While this Program constitutes a binding promise between you and the Company to arbitrate all claims in dispute in this Program Booklet, this Program is not and shall not be construed to create any contract of employment, expresses or implied. (See Plaintiff's Exhibit A at p. 1) ;(See also, Plaintiff's Exhibit B, p.2 *Not an Employment Contract*). Thus, Plaintiff argues, the Agreement is not a proper contract and cannot be used to compel arbitration.

21. Defendants argue that this paragraph only means that the document does not create an employment agreement, and that the paragraph was intended to clarify that Plaintiff's status as an at-will employee is unchanged by the Agreement.

22. For Defendants to argue that the statement “*Not an Employment Contract*: While this Program constitutes a binding promise between you and the Company to arbitrate all claims in dispute in this Program Booklet, this Program is not and shall not be construed to create any contract of employment, expresses or implied,” does not create an enforceable contract, at best, creates an ambiguity which must be interpreted in favor of Plaintiff.

23. The interpretation of a contract, including determining whether a contract is ambiguous, is a question of law for the courts. *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381 (2002).

24. As the Kentucky Supreme Court stated in the case of *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633 (2007) ambiguity found in contract language is to be construed against the drafter, and further, the contract must be liberally construed in favor of the non-drafting party. In other words, the ambiguous terms should be construed in such a manner as to effectuate the intentions of the parties, but where the evidence pertaining to the parties’ intent conflicts, the ambiguous terms should be construed against the party who drafted the document.

25. Kentucky law dictates that as a matter of general contract law, an individual cannot be legally bound by an agreement to which she did not consent. See *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009) (holding that assent to be bound by the terms of an agreement must be expressed and simple acknowledgment of the receipt of the document is insufficient).

26. In the instant matter, it is clear that parties’ intention to enter into a contract are conflicting. The Defendants assert that it presented Plaintiff with a form Agreement as part of her employment, while the Plaintiff contends she was not presented the Agreement as part of her orientation process, and thus was not aware of the terms of the Agreement and could not assent to the same.

27. Kentucky law dictates that acknowledgement of the receipt of a document is insufficient to bound a party to that document, and at best, Defendant ERG has Plaintiff's pre-stamped name on its Agreement.

28. The party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. *Ping v. Beverley Enterprises, Inc.*, 376 S.W.3d 581, 590 (Ky. 2012); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004).

29. A party meets that prima facie burden by providing copies of a written and signed agreement to arbitrate. *MCH Kenworth-Knoxville/Nashville v. M & H Trucking, LLC*, 392 S.W.3d 903, 906 (2013).

30. Unless the parties clearly and unmistakably manifest a contrary intent, that initial showing is addressed to the court, not the arbitrator, and the existence of the agreement depends on state law rules of contract formation. *Id.*; *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31, 129 S.Ct. 1896, 1908, 173 L.Ed.2d 832 (2009).

31. In the instant case, although it has attempted to retrieve proof of an agreement between the parties from Plaintiff, Yahoo, and Talent Reef, ERG cannot conclusively produce a signed agreement between the parties, thus, it cannot meet its necessary burden to compel arbitration.

32. Further, it is clear when applying Kentucky law, a party cannot be bound to an agreement to which it did not consent, and mere acknowledgment of a receipt of document is not enough to bind a party to this Agreement.

II. Plaintiffs' Claims Are Outside the Scope of the Agreement

33. Plaintiff argues that because ERG's attempt to pick and choose which disputes it wishes to arbitrate, ERG seemingly asserts its own definition of "non-legal" disputes into the

Agreement, and which it agrees may be brought in circuit court. See Plaintiff's Exhibit A, p. 5.

34. Among ERG's "non-legal" disputes which it states are not subject to arbitration are "issues with co-workers." *Id.* ERG is likely to argue that it attempts to define "non-legal" disputes as those which are not statutory or common law in Step Two of its Agreement; however, it is clear that "issues with co-workers" is contained in ERG's definition of non-arbitrable disputes.

35. This Court agrees with Plaintiff and finds that Plaintiff's claim's that revolve around issues with co-workers are excluded from the Agreement.

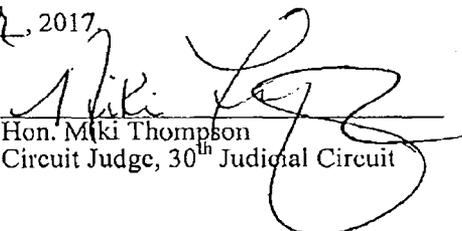
36. Therefore, the Court finds that no enforceable contract exist between the Plaintiff and the Defendants. However, even if a contract was formed, the claims Plaintiff has brought forth in her Complaint against her co-workers are excluded by ERG in its "Agreement."

37. The Court notes that Defendants object to and makes exceptions to the entirety of the Court's Conclusions of Law. The Court notes that this is a legal ruling, which is immediately appealable.

WHEREFORE, for the above-stated reasons, this Court hereby **ORDERS** that Defendants' Renewed Motion to Enforce Arbitration is **DENIED**.

The Clerk is directed to send certified copies of this Order to all parties or counsel of record.

ENTERED: 5th day of December, 2017.


Hon. Miki Thompson
Circuit Judge, 30th Judicial Circuit

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