

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JIMMIE CLAYTON,

Plaintiff,

v.

CLEAR CHANNEL METROPLEX, INC.,

Defendant.

OPINION AND ORDER

00-C-0511-C

This is a civil action for monetary relief in which plaintiff Jimmie Clayton contends that defendant Clear Channel Metroplex, Inc. violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2000e(17). Specifically, plaintiff alleges that defendant fired him because he is an African-American man who is married to a white woman and because he had complained to defendant that its allocation of resources was racially discriminatory.

Now before the court is defendant's motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6) or, alternatively, to stay the case and compel arbitration or to transfer the case because it is improperly venued

here. Also before the court is plaintiff's motion for leave to file a supplemental declaration in opposition to defendant's motion.

As an initial matter, I note that when the parties were briefing defendant's motion, both of them referred to matters outside the pleadings that they had filed. Defendant filed the arbitration agreement at issue in this case, along with parts of the record of the administrative proceedings and a copy of an offer of employment from defendant addressed to plaintiff. Plaintiff filed additional portions of the administrative record, including a transcript of the proceedings. In addition, plaintiff has requested permission to supplement these submissions with a declaration of his counsel summarizing the administrative proceedings.

Under Fed. R. Civ. P. 12(b), when a motion is made pursuant to Fed. R. Civ. P. 12(b)(6) and is supported by matters outside the pleadings that the court chooses to consider in connection with the motion, the court must convert the motion to one for summary judgment and give the opposing party a reasonable opportunity to present "all material made pertinent to such a motion by Rule 56." In this case, it is necessary to consider the terms of the arbitration agreement and the record of the administrative proceedings the parties have submitted in connection with defendant's motion. Therefore, the motion must be converted. A grant of plaintiff's motion to file a supplemental declaration will satisfy the court's obligation to allow plaintiff a reasonable opportunity to

submit all materials pertinent to the motion.

With respect to the defendant's motion, I conclude that venue is proper in this district. In addition, I conclude that defendant did not waive its right to demand arbitration by failing to raise the issue in the administrative proceedings and that defendant's motion for summary judgment must be granted because the parties' agreement precludes plaintiff from raising his claims in this court.

From the declaration, exhibits and pleadings filed by the parties, I find the following facts to be undisputed.

UNDISPUTED FACTS

Plaintiff Jimmie Clayton is an African-American man married to a white woman. Defendant Clear Channel Metroplex, Inc. is a domestic or foreign corporation and owner of WKKV radio station in Greenfield, Wisconsin. Plaintiff was employed at defendant's WKKV station from March of 1996 to September of 1998.

On May 1, 1998, plaintiff and defendant entered into an arbitration agreement. The agreement states in pertinent part:

employees give up their right to sue the Company, and the Company is giving up its right to sue employees in court, as well as the right to trial by jury. Instead, the Company and employees hereby agree that any legal claim or dispute that either may hereafter have against or with the other will be submitted solely to a private, impartial arbitrator (a "private judge," so to speak) for a final and binding decision.

...

The Agreement covers the following potential claims:

...

4. Any claim for discrimination, including but not limited to discrimination because of sex, pregnancy, race, national or ethnic origin, age, religion, creed, marital status, sexual harassment, sexual orientation, mental or physical disability or medial condition or other characteristic protected by statute;
5. Any claim of retaliation or discrimination against the Company for opposing the violation of any federal, state or local statute or ordinance, including but not limited to the Fair Labor Standards Act, Title VII of the Civil Rights Act pf 1964

On November 12, 1998, plaintiff filed a complaint with the Equal Rights Division of the Department of Workforce Development. Plaintiff alleged that defendant had violated the Wisconsin Fair Employment Act by discriminating in the terms and conditions of plaintiff's employment because of his race, and by discriminating against him because he opposed a discriminatory practice. Filing with the Equal Rights Division filing had the effect of filing the same complaint with the United States Equal Employment Opportunity Commission.

After the matter before the Equal Rights Division was dismissed for lack of probable cause, plaintiff filed an appeal on the probable cause issue and obtained a hearing before an Equal Rights Division administrative law judge on March 16, 2000. On April 20, 2000,

after the Equal Rights Division hearing had been held but before a decision had been issued, plaintiff withdrew his appeal of the finding of no probable cause in order to proceed in federal court. On April 21, 2000, the administrative law judge granted plaintiff's voluntary dismissal of his appeal. Defendant never mentioned the arbitration agreement during the administrative proceedings.

Plaintiff then filed the present action in this court, alleging violations of his rights under Title VII.

OPINION

A. Venue

Defendant argues that the Eastern District of Wisconsin is the proper venue under 28 U.S.C. § 1391, the general federal venue statute. Section 1391's provisions apply in civil actions not founded solely on diversity of citizenship "except as otherwise provided by law." However, plaintiff filed this action under Title VII, which contains its own venue provision. Johnson v. Payless Drug Stores Northwest, Inc., 950 F.2d 586, 587 (9th Cir. 1991). Suits for violations of Title VII of the Civil Rights Act "may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed." 42 U.S.C. § 2000e-5(f)(3). The parties do not dispute that the unlawful employment practices alleged in this case were committed in Wisconsin. Thus, plaintiff was free to file

his action in either the Western District of Wisconsin or the Eastern District of Wisconsin. The case is properly venued here. Defendant's motion to dismiss for improper venue or, alternatively, to transfer the case to the Eastern District of Wisconsin will be denied.

B. Waiver

Defendant next argues that this case should be dismissed because the arbitration agreement plaintiff signed precludes him from filing his lawsuit in federal court. Plaintiff objects to this motion, contending that because defendant failed to raise the arbitration issue in the administrative proceedings, it has waived its right to do so now.

The arbitration agreement plaintiff and defendant entered into is subject to the Federal Arbitration Act. The Federal Arbitration Act represents "a strong federal policy favoring arbitration as a means of dispute resolution." Morrie Mages & Shirlee Mages Foundation v. Thrifty Corp., 916 F.2d 402, 405 (7th Cir. 1990). The act provides that a written agreement to arbitrate a dispute arising out of a contract or a transaction involving commerce "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.

Waiver of the right to arbitration is a ground on which a federal court may refuse to enforce an arbitration agreement. St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Company, Inc., 969 F.2d 585, 587 (7th Cir. 1992). The matter is

largely discretionary and will be overturned only in the presence of clear error. Id. at 589. The essential question in determining waiver is whether in light of all the circumstances, the allegedly defaulting party has acted inconsistently with the right to arbitrate. Id. at 588. The presumption of arbitrability applicable in cases involving the Federal Arbitration Act dictates that "as 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 construction of contract language itself or allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983).

In support of its contention that defendant has waived its right to arbitration, plaintiff relies on two cases, Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388 (7th Cir. 1995), and St. Mary's Medical Center of Evansville, Inc., 969 F.2d 585. In both cases, the court of appeals held that the defendant had waived its right to arbitration. In both cases, however, the defendants had participated in litigation in federal court for months before asserting their right to arbitration. In Cabinetree, defendant had proceeded with state court litigation, removed the case to federal court and litigated there for months before demanding arbitration. Cabinetree of Wisconsin, Inc., 50 F.3d at 389. The Court of Appeals for the Seventh Circuit held that "an election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the

right to arbitrate." Id. at 390. In St. Mary's, the defendant had participated in litigation before a federal court for ten months before mentioning arbitration. The court stated that "the defendants had waived their right to arbitration for three reasons: the defendants' delay in demanding arbitration; their participation in discovery; and their decision to file their motion to dismiss" without mentioning arbitration in the motion. St. Mary's Medical Center of Evansville, Inc., 969 F.2d at 587. None of these circumstances is present in this case.

Defendant asserted its right to arbitration in direct response to the initiation of litigation in this court, rather than litigating first. Plaintiff has cited no support for its contention that the failure to request arbitration during proceedings before the Equal Rights Division waives the right to arbitration. I see no apparent reason why it should. In neither St. Mary's nor Cabinetree did the court of appeals suggest that a party loses its right to arbitrate even if it waits until a suit has been filed against it. The court did say in Cabinetree that ordinarily invocation of a nonarbitral forum will operate as a waiver of arbitration; it did not say that going through an an Equal Rights Division or EEOC proceeding would operate in the same way. Indeed, in light of the fact that an arbitration agreement is no defense to a proceeding before the EEOC, it would have been fruitless for defendant to have asserted its agreement in the Equal Rights Division forum. See Brennan v. King, 139 F.3d 258, 263 (1st Cir. 1998) (arbitration agreement is not relevant defense before EEOC). See also Brown v. ITT Consumer Financial Corp., 211 F.3d 1217, 1223 (11th Cir. 2000)

(upholding district court's decision that defendant had not waived its right to arbitration by failing to raise the arbitration issue with Equal Employment Opportunity Commission).

The facts show that plaintiff agreed to arbitrate any claim against defendant for discrimination because of race protected by statute and any claim of retaliation or discrimination against the defendant for opposing the violation of any federal, state or local statute or ordinance, including but not limited to Title VII of the Civil Rights Act of 1964. I conclude that because this dispute is subject to an arbitration agreement and because defendant has not waived its right to demand arbitration under the agreement, defendant's motion for summary judgment must be granted.

ORDER

IT IS ORDERED that

- 1) Defendant's motion to dismiss for improper venue or, alternatively, to transfer the case to the Eastern District of Wisconsin is DENIED;
- 2) Plaintiff's motion for leave to file a supplemental declaration is GRANTED;
- 3) Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is converted to a motion for summary judgment; and
- 4) Defendant's motion for summary judgment is GRANTED.

The clerk of court is directed to enter judgment for defendant and to close this case.

Entered this 10th day of August, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge