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

KARLA J. HANKEE,

Plaintiff, OPINION AND ORDER

v. 01-C-661-C

MENARD, INC.,

Defendant.

Plaintiff Karla J. Hankee has sued defendant Menard, Inc. for alleged employment discrimination on the basis of sex, pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2000e-17. Presently before the court is defendant's motion to dismiss the complaint for lack of jurisdiction and to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Defendant contends that plaintiff is bound by a provision in her employment contract that requires her to submit her claims against defendant to binding arbitration. In response to defendant's motion, plaintiff contends that the contract is invalid and unenforceable; in the alternative, she contends that defendant waived its right to insist on arbitration by failing to raise the issue during pre-suit proceedings before the Wisconsin Equal Rights Division and the Equal Employment Opportunity Commission. Because I find that the arbitration agreement is valid and enforceable and defendant has asserted its right to arbitration in a timely fashion, defendant's motion will be granted.

In deciding a motion to dismiss, the court must assume all facts alleged in the complaint to be true, construe the allegations liberally and view the allegations in the light most favorable to the plaintiff. Wilson v. Formigoni, 42 F.3d 1060, 1062 (7th Cir. 1994). Dismissal is properly granted if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Cushing v. City of Chicago, 3 F.3d 1156, 1159 (7th Cir. 1993). Because a motion to compel arbitration is essentially a claim that the court lacks subject matter jurisdiction, it is proper for the court to consider matters beyond the allegations in the complaint. Capitol Leasing Co. v. Federal Deposit Insurance Corp., 999 F.2d 188, 191 (7th Cir. 1993) (court may look beyond allegations to submitted evidence when deciding whether jurisdiction exists). For the sole purpose of deciding the motion to dismiss, I find the following facts from the complaint and the record.

FACTS

Plaintiff began working for defendant in July 1997 as an assistant manager. On December 30, 1998, plaintiff signed a one-page "Employment Agreement." The agreement contains a clause that provides as follows:

> **Remedy.** I agree that all problems, claims and disputes experienced within my work area shall first be resolved as outlined in the Team Member Relations section of the Grow With Menards Team Member Information Booklet which I have received. If I am unable to resolve the dispute by these means, I agree to submit to final and binding arbitration . . . Problems, claims or disputes subject to binding arbitration include, but are not limited to: Statutory claims arising under the Age Discrimination in Employment Act, Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, Title I of

> the Civil Rights Act of 1991, Americans with Disabilities Act, Family Medical Leave Act and Non-Statutory claims such as contractual claims, quasi-contractual claims, tort claims and any and all causes of action arising under state laws or common law.
>
> These claims shall be resolved by binding arbitration by the American Arbitration Association ("AAA") located at 225 North Michigan Avenue, Suite 2527, Chicago, IL 60601-7601 under its National Rules for the Resolution of Employment Disputes. A copy of the Code, Rules and fee schedule of the American Arbitration Association may be obtained by contacting it at the address listed above . . .
>
> Menard, Inc. is engaged in commerce using the U.S. Mail and telephone service. Therefore, the Agreement is subject to the Federal Arbitration Act, 9 U.S.C. Sections 1-14 as amended from time to time.

In addition, the Agreement includes the following language just above plaintiff's signature:

> **THIS DOCUMENT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES. I HAVE READ THIS ENTIRE AGREEMENT AND I FULLY UNDERSTAND THE LIMITATIONS WHICH IT IMPOSES UPON ME, AND I UNDERSTAND THAT THIS AGREEMENT CANNOT BE MODIFIED, EXCEPT BY THE PRESIDENT OF MENARD, INC.**

Plaintiff filed a charge of sexual harassment and retaliation with the Wisconsin Equal Rights Division in February 2000. Plaintiff and defendant participated in the Equal Rights Division's investigation, with both sides submitting documentation and taking depositions. After efforts to settle the dispute were unsuccessful, plaintiff requested the Equal Rights Division to adjourn its proceedings pending her request for a right to sue letter from the Equal Employment Opportunity Commission. The commission issued plaintiff a right to sue letter on September 6, 2001.

On November 27, 2001, plaintiff filed her federal complaint. She alleges that defendant's store manager engaged in a course of sexual harassment against her and others and retaliated against her after she complained. On January 24, 2002, in lieu of filing an answer, defendant filed the instant motion to dismiss.

OPINION

The Federal Arbitration Act authorizes the district court to issue an order compelling arbitration when one party has failed or refused to comply with an arbitration agreement. See 9 U.S.C. §§ 3 and 4. These provisions "manifest a 'liberal federal policy favoring arbitration agreements.'" E.E.O.C v. Waffle House, Inc., 122 S. Ct. 754, 762 (2002) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991)). Arbitration agreements in employment contracts are enforceable under the Federal Arbitration Act. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 113-118 (2001). As the party opposing arbitration, plaintiff bears the burden of proving that her claims are not suitable for arbitration. See Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 91 (2000).

I. ENFORCEABILITY

Plaintiff contends that the arbitration agreement is invalid and unenforceable because it violates public policy and deprives her of certain constitutional rights. Plaintiff argues that she was "forced" to waive her statutory rights under Title VII in exchange for employment;

she was deprived of equal protection because she was "unfairly put in a class opposed to those who contract with employers who do not require the arbitration clause as a condition precedent to employment;" and the arbitration procedures are inadequate to protect her substantive rights. In addition, plaintiff argues that this court should defer to Wisconsin law and find that employment contracts are exempt from the rule that arbitration agreements are enforceable.

Plaintiff's policy arguments merit little discussion. Besides the fact that plaintiff has not developed her arguments sufficiently to permit informed review, such anti-arbitration arguments have long been put to rest by the United States Supreme Court. The Court has rejected arguments that "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," finding them to be "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." Gilmer, 500 U.S. at 30 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)). Applying this deference to arbitration in Gilmer, the Court rejected plaintiff's contention that arbitration was inadequate to protect his rights under the Age Discrimination in Employment Act of 1967 and held that claims arising under that statute could be subject to compulsory arbitration. Gilmer, 500 U.S. at 26. The Court specifically rejected the same argument made by plaintiff that an arbitration agreement forces a party to give up substantive rights. As the Court explained, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the

substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" 500 U.S. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler--Plymouth, Inc., 473 U.S. 614, 628 (1985)); see also Circuit City, 532 U.S. at 123 ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law . . .").

Plaintiff has not adduced any evidence to support her claim that the arbitration procedures are inadequate to protect her substantive rights. Plaintiff asserts that she will have to bear the costs of arbitration, which she estimates will cost between five thousand and seven thousand dollars. However, plaintiff has failed to back up her claim of prohibitive costs with any evidence. In Green Tree Financial Corp., 531 U.S. at 90-91, the Court found that an supported claim based solely on "[t]he 'risk' that [plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." Accordingly, because there is no evidence in the record showing how much it will cost plaintiff in this case to arbitrate her claims, there is no basis to invalidate the arbitration agreement for cost reasons. Further, the arbitration agreement states that all claims will be decided according to the rules of the American Arbitration Association. The AAA Rules specify that the range of remedies available to an arbitrator is at least co-extensive with the range of remedies available in court and that the arbitrator may award the reimbursement of a representative's fees as part of the remedy. American Arbitration Association, National

Rules for the Resolution of Employment Disputes, Jan. 1, 2001, at ¶ 34 (attached to Supp. Aff. of Andrew Brown, dkt. #16). The AAA may also defer or reduce administrative fees in the event of extreme hardship on a party. Id. at ¶ 38. These rules undermine plaintiff's claim regarding fees. They also undermine plaintiff's assertion that the arbitration agreement is insufficient to protect her substantive rights because it provides no "guidelines" regarding damages, including front pay. Finally, although it is true that the Federal Arbitration Act does not permit appellate review of an arbitrator's award, a party may bring a federal court action to vacate the award if the arbitrator engaged in misconduct or exceeded her powers. 9 U.S.C. § 10; see also Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 232 (1987)"[W]e have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.").

Next, plaintiff contends that the employment agreement is void because there was no "meeting of the minds" between plaintiff and defendant. Although plaintiff casts her argument in terms of the doctrines of mutuality and consideration, in contending that she had no choice but to sign the agreement or face losing her employment at Menard, she is raising the argument that the contract is void as an unconscionable contract or a contract of adhesion.

To determine whether an arbitration agreement is valid, the court looks to the state law that governs contract formation. Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir. 1997). Because plaintiff was employed in Wisconsin, the court looks to Wisconsin contract law principles. Id. In general, Wisconsin courts define unconscionability as "the absence of a meaningful choice on the part of one party, together with contract terms that are unreasonably favorable to the other party." First Federal Financial Service, Inc. v. Derrington's Chevron, Inc., 230 Wis. 2d 553, 558, 602 N.W.2d 144, 146-47 (1999) (quoting Leasefirst v. Hartford Rexall Drugs, Inc., 168 Wis.2d 83, 89, 483 N.W.2d 585, 587 (Ct. App.1992)). Stated differently, "[a] contract is unconscionable when no decent, fair-minded person would view the result of its enforcement without being possessed of a profound sense of injustice." Foursquare Properties Joint Venture I v. Johnny's Loaf & Stein, Ltd., 116 Wis. 2d 679, 681, 343 N.W.2d 126 (Ct. App. 1983).

Plaintiff's contention that the Employment Agreement was unconscionable has no merit. Contrary to plaintiff's suggestion, she did have a choice: she could have rejected the terms of the agreement and found employment elsewhere. Plaintiff has submitted no evidence to suggest that there were no other employers in the Eau Claire area for whom she could have worked. (For this same reason, there is no merit to plaintiff's claim that she was denied equal protection.) Further, plaintiff has not alleged and has not adduced any evidence to show that she was coerced or defrauded into agreeing to the arbitration provision. Although the Supreme Court has indicated that "courts should remain attuned

to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract," it has cautioned that a naked claim of "unequal bargaining power," like the one plaintiff raises here, is not a reason to invalidate arbitration agreements in the employment context. Gilmer, 500 U.S. at 33 (citation omitted). Moreover, plaintiff has not alleged any facts tending to show that the terms of the agreement were unreasonably favorable to defendant, although such a showing is part of the unconscionability analysis.

Finally, there is no merit to plaintiff's contention that this court should apply Wis. Stat. § 788.01, which, although validating arbitration agreements in general, specifically provides that the law "shall not apply to contracts between employers and employees . . .". The Federal Arbitration Act preempts state law if a state singles out arbitration agreements, either statutorily or judicially, by imposing restrictions separate from its general contract law. See Doctor's Associates v. Casarotto, 517 U.S. 681, 686-88 (1996).

In sum, the arbitration provision contained within the Employment Agreement signed by plaintiff is valid and enforceable. Because plaintiff concedes that her claims are covered by the arbitration provision, the only issue remaining to be addressed is waiver.

II. WAIVER

Plaintiff contends that defendant waived its right to compel arbitration by failing to invoke the clause while she was pursuing her claim before the Equal Rights Division and

Equal Employment Opportunity Commission. It is true, as plaintiff asserts, that a contractual right to arbitrate may be waived, either expressly or implicitly. See Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir.1995); St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Products Co., 969 F.2d 585, 587 (7th Cir.1992). To determine whether there has been a waiver, a court must examine whether, "based on all the circumstances, the [party against whom the waiver is to be enforced] has acted inconsistently with the right to arbitrate." Grumhaus v. Comerica Sec., Inc., 223 F.3d 648, 650-51 (7th Cir. 2000), cert. denied, 532 U.S. 971 (2001). A party who elects to proceed before a nonarbitral tribunal for the resolution of a contract dispute is presumed to have waived its right to arbitrate. Cabinetree, 50 F.3d at 390. Further, waiver may be found if a party fails to demand arbitration as early as feasible once litigation has begun. See Baltimore & Ohio Chicago R. Co. v. Wisconsin Central, 154 F.3d 404, 408 (7th Cir. 1998).

Plaintiff has not cited any case that holds that a defendant waives its right to arbitrate by participating in administrative proceedings begun by plaintiff prior to suit. Although plaintiff quotes extensively from Cabinetree and St. Mary's, the facts of those cases are not on all fours with the instant case. Cabinetree involved a defendant who, after removing the plaintiff's breach of contract suit to federal court, participated in pretrial proceedings and discovery for six months before moving to stay the court action pending arbitration. Similarly, in St. Mary's, the defendant participated in the lawsuit for several months and did not move for arbitration until after the district court denied defendant's motion to dismiss

the complaint as time barred and insufficient as a matter of law. In both cases, the court held that defendant's election to proceed in a judicial forum was inconsistent with an intent to arbitrate. Cabinetree, 50 F.3d at 390; St. Mary's, 969 F.2d at 590-91. Neither case involved a claim that defendant had waived its right to demand arbitration by participating in prelitigation administrative proceedings.

Several courts have held that a party's participation in EEOC or local agency proceedings is not inconsistent with the right to arbitrate. See, e.g., Medina v. Hispanic Broadcasting Corp., 2002 WL 389628, *4 (N.D. Ill. March 12, 2002); DeGroff v. MascoTech Forming Techs. Fort Wayne, Inc., 179 F. Supp. 2d 896, 913 (N.D. Ind. 2001); Roberson v. Clear Channel Broadcasting, Inc., 144 F. Supp. 2d 1371, 1375 (S.D. Fla. 2001); Stromberg v. Howe Barnes Investments, Inc., 1995 WL 368905, *2 (N.D. Ill. 1995); DiCrisci v. Lyndon Guar. Bank of New York, 807 F. Supp. 947, 954 (W.D.N.Y. 1992) ("Mere participation in an action does not constitute a waiver of arbitration when an assertion of the right to arbitrate is made in a timely manner."); see also Brown v. ITT Consumer Financial Corp., 211 F.3d 1217, 1223 (11th Cir. 2000) (defendant was under no obligation to make a pre-suit demand for arbitration). The reasoning in these cases is persuasive. It is consistent with the general rule that a party must demand arbitration as early as feasible once *litigation* has begun. Furthermore, as the Supreme Court indicated in Gilmer, participation in administrative proceedings and arbitration is not mutually exclusive: an aggrieved individual who cannot institute a private judicial action because of an

arbitration agreement retains the right to file a charge with the EEOC. Gilmer, 500 U.S. at 28. In addition,"the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." Id. at 28-29. From this, it follows that an employer may participate in EEOC proceedings without losing its rights under the arbitration agreement. To hold otherwise would undermine the investigatory and conciliatory role that the EEOC and state agencies play in enforcing the anti-discrimination laws.

Because defendant in this case invoked its right to arbitration immediately after plaintiff filed suit, there was no waiver. Defendant's motion to dismiss the lawsuit in favor of arbitration must be granted.

ORDER

IT IS ORDERED that the motion of defendant Menard, Inc. to dismiss the complaint in favor of arbitration is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and dismiss this case.

Entered this 15th day of April, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge