IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ILAH TINDER,

OPINION
AND ORDER

Plaintiff,

00-C-0170-C

v.

PINKERTON SECURITY,

Defendant.

- -

This is a civil action for money damages. Plaintiff Ilah Tinder contends that her employer, defendant Pinkerton Security, violated Title VII of the Civil Rights Act of 1964, as amended in 1991, 42 U.S.C. § 2000-e, by discriminating against her on the basis of her sex and by retaliating against her for opposing discriminating conduct. The court has jurisdiction under § 706 of Title VII of the Civil Rights Act of 1964, as amended in 1991, 42 U.S.C. § 2000e-5(f); 28 U.S.C. § 1331; and 28 U.S.C. §1343.

The case is before the court on defendant's motion to stay pending arbitration. Because I conclude that the arbitration agreement is supported by adequate consideration and that plaintiff's continued employment-at-will with defendant constitutes her agreement to be bound

by the arbitration program, I will grant defendant's motion for a stay pending the outcome of arbitration.

From the affidavits, exhibits and pleadings filed by the parties and for the purpose only of deciding this motion, I find that the following facts are undisputed.

FACTS

Plaintiff was employed by defendant from October 21, 1996 to November 1999, as a security officer. On October 22, 1996, plaintiff signed an "Employee Acknowledgement" form that stated in part:

> 12. I acknowledge receipt of a copy of the Pinkerton "Officer's Manual" which contains certain rules and regulations. I agree to study the manual, thoroughly familiarize myself with its contents and keep it with me at all times while on duty.
> 13. I understand and agree that the "Officer's Manual" is a general guideline and is not to be construed as an employment contract of any kind. I understand that the "Officer's Manual" in no way supplements or contradicts or modifies the terms of my employment as governed by this Employee Acknowledgement. I also understand that Pinkerton reserves the right to change its policies, rules [and] "at-will" employment policy as stated in paragraph 1.

In October 1997, defendant issued a brochure to all employees entitled "Pinkerton's Arbitration Program," setting forth defendant's mandatory binding arbitration policy. The brochure stated that all employees who remained employed by defendant through January 1, 1998, became subject to the provisions of the arbitration program, including the following:

Q: Is Pinkerton also bound by these arbitration provisions?
A: Absolutely. Effective January 1, 1998, Pinkerton will be a binding arbitration company. This means that if Pinkerton has any claims against its employees, or ex-employees, it must also use binding arbitration under the same terms and conditions in Section II of this brochure.

Q: What if I do not want to be covered by this binding arbitration program?
A: Effective January 1, 1998, all employees, including the CEO are covered by the program. By remaining employed at Pinkerton through the effective date, you are agreeing to be covered by the program and you waive your right to a court trial.

The brochure was distributed through defendant's regular practice of distributing new and changed policies as a "payroll stuffer" included with each employee's paycheck. On October 10, 1997, Don W. Walker, defendant's Executive Vice President, issued a memorandum to all district offices directing them to distribute the Arbitration Program brochure with the next employee payroll. On October 27, 1997, Sally R. Phillips, defendant's Vice President - Legal Operations Support and James Fox, defendant's Assistant General Counsel, Litigation, issued a memorandum confirming that defendant's arbitration program brochure had been sent to all offices for distribution.

Plaintiff received her payroll check through the Milwaukee district office. The Milwaukee district office distributed the arbitration program payroll stuffer to all of its employees with the payroll immediately after receiving Walker's October 10, 1997, memorandum. Plaintiff was not paid by direct deposit. Plaintiff never signed a document or

delivered a signed document to defendant stating that she had received the brochure. Defendant did not provide plaintiff with an opt-out provision with respect to the mandatory arbitration program and plaintiff was not told specifically that if she did not submit to the program she would be fired.

Defendant implemented the mandatory arbitration program in January 1998.

In May 1998, defendant published an article entitled "Alternative Dispute Resolution" in its monthly employee magazine. The magazine, which referred to the article on its cover under the heading, "Using Arbitration," was sent to all district offices, including Milwaukee, Wisconsin, for distribution to all of defendant's employees. The article described the arbitration process and stated that the arbitration policy was implemented on January 1, 1998, and applied to all employees as of that date.

In addition to publishing the magazine article, defendant took steps in May 1998 to inform employees about the mandatory arbitration program. Defendant issued informative posters to all work sites for display. The posters were entitled, "Arbitration: It's fair, it's convenient, and it's policy." Defendant also issued a second payroll stuffer to all employees entitled, "Settling Disputes Through Arbitration," reminding employees of the program. Neither the magazine article nor the informative poster indicated that an employee's failure to abide by the arbitration program would result in termination from the company.

OPINION

The enforceability of an arbitration agreement is a matter of contract law. See Kiefer Specialty Flooring, Inc. v. Tarkett, Inc., 174 F. 3d 907, 909 (7th Cir. 1999); see Gibson v. Neighborhood Health Clinics, Inc., 121 F. 3d 1126, 1130 (7th Cir. 1997) ("An agreement to arbitrate is treated like any other contract.") If plaintiff and defendant have created an enforceable contract to arbitrate this dispute, the case will be stayed pending arbitration. Courts are guided by the strong support for the federal policy favoring arbitration, see Kiefer at 909, that applies even in cases involving claims of discrimination. See Gibson at 1129.

In determining whether a valid arbitration agreement exists, a federal court should look to the state law governing the formation of contracts. See id. at 1130. In this case, Wisconsin state law governs because plaintiff was employed in Wisconsin. See Michalski v. Circuit City Stores, Inc., 177 F.3d 634, 636 (7th Cir. 1999). Plaintiff argues that the contract is unenforceable because under Wisconsin contract law there was not adequate consideration and she never signed any acknowledgement of receipt of the arbitration program brochure.

Under Wisconsin law, a contract is not enforceable unless there is consideration for the promise. See Id. at 636. Consideration may be "either a detriment to the promisor or a benefit to the promisee." Id. (applying Wisconsin law). Plaintiff believes that defendant's promise to continue employing her was insufficient consideration to make the arbitration agreement

enforceable. Citing Gibson, she argues that because she signed the Employee Acknowledgement form one year before receiving the mandatory arbitration provision, her agreement to arbitrate disputes was not supported by consideration. Plaintiff misstates the holding in Gibson. In Gibson, the court found lack of consideration because the employee's promise to arbitrate was not given in exchange for any promise from the employer. See id. at 1131. The court did not base its decision on the length of time between events. The court of appeals recognized, "Often, consideration for one party's promise to arbitrate is the other party's promise to do the same." Id. Because the contract required the employee to submit claims to arbitration, but contained no mutual promise or other consideration by the employer, the court found the arbitration contract unenforceable. See id.

This case is distinguishable from Gibson because plaintiff and defendant mutually promised to submit claims to arbitration. Plaintiff's promise arose out of her continued employment with defendant. The arbitration brochure distributed to plaintiff stated clearly that by remaining employed after January 1, 1998, plaintiff was agreeing to submit all claims against defendant to arbitration. Defendant also made clear that it was agreeing to be bound by the agreement and submit to arbitration all claims against its employees after January 1, 1998. Because both plaintiff and defendant agreed to submit claims to arbitration, the mutual promises constitute adequate consideration.

Plaintiff also argues that the contract is not enforceable because plaintiff did not sign any agreement with respect to the arbitration program. Citing the Federal Arbitration Act, plaintiff contends that because she did not sign anything as proof of her receipt of the arbitration brochure, she cannot be bound by the arbitration program. Plaintiff's argument is misguided. Plaintiff makes the additional argument that she was unaware of the arbitration provision, but her position is untenable. The undisputed proof is that notices were sent out with paychecks. She received her paycheck directly, so she must have had an opportunity to read the notice. If she did not take advantage of the opportunity, that is not defendant's fault.

Plaintiff was employed by defendant as an employee-at-will. Accordingly, she was subject to policy changes defendant implemented at its own discretion. Plaintiff even signed an "Employee Acknowledgement" form indicating she understood she was an employee-at-will and that defendant reserved the right to change its policies. Because plaintiff agreed to be an employee-at-will and agreed that defendant retained the right to change its policies, she is not required to sign a separate contract agreeing to be bound by the changed policies. Her continued employment with defendant as an employee-at-will constitutes her agreement to be bound by the arbitration program.

Furthermore, defendant's mandatory arbitration program complied with the Federal Arbitration Act because the agreement was in writing. 9 U.S.C. § 3 states only that the

arbitration agreement be in writing, not that the agreement be signed by both parties. Defendant complied with this requirement when it distributed the written "Pinkerton's Arbitration Program" brochure to all employees, including plaintiff.

ORDER

IT IS ORDERED that defendant's motion to stay this action pending the outcome of arbitration proceedings is GRANTED. Because the arbitration proceeding may resolve all of the issues among the parties and make any further proceedings in this court unnecessary, the clerk of court is directed to close the case administratively. In the event the arbitration does not resolve all of the issues, the case will be reopened immediately upon motion of any party and will be set promptly for trial, with the parties retaining all rights they would have had had the case not been closed for administrative purposes.

Entered this 25th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge