

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BARBARA A. TROGDEN,)
) NO. 4:02-cv-90494
Plaintiff,)
) RULING ON DEFENDANT'S
vs.) MOTION TO COMPEL
) ARBITRATION AND STAY
PINKERTON'S INC., a/k/a) PROCEEDINGS
PINKERTON SECURITY AND)
INVESTIGATION SERVICES,)
)
Defendant.)

The above resisted motion is before the Court following hearing (#8). This is an action under Title VII and the Iowa Civil Rights Act for sex harassment and retaliation by plaintiff Barbara A. Trogden against her former employer, Pinkerton's, Inc. (Pinkerton). Under the authority of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., Pinkerton moves to compel arbitration and stay court proceedings. It contends a written arbitration program requires the parties to arbitrate plaintiff's discrimination claims. Plaintiff resists, arguing there was no agreement to arbitrate the dispute.

PROCEDURAL CONTEXT AND BACKGROUND FACTS

The parties dispute the making of an arbitration agreement, yet both assert the issue can be determined as a matter of law. However, if the making of an agreement is genuinely in dispute, the court is required to "proceed summarily to the trial

thereof." 9 U.S.C. § 4. Thus, the question initially before the Court is whether there are genuine issues of material fact about the existence and scope of the arbitration agreement, essentially the same standard as for summary judgment. See *Tinder v. Pinkerton Security*, 305 F.3d 728, 735 (7th Cir. 2002). If not, the court can decide without trial.

Trogden has provided an affidavit with her version of the relevant facts. She states she did not receive the document which outlined the terms and conditions of the alleged arbitration agreement, "Pinkerton's Arbitration Program" brochure, and further, that she was not aware of any binding arbitration program at Pinkerton. (Trogden Aff. at 1). For the purposes of the present motion, the Court has assumed the truth of the facts stated in Ms. Trogden's affidavit.

Ms. Trogden began her employment with Pinkerton as a security officer at a Des Moines tire plant on March 26, 1999. On March 18, 1999, during her orientation process, Trogden signed a "Handbook Acknowledgment" form in which she acknowledged receiving a copy of Pinkerton's "Security Officer Employee Handbook." By the acknowledgment she stated she understood the policies in the handbook governed the terms and conditions of her employment, that she read and understood the policies and agreed to be bound by them. (Rasmussen Aff. Ex. 1). The handbook contained an arbitration provision which stated:

Pinkerton is a binding Arbitration Company in states where applicable. . . .

Although we certainly hope that we can resolve issues internally and informally, any claims or controversies ("Claims") either Pinkerton may have against you or you may have against the Company or its officers, directors, employees or agents in their capacity as such, must be resolved by arbitration instead of the courts, whether or not such claims arise out of your employment (or its termination).

Claims you may have for workers' compensation or unemployment compensation benefits or complaints to the EEOC or similar state or local agencies are not covered by this Agreement.

The terms and conditions of Pinkerton's arbitration program is [sic] contained in "Pinkerton's Arbitration Program" brochure, which all Pinkerton employees are provided. Please contact your local Pinkerton office for a copy if you have misplaced yours.

(Reinsch Apr. 7, 2003 ltr and attch.).

Trogden also signed a "Hiring Process Checklist" dated March 18, 1999. (Rasmussen Aff. Ex. 4). The checklist outlined certain steps in the hiring process which the hiring representative was required to complete with a new employee. The checklist required the representative to give the new employee the "Alternative Dispute Resolution Brochure," another name for the arbitration program brochure. Trogden's checklist shows she was given the brochure by the hiring representative, and the receipt was acknowledged by Trogden. (Id.). In her affidavit Trogden states the hiring checklist was completed with her over the phone and she signed later. (Trogden Aff. at 1). As noted, she denies having received the brochure.

Pinkerton subsequently revised the employee handbook and on May 11, 2000 Trogden signed an acknowledgment of the receipt of that handbook.¹ (Rasmussen Aff. Ex. 3). The arbitration provision in the 2000 handbook was essentially the same as in the first handbook given to Trogden. Trogden states she was told to sign the March 18, 1999 and May 11, 2000 acknowledgments prior to actually receiving the handbooks. (Trogden Aff. at 1).

As the handbooks advised, the arbitration program brochure states the terms and conditions of the arbitration requirement. It broadly describes the scope of the claims covered:

Any claims or controversies ("Claims") either Pinkerton may have against an associate or an associate may have against the Company or against its officers, directors, associates or agents in their capacity as such, must be resolved by arbitration instead of the courts The claims covered include, but are not limited to . . . claims for harassment, discrimination (including, but not limited to race, sex, religion, national origin, age, marital status, or medical condition, handicap or disability) This provision includes, but is not limited to, Title VII, Civil Rights Act of 1964 . . . and comparable state statutes.

(Rasmussen Aff. Ex. 5 at 9). The program excludes claims for workers' compensation and unemployment compensation benefits, and does not restrict employees from filing charges with the EEOC or a state agency counterpart, though it requires arbitration if the matter is not resolved through the administrative process. (Id. at

¹The second acknowledgment was simply a receipt. It said nothing about Trogden's understanding of and agreement to the policies in the handbook.

7, 10). The procedures of the American Arbitration Association govern and the arbitrator applies the applicable federal and state substantive law. (Id. at 12). Unless prohibited by law, all fees and costs of the arbitrator are borne by Pinkerton. (Id. at 14). The arbitrator may award the relief permitted by law to the prevailing party, including attorney fees. (Id. at 12, 14).

The arbitration program brochure concludes with a "Consideration" section:

The mutual promises by the Company and by you to arbitrate differences, rather than litigate them before courts or other bodies, provide consideration for each other. By remaining employed with Pinkerton you are agreeing to waive your right to have a claim against the Company heard in a court of law.

(Id. at 16).

Trogden was terminated on November 19, 2001. She filed her discrimination claims with the Iowa Civil Rights Commission and received a right-to-sue letter. Pinkerton requested that Trogden arbitrate her claims but she has declined to do so.

DISCUSSION

Under § 2 of the FAA a "written provision in any . . . contract evidencing a transaction involving commerce" providing for the settlement of future disputes by arbitration is enforceable. 9 U.S.C. § 2. It is now well established that agreements between an employer and employee to arbitrate disputes, including disputes arising under the laws against employment discrimination, are arbitrable under § 2. See Circuit City Stores, Inc. v. Adams, 532

U.S. 105, 119 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991); Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 679 (8th Cir. 2001); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837-38 (8th Cir. 1997). Section 3 of the FAA requires a stay of proceedings subject to an arbitration agreement, and § 4 empowers the court to compel the parties to proceed with arbitration. 9 U.S.C. §§ 3, 4.

The court's limited role is twofold: to "determine whether there is a valid agreement to arbitrate and whether the specific dispute at issue falls within the substantive scope of that agreement."² Larry's United Super, Inc. v. Werries, 253 F.3d 1083, 1085 (8th Cir. 2001). Arbitration is a matter of contract and state law contract principles determine whether the parties have agreed to arbitrate a dispute. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Gannon, 262 F.3d at 680; Keymer v. Management Recruiters Intern., Inc., 169 F.3d 501, 504 (8th Cir. 1999); Barker v. Golf U.S.A., Inc., 154 F.3d 788, 791 (8th Cir. 1998), cert. denied, 525 U.S. 1068 (1999); Patterson, 113

²The arbitration program brochure provides that the arbitrator has the exclusive authority to resolve questions pertaining to the arbitrability of a dispute. (Rasmussen Aff. Ex. 5 at 13). Whether the parties agreed that the arbitrator has the power to determine arbitrability is for the Court, and that issue here merges with the larger question of whether there was an agreement to arbitrate at all. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. at 942-44.

F.3d at 834. Iowa law governs the employment relationship between the parties.

The elements of a contract in Iowa are an offer, acceptance, and consideration. See Taggart v. Drake Univ., 549 N.W.2d 796, 800 (Iowa 1996). The parties appear to agree that any arbitration agreement between them was formed under traditional, bilateral contract analysis; that is, a contract resulting from an exchange of promises. See Owen v. MBPXL Corp., 173 F. Supp. 2d 905, 915 (N.D. Ia. 2001).³ The arbitration program brochure expressly refers to the "mutual promises" to arbitrate as the consideration for the agreement. (Rasmussen Aff. Ex. 5 at 16). Both parties give up the right to resolve employment disputes between them in court. See Owen, 173 F. Supp. 2d at 946.

Trogden does not contend her claims are outside the scope of Pinkerton's arbitration program, they clearly are included. Rather, she argues that a valid offer was not communicated to her. To result in a contract an offer must be sufficiently definite in its terms and be communicated to the offeree. Anderson, 540 N.W.2d at 283-84, 286; see Kartheiser v. American Nat. Can Co., 84

³The Iowa Supreme Court employs unilateral contract theory in determining whether an employee handbook creates a contract. See Schoff v. Combined Ins. Co. of America, 604 N.W.2d 43, 48 (Iowa 1999); Magnussen Agency v. Public Entity Nat. Co., 560 N.W.2d 20, 25 (Iowa 1997); Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 283 (Iowa 1995). A unilateral contract is one in which the offer is accepted by the offeree's performance. Anderson, 540 N.W.2d at 283.

F. Supp. 2d 1008, 1015 (S.D. Ia. 1999); Harriott v. Tronvold, 2003 WL 1966765, *3 (Iowa App. Apr. 30, 2003).⁴ In this case the offer was the arbitration program brochure. The brochure is precise and definite in setting out a mutually binding arbitration obligation, readily capable of judicial enforcement. See Owen, 173 F. Supp. 2d at 919-20; Kartheiser, 84 F. Supp. 2d at 1015. At hearing Trogden's counsel conceded the brochure is sufficiently definite to constitute an offer. The existence of an arbitration agreement thus depends on whether the offer represented by the brochure was communicated to Trogden so that she had knowledge of it. "The offeree must know of the offer before there can be mutual assent." Anderson, 540 N.W.2d at 283; see Owen, 173 F. Supp. 2d at 921.

Notwithstanding her March 18, 1999 acknowledgments to the contrary, Trogden says she did not receive the brochure and was not aware of the binding arbitration program. Since Trogden would have known of the program had she read the handbook it is reasonable to infer she did not read the handbook. For the reasons that follow, Trogden's lack of actual knowledge of the arbitration program and non-receipt of the brochure containing its terms and conditions does not negate the existence of an arbitration agreement or require trial of the issue.

⁴Unpublished Iowa appellate decisions are not "controlling legal authority" but may be cited. Iowa R. App. P. 6.14(b).

Trogden received the 1999 and 2000 versions of the handbook. Both stated that Pinkerton was a "binding Arbitration Company" and, excepting workers' and unemployment compensation claims, and discrimination complaints to agencies, gave notice that any claims or controversies between Pinkerton and Trogden "must be resolved by arbitration instead of the courts" The handbook further advised that the terms and conditions of the arbitration program were in the program brochure which could be obtained from the local Pinkerton office.

An offeree is charged with constructive knowledge of an offer if the offeree has the opportunity to read it, actual knowledge is not essential to the formation of a contract. Owen, 173 F. Supp. 2d at 924 (citing Morgan v. American Family Mut. Ins. Co., 534 N.W.2d 92, 99 (Iowa 1995), overruled on other grounds Hamm v. Allied Mut. Ins. Co., 612 N.W.2d 775, 784 (Iowa 2000)) and Bryant v. American Exp. Fin. Advisors, Inc., 595 N.W.2d 482, 486 (Iowa 1999) (a "failure to fully read and consider" an agreement to arbitrate does not relieve a party of its provisions); see Kartheiser, 84 F. Supp. 2d at 1015 ("It is certainly the law in Iowa that where a handbook is actually distributed to employees, a given employee need not have actual knowledge of a policy or disclaimer to enforce it or have it enforced against him or her."). Trogden had an opportunity to read the handbooks, and there is no question about her capacity, being misled, or fraud. She is

therefore charged with knowledge of the arbitration provision in them and the incorporated reference to the terms and conditions in the program brochure. Indeed, though she received the handbook at a later time, by her March 18, 1999 acknowledgment Trogden agreed to be bound by the arbitration provision.

That the terms and conditions of the arbitration program were contained in a document other than the handbook is not significant to the analysis because the handbook gave Trogden notice and an opportunity to inform herself. Bryant, 595 N.W.2d at 487 (Iowa 1999) (citing 17A Am. Jur. 2d Contracts § 225, at 229-30 (1991)).

Bryant is instructive on the operation of Iowa contract law here. The Iowa Supreme Court's enforcement of the arbitration agreement in that case is difficult to distinguish legally and factually from the situation now before the Court. Bryant, a securities sales representative, was required by his employer to register with the National Association of Security Dealers, Inc. (NASD). The application stated he accepted and agreed to be bound by the conditions in the By-Laws and rules of the NASD, but said nothing about arbitration. An arbitration provision was part of a separate NASD "Code of Arbitration Procedure." The code required the arbitration of any dispute, claim or controversy, including those arising out of employment or the termination of employment of an associated person with any NASD member. Bryant was terminated

by American Express and claimed disability discrimination. The discrimination claim was settled. Bryant later competed with American Express in breach, according to American Express, of an agreement between the parties. For this reason American Express reduced a retirement account Bryant had retained on termination of his employment. Bryant sued claiming, among other things, retaliation for having filed the earlier discrimination claim. American Express moved to compel arbitration, the district court granted the motion and the Iowa Supreme Court affirmed. 595 N.W.2d at 483-84.

Bryant claimed he had not agreed to arbitrate. The Supreme Court held that when Bryant signed his NASD application he agreed to be bound by its regulations, one of which was the arbitration code, id. at 484, even though the application was silent on the subject of arbitration. The handbook provided to Trogden was not silent. It expressly informed her about the arbitration requirement and where to look for the details.

Bryant also claimed "he did not knowingly agree to arbitrate his claims because the arbitration provision was not found in the document he signed." Id. at 486. The court held the arbitration agreement was incorporated by reference in the application Bryant had signed and that his failure to read the arbitration code did not excuse him from being bound by it. Id. at 486-87. Similarly, Trogden's failure to read the handbook

arbitration provision and the terms and conditions of the arbitration program incorporated by it does not relieve her from being bound to arbitrate. Trogden, at least as much as Bryant, had knowledge of and an opportunity to read the terms of the arbitration requirement.

SUMMARY AND RULING

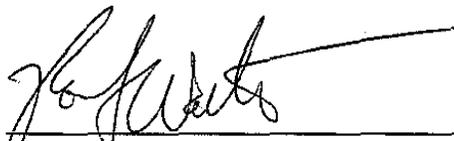
A contractual agreement to arbitrate between Trogden and Pinkerton resulted when, as provided in the offer represented by the arbitration program brochure, Trogden continued her employment with Pinkerton under the mutual promises to arbitrate. The offer was communicated to Trogden by the arbitration provision in the employee handbook she received and its reference to the brochure for the terms and conditions. That Trogden did not read the handbook and was not separately provided with the brochure does not prevent formation of the arbitration agreement because she is charged with knowledge of the handbook and the contents of the arbitration program brochure it incorporates. Pinkerton has therefore established there is no genuine issue of material fact concerning the agreement of the parties to arbitrate the claims brought in this action and its motion should be granted.

Defendant's motion to compel arbitration and stay proceedings is granted. The parties shall proceed to arbitration as provided in "Pinkerton's Arbitration Program" brochure. Proceedings in this cause are stayed. Ms. Reinsch's letter of

April 7, 2003 and the attachment which supplement the record as requested by the Court at hearing will be filed.

IT IS SO ORDERED.

Dated this 8th day of May, 2003.

A handwritten signature in cursive script, appearing to read "Ross A. Walters", written over a horizontal line.

ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE