UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99-CV-756-H

SHERRIE SPROWLS PLAINTIFF

V.

OAKWOOD MOBILE HOMES, INC. AND
WILLIAM ROTERT DEFENDANTS

MEMORANDUM OPINION

This case raises serious questions about the methods by which an employer may unilaterally impose binding arbitration as a term and condition of employment. Defendants, Oakwood Mobile Homes, Inc. and William Rotert (collectively "Oakwood"), ask this Court to compel arbitration and stay the proceeding. Plaintiff, Sherrie Sprowls, wants her case to continue in this forum.[1] She claims that she is not bound by Oakwood's arbitration policy because she had no knowledge of it prior to this suit. Oakwood counters that the "mail box" rule operates to presume her receipt of the arbitration agreement and that Plaintiff consented to the agreement by remaining employed after the policy took effect. Ultimately, this Court concludes that, at a minimum, an employee must have actual knowledge of the existence of an arbitration agreement before the contract is legally enforceable.

[1]Plaintiff is suing Oakwood for gender discrimination because she claims that the company promoted a less senior male over her.

I.

"The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 626 (1985); *see also Floss v. Ryan's Family Steak Houses*, 2000 FED App. 0154P (6th Cir.)("the FAA was not enacted to force parties to arbitrate in the absence of an agreement.")(*citing Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279, 1286 (10th Cir. 1997)). Because the parties dispute whether or not they agreed to arbitrate, the Court held an evidentiary hearing pursuant to 9 U.S.C. § 4.

During the hearing, Defendants presented evidence that in October 1997 Oakwood sent a corporation-wide mailing on its mandatory arbitration policy to all employees listed in the corporate database.[2] Plaintiff's correct address was listed in that database. The letter addressed to her was not returned, nor had she experienced difficulty with her mail in the past. Apparently, she had received all mail generated for mass mailing by Oakwood's database.

The October mailing contained a memorandum by Mark Stidham entitled "Changes to the Company's Substance Abuse and Related Policies" and a copy of the Dispute Resolution Program Manual. After describing the company's new drug policy, the memorandum stated that by continuing employment with Oakwood after November 1, 1997, the employee agreed to arbitrate certain employment related disputes, including allegations of discrimination. The memorandum was two pages in length and came in a standard business envelope.

William Rotert, Plaintiff's manager in October 1997, testified that Sprowls had additional notice of Oakwood's arbitration policy. He claimed to have posted the policy in the office and

[2]Plaintiff began working for Defendants as an at will employee in September of 1996. She resigned August 10, 1998.

may have discussed it at an employee meeting. Rotert also stated that the arbitration policy was discussed in Hot Stuff, a company-wide newsletter sent to managers and often read by employees. Moreover, Rotert testified that the policy was the subject of some discussion around the office, and while he could not remember any specific conversations involving Sprowls, he felt sure she must have known about it. Rotert claimed that he placed a copy of Stidham's memorandum on Sprowls' desk. Moreover, he remembered Sprowls commenting that "Oakwood was going to be doing the same thing with us (Oakwood employee's) that it is doing with Oakwood customers (requiring arbitration)" when he processed the paperwork for her manufactured home.

Scott Pharris, an employee hired in October 1997, testified that he received a copy of Oakwood's mandatory arbitration policy and saw copies throughout the office. Pharris, who is now a general manager for Oakwood, also stated that the policy was common knowledge among employees.

Plaintiff denied receiving the arbitration notice at home or in the office. She testified that she was never aware that Oakwood had a mandatory arbitration policy until after she filed this suit. Without recalling a specific discussion with Rotert at the time she purchased her house, she said that she could not have made an analogy between employee and customer arbitration because she was unaware that Oakwood required employee arbitration. Sprowls also claimed that none of the three supervisors whom she informed of her complaint mentioned arbitration.

Three other employees testified that they had not been provided with any information on Oakwood's arbitration policy. Like Plaintiff, they denied receiving the policy in the mail, seeing it in the office, or hearing it discussed. They all testified that they were unaware that Oakwood

had implemented such a policy. One of the employees, Hugh Carlen, testified that he found a memo containing information on arbitration in the break room trash bin in September of 1998.[3] Surprised at the information contained in the memo, he asked William Lane, manager in 1998, about it and was told that the memorandum was trash, not relevant to anyone.

Having considered all the evidence, the Court concludes that Defendant did mail the arbitration memorandum and policy to Plaintiff's residence in October 1997. The corporation-wide mailing system is sufficient proof that the letter had been sent and presumptively delivered to Plaintiff's address. However, this finding is not inconsistent with Plaintiff's testimony that she was unaware of the letter or its notice about the arbitration provision. Confronted with testimony from the majority of employees who worked at the local Oakwood branch that they were unaware of an arbitration policy and only one employee who recalls having received notice, the Court concludes that Oakwood's method of notifying its employees was ineffective. Six sales representatives worked in the office in October 1997. Four of those six denied knowledge of Oakwood's policy. Only one employee claims to have received the information, and he was a new hire at the time. As a new hire, it appears likely that Oakwood alerted him to the policy in a unique way. The Court concludes that many of the employees did not notice the arbitration agreement announcement because it was buried in the middle of correspondence concerning an entirely different subject. Therefore, the Court believes Plaintiffs' testimony that she was unaware of Oakwood's arbitration policy.

This same reasoning applies equally to Oakwood's argument that it posted the policy and

[3]Plaintiff resigned August 10, 1998. So, this memorandum was discovered a month after she stopped working for Oakwood.

placed it on employees' desks.[4] While Rotert may have done so, as an empirical matter, the memorandum did not alert employees to Oakwood's policy. This could have been the result of where it was posted, but it appears more likely that it was the result of the memorandum's title. Oakwood's memorandum appeared to focus on substance abuse changes; its title was misleading. Consequently, employees who were unconcerned with the company's substance abuse policies never received notice that Oakwood was proposing mandatory arbitration.

II.

The Federal Arbitration Act ("FAA") mandates that the district court stay proceedings in suits involving matters covered by an enforceable arbitration agreement. *See* 9 U.S.C. § 3; *see Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985). An arbitration agreement is enforceable if it meets the requirements of a legally binding contract under state law. *See* 9 U.S.C. § 2; *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Under Kentucky law, a contract is not enforceable unless both parties agree to the terms of the contract. *See, i.e., Friction Materials Co. v. Stinson*, 833 S.W.2d 388 (Ky. App. 1992)(employer could not enforce unilateral contract change until after the employee agreed to it by signing the contract). At a minimum, this requires that both parties have knowledge of the basic terms of the agreement and accept

[4]With regard to the Hot Stuff article, the Court can only conclude that most employees did not read the issue that discussed the new arbitration policy. While Plaintiff may have read Hot Stuff frequently, no witness had any knowledge of Plaintiff reading the issue in question and she denies having seen it. All conceded that the newsletter is only sent to managers and not distributed to employees in any systematic way. Under these circumstances, the Court concludes that Plaintiff never read the Hot Stuff article on arbitration.

Similarly, the testimony regarding discussions around the office was too vague to indite the Plaintiff or other witnesses who testified for her. Defendants' witnesses were not able to recount a specific conversation with Plaintiff or one of her witnesses. Rotert's recollection of Plaintiff's statement also appears ambiguous at best. He may have understood Plaintiff to be referring to employee arbitration, but based on the rest of the evidence, it appears unlikely that Plaintiff made such a reference. The statement he remembers her making is so indefinite, it could refer to almost anything.

those terms.[5]

Plaintiff argues that Oakwood cannot enforce its arbitration contract because she never agreed to it. She was unaware that Oakwood required arbitration or that remaining employed would bind her to arbitrate. Defendant counters that an employer can make unilateral changes to the terms and conditions of employment as long as the employee has reasonable notice of them. Under the mailbox rule, therefore, Defendant says that Plaintiff had notice of Oakwood's arbitration policy when the letter describing it was sent to her residence.

The Court cannot agree that these two legal principles, though independently valid, can be integrated to reach the result Defendant suggests. To reconcile Oakwood's rights as an at will employer with Sprowls' statutory rights requires a subtler analysis. The result of this analysis makes good sense. A company may unilaterally change the terms and conditions of at will employment, but it cannot permanently alter an employee's statutory rights unless the employee agrees to surrender those rights. A company may unilaterally decide to require mandatory arbitration. It can probably terminate an employee who does not agree to arbitrate. However, a company can only compel an employee to arbitrate, if that employee executed a valid arbitration contract.[6] The Federal Arbitration Act clearly states that arbitration agreements are only

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[5]Knowledge and acceptance can be imputed from signing a document, even if the signor did not read what he was signing. They are not imputed, however, from the fact that a document was mailed to an employee's residence when the document was titled in a misleading way and did not provide actual notice to the majority of those who received it.

[6]The cases Defendants cite hold that an employee may not recover for wrongful discharge against an employer who unilaterally changes the terms of employment. *See Nork v. Fetter Printing Co.*, 738 S.W.2d 824 (Ky. App. 1987); *Vollrath v. Georgia-Pacific Corp.*, 899 F.2d 533 (6th Cir. 1990); *Louisville & N.R. Co. v. Wells* (Ky. App. 1942); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983); *Bankey v. Storer Broadcasting Co.*, 882 F.2d 208 (6th Cir. 1989). These cases do not help resolve Plaintiff's case. This Court does not dispute that, if Plaintiff had been terminated for refusing to sign an arbitration agreement, she would not have been able to recover against Oakwood for wrongful discharge. The issue in this case, however, is what steps an employer must take to create an enforceable contract that binds an employee after the employment relationship ends.

enforceable on the same terms that a contract would be enforceable. All contracts require offer, acceptance and a meeting of the minds. Employment arbitration contracts are no different.

Defendants cannot satisfy these requirements by relying on the mailbox rule alone. For whatever reason, Oakwood chose not to require its employees to sign the arbitration agreement. While it is true, as Defendants argue, that an arbitration agreement need not be signed to be enforceable, not requiring a signature is a risk. *See* 9 U.S.C. § 2 (written arbitration agreements are binding except on such grounds as any contract is not enforceable). Without a signed agreement or any verbal discussion, Oakwood must counter Plaintiff's statement that she had no actual knowledge of Oakwood's arbitration policy and never agreed to it. The mailbox rule does not resolve this difficulty because it only leads to a presumption of receipt, not agreement. The Court presumes that Sprowls and the other employees received Oakwood's memorandum. However, the evidence indicates that the form of the memorandum was insufficient to provide them with actual knowledge of the proposed arbitration policy.[7]

That Plaintiff continued her employment is a neutral act. It reflects the status quo and is not probative as to the employee's knowledge or acceptance of the arbitration agreement. Under other circumstances, mailing an agreement to each employee's house might provide sufficient evidence of notice from which a court could infer acceptance.[8] However, in our circumstances,

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[7]In *Osborne v. Unigard Indemnity Co.*, 719 S.W.2d 737 (Ky. App. 1986), the court determined that the mailbox rule's presumption of receipt was sufficient to satisfy an insurance company's contractual duty to give written notice before cancellation of an insurance policy. This case is clearly distinguishable. Oakwood must prove that Plaintiff agreed to arbitrate, not merely that she had presumptive notice of Oakwood's arbitration policy.

[8]The Court need not decide today whether Plaintiff could be compelled to arbitrate if she had been aware of Oakwood's arbitration policy. Silence usually cannot be interpreted as the acceptance of an offer. *See Cincinnati Equip. Co. v. Big Muddy River Consolidated Coal Co.*, 164 S.W. 794 (Ky. App. 1914) ("even if the party making the offer prescribes that a failure to answer shall be regarded as an acceptance, such failure does not amount to an acceptance"); *Anders v. Georgetown College, Inc.,* 286 S.W.2d 78, 79 (Ky. App. 1955); Restatement of Contracts § 72; Restatement (Second) of Contracts § 69. This general rule does not apply, however, when the party remaining

the mailing's misleading title and the supporting testimony of her co-workers strongly supports Plaintiff's assertion that she was unaware of Oakwood's mandatory arbitration policy. Unless an employee signs an arbitration contract, the employee must have actual notice of the company's mandatory arbitration policy to be bound by it. Because Plaintiff never agreed to the arbitration contract, Oakwood cannot enforce it.[9] Defendants' motion to compel arbitration is denied.

The Court will enter an order consistent with this Memorandum Opinion.

JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

silent acted strategically. *See Posey v. R.G. Hill & Co.*, 291 S.W. 773, 775 (Ky. App. 1927) (when employer suggested plaintiff be relieved of an area and plaintiff did not protest, plaintiff was not entitled to revenue from the area for work he did not perform).

[9]In all of the cases Defendants cite to support their position the plaintiffs had signed or admitted knowledge of an arbitration agreement. In *Adkinson v. Professional Service Industries, Inc.*, while the plaintiff had not signed an arbitration agreement, she conceded that she had received actual notice of the company's mandatory arbitration plan. Similarly, in *Brown v. JC Penney Co.*, the plaintiff admitted to receiving materials that described the mandatory arbitration program. In *Jenkins v. Morgan, Keegan, & Co., Inc.* the employee actually signed two binding arbitration agreements. These cases are not analogous to the case at hand in which the evidence tends to show that Plaintiff was unaware that Oakwood had a mandatory arbitration policy. The Court cannot enforce an arbitration contract to which the employee never agreed.

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ORDER

Having read Defendant's motion to stay proceedings and compel arbitration and Plaintiff's response, listened to the testimony of both sides, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendant's motion to stay proceedings and compel arbitration is DENIED.

This ___ day of May, 2000.

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JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record