

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

CHARISSA GARDNER,)	
)	
Plaintiff,)	Case No. 1:01CV00030
)	
v.)	OPINION AND ORDER
)	
RYAN'S,)	
)	
Defendant.)	By: James P. Jones United States District Judge

Charles A. Stacy, Dudley, Galumbeck, Necessary & Dennis, Bluefield, Virginia, for Plaintiff; E. Grantland Burns, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Greenville, South Carolina, for Defendant.

In this Title VII action alleging racial discrimination by an employer, I will stay the proceedings and direct the parties to proceed to arbitration in accord with an arbitration agreement between the parties.

I

The plaintiff, Charissa Gardner, brought this action alleging racial discrimination by her employer in violation of her rights secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e-2000e-17 (West 1994 & Supp. 2001). Gardner also sought a declaratory judgment as to the enforceability of an arbitration agreement

(“Agreement”) signed by the plaintiff as part of her employment application. The defendant, Ryan’s Family Steak Houses, Inc. (“Ryan’s”), has moved to dismiss the action, or in the alternative, to stay proceedings and compel arbitration in accord with the Agreement.

The parties have briefed and argued the motion, and it is ripe for decision.¹

II

Gardner applied for employment as a server at Ryan’s Family Steak House in Bluefield, Virginia, on September 23, 1996. During the application process, the defendant presented Gardner with a “Job Applicant Agreement to Arbitration of Employment-Related Disputes,” which the plaintiff signed. The Agreement, between the plaintiff and Employment Dispute Services, Inc. (“EDS”), provides that Gardner agreed to submit to arbitration any employment-related dispute that might arise between her and Ryan’s. EDS agreed to provide the arbitration forum for any such dispute.²

Gardner was dismissed on June 26, 2000, on the ground that she engaged in a physical altercation with another employee off-premises. She claims that termination

¹ The parties have not identified any disputed issues of fact. Accordingly, enforceability of the arbitration agreement is purely a matter of law. *See Stedor Enter., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 733 (4th Cir. 1991).

² Ryan’s is expressly designated as a third-party beneficiary of the Agreement.

of her employment was motivated by racial discrimination. Gardner contends that one year earlier, Ryan's did not take similar action to terminate two Caucasian employees who were caught fighting on Ryan's property. Despite her agreement to arbitrate any employment dispute with Ryan's, Gardner filed this action in federal court seeking relief under Title VII for racial discrimination.

III

The Federal Arbitration Act ("FAA"), 9 U.S.C.A. §§ 1-307 (West 1999 & Supp. 2001), provides that agreements to arbitrate controversies "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.A. § 2. Where such an arbitration agreement exists, the court must stay the proceedings and direct the parties to proceed to arbitration on the issues as to which the arbitration agreement was signed. *See* 9 U.S.C.A. §§ 3, 4; *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985). "The FAA embodies a strong federal policy in favor of arbitration, and, accordingly, there is a strong presumption in favor of the validity of arbitration agreements." *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997). Furthermore, the policy in favor of arbitration applies even where a plaintiff's claims are statutory, rather than contractual, in nature. *See Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302, 1313 (2001).

Specifically, the Fourth Circuit has held that “[p]re-dispute agreements to arbitrate Title VII claims are . . . valid and enforceable.” *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999).

Against this backdrop, the plaintiff faces an uphill battle in her contention that the Agreement should not apply in the present case. The Agreement provides that the applicant “absolutely must use the [arbitration] forum for any and all employment-related disputes and/or claims and/or related tort claims [the applicant] may have against the Company” (Compl. Ex. A. ¶ E.) The law requires a court to presume the Agreement to be “valid, irrevocable, and enforceable” for compulsory arbitration of the plaintiff’s employment discrimination claims. 9 U.S.C.A. § 2. The FAA does exclude from coverage any arbitration agreement void or voidable “at law or in equity.” *Id.* The plaintiff argues that the Agreement is unenforceable because it is unconscionable, was obtained by undue influence, was obtained in the course of the unauthorized practice of law, and would violate Gardner’s constitutional rights of equal protection and due process of the law. I reject each of the plaintiff’s contentions.

The plaintiff first argues that the Agreement is an unconscionable adhesion contract. Virginia law defines an unconscionable contract as “one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other.” *Smyth Bros.-McCleary-McClellan Co. v. Beresford*, 104

S.E. 371, 382 (Va. 1920). The Agreement does not rise to this demanding standard. Furthermore, the Eighth Circuit, in applying an identically worded standard, found that the Agreement at issue in this case was not an unconscionable adhesion contract. *See Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 947 (8th Cir. 2001).

There is no basis for the claim that the Agreement was obtained by undue influence. The inequality of bargaining power between employers and employees has been held to be insufficient reason to render an arbitration agreement unenforceable. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). In the present case, the plaintiff was free to refuse to accept employment at Ryan's or could have applied for work with another employer. There is no merit to the contention that the plaintiff was unfairly coerced into signing the Agreement.

I similarly reject Gardner's argument that Ryan's engaged in the unauthorized practice of law with regard to obtaining Gardner's signature on the Agreement. The negotiation of a contract between private parties does not constitute the practice of law. Furthermore, the Agreement signed by the plaintiff contains the provision that "I understand I have the right to consult with an attorney of my choice." (Compl. Ex. A. ¶ I.) Therefore, the defendant did not engage in the unauthorized practice of law in presenting the Agreement to the plaintiff for her signature.

Furthermore, the plaintiff urges that arbitration of her claims would violate her constitutional rights of equal protection and due process of law. The Supreme Court has made it clear that the FAA evinces a federal policy recognizing the validity of arbitration as a forum for dispute resolution, including of statutory discrimination claims. *See Circuit City Stores, Inc.*, 121 S.Ct. at 1313. As such, the Fourth Circuit has held specifically that arbitration agreements involving Title VII claims are “valid and enforceable.” *Hooters of Am., Inc.*, 173 F.3d at 937. Because these courts have upheld the application of arbitration agreements to statutory discrimination claims, I cannot hold that enforcing the Agreement in this case would violate the plaintiff’s rights to equal protection or due process of law. As stated by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), “[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.”

At oral argument, the plaintiff requested that I adopt the reasoning of the Seventh Circuit in *Penn v. Ryan’s Family Steak Houses, Inc.*, No. 00-2355, 2001 WL 1231642 (7th Cir. Oct. 17, 2001). In that case, the court analyzed an arbitration agreement similar to the one signed by Gardner. The court held that the agreement between Penn and EDS was not enforceable because it contained “only an unascertainable, illusory

promise on the part of EDS.” *Id.* at *4. Compared to the employee’s specific promise to arbitrate any employment-related claim, EDS’s obligation to provide an arbitration forum was vague and uncertain, according to the court. The uncertainty arose from the fact that EDS retained the right to modify or amend the rules of the arbitration at any time. The court stated that this unilateral discretion ““makes performance entirely optional with the promisor.”” *Id.* (quoting *Pardieck v. Pardieck*, 676 N.E.2d 359, 364 n.3 (Ind. Ct. App. 1997)).

The arbitration rules in effect at the time Gardner signed the Agreement were different from those at issue in *Penn*, and thus distinguish that case. The set of rules applicable to Gardner state:

These Rules and Procedures may be modified and amended from time to time by [EDS]. However, in the event these Rules and Procedures are modified after a Claimant has signed an Agreement, the claimant shall have the option to have his or her claim adjudicated under the Rules and Procedures that were in effect on the date the Agreement was signed or the Rules and Procedures that are in effect on the date their claim is filed with [EDS].

(Employment Dispute Resolution Rules & Procedures at 7.) Clearly, EDS has addressed the problem by giving the claimant the right to choose which set of rules he or she prefers. Although EDS retains the right to amend or modify the rules, the claimant will not be adversely affected by any change in arbitration procedure. EDS is therefore obligated to provide an arbitration forum governed by written rules and

procedures—a promise that is neither illusory nor uncertain. Thus, the Gardner-EDS contract is enforceable and the plaintiff has no option but to proceed to arbitration under the terms of the Agreement.

IV

For the foregoing reasons, it is **ORDERED** as follows:

1. The defendant's motion (Doc. No. 2) is granted and the present action is stayed pending arbitration;
2. The parties are directed to proceed to arbitration pursuant to the terms and provisions of the Agreement; and
3. The parties are directed to advise the court in writing in ninety days following the date of entry of this opinion and order of the status of the arbitration proceedings, and each ninety days thereafter until the arbitration proceedings are concluded.

ENTER: October 31, 2001

United States District Judge