UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

EILEEN COMFORT,	:	
Plaintiff	:	
	:	CIVIL ACTION NO.
v.	:	3:04-cv-2142 (JCH)
	:	
MARINER HEALTH CARE, INC.,	:	
ET AL.	:	
Defendants.	:	APRIL 26, 2005

RULING ON MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION [DKT. NO. 10]

The plaintiff, Eileen Comfort ("Comfort"), brings this action alleging that the defendant, Mariner Health Care, Inc. ("Mariner") terminated her employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and the Connecticut Fair Employment Practices Act, Conn. Gen. Stat. §§ 46a-58 and 46a-60. Mariner moves to dismiss or, in the alternative, to compel arbitration of Comfort's claims.

I. FACTS

On February 4, 2002, Eileen Comfort ("Comfort") began work as a Rehabilitation Aide/Day Care Secretary for Bride Brook Nursing & Rehabilitation, a subsidiary of Marine Health Care, Inc. ("Marine"). On June 3, 2003, Comfort submitted an Internal Employment Application to Pendleton Nursing and Rehabilitation, Inc. ("Pendleton"), another subsidiary of Marine. Comfort was offered and accepted the position of Accounts Receivable Coordinator at Pendleton and agreed to begin the position on June 9, 2003. On that date, Comfort received and signed an Employment Dispute Resolution Program Agreement ("Agreement"). Agreement [Dkt. No. 11, Ex. A]. The Agreement provides that both Comfort and Mariner "agree to resolve all claims,

controversies or disputes relating to [Comfort's] application for employment, [Comfort's] employment and/or termination of employment with [Mariner] through [Mariner's] Employment Dispute Resolution Program." Id. Claims under Title VII of the Civil Rights Act of 1964 are explicitly included in the types of claims subject to the Employment Dispute Resolution Program. The Agreement further provides that "the last step of the EDR Program is final and binding arbitration by a neutral arbitrator" and that Comfort and Mariner both "forego any right either may have to a jury trial." Id.

Comfort claims that her work was well-received during the first few weeks of her employment. On July 17, 2003, she learned she was pregnant. She informed her supervisors of this fact on July 18 and July 19. Comfort claims that one of her supervisors, Amy Perkins, became agitated upon learning of Comfort's pregnancy and made numerous negative comments to Comfort and others regarding Comfort's pregnancy. On Monday, August 11, 2003, Ms. Perkins notified Comfort that Comfort would be terminated.

II. DISCUSSION

Comfort disputes that any valid arbitration agreement existed. Therefore, this court's first inquiry must be whether the parties entered into such an agreement. "[T]he question of whether the parties agreed to arbitrate is to be decided by the court . . ." John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48, 53 (2d Cir. 2001) (internal quotation marks omitted). "In the context of motions to compel arbitration . . . the court applies a standard similar to that applicable for a motion for summary judgment. If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary." Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003) (internal citations omitted).

In determining whether such an agreement exists and is enforceable, this court looks to general contract principles except insofar as "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Id. (internal quotation marks omitted) (emphasis added).

Comfort provides three bases for her argument that the Employment Dispute Resolution Agreement ("Agreement") is not enforceable. First, she argues that the Agreement lacks consideration. Second, she argues that the Agreement lacks mutuality of obligation. Finally, she argues that there was no meeting of the minds and, therefore, no enforceable contract.

Comfort's final contention is based on her arguments that the Agreement lacked consideration and mutuality of obligation. Furthermore, mutuality of obligation and consideration are related concepts, both pertaining to the existence of a contract. "Consideration consists of 'a benefit to the party promising, or a loss or detriment to the party to whom the promise is made.'" Christian v. Gouldin, 72 Conn. App. 14, 23 (2002) (quoting Finlay v. Swirsky, 103 Conn. 624, 631 (1925)). "Consideration in fact bargained for is not required to be adequate in the sense of equality of value." State v. Lex Assoc., 238 Conn. 612, 619 (1999) (internal quotation marks omitted). The Connecticut Supreme Court has cited with approval the Restatement (Second), Contracts insofar as "if the requirement of consideration is met, there is no additional requirement of mutuality of obligation." Id. (quoting 1 Restatement (Second), Contracts § 79, p. 200 (1981).

Where an individual's employment is at-will, continued employment is sufficient consideration to render an arbitration agreement binding. See Fahim v. Cigna

Investments, Inc., 1998 WL 1967944, *2 (D.Conn. 1998) (citing cases). Furthermore, the cases cited by Comfort to support her contention that consideration is lacking in this case are distinguishable insofar as in those cases, no manifestation of asset had taken place. See, e.g. Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997); Gibbs v. Connecticut General Life Insurance Co., 1998 WL 123010 (Conn. Super. Mar. 3, 1998) (finding that interoffice memorandum announcing change in policy, where employee of twenty-five years was never asked to acknowledge receipt of said change in policy, did not give rise to an enforceable arbitration agreement).

The one-page Agreement appears on its face to evidence mutuality of obligation. Comfort argues that the terms of the Agreement allow Mariner to unilaterally change or revoke the terms of the Agreement. To support this contention, Comfort cites language in the Agreement that reads as follows: "no representative of the Company, other than an officer of the Company at the level of Senior Vice President or above, has the authority to make any agreement contrary to the foregoing or to alter the Company's EDR Program." Contrary to Comfort's assertion, such language does not imply the inverse, that Mariner's officers at the level of Senior Vice President or above do have the authority to alter the Agreement or the program. The plain language of the provision provides Mariner's officers with authority "to make [an] agreement" to alter the Program, not unilateral authority to do so. Agreement [Dkt. No. 11, Ex. A].

Comfort also relies on the Employee Handbook and Mariner's reservation of rights with respect to policies described in the handbook. The Agreement, however, is independent of the Employee Handbook and never references the Employee Handbook or any policies or procedures within it. The simple fact that the Employee Handbook

references Mariner's Employment Dispute Resolution Program does not result in the applicability of the reservation of rights language in the Employee Handbook to the Agreement. The case relied on by plaintiff involves an arbitration agreement "annexed" to a handbook which the employer maintained authority to unilaterally modify at any time. Salazar v. Citadel Communications Corp., 135 N.M. 447 (2004). Such is not the case here, where the Agreement is independent of the Employee Handbook.

The Employment Dispute Resolution Handbook, however, is not independent of the Agreement. Indeed, it is referenced in the Agreement. Comfort argues that because Employment Dispute Resolution Program Handbook itself provides for unilateral revision of the arbitration rules and procedures by Mariner, there is no mutuality of obligation. Specifically, the Rules are subject to adoption by Mariner, without Comfort's approval. Employment Dispute Resolution Program Rules [Dkt. No. 18, Ex. 5] at ¶ A.2.a ("If different rules have been adopted by the Company and served on the American Arbitration Association (the"AAA"), these Rules shall not apply."). The Employment Dispute Resolution Program Rules further provide that "[t]he Rules apply in the form existing at the time proceedings are initiated under them." Id. at ¶ A.2.b. Mariner's contention that its ability to modify the rules is limited by the rules of the AAA itself is belied by the fact that the handbook specifies that "the employment dispute resolution rules of the AAA also apply to all proceedings governed by these Rules" only "[t]o the extent consistent with these Rules." Id. at ¶ A.2.c.

The handbook includes such provisions as a filing fee, ¶ B.1.d, appointment of arbitrators, ¶ B.5, and the timeline in which arbitration must occur, ¶ B.7. Revision of any one of such provisions may result in a substantive change to the terms of the

Arbitration Agreement. See, e.g. Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 314 (6th Cir. 2000) (finding that an arbitral "fee structure could potentially prevent an employee from prosecuting a federal statutory claim against an employer"). Mariner's ability to render such change unilaterally evidences a lack of mutuality. Comfort's allegation that she did not receive the Dispute Resolution Rules at the time she signed the Agreement supports a finding that the Agreement, which referenced "the EDR Program booklet," lacked mutuality of obligation. See Floss, 211 F.3d at 315 ("A promise constitutes consideration for another promise only when it creates a binding obligation.").

The instant case is distinguishable from Hottle v. BDO Siedman, LLP, 268 Conn. 694 (2004) in which the Connecticut Supreme Court determined that an arbitration agreement between a partnership and one of its members was enforceable where the partnership's board of directors maintained exclusive ability to amend the arbitral procedures. Finding that such provision was not substantively unconscionable, the Connecticut Supreme Court found the arbitration clause enforceable. In that case, any alterations were required to be communicated to the individual partners. Furthermore, the parties shared similar expertise and bargaining power. There was no argument, as there is in this case, that a lack of consideration or mutuality of obligation stemmed from the fact that the plaintiff was not provided the provisions reserving authority to revise procedural rules when she assented to the arbitration agreement.

Lastly, Comfort argues that because there was no meeting of the minds, there can be no enforceable contract under Connecticut law. This contention rests on the aforementioned allegations that the Agreement lacked consideration and mutuality of

obligation. Having concluded that the Agreement lacked mutuality, the court need not reach the question whether this argument, in and of itself, has merit.

III. CONCLUSION

For the reasons discussed above, the defendant's motion to dismiss or, in the alternative, to stay proceedings and compel arbitration is DENIED.

In light of the foregoing, plaintiff's Motion to Expedite [Dkt. No. 37] and defendant's Motion to Stay Discover [Dkt. No. 31] are DENIED as moot.

The court extends the discovery period until October 15, 2005 and the deadline for dispositive motions to November 15, 2005. Defendant is ordered to respond to the discovery served on March 15, 2005 no later than May 20, 2005.

SO ORDERED

Dated at Bridgeport, Connecticut this 26th day of April, 2005.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge