UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

SHERON B. DOSS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 3:15-cv-904**
	)	**Judge Aleta A. Trauger**
NORDSTROM, INC., N.A.; BLAKE NORDSTROM, individually and in his Capacity as C.E.O.; TREVOR COBB, individually and in his capacity as Store Manager; NICHOLE M. DINGMAN, individually and in her capacity as Human Resources Manager; and LAUREN LUETTKE, individually and in her capacity as Department Manager,	)	**Magistrate Judge John S. Bryant**
	)	
Defendants.	)	

MEMORANDUM

On August 15, 2015, the Magistrate Judge issued a Report and Recommendation (Docket No. 58 (the "R&R")) recommending that 1) the defendants' Motion to Dismiss, Or In The Alternative, To Stay The Proceedings and Compel Arbitration (Docket No. 18) be granted; 2) the parties be ordered to arbitrate their dispute; 3) the Complaint be dismissed; and 4) all other pending motions be terminated as moot. On August 30, 2016, the plaintiff filed an Objection to the R&R (Docket No. 61), to which the defendants filed a Response in opposition (Docket No. 62). For the reasons discussed herein, the R&R will be accepted and this action will be dismissed.

BACKGROUND & PROCEDURAL HISTORY

This action arises from the plaintiff's employment by defendant Nordstrom, Inc. ("Nordstrom"),[1] as a full-time sales associate in the Nordstrom store in Nashville, Tennessee. The plaintiff, proceeding *pro se*, filed this action on August 18, 2015, bringing claims against Nordstrom, as well as several of its managerial employees, for breach of contract and violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq*. ("Title VII") and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"),[2] based on allegations of age- and race-based discrimination and retaliation. (Docket No. 1.) According to the allegations in the Complaint, the plaintiff, at the time a sixty-two year old African-American woman, entered into an employment contract with Nordstrom in March of 2015. The Complaint alleges that, thereafter, the plaintiff repeatedly complained about harassment and discrimination based on her age and race, including being treated differently from other employees; repeatedly requested and was denied transfer to a different department; and was ultimately forced to resign due to a hostile work environment. The Complaint also alleges that Nordstrom violated its employment contract with the plaintiff by reducing her work hours without notice.

On September 28, 2015, the defendants filed a Motion to Dismiss, or in the Alternative, to Stay the Proceedings and Compel Arbitration, along with a Memorandum in support. (Docket Nos. 18, 19.) The defendants argue that, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. (the "FAA"), the plaintiff is bound by the arbitration clause in the Nordstrom Dispute Resolution Agreement (the "NDRA"), to which she agreed at the time she submitted her online

[1] In its briefing, Nordstrom notes that the plaintiff incorrectly identified it as Nordstrom Inc., *N.A.* in the Complaint, as reflected in the caption. (Docket No. 18, p. 1, n. 1.)

[2] While the plaintiff does not actually name the ADEA in the Complaint, claims for employment discrimination based on age are covered under the ADEA and not Title VII and, accordingly, the plaintiff's claims are understood as claims for violation of both statutes.

employment application to Nordstrom. The defendants also argue that individual defendants Blake Nordstrom, Trevor Cobb, Nichole M. Dingman, and Lauren Luettke, as supervisory employees of Nordstrom, cannot be held liable for violating Title VII or the ADEA under applicable federal law and, therefore, claims against these defendants should be dismissed.[3]

The defendants filed with their motion the Declaration of Mary Porter, Nordstrom's Director of Talent Acquisition, along with attached exhibits. (Docket No. 20.) In her Declaration, Ms. Porter avers that, at the time the plaintiff submitted her application for employment to Nordstrom, the plaintiff affixed her electronic signature to a document called "Important Information for You," signifying her agreement to the following language regarding the NDRA:

> I understand that Nordstrom resolves disputes or claims that arise from an application for employment, the employment relationship and/or the termination of employment through final and binding arbitration as explained in full in the [NDRA]. I understand that neither Nordstrom nor I may pursue courtroom litigation as a means to resolve disputes or claims between myself and Nordstrom that are covered by the [NDRA]. My signature below confirms that I have obtained a copy of [the NDRA] by clicking here or by visiting the Nordstrom Careers site or from a Nordstrom Human Resources office. My signature below also confirms that I reviewed the [NDRA] and that I understand and agree to its terms and conditions.

(*Id*. ¶¶ 9-10.) Ms. Porter further states that, on March 8, 2015, after accepting Nordstrom's employment offer, the plaintiff was asked to again provide her signature agreeing to the terms of

[3] The Complaint in this action does not expressly address which claims are being brought against which defendants (*see* Docket No. 1 ¶¶ 44-47) and, in seeking to dismiss the claims against the *individual* defendants, the defendants do not expressly address whether the breach of contract claim is also brought against them. The court finds, however, that it would not be reasonable to read the Complaint as asserting breach of contract claims against the individual defendants, since there are no allegations to suggest that they were parties to the employment agreement between the plaintiff and defendant Nordstrom. Moreover, nowhere in the record does the plaintiff argue that she is bringing breach of contract claims against these defendants. Accordingly, the unchallenged finding of the Magistrate Judge that the Title VII and ADEA claims are not properly brought against the individual defendants, discussed below, is a sufficient basis for dismissing them from this action entirely.

the NDRA, which she did electronically. (*Id*. ¶¶ 11-12.) Ms. Porter states that a true and correct copy of the NDRA to which the plaintiff agreed is attached as Exhibit D to her Declaration. (*Id*. ¶ 12.) The attached NDRA includes a mandatory arbitration clause, which is worded as follows:

> This Dispute Resolution Agreement ("Agreement") is governed by the [FAA] and evidences a transaction involving commerce. This agreement applies to any disputes arising out of or related to your application for employment with Nordstrom or one of its affiliates, subsidiaries or parent companies ("Nordstrom"), your employment with Nordstrom or the termination of your employment. . . . This Agreement is intended to apply to the resolution of past, present, and future disputes that otherwise would be resolved in a court of law and requires that all such disputes be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial except as otherwise stated in this Agreement. The Agreement applies without limitation to disputes regarding the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, discrimination, retaliation . . . or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act . . . and other state and local statutes, addressing the same or similar subject matters, and all other state statutory and common law claims.

(Docket No. 20-4 (Ex. D.), p. 2.) Finally, Ms. Porter states that the plaintiff signed an Employee Acknowledgement and Agreement Form, attached to Ms. Porter's Declaration as Exhibit G. (Docket No. 20 ¶ 12.) This attached form, containing the plaintiff's signature dated March 8, 2015, states, in pertinent part, that the employee has received and reviewed, and will agree to abide by, the NDRA. (Docket No. 20-7 (Ex. G).)

On October 5, 2015, the plaintiff filed a Response in opposition to the defendants' Motion to Dismiss, along with a Memorandum in support, arguing that 1) because the employment contract was breached (including through the defendant's failure to comply with the terms of the NDRA itself), the NDRA has been revoked and is no longer enforceable; 2) that the NDRA is unenforceable because it is an unconscionable contract of adhesion; and 3) that the individual defendants are proper defendants to the Title VII and ADEA claims in this action.

(Docket Nos. 22, 23.) With respect to her assertion that the defendants breached the NDRA, the plaintiff alleges, for the first time in this briefing, that the defendants did not properly comply with the steps outlined in the NDRA for attempting to resolve disputes outside of the arbitration process. (Docket No. 22, pp. 1-2.) The plaintiff specifically alleges that the defendants did not fully investigate her complaints internally and that they informed the plaintiff that that they were not open to reaching a resolution. (*Id*.) The plaintiff also recounts the allegations in her Complaint that the defendants did not adequately address her reports of discrimination and requests for transfer to a different department, allegations that underlie the breach of contract cause of action in the Complaint. (*Id*. at pp. 3-4.) The plaintiff does not, however, allege that she ever attempted to commence the arbitration process as outlined under the NDRA or that the defendants in any way indicated a refusal to engage in arbitration.

With respect to the plaintiff's argument that the arbitration agreement is an unenforceable adhesion contract, she references the fact that the contract was drafted by Nordstrom and presented as a mandatory condition of employment, with no provision for the plaintiff to waive or opt-out of its requirements, and without any procedure for Nordstrom to confirm that the plaintiff had actually read and *understood* what she was signing. (*Id*. at p. 3.) The plaintiff does not deny, however, that she did, in fact, sign the forms agreeing to be bound by the NDRA and indicating that she had read and understood its terms. (*Id*.) Nor does she deny any of the facts put forth in the Porter Declaration regarding her having been given the opportunity to access the NDRA both at the time she applied for her position at Nordstrom and at the time she began her employment, and to print a copy to retain for her records. Finally, the plaintiff does not dispute that the signed documents placed in the record by Ms. Porter are accurate copies of documents bearing the plaintiff's signature as quoted above.

On October 20, 2015, the defendants filed a Reply. (Docket No. 29.)

On August 15, 2016, the Magistrate Judge issued the R&R with respect to this motion. (Docket No. 58.) The Magistrate Judge began by noting that the Sixth Circuit applies the FAA to arbitration agreements formed in employment settings and, therefore, the FAA governs the question of arbitrability in this action, citing *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 376 (6th Cir. 2005). (*Id*. at p. 5.) The Magistrate Judge also noted that federal courts are required to exercise a strong presumption in favor of arbitration, citing *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000). (*Id*. at p.6.) The Magistrate Judge then followed a four-part test, laid out in *Glazer v. Lehman Bros., Inc.*, 394 F.3d 444, 451 (6th Cir. 2001), for determining a motion to dismiss and compel arbitration: 1) the court must determine whether the parties agreed to arbitrate, 2) the court must determine the scope of the arbitration agreement, 3) if there is a federal claim asserted, the court must determine whether Congress intended those claims to be non-arbtitrable, and 4) if some but not all of the claims are arbitrable, then the court must decide whether to stay the action pending arbitration. (*Id*. at p. 7.)

The Magistrate Judge found that the plaintiff's argument with respect to Nordstrom's alleged breach of the employment agreement (including a breach of the NDRA) is not a proper grounds for invalidating the agreement to arbitrate because the validity or revocation of the contract as a whole is a question for the arbitrator, citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006). (*Id*. at 8-9.) The Magistrate Judge, however, did not expressly address the question of whether the arbitration agreement itself is an unconscionable contract of adhesion but, rather, found that this question should also be determined by the arbitrator. (*Id*.) The Magistrate Judge then went on to find: 1) the parties entered an enforceable arbitration agreement; 2) the claims in this action are all within the scope of that agreement; 3)

the claims brought under Title VII and the ADEA are not excluded from arbitration under federal law, citing *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 309-10 (6th Cir. 2004) (Title VII) and *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991) (ADEA); 4) there is no basis for staying the action rather than dismissing it, because all claims are subject to arbitration; and 5) the individual defendants cannot be held liable under Title VII or the ADEA and, therefore, claims against those defendants should be dismissed, citing *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 404-05 (6th Cir. 1997). (Docket No. 58. at pp. 8-12.)

On August 30, 2016, the plaintiff filed her Objection to the R&R, arguing that the Magistrate Judge erred in finding that the questions of whether Nordstrom breached the NDRA and whether the arbitration agreement is an unconscionable adhesion contract are matters for the arbitrator to decide rather than grounds for voiding the arbitration agreement and keeping this action in federal court. (Docket No. 61.) The plaintiff expressly concedes, however, that she does not object to the Magistrate Judge's findings with respect to the dismissal of the individual defendants. (*Id*. at p. 1.) Moreover, the plaintiff does not object to the Magistrate Judge's findings that 1) an arbitration agreement was entered between the parties, 2) the plaintiff's claims all fall within the scope of that arbitration agreement, 3) claims under Title VII and the ADEA are arbitrable under federal law, and 4) dismissal is warranted rather than staying the proceedings, assuming that the parties are ordered to arbitrate all claims. In her Objection, the plaintiff also argues for the first time that Nordstrom committed fraud in its handling of her requests – under the NDRA – for resolution of her claims outside of the arbitration process. (*Id*.

at pp. 5-6.) Specifically, the plaintiff alleges that Nordstrom misrepresented that her claims were being investigated and would potentially be internally resolved.[4] (*Id*.)

On September 14, 2016, the defendants filed a Response to the plaintiff's Objection. (Docket No. 62.)

ANALYSIS

When a magistrate judge issues a report and recommendation regarding a dispositive pretrial matter, the district court must review *de novo* any portion of the report and recommendation to which a specific objection is made. Fed. R. Civ. P. 72(b); 28 U.S.C. §636(b)(1)(C); *United States v. Curtis*, 237 F.3d 598, 603 (6th Cir. 2001); *Massey v. City of Ferndale*, 7 F.3d 506, 510 (6th Cir. 1993). The only objection to the R&R advanced by the plaintiff is with respect to the Magistrate Judge's finding that the arbitration agreement entered by the parties is *enforceable*. As noted above, the plaintiff contends that the Magistrate Judge erred in failing to find the NDRA either revoked by the defendant's breach of contract or unenforceable as an unconscionable adhesion contract. For the reasons discussed below, there is no merit to either of these objections.

[4] Finally, in her Objection, the plaintiff uses the term "duress" to refer to her state of mind at the time she signed the NDRA, apparently referring to the facts put forth in her briefing that her husband had passed away and she was in "dire need of employment." (Docket No. 61, p. 6.) Nowhere in the record, however, has the plaintiff argued that the arbitration agreement was signed under duress as defined for purposes of invalidating an agreement under Tennessee law, meaning as a product of improper coercive influence placed on her by Nordstrom. *See Barnes v. Barnes*, 193 S.W.3d 495, 500 (Tenn. 2006) (Under Tennessee law, "[d]uress is defined as a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party, and causes him to do and act or make a contract not of his own volition, but under such wrongful external pressure."). As recounted below, the plaintiff does allege that Nordstrom conditioned her employment on her acceptance of the arbitration agreement within the NDRA, but this is not grounds for a finding of even procedural unconscionability, let alone grounds for a finding of duress that invalidates a contract.

The plaintiff is correct that arbitration agreements may be rendered unenforceable on the same grounds as other contracts, in common law and in equity. *See Gilmer*, 500 U.S. at 24-25 (citing 9 U.S.C. § 2). The plaintiff's arguments that the arbitration agreement she entered with Nordstrom is unenforceable, however, fail as a matter of law. First, the Magistrate Judge correctly found that an alleged breach of a contract containing an arbitration clause is a matter for the *arbitrator* to decide and is not grounds to invalidate the arbitration clause, which is severable for this purpose from the remainder of the challenged contract. *See Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 394 (6th Cir. 2003) (finding that allegations of breach of a contract containing an arbitration clause are not grounds for rendering the arbitration agreement invalid and that the only way to invalidate an arbitration clause is to show that the arbitration clause *itself* was the product of improper contract formation). Here, as the Magistrate Judge found, the plaintiff's assertions that Nordstrom breached its employment contract with the plaintiff by reducing her hours without notice, as well as her assertions that Nordstrom specifically breached the NDRA by failing to investigate her claims and reach a resolution outside of the arbitration process, are all matters to be decided by the arbitrator. There are no allegations anywhere in the record that the plaintiff attempted to initiate arbitration proceedings and Nordstrom refused to arbitrate, or that Nordstrom otherwise indicated an intent to renege on its agreement to arbitrate this dispute, such as would warrant legal review.

The plaintiff's allegations of fraud in the communication process around her internal complaint are raised for the first time in her Objection and so are not properly before the court in its review of the R&R. Nevertheless, the court notes that any fraud committed by Nordstrom in the course of responding to the plaintiff's request for extra-arbitral review of her complaints are, again, matters for the arbitrator to consider. The plaintiff appears to confuse fraud in this context

with fraud in the context of initially entering an arbitration agreement, which, as discussed below, may be grounds for rendering an arbitration clause invalid. In this action, however, there are no allegations that Nordstrom committed fraud in the process of entering into the arbitration agreement with the plaintiff.

Contrary to the Magistrate Judge's findings, however, a federal court should, in fact, review the question of whether an arbitration agreement is unconscionable before compelling arbitration and dismissing the legal action. *See Buckeye*, 546 U.S. at 446 (differentiating between challenges to the validity of a contract as a whole and challenges to the formation of the arbitration clause itself). "[*U]nless the challenge is to the arbitration clause itself*, the issue of the contract's validity is considered by the arbitrator in the first instance." *Id*. (emphasis added); *see also Johnson v. Long John Silver's Rests., Inc.*, 320 F. Supp. 2d 656, 663-64 (M.D. Tenn. 2004) (differentiating grounds upon which the arbitration clause itself should be voided from matters to be considered by the arbitrator). Here, the plaintiff challenges the arbitration clause in the NDRA *itself* by arguing that it is an unconscionable contract of adhesion. This is a matter that should be addressed by the court before determining that the parties entered an enforceable arbitration agreement. Upon *de novo* review, however, the court finds that the arbitration provision of the NDRA is not an unconscionable contract of adhesion and, therefore, this argument does not, in the end, provide a basis for overturning the Magistrate Judge's finding that the parties entered an enforceable arbitration agreement.

Under Tennessee law, in order to find that a contract is an unenforceable adhesion contract, it must be found both adhesive *and* unconscionable. *See Seawright v. Am. Gen. Fin. Servs.*, 507 F.3d 967, 976-77 (6th Cir. 2007); see also *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 503 (6th Cir. 2004). An adhesion contract is one that is offered on a standard form, on a take it

or leave it basis, without giving the weaker party to the negotiation an opportunity to bargain, and under conditions where the weaker party has a lack of meaningful choice. *Id*. at 975-76; *see also Cooper*, 367 F.3d at 499 (citing *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996)). Unconscionability is found where "the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. *Seawright*, 507 F.3d at 977 (quoting *Huan v. King*, 690 S.W. 2d 869, 872 (Tenn. Ct. App. 2001)).

First, the arbitration agreement between the plaintiff and Nordstrom is not an adhesion contract, because the plaintiff has put forth no evidence that she lacked meaningful choice in whether to enter the agreement or seek employment elsewhere. In *Seawright*, the Sixth Circuit explained that an arbitration agreement in an employment contract is not a contract of adhesion simply because the potential employee has no choice but to agree in order to be hired or to *continue* her employment in that *particular* job. *Id*. at 976 (citing *Cooper*, 367 F.3d at 502). Rather, a lack of meaningful choice would require a showing that the employee had no other comparable employment options. *Id*. As the Sixth Circuit recounted in *Cooper*, Tennessee courts have found a lack of meaningful choice in the adhesion context in a contract given by a doctor to a patient in the middle of her treatment, such that the patient would not be able to maintain her doctor-patient relationship or have her medical treatment continue uninterrupted without agreeing to the contract's terms. 367 F.3d at 499 (citing *Buraczynski*, 919 S.W.2d 314). Tennessee courts have not found a contract to be adhesive, however, where a consumer is simply deprived of the choice of purchasing a product or service from a particular merchant without agreeing to a particular contract term, absent evidence that the consumer would be unable to

purchase that item elsewhere. *Id*. at 500 (citing *Pyburn v. Bill Heard Chevrolet*, 63 S.W. 3d 351 (Tenn. Ct. App. 2001); *Wallace v. Nat'l Bank of Commerce*, 938 S.W.2d 684 (Tenn. 1997)). In light of these holdings, the plaintiff cannot establish that Nordstrom presented her with a contract of adhesion merely by conditioning her employment with Nordstrom on the arbitration agreement. The record is devoid of any evidence to suggest that the plaintiff lacked other comparable employment options elsewhere.

Further, even if the arbitration agreement between the plaintiff and Nordstrom were an adhesion contract, it is neither substantively nor procedurally unconscionable. Under Tennessee law, a mere inequality between two parties to an agreement is not sufficient to find unconscionability. *See Cooper*, 367 F.3d at 504 (finding no unconscionability, even where the agreement was between a sophisticated employer and a low-level fast-food worker). Unconscionability requires a showing that either the weaker party to the agreement – by virtue of age, intelligence, education, or experience – was so clearly unable to understand the terms of the agreement as to shock the conscience (procedural unconscionability), or that the terms of the agreement are so unfair as to be unreasonable (substantive unconscionability). *Id*. at 504-505. The Sixth Circuit has held that an arbitration agreement in the employment context is not so unreasonable where the terms are mutual and the agreement is not aimed solely at limiting the liability of the employer. *Id*. at 505; *Seawright*, 507 F.3d at 977.

Here, the plaintiff has not established any grounds for the court to find that there was procedural or substantive unconscionability. While there may be an imbalance of power between the plaintiff and Nordstrom, in that Nordstrom is a large company that drafted the agreement and the plaintiff is an individual seeking a non-managerial sales position, this is not sufficient under the law to establish procedural unconscionability. The plaintiff has presented no

evidence to suggest that her age, education, or experience rendered her unable to understand the terms of the contract.[5] Nor has the plaintiff cited any legal proposition to support her argument that Nordstrom was required to affirmatively ensure that she truly understood the terms of the arbitration agreement, beyond providing her with a copy, giving her the opportunity to keep a copy, and asking for her signature to confirm that she read and understood all terms of the NDRA. With respect to the substantive terms of the arbitration agreement, as quoted above, the agreement is clearly mutual, and Nordstrom has waived its rights to pursue litigation just as the plaintiff has.[6] There is no evidence whatsoever to indicate that this agreement was aimed at limiting the liability of Nordstrom.

In sum, the court finds that the arbitration agreement has not been rendered unenforceable due to allegations of Nordstrom's breach of contract, which is a matter for the arbitrator to determine. Nor is the arbitration agreement an unconscionable contract of adhesion. Accordingly, there is no basis to reject the Magistrate Judge's findings that the parties entered an enforceable agreement to arbitrate and, therefore, the dispute should be subject to arbitration and this action, dismissed.

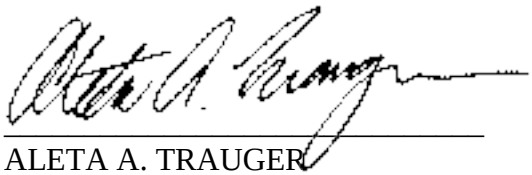
CONCLUSION

[5] In fact, to the contrary, the plaintiff has placed in the record a letter from the Nashville Branch of the NAACP, in support of her position in this action, stating that the plaintiff has obtained Juris Doctorate and Master's in Social Work degrees and has extensive employment experience in a variety of professional settings. (Docket No. 54.)

[6] Notably, the plaintiff has not argued that the arbitration agreement in this action is one-sided or otherwise unfair to her in terms of costs, selection of arbitrators, discovery opportunities, or scope of remedies – the type of arguments often used to challenge arbitration agreements on grounds of substantive unconscionability. Moreover, the court's review of the arbitration agreement in the record reveals that such assertions here would be without merit.

For the foregoing reasons, the R&R will be accepted, as supplemented herein, the Motion to Dismiss, or In Alternative, To Stay the Proceedings and Compel Arbitration will be granted, and this action will be dismissed.

An appropriate order will enter.



ALETA A. TRAUGER
United States District Judge