UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

ANTHONY LONNIE FORBES,

Plaintiff,

v. ACTION NO. 4:16cv172

SEAWORLD PARKS & ENTERTAINMENT,

Defendant.

MEMORANDUM DISMISSAL ORDER

This matter is before the Court on the following motions filed by *pro se* Plaintiff Anthony Lonnie Forbes ("Plaintiff") and Defendant SeaWorld Parks & Entertainment[1] ("Defendant"):

(i) Defendant's Motion to Dismiss and Compel Arbitration ("Motion to Dismiss"), ECF No. 8;

(ii) Plaintiff's Motion for Issuance of Subpoena Duces Tecum ("First Motion for Subpoena"), ECF No. 17;

(iii) Plaintiff's Motion for Issuance of Subpoena Duces Tecum ("Second Motion for Subpoena"), ECF No. 18; and

(iv) Plaintiff's Motion for Issuance of Subpoena Duces Tecum ("Third Motion for Subpoena"), ECF No. 19.

The Court concludes that oral argument is unnecessary because the facts and legal arguments are adequately presented in the parties' briefs. For the reasons set forth below, Defendant's Motion to Dismiss, ECF No. 8, is **GRANTED**, and Plaintiff's First Motion for Subpoena, ECF No. 17, Second Motion for Subpoena, ECF No. 18, and Third Motion for Subpoena, ECF No. 19, are **DISMISSED as moot**.

[1] Defendant states that Plaintiff incorrectly identified it as "SeaWorld Parks & Entertainment," and that its proper name is "SeaWorld Parks & Entertainment LLC d/b/a Busch Gardens Williamsburg." Mot. to Dismiss at 1 n.1, ECF No. 8.

I. Summary of Plaintiff's Allegations

Plaintiff is an African American male who was formerly employed by Defendant at Busch Gardens in Williamsburg, Virginia. Compl. at 3, 6. Plaintiff claims that he was sexually harassed by two assistant managers, Tenekia Harden and Beth Gabbert. *Id.* at 6. When Plaintiff "showed no interest" in Ms. Harden and Ms. Gabbert, Plaintiff claims that he was yelled at and his hours were cut. *Id.* Plaintiff reported the inappropriate conduct to a manager, Jackie Diggs, but claims that Ms. Diggs simply laughed and "allowed [Ms. Harden] to do whatever she wanted." *Id.* Plaintiff further claims that Ms. Diggs "made inappropriate racial comments and jokes," "constantly screamed and yelled at only [b]lack employees," and retaliated against Plaintiff by instructing supervisors to "write up" Plaintiff for various disciplinary issues that Plaintiff considered to be unwarranted. *Id.* Plaintiff reported his concerns to the Human Resources Department and was subsequently "transferred to an unwelcoming environment." *Id.* at 6-7. Plaintiff claims that he was "isolated," assaulted, and subjected to racial comments without consequence. *Id.* at 7.

Plaintiff eventually met with "high ranking officials" who initiated an investigation. *Id.* Following the investigation, Plaintiff was notified that the officials "found evidence that [Plaintiff] was sexually [h]arassed." *Id.* at 8. Melissa Hargis, the Senior Director of Human Resources, asked Plaintiff to provide input on potential resolutions. *Id.* Plaintiff requested copies of the investigation findings; however, his request was denied. *Id.* Plaintiff claims that he "was later fired after stating he would go to the authorities." *Id.*

After filing a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") and receiving a Right to Sue Letter, Plaintiff filed suit in this Court, asserting claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 1981,

and the Virginia Human Rights Act, as well as state law claims for assault and battery and intentional infliction of emotional distress. *Id.* at 3, 9-10.

II. Defendant's Motion to Dismiss

A. Background

Defendant asserts that "Plaintiff agreed to submit all employment-related claims to [Defendant's] Dispute Resolution Program ('DRP')," which culminates in "final and binding arbitration." Mem. in Supp. of Mot. to Dismiss at 2, ECF No. 9. Based on this agreement, Defendant argues that dismissal is warranted because "this Court is not the correct forum for any of Plaintiff's claims." *Id.* To support its position, Defendant points to a number of documents evidencing Plaintiff's agreement to arbitrate his disputes with Defendant. First, Defendant highlights the specific language of the DRP. The DRP states:

> SPECIAL NOTICE TO EMPLOYEES
>
> THIS POLICY CONSTITUTES A BINDING AGREEMENT BETWEEN YOU AND THE COMPANY FOR THE RESOLUTION OF EMPLOYMENT DISPUTES.
>
> By continuing your employment with SeaWorld Parks & Entertainment, Inc., and/or any of its subsidiaries, divisions or affiliated companies ("Company"), you and the Company are agreeing as a condition of your employment to submit all covered claims to the SeaWorld Parks & Entertainment Dispute Resolution Program ("DRP"), to waive all rights to a trial before a jury on such claims, and to accept an arbitrator's decision as the final, binding and exclusive determination of all covered claims. This program does not change the employment-at-will relationship between you and the Company.

Id., Ex. A at 2. The DRP encourages employees "to resolve work-related disputes informally through dialogue with their managers or a Human Resources (HR) representative," but states that "when informal efforts do not resolve an Employee's dispute, and the Employee wishes to pursue

the matter further, an Employee must submit his or her dispute to the DRP." *Id.* "Covered claims" are defined under the DRP to include, among other things:

> [C]laims relating to or arising out of the employment relationship that: . . .
>
> B. the Employee may have against the Company and/or any individual employee who is acting within the scope of his or her employment with the Company, where the Employee alleges unlawful termination and/or unlawful or illegal conduct on the part of the Company, including, but not limited to the following:
>
> (1) Claims relating to involuntary terminations, such as layoffs and discharges (including constructive discharges) when those terminations are alleged to be discriminatory or otherwise unlawful under applicable federal or state law;
>
> (2) Employment discrimination and harassment claims based on, for example, age, race, sex, religion, national origin, veteran status, citizenship, disability, or other characteristics protected by applicable laws;
>
> (3) Retaliation claims for legally protected activity and/or for whistle-blowing under federal or state law; [and]
>
> . . .
>
> (7) Tort claims, such as negligence, defamation, invasion of privacy, and infliction of emotional distress. . . .

Id. at 6. The DRP contains three procedural levels for dispute resolution. At Level 1, the "Employee and the management team attempt to resolve the Employee's dispute locally." *Id.* at 3. At Level 2, "an independent mediator helps the Employee and the Company open lines of communication in an attempt to facilitate a resolution." *Id.* Level 3 is "Binding Arbitration" whereby "an independent arbitrator provides the Employee and the Company with a ruling on the merits of the Employee's covered claim(s)." *Id.* During this phase, the Company and the Employee jointly select an arbitrator "from a panel provided by an organization of professional mediators and arbitrators, such as the American Arbitration Association ('Association')," or they may mutually agree to select an arbitrator "without use of panels from the Association or similar

organizations." *Id.* The DRP explains that "[t]he arbitrator's decision is the final, binding and exclusive remedy for the Employee's covered claim(s) and is equally final and binding upon the Company." *Id.* The DRP further explains: "This program constitutes a written agreement to arbitrate pursuant to the Federal Arbitration Act, 9 U.S.C.A. Sections 1-14." *Id.* at 7.

Defendant also notes that Plaintiff's offer letter contained an explicit reference to the DRP, stating: "As a team member of Busch Gardens Williamsburg, you will be covered by the company's Dispute Resolution Program (DRP). In the unlikely event you would have a workplace dispute, DRP will be the exclusive method available to you for resolution." *Id.*, Ex. C. Plaintiff signed his offer letter on July 11, 2013, "confirm[ing] this offer of employment." *Id.* That same day, Plaintiff signed a General Policy Acknowledgment Form (i) indicating that he reviewed and understood the DRP (and other policies), and (ii) acknowledging that he was "expected to comply fully" with all applicable policies. *Id.*, Ex. D. Additionally, during his employment, Plaintiff signed other "Acknowledgements" regarding the DRP "on no fewer than 12 occasions."[2] Reply Br. at 4, Ex. F, ECF No. 16. In the "Acknowledgements," Plaintiff stated:

> I agree to submit to final and binding arbitration under the SeaWorld Parks & Entertainment, Inc. Dispute Resolution Program (the 'DRP') any and all disputes between the Company and me regarding or related in any way to my employment with the Company. I acknowledge that the Company will not offer employment to me if I do not agree to arbitrate any employment-related claims between the Company and me.
>
> I agree further that arbitration will be the exclusive method that I will have for final and binding resolution of claims covered by the DRP.

Id.

[2] Defendant attached twelve "Acknowledgements" to its Reply Brief that were electronically signed by Plaintiff at various times between April 22, 2013, and August 26, 2015. Reply Br., Ex. F, ECF No. 16.

Despite all of this, Plaintiff seeks to avoid arbitration and argues that (i) "there was no valid agreement to arbitrate any of the disputes at hand because the Plaintiff was induced to enter into the contract containing the arbitration agreement by fraud;" (ii) "[t]he arbitration claims and its application are unconscionable and therefore unenforceable;" (iii) "Defendant waived its right to compel arbitration under the agreement;" and (iv) "Defendant has continued to harass Plaintiff outside of the scope of employment." Opp. Br. at 2, ECF No. 15

B. Legal Standards

Defendant seeks dismissal of Plaintiff's action "pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(3) and the Federal Arbitration Act." Mem. in Supp. of Mot. to Dismiss at 1, ECF No. 9. A motion to dismiss under Federal Rule 12(b)(1) challenges the Court's subject matter jurisdiction over the asserted claims. Fed. R. Civ. P. 12(b)(1). Plaintiff bears the burden of proving that subject matter jurisdiction exists by a preponderance of the evidence. *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347-48 (4th Cir. 2009). In determining whether subject matter jurisdiction exists, the district court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004); *Johnson v. Portfolio Recovery Assocs., LLC*, 682 F. Supp. 2d 560, 566-67 (E.D. Va. 2009).

A motion to dismiss under Federal Rule 12(b)(3) asserts that the venue selected by Plaintiff to address his claims is improper. Fed. R. Civ. P. 12(b)(3). Courts characterize an arbitration clause as "a specialized kind of forum-selection clause," and advise that "a motion to dismiss based on a forum-selection clause should be properly treated under Rule 12(b)(3) as a motion to dismiss on the basis of improper venue." *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 365 n.9 (4th Cir. 2012) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) and

Sucampo Pharm., Inc. v. Asetllas Pharma, Inc., 471 F.3d 544, 550 (4th Cir. 2006)); *see also Mitchell v. Sajed*, No. 3:13cv312, 2013 U.S. Dist. LEXIS 102207, at *14 (E.D. Va. July 22, 2013) (dismissing an action "on the basis of improper venue" after the court determined that an arbitration agreement covered the plaintiff's claims). "On a motion to dismiss under Rule 12(b)(3), the court is permitted to consider evidence outside the pleadings." *Sucampo Pharm., Inc.*, 471 F.3d at 550.

Congress passed the Federal Arbitration Act ("FAA") "to reverse the longstanding judicial hostility to arbitration agreements," and to reflect a new "liberal federal policy favoring arbitration agreements." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002); *Murray v. UFCW Int'l, Local 400*, 289 F.3d 297, 301 (4th Cir. 2002); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Hawthorne v. BJ's Wholesale Club*, No. 3:15cv572, 2016 U.S. Dist. LEXIS 114969, at *9 (E.D. Va. Aug. 26, 2016). Pursuant to the FAA, "[w]hen parties have entered into a valid and enforceable agreement to arbitrate their disputes and the dispute at issue falls within the scope of that agreement, . . . federal courts [must] stay judicial proceedings, *see* 9 U.S.C.A. § 3, and compel arbitration in accordance with the agreement's terms." *Murray*, 289 F.3d at 301. "[I]f a court determines 'that all of the issues presented are arbitrable, then it may dismiss the case.'" *Hawthorne*, 2016 U.S. Dist. LEXIS 114969, at *19 (quoting *Greenville Hosp. Sys. v. Emp. Welfare Ben. Plan for Emps. of Hazelhurst Mgmt. Co.*, 628 F. App'x 842, 845-46 (4th Cir. 2015)); *see also Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001). "[A]ny doubts concerning the scope of arbitral issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Murray*, 289 F.3d at 301 (internal citations omitted).

Notably, the United States Court of Appeals for the Fourth Circuit has explained:

> It is settled that the provisions of the FAA, and its policy favoring the resolution of disputes through arbitration, apply to employment agreements to arbitrate discrimination claims brought pursuant to federal statutes, including Title VII of the Civil Rights Act. Such an agreement is enforceable because "by 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 judicial, forum."

Murray, 289 F.3d at 301 (internal citations omitted).

When a party seeks to compel the arbitration of a dispute pursuant to the FAA, the party must demonstrate:

> (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the [opposing party] to arbitrate the dispute.

Galloway v. Santander Consumer USA, Inc., 819 F.3d 79, 84 (4th Cir. 2016).

C. Analysis

In seeking to avoid arbitration, Plaintiff first argues that the arbitration agreement at issue in this case is invalid because Plaintiff was "induced to enter into the contract containing the arbitration agreement by fraud." Opp. Br. at 2, ECF No. 15. To support his position, Plaintiff claims that (i) the DRP attached to Defendant's Motion to Dismiss is "an outdated policy;" (ii) he did not receive a copy of the DRP until after his employment was terminated; (iii) "the DRP policy is not mandatory, but encouraged;" (iv) he "signed documentation stating that he would follow all policies," but considers this to be an "attempt to force Plaintiff into an '[a]greement to [a]rbitrate by [f]raud;" and (v) the offer letter attached to Defendant's Motion to Dismiss was "outdated," as

he was "promoted at least three (3) times while working for Defendant." *Id.* at 2-3. The Court is not persuaded by Plaintiff's arguments.

First, Plaintiff's speculation that the DRP provided by Defendant is "outdated" is factually unsupported.[3] Second, Plaintiff's claim that he never received a copy of the DRP conflicts with the General Policy Acknowledgement Form, signed by Plaintiff, in which he indicated that he read and understood the DRP on July 11, 2013. Mem. in Supp. of Mot. to Dismiss, Ex. D, ECF No. 9. Third, Plaintiff's claim that the DRP is only encouraged, not mandatory, conflicts with the specific language of the DRP that states that covered claims "must" be submitted to the DRP. *Id.*, Ex. A. Fourth, Plaintiff's claim that his agreement to abide by all of Defendant's policies was, in some way, an attempt by Defendant to fraudulently induce Plaintiff into an arbitration agreement is factually unsupported. Finally, even if Plaintiff received subsequent promotions during his employment with Defendant, thus making his prior offer letter "outdated," Plaintiff has not provided any information to suggest that the DRP did not apply to his subsequent promotions.

Plaintiff next argues that the arbitration agreement is unconscionable because it "only allows Defendant to modify the agreement's terms" and it "is overly harsh and lacks mutuality." Opp. Br. at 3, ECF No. 15. The Court disagrees. "Virginia has traditionally defined an unconscionable contract as one that no person in his or her 'senses and not under delusion would make on the one hand, and [that] no honest and fair [person] would accept on the other.'" *Hawthorne*, 2016 U.S. Dist. LEXIS 114969, at *14 (citing *Lee v. Fairfax Cty. Sch. Board*, 621 F. App'x 761, 762 (4th Cir. 2015)) (alterations in original). Unconscionability has been described

[3] Notably, Defendant indicates in its Reply Brief that "the DRP has not been altered in any substantive way since it was formed over a decade ago." Reply Br. at 3, ECF No. 16.

as "a narrow doctrine" that "requires a showing of inequality 'so gross as to shock the conscience.'" *Id.*

Here, the terms of the arbitration agreement at issue explain that the arbitration will be conducted by an "independent arbitrator" who is "jointly select[ed] by Plaintiff and Defendant. Mem. in Supp. of Mot. to Dismiss, Ex. A at 3, ECF No. 9. Further, the terms make it clear that the agreement applies equally to both Plaintiff and Defendant. For example, "covered claims" are specifically defined as "claims relating to or arising out of the employment relationship that: A. the Company may have against an Employee . . . and/or B. the Employee may have against the Company. . . ." *Id.*, Ex. A at 6. Further, the agreement specifically states that "the arbitrator's decision . . . is equally final and binding upon the Company." *Id.* While it is true, as Plaintiff notes, that the arbitration agreement only allows Defendant, not Plaintiff, to modify its terms, the agreement requires Defendant to provide Plaintiff with "30 calendar days' notice" of any such modifications. This modification provision does not result in an unconscionable contract. Under these circumstances, the Court finds that Plaintiff has not provided evidence to support his conclusory assertion that the agreement to arbitrate was unconscionable. *See Hawthorne*, 2016 U.S. Dist. LEXIS 114969, at *15 (noting that "courts have found that when plaintiffs maintain an option to refuse to sign the form and to work elsewhere instead, . . . the plaintiffs faced a contract that was not unconscionable").

Plaintiff next argues that Defendant "waived its right to arbitrate through actions which are inconsistent with arbitration as the exclusive remedy." Opp. Br. at 3, ECF No. 15. Plaintiff claims that Defendant "was given the opportunity to arbitrate on at least three occasions," but chose not to do so. *Id.* Plaintiff states that (i) he "asked for mediation when submitting [his] claim to [the] EEOC," but Defendant denied the request; (ii) his lawyer sent a letter to Defendant

"requesting settlement outside of court," and Defendant did not "bring up arbitration," although it "would have been appropriate" to do so; and (iii) he sent an email to Defendant's counsel, Nancy Lester, that "was not responded to." *Id.* at 3-4.

"The party opposing arbitration 'bears the heavy burden of proving waiver.'" *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 250 (4th Cir. 2001) (quoting *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 95 (4th Cir. 1996)). Here, Defendant filed its Motion to Dismiss, in which it raised the arbitration issue, as its first responsive pleading to Plaintiff's Complaint. Even assuming Defendant declined mediation with the EEOC, failed to "bring up arbitration" in response to Plaintiff's informal settlement requests, and failed to respond to certain emails, the Court finds that such behavior does not satisfy the "heavy burden" required to support a finding of waiver.

Finally, Plaintiff argues that the arbitration agreement should not be enforced because "Defendant has continued to harass Plaintiff outside of the scope of employment." Opp. Br. at 2, ECF No. 15. Specifically, Plaintiff claims that Defendant's counsel contacted him via phone and "stated that it wouldn't be good for me if I didn't drop my lawsuit and arbitrate." *Id.* at 4. Plaintiff considered this statement to be "a threat." *Id.* Plaintiff also points to Exhibits 44 and 45, without explanation, as evidence of alleged harassment by Defendant; however, those exhibits appear to be communications from Defendant's counsel discussing waiver of service and advising Plaintiff that "the proper forum" for his dispute is Defendant's DRP. *Id.*, Exs. 3, 4.[4] Finally, Plaintiff claims that Sandra Graham, an employee of the law firm representing Defendant, posted a message on Liberty University's website regarding her plans to "continue into the Juris Master's

[4] Although Plaintiff labeled the referenced exhibits as "Exhibit 44" and "Exhibit 45," the documents are identified on the docket as Exhibits 3 and 4 to Plaintiff's opposition brief. Opp. Br., Exs. 3, 4, ECF No. 15.

program in American Legal Studies." *Id.* at 4-5. Plaintiff believes the post was a "subliminal racially motivated post intended to harass, intimidate and threaten [Plaintiff]." *Id.* at 5. The Court determines that Plaintiff's allegations of harassment do not provide sufficient justification to ignore the parties' valid agreement to arbitrate their disputes.

Based on a thorough review of the parties' submissions, the Court is satisfied that the arbitration provision of the DRP is valid, enforceable, and applies to all of the claims asserted by Plaintiff in this lawsuit. Accordingly, Defendant's Motion to Dismiss, ECF No. 8, is **GRANTED**[5], and this action is **DISMISSED** in its entirety.

III. Plaintiff's Motions for Subpoenas

Plaintiff filed three Motions for Subpoenas in which he asks the Court to issue orders that would allow Plaintiff to obtain certain documents related to his case. First, Second, & Third Mots. for Subpoenas, ECF Nos. 17, 18 and 19. None of the requested documents relate to the applicability or validity of the arbitration provision of the DRP. Because the Court has determined that dismissal of this case is warranted based on the arbitration provision of the DRP, Plaintiff's subpoena motions are **DISMISSED as moot.**

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[5] The Court grants Defendant's Motion to Dismiss pursuant to Federal Rule 12(b)(3) and the FAA. It is unclear to the Court whether Defendant's alternate basis for dismissal, the lack of subject matter jurisdiction under Federal Rule 12(b)(1), is appropriate under the facts of this case. In *Bayer CropScience AG v. Dow AgroScience LLC*, No. 2:12cv47, 2012 U.S. Dist. LEXIS 97850, at *19-23 (E.D. Va. July 13, 2012), this Court recognized that certain provisions of the FAA "confer upon this Court the authority to retain jurisdiction over a matter that is subject to arbitration." This Court further recognized that "the Federal Circuit has reasoned that an arbitration agreement does not divest the court of jurisdiction to hear a matter," and stated that, "'while older case law suggests that an arbitration clause ousts a court of jurisdiction, that view has lost much, if not all, of the legitimacy it once may have had. Arbitration agreements are properly viewed as contractual arrangements for resolving disputes, not as documents divesting a court of jurisdiction.'" *Id.* at *22 (quoting *Hardie v. United States*, 19 F. App'x 899, 906 (Fed. Cir. 2001)). The Court need not – and will not – resolve this issue here, however, because (i) the parties did not address the issue in their briefs, and (ii) alternate bases exist to support the dismissal of this action.

IV. Conclusion

For the reasons set forth above, Defendant's Motion to Dismiss, ECF No. 8, is **GRANTED**, and this action is **DISMISSED** in its entirety. Further, Plaintiff's First Motion for Subpoena, ECF No. 17, Second Motion for Subpoena, ECF No. 18, and Third Motion for Subpoena, ECF No. 19, are **DISMISSED as moot**.

Plaintiff may appeal from this Memorandum Dismissal Order by forwarding a written notice of appeal to the Clerk of the United States District Court, Newport News Division, 2400 West Avenue, Newport News, Virginia 23607. The written notice must be received by the Clerk within thirty (30) days from the date of the entry of this Memorandum Dismissal Order. If Plaintiff wishes to proceed *in forma pauperis* on appeal, the application to proceed *in forma pauperis* is to be submitted to the Clerk of the United States District Court, Newport News Division, 2400 West Avenue, Newport News, Virginia 23607.

The Clerk is **DIRECTED** to send a copy of this Memorandum Dismissal Order to Plaintiff and counsel for Defendant.

IT IS SO **ORDERED**.

/s/ MSD
Mark S. Davis
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

June 2, 2017