IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| FAITH SHERRARD,<br><br>Plaintiff,<br><br>v.<br><br>MACY'S SYSTEM AND TECHNOLOGY, INC.,<br><br>Defendant. | CIVIL ACTION FILE NO.<br><br>1:16-CV-3322-CC-CMS |

**FINAL REPORT AND RECOMMENDATION**

This case is before the Court on Defendant Macy's System and Technology, Inc.'s Motion to Compel Arbitration. (Doc. 11). In its Motion, Defendant argues that pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. ("FAA") and Federal Rule of Civil Procedure 12(b), this Court should compel Plaintiff Faith Sherrard to arbitrate all the claims she raises against Defendant in this case and dismiss Plaintiff's claims pending arbitration. For the reasons that follow, I **RECOMMEND** that Defendant's Motion to Compel Arbitration (Doc. 11) be **GRANTED**.

## I. BACKGROUND FACTS

On September 2, 2016, Plaintiff initiated this action, *pro se*. (Doc. 1). In the Complaint, Plaintiff alleges that she was the victim of race and disability discrimination as well as retaliation by Defendant, her former employer. (Doc. 1 at 1-2). Plaintiff provided a five-page, single-spaced "Case Timeline" in support of her Complaint. (Id. at 10-14). In it, Plaintiff states that she was under extreme stress at work beginning in October 2013 due to a growing workload and lack of support. (Id. at 10). According to the Timeline, Plaintiff's supervisor was not supportive, and Plaintiff began to feel alienated. (Id.). Plaintiff states that in October 2014, she made an internal complaint of disparate treatment based on her race (African American). (Id. at 12). In December 2014, she spoke with a member of the Human Resources department about the treatment she received, but the human resources representative "hardly took any notes" and gave "the impression that she would not provide an unbiased or thorough review" of Plaintiff's grievances. (Id. at 13). In January 2015, Plaintiff complained to human resources about a racially offensive doll in her manager's office. (Id. at 13, 14). Plaintiff states that her supervisor and colleagues harassed and embarrassed her in retaliation for filing the internal complaint of race discrimination. (Id. at 14).

Plaintiff filed a Charge of Discrimination with the EEOC on January 9, 2015 alleging that Plaintiff's supervisor treated Plaintiff less favorably than Plaintiff's white peers. (Doc. 1 at 16). The Charge does not include any allegations of disability discrimination. (Id.).

According to the Timeline, on January 21, 2015, Plaintiff became very ill with debilitating stress headaches, and ultimately, she was diagnosed with Bipolar Disorder, Panic Disorder, and Post Traumatic Stress Disorder. (Doc. 1 at 14). Although she tried to return to work, it appears that Plaintiff was never fully able to return to work and began long-term disability leave on February 4, 2015. (Id.). Plaintiff states that she currently receives Social Security Disability benefits, which indicates an ongoing inability to work. (Id.).

In her Timeline, Plaintiff states that at some point after she filed her EEOC Charge, she made a request to mediate with Defendant and that Defendant refused to mediate. (Doc. 1 at 14). Plaintiff alleges that on October 8, 2015, Defendant terminated her employment for the stated reason that there was no date in the foreseeable future for her to return to work and there were no available jobs that Plaintiff could perform with or without a reasonable accommodation. (Id.). Eight months later, on June 7, 2016, the EEOC sent Plaintiff a Notice of Right to Sue.

(Id. at 15). Thereafter, on September 2, 2016, Plaintiff initiated this civil action. (Doc. 1).

## II. FACTS RELEVANT TO ARBITRATION ISSUES[1]

Defendant hired Plaintiff on June 25, 2007. (Doc. 11-4, Declaration of Matthew Melody ("Melody Decl.") at 7, ¶ 15). At that time, Defendant provided Plaintiff with information about Defendant's internal workplace dispute resolution program called the Solutions InSTORE Program (the "Program"). (Id. at 2, 10 ¶¶ 4-8, 23; Doc. 11-4 at 34-36, Plaintiff's signed Solutions InSTORE New Hire Acknowledgement form).

The Program's parameters are set forth in a document titled "Plan Document" that describes a series of four steps that an employee may take in the event of a workplace problem. (Doc. 11-2, Plan Document; Melody Decl. at 3, ¶ 7). Under the Program, an employee may first bring her concerns to a supervisor or member of local management for discussion and resolution, and if that does not

[1] I have taken these facts from the documents attached to Defendant's Motion. Plaintiff does not appear to dispute these facts, at least for purposes of the narrow legal issue presently before the Court. I note that Defendant filed several documents as exhibits to the Declaration of Regunathan Veeraraghavan, but Defendant failed to file Mr. Veeraraghavan's declaration, possibly due to its inadvertent filing of the Declaration of Matthew Melody two times. (See Docs. 11-4, 11-5). In any event, I found sufficient support for these facts within Mr. Melody's declaration and the exhibits thereto.

solve the problem, she may proceed to the second step and submit a written request for review by a Human Resources Vice President. (Doc. 11-2 at 4; Melody Decl. at 3-4, ¶¶ 7-8). The third step is a request for reconsideration directed to the Office of Solutions InSTORE in Cincinnati, Ohio. (Id.). If these informal resolution efforts are unsuccessful, an aggrieved employee may proceed to step four and submit her dispute to binding arbitration administered by the American Arbitration Association. (Id.). While employees are encouraged to utilize the first three steps of the Program before proceeding to arbitration, there is no administrative or other prerequisite to proceed to arbitration. (Melody Decl. at 4, ¶ 8).

The Plan Document contains lengthy and detailed provisions regarding the arbitration process, including twenty-three separately numbered articles covering everything from discovery, to costs and appeal rights. (Doc. 11-2 at 8-20). With respect to either party's ability to file a civil lawsuit in court, the Plan Document provides as follows:

> **Article 3- Dismissal/Stay of Court Proceedings**
> By agreeing to arbitration, the Associate and the Company agree to resolve through arbitration all claims described in or contemplated by Article 2 above.[2] This means that neither the Associate nor the

[2] Article 2 provides, among other things, that "all employment-related legal disputes, controversies or claims arising out of, or relating to, employment or cessation of employment . . . shall be settled exclusively by final and binding arbitration." (Doc. 11-2 at 9).

> Company can file a civil lawsuit in court against the other party relating to such claims. If a party files a lawsuit in court to resolve claims subject to arbitration, both agree that the court shall dismiss the lawsuit and require the claim to be resolved through [the Program]. . .

(Doc. 11-2 at 10). Plaintiff acknowledged in writing on June 25, 2007 that she had received a copy of Plan Document and further acknowledged:

> that I have been instructed to review this material carefully. I understand that I have 30 days from my date of hire to review this information and postmark my form to the Office of Solutions InSTORE if I wish to exclude myself from coverage under Step 4 of the program, Arbitration.

(Doc. 11-4 at 34-36). The Plan Document makes clear that by accepting and continuing employment with Defendant and not opting out within the specified time period, Plaintiff agreed to be covered by the Program and bound by the arbitration provision:

> All Associates agree to be covered by Step 4 – Arbitration by accepting or continuing employment with the Company after the Effective Date. Associates are given the option to exclude themselves from Arbitration by completing an election form within the prescribed time frame. Until and unless an Associate elects to be excluded from arbitration within the prescribed time frame, the Associate is covered by Step 4 – Arbitration.
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> * * *
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> All Associates are automatically covered by all 4 steps of the program by taking or continuing a job with the Company. That means that all Associates agree, as a condition of employment, to arbitrate any and all disputes, including statutory and other claims, not resolved at Step 3. However, Arbitration is a voluntary condition of employment.

> Associates are given the option of excluding themselves from Step 4 arbitration within a prescribed time frame.

(Doc. 11-2 at 5, 8). At the time she was hired, Plaintiff was offered the opportunity to opt out of the arbitration provision, but Defendant's records reflect that Plaintiff did not opt out. (Melody Decl. at 11-12, ¶ 27). In her response to Defendant's Motion, Plaintiff does not argue that she exercised her right to exclude herself from the arbitration provision. (Docs. 13, 14, 15).

## III. DISCUSSION

The Federal Arbitration Act ("FAA") reflects a "liberal federal policy favoring arbitration," and requires courts to vigorously enforce agreements to arbitrate. AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 339 (2011). Section 2 of the FAA provides that a written agreement to arbitrate "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. § 2. Arbitration agreements must be enforced according to their terms. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010).

Defendant argues that Plaintiff is contractually bound to arbitrate the discrimination and retaliation claims raised in the Complaint. (Doc. 11-1 at 14-21). In response, Plaintiff concedes that the parties have a valid and enforceable agreement to arbitrate and that the claims she raises in her Complaint are

encompassed within the arbitration agreement. (Doc. 13-1 at 2). Plaintiff argues, however, that Defendant has waived its right to arbitrate by "consistently demonstrate[ing] an indifference to all forms of ADR." (Id. at 3). In support of this position, Plaintiff states that Defendant did not timely respond to her complaints, refused to mediate, and then terminated her while she was on long-term disability.[3] (Id. at 4-6).

[3] Plaintiff also complains that Defendant failed to properly serve her with a copy of the motion to compel arbitration. (Doc. 13-1 at 7). Defendant's Certificate of Service accompanying the Motion does not reflect proper service. It states that the Motion:

> is being served on this day on all counsel of record or pro se parties identified on the following Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

(Doc. 11-1 at 24). No Service List was attached. As counsel should be aware, CM/ECF filing does not constitute service on most *pro se* plaintiffs, who, unless they have otherwise consented in writing, must be served under Federal Rule of Civil Procedure 5(b)(2). See LR 5.1A(3), NDGa.; Fed. R. Civ. P. 5(b)(2); see also Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases, Appendix H-A7 to Local Rules, NDGa. (prohibiting *pro se* parties from filing electronically unless the party is an attorney in good standing admitted to practice before the Court). In any event, it is evident that at some point, Plaintiff received a copy of the motion, and she has now filed a response. In the future, Defendant should take care to properly serve pleadings on *pro se* parties and to ensure that the certificates of service accompanying the filings accurately reflect those efforts.

The Eleventh Circuit recognizes that a party may waive its right to arbitration in certain limited circumstances:

> Despite the strong policy in favor of arbitration, a party may, by its conduct, waive its right to arbitration, and we apply a two-part test to determine that issue. First, we decide if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right. A party acts inconsistently with the arbitration right when the party substantially invokes the litigation machinery prior to demanding arbitration. Second, we look to see whether, by acting inconsistently with the arbitration right, that party has in some way prejudiced the other party. To determine whether the other party has been prejudiced, we may consider the length of delay in demanding arbitration and the expense incurred by that party from participating in the litigation process.

Garcia v. Wachovia Corp., 699 F.3d 1273, 1277 (11th Cir. 2012) (internal citations and quotations omitted). "Because federal policy strongly favors arbitration, the party who argues waiver 'bears a heavy burden of proof' under this two-part test." Krinsk v. SunTrust Banks, Inc., 654 F.3d 1194, n.17 (11th Cir. 2011) (quoting Stone v. E.F. Hutton & Co., 898 F.2d 1542, 1543 (11th Cir. 1990)).

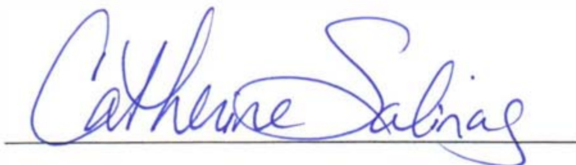
Here, there is no indication that Defendant acted inconsistently with its arbitration right by invoking the litigation machinery prior to demanding arbitration. On the contrary, Defendant's first substantive filing in this case was the instant motion to compel arbitration; Defendant has not yet filed an answer or a motion to dismiss. Plaintiff has provided no authority to support her assertion that Defendant's alleged delay in responding to her complaints during the first stages of

the informal dispute resolution process, its unwillingness to mediate, or its decision to terminate her employment some months later amounts to a waiver of Defendant's right to enforce the arbitration agreement. Accordingly, Defendant is entitled to fully enforce those rights.

## IV. CONCLUSION

Because the parties have a valid arbitration agreement and it is undisputed that the claims asserted in Plaintiff's Complaint fall within that agreement, the parties must submit the entirety of their dispute to arbitration. Accordingly, I **RECOMMEND** that Defendant's Motion to Compel Arbitration (Doc. 11) be **GRANTED**, that the claims raised in the Complaint be sent to arbitration, and that this case be **DISMISSED WITHOUT PREJUDICE**.[4]

**SO REPORTED AND RECOMMENDED**, this 1st day of March, 2017.



Catherine M. Salinas
United States Magistrate Judge

[4] In making this ruling, I have not reached any conclusions as to the merits of Plaintiff's discrimination and retaliation claims.