IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

ANDERSON/GREENWOOD DIVISION

Albany Devionna Morton, Plaintiff, vs. Darden Restaurants, Inc., Defendant.	Civil Action No. 8:17-1865-HMH-KFM **REPORT OF MAGISTRATE JUDGE**

This matter is before the court on the defendant's motion to dismiss or stay proceedings and compel arbitration (doc. 14). Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Civil Rule 73.02(B)(2)(g) (D.S.C.), all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

In her amended complaint, the plaintiff, who is a black female, alleges causes of action against her former employer for race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended (doc. 6, amend. comp. ¶¶ 32-48). The defendant filed a motion to dismiss or stay proceedings and compel arbitration on November 22, 2017 (doc. 14). The plaintiff filed a response in opposition to the defendant's motion on January 2, 2018 (doc. 26), and the defendant filed a reply on January 9, 2018 (doc. 29).

FACTS PRESENTED

The plaintiff worked for the defendant at its LongHorn Steakhouse restaurant in Anderson, South Carolina from approximately April 30, 2012, to February 20, 2016 (doc. 6, amend. comp. ¶¶ 3, 29; doc. 14-2, Ingalsbe decl. ¶ 4).[1] GMRI, Inc. ("GMRI"), a

[1] Melissa Ingalsbe is the Director of Dispute Resolution and Human Resource Compliance for the defendant and its subsidiaries (doc. 14-2, Ingalsbe decl. ¶ 3).

subsidiary of Darden Restaurants, owns and operates LongHorn Steakhouse restaurants throughout the United States. GMRI maintains a national Dispute Resolution Process ("DRP") that has been in place since at least 2005 (with various updates) that applies to all employees. The DRP is a term and condition of employment for all employees across the country (doc. 14-2, Ingalsbe decl. ¶ 5).

On or about April 12, 2012, the plaintiff completed and submitted her GMRI employment application (doc. 14-2, Inglasbe decl. ¶ 6 & ex. A). The employment application includes a section entitled "Special Employment Notices" that includes the following statement, which the plaintiff accepted:

> I understand that the Darden Companies, including . . . LongHorn Steakhouse, . . . have in place a Dispute Resolution Process (DRP), and I further acknowledge and agree that if I am offered and accept employment, any dispute between me and any of the Darden Companies relating in my employment and/or my separation from employment, shall be submitted within one (1) year of the day which I learned of the event and shall be resolved pursuant to the terms and conditions of the DRP.

(*Id.* ¶ 6 & ex. A at 3).

At the time of the plaintiff's hire on or about April 30, 2012, the January 2005 (Reformatted April 2011) DRP book was in effect (doc. 14-2, Inglasbe decl. ¶ 7 & ex. B). It provided, in relevant part, that employment-related disputes are subject to mutually-binding arbitration:

> The first three steps of DRP-the Open Door, Peer Review and Mediation-apply to all employment-related disputes or claims brought by the Employee against the Company or the Company against the Employee other than those limited "Exceptions" listed below. Some examples of disputes which are covered by the first three steps of DRP include, but are not limited to: disputes about compensation earned, termination, discrimination and harassment.
>
> Only disputes which state a legal claim may be submitted to Arbitration, which is the fourth and final step of DRP. The arbitrator has the authority to dismiss disputes that do not state a legal claim. Examples of legal claims may include but are not

> limited to: claims that arise under the Civil Rights Act of 1964, Americans With Disabilities Act, Fair Labor Standards Act, Age Discrimination in Employment Act, Family Medical Leave Act, Employee Retirement Income Security Act, unfair competition, violation of trade secrets, any common law right or duty, or any federal, state or local ordinance or statute.
>
> **The DRP is the sole means for resolving covered employment-related disputes, instead of court actions. Disputes eligible for DRP must be resolved only through DRP, with the final step being binding arbitration heard by an arbitrator. This means DRP-eligible disputes will NOT BE RESOLVED BY A JUDGE OR JURY. Neither the Company nor the Employee may bring DRP-eligible disputes to court. The Company and the Employee waive all rights to bring a civil court action for these disputes**.

(*Id.* ¶ 7 & ex. B at 2) (emphasis in original).

The defendant's managers present and distribute the DRP book to each new employee during their new hire orientation and obtain the employee's signature to the DRP book acknowledgement form, which, when signed, confirms receipt, review, and understanding of the DRP book and confirms agreement to submit covered matters to the DRP (doc. 14-2, Inglasbe decl. ¶ 7 & ex. B at 11). The defendant cannot locate the plaintiff's signed DRP acknowledgement form from her new hire orientation, which is missing along with other parts of her personnel file (*id.* ¶ 8). Ms. Ingalsbe states in her affidavit that the DRP is a term and condition of employment for all employees across the country, and if a newly hired employee declines to sign the acknowledgment form and agree to the DRP, managers are instructed to discontinue the hiring/employment process and not to employ the individual (*id.*).[2]

On or about May 30, 2013, the defendant simultaneously rolled out an update to the DRP and also an update to the Team Member Handbook. The defendant instructed its managers to distribute the DRP update notice to all employees and also post the update

[2] There is nothing in the plaintiff's available personnel records indicating that she ever objected to the any provisions of the DRP, and Ms. Ingalsbe has no knowledge that the plaintiff ever objected (doc. 14-2, Inglasbe decl. ¶ 13).

in their restaurants (doc. 14-2, Inglasbe decl. ¶ 9). The defendant did not require signed acknowledgments of the May 2013 DRP update – rather, as expressly stated in the DRP update notice, "By coming to work here after July 15, 2013[,] you and the Company agree to be bound by the updated Dispute Resolution Process" (*id.* ¶¶ 9-10 & ex. C). The defendant further instructed managers to distribute and then collect the employees' signed Team Member Handbook acknowledgment forms (*id.* ¶ 11 & ex. D). The plaintiff signed her Team Member Handbook acknowledgment form on May 30, 2013 (*id.* ¶ 12 & ex. E). The plaintiff's signed acknowledgment form references on page one the defendant's "commitment to maintaining a work environment in which all employees: . . . [h]ave a Dispute Resolution Process to address and resolve employee complaints and disputes" (*id.* ¶¶ 11-12 & exs. D, E).

The plaintiff states in her affidavit that she has "never seen the DRP," and she "do[es] not recall" ever seeing the DRP updates (doc. 26-1, pl. aff.). During the time the Equal Employment Opportunity Commission was investigating the plaintiff's complaints, defense counsel advised the plaintiff's counsel of the DRP and the alleged agreement that this matter be submitted to arbitration (*id.*; doc. 26-2). The plaintiff states in her affidavit that she subsequently used a former co-worker's login information to access the defendant's employee intranet site, and she could not find a copy of the DRP (doc. 26-1, pl. aff.).

One of the plaintiff's former managers, Carles A. Osborne, III, states in his affidavit that he saw the plaintiff's signed DRP acknowledgment in her personnel file at the LongHorn Steakhouse restaurant when he was the plaintiff's manager between approximately December 2013 and January 2015 (doc. 29-1, Osborne decl. ¶¶ 2-3). Mr. Osborne occasionally audited the personnel files in his restaurant to ensure they were in order, and he saw the plaintiff's signed DRP acknowledgment in her file (*id.* ¶ 3). Mr. Osborne does not know what happened to the plaintiff's signed DRP acknowledgment or why it is now missing from her personnel file (*id.* ¶ 4). Mr. Osborne further states in his

declaration that he conducted new hire orientations, and the plaintiff was present for at least one of these and heard Mr. Osborne discuss and explain the DRP (*id*. ¶ 5).

APPLICABLE LAW AND ANALYSIS

Motion to Compel Arbitration

The DRP states that it is governed by the Federal Arbitration Act ("FAA") (doc. 14-2, Ingalsbe decl., ex. B at 6), which provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . 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. The statute further defines "commerce" to include "commerce among the several States." *Id.* § 1. "[T]he term 'involving commerce' in the FAA [is] the functional equivalent of the more familiar term 'affecting commerce' – words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco*, 539 U.S. 52, 56 (2003). The defendant operates LongHorn Steakhouse restaurants throughout the United States, receives goods and products through interstate shipping, and relies on interstate communication to run its business and serve its customers (doc. 14-2, Ingalsbe decl. ¶ 2), and thus the DRP involves commerce. Accordingly, the DRP is governed by the FAA.

Under the FAA, when a question of arbitrability arises, the district court's determination is limited to a two-step inquiry: (1) whether a valid arbitration agreement exists; and (2) whether the specific dispute falls within the substantive scope of the arbitration agreement. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (citations omitted). "[T]he Supreme Court has consistently encouraged a 'healthy regard for the federal policy favoring arbitration.'" *Levin v. Alms & Assocs., Inc*., 634 F.3d 260, 266 (4th Cir. 2011) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983)). " '[E]ven though arbitration has a favored place, there still must be an underlying

agreement between the parties to arbitrate.' " *Adkins v. Labor Ready, Inc*., 303 F.3d 496, 501 (4th Cir. 2002) (quoting *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997)). "Whether a party agreed to arbitrate a particular dispute is a question of state law governing contract formation." *Id*. (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

The plaintiff's arguments all relate to whether a valid arbitration agreement exists, and she does not contend that the claims raised in her complaint fall outside the scope of the agreement (doc. 26 at 2). "Motions to compel arbitration in which the parties dispute the validity of the arbitration agreement are treated as motions for summary judgment." *Rose v. New Day Fin., LLC*, 816 F. Supp. 2d 245, 251 (D. Md. 2011) (citation omitted). "Accordingly, arbitration should be compelled where 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Erichsen v. RBC Capital Markets, LLC*, 883 F. Supp. 2d 562, 566–67 (E.D.N.C. 2012) (quoting Fed. R. Civ. P. 56).

Under South Carolina law, a valid contract requires an offer, acceptance of the offer, and valid consideration. *Hardaway Concrete Co., Inc. v. Hall Contracting Corp*., 647 S.E.2d 488, 492 (S.C. Ct. App. 2007) (citation omitted). The defendant has presented evidence showing that on her employment application the plaintiff accepted that if she was employed with the defendant, disputes relating to employment would be governed by the DRP (doc. 14-2, Inglasbe decl. ¶ 6 & ex. A). The defendant has also presented evidence that its practice is to provide new employees with a DRP book and request that they sign an acknowledgment form during the orientation process, and if a new employee refuses to do so, managers are instructed not to employ the individual (*id.* ¶¶ 7-8). The evidence before the court further shows that the May 2013 DRP update stated that an employee's continued employment after July 15, 2013, constituted acceptance of the updated DRP (*id.* ¶¶ 9-10 & ex. C at 3). In South Carolina, continued employment constitutes both sufficient consideration for, and acceptance of an offer of, an arbitration agreement. *See Towles v. United Healthcare Corp*., 524 S.E.2d 839, 845 n. 4 (S.C. Ct. App.1999) (noting that an

employee's continued employment constituted acceptance and sufficient consideration to make arbitration agreement binding).

There is no dispute that the plaintiff continued her employment with the defendant after July 15, 2013. While the plaintiff states in her affidavit that she "do[es] not recall ever seeing" the May 2013 DRP update (doc. 26-1, pl. aff.), this is insufficient to create an issue of fact as to the validity of the arbitration agreement. *See Gadberry v. Rental Servs. Corp.,* C.A. No. 0:09-3327-CMC-PJG*,* 2011 WL 766991, at *2 (D.S.C. Feb. 24, 2011)) (granting motion to compel arbitration and finding no genuine issue of material fact where an employee failed to introduce affirmative evidence that he did not sign the contract containing an arbitration agreement, instead stating that he could not recall doing so); *see also Bentaous v. Asset Acceptance, LLC*, C.A. No. JFM-13-3314, 2014 WL 5790946, at *2 (D. Md. Nov. 4, 2014) (granting motion to compel arbitration and rejecting plaintiff's argument that she did not recall consenting to arbitration agreement because "[o]bviously, a statement that someone does not recall something does not constitute a denial that the event occurred"). Moreover, it is undisputed that the plaintiff signed the May 30, 2013, Team Member Handbook acknowledgment form, which referenced the DRP (doc. 14-2, Ingalsbe decl., ex. D, E).

As the plaintiff's counsel acknowledges in the response in opposition to the motion to compel arbitration, "[t]here need not be a signed agreement for there to be an enforceable agreement" (doc. 26 at 2). The plaintiff argues, however, that "[t]he defendant has proffered no competent evidence that the content of the DRP was ever made available to [her]" (*id.*). While the defendant has not provided the plaintiff's signed DRP acknowledgment, it has provided the declaration of Mr. Osborne who states that he saw the plaintiff's signed DRP acknowledgment in her personnel file at the LongHorn Steakhouse restaurant when he was the plaintiff's manager (doc. 29-1, Osborne decl. ¶¶ 2-3). Mr. Osborne further states in his declaration that he conducted new hire orientations, and the plaintiff was present for at least one of these and heard Mr. Osborne discuss and

explain the DRP (*id*. ¶ 5). The plaintiff's statement that she has "never seen the DRP" (doc. 26-1, pl. aff.) is insufficient to raise an issue of material fact. Here, the plaintiff does not affirmatively attest that she never signed the DRP acknowledgment form, that she never agreed to the DRP, or that she was never told about the DRP or the updates. In a similar case from the Eastern District of California, the United States Magistrate Judge found no genuine issue of material fact as to whether the plaintiff agreed to arbitrate employment disputes with his employer:

> While the evidence did not include a signed copy of the PPF-Villarreal arbitration agreement, PPF provided sufficient circumstantial evidence that such an agreement existed. The Court also acknowledges that Villarreal has provided testimony that he does not recall signing the arbitration agreement and did not receive a copy of an agreement from PPF. However, Villarreal's testimony does not affirmatively discount the possibility that he may have signed an arbitration agreement with PPF upon commencement of his employment and does not recall that specific document. Moreover, Villarreal's declaration does not say that he contested arbitration, remembers refusing to sign such an agreement, or otherwise diverged from the ordinary hiring procedures.

Villareal v. Perfection Pet Foods, LLC, C.A. No. 1:16-cv-1661-LJO-EPG, 2017 WL 1353802, at *6 (E.D. Cal. Apr. 10, 2017).

Based upon the foregoing, the record taken as a whole could not lead a rational trier of fact to find that a valid, binding arbitration agreement does not exist between the parties. Moreover, as the plaintiff does not contest that her claims in this action for Title VII race discrimination and retaliation are within the scope of the DRP, the undersigned recommends that the motion to compel arbitration be granted.

Motion to Dismiss or Stay Proceedings

"The FAA requires a court to stay 'any suit or proceeding' pending arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration,'" and "[t]his stay-of-litigation provision is mandatory." *Adkins*, 303 F.3d at 500 (quoting 9 U.S.C. § 3). However, the Fourth Circuit has also held that if all of the claims asserted in a

complaint are subject to arbitration, dismissal of the complaint is "a proper remedy." *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc*., 252 F.3d 707, 709–10 (4th Cir. 2001) (citation omitted). The Fourth Circuit has acknowledged the inconsistency between its opinions on this issue. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 n.18 (4th Cir. 2012) ("There may be some tension between our decision . . . indicating that a stay is required when the arbitration agreement 'covers the matter in dispute'— and *Choice Hotels* — sanctioning dismissal 'when all of the issues presented . . . are arbitrable.' ") (citations omitted). "At present, in this Circuit a district court *must* stay an action pending arbitration of any arbitrable claims, with the exception that it *may* instead dismiss an action if all claims asserted are arbitrable." *Weckesser v. Knight Enters. S.E., LLC*, 228 F. Supp. 3d 561, 564 (D.S.C. 2017) (emphasis in original). Here, as all the asserted claims are arbitrable, the undersigned recommends that the action be dismissed.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the defendant's motion to compel arbitration and dismiss this action (doc.14) should be granted.

IT IS SO RECOMMENDED.

s/ Kevin F. McDonald
United States Magistrate Judge

March 2, 2018
Greenville, South Carolina