IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JENNIFER SHOCKLEY, Individually, and on behalf of all other similarly situated persons, Plaintiff, v. PRIMELENDING, A PLAINSCAPITAL COMPANY, Defendant.	)	No. 17-00763-CV-W-DW

ORDER

Before the Court is Defendant's Motion to Compel Individual Arbitration (the "Motion") (Doc. 9). The Motion is fully briefed. See Docs. 10, 15, 18, 21, 24. Accordingly, for the reasons set forth below, the Motion is DENIED.

I.

Plaintiffs Jennifer Shockley and Teresa Jones were formerly employed by Defendant PrimeLending. Plaintiffs sued Defendant for alleged violations of the Fair Labor Standards Act and Missouri law, including the Missouri Minimum Wage Law. Defendant seeks to compel individual arbitration of their claims.

Plaintiffs were employed as mortgage loan processors. During the course of their employment, Defendant supplied Plaintiffs with an employee handbook entitled "PrimeLending Handbook Addendum" (the "Handbook"). The Handbook contains an arbitration provision that states that the parties agree to resolve all disputes through arbitration, and a delegation provision that delegates authority to the arbitrator to decide all questions of arbitrability. Defendant filed the present Motion, arguing that the arbitration clause requires an arbitrator to decide this

dispute, including any questions of arbitrability, and therefore the Court should compel arbitration.

Plaintiffs argue that arbitration is not required for two reasons. First, the parties never formed a contract, and thus never agreed to arbitrate their claims and to delegate authority to an arbitrator. Second, both the delegation clause and arbitration clause are unenforceable.

Defendant responds that the Court should nevertheless compel arbitration because the delegation provision grants authority to the arbitrator to decide all questions of arbitrability, meaning Plaintiffs' arguments against arbitration, specifically the contract formation and enforceability issues, should be decided by the arbitrator, not the Court.

II.

Arbitration agreements are strongly favored under federal law and courts must enforce them according their terms. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011). "A dispute must be submitted to arbitration if there is a valid agreement to arbitrate and the dispute falls within the scope of that agreement." Berkley v. Dillard's Inc., 450 F.3d 775, 777 (8th Cir. 2006). Parties may also contract to delegate authority to the arbitrator to decide "gateway questions of arbitrability," such as whether a particular dispute falls within the scope of the arbitration agreement, whether the agreement is valid, or whether defenses to enforcement apply (such as fraud, duress, unconscionability, etcetera). Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68-70 (2010). Courts must give full effect to valid delegation provisions. Id.

While parties can delegate questions of validity to arbitrators, the "issue of [an] agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded[.]'" Id. at 70 n.2. When a party seeks to compel arbitration, even in cases where delegation provisions exist, the court must still determine whether an agreement was formed, as

it is well settled that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002). "The party seeking to compel arbitration bears the burden of establishing the arbitration agreement's existence, and the facts and evidence must be viewed in the light most favorable to the party disputing the arbitration agreement's existence." In re Glob. Tel*Link Corp. ICS Litig., No. 5:14-CV-5275, 2017 WL 831101, at *1 (W.D. Ark. Mar. 2, 2017). Arbitration agreements are contracts, meaning they must comply with the basic principles of contract law. Campbell v. Adecco USA, Inc., No. 2:16-CV-04059-NKL, 2016 WL 3248579, at *1 (W.D. Mo. June 13, 2016). In order to form a valid contract under Missouri law, the contract must contain the essential elements of offer, acceptance, and bargained for consideration. Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 662 (Mo. 1988).

III.

The Handbook contains both an arbitration clause and delegation clause. The delegation clause at issue is broad. It delegates exclusive authority to an arbitrator to decide all questions of arbitrability, including claims relating to the interpretation, applicability, enforceability, or formation of the arbitration clause. See Doc. 18-1, Ex. B at 5.

The arbitration and delegation clauses limit the Court's role in this case. The Court must first determine if a contract was formed. If no, the analysis ends there, and the Motion to Compel must be denied. If yes, then the Court must determine if the delegation clause is valid. If the delegation clause is valid, then all of Plaintiffs' claims concerning the validity and enforcement of the arbitration agreement itself must be decided by an arbitrator.[1] In this case, the first step is dispositive because a contract was never formed between the parties.

1 If invalid, the Court may decide Plaintiffs' claims, which could still result in either denying or compelling arbitration.

The essential elements of a valid contract under Missouri law "include offer, acceptance, and bargained for consideration." Johnson, 745 S.W.2d at 662. In this case, both offer and acceptance are lacking.[2]

First, the furnishing of an employee handbook without more does not constitute an offer to employees. See Johnson, 745 S.W.2d at 662 ("[Employer's] unilateral act of publishing its handbook was not a contractual offer to its employees. The handbook was merely an informational statement of [employer's] self-imposed policies[.]"); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997)("Under Missouri law, employee handbooks generally are not considered contracts, because they normally lack the traditional prerequisites of a contract."); Riley v. Lance, Inc., No. 05-0520-CV-W-DW, 2006 WL 2711611, at *5 (W.D. Mo. Sept. 21, 2006)(Holding that issuance of employee handbook does not create an employment contract.).

In this case, the terms of the Handbook evidence that it is not an offer, but merely informational. For example, the Handbook states that its terms "may be modified, amended or deleted by the company at any time with or without notice," and at one point expressly denies contract formation.[3] See Doc. 18-1, Ex. B-1 at 2, 4. In cases where courts have found valid offers, employee handbooks contained express contractual terms conveying the power of acceptance to employees. See Berkley, 450 F.3d at 777 (Valid offer created where employer distributed arbitration agreement to employee stating: "by accepting or continuing employment with Dillard's, you have agreed to accept the Program known as the Agreement to Arbitrate

2 Although the Court does not reach this issue, consideration appears to be lacking as well. See Campbell, 2016 WL 3248579, at *3 (Language that permitted employer to unilaterally amend agreement retroactively rendered promise to arbitrate illusory, and therefore Court found consideration was lacking).

3 When discussing the company's discipline process, the Handbook definitively states that "[t]his process does not establish a contract between [Defendant] and its employees, but it merely a management tool that may or may not be followed, depending on the circumstances of a particular situation." Doc. 18-1, Ex. B at 4.

Certain Claims."); Patterson, 113 F.3d at 835 (Employee-employer arbitration agreement found valid where it contained contractual terms such as "I understand," "I agree," "I agree to abide by and accept," and was signed by employee.). No such language exists in this case.

Second, even if the Handbook could be construed as an offer, it was not accepted by Plaintiffs. Simply reviewing company policies does not constitute acceptance. See Jackson v. Higher Educ. Loan Auth. of Missouri, 497 S.W.3d 283, 290 (Mo. App. E.D. 2016)(Employee's acknowledgement of receipt of employer's arbitration policy "does not suddenly transmute the ADR Policy into an acceptance of an offer."). In this case, Plaintiffs do not recall ever receiving, reviewing, or expressly agreeing to the terms contained in the Handbook, and Defendant produces no evidence to the contrary. The only evidence produced are certificates of completion, which Defendant claims were awarded to Plaintiffs for reviewing company policies including the Handbook. But Defendant's evidence, at best, proves that Plaintiffs reviewed the Handbook, which again does not constitute acceptance.

Nevertheless, Defendant argues that the Court should compel arbitration because the delegation clause in the Handbook grants exclusive authority to the arbitrator to decide questions of arbitrability, including those related to contract formation. If Defendant's argument was correct, a party who never agreed to arbitrate claims could be compelled to proceed to arbitration in order to prove that she never agreed to arbitrate claims in the first place. Enforcing a contract where no contract in fact exists or ever existed seems illogical. The Eighth Circuit agrees.

In Nebraska Machinery Company v. Cargotec Solutions, LLC, the plaintiff, a construction equipment dealer, contracted with the defendant, a manufacturer, to purchase engines. The terms of the contract were memorialized in multiple purchase orders. When a dispute later arose, the defendant moved to compel arbitration. One of the purchase orders

contained an arbitration clause and a delegation clause that granted exclusive authority to an arbitrator to decide all questions of arbitrability. The plaintiff argued that neither clause was part of the parties overarching contract. The defendant argued that the delegation clause required the arbitrator, and not the court, to decide if the arbitration clause and delegation clause were terms to the contract. In rejecting the defendant's argument, the Eighth Circuit stated that before compelling arbitration, the court must first determine the threshold question of whether an arbitration agreement was made. Whether the arbitration clause became part of the parties' agreement was a question "presumptively committed to judicial determination. Compelling arbitration without answering the threshold question would give effect to an arbitration provision that may not even be part of the contract. Nebraska Mach. Co. v. Cargotec Sols., LLC, 762 F.3d 737 (8th Cir. 2014). See also Glob. Tel*Link Corp., 2017 WL 831101, at *2 ("When the parties dispute whether an arbitration agreement was ever concluded in the first place, then the Court cannot rely on the disputed arbitration agreement itself to compel arbitration of the issue of its own formation, since doing so puts the cart before the horse by specifically enforcing an alleged agreement whose very existence has not yet even been established.").

No contract was ever formed between Plaintiffs and Defendant. Therefore, Defendant's Motion is DENIED.

IV.

Accordingly, for the reasons set forth above, Defendant's Motion to Compel Individual Arbitration (Doc. 9) is DENIED.

IT IS SO ORDERED.

Date: January 12, 2018

/s/ Dean Whipple
Dean Whipple
United States District Judge