IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 18-cv-01749-PAB-SKC

CARMEN BUTLER,

Plaintiff,

v.

AT&T,

Defendant.

ORDER

This matter comes before the Court on Defendants' Motion to Compel Arbitration and Stay Proceedings [Docket No. 14] and Defendants' Motion for Leave to File Notice of Supplemental Authority in Further Support of their Motion to Compel Arbitration and Stay Proceedings [Docket No. 32] filed by AT&T Services, Inc. ("AT&T").[1] Defendant argues that plaintiff Carmen Butler's claims for employment discrimination are subject to mandatory arbitration.

I. BACKGROUND

According to the complaint (which plaintiff calls a "petition"), plaintiff began

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[1] Defendant's notice of removal bears a different caption; defendant believes that the caption on the notice of removal more correctly reflects the true parties in this case. Docket No. 1 at 1 n.1. It is true that the body of the complaint refers to various individuals as "defendants." *See* Docket No. 3 at 2. However, defendant has no authority to amend the caption unilaterally through the notice of removal. Rather, plaintiff controls the caption; correcting the caption will need to be done by plaintiff through the filing of a motion. *See* Fed. R. Civ. P. 10(a) ("The title of the complaint must name all the parties . . . .").

working for AT&T as Lead Analyst/Corporate Security in October 2011.[2] Docket No. 3 at 3, ¶ 21. While employed by AT&T, plaintiff's computer system user name was CB998v and her email address was CB998v@us.att.com. Docket No. 14-3 at 2, ¶ 6.

Beginning in late 2011, AT&T implemented a new Management Arbitration Agreement (the "MAA") to resolve legal disputes through binding arbitration rather than in the courts. Docket 14-1 at 2, ¶ 4. The MAA requires that employees arbitrate "any claim" against "(1) any AT&T company, (2) its present or former officers, directors, employees or agents in their capacity as such or otherwise, [and] (3) the Company's parent, subsidiary and affiliated entities, and all successors and assigns of any of them." *Id*. at 8. The MAA covers claims "arising out or related to [the employee's] employment or termination," including "all . . . state and local statutory and common law claims." *Id*. at 8-9. The MAA also requires AT&T to bring any claim against an employee through the same arbitration process. *Id.* at 8.

AT&T began to disseminate the MAA in November 2011. *Id.* at 2, ¶ 4. AT&T placed the full text of the MAA on the company intranet site. *Id*., ¶ 7. Beginning on November 30, an internal application delivered a copy of the MAA to AT&T employees in batches of about 20,000 emails per day over five days. *Id*., ¶ 6. The email included an "Important Notice Regarding Management Arbitration Agreement" ("Notice"), which explained that the MAA "provides for employees and AT&T to use independent, third party arbitration rather than courts or juries to resolve legal disputes." *Id*. at 6, 8. The Notice stated that the decision to participate "is entirely up to you" and that employees

[2]There is some disagreement about plaintiff's job title. *Compare* Docket No. 3 at 3, ¶ 21, *with* Docket No. 14-3 at 1, ¶ 4 ("Lead Analyst-Asset Protection").

could opt out of the MAA by 11:59 p.m. Central Standard Time on February 6, 2012 by opening the attached copy of the MAA, following the link provided, and registering their decision to opt out by the deadline. *Id*. The Notice provided a phone number for an Employee Service Hotline that employees could call with any questions. *Id*. at 8. Finally, the Notice asked employees to click a button labeled "Review Completed" once they had reviewed the MAA. *Id*. at 6, 8.

An internal application sent the email to plaintiff's email address on November 30, 2011 and on December 15, 2011. Docket 14-2 at 3, ¶ 8. AT&T records show that user CB998v viewed the MAA on January 10, 2012 and clicked the "Review Completed" button. *Id*. at 3-4, 15. Plaintiff did not opt out of the MAA by the deadline. Docket 14-5 at 3, ¶ 10. Plaintiff left AT&T in July 2016. Docket 1-2 at 5, ¶ 49.

On May 25, 2018, plaintiff filed the instant lawsuit in the District Court for the City and County of Denver, Colorado, alleging violations of the Colorado Discrimination Act and Colo. Rev. Stat. § 24-34-402(1)(a)(e). *Id*. at 1, ¶ 1. Defendant removed the lawsuit to this Court on the basis of diversity jurisdiction. Docket No. 1 at 1; *see also* Docket No. 10.

II. ANALYSIS

Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, agreements to arbitrate are "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 Supreme Court has "long recognized and enforced a liberal federal policy favoring arbitration agreements," and under this policy, doubts concerning the scope of arbitrable issues

are resolved in favor of arbitration. *Nat'l Am. Ins. Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). The FAA mandates a stay of a judicial proceeding "upon any issue referable to arbitration under an agreement in writing for such arbitration[.]" 9 U.S.C. § 3.

Defendant, as the party claiming an obligation to arbitrate, has the burden of establishing that plaintiff's claims are subject to arbitration. *See McCarthy v. Azure*, 22 F.3d 351, 354-55 (1st Cir. 1994); *see also Bellman v. i3Carbon, LLC*, 563 F. App'x 608, 613 (10th Cir. 2014) (unpublished). "The existence of an agreement to arbitrate is a threshold matter which must be established before the FAA can be invoked." *Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279, 1287 (10th Cir. 1997). If defendant meets its burden, the burden shifts to plaintiff to show that there is a "genuine issue of material fact as to the making of the agreement, using evidence comparable to that identified in Fed. R. Civ. P. 56." *Stein v. Burt-Kuni One, LLC*, 396 F. Supp. 2d 1211, 1213 (D. Colo. 2005). The decision whether to enforce an arbitration agreement requires a two-step inquiry: first, the Court must determine whether a valid agreement to arbitrate exists; and, second, the Court must determine whether the specific dispute falls within the scope of that agreement. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *see also Martinez v. TCF Nat'l Bank*, No. 13-cv-03504-PAB-MJW, 2015 WL 854442, at *1 (D. Colo. Feb. 25, 2015).

AT&T's MAA provides for arbitration of "any claim" that "aris[es] out of or related to [the employee's] employment or termination" between an employee and AT&T,

including those that arise under state law. Docket 14-1 at 8-9. Plaintiff does not contest that her state law claims of employment discrimination fall within the scope of the arbitration agreement. Rather, plaintiff argues that the agreement to arbitrate is not valid. *See* Docket No. 23 at 2-4. Therefore, the only issue before the Court is the validity of the arbitration clause.

Since arbitration is a matter of contract, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010), in deciding whether there is an enforceable agreement to arbitrate "courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). In Colorado, "[t]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 888 (Colo. 1986) (citing Restatement (Second) of Contracts § 17(1) (1981)).

A. Mutual Assent

A properly formed contract requires a manifestation of mutual assent. *See I.M.A., Inc.*, 713 P.2d at 888. Put another way, there needs to be an offer and an assent to that offer (also called an acceptance). *Master Palletizer Sys. Inc. v. T.S. Ragsdale Co., Inc.*, 725 F. Supp. 1525, 1531 (D. Colo. 1989) (applying Colorado law).

AT&T made an offer when it transmitted the MAA to its employees via email, namely, an offer to bind the employee and the company to arbitration in the case of a dispute. *See* Docket 14-1 at 8-11. The email transmitting the MAA included the text of the agreement, which contained all of the terms. *Id*. The email also included

information in the Notice about how the employee could accept the offer (by taking no action and continuing employment) or decline the offer (by going to a link and opting out before the deadline of 11:59 p.m. Central Time on February 6, 2012).

Plaintiff argues that she did not accept the offer for several reasons. *See* Docket 23 at 2-3. All of her arguments fail.

First, plaintiff argues that she did not accept the offer because she "does not recall" the arbitration agreement. Docket No. 23 at 3. This representation is made in Plaintiff's Response to Defendants' Motion to Compel Arbitration, Docket No. 23, but it is not accompanied by a sworn declaration or other affidavit of personal knowledge. Therefore, it is insufficient to create a triable issue of fact. *See Hayes v. Marriott*, 70 F.3d 1144, 1148 (10th Cir. 1995) (unsworn allegations do not constitute proper summary judgment evidence); *see also Stein*, 396 F. Supp. 2d at 1213 (burden in case challenging arbitration clause is on plaintiff to identify a genuine issue of material fact, using "evidence comparable to that identified in Fed. R. Civ. P. 56"). Even assuming that plaintiff does not recall the arbitration agreement, AT&T has offered evidence that plaintiff's unique username, CB998v, accessed the MAA on January 10, 2012 and clicked the "Review Complete" button. *See* Docket 14-2 at 3-4, ¶¶ 10-11. This is sufficient evidence that plaintiff herself reviewed the agreement. Interpreting substantially similar New Mexico law on contract formation, the Tenth Circuit, in an unpublished opinion, concluded that an employer's sending of a single email constituted notice and acceptance of a company's arbitration agreement where the employer introduced evidence that the employee habitually opened emails from

management. *Pennington v. Northrop Grumman Space & Mission Sys. Corp.*, 269 F. App'x 812, 815 (10th Cir. 2008). Here, AT&T has introduced evidence that it sent two emails to plaintiff and that she indicated she reviewed the arbitration agreement. *See* Docket 14-2 at 3-4, ¶¶ 8, 10-11. Therefore, plaintiff had adequate notice of the agreement, even if she does not recall the agreement today.

Second, plaintiff argues that she did not accept the offer because she did not take any action to accept the contract. Docket No. 23 at 3. However, under Colorado law, an at-will employee who is offered a new condition of employment accepts that offer through continuing the employment relationship. *Lucht's Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058, 1063 (Colo. 2011).[3] Plaintiff, an at-will employee, continued to be employed by AT&T for over four years after the deadline to opt out of the arbitration agreement expired. Docket No. 1-2 at 5, ¶ 49. Contrary to plaintiff's argument, plaintiff did take actions to accept the contract – she did not opt out of the agreement and continued to work for AT&T. *Cf. Rivera-Colón v. AT&T Mobility Puerto Rico, Inc.*, 913 F.3d 200, 210-211 (1st Cir. 2019) (in case challenging the same arbitration agreement, concluding that AT&T's "stipu2lation of silence as acceptance" followed by plaintiff's silence constituted evidence of plaintiff's intent to accept the

[3] Under Colorado law, an employee hired for an indefinite period of time is presumed to be an "at will employee." *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 711 (Colo. 1987). Plaintiff does not assert in her complaint that her employment was pursuant to a contract and offers no other evidence to rebut the at-will presumption. *See* Docket No. 1-2. The Court will, for purposes of this motion, assume that she was an at-will employee.

agreement).[4]

Finally, plaintiff argues that she did not sign a formal contract, which indicates that the parties did not have mutual intent to enter into an agreement. This argument is unsupported. Under the FAA, the terms of an arbitration agreement must be in writing, but there is no requirement that the writing be signed by either party. *Todd Habermann Constr., Inc. v. Epstein*, 70 F. Supp. 2d 1170, 1174 (D. Colo. 1999) (citing *Med. Dev. Corp. v. Industrial Molding Corp.*, 479 F.2d 345, 348 (10th Cir. 1973)). Here, all of the terms of the MAA are in writing, as required by the FAA. Docket 14-1 at 8-11. Because the evidence presented shows that AT&T made an offer and plaintiff accepted that offer, mutual assent to the MAA exists.

B. Consideration

In addition to mutual assent, a contract must be supported by consideration, which is an "exchange of one party's promise or performance for the other party's promise or performance." *See PayoutOne v. Coral Mortg. Bankers*, 602 F. Supp. 2d 1219, 1224 (D. Colo. 2009) (applying Colorado law); *see also* Restatement (Second) of Contracts § 71. In Colorado, consideration need only consist of a benefit to the promisor or detriment to the promisee. *See W. Fed. Sav. & Loan Ass'n v. Nat'l Homes Corp.*, 445 P.2d 892, 897 (1968).

Plaintiff argues that the agreement is invalid because the plaintiff "receives no benefit from entering into arbitration." *See* Docket No. 23 at 4. This argument fails.

[4] The Court grants defendant's motion for leave to file notice of supplemental authority regarding *Rivera-Colón*, which was decided after briefing closed on the motion to compel arbitration. Docket No. 32.

Here, AT&T and plaintiff are making mutual promises to arbitrate. *See* Docket No. 14-1 at 8 ("[T]his agreement also applies to any claim that [AT&T] may have against [the employee.") AT&T's promise to arbitrate gives plaintiff the benefit of having any claims made against her by AT&T heard through an informal arbitration proceeding rather than in the courts – or, alternatively, it gives AT&T the detriment of not being able to enforce its rights in court. Courts in this district have found that mutual promises to arbitrate are sufficient consideration under the FAA. *See Crawford v. United Servs. Auto Ass'n Ins.*, No. 06-cv-00380-EWN-BNB, 2006 U.S. Dist. LEXIS 46433, at *25 (D. Colo. July 10, 2006) (concluding that both employee and employer have suffered legal detriment by agreeing to arbitrate their legal claims). Therefore, the mutual promise to arbitrate is sufficient consideration to support the agreement.

C. Unconscionability

A court may refuse to enforce a contract if the contract (or a term of the contract) is unconscionable at the time the contract is made. Restatement (Second) of Contracts § 208. In the employment context, a plaintiff must show more than "[m]ere inequality in bargaining power" to prove that an arbitration agreement is unconscionable. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). To find a contract unconscionable under Colorado law, a court must find "overreaching on the part of one of the parties" resulting from "inequality of bargaining power" or an "absence of meaningful choice on the part of one of the parties." *Davis v. M.L.G. Corp.*, 712 P.2d 985, 991 (Colo. 1986).

Plaintiff argues that the MAA should not be enforced by the Court because

defects in the bargaining process and the terms of the contract are unconscionable. *See* Docket No. 23 at 2-4. Plaintiff does not meet her burden to show that AT&T exercised more than "mere inequality" in bargaining power.

First, plaintiff argues that the "passive system" AT&T used to disseminate the MAA is unfair to employees because they do not have the time to "decipher legal documents." Docket No. 23 at 2. However, the Court finds that AT&T provided a reasonable opportunity for plaintiff to review the agreement. AT&T's deadline for opting out of the MAA was over two months after the employees received the initial email. *See* Docket 14-1 at 6, 8. Courts in this district have held that as few as ten business days is sufficient time for an employee to review an arbitration agreement. *See Smith v. Keypoint Gov't Solutions, Inc.*, No. 15-cv-00865-REB-KLM, 2015 WL 3896859, at *3 (D. Colo. June 23, 2015) (finding nothing "inherently unreasonable" about a deadline of ten business days for an employee to opt out of arbitration). AT&T also sent a reminder email to plaintiff on December 15, 2011, which was over six weeks before the deadline for plaintiff to opt out. *See* Docket 14-2 at 3, ¶ 8.

Second, plaintiff argues that the email sent with the MAA is ambiguous and misleading. The Court disagrees. Plaintiff contends that the language in the notice about arbitration being used to "settle disputes between the company and employees" leads an employee to believe that the agreement "did not include law suits or other legal claims." Docket No. 23 at 2. This assertion is contradicted by the first sentence of the Notice, which explicitly states that the MAA "provides for employees and AT&T to use independent, third-party arbitration rather than courts or juries to resolve *legal*

disputes." Docket No. 14-1 at 8 (emphasis added). Plaintiff provides no other evidence that the MAA is ambiguous or misleading.

Third, plaintiff argues that the MAA should be set aside because the plaintiff had to give up her constitutional right to a jury trial. In Colorado, individuals may decide to waive the right to a jury trial and instead agree to arbitrate claims. *See Moffett v. Life Care Ctrs. of Am.*, 219 P.3d 1068, 1074 (Colo. 2009). Plaintiff's argument that the arbitration agreement causes her to "automatically lose[]" her right to a jury trial is not supported by the facts, which show that Plaintiff had the opportunity to opt out of the agreement without any adverse employment effect. *Compare* Docket No. 23 at 3, *with* Docket No. 14-1 at 8 ("No one will be subjected to pressure or retaliation in connection with this decision.")

Finally, plaintiff argues that the MAA should be set aside because it is a contract of adhesion, written "without [p]laintiff's input or any negotiation." *See* Docket No. 23 at 4. Although plaintiff is correct that she had no input into the MAA, under Colorado law a form contract is not unconscionable without more evidence of procedural inequities. *See Adams v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 888 F.2d 696, 700 (10th Cir. 1989) (finding "no authority" that arbitration clauses are unconscionable, even if they are contracts of adhesion); *Vernon v. Qwest Communications Int'l, Inc.*, 857 F. Supp. 2d 1135, 1158 (D. Colo. 2012) (applying Colorado law to hold that consumer contract offered on "take it or leave it" basis is not a contract of adhesion without more evidence). Plaintiff offers no other evidence that demonstrates defects in the bargaining process.

Because the MAA is a valid contract between plaintiff and AT&T and the agreement covers the claims she asserts in this matter, the Court determines that the arbitration agreement is enforceable.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED that Defendants' Motion to Compel Arbitration and Stay the Proceedings [Docket No. 14] is **GRANTED**. It is further

ORDERED that Defendants' Motion for Leave to File Notice of Supplemental Authority in Further Support of their Motion to Compel Arbitration and Stay Proceedings [Docket No. 32] is **GRANTED**. It is further

ORDERED that, pursuant to D.C.COLO.LCivR 41.2, this action shall be administratively closed. It is further

ORDERED that, no later than twenty days after the completion of the arbitration proceeding, the parties shall file a status report advising the Court whether they believe the case should be reopened for good cause for any further proceedings in this Court or whether the case may be dismissed.

DATED March 18, 2019.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
Chief United States District Judge