UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 18-21960-CIV-MARTINEZ/AOR

SUSANA HERBOSO,

Plaintiff,

v.

POLLO OPERATIONS, INC. and
DINOLAYS VERA,

Defendants.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Defendant Pollo Operations, Inc. d/b/a Pollo Tropical's ("Pollo Tropical") Motion to Compel Arbitration and Dismiss or, in the Alternative, Stay Proceedings Pending Arbitration (hereafter, "Motion to Compel Arbitration") [D.E. 11]. This matter was referred to the undersigned pursuant to 28 U.S.C. § 636 by the Honorable Jose E. Martinez, United States District Judge [D.E. 12]. The undersigned held a hearing on this matter on August 7, 2018 [D.E. 19]. For the reasons stated below, the undersigned respectfully recommends that the Motion to Compel Arbitration be GRANTED and this case be DISMISSED WITHOUT PREJUDICE.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of an employment dispute between Plaintiff Susana Herboso ("Plaintiff" or "Herboso") and her former employer, Pollo Tropical. See Compl. [D.E. 1]. Pollo Tropical employed Plaintiff from August 28, 2000 until it terminated her employment on May 5, 2017. Id. at 2, 4.

On June 16, 2006, Pollo Tropical issued a Company Memorandum to its employees with

the subject line: "Mandatory Arbitration Program – Existing Employee Roll-Out" (hereafter, "Memorandum") [D.E. 11-1 at 13]. See Declaration of Sally Throckmorton ("Throckmorton Decl.") [D.E. 11-1 at 3]. The Memorandum described the implementation of a Mandatory Arbitration Program ("MAP") [D.E. 11-1 at 7-8] to be agreed upon in the Agreement for Resolution of Disputes Pursuant to Binding Arbitration ("Arbitration Agreement") [D.E. 11-1 at 10-11] (MAP and Arbitration Agreement, together "Arbitration Policy"), a copy of which was attached to the Memorandum. See Throckmorton Decl. [D.E. 11-1 at 3]. The Memorandum stated that employees' employment-related disputes that could not be resolved internally would be resolved through arbitration rather than in a lawsuit; and it directed employees to review the Arbitration Agreement carefully because they would "agree to be bound by its terms and conditions after August 1, 2006." See Memorandum [D.E. 11-1 at 13]. The Memorandum further stated, "**By reporting to work on or after August 1, 2006, you agree to the terms of MAP as a condition of your continued employment with [Carrols Corporation/Taco Cabana/Pollo Tropical]**." Id. (bold in original).

The Arbitration Agreement states:

> Pollo Tropical…has therefore implemented a mandatory arbitration program that is a condition of your employment. . . . Under this arbitration program, which is mandatory, [Pollo Tropical] and you agree that any and all disputes, claims or controversies for monetary or equitable relief arising out of or relating to your employment, even disputes, claims, or controversies relating to events occurring outside the scope of your employment ("Claims"), shall be arbitrated before JAMS . . . .
>
> Claims subject to arbitration shall include, without limitation, disputes, claims, or controversies relating or referring in any manner, directly or indirectly, to: Title VII of the Civil Rights Act of 1964 and similar state statutes; the Federal Age Discrimination Employment Act and similar state statutes; the whistleblower provisions of state or federal law or state or federal regulations; personal or emotional injury to you or your family; the Federal Fair Labor Standards Act or similar state statutes; the Family and Medical Leave Act or similar state statutes; the Americans with Disabilities Act or similar state statutes; injuries you believe

> are attributable to [Pollo Tropical] under theories of product liability, strict liability, intentional wrongdoing, gross negligence, negligence, or *respondeat superior*; actions or omissions of third parties you attribute to [Pollo Tropical]; the Employee Retirement Income Security Act tort claims brought pursuant to actual or alleged exceptions to the exclusive remedy provisions of state workers compensation laws; federal and state antitrust law; benefits, bonuses, and wages; contracts; pensions; federal, state, local, or municipal regulations, ordinances, or orders; any common law, or statutory law relating to discrimination by sex, race, national origin, sexual orientation, family or marital status, disability, weight, dress, or religion; and alleged wrongful retaliation of any type, including retaliation related to workers compensation laws or employee injury benefit plan actionable at law or equity, but not any claims under workers compensation laws or employee injury benefit plan. My agreement to arbitrate Claims extends to Claims against [Pollo Tropical's] officers, directors, managers, employees, owners, attorneys and agents, as well as to any dispute you have with any entity owned, controlled or operated by [Pollo Tropical].

See Arbitration Agreement [D.E. 11-1 at 10].

The Memorandum and the Arbitration Agreement were distributed to Pollo Tropical employees on June 16, 2006 as an attachment stapled to their paychecks and/or paystubs. See Throckmorton Decl. [D.E. 11-1 at 3]. However, Plaintiff contends that neither the Memorandum nor the Arbitration Agreement were attached to her paycheck or paystub, and that Pollo Tropical never provided her with the Memorandum or the Arbitration Agreement in any other manner. See Affidavit of Susana Herboso ("Herboso Affidavit") [D.E. 15-1 at 2].

On August 1, 2006, Pollo Tropical implemented the MAP, which was contained in the Pollo Tropical Employee Handbook (hereafter, "Employee Handbook"). See Throckmorton Decl. [D.E. 11-1 at 3]; MAP [D.E. 11-1 at 7-8]. The MAP states, in pertinent part, "All Pollo Tropical employees are subject to the Company's Mandatory Arbitration Program." See MAP [D.E. 11-1 at 8]. The Employee Handbook also contained an Acknowledgment form, which stated that "the information contained in this Handbook is subject to change at anytime and at the sole discretion of [Pollo Tropical]." See Acknowledgement [D.E. 15-2].

Plaintiff continued working for Pollo Tropical after August 1, 2006. See Throckmorton

Decl. [D.E. 11-1 at 4]; Herboso Affidavit [D.E. 15-1 at 2]. She was promoted to General Manager on July 2, 2007. See Throckmorton Decl. [D.E. 11-1 at 2]; Herboso Affidavit [D.E. 15-1 at 2]. Plaintiff admits that, as General Manager, she was provided with an Employee Handbook that contained the MAP as part of the new hire paperwork that Pollo Tropical directed her to have new hires sign. See Herboso Affidavit [D.E. 15-1 at 3]. Plaintiff provided at least three new hires with the MAP and the Arbitration Agreement during her tenure as General Manager. See Throckmorton Decl. [D.E. 11-1 at 4]; see also New Hire Paperwork Checklists [D.E. 11-1 at 15, 17, 19]. Plaintiff claims to have believed that "arbitration applied only to those individuals employed by [Pollo Tropical] after the date it created and disseminated its arbitration program." See Herboso Affidavit [D.E. 15-1 at 3].

On May 16, 2018, Plaintiff brought this action against Pollo Tropical and Defendant Dinolays Vera ("Vera") (together, "Defendants") asserting claims for age discrimination in violation of the Florida Civil Rights Act, Fla. Stat. § 760.01, et seq.; retaliatory discharge in violation of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3); and retaliatory discharge in violation of Florida's Private Whistleblower Act, Fla. Stat. § 448.102. See Compl. [D.E. 1]. Specifically, Plaintiff alleges that Pollo Tropical demoted her from General Manager to Assistant Manager because of her age, and that Defendants fired her for complaining about Pollo Tropical's purported failure to pay overtime. Id.

On June 29, 2018, Pollo Tropical filed the instant Motion to Compel Arbitration [D.E. 11]. Pollo Tropical argues that the Arbitration Policy is binding and enforceable against Plaintiff, and that all of her claims fall within the scope of the Arbitration Policy, requiring that the instant case be dismissed and the claims be arbitrated. Id. at 8-12. On July 13, 2018, Plaintiff filed her Response, arguing that there was no enforceable agreement to arbitrate [D.E. 15]. On July 20,

2018, Pollo Tropical filed its Reply [D.E. 16].

APPLICABLE LAW

"The validity of an arbitration agreement is generally governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "FAA"), which was enacted in 1925 to reverse the longstanding judicial hostility toward arbitration." Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1367 (11th Cir. 2005) (citing Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 626-27 (1985); Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312 (11th Cir. 2002)). "The FAA embodies a liberal federal policy favoring arbitration agreements." Id. (citations omitted). Pursuant to the FAA, a written arbitration provision in a "contract evidencing a transaction involving commerce" is "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. To determine whether parties should be compelled to arbitrate a dispute, courts consider: (1) whether an enforceable written agreement to arbitrate exists; (2) whether the issues are arbitrable; and (3) whether the party seeking arbitration has waived the right to arbitrate. Sims v. Clarendon Nat. Ins. Co., 336 F. Supp. 2d 1311, 1326 (S.D. Fla. 2004).

"[I]n determining whether a binding agreement arose between the parties, courts apply the contract law of the particular state that governs the formation of contracts." Caley, 428 F.3d at 1368. Under Florida law, mutual assent is a prerequisite for the formation of any contract and is evaluated by analyzing the parties' agreement process in terms of offer and acceptance. Kolodziej v. Mason, 774 F.3d 736, 741 (11th Cir. 2014) (citations omitted). In determining assent, courts do not look into the subjective minds of the parties, but rather, "the law imputes an intention that corresponds with the reasonable meaning of a party's words and acts." Id. at 745. The best evidence of intent is the plain language of the contract. Tranchant v. Ritz Carlton Hotel

Co., LLC, No. 2:10-CV-233-FTM-29DNF, 2011 WL 1230734, at *3 (M.D. Fla. Mar. 31, 2011) (citations omitted).

It is not necessary for the party opposing arbitration to have signed the arbitration agreement in order for it to be enforced; and assent can be established through a course of conduct. Mays v. Keiser Sch., Inc., No. 10-61921-CIV, 2011 WL 1539675, at *2 (S.D. Fla. Mar. 31, 2011) (citations omitted), report and recommendation adopted, 2011 WL 1496774 (S.D. Fla. Apr. 19, 2011). See also Sundial Partners, Inc. v. Atl. St. Capital Mgmt. LLC, No. 8:15-CV-861-T-23JSS, 2016 WL 943981, at *5 (M.D. Fla. Jan. 8, 2016) ("Because the object of a signature is to show mutuality or assent, a contract may be binding on a party notwithstanding the absence of a signature if the parties assented to the contract in another manner."), report and recommendation adopted, 2016 WL 931135 (M.D. Fla. Mar. 11, 2016). Moreover, the FAA does not require that an arbitration agreement be signed by the parties. Id.; 9 U.S.C. § 2. Courts in Florida have found that continued employment after receiving notice of the terms of an arbitration agreement constitutes assent. See Mays, 2011 WL 1539675, at *2 (finding that the plaintiff's "course of conduct of continuing her employment with Defendant, with knowledge of the terms of the Agreement, including the arbitration clause, constitutes an assent to those terms"); Sierra v. Isdell, No. 6:09-cv-124-Orl-19KRS, 2009 WL 2179127, at *4 (M.D. Fla. July 21, 2009) (finding that plaintiff's continued employment after obtaining knowledge of the terms of an arbitration agreement established assent); BDO Seidman, LLP v. Bee, 970 So.2d 869, 875 (Fla. 4th DCA 2007) (finding that a party acquiesced to the terms of the agreement to arbitrate by continuing employment after the agreement came into existence).

"[A] party seeking to avoid arbitration must unequivocally deny that an agreement to arbitrate was reached and must offer 'some evidence' to substantiate the denial." Mays, 2011 WL

1539675, at *1 (citations omitted). The Eleventh Circuit has held:

> If, under a "summary judgment-like standard," the district court concludes that there "is no genuine dispute as to any material fact concerning the formation of such an agreement," it "may conclude as a matter of law that [the] parties did or did not enter into an arbitration agreement."

Burch v. P.J. Cheese, Inc., 861 F.3d 1338, 1346 (11th Cir. 2017) (quoting Bazemore v. Jefferson Capital Sys., LLC, 827 F.3d 1325, 1333 (11th Cir. 2016)). On summary judgment, "courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." Scott v. Harris, 550 U.S. 372, 378 (2007) (citations omitted). Upon being satisfied that the issue is referable to arbitration, the Court may, on application of one of the parties, stay the trial of the action until the conclusion of the arbitration proceedings. 9 U.S.C. § 3. Courts in this District have also "dismissed the case where all claims were subject to arbitration." Perera v. H & R Block E. Enters, Inc., 914 F. Supp. 2d 1284, 1290 (S.D. Fla. 2012) (citations omitted); see also Amat v. Rey Pizza Corp., 204 F. Supp. 3d 1359, 1368 (S.D. Fla. 2016) (adopting recommendation to dismiss the case because "all of the issues raised in the district court were arbitrable").

DISCUSSION

Plaintiff argues that there is no enforceable agreement to arbitrate because she never received the Memorandum or the Arbitration Policy when Pollo Tropical distributed them to its employees. See Response [D.E. 15 at 5-6]. However, Plaintiff admits that she did receive the Employee Manual that contained the MAP as part of the new hire paperwork that Pollo Tropical directed her to have new hires sign in her role as General Manager. See Herboso Affidavit [D.E. 15-1 at 3]. Further, Plaintiff does not dispute that she provided at least three new hires with the MAP and the Arbitration Agreement during her tenure as General Manager. See Throckmorton Decl. [D.E. 11-1 at 4]; see also New Hire Paperwork Checklists [D.E. 11-1 at 15, 17, 19]. It is

also undisputed that Plaintiff continued working for Pollo Tropical until she was terminated on May 5, 2017. See Compl. [D.E. 1 at 4]; Throckmorton Decl. [D.E. 11-1 at 2].

Viewing the facts and drawing reasonable inferences in the light most favorable to Plaintiff, see Scott, 550 U.S. at 378, the undersigned concludes that Plaintiff had notice of the terms of the Arbitration Policy during her employment, including that it was mandatory for all Pollo Tropical employees and that it was a condition of employment; and she continued to work for Pollo Tropical after obtaining such knowledge. Thus, the undersigned finds that Plaintiff's conduct constituted assent to the Arbitration Policy. See Mays, 2011 WL 1539675, at *2; Sierra, 2009 WL 2179127, at *4; BDO Seidman, 970 So.2d at 875. Moreover, that Plaintiff never signed the Arbitration Agreement is of no moment. See Mays, 2011 WL 1539675, at *2; Sundial Partners, Inc., 2016 WL 943981, at *5; 9 U.S.C. § 2.

Although Plaintiff claims that she believed that "arbitration applied only to those individuals employed by [Pollo Tropical] after the date it created and disseminated its arbitration program," see Herboso Affidavit [D.E. 15-1 at 3], her subjective intent does not raise a genuine issue of material fact. See Kolodziej, 774 F.3d at 745. The plain language of the Arbitration Policy indicates that it was mandatory for all employees and that it was a condition of employment. See MAP [D.E. 11-1 at 8]; Arbitration Agreement [D.E. 11-1 at 10]. Hence there is no evidence to indicate that the Arbitration Policy was intended to apply only to new hires. See Tranchant, 2011 WL 1230734, at *3. Accordingly, the "reasonable meaning" of Plaintiff's continued employment is that she intended to be bound to the Arbitration Policy. Kolodziej, 774 F.3d at 745. Furthermore, Plaintiff's statement in her affidavit that she believed the Arbitration Policy applied only to those employed after Pollo Tropical disseminated it implies that she knew

exactly when it was distributed. Such a belief is inconsistent with Plaintiff's claim that she was never provided with the Memorandum or Arbitration Agreement in any manner.

Additionally, Plaintiff argues that the MAP is illusory and unenforceable due to the inclusion of the following language in the Acknowledgment for the Employee Handbook: "the information contained in this Handbook is subject to change at anytime and at the sole discretion of Pollo Tropical." See Response [D.E. 15 at 7-8]; Acknowledgement [D.E. 15-2]. Under Florida law, a contract is illusory when "one of the promises appears on its face to be so insubstantial as to impose no obligation at all on the promisor." Princeton Homes, Inc. v. Virone, 612 F.3d 1324, 1331 (11th Cir. 2010) (citations omitted). Potential future alterations to the Employee Handbook do not render the MAP illusory. See Vince v. Specialized Servs., Inc., No. 8:11-CV-1683-T-24-TBM, 2011 WL 4599824, at *3 (M.D. Fla. Oct. 3, 2011) (rejecting the notion that an arbitration agreement contained in an employee handbook was illusory because the employer could alter the terms of the employee handbook).

Given these considerations, the undersigned concludes that there was an enforceable agreement for Plaintiff to arbitrate all of her claims against Defendants. Because all of Plaintiff's claims are subject to arbitration, the undersigned recommends that the case be dismissed without prejudice. Perera, 914 F. Supp. 2d at 1290; Amat, 204 F. Supp. 3d at 1368.

RECOMMENDATION

Based on the foregoing considerations, the undersigned RESPECTFULLY RECOMMENDS that Pollo Tropical's Motion to Compel Arbitration [D.E. 11] be GRANTED and the case be DISMISSED WITHOUT PREJUDICE.

Pursuant to Local Magistrate Judge Rule 4(b), the parties have **fourteen days** from the date of this Report and Recommendation to file written objections, if any, with the Honorable Jose E. Martinez. Failure to timely file objections shall bar the parties from attacking on appeal the factual findings contained herein. See Resolution Tr. Corp. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993). Further, "failure to object in accordance with the provisions of [28 U.S.C.] § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." See 11th Cir. R. 3-1 (I.O.P. - 3).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida this 27th day of November, 2018.

ALICIA M. OTAZO-REYES
UNITED STATES MAGISTRATE JUDGE

cc: United States District Judge Jose E. Martinez
Counsel of Record