VERMONT SUPERIOR COURT

SUPERIOR COURT **Windsor Unit**	**CIVIL DIVISION** **Docket No. 325-5-13 Wrcv**

Linda S. West, **Plaintiff** **v.** **Seldon Technologies, Inc.,** **Defendant.**	

Decisions on Defendant's Motion to Compel Arbitration and Motion to Dismiss

Plaintiff, Linda West, sues Defendant, Seldon Technologies, for several employment-related claims. Specifically, Plaintiff sues for illegal retaliation (Count I), age discrimination (Count II), breach of contract (Count III), and breach of the covenant of good faith (Count IV). On July 16, 2013, Defendant moved to compel arbitration pursuant to an arbitration agreement signed by Plaintiff on June 7, 2006. Alternatively, Defendant requests the Court dismiss Counts I and IV. On July 26, 2013, Plaintiff opposed Defendant's motions. Defendant responded to the opposition on August 8, 2013. Plaintiff filed another opposition on August 19, 2013.

Plaintiff signed the arbitration agreement, which was part of Seldon's Employee Manual, on the request of her supervisor. Plaintiff claims she signed the agreement because she believed she had to choose between signing the agreement and leaving Seldon. The agreement contains many provisions, and a few sentences are especially important for this decision.

> If an employment dispute arises while you are employed at Seldon, Seldon requests that you agree to submit any such dispute arising out of your employment or the termination of your employment (including, but not limited to, claims of unlawful termination based on race, sex, age national origin, disability, breach of contract or any other bias prohibited by law) exclusively to binding arbitration under the federal Arbitration Act, 9 U.S.C. Section 1. Similarly, any disputes arising during your employment involving claims of unlawful discrimination or harassment under federal or state statutes shall be submitted exclusively to binding arbitration under the above provisions. This arbitration shall be the exclusive means of resolving any dispute arising out of your employment or termination from employment by Seldon or you, and no other action can be brought by employees in any court or any forum.

Seldon Technologies, Inc. Employee Manual, *9. Seldon issued an updated employee manual in 2012. Plaintiff did not sign the new manual, but the new manual is substantially similar to the old manual for the purpose of the arbitration agreement.

The Court treats motions to compel arbitration similar to motions for summary judgment. *See Porter v. AT&T Mobility, Inc.*, 2011 VT 112, ¶ 6, 190 Vt. 635. Accordingly, the Court will make all inferences in favor of the non-moving party. *Lamay v. State*, 2012 VT 49, ¶ 6, 191 Vt. 635. Nevertheless, the non-moving party cannot rely solely on the pleadings to rebut credible evidence. *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 5, 175 Vt. 413.

The issue in this motion is whether the Court should compel arbitration based on the 2006 agreement. "Vermont law and public policy strongly favor arbitration as an alternative to litigation for the efficient resolution of disputes." *Lamell Lumber Corp. v. Newstress Int'l, Inc*, 2007 VT 83, ¶ 9, 182 Vt. 282 (internal quotations omitted). Further, the Court must stay any proceeding if it determines there is an enforceable arbitration agreement and refer the dispute to an arbitrator. *See* 9 U.S.C. § 3. Nevertheless, arbitration agreements are contracts and the Court must apply contract law principals when enforcing an arbitration agreement. *Lamell*, 2007 VT 93, ¶ 9. On its face, the agreement is a binding contract to arbitrate employment-related claims. Plaintiff raises four arguments about why the contract is not valid.

First, Plaintiff argues the agreement is not enforceable because it is confusing.[1] To support her claim, Plaintiff cites *Dillion v. Champion Jogbra*. *See* 175 Vt. 1, 5 (2002). *Dillion* concerned a case where an employer terminated an employee without following the procedures in its employee manual. *Id.* at 2–3. *Dillon* did not consider an arbitration agreement. *See id.* Although, *Dillion* may support the argument that an unclear employee manual is enough to deny an employer summary judgment, the Court must still determine if the agreement in this case is unclear. If the Court determines the agreement is not confusing, it does not need to consider to consequences of a confusing agreement under *Dillion*. Whether a contract is ambiguous is a question of law for the Court to decide. *John A. Russell Corp. v. Bohlig*, 170 Vt. 12, 16 (1999). "To determine the meaning of a specific provision of a contract, we consider the whole instrument and construe it in harmony if possible." *Id.* at 17.

After reading the employee manuals, particularly the language quoted above, the Court concludes the arbitration agreement is not confusing. In and of itself, the "request" language may create the appearance that arbitration is optional; however, the Court reads the agreement as a whole to understand its meaning. *See id.* Within the same sentence that Seldon requests the employee submit any disputes to arbitration, it refers to arbitration as an exclusive remedy. At the end of the same paragraph, Seldon also emphasizes that arbitration is the employee's (and Seldon's) only recourse for an employment-related dispute. Moreover, the rest of the arbitration agreement indicates how the arbitration process will occur. Nothing in the agreement indicates the arbitration process is optional, and there is no language like "should you choose to arbitrate." Under these circumstance, "request" is a polite version of "require." Additionally, nothing in the rest of the manual suggests Seldon intended the arbitration agreement to be non-binding. The arbitration agreement is therefore not confusing and indicates all employment-related disputes must be submitted to an arbitrator.

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[1] In her August 19, 2013 response, Plaintiff appears to argue the employee manual is confusing in two ways. First she argues the Court should apply the doctrine of judicial estoppel, or some similar equitable doctrine, because of alleged inconsistencies in the manual. Second, she argues the word "requests" in the manual makes it confusing. The Court views these claims as part of the same argument and addresses them together.

Second, Plaintiff argues the employee manual is not binding because Seldon issued a revised handbook in 2012, which Plaintiff did not sign. Plaintiff does not cite any law indicating an updated employee manual invalidates an earlier agreement. Moreover, the updated employee manual is substantially similar to the 2006 version, especially in relation to the arbitration agreement. Plaintiff points to no meaningful difference in the manuals to explain why the Court should disregard the 2006 manual. Furthermore, both the 2006 and 2012 manuals indicate the employee automatically accepts the terms of the arbitration agreement by continuing employment with Seldon. The arbitration agreement is still enforceable.

Third, Plaintiff argues the arbitration agreement is unenforceable because there was no consideration for the agreement. To support her argument, Plaintiff cites a Missouri Court of Appeals case that held continued employment of an at-will employee is not sufficient consideration for an arbitration agreement. *See Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 23 (Mo. Ct. App. 2008). The Court has two problems with Plaintiff's argument. First, the Court does not find the reasoning of *Morrow* persuasive. Any benefit to the promisor is sufficient consideration. *See Bergeron v. Boyle*, 2003 VT 9, ¶ 19, 176 Vt. 78. Continued employment is a sufficient benefit to be consideration because the employer may terminate the relationship at any time. The First Circuit has also disagreed with the reasoning of *Morrow* because it applied too high of a burden for consideration. *See Soto v. State Indus. Prods., Inc.*, 642 F.3d 67, 74 n.6 (1st Cir. 2011). Second, there is consideration for an arbitration agreement where both parties bind themselves to arbitrate. *See Mead v. Owen*, 83 Vt. 132, 135 (1910). The Court reads the agreement to mean Seldon also binds itself to arbitration.[2] Accordingly, there is consideration from the mutual agreement to arbitrate.

Finally, Plaintiff argues the arbitration agreement is unenforceable because it is unconscionable. Plaintiff believes the agreement is unconscionable because she was given a choice between signing the agreement or resigning her position. Plaintiff cites two cases to support her argument about unconscionablility. First, Plaintiff cites *Doctor's Associates, Inc. v. Casarotto*. 517 U.S. 681, 687 (1996). Although *Doctor's Associates* indicates a court may invalidate an arbitration agreement for unconscionablility, it does not indicate Plaintiff's choice made the agreement unconscionable. Plaintiff also cites *Hooters of America, Inc. v. Phillips*, which held an arbitration agreement unconscionable. *See* 173 F.3d 933, 938–39 (4th Cir. 1999). The court found the arbitration agreement in *Hooters* unconscionable because it contained biased arbitration rules. *Id.* Plaintiff does not allege the arbitration agreement in this case contains similarly biased rules.

The arbitration agreement in this case agreement is not unconscionable. As discussed above, the Court finds nothing improper about requiring an at-will employee to choose terminating her employment and signing an arbitration agreement unless the agreement itself is unfair. To determine if an agreement is unconscionable, the Court will look to the terms of the agreement itself. Nothing in the agreement between Plaintiff and Seldon suggests that it is

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[2] Specifically, the Court considers this sentence: "Similarly, any disputes arising during your employment involving claims of unlawful discrimination or harassment under federal or state statutes shall be submitted exclusively to binding arbitration under the above provisions." The sentence indicates Seldon binds itself to submit any claims to arbitration.

unfair. The Court will enforce Vermont's policy of favoring arbitration where there is a binding contract.

The Court must grant Defendant's motion to compel arbitration. Plaintiff signed an enforceable agreement to arbitrate all employment-related disputes with Defendant. None of Plaintiff's arguments undercut the enforceability of the arbitration agreement. The Court does not reach Defendant's arguments relating to the dismissal of Plaintiff's claims because the arbitrator should consider the validity of Plaintiff's claims. Pursuant to the Federal Arbitration Act, the Court will stay this case pending the resolution of arbitration. *See* 9 U.S.C. § 3. The Court will dismiss the action after arbitration is complete.

Order

The Court *grants* Defendant's motion to compel arbitration. The Court *stays* any further proceedings in this case pending the completion of arbitration. The Court *denies* Defendant's partial motion to dismiss. Defendant is directed to notify this Court once arbitration has been completed.

Dated at Woodstock, Vermont on August 30, 2013

Harold E. Eaton, Jr.
Superior Court Judge

FILED

AUG 30 2013

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WINDSOR UNIT