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

MARGARET BUNCH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 00-0364-CV-W-3-ECF
	)	
RENT-A-CENTER, INC.,	)	
	)	
Defendant.	)	

ORDER GRANTING MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY PROCEEDINGS AND COMPEL ARBITRATION

Pending is Defendant's Motion to Dismiss, or In the Alternative, to Stay Proceedings and Compel Arbitration (Doc. #25). Defendant seeks to enforce an arbitration agreement included as part of Plaintiff's employment application. For the following reasons, Defendant's motion is granted and this case is hereby stayed pending the outcome of arbitration.

This case arises out of Plaintiff's employment relationship with Defendant. Plaintiff alleges she was discriminated against on the basis of her gender while working as a rental specialist for Defendant. On July 28, 1998, Plaintiff completed an application for employment with Thorn Americas, Inc. ("Thorn"). The employment application included an arbitration clause permitting either Plaintiff or Defendant to compel arbitration of employment disputes, claims or controversies. She was hired by Thorn on August 17, 1998. The same month, Thorn was purchased by Renter's Choice. After the consolidation, the surviving corporation was named Rent-A-Center (the current named Defendant). On December 23, 2000, Plaintiff was fired and she later filed a lawsuit alleging sexual discrimination, harassment and retaliation. Defendant has filed this motion, seeking to enforce the agreement to arbitrate contained in the employment application.

A. DISCUSSION

The Supreme Court has recently held that claims of employment discrimination in violation of Title VII of the Civil Rights Act are subject to arbitration under the Federal Arbitration Act ("FAA"). Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302, 1313 (2001); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 25 (1991). The FAA governs the enforcement of most employer-employee mandatory arbitration agreements and provides that a written arbitration agreement "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. Courts have observed that there is a liberal federal policy favoring arbitration agreements and that when arbitrating statutory claims, such as those pursuant to Title VII, a "party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." Gilmer, 200 U.S. at 25; see Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943, 946 (8th Cir. 2001)(stating that any doubts concerning the scope of arbitrable issues, including the construction of the contract language itself, should be resolved in favor of arbitration).

In order for the arbitration provisions to be enforced pursuant to the FAA, there must be a valid contractual agreement between the employer and employee showing the parties' intent to settle controversies through arbitration. State contract law governs whether an arbitration agreement is valid and enforceable. Lyster, 239 F.3d at 946.

I Enforceability Under Missouri Contract Law

Plaintiff has advanced several arguments contending that the arbitration agreement is not enforceable under Missouri contract law. First, Plaintiff argues that the parties did not enter into a valid agreement to arbitrate because 1) the clause does not constitute a separate and binding contract and 2) the arbitration clause was vague. The arbitration

clause appears on the second page of the employment application at the end of a section entitled "AGREEMENTS AND AUTHORIZATIONS FOR BACKGROUND CHECKS & DRIVER'S LICENSE CHECKS." The clause reads as follows:

> **ARBITRATION.** (A) *AGREEMENT TO ARBITRATE UPON REQUEST*. IN THE EVENT THE PARTIES HAVE A DISPUTE, CLAIM OR CONTROVERSY ARISING FROM OR RELATION TO THIS APPLICATION OR ANY ISSUE SURROUNDING SUBSEQUENT EMPLOYMENT AND EITHER PARTY ASSERTS A CLAIM OR COUNTERCLAIM AGAINST THE OTHER, THE PARTY AGAINST WHOM THE CLAIM OR COUNTERCLAIM IS ASSERTED HAS THE RIGHT TO REQUIRE THAT THE ENTIRE DISPUTE BETWEEN THE PARTIES, INCLUDING ANY DISPUTE OVER THE ENFORCEMENT AND APPLICABILITY OF THIS ARBITRATION CLAUSE AND THE VALIDITY OF THIS AGREEMENT, BE RESOLVED BY BINDING ARBITRATION BY AND UNDER THE CODE OF PROCEDURE OF THE NATIONAL ARBITRATION FORUM IN EFFECT AT THE TIME THE CLAIM OR COUNTERCLAIM IS FILED OR BY SUCH OTHER ARBITRATOR AS THE PARTIES MAY AGREE TO IN WRITING. THIS AGREEMENT TO ARBITRATE SHALL APPLY TO ALL DISPUTES ARISING UNDER CASE LAW, STATUTORY LAW AND ALL OTHER LAWS. JUDGEMENT UPON ANY AWARD MAY BE ENTERED IN ANY COURT HAVING JURISDICTION. (B) *NO RIGHT TO TRIAL BY COURT OR JURY*. **THE PARTIES UNDERSTAND AND AGREE THAT THEY HAVE WAIVED ANY RIGHT TO A TRIAL BEFORE A COURT OR JURY IF ARBITRATION IS REQUIRED.**
> **I HAVE READ AND UNDERSTAND THE ABOVE APPLICATION.**
> DATE_____ SIGNATURE_____

An arbitration contract requires the traditional contract elements of offer, acceptance, and consideration. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 833 (8th Cir. 1997). Relying on *Patterson,* Plaintiff argues the arbitration clause in her agreement is not separate and distinct from the rest of the employment application and thus the clause should not be enforced. In *Patterson*, the arbitration clause was featured as part of an employee handbook. Under Missouri law, employee handbooks are generally not considered contracts because an employer's unilateral act of publishing a handbook does not constitute a contractual offer to the employee. Johnson v. McDonnell Douglas, 745 S.W.2d. 661, 662 (Mo. 1985). However, the court in *Patterson* determined that the arbitration clause was still enforceable, partly because it was separate and distinct from the other provisions of the handbook.

In this case, the arbitration clause was included as part of the employment application - not an employee handbook. Plaintiff has provided no cases which hold that an employee application, like an employee handbook, does not constitute a contract or

that the arbitration clause must be separate and distinct from other provisions in the application. To the contrary, the application contains representations from the prospective employee to the employer specifically designed to induce the formation of an employment relationship, and thus is part of the contractual relationship between the employee and employer. Even though Plaintiff's employment was terminable at will and she was not what is traditionally termed a "contract" employee, an at-will employee and employer can still enter into a contractual agreements. Skinner v. Maritz, Inc., 2001 WL 641556, *17 (8th Cir. 2001)("[The at-will doctrine] cannot be taken to mean that at-will employees are bereft of any and all contractual rights, e.g., the right to treat the employer's failure to pay for work done by the employee prior to termination of the employment relationship as a breach of contract."). For example, employment applications typically include various agreements, not only related to arbitration but also for credit checks, background checks, etc. Furthermore, courts have enforced the use of arbitration clauses in employee applications. See Circuit City, 121 S. Ct. at 1306. While it may be necessary for an arbitration clause to be separate and distinct from an employee handbook, the same requirement does not necessarily extend to employment applications.

Nevertheless, even if it were necessary for the arbitration clause to be separate and distinct from the employment application, Plaintiff's arbitration agreement would still meet this requirement. First, the clause is featured in a separate paragraph and set off by the heading "ARBITRATION" which appears in bold and capital letters. Although Plaintiff has characterized the size of the print as "very small", it actually is either the same size or larger than other print on the application. The arbitration clause is also the only section of the application that includes underlined text.

In *Patterson*, the Eight Circuit listed additional factors that, if present, weigh in favor of enforcement arbitration clauses appearing in otherwise unenforceable employee handbooks, namely: (1) the existence of "a marked transition in language and tone from the paragraph preceding the arbitration clause to the arbitration clause itself," and (2) the "use of "contractual terms such as 'I understand,' 'I agree,' I 'agree to abide by and accept,' 'condition of employment,' 'final decision,' and 'ultimate resolution.'" Patterson, 113 F.3d at

835. In this case, the tone and language of the arbitration clause resemble that of a contractual arrangement. Also, the arbitration clause includes typical "contract" terms such as "agreement to arbitrate," and "the parties understand and agree." Finally, the arbitration clause was not buried in the application. To the contrary, the clause was at the very end of the application directly above the signature line.

Plaintiff also argues that the arbitration clause was vague and the language did not explicitly refer to any applicability of the provision upon termination of the employment relationship. The clause refers to arbitration of a "dispute, claim or controversy arising from or relating to the application or any issue surrounding subsequent employment." The phrase "any issue surrounding subsequent employment" includes Plaintiff's claim of discrimination during her term of employment. Many "issue[s] surrounding subsequent employment" may not arise until the time of termination, and a narrow reading of the arbitration clause to preclude enforcement of them after termination would potentially leave many claims outside of the ambit of arbitration. Such a narrow reading does not give full effect to the arbitration clause and is not consistent with the clause as a whole or the apparent intentions of the parties. The arbitration clause is sufficiently specific in describing its effect and is enforceable.

Finally, Plaintiff cites other language contained in the application and argues that it prevents enforcement of her agreement to arbitrate. Plaintiff relies on language appearing three paragraphs prior to the arbitration clause which reads: "I RECOGNIZE AND AGREE THAT THIS APPLICATION IS NOT AN OFFER OR A CONTRACT OF EMPLOYMENT BY THORN." Plaintiff argues that by virtue of this statement, Defendant has admitted that the employment application, and the arbitration clause included therein, does not constitute a contract under Missouri law. Plaintiff, however, fails to mention the language immediately following the statement which, when read in conjunction, clarifies the statement. The following sentence reads: "I FURTHER RECOGNIZE AND AGREE THAT IF I AM EMPLOYED BY THORN, IT MAY TERMINATE MY EMPLOYMENT WITH OR WITHOUT NOTICE AND/OR CAUSE AT ANY TIME, AND AT ITS WILL." When read in context, the statement "THIS APPLICATION IS NOT AN OFFER OR CONTRACT OF

EMPLOYMENT" seems to refer directly to the Plaintiff's at-will status, in other words, the conditions under which her employment can be terminated, and nothing more. If anything else, the statement may simply refer to the fact that the act of filling out and returning the application does not guarantee employment. Nonetheless, the language contains no terms which would defeat the later agreement to arbitrate. This statement, appearing three paragraphs before the arbitration clause, cannot logically be read to defeat the arbitration clause. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995) ("a document should be read to give effect to all its provisions and to render them consistent with each other").

The intention of the parties is paramount, and the Court will not order arbitration if it is in contravention of the parties' intentions. Nevertheless, there is no reason to find that the parties did not agree to arbitration of this case. Given that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," the Court holds that the arbitration clause included in Plaintiff's employment application is enforceable under Missouri contract law. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

II Rent-A-Center's Standing to Enforce Arbitration Agreement

Plaintiff also argues that Rent-a-Center, the successor to Thorn, does not have standing to enforce the arbitration agreement. In August, 1998, Renter's Choice purchased Thorn Americas and named the newly formed entity Rent-A-Center. Pursuant to the Agreement and Plan of Merger, all liabilities, obligations and all assets and property of both Thorn and Renters Choice were allocated and/or assumed by the surviving entity, Rent-A-Center. Defendant's Exhibit D: Agreement and Plan of Merger.

First, Plaintiff contends that Rent-A-Center was not a party to the arbitration agreement and thus it cannot force Plaintiff to arbitrate. Rent-A-Center is Thorn's successor in interest and, as it assumed all of Thorn's liabilities, obligations, assets and property, is in privity with the arbitration agreement. Under Missouri law, one who is a

party to a contract or in privity with it can enforce the contractual obligation. County Asphalt Paving Co. v. 1861 Group, LTD., 851 S.W.2d 577, 582 (Mo. Ct. App. 1993); Raytown Consol. Sch. Dist. Number 2 v. American Arbitration Ass'n, 907 S.W.2d 189 (Mo. Ct. App. 1995). Therefore, the fact that Rent-A-Center was not an original party to the agreement does not preclude it from compelling arbitration. Second, Plaintiff states that, because Rent-A-Center has abandoned all of the policy and procedures of the former Thorn entity, including use of an arbitration clause in employment applications, Plaintiff's arbitration clause is no longer enforceable. This argument is untenable. Simply because an entity has made the unilateral decision that it no longer desires to continue to administer a particular policy does not strip it of the contractual right to enforce a valid contract related to the policy.

C. CONCLUSION

Based on the above discussion, the Court concludes that Plaintiff's claims of sexual harassment, sexual discrimination and retaliation are arbitrable. Defendant's motion to compel arbitration is granted. This case is hereby stayed pending the outcome of arbitration.

IT IS SO ORDERED.

Date: July 18, 2001

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT