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

CHRIS J. DONALD,

Plaintiff,

vs. 03 CV 2552

NORTHWEST AIRLINES, INC.,

Defendant.

REPORT AND RECOMMENDATION

Before the Court is defendant Northwest Airlines, Inc.'s ("Northwest") Motion to Stay Proceedings and to Compel Arbitration, filed February 18, 2004 (docket entry 22).[1] On March 8, 2004, plaintiff Chris Donald filed his response in opposition to the motion. Northwest filed a reply memorandum on March 17, 2004. The motion was referred to the United States Magistrate Judge for report and recommendation.

On March 22, 2004, Donald submitted his Supplemental Response in Opposition to Defendant's Motions to Stay Proceedings and to Compel Discovery. On March 26, 2004, the Court held a hearing on

[1]On February 18, Northwest also filed a Motion to Stay the Rule 16(b) Scheduling Conference and Discovery (docket entry 21). By separate order entered today, and for reasons stated in this Report and Recommendation, that motion to stay is granted.

46

the motion. Counsel for all parties were present. At the hearing, the Court heard argument from counsel and admitted as an exhibit the Agreement Between Northwest Airlines, Inc. and International Association of Machinists and Aerospace Workers (Exhibit 1). Because Northwest did not have an opportunity prior to the hearing to file a written response to Donald's March 22 supplemental response, the Court permitted Northwest to file its own supplemental response after the hearing, which it did on April 2, 2004. Subsequently, Donald submitted a letter to the Court on April 19, 2004, citing additional case law in support of his opposition to Northwest's motion.[2] In response, and with leave of Court, Northwest filed its Final Reply on April 30, 2004. Finally, on June 9, 2004, at the request of Northwest, the Court held a telephone conference call with counsel of record, at which time Northwest asked to supplement footnote 1 of its April 30 final reply with a citation to Carr v. Northwest Airlines, Inc., No. 03-2479, 2004 WL 1666443 (W.D. Tenn. May 24, 2004).

For the reasons below, it is recommended that Northwest's motion to stay and compel arbitration be GRANTED.

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[2]Donald cited Dale Supply Co. v. York Int'l Corp., 2003 WL 22309461 (Tenn. Ct. App. 2003), in support of his argument that the doctrine of federal preemption would be violated if he was exempt from mandatory arbitration under Section 1 of the Federal Arbitration Act, but was then required to arbitrate those exact same claims under the Tennessee Uniform Arbitration Act.

I. PROPOSED FINDINGS OF FACT

A. Background Facts

Donald was hired by Northwest on February 14, 1994, and was employed as an Equipment Services Employee ("ESE") until he was terminated on March 13, 2002. As an ESE, Donald was responsible for ground services, and his duties included loading and towing aircrafts. When Donald was initially hired, he executed a document titled Conditions of Employment: Contract Employees ("Conditions of Employment"). Contract employees work in positions that are governed by a collective bargaining agreement between Northwest and one of its unions.[3] Donald, a ground services employee, was considered a "contract employee." The Conditions of Employment included a paragraph - typed in all capital letters and appearing immediately above the signature line - that required Donald to arbitrate any claims or disputes that might arise with respect to his employment with Northwest. Specifically, the paragraph stated as follows:

> 10. I understand and agree that any claims or disputes I may have with respect to my employment with the

[3]The parties dispute whether there was a collective bargaining agreement in effect at the time Donald first became employed with Northwest. Paragraph 5 of the Conditions of Employment refers to an existing agreement between Northwest and Donald's union, International Association of Machinists & Aerospace Workers. However, the only collective bargaining agreement provided to the Court was Exhibit 1, which was executed on February 25, 1999, and is identified on the front cover as the "First Edition." The Court, however, need not resolve this factual dispute for purposes of ruling on the motion.

> company, including pay, benefits, work rules, discipline, or termination, except for worker's compensation claims, shall be subject to arbitration between the company and myself. The arbitration shall be conducted in accordance with the Rules of the American Arbitration Association and shall be final and binding on both parties. The expenses of the neutral arbitrator and any court reporter shall be paid by the company. This provision shall be construed as broadly as possible and any claims which I may have against the company arising from the employment relationship, including discrimination claims under Title VII, the Age Discrimination in Employment Act, Americans with Disabilities Act, or any other state or federal law prohibiting discrimination, shall be conclusively decided by binding arbitration. I understand binding arbitration is an express condition precedent to my employment with Northwest and that if I do not wish this provision to bind me as an employee of Northwest, I must immediately notify the Human Resources Department at Northwest prior to execution of this agreement or processing of my employment with the company. To signify that I have read, understand and agree to this paragraph, I have initialed this paragraph in the blank at the end of this sentence.

(See Tab 1 to Def.'s Mem. in Support of Motion to Stay and Compel Arbitration). Donald's agreement to arbitrate all employment-related claims was an express condition precedent to his employment with Northwest. (See Decl. of Parsons, Tab 1 to Def.'s Mem. in Support of Motion to Stay and Compel Arbitration). Donald initialed paragraph 10, as required, and signed the Conditions of Employment.

On February 25, 1999, Northwest entered into a collective bargaining agreement ("CBA") with Donald's union, the Internal Association of Machinists & Aerospace Workers ("IAM CBA"). The effective date of the IAM CBA was October 3, 1996, and it covered the period from October 3, 1996 through February 24, 2003. At all

relevant times, Donald was a member in good standing of the IAM.

Donald worked for Northwest until March 13, 2002, when his employment was terminated. On that same date, Donald filed a grievance under the IAM CBA. Donald also filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 15, 2002. His grievance was denied at steps one and two of the grievance procedures, and Donald's union representative declined to take the final step of arbitration of his claims before the System Board of Adjustment, pursuant to the IAM CBA. The EEOC mailed Donald a Notice of Right to Sue on April 29, 2003, which was received by Donald on or about May 1, 2003.

B. The Litigation

On July 29, 2003, Plaintiff filed his pro se complaint in federal district court, alleging a Title VII race discrimination claim against Northwest. On August 27, 2003, Northwest filed its answer, and in paragraph 39, asserted that Donald's action is barred because of the arbitration agreement. On that same date, Northwest filed a Motion for Judgment on the Pleadings, pursuant to Fed. R. Civ. P. 12(c). Northwest argued in its motion that a Title VII plaintiff must file a civil suit within 90 days of receiving the Right to Sue letter from the EEOC. Because Donald, according to the complaint he filed, claimed that he received his Right to Sue letter on April 29, 2003, his complaint, which was filed with the Court 91 days later, was time barred under 42 U.S.C. § 2000e -

5(f)(1).

Sometime in or before January 2004, Donald hired an attorney, who filed a response to Northwest's Rule 12(c) motion. Donald explained that the April 29, 2003 date in the pro se complaint was an error, and that he in fact filed his complaint within 90 days. Donald also filed a motion to amend the complaint to correct this error in the date. On January 7, 2004, the parties appeared in court for a scheduling conference pursuant to Fed. R. Civ. P. 16(b). At that time, Northwest made an oral motion to stay the scheduling conference and all discovery, asserting that Donald is required to resolve his discrimination claim through binding arbitration as required under the Conditions of Employment. Northwest also objected to Donald's motion to amend the complaint only to the extent that it believed that the Court should require Donald, as a condition for granting the motion to amend, to reimburse Northwest for its attorney's fees for filing the Rule 12(c) motion.

On January 28, 2004, the Court granted Donald's motion for leave to amend the complaint and denied Northwest's motion for reimbursement of attorney's fees. On January 30, 2004, based on the amendment to the complaint, the Court denied Northwest's motion for judgment on the pleadings.

II. PROPOSED CONCLUSIONS OF LAW

A. The Federal Arbitration Act

The Federal Arbitration Act ("FAA") provides that written agreements to arbitrate "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. The FAA was enacted with the purpose "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

When a party files a motion to compel arbitration, the court "must follow the procedure set forth in section 4 of the FAA." Highland Wellmont Health Network, Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 573 (6th Cir. 2003). Section 4 of the FAA provides as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed . . . . [U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration. . . .

9 U.S.C. § 4; see also Great Earth Cos. v. Simons, 288 F.3d 878, 889 (6th Cir. 2002). As this Court recently stated in Terry v. Labor Ready, Inc., No. 02-1035, 2002 WL 1477213 (W.D. Tenn. July 2, 2002) (unpublished):

> Under the Federal Arbitration Act, a district court must stay proceedings if satisfied that the parties have agreed in writing to arbitrate the issue(s) presented in the lawsuit. The district court has no discretion to refuse to compel arbitration if the court finds that the parties have so agreed. Any limitation of an arbitration provision must be read narrowly in order to effectuate the strong national policy of favoring enforcement of agreements to arbitrate, and any doubts must be resolved in favor of arbitration. Arbitration should be ordered unless it can be said that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Id. at *1 (internal citations omitted); see also Fazio v. Lehman Bros., Inc., 340 F.3d 386, 392 (6th Cir. 2003). Donald, as the party opposing arbitration, carries the burden of proving that the claims at issue are unsuitable for arbitration. See Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91 (2000); Terry, 2002 WL 1477213, at *1, *3 (citing Gilmer, 500 U.S. 20).

B. The Sixth Circuit Test

In Stout v. J.D. Byrider, 228 F.3d 709 (6th Cir. 2000), cert. denied, 531 U.S. 1148 (2001), the Sixth Circuit set forth a four-step test to determine whether a case must be submitted to arbitration:

> When considering a motion to stay proceedings and compel arbitration under the Act, a court has four tasks: first, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration.

Id. at 714.

The Court submits that, applying the four-step test to the facts of this case, Donald's discrimination claim must be submitted to arbitration. First, the parties agreed to arbitrate Donald's Title VII discrimination claim. When Donald began his employment with Northwest in 1994, he entered into a written agreement with Northwest (the Conditions of Employment) in which he agreed to arbitrate any employment-related claims he might have against Northwest, including any Title VII discrimination claims. The arbitration provision was typed in all capital letters and appeared immediately above Donald's signature. Moreover, Donald initialed the arbitration provision as required, which further demonstrates his agreement to arbitrate his discrimination claims.

Second, the scope of the arbitration agreement includes Donald's Title VII claim. Paragraph 10 of the Conditions of Employment expressly covers "any claims or disputes [Donald] may have with respect to [his] employment with [Northwest], including . . . any claims which [Donald] may have against the company arising from the employment relationship, including discrimination claims under Title VII . . ."

Third, it is well-settled that Congress intended federal statutory employment discrimination claims to be matters suitable for arbitration. See Gilmer, 500 U.S. at 26-33. The Sixth Circuit has recognized that agreements to arbitrate statutory employment

discrimination claims are enforceable:

> The Supreme Court has held that agreements to arbitrate employment disputes as a condition of employment are generally enforceable under the Federal Arbitration Act. This court has consistently upheld the validity of pre-dispute mandatory arbitration agreements. It is well settled that judicial protection of pre-dispute arbitral agreements extends to agreements to arbitrate statutory employment discrimination claims.

McMullen v. Meijer, Inc., 355 F.3d 485, 489 (6th Cir. 2004) (internal citations omitted); see also Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991).

Fourth, Donald's allegation of unlawful discrimination under Title VII is expressly covered by the Condition of Employment's broad arbitration provision, and thus the entire claim is subject to arbitration. See Terry, 2002 WL 1477213, at *1 ("When a contract contains a broad arbitration clause covering all controversies arising under the agreement, arbitration must be ordered unless the party seeking to avoid it can show that the particular dispute was expressly excluded.") (citing Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co., 706 F.2d 155, 160 (6th Cir. 1983)). Thus, under the Stout test, Donald's discrimination claim must be submitted to arbitration.

C. Donald's Objections to Arbitration

Donald has raised several arguments in opposition to arbitration. The Court will address each of these arguments below.

1. Waiver of Arbitration Agreement

Donald argues that Northwest waived the arbitration agreement

by actively participating in this litigation, by delaying enforcement of that provision, and by filing its Rule 12(c) motion.

"Among factors examined by the courts in determining whether there has been a waiver of the right to arbitrate are: (1) whether the party's actions are inconsistent with the right to arbitrate; (2) the degree of pretrial litigation; (3) the length of delay in invoking an arbitration right and seeking a stay; (4) the proximity to the trial date; (5) whether a defendant seeking arbitration filed a counterclaim without asking for a stay; and (6) the resulting prejudice to the opposing party." Southern Sys., Inc. v. Torrid Oven Ltd., 105 F.Supp.2d 848, 854 (W.D. Tenn. 2000).

Applying these six factors to the present case, the Court submits that Northwest did not waive its right to compel arbitration. First, Northwest has not acted inconsistently with the right to arbitrate. It raised the issue of arbitration in its answer to Donald's complaint, and again in its first appearance before the Court. Although Northwest filed a Rule 12(c) motion, that two-page motion was filed the same day that Northwest filed its answer, and the motion was based only on the untimeliness of the complaint on its face. While the filing of a dispositive motion by the party seeking to compel arbitration is a factor the Court can and does consider in its waiver analysis, see Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991), under the circumstances of this case, the Court submits that Northwest's filing of the Rule

12(c) motion (along with the other factors discussed below) does not amount to a waiver of the arbitration agreement.

Second, the degree of pretrial litigation has been minimal. Northwest has only filed an answer, a Rule 12(c) motion, and its briefs on the present motion to compel arbitration. The parties have not engaged in any pretrial discovery, and Northwest has asked the Court to stay all discovery. Third, there was little delay in invoking its arbitration right, as Northwest raised the issue of arbitration in its answer and at its first appearance before the Court. Fourth, no trial date has been set in this case. Fifth, Northwest did not file a counterclaim against Donald. Finally, Donald has not demonstrated to the Court that he has been prejudiced to such an extent as to warrant a finding of waiver.

Other courts have found no waiver of arbitration under similar circumstances. See, e.g., Germany v. River Terminal Ry. Co., 477 F.2d 546, 547 (6th Cir. 1973)("[W]aiver may not be inferred from the fact that a party does not rely exclusively on the arbitration provisions of a contract, but attempts to meet all issues raised in litigation between it and another party to the agreement."); Systran Fin. Servs. Corp. v. Giant Cement Holding, Inc., 252 F. Supp. 2d 500, 508 (N.D. Ohio 2003)(holding that a party did not waive its right to compel arbitration because no discovery or extensive litigation had occurred even after the defendant filed an

answer, cross-claim, and a motion to dismiss another cross-claim).[4]

2. IAM CBA Superseded the Conditions of Employment

Donald claims that the Conditions of Employment was superseded by the IAM CBA. Specifically, Donald argues that Article 3 of the IAM CBA expressly states that the IAM CBA supersedes any and all agreements existing or previously executed between Northwest and any individual. He asserts that because his Conditions of Employment and the IAM CBA both cover employment disputes involving pay, benefits, work rules, discipline, and termination, he believes that the IAM CBA directly conflicts with the terms of the prior Conditions of Employment, and thus, supersedes that prior agreement.

Article 3 of the IAM CBA states as follows:

> It is expressly understood and agreed this Agreement supersedes any and all agreements now existing or previously executed between the Company and any union or individual affecting the craft and class of employees covered by this Agreement . . . .

(See Ex. 1 at 3.1). This Court agrees that the IAM CBA superseded the Conditions of Employment to the extent that the Conditions of

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[4]The cases cited by Donald are distinguishable on the facts to the case at hand. See Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat, 289 F.3d 434, 438 (6th Cir. 2002)(holding that a party waived its right to arbitration when the party raised the claim seventeen months after the lawsuit was filed and after the district court had entered a default judgment against it); Kramer, 943 F.2d at 179 (holding that a defendant waived his right to arbitration by engaging in four years of pretrial litigation that included failing to raise the arbitration clause in his answer, serving a notice to depose the plaintiff, and filing a motion for summary judgment).

Employment conflicts with the IAM CBA. See Espinal v. Northwest Airlines, 90 F.3d 1452, 1458-59 (9th Cir. 1996) ("Thus, even assuming Espinal had an enforceable hiring contract with Northwest, the CBA superceded that agreement to the extent that the contracts differed")(citing J.I. Case Co. v. NLRB, 321 U.S. 332, 337-39 (1944)). Thus, when the IAM CBA went into effect in 1996, that CBA governed Donald's terms and conditions of employment to the extent the IAM CBA conflicted with the Conditions of Employment. The Court submits, however, that Donald's agreement to arbitrate his statutory rights contained in the Conditions of Employment was not superseded by the IAM CMA. The IAM CMA does not conflict with that agreement to arbitrate. The Court, in reviewing the IAM CBA, could find nothing either in Articles 13 and 14 (the grievance procedures) or anywhere else that conflicts with Donald's agreement to arbitrate his statutory rights.

In any event, Donald's union *could not* have prospectively bargained with Northwest over the forum in which Donald had previously chosen to resolve violations of his statutory rights. In so concluding, this Court relies on Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Penny v. United Parcel Service, 128 F.3d 408 (6th Cir. 1997); and Air Line Pilots Ass'n v. Northwest Airlines, Inc., 199 F.3d 477 (D.C. Cir. 1999), adopted en banc, 211 F.3d 1312 (D.C. Cir. 2000), cert. denied, 531 U.S. 1011 (2000). In Gardner-

Denver, the Supreme Court held that a prior arbitral decision does not divest federal courts of jurisdiction over actions brought by employees under Title VII. Gardner-Denver, 415 U.S. at 47. An employee, the Court stated, can "pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII." Id. at 59-60. In Gilmer, the Court held that claims under federal civil rights statutes may be the subject of an arbitration agreement, enforceable pursuant to the FAA, and thus, plaintiff's voluntary agreement to arbitrate entered into at the time of his employment was binding on him. Gilmer, 500 U.S. at 35.

In Air Line Pilots, defendant Northwest required newly hired pilot trainees to sign individual employment contracts called "Conditions of Employment," which included a clause under which each trainee agreed to binding arbitration of any discrimination claim the trainee might have against Northwest. Air Line Pilots, 199 F.3d at 479. The airline pilots' union, ALPA, filed suit claiming that Northwest violated the Railway Labor Act by requiring trainees to agree to binding arbitration without first having bargained with ALPA over them. Id. The district court granted summary judgment for ALPA, and Northwest appealed, arguing that it was free to bargain individually with its employees over the arbitration clause because the arbitration of individual statutory claims is not a mandatory subject of collective bargaining. Id.

The Court of Appeals agreed with Northwest, and reversed:

> We see a clear rule of law emerging from Gardner-Denver and Gilmer: Unless the Congress has precluded his doing so, an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him. All of the circuits to have considered the meaning of Gardner-Denver after Gilmer, other than the Fourth, are in accord with this view. . . .
>
> Thus, even after Gilmer, Gardner-Denver stands as a firewall between individual statutory rights the Congress intended can be bargained away by the union, and those that remain exclusively within the individual's control. . . .
>
> In any event, as we read Gardner-Denver and Gilmer, ALPA can have no role in negotiating obligatory procedural rules for arbitration of individual statutory claims. Read together, those cases establish that only the individual can determine in what forum he will vindicate his statutory rights, and this choice should not be burdened by the majoritarian concerns that motivate a union. . . .
>
> We conclude that the Arbitration Clause is not a mandatory subject of bargaining under the RLA. Therefore, Northwest is not required by [the RLA] to negotiate with ALPA over it. Instead, Northwest may, as it did, propose the Arbitration Clause directly to each individual employee.

Id. at 484-86 (citations omitted); see also Penny v. United Parcel Services, 128 F.3d 408, 411-14 (6th Cir. 1997) ("[A]lthough Gilmer permits an individual to waive his prerogative to pursue a statutory right in a judicial forum, that case does not alter Gardner-Denver's holding that a labor union cannot make such a waiver prospectively on an individual's behalf."). Gardner-Denver, Gilmer, Air Line Pilots, and Penny together demonstrate that a union member has the ability to enter into an agreement with his or

her employer to arbitrate violations of statutory rights, and that individual arbitration agreement cannot be bargained away by a union. In this case, the IAM CBA does not - and indeed, cannot - supersede Donald's agreement to arbitrate his statutory rights.

3. Exclusion Under Section 1 of the FAA

Donald contends that the arbitration agreement was "void *ab initio*" because airline transportation employees are exempt from mandatory arbitration pursuant to Section 1 of the FAA. Section 1 states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Donald argues that, as an ESE worker with Northwest, he is excluded from the FAA.

The parties have not cited - and the Court through independent research could not find - any case law directly addressing whether ground services employees for an airline are exempt under Section 1.[5] The Court need not decide this issue, however, because even assuming, *arguendo*, that Donald falls within the category of "other class or workers engaged in foreign or interstate commerce," the exemption is inapplicable because the IAM CBA, and not the

[5]The cases cited by Donald all involve airline pilots, not airline ground services workers such as Donald. See, e.g., Lepera v. ITT Corp., 1997 WL 535165, at *7 (E.D. Pa. Aug. 12, 1997) (unpublished); Trans World Airlines, Inc. v. Sinicropi, 887 F.Supp. 595, 609 N.13 (S.D.N.Y. 1995); Herring v. Delta Airlines, Inc., 894 F.2d 1020, 1023 (9th Cir. 1990).

Conditions of Employment, is the "contract of employment." See Bacashihua v. United States Postal Serv., 859 F.2d 402, 404 (6th Cir. 1988). To the extent that the Conditions of Employment could have been a contract of employment, it was later superseded (as discussed above) by the IAM CBA in 1996. See Espinal, 90 F.3d at 1458-59. Thus, the arbitration agreement contained in the Conditions of Employment is an independent agreement to arbitrate that exists outside of the IAM CBA, and Northwest is seeking to compel arbitration under the Conditions of Employment, not the IAM CBA. See Gilmer, 500 U.S. at 25 n.2 (stating that Section 1's exclusionary clause does not apply to arbitration clauses contained in securities registration application with New York Stock Exchange); Broadribb v. Globe Airport Sec. Servs., Inc., No. Civ. 031187, 2003 WL 22136071, at *3 (D. Minn. Sept. 15, 2003) (unpublished) (pre-dispute resolution agreements signed by plaintiffs were not contracts of employment).[6] For these reasons, it is submitted that Section 1's exclusion does not apply in this

[6]Northwest also argues, in the alternative, that even if Donald is excluded under Section 1 of the FAA, he is nevertheless required to arbitrate his claims pursuant to the Tennessee Uniform Arbitration Act, Tenn. Code Ann. § 29-5-301 et seq. Because the Court concludes that Donald is not excluded under Section 1, this issue does not need to be decided by the Court. However, the Court does note that the Third Circuit, in Palcko v. Airborne Express, Inc., 372 F.3d 588 (3d Cir. 2004), has recently held that a plaintiff who is excluded under Section 1 of the FAA may be required to arbitrate those same claims under the state arbitration act, and that plaintiff's exemption status under Section 1 does not preempt the enforcement of the arbitration agreement under state law. Id. at 595-96.

case.

4. Traditional Grounds for Revocation

Finally, Donald claims that the arbitration agreement was void as lacking in consideration, illusory, and an improper contract of adhesion. "An agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, 'save upon such grounds as exist at law or in equity for the revocation of any contract.' Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987)(quoting 9 U.S.C. § 2). Additionally, "the party opposing arbitration bears the burden of proving that the arbitration agreement should not be enforced." Johnson v. Long John Silver's Restaurants, Inc., 320 F.Supp.2d 656, 667 (M.D. Tenn. 2004).

The Court of Appeals for the Sixth Circuit considered a very similar arbitration agreement in Cooper v. MRM Inv. Co., 367 F.3d 493 (6th Cir. 2004). In Cooper, the Court stated that a contract of adhesion under Tennessee law could be found with the presence of two elements: (1) it must be offered on a take-it-or-leave-it basis, and (2) evidence that the employee would be unable to find suitable employment if he or she refused to sign the agreement.[7]

[7]It appears that neither party disputes that Donald's arguments relating to the revocation of the arbitration provision is governed by the law of Tennessee. The parties agree that the

Id. at 499-502. In this case, although it is undisputed that the Conditions of Employment (and specifically the arbitration clause) was on a take-it-or-leave it basis, Donald failed to provide any evidence demonstrating that he could not have found other suitable employment by refusing to sign the agreement. Therefore, he has not met his burden of proving it was a contract of adhesion. See Terry, 2002 WL 1477213, at *2.

The Cooper Court also reversed the district court's decision that there was an insufficient "modicum of bilaterality." Id. at 505. The appellate court found that even though the plaintiff may have had far less bargaining power, the provision had sufficient consideration to be enforceable. Id.; accord Wilks v. Pep Boys, 241 F.Supp.2d 860, 863 (M.D. Tenn. 2003) Similarly, the provision at issue here required both Donald and Northwest to submit any complaints to an arbitrator, and it was not inconspicuous. Therefore, it cannot be said that the provision lacked consideration.

Finally, a promise can be rendered illusory "when a promisor retains the right to decide whether or not to perform the promised act." Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 315 (6th Cir. 2000). Where "parties are bound to arbitrate claims

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Conditions of Employment was executed in Tennessee, and Donald worked at the Memphis location for nearly all of his employment. See Ohio Cas. Ins. Co. v. Travelers Indem. Co., 493 S.W.2d 465, 467 (Tenn. 1973).

arising in their relationship, and the Agreement . . . cannot be revoked or modified without a writing signed by both parties," the promise is not illusory. Wilks, 241 F.Supp.2d at 863. It is submitted that the arbitration provision in Donald's contract cannot be said to be illusory because both parties were bound to arbitrate their claims and neither party could unilaterally change the terms of the agreement.

The case cited by Donald, Walker v. Ryan's Family Steak Houses, Inc., 289 F.Supp.2d 916 (M.D. Tenn. 2003), is distinguishable. Walker involved an agreement signed by an individual applying for a job at Ryan's Family Steak House ("Ryan's"). See id. at 919. The agreement required the individual to file any disputes it had with Ryan's to a third-party arbitration company, who was paid annually by Ryan's to arbitrate claims by and against its employees. Id. The court was primarily troubled by the potentially close relationship between Ryan's and the arbitration company. Id. at 924-28. Specifically, the court found that the financial relationship between the two parties could create a bias in favor of Ryan's in employer-employee disputes. Id. at 924. In dicta, the court also stated that the agreement lacked consideration because it was illusory, id. at 929; it was illusory because the arbitration corporation could unilaterally change the rules of arbitration without the consent of the employees, id. at 930-31; and it was an adhesion contract because

of the "one-sided terms, together with the manifest inequality of the parties' bargaining positions." Id. at 934. In the case before the Court, however, these factors are not present.

Because Donald has failed to show that the "traditional grounds for revocation of a contract exist," see Terry, 2002 WL 1477213, at *2, it is submitted that the arbitration provision is valid and must be enforced.

III. RECOMMENDATION

For the reasons above, it is recommended that Northwest's Motion to Compel Arbitration be GRANTED. It is further recommended that all proceedings be STAYED.[8]

Respectfully submitted this 8th day of September 2004.

TU M. PHAM
United States Magistrate Judge

9/8/04
Date

[8]Northwest requests on page 11 of its Memorandum In Support of Motions to Stay Proceedings and To Compel Arbitration that the case be dismissed. The Court submits that a stay of the litigation, rather than dismissal, is appropriate under the FAA and the case authority in this circuit. See 9 U.S.C. § 3 (court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."); Fazio v. Lehman Bros., Inc., 340 F.3d 386, 392 (6th Cir. 2003) ("If a court determines that the cause of action is covered by an arbitration clause, it must stay the proceedings until arbitration process is complete."); Highland Wellmont Health Network, Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 573 (6th Cir. 2003) (same).

NOTICE

IF EITHER OR BOTH PARTIES HAVE ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT AND RECOMMENDATION, THE PARTIES MUST FILE THEIR OBJECTIONS WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT AND RECOMMENDATION. 28 U.S.C. §636(b)(1)(C). FAILURE TO FILE OBJECTIONS WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.

UNITED STATES DISTRICT COURT - WESTERN DISTRICT OF TENNESSEE

Notice of Distribution

This notice confirms a copy of the document docketed as number 46 in case 2:03-CV-02552 was distributed by fax, mail, or direct printing on September 9, 2004 to the parties listed.

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