IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WEN-CHOUH LIN, Plaintiff,	)	
v.	)	1:09CV882
RICHARD BRODHEAD, DEBORAH JAKUBS, and DUKE UNIVERSITY, Defendants.	)	

MEMORANDUM OPINION, ORDER, AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The instant matter comes before the undersigned United States Magistrate Judge on Defendants' Motion to Stay Proceedings Pending Arbitration or, in the Alternative, to Dismiss the Complaint for Lack of Subject Matter Jurisdiction and Improper Venue (Docket Entry 8), and Plaintiff's Motions to Amend (Docket Entries 16, 23). (See Docket Entries dated Feb. 18, 2010, June 23, 2010, and Dec. 1, 2011; see also Docket Entry dated Jan. 23, 2010 (assigning case to undersigned Magistrate Judge).) For the reasons that follow, Defendants' Motion to Stay or Dismiss should be denied in part and Plaintiff's Motions to Amend will be deferred.

I. Background

According to the Complaint, Defendant Duke University ("the University") hired Plaintiff, an Asian male over the age of 40, in 1968. (Docket Entry 1, ¶¶ 9, 11, 12, 14.) The Complaint further asserts that "[b]etween 1984 and 1989 the Plaintiff filed

is therein contained.'" Martin, 133 N.C. App. at 121-22, 514 S.E.2d at 310 (quoting Gas House Inc. v. Southern Bell Tel. Co., 289 N.C. 175, 180, 221 S.E.2d 499, 503 (1976)). Furthermore, "the Court of Appeals of North Carolina has held . . . that continuing employment after learning of the existence of a [dispute resolution procedure] constitutes an employee's agreement to be bound by an arbitration agreement." Hightower v. GMRI, Inc., 272 F.3d 239, 242 (4th Cir. 2001) (citing Howard v. Oakwood Homes Corp., 134 N.C. App. 116, 120-21, 516 S.E.2d 879, 882-83 (1999)).[2] Plaintiff in this case continued his employment for at least two and a half years after signing the Acknowledgement. If Plaintiff received the version of the disclaimer language Defendants allege the University provided him, he agreed to arbitrate the instant claim.

Defendants argue that, regardless of which Disclaimer Plaintiff received, neither the Disclaimer nor the Handbook "purport[ed] to negate the plain language of the *Dispute Resolution Policy*, which Plaintiff admits that he received and admits acknowledging in writing he received. . . . On their face, the

[2] In Howard, the terms of the dispute resolution program "unambiguously bound [the plaintiff] to the agreement should she continue employment" through a specified date. Howard, 134 N.C. App. at 120, 516 S.E.2d at 882. The materials provided to the plaintiff reflected that the dispute resolution program represented the exclusive means of resolving disputes concerning termination, although the plaintiff did not sign any acknowledgement or agreement. Id. at 117. Those facts differ from this case in that the Parties dispute what disclaimer language regarding the dispute resolution processes Plaintiff received.

[University's] policies and procedures themselves are binding on employees, not the summary provisions of the Handbook." (Docket Entry 13 at 4.) However, nothing in the Acknowledgement indicates that Plaintiff received notice of the actual Dispute Resolution Policy; rather it indicates Plaintiff reviewed the procedures outlined in the Handbook. (See Docket Entry 9-7 at 2.) Standing alone, the University's "unilaterally promulgated employment manuals or policies" do not constitute part of Plaintiff's employment contract "unless expressly included in it." Walker, 77 N.C. App. at 259-60, 335 S.E.2d at 83-84. Whether the University's dispute resolution policy became a part of Plaintiff's contract thus depends on which version of the Disclaimer appeared in the Handbook he received.

As a final matter, Plaintiff argues that, whether or not an agreement to arbitrate existed, the dispute resolution procedures were denied to him. (See Docket Entry 11 at 3-6.) Plaintiff's allegations, however, do not support that conclusion. In this regard, Plaintiff admits that the letter informing him of the elimination of his position also stated that he had recourse to the "rights of Staff Affected by Reduction in Force." (Id. at 4; see also Docket Entry 12-5 at 2.) These rights included "'[t]he right to question, through the Duke Dispute Resolution Process, the specific provisions of the reduction-in-force process and how they were applied to the staff member.'" (Docket Entry 11 at 4 (quoting

Docket Entry 12-6 at 2).) Plaintiff asserts that he then received a follow-up letter stating that in fact "'the documentation on Continuing Appointment overrides the University Policy on Reductions in Force.'" (Docket Entry 11 at 4 (quoting Docket Entry 12-7 at 2).) Pursuant to the Continuing Appointment policy, Plaintiff allegedly believed the University would attempt to reassign him to a new position. (Id.; see also Docket Entry 12-7 at 2 (explaining Continuing Employment procedures and stating University would "work with [Plaintiff] to reassign [him] to another position should a position for which [he was] qualified become available").)

According to Plaintiff, he thus "was lead [sic] to believe that under the University policy on Continuing Appointment, his rights including the right to a resource through DRP (provided under Defendants' Rights of Staff Affected by a Reductions-in-Force policy) was [sic] not available and was [sic] superseded by Continuing Appointment policy." (Docket Entry 11 at 5; see also Docket Entry 12-7 at 2-3 ("The documentation on Continuing Appointment does not contain other provisions for additional benefits for staff affected by an elimination of their position.").) Although the letter in question indicates that "the process outlined in the documentation on Continuing Appointment overrides the University Policy on Reductions in Force" (Docket Entry 12-7 at 2), it does not specifically refer to or revoke the

dispute resolution process (see id. at 2-3). Furthermore, nothing in the documentation on Continuing Appointment forecloses resort to the dispute resolution process. (See Docket Entry 12-8.) These circumstances do not support an inference that Plaintiff suffered a denial of access to the University's dispute resolution procedure.

In sum, a material question of fact exists concerning whether the Parties actually reached an agreement to arbitrate. As a result, that issue requires resolution by trial. See 9 U.S.C. § 4; Minter, 2004 WL 735047, at *2. "If no jury trial be demanded by the party [opposing arbitration] . . . the court shall hear and determine such issue." 9 U.S.C. § 4. Plaintiff did not timely demand trial by jury of this issue pursuant to either 9 U.S.C. § 4 or Federal Rule of Civil Procedure 38. (See Docket Entries 11, 14.) Accordingly, trial of this issue should proceed before the Court. See Starr Elec. Co., Inc. v. Basic Const. Co., 586 F. Supp. 964, 967 (M.D.N.C. 1982) (Gordon, C.J.).

B. Motions to Amend

Plaintiff filed a Motion to Amend (Docket Entry 16) whereby he requests leave to add a Title VII unequal pay claim to his Complaint (id. at 1-3). He then filed a second Motion for Leave to Amend (Docket Entry 23) in which he seeks to add a paragraph noting that the EEOC issued a right to sue letter on August 23, 2011 (id. at 1).

Should the Court determine that an agreement to arbitrate exists between the Parties, the Court would lack jurisdiction to address Plaintiff's Motions to Amend. See Joyner v. GE Healthcare, C.A. No. 4:08-2563-TLW-TER, 2009 WL 3063040, at *4 (D.S.C. Sept. 18, 2009) (unpublished) (adopting report and recommendation of Magistrate Judge finding arbitration clause enforceable and absence of jurisdiction to rule on motion to amend complaint). The Court therefore will defer ruling on the Motions to Amend pending resolution of the arbitration issue.

III. Conclusion

A material factual dispute exists as to whether Plaintiff agreed to an arbitration provision. Accordingly, the Court should hold a bench trial to resolve which version of the disclaimer language the University provided to Plaintiff.

IT IS THEREFORE RECOMMENDED that Defendants' Motion to Stay Proceedings Pending Arbitration or, in the Alternative, to Dismiss the Complaint for Lack of Subject Matter Jurisdiction and Improper Venue (Docket Entry 8) be denied in part in that the Court should not compel arbitration at this time, but instead should hold a bench trial to determine whether Plaintiff received disclaimer language that would preclude a conclusion that the Parties reached an agreement to arbitrate.

IT IS ORDERED that Plaintiff's Motions to Amend the Complaint (Docket Entries 16, 23) are **DEFERRED** pending resolution of the arbitrability issue.

/s/ L. Patrick Auld
L. Patrick Auld
United States Magistrate Judge

October 9, 2012