STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF AIKEN	)	FOR THE SECOND JUDICIAL CIRCUIT
	)	
Kristie Parker,	)	Case No.: 2017-CP-02-00663
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION**
	)	
Aiken Regional Medical Center, Lisa Davis, Jennifer Sevilla, and David Cook,	)	
	)	
Defendants.	)	
	)	

THIS MATTER came before the Court by way of a Motion to Compel Arbitration filed by Defendants Aiken Regional Medical Center, Lisa Davis, Jennifer Sevilla, and David Cook ("Defendants"). After due notice, a hearing was held on July 24, 2017 in Aiken County, South Carolina. Present at the hearing were counsel for all parties: Shannon Polvi, Esq., for Plaintiff, and Jennifer K. Dunlap, Esq., for Defendants. The Court has carefully considered the motions, arguments of counsel, memoranda submitted in support of the parties' respective positions, and the law.

FACTS

Plaintiff was employed by Defendant Aiken Regional Medical Center ("ARMC") as a registered nurse from May 2006 until December 2016. In October 2013, Defendant ARMC introduced an arbitration agreement, entitled the Alternative Resolution for Conflicts Agreement (hereinafter, the "ARC Agreement"). On December 11, 2013, Plaintiff electronically reviewed and acknowledged the ARC Agreement. Though Plaintiff had the option to opt-out of arbitration, she did not submit an Opt-Out Form to Human Resources within thirty days after reviewing and acknowledging the ARC Agreement.

On March 21, 2017, Plaintiff filed a Complaint against Defendants for defamation, public policy discharge, and civil conspiracy. Defendants then filed a motion requesting that this Court compel arbitration of Plaintiff's claims in accordance with the terms of the arbitration agreement and dismiss the action in its entirety or, in the alternative, stay the action pending arbitration.

LEGAL STANDARD

The Federal Arbitration Act ("FAA") governs the judicial enforcement of agreements to arbitrate. 9 U.S.C. §§ 1 et seq.; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA makes clear that a written agreement to arbitrate contained in any "contract evidencing a transaction involving commerce...shall be valid, irrevocable and enforceable." 9 U.S.C. § 2. As the United States Supreme Court has explained, "[t]he effect of the [FAA] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA]." *Moses H. Cone*, 460 U.S. at 24.

To determine whether an arbitration agreement exists between the parties, courts apply state law principles governing contract formation. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). South Carolina maintains a strong public policy in favor of arbitration to settle disputes. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118 (2001). "Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered." *Id.* at 592, 553 S.E.2d at 116. Thus, the federal policy favoring arbitration is binding in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements." *Id.* at 590, 553 S.E.2d at 115.

Arbitration is proper under the FAA if the movant can demonstrate (1) the transaction at issue involves "interstate or foreign commerce," (2) "the existence of a dispute between the parties," (3) "a written agreement that includes an arbitration provision which purports to cover

the dispute," and (4) "the failure, neglect or refusal of the defendant to arbitrate the dispute." *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005) (internal quotation omitted). If the court compels arbitration, then the litigation must be stayed pending the outcome of the arbitration proceeding. 9 U.S.C. § 3. In addition, dismissal of the action is proper when all of the issues presented in a lawsuit are arbitrable. *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001).

DISCUSSION

A. The ARC Agreement is a Binding Contract to Arbitrate.

Plaintiff contends that there was no contract to arbitrate between Plaintiff and Defendants because there is no acceptance and no consideration. To the contrary, the evidence clearly reflects that there was both acceptance and consideration for the arbitration agreement.

1. Plaintiff Accepted the ARC Agreement Through Her Electronic Acknowledgment of the Agreement and Through Her Continued Employment.

Plaintiff accepted the arbitration agreement through her electronic acknowledgment of the ARC agreement and through her continued employment with ARMC. Defendants submitted the Declaration of Dawn Kownacki, which provides a detailed overview of ARMC's roll-out of the ARC Agreement in October 2013. Employees were required to review and electronically acknowledge the ARC Agreement by participating in an online learning activity entitled the Alternative Resolution of Conflicts Course, which could only be accessed by logging into Healthstream using the employee's unique username and password. The Alternative Resolution of Conflicts Course required employees to complete four distinct steps, all of which were accessible from the Course Details page:

(1) the employee must open and review the ARC Summary,

(2) the employee must open and review the ARC Agreement,

(3) the employee must open and review the ARC Acknowledgement, and

(4) the employee must complete the ARC Attestation.

Plaintiff completed all four steps and the ARC Attestation, which provides, "I acknowledge this course contains the ARC Program materials, and I have had an opportunity to review them." As set forth above, the ARC Program materials included a copy of the ARC Agreement and the ARC Acknowledgment, which set forth the terms of the arbitration agreement and Plaintiff's acknowledgment of those terms. The ARC Acknowledgment provides, "**I FURTHER UNDERSTAND THAT IF I DO NOT OPT OUT OF THE ARC PROGRAM WITHIN THIRTY DAYS OF TODAY'S DATE, I WILL BE BOUND BY THE ARC AGREEMENT.**" (emphasis in original.) Plaintiff viewed the opt-out form and had an opportunity to select the box indicating that she did not understand the materials so she could repeat the course or contact the Human Resources Department with questions. She also had the option to print the opt-out form and to opt-out of the ARC Program. Plaintiff did not indicate that she did not understand the materials, nor did she submit an opt-out form. Her continued employment with ARMC, and her electronic acknowledgment are evidence of her acceptance of the ARC Agreement. Pursuant to the Uniform Electronic Transfers Act, S.C. Code Ann. 26-6-90(A), Plaintiff's electronic acknowledgment constitutes a valid signature. Specifically, the statute provides as follows:

> An electronic record or electronic signature is attributable to a person if it is the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of a security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

The case law clearly reflects that an electronic acknowledgment of an arbitration agreement like the one at issue is enforceable. *See Carter v. MasTec Servs. Co.*, No. C.A. 2:09-2721-PMD, 2010 WL 500421, at *3 (D.S.C. Feb. 5, 2010) (finding plaintiffs could not legitimately claim they did not knowingly assent to the dispute resolution policy when they failed to opt out of it within the 30-day period provided to take such action); *Thick v. Dolgencorp*

of Texas, Inc., No. 4:16-CV-00733, 2017 WL 108297 (E.D. Tex. Jan. 11, 2017) (granting employer's motion to compel arbitration on the grounds that employee electronically acknowledged the arbitration agreement and did not select the option to opt-out of the agreement in thirty days); *Stover-Davis v. Aetna Life Ins. Co.*, No. 1:15-cv-1938, 2016 WL 2756848 (E.D. Cal. May 12, 2016) (granting employer's motion to compel arbitration on the grounds that employee consented to arbitration when she electronically signed employee handbook acknowledgment and failed to opt-out within thirty days); *Yearwood v. Dolgencorp, LLC*, No. 6:15-cv-00898, 2015 WL 5935167 (N.D. Ala. Oct. 13, 2015) (granting employer's motion to compel arbitration of an arbitration agreement that was electronically signed by employee despite employee's claim that she did not recall signing the agreement).

Plaintiff presented no evidence opposing the Declaration of Dawn Kownacki or the Declaration of Kristen Medlin, which attest to the following:

> (1) Plaintiff logged into HealthStream using her unique username and password;
>
> (2) Plaintiff manually reviewed and clicked through each step in the Alternative Resolution of Conflicts Course, including opening and reviewing the ARC Agreement;
>
> (3) Plaintiff "passed" the ARC Attestation with a score of 100%" meaning she had reviewed the ARC materials, including the ARC Agreement and the ARC Acknowledgment and did not select the box indicating she did not understand the information;
>
> (4) Plaintiff's Course Details pages show a "Status" of "Completed" next to each step in the Alternative Resolution of Conflicts Course;
>
> (5) Plaintiff viewed the opt-out form, but never submitted an opt-out form indicating her desire to opt-out of the ARC Program;
>
> (6) Plaintiff is the only one who could have electronically acknowledged the ARC Attestation because the course materials could only be accessed by Plaintiff entering her unique username and password.

Based on the foregoing, Plaintiff's continued employment and electronic acknowledgment constitute a valid acceptance of the ARC Agreement.

2. The Consideration for the Arbitration Agreement was Plaintiff's Continued Employment and the Parties' Mutual Promise to Arbitrate.

After completing the ARC Program and acknowledging her agreement to the terms of the ARC Agreement, Plaintiff never submitted an opt-out form despite having thirty days to do so. The ARC Agreement specifically provides, "**Should an Employee not opt out of this Agreement within 30 days of the Employee's receipt of this Agreement, continuing the Employee's employment constitutes mutual acceptance of the terms of this Agreement by Employee and the Company.**" (ARC Agreement ¶ 9 (emphasis in original).) As set forth in *Towles v. United HealthCare Corp.*, an employee's continued employment constitutes sufficient consideration to render an acknowledgement legally binding. 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). In addition the Fourth Circuit has also held that "[a] mutual promise to arbitrate constitutes sufficient consideration for [an] arbitration agreement." *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997).

Based on the foregoing, Plaintiff's continued employment and the parties' mutual acceptance of the terms of the arbitration agreement both constitute sufficient consideration for the ARC Agreement. Moreover, because Plaintiff had the option to opt-out of arbitration, but failed to do so, the agreement is not unconscionable.

B. The transaction involves interstate commerce.

The FAA applies to all written contracts "evidencing a transaction involving [interstate] commerce." 9 U.S.C. § 2; *see also Allied-Bruce Terminex Co. v. Dobson*, 513 U.S. 265, 274 (1995). The "involving interstate commerce" standard stretches to the limits of congressional power created by the Commerce Clause of the United States Constitution. *See Allied-Bruce*, 513 U.S. at 274. Arbitration agreements entered as part of the employment relationship are routinely enforced under the FAA. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109-110, 119 (2001) (holding arbitration agreement contained in job application covered by FAA).

Plaintiff's ARC Agreement falls within the scope of the FAA. The parties contemplated that the transaction involved interstate commerce and so stated in the first sentence of the ARC Agreement. Specifically, the Agreement states that it is "governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. and evidences a transaction involving commerce." (ARC Agreement ¶ 1.) The ARC Agreement also provides:

> Any demand for arbitration made to the Company shall be provided to the Company's Legal Department at:
>
> Law Department
> UHS of Delaware, Inc.
> 397 South Gulph Road
> King of Prussia, PA 19406

(ARC Agreement ¶ 5.) Accordingly, the ARC Agreement itself requires the use of interstate commerce and clearly reflects the parties' agreement to abide by the federal rules of arbitration and to have the terms of the Agreement enforced consistent with the goals of the FAA.

Further, businesses in the hospital industry, like ARMC, necessarily affect and involve interstate commerce as contemplated by the FAA. Indeed, Congress regulates the labor of employees of hospitals under the Fair Labor Standards Act ("FLSA"), which Congress enacted under its commerce power. 29 U.S.C. § 202(b). Tellingly, the FLSA applies automatically to hospitals, schools, and public agencies. 29 U.S.C. § 203(s)(1)(B), (C). Based on the foregoing, there can be no question that the ARC Agreement is governed by the FAA.

C. A dispute exists between the parties.

The filing of this contested lawsuit is sufficient evidence of a dispute between the parties.

D. The arbitration clause at issue covers the dispute.

"Whether a party has agreed to arbitrate an issue [under the FAA] is a matter of contract interpretation . . . ." *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996). In interpreting an arbitration clause, however, courts must keep in mind

that the FAA embodies a "federal policy favoring arbitration" and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone.*, 460 U.S. at 24-25; *see also American Recovery Corp.*, 96 F.3d at 92; *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. Indeed, a court may not deny a party's request to arbitrate under the FAA "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Warrior & Gulf Navigation*, 363 U.S. 574, 582-83 (1960); *see also Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001) ("[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide in favor of arbitration."). In this case, it is clear that the defamation, public policy discharge, and civil conspiracy claims asserted in Plaintiff's Complaint are within the scope of the ARC Agreement.

1. Terms of the ARC Agreement Clearly Cover Plaintiff's Claims.

Pursuant to the terms of the ARC Agreement, it covers "disputes regarding the employment relationship...[and] termination...and claims arising under state statutes." (ARC Agreement ¶ 1.) By its terms, therefore, it encompasses all of Plaintiff's claims in this lawsuit – defamation, public policy discharge, and civil conspiracy – because those claims arise out of Plaintiff's employment and allegedly improper termination.

2. Plaintiff's Claims Against Individually Named Defendants are Subject to Arbitration Because They are "Intertwined" with Plaintiff's Claims Against ARMC.

A nonsignatory to an arbitration agreement may force one of the signatories to that agreement to arbitrate claims against it pursuant to the "intertwined claims" test. *Carter v. MasTec Services Co., Inc.*, No. 2:09-2721, 2010 WL 500421 (D.S.C. Feb. 5, 2010); *Gadberry v. Rental Servs. Corp.*, No. 0:09-3327-CMC-PJG, 2011 WL 766991 (D.S.C. Jan. 21, 2011). Pursuant to the "intertwined claims" test, Plaintiff can be compelled to arbitrate her claims

against the individual named Defendants, Lisa Davis, Jennifer Sevilla, and David Cook, even though they are not signatories to the arbitration agreement between ARMC and Plaintiff.

"The United States Court of Appeals for the Fourth Circuit has applied this test and recognized that a nonsignatory to an arbitration agreement can nonetheless force a signatory to the agreement to arbitrate claims against it if the signatory is raising 'allegations of... substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.'" *Gadberry*, 2011 WL 766991 at *3 (quoting *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 396 (4th Cir.2005)).

In *Gadberry*, the plaintiff asserted claims against his former employer and the employee benefits administrator for violation of the ADA, FMLA, and ADEA. *Gadberry*, 2011 WL 766991 at *3. The former employer moved to compel arbitration pursuant to an arbitration provision in the plaintiff's employee contract with his former employer, and the benefits administrator, who was not a signatory to the employment contract, moved to compel arbitration pursuant to the intertwined claims doctrine. *Id.* The court compelled arbitration of the claims asserted against both the former employer and the benefits claims administrator on the grounds that the claims against the defendants were based upon the same factual allegations and were inherently inseparable. *Id.*

In the subject action, Plaintiff has asserted claims against both her former employer, ARMC, as well as her former co-employees. All of Plaintiff's allegations, including her conspiracy claim, arise from the same set of facts, specifically, Plaintiff's termination as a result of the events surrounding the holding of a room for a patient and Plaintiff's alleged report of improper conduct by the Defendants. Accordingly, under the "intertwined claims" doctrine, the individual defendants may compel arbitration of the claims asserted by Plaintiff even though they were not signatories to the arbitration agreement between Plaintiff and ARMC. *See S.C.*

Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993) (compelling arbitration when nonsignatory parties were willing to submit to arbitration and holding a party cannot avoid an arbitration agreement by naming nonsignatory parties in his complaint because this would nullify the rule requiring arbitration); *see also Towles*, 338 S.C. 29, 524 S.E.2d 839 (compelling arbitration for claims brought by employee against employer, co-employees, and others for defamation, conspiracy, negligent supervision, wrongful discharge, and intentional infliction of emotional distress pursuant to arbitration clause in employee handbook).

E. Plaintiff has failed, refused, and/or neglected to arbitrate this dispute.

The filing of this lawsuit and Defendants' filing of the Motion to Compel Arbitration are evidence that Plaintiff has neglected to arbitrate this dispute.

CONCLUSION

Because all elements necessary to arbitrate a claim under the FAA have been satisfied, this matter shall be submitted to arbitration.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Compel Arbitration is GRANTED, and all proceedings in this matter are hereby STAYED pending arbitration.

AND IT IS SO ORDERED.

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The Honorable Doyet A. Early, III
Circuit Court Judge

September ____, 2017

Aiken Common Pleas

Case Caption: Kristie Parker VS Aiken Regional Medical Center , defendant, et al

Case Number: 2017CP0200663

Type: Order/Other

So Ordered

s/D.A. Early III 2136