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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DEWAYNE A. WILLIAMS, Plaintiff and Respondent, v. ALORICA, INC., Defendant and Appellant.	G052452 (Super. Ct. No. 30-2015-00774605) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Reversed with directions.

Ogletree, Deakins, Nash, Smoak & Stewart, Betsy Johnson, Ryan H. Crosner and Jack S. Sholkoff for Defendant and Appellant.

Schimmel & Parks, Alan I. Schimmel, Michael W. Parks and Stacey R. Cutting for Plaintiff and Respondent.

INTRODUCTION

Alorica, Inc., appeals from an order denying its petition to compel respondent Dewayne Williams to arbitrate his employment-related lawsuit. The trial court ruled that Alorica had not established the existence of an agreement to arbitrate.

We reverse. Williams accepted Alorica's arbitration policy offer by continuing to work past a stated deadline. The court did not rule on the issue Williams raised – whether the agreement was unconscionable – and we therefore return the matter to the trial court to make this ruling.

FACTS

Williams alleged he worked for Alorica for over five years as a company trainer in the Fresno office. After being terminated in July 2014, he sued Alorica for several workplace discrimination causes of action under the Fair Employment and Housing Act (FEHA). He alleged that he had been subjected to sexual orientation and disability discrimination and that Alorica had retaliated against him, denied reasonable accommodation for his disability, and failed to engage in the interactive process.[1] Specifically he alleged that an Alorica employee, the Information Technology (IT) department manager (whom Williams did not name as a defendant), had threatened and harassed him because of his sexual orientation, causing him to suffer from Post Traumatic Stress Disorder (PTSD).

Williams alleged that he disclosed the IT department manager's harassment to Alorica's human resources (HR) manager on July 9, 2014, and notified the regional HR manager of his PTSD on July 21. Alorica fired Williams on July 22, 2014.

[1] Williams also alleged some non-FEHA claims: wrongful termination, retaliation, and negligent hiring and supervision.

Alorica moved to compel arbitration. It submitted a copy of an e-mail dated April 24, 2014, entitled "Mandatory Read: Alorica Employee Dispute Resolution Policy." For purposes of this appeal, the relevant provisions of the e-mail follow.

"[Paragraph 1] This document describes Alorica's Employee Dispute Resolution Policy. If you have not already entered into an Arbitration Agreement with Alorica Inc. (the 'Company'), your continuing to work for the Company after June 1, 2014 constitutes your agreement to be bound by this policy. If you continue to work for the Company after June 1, 2014, and you have not already entered into an Arbitration Agreement with the Company, you and Company hereby agree to all of the following terms of this policy as follows:

"[Paragraph 2] All disputes, claims, or controversies arising out of or relating to your employment by the Company or the termination of your employment, and any claims or disputes as to the scope and enforceability of this arbitration policy, shall be resolved exclusively by final and binding arbitration, except that You or the Company may apply to a court of competent jurisdiction for any provisional remedy, including a temporary restraining order or preliminary injunction, before, during, or after any arbitration proceeding.

"[Paragraph 3] Such arbitration shall be held within the Federal Judicial District in which you are or were last employed by the Company and shall be conducted pursuant to the JAMS Employment Arbitration Rules, copies of which may be obtained at www.jamsadr.com, from your local on-site Human Resources Department, or by request directed to the Office of General Counsel, Alorica, Inc., 5 Park Plaza, Suite 1100, Irvine CA 92614. The Company agrees to bear all but the first $350 of the arbitration filing fee.

"[¶] . . . [¶]

"[Paragraph 6] . . . This policy may be modified or terminated only by consent of the parties.

"[¶] . . . [¶]

"[Paragraph 8] Your electronic acknowledgement via EIS or other electronic means confirms that you have received, read, and understood this document.

"[Paragraph 9] You are able to pick up a hard copy from your HR Representative or print from the Alorica Intranet."

Alorica submitted evidence Williams had opened the e-mail on April 25, 2014, the same day it was sent.

Williams opposed the motion to compel arbitration on the grounds that, first, there was no agreement to arbitrate and, second, if there was an agreement, it was both procedurally and substantively unconscionable. In his supporting declaration, Williams admitted he had opened the dispute resolution e-mail, but had not read it, understood it, or agreed to it. He merely clicked on an "acknowledge" button. He also asserted that Alorica's system did not allow him to continue working on the computer unless he clicked on the button.

The trial court ruled there was no agreement to arbitrate because hitting the acknowledgement button was "ambiguous"; Williams had to click on the button to keep working. The court regarded this fact as the equivalent of firing Williams before June 1. Having found no agreement to arbitrate, the court did not address unconscionability.

DISCUSSION

"[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement – either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation [citation] – that party bears the burden of

producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*).)

"'"Contract formation requires mutual consent, which cannot exist unless the parties 'agree upon the same thing in the same sense.'"' [Citation.] 'The manifestation of mutual consent is generally achieved through the process of offer and acceptance.' [Citation.]" (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 309.)

"[A] party's acceptance of an agreement to arbitrate may be express [citations] or implied-in-fact where, as here, the employee's continued employment constitutes her acceptance of an agreement proposed by her employer. [Citations.]" (*Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 420 (*Craig*); see *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 236.)

In *Craig*, the employer sent a memorandum alerting the employees to a four-step dispute resolution program that included arbitration. A subsequently fired employee who sued the company for wrongful termination, harassment, and discrimination, among other theories, opposed the petition to compel arbitration by arguing that she never expressly agreed to arbitrate or signed any acknowledgement form. Therefore, she argued, there was no agreement to arbitrate. (*Craig, supra,* 84 Cal.App.4th at pp. 419-420.)

The court disagreed. Citing "[g]eneral principles of contract law," the court held that continuing to work for the company after receiving the dispute resolution memorandum constituted an implied-in-fact acceptance of the agreement to arbitrate. (*Craig, supra,* 84 Cal.App.4th at p. 420.)

In the present case, the offer was contained in the e-mail Alorica sent to Williams on April 25. Williams admitted he received the e-mail, but asserted he did not

read it. This failure or refusal to read the e-mail does not insulate him from the policy, any more than he would be insulated if he had received a paper copy and thrown it in the trash without reading it. "[A]n employee may [not] avoid an employer's arbitration policy imposed as a condition of employment by remaining willfully, or even negligently, ignorant of the policy. For example, an employee may not avoid an implied-in-fact arbitration agreement by failing to read a notice the employer sent to notify the employee about the employer's arbitration policy. (See *24 Hour Fitness* [*Inc. v. Superior Court* (1998)] 66 Cal.App.4th [1199,] 1215 [employee who signed acknowledgment that she received an employee handbook containing an arbitration provision cannot avoid arbitration by failing to read the handbook; '"'[a] party cannot use his own lack of diligence to avoid an arbitration agreement'"'].)" (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 65-66.) Alorica made a valid offer to Williams.

The second part of contract formation is acceptance. "Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal." (Civ. Code, § 1584.)

In this case, acceptance was manifested by Williams' continuing to work at Alorica after June 1, 2014. (See *Craig, supra*, 84 Cal.App.4th at p. 420.) Unlike the employee in *Craig*, Williams was explicitly told that continuing to work constituted acceptance of the agreement and was even given a specific date after which this acceptance would become effective. Alorica did not demand immediate acceptance, but gave Williams five weeks to decide whether to agree to arbitration or to leave Alorica's employ. Continuing to work for Alorica after June 1 was an *express* acceptance of the arbitration agreement.

There was conflicting testimony regarding whether an employee could have access to the Alorica computer system without clicking on an "acknowledge" button in an e-mail. Williams claimed that once an e-mail such as the "Mandatory Read" was

opened, he had to click on an acknowledge button before he could do any more work. Alorica submitted a declaration stating that the computer program requiring clicking an acknowledge button was not necessary to any part of his work and the computer system allowed an employee to clock in and out manually.[2]

Which party is right about this is irrelevant. Williams' consent to the arbitration agreement was not indicated by clicking on the e-mail; it was conveyed by his continuing to work for Alorica after June 1, 2014. Clicking on the e-mail merely acknowledged that Williams had received, read, and understood the document – the offer. He did not dispute that he had received and opened the e-mail. As discussed above, the fact that he may have clicked on the acknowledge button *without* reading the e-mail does not excuse him, any more than tearing up a written offer would. His acceptance came five weeks later, when he reported for work on June 2, 2014. Whatever were the vagaries of Alorica's e-mail system, it did not force Williams to work after June 1.

Williams also asserted that some incidents of harassment occurred before June 1, that is, before the arbitration agreement became effective. Although Williams alleged that the IT manager accused him of sexual harassment in May 2014 and interfered with his computer use thereafter, he also alleged he did not report "the campaign of harassment that he had been subjected to by [the manager] and the IT department" to Alorica until July 9, 2014, well after the arbitration policy went into effect.

Alorica is the sole defendant in this action. Williams did not allege any wrongdoing by Alorica that preceded July 9, and the IT manager's status and role in the company is unclear and must await further development. Williams alleged no facts to establish the manager was in the particular chain of command above Williams as a trainer. We resolve doubts about the validity of an arbitration agreement in favor of

[2] The Alorica declaration stated that the Employment Information System (EIS) is used for clocking in and out and for HR-related functions. As a trainer, Williams did not need to use the EIS to do his job.

arbitration. (*Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 247.)

We therefore hold that Alorica established the existence of an enforceable arbitration agreement. Because the trial court did not reach the second step of the analysis – whether the agreement was unconscionable – we return the matter to the trial court for a ruling on this issue, assuming that the parties do not reach an agreement regarding arbitration.

DISPOSITION

The order denying appellant's petition to compel arbitration for lack of an enforceable agreement is reversed, and the trial court is ordered to rule on the issue of unconscionability if the parties do not otherwise agree regarding arbitration. Appellant is to recover its costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.