
No. 03-14342-G

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

FONZA LUKE,

Plaintiff-Appellant,

v.

BAPTIST MEDICAL CENTER-PRINCETON,

Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of Alabama

BRIEF OF PLAINTIFF-APPELLANT

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No. 03-14342-G, Luke v. Baptist Medical Center-Princeton

CERTIFICATE OF INTERESTED PERSONS

The following is a list of trial judges, attorneys, persons, associations of persons, firms, partnerships, corporations, conglomerates, affiliates and other legal entities which have, or are believed to have, an interest in the outcome of this case:

1. Adams and Reese/Lange Simpson LLP (Counsel for Defendant-Appellee)
2. Baptist Health System, Inc. (Defendant-Appellee)
3. Baptist Medical Center-Princeton (Defendant-Appellee)
4. Bland, F. Paul (Counsel for Plaintiff-Appellant)
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6. Hancock, William K. (Counsel for Defendant-Appellee)
7. Lovelace Blackburn, The Hon. Sharon (U.S. District Court Judge)
8. Luke, Fonza (Plaintiff-Appellant)
9. Quirk, Michael J. (Counsel for Plaintiff-Appellant)
10. Trial Lawyers for Public Justice, P.C. (Counsel for Plaintiff-Appellant)

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Plaintiff-Appellant respectfully request oral argument in this case, which presents important questions of state and federal law concerning the formation of a contract that purports to waive a civil rights claimant's access to the civil justice system. Counsel believe that oral argument will assist the Court in its determination of these matters.

TABLE OF CONTENTS

TABLE OF CITATIONS	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES PRESENTED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. STANDARD OF REVIEW	13
II. THE PARTIES NEVER ENTERED INTO AN AGREEMENT TO ARBITRATE UNDER STATE OR FEDERAL LAW.	14
A. Luke Cannot Be Compelled to Arbitrate After She Explicitly and Repeatedly Rejected BHS’s Multiple Offers for Arbitration.	15
B. The FAA Does Not Permit Arbitration Without a Party’s Consent.	24
III. LUKE DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HER FEDERAL STATUTORY RIGHTS.	27
CONCLUSION	31

TABLE OF CITATIONS

FEDERAL CASES

<i>Air Line Pilots Ass’n v. Miller</i> , 523 U.S. 866 (1998)	26
<i>Bailey v. Federal National Mortgage Association</i> , 209 F.3d 740 (D.C. Cir. 2000)	14, 18-19
<i>Blair v. Scott Specialty Gases</i> , 283 F.3d 595 (3d Cir. 2002)	1, 30
<i>Davis v. Prudential Securities, Inc.</i> , 59 F.3d 1186 (11 th Cir. 1995)	25
<i>Devlin v. Ingram</i> , 928 F.2d 1084 (11 th Cir. 1991)	15
<i>Employers Ins. of Wausau v. Bright Metal Specialties, Inc.</i> , 251 F.3d 1316 (11 th Cir. 2001)	1
<i>Equal Employment Opportunity Comm’n v. Waffle House, Inc.</i> , 534 U.S. 279 (2002)	26
<i>First Options of Chicago, Inc. v. Kaplan</i> , 514 U.S. 938 (1995)	14, 24
<i>Fleetwood Enterprises, Inc. v. Gaskamp</i> , 280 F.3d 1069 (5 th Cir. 2002)	24
<i>Goldberg v. Bear, Stearns & Co.</i> , 912 F.2d 1418 (11 th Cir. 1990)	26
<i>Green Tree Fin. Corp. v. Randolph</i> , 531 U.S. 79 (2000)	1
<i>Hammaker v. Brown & Brown, Inc.</i> , 214 F. Supp. 2d 575 (E.D. Va. 2002) ..	29-30
<i>King v. Richmond County, Georgia</i> , 331 F.3d 1271 (11 th Cir. 2003)	13
<i>Kummetz v. Tech Mold, Inc.</i> , 152 F.3d 1153 (9 th Cir. 1998)	28

<i>Moore v. Pennsylvania Castle Energy Corp.</i> , 89 F.3d 791 (11 th Cir. 1996)	13
<i>Parker v. Secretary for the Department of Corrections</i> , 331 F.3d 764 (11 th Cir. 2003)	13
<i>Phillips v. Cigna Investments, Inc.</i> , 27 F. Supp. 2d 345 (D. Conn. 1998)	20
<i>Penn v. Ryan’s Family Steakhouses</i> , 95 F. Supp. 2d 940 (S.D. Ind. 2000), <i>aff’d and remanded</i> , 269 F.3d 753 (7 th Cir. 2001)	28-29
<i>Prudential Insurance Co. of America v. Lai</i> , 42 F.3d 1299 (9 th Cir. 1994) . .	27-28
<i>Riley Manufacturing Co., Inc. v. Anchor Glass Container Corp.</i> , 157 F.3d 775, 779 (10 th Cir. 1998)	24-25
<i>Robinson v. Ada S. McKinley Community Services, Inc.</i> , 19 F.3d 359 (7 th Cir. 1994)	19-20
<i>Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 170 F.3d 1 (1 st Cir. 1999)	30
<i>Seus v. John Nuveen & Co., Inc.</i> , 146 F.3d 175 (3d Cir. 1998)	30
<i>Specht v. Netscape Communications Corp.</i> , 306 F.3d 17 (2d Cir. 2002)	25
<i>Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University</i> , 489 U.S. 468 (1989)	25
<i>Weeks v. Harden Manufacturing Corp.</i> , 291 F.3d 1307 (11 th Cir. 2002)	22
<i>Williams v. Cigna Fin. Advisors, Inc.</i> , 56 F.3d 656 (5 th Cir. 1995)	30

STATE CASES

<i>Baptist Health System, Inc. v. Mack</i> , ___ So. 2d ___, 19 I.E.R. Cas. 1574, 2003 WL 1900697 (Ala. April 18, 2003)	10, 17-18, 22
<i>Cooks Pest Control, Inc. v. Rebar</i> , 852 So. 2d 730 (Ala. 2002)	22-23
<i>Crown Pontiac, Inc. v. McCarrell</i> , 695 So. 2d 615 (Ala. 1997)	15-16
<i>Deeco, Inc. v. 3-M Co.</i> , 435 So. 2d 1260 (Ala. 1983)	15
<i>Edwards v. Thornburgh</i> , 396 So. 2d 678 (Ala. 1981)	18
<i>Ex Parte Amoco Fabrics and Fibers Co.</i> , 729 So. 2d 336 (Ala. 1998)	21
<i>Ex Parte Cobb</i> , 781 So. 2d 208 (Ala. 2000)	14
<i>Ex Parte Payne</i> , 741 So. 2d 398 (Ala. 1999)	14
<i>Garfinkle v. Morristown Obstetrics & Gynecology Assoc's, P.A.</i> , 773 A. 2d 665 (N.J. 2001)	29
<i>Hall v. Integon Life Ins. Co.</i> , 454 So. 2d 1338 (Ala. 1984)	22
<i>Herring v. Prestwood</i> , 414 So. 2d 52 (Ala. 1982)	22
<i>Modern Woodmen of America v. McElroy</i> , 815 So. 2d 520 (Ala. 2001)	14
<i>Patrick Home Center, Inc. v. Karr</i> , 730 So. 2d 1171 (Ala. 1999)	13-14
<i>TranSouth Fin. Corp. v. Bell</i> , 739 So. 2d 1110 (Ala. 1999)	14

FEDERAL STATUTES

9 U.S.C. §§ 1 <i>et seq.</i>	8
9 U.S.C. § 2	24
9 U.S.C. § 16(a)(3)	1
29 U.S.C. § § 621 <i>et seq.</i>	2, 3, 7, 8
29 U.S.C. § 626(f)(1)	29, 30
29 U.S.C. § 626(f)(2)	29, 30
42 U.S.C. §1981	3, 7, 8
42 U.S.C. § 1983	3, 7, 8
42 U.S.C. §§ 2000e <i>et seq.</i>	2, 3, 7, 8

LEGISLATIVE MATERIALS

137 Cong. Rec. S. 15472 (Oct. 30, 1991)	28
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JURISDICTIONAL STATEMENT

This is an appeal from an order of the District Court dismissing all claims without prejudice and compelling the parties to arbitrate. An order dismissing all claims in favor of arbitration is final and appealable under the Federal Arbitration Act, 9 U.S.C. § 16(a)(3). *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89 (2000) (“[W]here, as here, the District Court has ordered the parties to proceed to arbitration, and dismissed all claims before it, that decision is ‘final’ within the meaning of § 16(a)(3), and therefore appealable.”) A District Court’s dismissal order is final and appealable whether it be made with or without prejudice to the plaintiff. *Employers Ins. of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1322 n. 6 (11th Cir. 2001) (“Although the district court did not specify whether the dismissal was with or without prejudice, the arbitration order clearly disposed of the entire case on the merits and left no part of it pending before the court.”); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 602 (3d Cir. 2002) (holding that a dismissal without prejudice is a final and appealable order under § 16(a)(3); citing *Bright Metal Specialties*).

Plaintiff timely filed her notice of appeal on August 27, 2003 (Appellant’s Excerpts of Record (“ER”) Tab 8, p. 75), within 30 days of the District Court’s Order of July 31, 2003 dismissing the case (ER Tab 7, pp. 70-74). The appeal was docketed in this Court on August 28, 2003.

STATEMENT OF ISSUES PRESENTED

(1) Whether, under Alabama contract law and the Federal Arbitration Act, an employee who never signed a written arbitration agreement and repeatedly refused to agree to arbitration when her employer offered such a contract may, nevertheless, be compelled to arbitrate her employment discrimination claims simply because she continued working in a job she had held for the 26 years before she refused the employer's offer for arbitration.

(2) Whether an employer's binding arbitration program gives rise to a "knowing and voluntary" waiver of an employee's statutory rights of access to federal court and to a jury trial, as required by Title VII of the Civil Rights Act of 1964 (as amended by the Civil Rights Act of 1991) and the Age Discrimination in Employment Act, when the program is purported to take effect over her repeated refusals based solely on the fact that she did not resign from a job she had held for 26 years.

STATEMENT OF THE CASE

On March 21, 2003, Fonza Luke filed this action against defendant Baptist Medical Center-Princeton, also known as Baptist Health System ("BHS"), her former employer, in the United States District Court for the Northern District of Alabama. Luke, an African-American female who was 59 years old at the time she was terminated, alleged that BHS illegally discriminated against her on the basis of race

and age in violation of (1) Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended by the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e *et seq.*; 2) 42 U.S.C. §§ 1981 and 1983; and 3) the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 621 *et seq.*, when it fired her from her job as a Licensed Practical Nurse after almost 30 years of employment. (ER Tab 2, p. 7 ¶ 17; p. 10 ¶ 1).

On May 19, 2003, BHS moved the district court to stay proceedings and compel Luke to arbitrate her claims. The district court granted the motion in part, holding that Luke was bound to arbitrate her claims even though she never signed a written agreement to arbitrate and even though she repeatedly refused to agree when BHS introduced its written arbitration clause. (ER Tab 7, p. 73). The district court held that Luke was bound because BHS’s arbitration document said it would take effect against any employee who came to work on or after January 1, 1998, and because Luke did not quit her job of 26 years. (ER Tab 7, p. 73). Instead of granting BHS’s motion to stay proceedings, however, the district court dismissed the case without prejudice. (ER Tab 7, p. 74). This appeal followed. (ER Tab 8, p. 75).

STATEMENT OF FACTS

Fonza Luke worked as a Licensed Practical Nurse for BHS for almost 30 years, from July 1971 until March 2003. (ER Tab 2, p. 7 ¶ 17). Between 1990 and 2001, Luke worked as a Nurse Technologist in BHS’s Gastroenterology Laboratory (the “GI

lab”). (ER Tab 2, p. 18, Luke Affidavit). Physicians she worked with during this time described her as displaying an “exemplary work ethic,” as being professional, efficient, hard-working, and knowledgeable, and as having a “wealth of experience.” (ER Tab 2, pp. 7-8 ¶¶ 18-19). In performance evaluations, including one given approximately three weeks before she was fired, Luke frequently achieved the highest possible rating as a “role model for the other employees.” (ER Tab 2, p. 8 ¶ 20).

A. BHS’s Arbitration Program

On November 13, 1997, after she had been employed for more than 26 years, Luke attended a meeting of employees where BHS introduced a new “Dispute Resolution Program.” (ER Tab 3, p. 25 ¶ 2, Hyle Declaration; Tab 4, p. 54 ¶ 3, Luke Affidavit). During the meeting, a hospital official said that BHS was adopting this program, that the program would force employees to submit legal disputes to binding arbitration and prevent them from going to court, and that the program would take effect on employees working as of January 1, 1998. (ER Tab 3, p. 25 ¶ 2, Hyle Decl.; Tab 4, p. 54 ¶ 3, Luke Aff.). The program document stated in relevant part:

By remaining or becoming employed after receiving notice of this Program, you consent to the resolution by arbitration of any dispute, whether or not arising out of your employment (including your application, your hiring, or your failure to be hired) or its termination, that you may have with or against BHS or that BHS may have with or against you, except as otherwise provided herein. BHS also consents to the resolution, by arbitration, of all disputes between you and BHS, except as otherwise provided herein.

(ER Tab 3, p. 30, Exhibit 1 to Hyle Decl.). The program document included a form labeled “Acknowledgment of Receipt of BHS Dispute Resolution Program.” (ER Tab 3, p. 42, Exhibit 1 to Hyle Decl.).¹

During this meeting, Luke repeatedly refused to agree to the Dispute Resolution Program and its binding arbitration requirement. When she was asked to agree to the program, Luke refused to sign the program document’s Acknowledgment of Receipt form. (ER Tab 4, p. 54 ¶ 3, Luke Aff.). Luke documented this fact by writing in the words “No Form” when she signed the meeting’s attendance sheet. (ER Tab 4, p. 54 ¶ 3, Luke Aff.; Tab 3, p. 45, Exhibit 2 to Hyle Decl.). During this meeting, Luke’s immediate supervisor, Jamie Reynolds, told her that she would be fired if she did not sign the acknowledgment form. Luke responded by specifically stating that she would not sign, would not agree to be bound by any arbitration program, would not waive her legal rights, and that BHS would have to fire her because she would not agree to this program. (ER Tab 4, p. 54 ¶ 4, Luke Aff.). BHS did not terminate Luke’s employment at this point, and she continued working.

Several weeks after the November 13 meeting, Reynolds again approached

¹ BHS also circulated a notice regarding the Dispute Resolution Program with employees’ paychecks, but the notice does not contain a signature line for any employee to signify their assent to its terms. (ER Tab 3, p. 25 ¶ 2, Hyle Decl.; pp. 46-47, Exhibit 3 to Hyle Decl.).

Luke and again asked her to sign the “Acknowledgment of Receipt of BHS Dispute Resolution Program” form. (ER Tab 4, p. 54 ¶ 5, Luke Aff.). Once again, Luke refused to do so and told Reynolds that “You’ll have to terminate me because I refuse to sign my rights away.” (ER Tab 4, pp. 54-55 ¶ 5, Luke Aff.). Again, BHS did not fire her. Luke continued working for three and a half more years until the events leading to BHS’s termination of her employment in March 2001.

B. BHS’s Termination of Luke’s Employment

Some time in February 2001, Luke submitted a written request for two days off from work to attend a continuing education class on March 22 and 23 that one of the GI Lab physicians wanted her to attend. (ER Tab 2, p. 8 ¶ 21). Her supervisor gave her permission to take one, but not both days, off from work. (ER Tab 2, p. 8 ¶ 21). The week before the class was scheduled, Luke discovered that she had recently been exposed to hepatitis while assisting with a procedure on a patient. Unbeknownst to her during the procedure, the patient had hepatitis and she had a cut on her hand beneath her surgical glove. (ER Tab 2, p. 19, Luke Aff.). She was told that she would need to have several weeks of followup lab work. This caused serious distress for Luke because she had previously contracted hepatitis through her work for BHS approximately five years earlier. (ER Tab 2, p. 20, Luke Aff.). When Luke told her supervisor about this exposure, the supervisor told her to pray and refused to give her

any additional time off from work. (ER Tab 2, p. 20, Luke Aff.). Luke took her scheduled day off to attend the continuing education class on March 22 and then also called in to say that she would be out on March 23. (ER Tab 2, p. 20, Luke Aff.).

When Luke returned on her next scheduled work day, BHS's Director of Human Resources informed her that she was being terminated for insubordination after almost 30 years of employment with BHS. (ER Tab 2, p. 9 ¶ 21).

C. The Proceedings Below

Luke timely filed a charge of race discrimination under Title VII with the Equal Employment Opportunity Commission ("EEOC") against BHS on August 3, 2001. (ER Tab 2, p. 6 ¶ 14). She amended the charge to add a claim of age discrimination under the ADEA on December 14, 2001. (ER Tab 2, p. 6 ¶ 14). The EEOC issued a Notice of Right to Sue on January 24, 2003. (ER Tab 2, p. 14).

Luke filed her complaint in the United States District Court for the Northern District of Alabama on March 21, 2003. The complaint charges that BHS illegally discriminated against Luke on the basis of race and age in violation of Title VII, 42 U.S.C. §§ 1981 and 1983, and the ADEA, when it terminated her employment. (ER Tab 2, pp. 3-4 ¶¶ 1-2). Luke alleges that BHS's stated reason for firing her, insubordination, was a pretext for discriminatory motives because, at the time of her discharge, there were several similarly situated younger white employees who were

not fired for taking days off after their requests for those days off were denied. (ER Tab 2, p. 9 ¶ 22). In her prayer for relief, Luke seeks compensatory and punitive damages, reinstatement to her former position, back-pay plus interest, and declaratory and injunctive relief as are made available under Title VII, Sections 1981 and 1983, and the ADEA. (ER Tab 2, pp. 10-11 ¶¶ 1-3). Luke is also demanding a jury trial on these claims. (ER Tab 2, p. 11).

BHS responded by moving the district court to stay proceedings and compel arbitration of all claims on May 19, 2003. (ER Tab 3, pp. 22-23). In support of its motion, BHS argued that its arbitration program document is enforceable against Luke under the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1 *et seq.*, because she was aware of the program and continued to work for BHS after January 1, 1998. (ER Tab 5, p. 56). BHS recognized the fact that Luke did not sign the arbitration document. (ER Tab 5, p. 60). BHS further acknowledged that “*Alabama courts have not specifically addressed the effects of an at-will employee’s verbal objections to modification to the terms of her employment . . .*” (ER Tab 5, p. 61) (emphasis added). Nevertheless, BHS claimed that Luke was bound because she gave her assent by continuing to work in a job she had held for more than 26 years prior to the introduction of the arbitration program. (ER Tab 5, pp. 62-63).

In response, Luke argued to the district court that she was not bound by BHS’s

arbitration program because the program fails as a contract or as a modification of Luke's pre-existing implied at-will employment relationship with BHS. (ER Tab 4, p. 50 ¶ 1). In support of this argument, Luke emphasized that: (1) she did not sign BHS's arbitration program document; (2) she repeatedly stated her refusal to be bound by the arbitration program's terms; (3) her supervisor repeatedly told her she would be fired if she did not agree to the arbitration program; (4) she repeatedly told her supervisor that she would *have* to be fired because she would not agree to the arbitration program; and (5) BHS did not then fire her, but instead allowed her to continue working for almost four more years. (ER Tab 4, pp. 51-52 ¶¶ 9-11).

On July 31, 2003, the district court granted the motion to compel arbitration and dismissed Luke's claims without prejudice. The district court found that Luke refused to sign the arbitration document at the November 1997 meeting, that she persisted in her refusal even after her supervisor threatened her with termination, and that her supervisor did not follow through on this threat. (ER Tab 7, p. 71). The court further found that her supervisor approached her again several weeks later asking her to sign the arbitration document, that Luke again refused, and that BHS allowed Luke to continue working for almost four more years. (ER Tab 7, p. 71). Nevertheless, the district court adopted BHS's arguments and held that, because Luke was aware of the arbitration program and remained employed after January 1, 1998, the program was

binding on her. (ER Tab 7, p. 72). The court's primary authority cited in support of this holding was *Baptist Health System, Inc. v. Mack*, ___ So. 2d ___, 19 I.E.R. Cas. 1574, 2003 WL 1900697 (Ala. April 18, 2003), which held that a BHS employee who signed an acknowledgment form, never objected to arbitration, and then continued working with BHS, was bound by the program's terms. (ER Tab 7, p. 72). The district court recognized that Luke, unlike the plaintiff in *Mack*, refused to sign the arbitration document and openly objected to it, but held that these facts were of no moment in determining whether she agreed to arbitration. (ER Tab 7, pp. 72-73). After holding that Luke was required to arbitrate, the district court dismissed the case without prejudice. (ER Tab 7, p. 74). This appeal followed.

SUMMARY OF ARGUMENT

Fonza Luke never agreed to arbitrate her claims. BHS's Dispute Resolution Program document is not binding on Luke because she never signed it and she never otherwise assented to its terms regarding binding arbitration. Under applicable Alabama contract law principles, an offer *and* an acceptance are both essential elements to the formation of a contract. When her supervisor asked her on two separate occasions to sign the program document, Luke refused both times and stated unequivocally that she did not agree to be bound by its terms and would not waive her legal rights. The fact that Luke was aware of the arbitration program and continued

working for BHS after the program's effective date, as she had been doing for the previous 26 years, does not demonstrate that Luke intended to agree to arbitration. Luke's repeated rejections of the arbitration program should be treated as just that, a rejection of BHS's offer for an arbitration contract.

Alternatively, Luke's explicit statements rejecting BHS's arbitration offer and saying that BHS would have to fire her before she waived her rights may be deemed a counter-offer for ongoing employment without arbitration. BHS accepted this counter-offer by allowing her to continue working after she refused its offer. Under Alabama contract law, a written or oral response to an offer proposing substantially different terms is a counter-offer, which the original offeror may accept by complying with the counter-offeror's designated manner of acceptance. When BHS offered the arbitration program as a condition of her continued employment and sought her signature on the program document on two separate occasions, Luke both times refused to agree to the program and stated instead that BHS would have to fire her because she would not waive her rights. To the extent that BHS's introduction of the arbitration program constituted an offer for employment with arbitration, Luke's responses insisting on work without arbitration were a counter-offer. BHS demonstrated its intent to accept this counter-offer by allowing Luke to continue working for three years after she refused arbitration and challenged BHS to fire her.

Regardless of whether Luke's repeated refusals were a counter-offer or a simple rejection, however, in no event did she ever agree to arbitration.

Furthermore, federal arbitration law does not compel Luke to arbitrate her claims. First, the FAA does not create independent federal rules of contract law and instead calls for application of state law principles to questions regarding the formation of contracts. Second, the U.S. Supreme Court and this Court have repeatedly held that arbitration under the FAA is strictly a matter of consent, not coercion. Therefore, a party cannot rely on federal policy goals to compel arbitration of claims in the absence of a voluntary agreement to arbitrate. The FAA's baseline requirement of a consensual agreement cannot be satisfied where BHS claims that Luke's only "choice" for avoiding arbitration was to resign from a job she had been working in for 26 years.

Finally, BHS cannot satisfy its burden of demonstrating that Luke made a knowing and voluntary waiver of her statutory rights of access to federal court and to a jury trial under Title VII and the ADEA. Numerous federal courts across the country have held that these rights are critical to the Title VII and ADEA enforcement schemes so that a claimant can only be required to relinquish these rights, whether through arbitration or otherwise, if there was a "knowing and voluntary" waiver of them. This statutory standard of voluntariness cannot be found here, where Luke

consistently refused BHS's offers for arbitration. In the face of these rejections, BHS asserts that its arbitration program was a mandatory condition of Luke's continuing employment after 1997 and that Luke could *only* avoid arbitration by quitting the job she had held for the past 26 years. Luke's mere continuation of her employment under these circumstances should not be considered a knowing and voluntary waiver of her statutory and constitutional rights.

ARGUMENT

I. STANDARD OF REVIEW

The district court's conclusions of law are reviewed *de novo* and its findings of fact are reviewed for clear error. *King v. Richmond County, Georgia*, 331 F.3d 1271, 1275 (11th Cir. 2003). Mixed questions of law and fact are reviewed *de novo*. *Parker v. Secretary for the Dep't of Corrections*, 331 F.3d 764, 768 (11th Cir. 2003). The question of whether parties entered into a contractual agreement, including an agreement for arbitration, is a matter of law that is reviewed *de novo*. *See, e.g., Moore v. Pennsylvania Castle Energy Corp.*, 89 F.3d 791, 797 (11th Cir. 1996) ("The question whether the parties have assented to a writing as a complete integration of their agreement is a question of law for the court, which is subject to the *de novo* standard of review."); *Patrick Home Center, Inc. v. Karr*, 730 So. 2d 1171, 1172 (Ala. 1999) ("determinations of arbitrability, like the interpretation of any contractual

provision, are subject to *de novo* review.”) (citation omitted); *cf. Bailey v. Federal Nat’l Mortgage Ass’n*, 209 F.3d 740, 744 (D.C. Cir. 2000) (“the determination that parties have contractually bound themselves to arbitrate disputes –a determination involving interpretation of state law–is a legal conclusion subject to our *de novo* review, but . . . the findings upon which that conclusion is based are factual and thus may not be overturned unless clearly erroneous.”)

II. THE PARTIES NEVER ENTERED INTO AN AGREEMENT TO ARBITRATE UNDER STATE OR FEDERAL LAW.

Luke did not agree to arbitrate her claims. In cases governed by the FAA, ordinary state contract law principles apply to the determination of whether a party has agreed to arbitrate. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). It is bedrock Alabama contract law that “[a] contract cannot be formed without an offer, an acceptance, consideration, and mutual assent to terms essential to the contract.” *Ex Parte Payne*, 741 So. 2d 398, 403 (Ala. 1999); *Ex Parte Cobb*, 781 So. 2d 208, 210 (Ala. 2000) (quoting *Payne*). A party seeking to compel arbitration bears the burden of proving the existence of these elements of a contractual agreement. *Modern Woodmen of America v. McElroy*, 815 So. 2d 520, 526 (Ala. 2001); *TranSouth Fin. Corp. v. Bell*, 739 So. 2d 1110, 1114 (Ala. 1999). BHS cannot satisfy its burden of proving acceptance and mutual assent because it is undisputed on the record here that Luke repeatedly refused to sign the arbitration document and told

her supervisor that she refused to be bound by its terms, would not waive her rights, and would have to be fired if BHS truly meant to require arbitration.

A. Luke Cannot Be Compelled to Arbitrate After She Explicitly and Repeatedly Rejected BHS's Multiple Offers for Arbitration.

BHS cannot demonstrate that Luke ever accepted or assented to its offer for arbitration through the arbitration program document. Under Alabama contract law, a party seeking to prove assent must produce either a signed written agreement or comparable evidence demonstrating the opposing party's intent to agree to an offer:

The existence *vel non* of a contract is determined by reference to the reasonable meaning of the parties' external and objective manifestations of mutual assent. Conduct of one party from which the other may reasonably draw the inference of assent to an agreement is effective as acceptance.

Deeco, Inc. v. 3-M Co., 435 So. 2d 1260, 1262 (Ala. 1983); *see also Devlin v. Ingram*, 928 F.2d 1084, 1090 (11th Cir. 1991) ("The intention of the parties at the time of the making of the contract controls, not subsequent perceptions.") Where, as here, a contract document contains a signature line and a party rejected the opportunity to sign it, the lack of a signature shows a lack of mutual assent. *Crown Pontiac, Inc. v. McCarrell*, 695 So. 2d 615, 618-19 (Ala. 1997) ("the absence of a signature under the arbitration clause shows a lack of mutuality and assent, where the contract contains a signature line specifically for the arbitration clause"). BHS's failed attempts to obtain Luke's signature to the arbitration program acknowledgment therefore

demonstrates by itself that Luke never gave her assent to the offer for arbitration.

But even if BHS's failure to obtain Luke's signature were not conclusive, the record here shows that *neither* party's conduct supports a reasonable inference of acceptance or mutual assent at the time of alleged contract formation. First, Luke's explicit refusal on two separate occasions to sign the arbitration document and her repeated statements of refusal to be bound by it cannot possibly co-exist with an inference that she assented to arbitration. Certainly, she could not believe that she had agreed to arbitrate after stating that she refused arbitration.

Likewise, the fact that BHS approached Luke a second time seeking her signature after she refused the first request shows that *BHS too* never believed that she agreed to arbitrate. If BHS really believed that Luke's continuing employment established assent, then it would not have needed to approach her a second time several weeks after the employee meeting to ask her once again to sign the arbitration acknowledgment. BHS's second request for Luke's signature thus provides even stronger evidence that there was no acceptance or mutual assent. Of course, Luke's refusal of the second request for her signature did nothing to dispel BHS's notion that she did not agree to arbitration. Under these circumstances, the district court's conclusion that Luke agreed to arbitrate has no basis in fact.

In the face of this record, BHS is forced to argue that "*her words may have said*

‘no,’ but her actions meant ‘yes,’” based on the arbitration document’s statement that continued employment would signify acceptance and on the fact that Luke did not quit her 26 year nursing job. As authority for this argument, BHS and the district court relied heavily on *Baptist Health Systems, Inc. v. Mack*, ___ So. 2d ___, 19 I.E.R. Cas. 1574, 2003 WL 1900697 (Ala. April 18, 2003), a case that is factually different in critical respects. In *Mack*, the employee who was found to have assented to BHS’s arbitration clause actually signed the arbitration document’s acknowledgment form, which stated that:

I acknowledge receipt of the *BHS Dispute Resolution Program* document. I understand that I am obligated to read this document as it governs my continued employment and all future legal disputes between me and Baptist Health System as defined in this document. I understand that it is my responsibility to consult my Human Resource director if I have any questions.

Id. at *3. This is the same acknowledgment that BHS twice presented to Luke and that Luke twice refused to sign because she did not agree to its terms. Furthermore, *Mack* makes no mention of any evidence that the employee there had ever refused BHS’s arbitration offer, which is hardly surprising since she signed the arbitration document. At bottom, *Mack*’s holding that an employee agreed to arbitrate where she signed the BHS arbitration document, where she never communicated a rejection of its terms, and where she continued working in her job after signing the document, does not support BHS’s argument that Luke should be bound in this case where the

record shows precisely the opposite of these first two circumstances.

The absence of a signed written agreement and the presence of undisputed evidence of Luke's rejection of BHS's arbitration offer makes this case far more like *Bailey v. Federal Nat'l Mortgage Ass'n*, 209 F.3d 740 (D.C. Circuit 2000), where the court held that an employee was not bound to arbitrate. In *Bailey*, the employer was trying to enforce an arbitration clause that, like the one here, purported to take effect upon the plaintiff's continued employment: "[B]y starting or continuing work for Fannie Mae on or after that date, each employee is indicating that he or she accepts the Policy and agrees to be bound by it." *Id.* at 742. Also as in this case, the plaintiff in *Bailey* never signed and executed the employer's written arbitration document and instead notified the employer of his intent to reject the arbitration policy prior to its effective date. *Id.* at 744-45.² Based on these facts, the D.C. Circuit held that the parties never entered into a contractual agreement because there was never a "meeting of the minds' as to all material terms." *Id.* at 746. As the court explained:

Fannie Mae's principal claim is that Mr. Bailey agreed to the new arbitration policy because he did not positively reject it. This is a *non-sequitur*. Even if we accepted the premise—which we do not, because the

² Although the plaintiff in *Bailey* gave his employer written notice of his rejection of the arbitration policy, the fact that Luke's rejection of BHS's arbitration program was delivered orally to her supervisor does not make it any less effective. *Cf. Edwards v. Thornburgh*, 396 So. 2d 678, 681 (Ala. 1981) (recognizing effect of oral rejection of written counter-offer).

District Court's finding to the contrary is not clearly erroneous—it would not follow that Mr. Bailey's failure to reject a proposal, without more, evidenced his assent to be bound.

Id. The same result should apply here in light of the same factual circumstances that Luke never signed a written arbitration agreement; that she gave explicit notice to BHS that she was rejecting its offer for arbitration; and that she was allowed to continue working after she rejected the offer.

BHS's argument that Luke's repeated rejections of its arbitration offer were ineffective because the only way she could have rejected the offer was by quitting her job of 26 years has no merit. The district court below held that "Plaintiff continued her at-will employment with BHS and, as a result, accepted the terms of the [arbitration document] by performance." (ER Tab 7, p. 73). But other courts have resoundingly rejected this precise argument. In *Robinson v. Ada S. McKinley Community Services, Inc.*, 19 F.3d 359 (7th Cir. 1994), for example, the Seventh Circuit held that an employee was not bound by an employer's unilateral disclaimer of a pre-existing employment contract based solely on the fact that she continued working after the employer announced the disclaimer. While the employer argued that the plaintiff's continued employment gave the disclaimer effect, the court disagreed and held that "[a]cceptance and consideration cannot be inferred from Robinson's continued work" when that work was merely the performance of her

duties under the pre-existing relationship. *Id.* at 364.³ The Seventh Circuit easily disposed of the employer's argument for assent based solely on the employee's continued employment:

According to McKinley's logic, the only way Robinson could preserve her rights under their original employment contract would be to quit working after McKinley issued the disclaimer. ***That is ridiculous.***

Id. (emphasis added). The argument is no more plausible here, where BHS would mandate that a 59 year old employee must resign from her job of 26 years in order to preserve her constitutional and statutory rights.

The undisputed evidence here demonstrates that Luke rejected the offer for arbitration. The only conduct that BHS has ever tried to identify as signifying Luke's assent is her continued work on her job, conduct that is nothing more than the performance of her duties under the parties' pre-existing 26 year employment relationship. Whatever its significance might be in isolation, this conduct should not be deemed to signify assent here, where it is undisputed that: (1) Luke twice refused BHS's requests that she sign its arbitration document; (2) she repeatedly told her supervisor that she refused to waive her rights or to be bound by the terms of the

³ See also *Phillips v. Cigna Investments, Inc.*, 27 F. Supp. 2d 345, 359 (D. Conn. 1998) ("Indeed, it is somewhat illogical to assume that the plaintiff's continuation of her employment was a knowing acceptance of a unilaterally promulgated [arbitration] policy by her employer.")

arbitration document; (3) she challenged her supervisor to fire her if BHS really meant to require arbitration; and (4) BHS allowed her to keep working for over three more years. The conclusion that Luke rejected BHS's arbitration offer is inescapable.

Alternatively, Luke's conduct in rejecting the arbitration offer may be deemed to give rise to a counter-offer for employment without arbitration that BHS accepted. Before November 1997, Luke worked for BHS in an at-will employment relationship. *See Ex Parte Amoco Fabrics and Fibers Co.*, 729 So. 2d 336, 339 (Ala. 1998) ("The bedrock principle of Alabama employment law is that, in the absence of a contract providing otherwise, employment in this state is at-will, terminable at the will of either party.") BHS's introduction of its arbitration program was an offer to modify this relationship by offering a contract-based forum for resolving future employment disputes. When Luke rejected this offer, she specifically told her supervisor that "You'll have to terminate me because I refuse to sign my rights away." (ER Tab 4, p. 55 ¶5, Luke Aff.). While this response is an unambiguous rejection of BHS's arbitration offer, it also demonstrates Luke's intention to remain employed with BHS. The statement is thus tantamount to an oral counter-offer for employment *without* arbitration. *Hall v. Integon Life Ins. Co.*, 454 So. 2d 1338, 1342 (Ala. 1984) ("any expression of assent restating the offer must not change the material terms of the offer"); *cf. Herring v. Prestwood*, 414 So. 2d 52, 57 (Ala. 1982) ("A written contract

can be modified by the subsequent oral agreement of the parties.”) In specifying that BHS could reject the proposal by firing her, Luke’s counter-offer invited acceptance through BHS’s acquiescence to her continued employment. *See Baptist Health System, Inc. v. Mack*, 2003 WL 1900697 at *7 (“assent may be manifested by ratification”) (citation omitted). BHS’s failure to terminate Luke’s employment for three and a half more years therefore demonstrates its intention to accept her counter-offer for employment without arbitration.⁴

The Alabama Supreme Court recently recognized the effect of a consumer’s “no arbitration” agreement that was formed under comparable circumstances. In *Cook’s Pest Control, Inc. v. Rebar*, 852 So. 2d 730 (Ala. 2002), the parties had a contract under which the individual plaintiff paid the defendant corporation to provide anti-termite treatment for his home. The contract included an arbitration clause. *Id.* at 733. When the agreement was due to expire, the defendant offered renewal on substantially similar terms, which the customer could accept by paying a renewal fee. The customer paid the renewal fee in the manner specified, but included with his payment an “Addendum” making changes to the agreement that would allow him to sue in court and have a jury trial. *Id.* The addendum specified that the company could

⁴ As this Court has held, BHS was free to reject this counter-offer by terminating Luke’s employment based on her refusal to agree to arbitration. *See Weeks v. Harden Manufacturing Corp.*, 291 F.3d 1307 (11th Cir. 2002).

accept these changes by cashing the customer's check for the renewal fee or by continuing to provide service. *Id.* at 734. The company did both. *Id.* When a dispute arose between the parties and the customer sued in state court, the company moved to compel arbitration.

The Alabama Supreme Court held that the defendant's motion was properly denied because the parties agreed not to arbitrate. The court found that the plaintiff rejected the defendant's offer for renewal with the arbitration clause by making a counter-offer for renewal on substantially different terms, namely without arbitration. *Id.* at 737. The court further found that the defendant accepted this counter-offer by cashing the check and continuing to provide service after receiving the no-arbitration proposal. *Id.* *Rebar's* holding that the company assented to the customer's counter-offer for service without arbitration provides strong support for Luke's argument here that BHS accepted her counter-offer for employment without arbitration by allowing her to continue working for three and a half years after she stated that she would only work without the arbitration program.

Regardless of whether Luke's words and conduct in response to BHS's offer for arbitration constituted an ordinary rejection or a counter-offer for work without arbitration, in no event did she ever agree to arbitrate her claims. Although Luke did continue working after the arbitration document's self-proclaimed effective date, she

only did so after refusing BHS's multiple requests for her signature, after telling her supervisor that she rejected the arbitration document and would not sign away her rights, and after challenging BHS to fire her if it was serious about arbitration. Under these circumstances, Luke's continued work in a job she had held for 26 years should not be treated as assent. Luke never agreed to arbitrate her claims.

B. The FAA Does Not Permit Arbitration Without a Party's Consent.

The Federal Arbitration Act only underscores the conclusion that BHS cannot compel arbitration because Luke never consented to it. First, as discussed herein, the FAA only takes effect after a court determines that parties have formed an agreement to arbitrate under state law principles governing contract formation. *First Options*, 514 U.S. at 944; *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002) (“[T]his federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead ‘[o]rdinary contract principles determine who is bound.’”) (citation omitted); *Riley Manufacturing Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998) (“[W]hen the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away.”)

Furthermore, the FAA by its own terms is predicated upon notions of consent so that a party can never be compelled to relinquish her right of access to court where

she has not explicitly consented to do so. The FAA's primary substantive section states in relevant part that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . 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's grounding in contract principles ensures that "[a]rbitration under the Act is a matter of consent, not coercion." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989); *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1193 (11th Cir. 1995) (quoting *Volt*). As the Second Circuit recently held: "Arbitration agreements are no exception to the requirement of manifestation of assent. This principle of knowing consent applies with particular force to provisions for arbitration." *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 30 (2d Cir. 2002) (finding on-line software merchant's arbitration clause unenforceable because consumers did not see it and could not give their assent to it).

Federal policy goals concerning arbitration therefore can never be used to override a party's determination to preserve her rights in the civil justice system. In a case addressing disputes under federal labor law between a union and its members, the Supreme Court held that:

[G]enuine as the Union's interest in avoiding multiple proceedings may be, that interest does not overwhelm objectors' resistance to arbitration

to which they did not consent, and their election to proceed immediately to court for adjudication of their federal rights.

Air Line Pilots Ass’n v. Miller, 523 U.S. 866, 879 (1998); *see also Equal Employment Opportunity Comm’n v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (“[W]e do not override the clear intent of the parties . . . simply because the policy favoring arbitration is implicated.”) This Court has similarly held in applying the FAA that “courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties.” *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1419-20 (11th Cir. 1990). These cases firmly establish that a party who resists an arbitration offer cannot be compelled to arbitrate consistent with the FAA.

Here, the record demonstrates conclusively that Luke never consented to arbitrate her claims. BHS does not dispute any of the evidence showing that Luke refused her supervisor’s request that she sign the arbitration document in November 1997; that she refused her supervisor’s subsequent request for a signature several weeks later; and that she told her supervisor on both occasions that she would not agree to arbitration and would not waive her rights. In the face of this overwhelming evidence of refusal, BHS relies exclusively on Luke’s continued work in her job as evidence of consent to arbitration. But this conduct was nothing more than Luke’s performance of her duties under a pre-existing 26 year employment relationship.

Under these circumstances, the FAA does not require Luke to arbitrate her claims because a consensual agreement to arbitrate is nowhere to be found.

III. LUKE DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HER FEDERAL STATUTORY RIGHTS.

Luke is asserting claims of employment discrimination under Title VII and the ADEA. Numerous courts have held that these and similar civil rights statutes only permit arbitration of claims where a claimant has made a knowing and voluntary waiver of her statutory rights to litigate in court and have a jury trial. Under this statutory waiver standard, Luke should not be held to have knowingly and voluntarily waived her rights after she repeatedly rejected BHS's offers for arbitration.

Courts adopting the knowing and voluntary waiver standard have relied heavily on the 1991 amendments to the federal civil rights statutes. In *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), the court held that the plaintiff did not have to arbitrate her Title VII sex discrimination claims because the employment contract she signed did not describe what types of claims had to be arbitrated. *Id.* at 1305. *Lai's* holding was based largely on the court's finding that Congress, in the 1991 civil rights amendments, intended that there be "at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies, and procedural protections prescribed in Title VII . . ." *Id.* at 1304. The court cited Title VII's pre-1991 prohibition against

waivers of statutory remedies, the purposes of the 1991 amendments to *expand* the remedies available to claimants, and the legislative history of these amendments showing that arbitration was encouraged only where “the parties knowingly and voluntarily elect to use these methods.” *Id.* (quoting 137 Cong. Rec. S. 15472, S. 15478 (Oct. 30, 1991) (statement of Senator Dole)).

Courts have subsequently applied this statutory knowing and voluntary waiver standard to prohibit employers from compelling arbitration of Title VII and other employment discrimination claims in certain circumstances. *See, e.g., Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1155-56 (9th Cir. 1998) (no knowing waiver where signed document did not reference fact of arbitration clause in incorporated booklet); *Penn v. Ryan’s Family Steakhouses*, 95 F. Supp. 2d 940, 954-55 (S.D. Ind. 2000) (ADA claimant “did not make a knowing and voluntary waiver of a judicial forum” by signing documents during job interview), *aff’d and remanded*, 269 F.3d 753 (7th Cir. 2001); *cf. Garfinkel v. Morristown Obstetrics & Gynecology Assoc’s, P.A.*, 773 A.2d 665, 670-72 (N.J. 2001) (arbitration clause not referencing statutory claims fails to satisfy state employment discrimination statute’s requirement of a “clearly and unmistakably established” waiver) (citation omitted).

The ADEA also establishes a knowing and voluntary standard for any waiver of a claimant’s statutory rights. The Act explicitly declares that “An individual may

not waive any right or claim under this Act unless the waiver is knowing and voluntary.” 29 U.S.C. § 626(f)(1). The Act also sets minimum standards for determining whether a waiver is knowing and voluntary by requiring, for example, that the waiver be part of a written agreement that is easy to understand; that it specifically refer to rights under the ADEA; that it not waive rights in future disputes; that the individual party be advised to consult with an attorney and be given a period of 21 days to consider the agreement; and that the individual be given a seven-day period within which to revoke her acceptance. 29 U.S.C. § 626(f)(2).

At least one federal court has held that the ADEA’s anti-waiver rules apply to contracts limiting a claimant’s right to a jury trial under the Act. In *Hammaker v. Brown & Brown, Inc.*, 214 F. Supp. 2d 575 (E.D. Va. 2002), the court held that the statutory language regulating waivers of “any right or claim under this Act” must encompass waivers of procedural rights such as the right to a jury trial. *Id.* at 580. Under this reading of the Act, BHS’s motion to compel arbitration of Luke’s ADEA claims should fail because BHS cannot satisfy either the specific requirements of Section 626(f)(2) or the general requirement of Section 626(f)(1) for a “knowing and voluntary” waiver after Luke repeatedly refused its arbitration program.

Although *Hammaker* represents a minority interpretation of the ADEA among federal courts in applying the Act’s anti-waiver rules to waivers of the right to a jury

trial, the reasoning of the opinion carries persuasive force. *Hammaker* recognized several circuit court opinions holding that arbitration clauses are not subject to the ADEA's anti-waiver rules because those rules only apply to waivers of substantive rights. See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 13-14 (1st Cir. 1999); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 181 (3d Cir. 1998), *abrogated on other grounds by Blair v. Scott Specialty Gases*, 283 F.3d 595, 599-602 (3d Cir. 2002); *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995). *Hammaker* rejected these decisions, however, for relying on an untenable distinction between procedural and substantive rights in the face of statutory language regulating waivers of "any right or claim under this Act." *Hammaker*, 214 F. Supp. 2d at 580. Although *Hammaker* also acknowledged a distinction between arbitration clauses and jury trial waivers calling for bench trials, *id.* at 579, the court never explained whether or how this distinction related to the cited statutory language. Since arbitration clauses necessarily abrogate a claimant's right to a jury trial under the ADEA, they must be governed by the Act's "knowing and voluntary waiver" requirement.

Luke did not knowingly and voluntarily waive her statutory rights to sue in federal court and have a jury trial in this case. She repeatedly and unambiguously rejected BHS's offers for arbitration. BHS's argument that Luke's only choice in November 1997 was between arbitration and quitting the nurse's job she had held for

26 years cannot possibly be the foundation for a “knowing and voluntary waiver” of her statutory rights. Luke should not be required to arbitrate her statutory claims.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the district court’s order compelling Luke to arbitrate her statutory race and age discrimination claims.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief was prepared using Times New Roman typeface in 14-point font and contains 7,672 words, excluding Tables of Contents and Authorities and Certificates of Interested Parties, Compliance, and Service.

Dated: October 6, 2003

Michael J. Quirk

CERTIFICATE OF SERVICE

I hereby certify that one signed original and six copies of the foregoing Brief of Plaintiff-Appellant were sent by overnight delivery this 6th day of October, 2003 to the Clerk of the United States Court of Appeals, Eleventh Circuit as follows:

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