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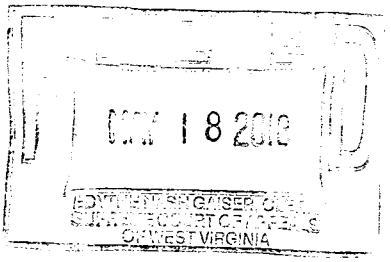
NO. 18-0007

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Anita Collins,
Plaintiff Below, Respondent

v.

EMPLOYEE RESOURCE GROUP, LLC, DAVID CURRY and JAMES MOLLETTE
Defendants Below, Petitioners

From the Circuit Court of Mingo County, West Virginia
Civil Action No.: 16-C-214

RESPONSE BRIEF OF RESPONDENT ANITA COLLINS

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I. Statement of the Case

a. Factual Background

This case was brought against Employee Resource Group (sometimes hereinafter "ERG"/Petitioner") David Curry (sometimes hereinafter "Curry"/Petitioner"), and James Mollette (sometimes hereinafter "Mollette /Petitioner") by Complaint filed in November 2016 in the Circuit Court of Mingo County. *See* APP 4-14. Respondent, Anita Collins ("Respondent/Respondent"), alleged Petitioners discriminated against her by terminating her employment soon after she had complained of workplace sexual harassment perpetrated by Mollette, Respondent's supervisor. *See* APP 5-7. ERG owns and operates a Wendy's restaurant located in South Williamson, Kentucky. *See* APP 5 at ¶ 9.

Respondent was hired with Petitioner ERG in April 2016, and in August 2016, became the victim of workplace sexual harassment. *See* APP 6 at ¶ 13. During an August incident, Mollette requested that Respondent perform lewd sexual acts on him while she bent over to tie her shoe because "she was already down there." *Id.* Further, Respondent alleges that several weeks later Mollette approached her in the Wendy's parking lot and physically grabbed her buttocks area while making a lewd comment about the same. *See* APP 6 at ¶ 15. Respondent asserts that she reported both incidents to Curry who is store manager and Mollette's supervisor, however, no further action was taken by the employer. *See* APP 6 at ¶ 14, 16.

Finally, on November 2, 2016, Respondent asserts that Mollette informed her that she should make arrangements to wear different black pants than Wendy's standard issue because her "ass" did not look in the Wendy's uniform pants. *See* APP at ¶ 18. Because of that comment, Respondent informed Mollette that he could kiss her "ass." *Id.* On November 3, 2017, the very

next day, ERG terminated Respondent's employment over the November 2, 2016, incident for "not following company policies." *Id.* As a result of these actions, Respondent filed her suit in the Mingo County Circuit Court and the Petitioners moved to compel arbitration.

As part of the hiring process, ERG contends that applicants apply for employment through a website, 4aWendys'job.com. *Appendix*, p. 154. If successfully chosen to become an ERG employee, ERG contends the applicant is then sent an email by ERG vendor, Talent Reef, with various information, including a Dispute Resolution Booklet. *Appendix*, pp. 157,162. According to Michael Ball, the hiring manager at the South Williamson, Kentucky, Wendys, the applicant is then left to his or her own devises to complete any paperwork presented, without explanation or input from ERG. *Appendix*, p. 161.

More troubling, Respondent never signed for the Arbitration Agreement, and, therefore, no contract exists between the parties. At best, Respondent's name was pre-stamped to an Arbitration Agreement that she never signed nor read. In his deposition, Michael Ball, the hiring manager, testified that Respondent's name was automatically stamped to each document when she signed into her email and that not every policy had to be signed for. *Appendix*, p. 231, lines 10-17. More specific in his deposition, Mr. Ball agrees that Respondent did not sign the receipt indicating she had received the Dispute Resolution Agreement. Mr. Ball stated that there was no employee number or employee signature on that document. *Appendix*, p. 228, lines 15-21.

In an effort to prove that Respondent did in fact sign its dispute resolution agreement and that an agreement between the parties existed, ERG contacted both Respondent's email carrier, Yahoo, and its own hiring program, Talent Reef, seeking documents pertaining to the formation of the agreement to arbitrate. *Appendix*, p. 547 at ¶ 31. Unfortunately for Petitioner, but not surprisingly to Respondent, the information did not exist. *Id.* Simply stated, the Respondent did

not sign for or agree to arbitrate her disputes with Petitioner ERG; thus, no enforceable agreement exist between the parties.

Additionally, in its Agreement, ERG asserts that not all disputes must be submitted to arbitration. *Appendix*, p. 60. In Petitioners' attempt to pick and choose which disputes it wished to arbitrate, it seemingly asserted its own definition of "non-legal" disputes into the Agreement, and which it agrees may be brought in circuit court. *Id.* Among ERG's "non-legal" disputes which it states are not subject to arbitration are "issues with co-workers." *Id.* At the very heart of Respondent's claim are issues with a co-worker who happened to be her supervisor. *Appendix*, p. 5-7. As noted those claims are not required to be arbitrated per the agreement. *Appendix*, p. 60.

b. Procedural History

Respondent filed her Complaint in November 2016, in the Circuit Court of Mingo County against Employee Resource Group, James Mollette, and David Curry. *Appendix*, p. 4-14. In that Complaint, Respondent alleged violations of the Kentucky Civil Rights Act, common law wrongful termination, extreme and outrageous conduct, hostile work environment, and negligent retention of a supervisor. *Appendix*, pp. 4-14. All counts are based on ERG's failure to address sexual discriminatory actions of Mollette due to his workplace behavior, and the subsequent termination of Respondent. *Appendix, pp. 4-14.*

In or around February 14, 2017, the Petitioners filed their Motion to Enforce Arbitration Agreement. *Appendix*, p. 39-64. Thereafter, on March 3, 2017, Respondent filed her response to said Motion (Appendix, 65-88), and the Petitioners filed their Reply on March 9, 2017. *Appendix*, pp. 89-134. On May 22, 2017, the Mingo County Circuit Court denied the Motion to Enforce

Arbitration; however, it permitted Petitioners to renew said Motion after conducting discovery. *Appendix*, pp. 135-139.

After conducting discovery, the Petitioners then renewed its Motion to Enforce the Arbitration Agreement on or about October 17, 2017. *Appendix*, p. 411- 486. On October 24, 2017, Respondent filed her Response Opposing the Renewed Motion (*Appendix*, p. 487-541), and On December 12, 2017, the Mingo County Circuit Court again denied the Motion the Enforce Arbitration. *Appendix*, p. 542-548. This Order is the basis of Petitioners' appeal.

II. SUMMARY OF ARGUMENT

Petitioners attempt to argue the enforceability of the Agreement's terms as a basis for its validity; however, the discussion need not proceed that far. The parties did not enter into a contract, thus Respondent is not required to submit her claims to arbitration. The evidence clearly shows the Respondent did not receive or sign the receipt for the Petitioners' Dispute Resolution Program. Further, the causes of action in this matter arose in the State of Kentucky; therefore, Kentucky's substantive law will apply. Kentucky courts have routinely ruled in these matter that a mere receipt of a document, if it exist, is not enough to bound a party to the arbitration agreement. Accordingly, this Court should affirm the lower court's ruling allow this matter to remain on that court's litigation docket.

III. STATEMENT REGARDING ORAL ARGUMENT

Respondent believes that oral argument in unnecessary pursuant to West Virginia Rules of Appellate Procedure 18(a)(3) and (4), because the facts and arguments are adequately presented in the briefs and record on appeal. The decisional making process will not be significantly aided

by oral argument, and the dispositive issues have been authoritatively decided. If the Court deems oral argument necessary, Respondent has no preference between Rule 19 and Rule 20.

IV. ARGUMENT

A. Jurisdiction

An order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine. Syl. pt. 1, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556 (2013). Petitioners have appealed the lower court's December 29, 2016, Order in which arbitration was denied, thus, such ruling is subject to immediate appeal in this Court.

B. Standard of Review

The main issue to be decided on appeal is the interpretation of a contract. When an appeal from an order denying a motion to dismiss and to compel arbitration is properly before this Court, our review is *de novo. West Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 796 S.E.2d 574 (2017). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." *Chrystal R.M. v Charlie A. L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

C. Applicable Substantive Law[1]

Under the Federal Arbitration Act, whether a valid arbitration agreement exists between the parties is determined by the applicable state contract law which in this case is Kentucky. The

[1] The cause of action in this matter occurred in Kentucky. Kentucky's substantive law will govern as to whether a contract was formed between the parties. The Petitioner admits as such in its lower court filings. *Appendix*, p. 416. In its appeal brief, the Petitioner relies solely on West Virginia state law to contradict the circuit court ruling. To the extent Petitioner relies on West Virginia state law to govern the formation of a contract in this matter, the Respondent respectfully asserts that argument was waived by not raising such in the lower court proceedings.

Kentucky Court has repeatedly held the arbitration agreements are not to be treated differently than any other contract. The validity of an arbitration clause is a matter of contract law and should be reviewed with reference to state law of contract formation. *Seawright v. Am. Gen. Fin. Servs.*, 507 F.3d 967, 972 (6th Cir.2007). Here, the Court must apply Kentucky law. The agreement was allegedly executed in Kentucky, Petitioner has a principal place of business in Kentucky, Respondent's termination occurred in Kentucky, and neither party argues for another state's law to apply. *Cooper v. MRM Invest. Co.*, 367 F.3d. 493, 499 (2004).

In general, West Virginia adheres to the conflicts of law doctrine of lex loci delicti. *State ex rel. American Electric Power Co., Inc. v. Swope*, 239 W.Va. 470, 801 S.E.2d 485 (2017). Pursuant to doctrine of "lex loci delicti," the substantive rights between the parties are determined by the law of the place where the cause of action arose. *Id.* In this matter, it is clear the cause of action arose in Kentucky.

D. The Mingo County Circuit Court properly applied Kentucky law and denied the Petitioners' Motion to Enforce Arbitration as no contract between the parties existed. (Assignment of Error 1).

i. Deposition of Michael Ball

Michael Ball is a supervisor at Petitioners' South Williamson, Kentucky, Wendys, and is in control of the hiring process for the store. *Appendix*, p.155. Further, Michael Ball testified that he does not review any arbitration agreement with hired employees, the agreement itself it sent to the applicant's home via email and left to the applicant's devises to sign and understand the arbitration agreement. *Appendix*, pgs.157-158.

Petitioners offer no type of explanation as to what each document to be signed in the hiring process means to the new hire. Mr. Ball testified that although he informs applicants to expect an email as part of the hiring process, he does not explain the content of the document. When asked about explaining the documents to the new hire, Mr. Ball indicated:

A. They're explained to that before they do-- like I said, when they leave, I always explain to them that I am going to be sending them an email and all these forms needs to be filled out before you come to orientation.
Q. Is there any type of explanation in the email explaining what the forms are?
A. I'm not sure.
Q. Do you place one -- an explanation in the email?
A. No....

Appendix, p. 161, lines 9-23.

What is more concerning, and indicative to the fact there is no contract, the Petitioners' Arbitration Agreement was never consented to nor signed by Respondent. When asked in his deposition, Mr. Ball responded the line of questioning as follows:

Q. Earlier Mr. Shafer [Petitioners' counsel] had asked you about the Talent Reef[2] and the forms being emailed. Do you remember that?
A. Yes...
Q. I want to go through this please. This is the Agreement and receipt for dispute resolution program. Can you show me where there is even a name or a number on this crew member signature?
A. There is not no number there.
Q. There is not a name either, is there?
A. No, there is not a name on that one...
Q. How did that get by the Talent Reef program if that is how you were signing?
A. I don't know exactly on their side of it but I do know when they put the number in, like their password or whatever, it automatically stamps their name to it.
Q. Anita Collins' name was automatically stamped to these documents?
A. Yes, when we put that code in, yes. I am pretty sure that is how that works.
A. I'm not sure if that's -- that's -- she would have to set the password or something like that up herself.
Q. I am not asking you what the password is. I am asking you on this document where would it be entered?
A. I don't know.
Q. But it's not, is it?

[2] Talent Reef is a program used by Wendy's in its hiring process. *Appendix*, 159.

A. No.
Q. As a matter of fact, the only thing on here is a pre-stamped name of Anita Collins?
A. Correct.

Appendix, p. 227-232.

A review of the "Agreement" clearly indicates Respondent did not sign the document. Petitioners' have presented a document which is labeled Agreement & Receipt for Dispute Resolution Program. *Appendix*, pgs. 63-64. Within the three (3) page document, there are multiple places in which the employee is asked to "digitally sign." We now know those "digital signatures" were merely pre-stamped to the documents once the Respondent signed into her email. Respondent maintains that she has never seen nor signed the documents, and an additional review of the document, indicates that Petitioners' agent has signed the document, not merely a typed name. *Id.*

In Kentucky, the court has been faced with this very issue before and it found that as a matter of general contract law, an individual cannot be legally bound by an agreement to which she did not consent. See *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009) (holding that assent to be bound by the terms of an agreement must be expressed and simple acknowledgment of the receipt of the document is insufficient). Here, the Respondent neither consented nor signed the document. As stated in *Ally Cat*, there must be an assent to be bound to the contract. All that exist here is a pre-stamped name to a document.

Under both the Federal Arbitration Act (FAA) and the Kentucky Uniform Arbitration Act (KUAA), a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. *Ping v. Beverley Enterprises, Inc.*, 376 S.W.3d 581, 590 (Ky. 2012); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004). A party meets that prima facie burden by providing copies of a written and signed agreement to arbitrate. *MCH Kenworth-Knoxville/Nashville v. M & H Trucking, LLC*, 392 S.W.3d 903, 906 (2013). Unless the parties

clearly and unmistakably manifest a contrary intent, that initial showing is addressed to the court, not the arbitrator, and the existence of the agreement depends on state law rules of contract formation. *Id.*; *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31, 129 S.Ct. 1896, 1908, 173 L.Ed.2d 832 (2009). In the instant case, Petitioners' cannot conclusively produce a signed agreement between the parties, thus, it cannot meet its necessary burden to compel arbitration.

ii. Respondent's Yahoo Email Account

On July 17, 2017, Petitioners deposed Respondent in this matter. *Appendix*, p. 257. During its questioning, Petitioners asked Respondent if she had maintained a Yahoo email account. *Appendix*, p. 276. Respondent admitted she did have such an account; however, that email account had been inactive for eight (8) months prior to Respondent's deposition. *Appendix,* p. 276

Believing Respondent's email account would reveal information to support Petitioners' assertion that Respondent she did receive and sign for the arbitration agreement, the Petitioners' issued a subpoena to Yahoo on August 22, 2017, seeking information regarding Respondent's email account. *Appendix*, pgs. 426-434. Having nothing to hide, and in an effort to cooperate with the Petitioners' request, Respondent signed a release on October 9, 2017, permitting Yahoo to turn over any emails to the Petitioners which pertained to its subpoena. *Id.* The Petitioners assert that because Respondent could not access her email, she has waited just long enough to prevent it from gathering the information needed to prove the arbitration agreement existed. This is false, the reason Petitioners cannot produce a valid arbitration agreement is because it does not exist. Further, Petitioners waited nearly one (1) year after the filing of the lawsuit to attempt to collect or subpoena the documents it believed supported its arbitration position.

E. According to Petitioners' Agreement, Respondent's claims are outside the scope of the Agreement, thus, are not required to be arbitrated.

The Arbitration Agreement the Petitioners seeks to enforce contains a section identifying "Claims not Subject to Arbitration." *Appendix*, pgs. 59-60. Contained within that section are claims for "non-legal" disputes. *Id.* The Petitioner then defines non-legal disputes, in-part, as "issues with co-workers." *Id.*

Petitioner is likely to argue that it attempts to define "non-legal" disputes as those which are not statutory or common law in Step Two of its Agreement; however, it is clear that "issues with co-workers" is contained in Petitioners' definition of non-arbitrable disputes. *Id.*

At the very least, Petitioners have created an ambiguity in its own Agreement, and, in Kentucky any ambiguity found in contract language is to be construed against the drafter, and further, the contract must be liberally construed in favor of the non-drafting party. *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633 (2007). It is unmistakable that Petitioner was the drafter of this Agreement, thus the non-arbitrable matters defined in the Agreement must be construed liberally and, in the light, most favorable to the Respondent.

It is uncontroverted that Respondent's allegation found in her Complaint all revolve around "issues with co-workers." The "issues with co-workers" is so clear Respondent named two of her co-workers as parties. Petitioners intentionally excluded these actions from its Agreement.

CONCLUSION

For all the reasons outlined above, the Respondent, Anita Collins, prays this appeal be refused; and further, respectfully request this Honorable Court affirm the December 12, 2017, Order of the Mingo County, West Virginia Circuit Court and remand this case back to that court for trial.

Anita Collins,
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CERTIFICATE OF SERVICE

I, Nathan D. Brown, counsel for the Petitioners, do hereby certify that on this the 17th day of May, 2018, a copy. Of the foregoing Response Brief Of Respondent Anita Collins was served upon Bradley K. Shafer, Counsel for Petitioner, by depositing true copies thereof in the regular United States Mail, postage prepaid, and addressed to him at his last known address.

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