07-4135-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CARLA MANIGAULT,

Plaintiff-Appellee,

—v.—

MACY'S EAST, LLC, TERRY WHITTAKER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLANTS

MEIR FEDER
SAMUEL ESTREICHER
JONES DAY
222 East 41st Street
New York, New York 10017
(212) 326-3939

Attorneys for Defendants-Appellants Macy's East, LLC, and Terry Whittaker

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellant Macy's East, LLC, certifies that it is a wholly-owned direct subsidiary of Macy's Department Store, Inc., and an indirect wholly-owned subsidiary of Macy's Retail Holdings, Inc. and Macy's, Inc. Macy's, Inc. is a publicly-held company whose stock is traded on the New York Stock Exchange.

ORAL ARGUMENT REQUEST

Defendants-Appellants Macy's East, LLC, and Terry Whittaker respectfully request oral argument and submit that argument may be useful to the Court to answer any questions that the Court may have in resolving the legal issues presented by this appeal.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES, REGULATIONS, AND RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Defendants-Appellants Macy's East, LLC ("Macy's"), and Terry Whittaker ("Whittaker") appeal from an order of the United States District Court for the Eastern District of New York denying defendants' motion to compel arbitration. The district court's opinion is reported at *Manigault v. Macy's East, LLC*, 506 F. Supp. 2d 156 (E.D.N.Y. 2007) (Block, J.).

JURISDICTIONAL STATEMENT

Plaintiff-Appellee Carla Manigault ("Manigault") filed a complaint asserting claims under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, *et seq.*, the New York State Human Rights Law, N.Y. Exec. Law § 296, *et seq.*, and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-102. The district court had subject-matter jurisdiction over this suit pursuant to 42 U.S.C. § 2000e-5(f)(3), 28 U.S.C. § 1331, and 28 U.S.C. § 1367. This Court has appellate jurisdiction pursuant to 9 U.S.C. § 16(a)(1). The district court's memorandum and order denying defendants' motion to compel arbitration was entered on August 28, 2007 and defendants filed a timely notice of appeal on September 25, 2007. *See* Fed. R. App. P. 4(a)(1). The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, permits interlocutory review of a denial of a motion to compel arbitration. *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 234 (2d Cir.), *cert. denied*, 127 S. Ct. 838 (2006).

QUESTION PRESENTED

Under New York law, an at-will employee who receives notice of a change in the terms of her employment and elects to continue her employment is deemed to agree to the new terms. The question at issue in this case is: When an employer notifies employees that it is instituting a policy under which all employees are required to arbitrate all employment disputes unless they affirmatively opt out of such arbitration by a particular date, and an at-will employee continues her employment and chooses not to opt out, is that employee bound to arbitrate her employment disputes?

STATEMENT OF THE CASE

Plaintiff filed suit in the United States District Court for the Eastern District of New York against Macy's and Whittaker, asserting claims of sexual harassment and retaliation under federal, state, and municipal discrimination laws. Defendants filed a motion to compel arbitration pursuant to the FAA. The district court denied the motion to compel arbitration, and this appeal followed.

INTRODUCTION

This case raises the issue whether an employer can enforce an arbitration agreement with an at-will employee who was given advance notice that she (and the employer) would be bound by the arbitration agreement unless she affirmatively opted out of arbitration. Given the posture of the case, moreover, it must be assumed, as the district court did below, that the employee, plaintiff Carla

Manigault, "received all of [Macy's] mailings and was told explicitly of the opt-out procedure at the meeting she attended." (A156.) The district court, however, expressly disagreeing with the overwhelming weight of authority, held that Manigault was not bound by the agreement because she purportedly did not affirmatively consent to arbitration. In doing so, the court departed from longtime New York employment law principles establishing that an at-will employee's conduct in continuing to work after notice of a change in the terms of employment constitutes affirmative consent to the new terms.

This departure from settled employment law principles raises serious concerns for large employers who, at least until now, have been able to institute uniform changes in terms and conditions of employment by giving employees advance notice of those changes, without having to undertake the costly and uneven process of securing affirmative endorsements from each employee to each new term. The ruling adds a further irony by suggesting that Macy's could have enforced the instant agreement had it imposed an inflexible arbitration requirement, rather than offering employees the opportunity to opt out of the agreement. As a result, the district court's ruling, while purporting to benefit employees, will, if not reversed, create a strong incentive for employers to insist on arbitration without affording their employees any opportunity to opt out.

STATEMENT OF FACTS

A. Overview of Macy's Solutions InStore Program

In the fall of 2003, Macy's introduced the Solutions InStore ("SIS") program, a four-step dispute resolution program culminating in binding arbitration. (A19-23, 26-47, 79-81.) The first three steps are: (1) an employee's presentation of an informal grievance to local management; (2) if the employee is not satisfied with the resolution, she can obtain review of the decision by senior divisional Human Resources professionals; and (3) if the employee is still dissatisfied, she can choose further review either by the corporate office of the SIS program, which does not report to the employee's local or divisional management, or—as to disputes concerning certain subject areas—by a panel of her peers. (A19, 27-31, 53-56.) Macy's is bound by a resolution of the dispute at any of these steps, (A19, 50, 55); the employee, however, is not bound and can take the dispute to the fourth and final step—mandatory binding arbitration under the auspices of the American Arbitration Association, (A19, 27, 29, 32-47.)

The arbitration step of the SIS program makes available the same remedies that an employee could recover in court. (A44.) In addition, the program offers both financial assistance and certain procedural benefits to employees who bring claims in arbitration. (A37, 44.) Employees are provided up to $2,500 annually for reimbursement of any attorney's fees**.** (A44.) In addition, for employees who

choose not to bring an attorney to the arbitration proceeding, Macy's is barred from having an attorney present at the proceeding. (A37.) Employees who elect to proceed without an attorney can also receive an additional $500 to cover incidental costs. These features help to provide a means of redress for employees whose claims otherwise would not attract private counsel. (A44.)

The SIS program became effective on January 1, 2004. (A34, 90.) Unlike arbitration programs maintained by many other employers, Macy's allowed its incumbent employees the opportunity to exclude themselves from the binding arbitration step of the program. (A19-25, 60, 78.) Employees like Manigault who were on the payroll as of its effective date were informed that if they wished to exclude themselves from arbitration, they would have to take advantage of the opt-out procedure by returning an Election Form to the SIS office by October 31, 2003. (A60.) If they did not return the form by that date, both they and the company would be subject to binding arbitration. For those who did not opt out prior to October 31, 2003, they were given a second and final opportunity to opt out in October 2004, following the same procedure. (A78.) Manigault did not avail herself of either opportunity to opt out. (A22-25.)

B. Information Sessions Explaining Macy's Arbitration Policy

To ensure that all employees were aware of the details of the SIS program and of the obligation to opt out of binding arbitration if they wished to be excluded

from the requirement to arbitrate employment disputes, Macy's conducted information sessions explaining the program, which active employees were required to attend. (A19-20, 79-81.) These small group sessions included a Power Point presentation and a video explaining the new policy, as well as a twelve-page brochure about the SIS program. (A19-20, 48-59, 79-107, 146.) At the conclusion of the presentation, employees were given an opportunity to ask any questions they had about the program. (A106.)

The Power Point presentation explained that the SIS policy would take effect on January 1, 2004 and that arbitration under Step 4 "is binding on both the employer and the employee." (A90.) In addition, the presentation specified that the entire program, including Step 4, would apply to all employees "automatically," but that arbitration under Step 4 was "voluntary" in that employees would be given an opportunity to choose not to be covered by Step 4. (A103-04.) Employees wishing to opt out in this fashion, however, would be "require[d]" to so inform Macy's "in writing." (A104.) In particular, the following slide, *id.*, was shown during the information sessions:

Step 4: The Decision in [sic] Yours

- All employees will be covered by Steps 1-4 automatically.
- Step 4, however, is voluntary.

- If an employee chooses not to be covered by and receive the benefits of Step 4, we will require they tell us in writing.
- Current employees will have this opportunity in the Fall of this year from materials they receive in a home mailing.
- The election is maintained during your career with the Company.

Echoing these statements, both the video and brochure explained that arbitration under Step 4 would be provided to all employees unless they elected to be excluded from arbitration by returning a form that would be mailed to them in the coming weeks. (A58, 146.) The video also encouraged employees who had questions to speak with a human resources representative or to contact the SIS office, (A146), and both the presentation and brochure informed employees that there would be a second opportunity to exclude themselves from arbitration in a year. (A58, 105.)

A number of these information sessions were held at Macy's Avenue U location where plaintiff worked (A19-20, 79-81), and plaintiff's counsel conceded at oral argument before the district court that plaintiff attended one of them, (A131-32; *cf.* A81 (explaining that plaintiff had a work schedule that required her to attend one of these information sessions).)

C. Macy's Mailing Of Notice, And Plaintiff's Election To Continue To Work Without Opting Out

After conducting the information sessions, Macy's mailed to all its employees a package (the "SIS package") containing the SIS Plan Document and the Early Dispute Resolution Program Election Form ("Election Form"), along with a pre-addressed postage-paid envelope for returning the Election Form. (A20-22, 26-47, 60, 111.) The Election Form states that in order "*not to be covered* by the benefits of Arbitration, Step 4 of the [SIS] program" an employee must return the Election Form to Macy's by October 31, 2003. (A60) (emphasis in original).

The Plan Document included a full arbitration agreement detailing the specifics of arbitration under Step 4. (A26-47.) The document explained that arbitration covers all employees who have not "return[ed] an 'Arbitration Election Form' within the prescribed time limits." (A32.) It also stated that the SIS program "is effective on January 1, 2004" and that any employment related disputes "raised on or after the effective date must be arbitrated pursuant to the[] rules and procedures [set out in the Plan Document]." (A34.) In addition, the Plan Document spelled out the consequences of arbitration, stressing "that neither the Associate nor the Company can file a civil lawsuit in court against the other party," *id.*, and listing the various statutory claims subject to arbitration, including Title VII and state discrimination statutes (A32-33).

The SIS packages were sent by first class mail to the home addresses of all active Macy's employees, using the same procedures and same address used to provide employees with other important documents that provide information and may require action, including health benefit documents, 401(k) documents, and employees' annual W-2 forms. (A20-23, 111-18.) Plaintiff's name was included on a list of recipients generated as part of the SIS mailing process, indicating that a SIS package was sent to her home address. (A21.) To ensure that all employees received SIS packages, the SIS program mailing procedure included a procedure to track packages returned as undeliverable, and to ensure that the affected employees received a SIS package at their work locations. (A21-22, 61.) Although Manigault denied receiving her SIS package, (A108-09), it was not returned as undeliverable, (A21-22). Indeed, none of the numerous mailings sent by Macy's to Manigault's home address of record has ever been returned as undeliverable.[1] (A21-22, 111-12, 115, 118.)

For example, among the numerous documents plaintiff received from Macy's at the same address are 401(k) documents. (A114-15.) Under that program, an initial 401(k) packet sent to plaintiff explained that, unless plaintiff

[1] Manigault's denial is of no relevance to this appeal, in that the district court expressly decided the motion on the assumption that Manigault "received all of [Macy's] mailings and was told explicitly of the opt-out procedure at the meeting she attended." (A156.)

elected otherwise, she would automatically be enrolled in the 401(k) plan, with three percent of her salary going directly into a 401(k) account. *Id.*[2] Plaintiff did not opt out, and she was therefore enrolled in the plan, following which she has been sent quarterly 401(k) account statements at the same home address. *Id.*

With respect to the SIS program, following the mailings, approximately ten percent of eligible employees opted out of arbitration by returning the Election Form included in the mailing. (A22, 70.) Manigault was not one of them. (A22-23.) In January 2004, Macy's sent a welcoming brochure about the SIS program to all employees, including plaintiff, who had not sent in an opt-out form. (A23, 62-65.) The brochure encouraged employees to contact their manager or human resources representative if they had any questions about the SIS program. (A65.) Additionally, the brochure directed employees to a SIS website, where they could obtain additional copies of the Plan Document. *Id.*

In addition, in October 2004, Macy's provided employees a second opportunity to opt out of arbitration. (A23-25, 78.) A new election form ("2004 Election Form"), which mirrored the initial Election Form, was mailed using Macy's standardized mailing procedure, along with a newsletter and brochure.

---

[2] The Macy's 401(k) plan also includes a company contribution in addition to the employee's contribution through payroll deductions. *See* http://www.macysjobs.com/macyseast/benefits/future.asp (last visited Dec. 17, 2007).

(A23-24, 66-78.) Macy's required employees to return the 2004 Election Form by November 15, 2004 if they wished to opt out of arbitration. (A22-25, 78.) Plaintiff, again, did not return the form. (A25.)

D. The District Court's Order Denying Defendant's Motion To Compel Arbitration

The district court denied defendants' motion to compel arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, finding that, even assuming plaintiff had full notice of the terms of the SIS program and the opt-out obligation, there was no basis for finding a binding arbitration agreement. (A147-63.) The district court recognized that courts had compelled arbitration in every one of the "cases involving similar or identical circumstances" of which it was aware—including cases involving the SIS program itself—and further recognized that some of those cases could not be distinguished. (A161-63.) Nonetheless, the court stated that it would "choose[] not to follow them," because it believed they "compromised the time-honored principle" that "an offeree's utter silence and inaction" cannot give rise to a binding agreement. (A162.)

In addition, the court rejected the argument that there was a course of dealing under which Manigault's failure to return the opt-out form could reasonably be deemed acceptance of the new terms instituted by Macy's, on the ground that Macy's purportedly had not offered evidence of any prior situations in which Manigault had accepted new terms in this fashion. (A160-61.) The court

offered no explanation of why Manigault's automatic enrollment in the 401(k) plan through her failure to opt out did not constitute such evidence.

Finally, the district court declined to address whether Manigault's continuing in her employment under the terms of the SIS program constituted an agreement to arbitrate under New York law, stating that the inclusion of an opt-out option prevented the terms of the SIS program from constituting a condition of employment. (A162-63.)

SUMMARY OF ARGUMENT

The district court committed a fundamental error by failing to recognize that, under New York law, an at-will employee who receives notice of a change in the terms of her employment and elects to continue her employment is deemed to agree to those new terms by continuing to work. *E.g.*, *Shah v. Wilco Sys., Inc.*, 27 A.D.3d 169, 174, 806 N.Y.S.2d 553, 557 (1st Dep't 2005) ("[A]n employer can change any term in an at-will employment and the employee's continued employment is deemed to be a consent thereto."), *leave dismissed in part and denied in part*, 7 N.Y.3d 859, 857 N.E.2d 1129, 824 N.Y.S.2d 597 (2006). Here, Macy's modified the terms of Manigault's employment by instituting the terms of the SIS program—*i.e.*, requiring employees to accept binding arbitration unless they affirmatively opted out of such arbitration. Under well-settled New York law,

by continuing to work under these new terms—and choosing not to opt out—Manigault necessarily agreed, through her conduct, to binding arbitration.

The district court's observation that "no unilateral conduct on the part of an offeror . . . can ever be the basis for the creation of a binding agreement in the face of an offeree's utter silence and inaction," (A162), therefore misses the point. Manigault is not bound to arbitrate through "unilateral" action by Macy's, or through "utter silence and inaction." She is bound, under long-settled New York employment contract principles, by her conduct of continuing to work under the modified terms of employment. Nor can the terms of the SIS program be deemed not to constitute new terms of employment, as the district court believed, merely because those terms gave employees the option of opting out rather than "requiring them to agree to arbitration." *Id.* This a clear legal and analytical error. Under New York law, the SIS program as a whole—including its procedures for opting out—was the new condition of employment, and plaintiff's continuing to work constituted acceptance of those procedures, including the requirement that she affirmatively opt out if she was to exclude herself from the obligation to arbitrate her employment disputes.

Accordingly, the district court's order should be reversed.

STANDARD OF REVIEW

A district court's denial of a motion to compel arbitration is reviewed *de novo*. *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 234 (2d. Cir.), *cert. denied*, 127 S. Ct. 838 (2006).

ARGUMENT

UNDER NEW YORK LAW, MANIGAULT'S CONTINUATION OF HER EMPLOYMENT WITHOUT OPTING OUT OF ARBITRATION CONSTITUTED ACCEPTANCE OF BINDING ARBITRATION

The district court's ruling conflicts with longstanding New York contract principles governing at-will employment, under which an employer is "free to modify the terms of . . . employment, subject only to [the employee's] right to leave his employment if he f[inds] the new terms unacceptable." *Bottini v. Lewis & Judge Co., Inc.*, 211 A.D.2d 1006, 1008, 621 N.Y.S.2d 753, 754 (3d Dep't 1995). Where, as here, the employer modifies the terms of employment and the employee "remain[s] in [the] employment . . . [the employee] is deemed to have assented to the modification and, in effect, commenced employment under a new contract." *Id.* Once Macy's notified employees that they would automatically be subject to the terms of the SIS program—including mandatory arbitration for all employees who did not opt out by the official deadline—Manigault's decision to continue in her employment with Macy's without opting out necessarily constituted an agreement to arbitrate.

A. New York Contract Law Governs Whether Plaintiff Agreed To Arbitrate

Under the FAA, courts "apply ordinary state-law principles that govern the formation of contracts" in order to determine whether a party agreed to arbitrate. *First Options of Chicago v. Kaplan, Inc.*, 514 U.S. 938, 944 (1995); *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 149 (2d Cir. 2004) (looking to New York law in holding that plaintiff, who signed U-4 form containing arbitration clause, was bound to arbitrate); *The Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 120 (2d Cir. 2003) ("Whether parties have obligated themselves to arbitrate certain issues, including the question of arbitrability, is determined by state law."). As the district court noted, the parties do not dispute that New York law governs whether plaintiff agreed to arbitrate. (A153-54.)

B. Under New York Law, An At-Will Employee Who Is Notified Of A Change In The Terms Of Employment Accepts That Modification Of The Employment Contract By Continuing To Work

Under settled New York law, Macy's was entitled to modify the terms and conditions of employment for at-will employees by instituting the terms of the SIS program, including the requirement of binding arbitration for employees who did not affirmatively opt out. Once Macy's notified employees of this new requirement—as the district court specifically assumed Macy's did (A156)—Carla

Manigault's decision to continue in her employment with Macy's constituted her acceptance of and agreement to the new requirement.

By disagreeing with the other case law addressing this issue and declining to compel arbitration, the district court fundamentally erred, and confused the legal principles applicable to at-will employment contracts—which apply here—with the principles governing contracts between unrelated parties, which do not. In doing so, the opinion below seriously distorts long-settled New York contract principles. Under New York law, when an employer, as here, institutes new terms and conditions of employment, an at-will employee's continuation of her employment under the new terms is not "inaction." Rather, once the employee receives notice of a change in the terms of her employment, her continuation of employment is *conduct* that constitutes acceptance of the new terms and conditions. *See, e.g.*, *Bottini*, 211 A.D.2d at 1008, 621 N.Y.S.2d at 754. Put slightly differently, the at-will employee is deemed to enter into a new contract with the employer that incorporates the new terms promulgated by the employer. *See Hanlon v. MacFadden Publ'ns, Inc.*, 302 N.Y. 502, 505, 99 N.E.2d 546, 547 (1951) (employee's continued employment after announcement of reduced commission rate "constituted a material change in the terms of [the employee's] hiring, resulting in a new [hire] or a rehiring"); *Bottini*, 211 A.D.2d at 1008, 621 N.Y.S.2d at 754 ("Having remained in defendant's employment . . . [the employee was]

deemed to have assented to the modification and, in effect, commenced employment under a new contract.").[3]

Thus, under New York law—and squarely contrary to the district court's reasoning—an at-will employee need not state expressly, either verbally or in writing, that she consents to newly-instituted terms or conditions of employment. Rather, it has long been established that such employees manifest assent to such changes simply by continuing employment after receiving notice of the modified terms. Indeed, even where the employee *expressly* declines to assent to the new terms, the employee's continuation of employment constitutes acceptance by conduct. *See Dwyer v. Burlington Broadcasters, Inc.*, 295 A.D.2d 745, 744 N.Y.S.2d 55, 56-57 (3d Dep't 2002) (employee's refusal to sign document reciting modification of prior oral agreement held irrelevant because the plaintiff assented to the modification by continuing her employment); *In re Footstar, Inc.*, No. 04-

[3] *See also, e.g.*, *Int'l Paper Co. v. Suwyn*, 951 F. Supp. 445, 448 (S.D.N.Y. 1997) (noting, in the context of a non-compete agreement, that by remaining with his employer plaintiff "effectively assented to the modification and commenced employment under new terms"); *Frishberg v. Espirit de Corp., Inc.*, 778 F. Supp. 793, 802-03 (S.D.N.Y. 1991) (holding that a "new agreement was formed" each time employee elected to stay with employer after a "commission reduction or removal of an account"), *aff'd*, 969 F.2d 1042 (2d Cir. 1992) (table); *Waldman v. Englishtown Sportswear, Ltd.*, 92 A.D.2d 833, 835, 460 N.Y.S.2d 552, 555 (1st Dep't 1983) (by reducing employee's commission rate, employer "offered to, in effect, rehire" employee at the lower rate).

22350, 2007 Bankr. LEXIS 2303, at *13-15 (Bankr. S.D.N.Y. July 6, 2007) (refusal to sign agreement altering prior compensation held irrelevant).[4]

Moreover, the case law makes clear that employers need not use any particular form of words in communicating new terms and conditions, or notify employees expressly that continued employment will constitute their assent to the new terms. The announcement of the change, coupled with the employee's continued employment, is sufficient. *See, e.g., Gen. Electric Technical Servs. Co. Inc. v. Clinton*, 173 A.D.2d 86, 88, 577 N.Y.S.2d 719, 720-21 (3d Dep't 1991); *Hanlon*, 302 N.Y. at 505-06, 99 N.E.2d at 547; *Bottini*, 211 A.D.2d at 1007-08, 621 N.Y.S.2d at 753-54; *Waldman*, 92 A.D.2d at 833, 460 N.Y.S.2d at 553-54. In *General Electric*, for example, the court expressly rejected an argument that the employee "was not subject to [a policy promulgated by his employer] since he was not told that the [policy] was a condition of employment," stressing that, even in the absence of the phrase "condition of employment," the employee was notified, as here, that the policy would apply to all employees. *Gen. Electric*, 173 A.D.2d at 88, 577 N.Y.S.2d at 720. Similarly, the cases make clear that an employer need

[4] In purporting to distinguish *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104 (9th Cir. 2002), the district court suggested that the SIS program was defective because it did not require employees to sign a form acknowledging receipt of the SIS documents. (A161.) As explained in the text, this proposition is inaccurate under New York law.

not communicate the change in any particular *manner*. *See id.* (employee given pamphlet explaining policy); *Horowitz v. La France Indus., Inc.*, 274 A.D. 46, 47, 79 N.Y.S.2d 794, 796 (1st Dep't 1948) (employee informed of change in terms orally at meeting and through notation on paychecks).

The district court indicated that it was aware that it was taking an outlier position by refusing to follow cases such as *Garrett v. Circuit City Stores, Inc.*, 338 F. Supp. 2d 717 (N.D. Tex. 2004), which hold that employees agree to arbitration by continuing in their jobs after receiving notice of their employer's arbitration policy. (A161) ("the Court is not aware of any case that has rejected an employer's effort to impose binding arbitration based solely on its employees' silence"). In *Garrett*, for example, Circuit City adopted a policy that, like the SIS program, required employees to arbitrate disputes unless they timely elected to opt out of arbitration. The court held that—under Texas law, which, like New York law, holds that continued employment following notification of a change in terms constitutes assent—the plaintiff had agreed to arbitration by continuing to work at Circuit City. 338 F. Supp. 2d at 720 (citing *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986)). On appeal, the Fifth Circuit agreed. *Garrett*, 449 F.3d 672, 675 n.2. (5th Cir. 2006) (citing *Hathaway*, 711 S.W.2d at 229); *accord In re Halliburton Co.*, 80 S.W.3d 566, 568-69 (Tex. 2002).

Courts across the country have similarly held that employees can agree to arbitration by continuing to work after receiving notice of their employer's arbitration policy. *See, e.g., Berkley v. Dillard's Inc.*, 450 F.3d 775, 777 (8th Cir. 2006) (under Missouri law, employee accepted arbitration policy by continuing her employment, even though she refused to sign form acknowledging receipt of policy); *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 475-78 (10th Cir. 2006) (under Oklahoma law, employee agreed to arbitrate because, despite initially objecting to arbitration policy, she continued working after employer reasserted that its offer of employment required employees to arbitrate); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368-70, 1374-76 (11th Cir. 2005) (under Georgia law, employee accepted arbitration policy through continued employment), *cert. denied*, 126 S. Ct. 2020 (2006); *May v. Higbee Co.*, 372 F.3d 757, 763-65 (5th Cir. 2004) (under Mississippi law, plaintiff's "conduct" in continuing employment "manifest[ed] her assent to be bound" by employer's arbitration policy); *Hightower v. GMRI, Inc.*, 272 F.3d 239, 242-43 (4th Cir. 2001) (under North Carolina law, plaintiff demonstrated acceptance of arbitration policy by continuing employment after he knew arbitration policy applied to him); *see also Tinder v. Pinkerton Sec.*, 305 F.3d 728, 734 (7th Cir. 2002) (under Wisconsin law, plaintiff "evidenced her mutual promise to arbitrate her disputes with [her employer]" by "remain[ing] on the job past the effective date of the [arbitration]

program"); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002) (under California law, employee "assented to [arbitration policy] by failing to exercise his right to opt out of the program"); *Melena v. Anheuser-Busch, Inc.*, 847 N.E.2d 99, 109 (Ill. 2006); *Baptist Health Sys., Inc. v. Mack*, 860 So. 2d 1265, 1273-74 (Ala. 2003); *Halliburton*, 80 S.W.3d at 568-69.[5]

The district court purported to find support for its rejection of this extensive case law in the Restatement (Second) of Contracts § 69(1), which it cited for the proposition that an offeree's silence ordinarily does not constitute acceptance of a contract offer. (A156-61.) But the district court failed to note that this principle applies only to an offeree's *combined* "silence *and inaction*," § 69(1) (emphasis added)—and that it is Manigault's *action* of continuing in her employment, under New York law, that constituted her acceptance of the new terms of employment.[6]

---

[5] In a number of these cases, the arbitration policy was communicated to the employee using the same methods employed by Macy's to inform its personnel of the SIS program. *See, e.g.*, *Caley*, 428 F.3d at 1364 (employer mailed copies of arbitration policy to employees, placed documents on company website and posted notices on bulletin boards); *Tinder*, 305 F.3d at 731-32 (notification in two "payroll stuffer" mailings, as well as through employee magazine and posters); *Hightower*, 272 F.3d at 240-41 (arbitration policy explained at meeting where employee was given copy of the policy).

[6] Both New York law and the Restatement recognize the more general principle that "[a]n offer may be accepted by conduct or acquiescence." *John William Costello Assocs., Inc. v. Standard Metals Corp.*, 99 A.D.2d 227, 231, 472 N.Y.S.2d 325, 327 (1st Dep't 1984); *see* Restatement (Second) of Contracts § 19 (assent may be manifested by "acts or by failure to act").

In addition, under § 69(1) itself, an offeree's failure to opt out will constitute acceptance, *inter alia*, where "because of previous dealings *or otherwise*, it is reasonable that the offeree should notify the offeror if he does not intend to accept," § 69(1)(c) (emphasis added)—a provision clearly applicable when an at-will employee is notified that a new term or condition of employment will apply unless she affirmatively opts out. *Cf., e.g., Najd,* 294 F.3d at 1109 (finding agreement to arbitrate under California law; "where circumstances . . . place[] the offeree under a duty to act or be bound, his silence or inactivity will constitute his assent") (internal quotation marks omitted).

The district court only briefly addressed the principle that continued employment can constitute acceptance, dismissing it on the ground that because employees were free to opt out, "agree[ing] to arbitration" was not a condition of their employment.[7] (A162-63.) This clearly misses the point. The new condition of employment that Macy's instituted, as a mandatory policy that applied to all employees, was the SIS program and procedures *as a whole*. By continuing her

[7] In an aside, the district court expressed doubts about the enforceability of arbitration policies that, unlike the SIS program, *require* incumbent employees, as a condition of continuing employment, to agree to arbitration. (A162-63.) No case law support was offered for this speculation, *id.*, which is contrary to Second Circuit law. *See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999) (rejecting argument that requiring agreement to arbitrate as condition of employment is unconscionable).

employment after Macy's instituted those procedures—with what the district court assumed was full notice of the change—Manigault necessarily agreed to those procedures, including the obligation to arbitrate if she did not opt out in the prescribed fashion. Viewed slightly differently, once the opt-out deadline passed, and Manigault continued working under terms and conditions that now included her obligation to arbitrate all claims, her conduct constituted her agreement to that condition.

Indeed, under the district court's reasoning, providing employees the opportunity to opt out of a new policy eliminates the company's ability to require, as a condition of employment, that *other* employees (those who do not opt out) be bound by the policy. Thus, under the district court's approach, a company could only give employees the opportunity to opt out of a new requirement by forgoing the right to have all other (non-opt-out) employees accept the requirement by continuing in their employment—*i.e.*, it would have to obtain affirmative, express consent from each employee to the new term or condition. This is not only contrary to New York law, but irrational. It would necessarily create a perverse incentive for companies to *eliminate* any ability to opt out, so as to preserve the efficiencies of the traditional condition-of-employment regime. The district court offered no reason why such a result—which would harm rather than help employees, by deterring employers from allowing opt-outs—would make sense.

In short, the district court's reasoning—which was premised entirely on the notion that Manigault's continued employment constituted "utter silence and inaction"—rests on a clear misapplication of New York law. Under settled New York employment contract principles, Manigault's continuation of her employment, coupled with her failure to opt out of binding arbitration, constituted her contractual assent to such binding arbitration under the terms of the SIS program.

C. There Was Also A Course Of Dealing Under Which Manigault's Decision Not To Opt Out Established An Agreement To Arbitrate

The district court also erred for an independent reason. The court rejected Macy's argument that the parties' course of dealing obligated Manigault to affirmatively opt out of Step 4, ruling that there was no prior course of dealing because there was purportedly no evidence that Macy's mailed plaintiff any offers "that, though not expressly accepted by Manigault, nevertheless conferred benefits she retained." (A160-61.)

This conclusion was demonstrably incorrect. Macy's offered evidence establishing that it automatically enrolls its employees in a 401(k) plan, deducting three percent of an employee's salary unless the employee opts out of the program or affirmatively chooses a different contribution level. (A114-15.) Manigault was automatically enrolled through this program in July 2004 after she received notice of the program in the mail, and has accordingly received the benefits of a 401(k) account (including pre-tax contributions, tax-free appreciation until withdrawal,

and company matching contributions)—even though, as here, she did not expressly agree to participate in the 401(k) plan. *Id.* Notably, there is no evidence that plaintiff has ever challenged these deductions from her paycheck or claimed that they were made without her consent. She therefore *has* "retained" benefits that were conferred through automatic enrollment, "though not expressly accepted by [her]." (A160.)

Although this acceptance of benefits by Manigault had not yet occurred at the time of her initial opportunity to opt out of the SIS arbitration provision, in October 2003, it *had* occurred before the time of her second opportunity to opt out of arbitration, in November 2004. (A114-15.) Manigault's acceptance of the benefits of the 401(k) account is thus a further reason she was obligated to inform Macy's if she was opting out of arbitration, *see, e.g., Russell v. Raynes Assocs. Ltd. P'ship*, 166 A.D.2d 6, 15, 569 N.Y.S.2d 409, 414 (1st Dep't 1991) (duty to speak "may be created by a course of conduct"); Restatement (Second) of Contracts § 69(1)(c) (failure to reply may operate as acceptance of offer "[w]here because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept"), and a further, independent basis on which the district court's order should be reversed.

D. Automatic Enrollment That Provides Employees The Ability To Opt Out Is A Regular Feature Of Employment

Acceptance of the district court's interpretation of New York law would have detrimental consequences well beyond the context of arbitration agreements. By automatically enrolling employees in programs such as 401(k) and health benefit plans, employers are able to overcome both costly administrative burdens and the influence of inertia on everyday human decision making. Such programs are permissible provided that the employee receives notice and is given the ability to opt out, a standard consistent with the general contract principles that govern employment relationships. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (Aug. 17, 2006) ("PPA") (codifying automatic 401(k) enrollment); Default Investment Alternatives Under Participant Directed Individual Account Plans, 72 Fed. Reg. 60,452 (Oct. 24, 2007) (to be codified at 26 C.F.R. pt. 2550) (implementing PPA); Prop. Treas. Reg. § 133300-07, 72 Fed. Reg. 63,144 (Nov. 8, 2007) (same); Treas. Reg. § 1.132-9, Q&A 12(b) (2006) (automatic election for transportation benefit); Rev. Rul. 2002-27, 2002-1 C.B. 925 (automatic enrollment and deductions for group health coverage); Rev. Rul. 2000-8, 2000-1 C.B. 617 (pre-PPA ruling permitting automatic 401(k) enrollment for incumbent employees); Rev. Rul. 98-30, 1998-1 C.B. 1273 (same for new hires).

Indeed, Macy's, following established procedures, automatically enrolls its employees—including Manigault, who has never objected—in a 401(k) plan,

deducting three percent of an employee's salary unless the employee opts out of the program or affirmatively chooses a different contribution level. (A114-15.)

In implementing the SIS program, Macy's followed procedures similar to the widely accepted process used in automatic enrollment programs. Under this approach, Macy's was able, in a cost-effective and efficient manner, to adequately inform employees of the SIS program and to provide a simple opt-out mechanism. The district court's decision, which imposes a higher standard, not only fails to comport with established principles of contract law, but is also needlessly burdensome and in conflict with established employment policy. In addition, by questioning the contractual underpinning of automatic enrollment programs, the district court's decision could subject such programs to challenges by employees who, despite receiving sufficient notice, may claim that they never affirmatively assented to automatic enrollment.

CONCLUSION

Because plaintiff agreed to arbitrate by continuing to work, and choosing not to opt out, after receiving notice of Macy's arbitration policy, this Court should reverse the district court's order denying defendants' motion to compel arbitration.

Dated: December 17, 2007

Respectfully submitted,

/s/ Meir Feder

Meir Feder
Samuel Estreicher
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939

Attorneys for Defendants-Appellants Macy's East, LLC, and Terry Whittaker

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B). It contains 6,274 words as counted by the word-processing system used to prepare the brief, exclusive of the parts of the brief exempted from the type-volume limitation by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman type.

Dated: December 17, 2007

/s/ Meir Feder
Meir Feder

Attorney for Defendants-Appellants,
Macy's East, LLC, and Terry Whittaker

ANTI-VIRUS CERTIFICATION

Case Name: Manigault v. Macy's East, LLC

Docket Number: 07-4135-cv

I, Ramiro A. Honeywell, hereby certify that the Appellant's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 12/17/2007) and found to be VIRUS FREE.

/s/ Ramiro A. Honeywell

Ramiro A. Honeywell
Record Press, Inc.

Dated: December 17, 2007