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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No.: 2019-000451
Published Opinion No. 5934 (S.C. Ct. App. Filed August 10, 2022)

Nicole Lampo,..... Petitioner

v.

Amedisys Holding, LLC, and
Leisa Victoria Neasbitt .....Respondents

RESPONDENTS' RETURN TO PETITION FOR A WRIT OF CERTIORARI

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1. Whether an existing employee agrees to arbitrate his or her employment-related disputes against his or her employer after the undisputed evidence establishes that the employee acknowledged receipt of an arbitration agreement, failed to "opt out" of that agreement (despite having the ability to do so), and continued to work for five years?

2. Whether an individual's inability to recall any specifics regarding their acquiescence to an arbitration agreement can give rise to an issue of fact when the undisputed evidence establishes the employee, in this case, acknowledged receipt of the arbitration agreement and their obligation to review it?

II. COUNTER STATEMENT OF THE CASE

A. Relevant Factual Background

Amedisys provides home health and hospice services to patients throughout the United States. J.A. pp. 13-14. In July 2013, Amedisys hired Ms. Lampo to work as a Physical Therapist primarily out of its Horry and Georgetown County, South Carolina care centers. *See id.* Like all employees, Amedisys provided Ms. Lampo with a unique username and password permitting Ms. Lampo to log into Amedisys' computer-based system, known as "SharePoint." J.A. pp. 46-47. During that time, Amedisys also assigned Ms. Lampo a unique email account accessible only to her via her unique username and password, which Ms. Lampo had the ability to change at her discretion. *Id.*

On August 6, 2013, Amedisys emailed all employees, including Ms. Lampo, concerning the Company's written Dispute Resolution Agreement ("Arbitration Agreement"). J.A. pp. 47, 51. The email subject line stated, "Important Policy Change – Must Read." *Id.* The body of the email stated: "[t]his e-mail contains important time-sensitive materials that the Company requires that you read as they could affect your legal rights. Please click here to receive them." *Id*. Upon clicking on the "here" hyperlink in the email, each employee, including Ms. Lampo, was provided with an Acknowledgment Form, which stated:

THE AMEDISYS ARBITRATION PROGRAM

ACKNOWLEDGEMENT FORM

> By clicking "Acknowledge" below, you will be given access to the Amedisys Arbitration Program materials, which include a Cover Letter, the Dispute Resolution Agreement, and FAQs. You are required to review these materials. Please read the materials carefully. **Unless you opt out of the Dispute Resolution Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights.**
>
> By clicking the "Acknowledge" button on this screen I acknowledge and understand that I will be given access to the materials described in the above paragraph and that I am required to review these materials."

J.A. pp. 48, 54. Once an employee clicked "Acknowledge" on the Acknowledgement Form, they were directed to a webpage that provided descriptions and links to all of the Amedisys' Arbitration Program materials, including a cover letter, the Arbitration Agreement, and a six-page fact sheet of FAQs explaining the Arbitration Agreement.[1] J.A. pp. 48, 54, 62-73. These three documents were the only documents located on the webpage. *See id.* Ms. Lampo clicked "Acknowledge" on August 6, 2013 at 1:55 p.m. J.A. pp. 57, 60. Thereafter, Ms. Lampo had unrestricted access to Amedisys' Arbitration Program materials and could read them, consult with an attorney (or anyone else) about them if she chose (including by calling a Company-provided Hotline), and then make a decision if she wanted to participate in the program or opt out.

The Arbitration Agreement, which Ms. Lampo "Acknowledged" she was "required" to review (*see* J.A. p. 54) provides for mutual arbitration, and states:

> "This Dispute Resolution Agreement ("the "Agreement") is an agreement to resolve any and all legal disputes between you ("Employee") and Amedisys before an arbitrator, rather than in court."

[1] Included in the materials was information regarding a "hotline" Ms. Lampo (or any other employee) could call if she had questions about the Arbitration Agreement. J.A. p. 73.

J.A. 48, 62. The Arbitration Agreement further states that it "is effective immediately, subject to Employee opting out of the Agreement within 30 days, in accordance with Section 9, above." J.A. pp. 48, 62, 68.

The Arbitration Agreement reiterated that "Arbitration is not a mandatory condition of Employee's employment at the Company, and therefore an Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Agreement." *See id.* The Arbitration Agreement states it is governed by the Federal Arbitration Act and applies to "any dispute arising out of or related to Employee's employment with Amedisys or termination of employment regardless of its date of accrual and survives after the employment relationship terminates." *See id.* Under the Arbitration Agreement, the employee and Amedisys may select an arbitrator by mutual agreement, and if they are unable to do so, the selection proceeds under American Arbitration Association ("AAA") rules. J.A. p. 64. Written discovery, depositions and dispositive motions are allowed. J.A. p. 65. Furthermore, the Arbitration Agreement states that Amedisys will pay the arbitrator's fees and any costs in accordance with AAA rules and Ms. Lampo is responsible for her own attorney's fees, witness fees, costs and expenses, just like she would if this matter were litigated in court. J.A. p. 67.

To ensure it was easy for employees to opt out of the Arbitration Agreement if they desired, Amedisys included a simple "Dispute Resolution Agreement Opt-Out Form" as Attachment "A" to the Arbitration Agreement. J.A. pp. 49, 69. Thus, to "opt-out" of the Arbitration Agreement, all an employee needed to do was sign, date, and return the Arbitration Agreement Opt-Out Form within 30 days of the employee's receipt of the same. *See id.* To make sure employees understood this, the cover letter provided to Ms. Lampo, which she "Acknowledged" she was required to review, explained:

> **What if I do not want to arbitrate?** You have **30 days** from the date of this memorandum to opt out of the Dispute Resolution Agreement. **You may do so by printing the Opt-Out Form (Attachment A to the Agreement), printing and signing your name . . . and sending it by U.S. Mail to Amedisys, Inc., postmarked no later than 30 days from the date you acknowledged receipt of the Dispute Resolution Agreement.**

The Arbitration Agreement itself also states, in relevant part:

> Should Employee fail to opt out of this Agreement within the 30-day period in the manner provided above, Employee's continuation of his or her employment with the Company shall constitute Employee's and Company's mutual acceptance of the terms of this Agreement.

J.A. pp. 48-49, 67-68, 71-72.

Amedisys' Human Resources Department maintains a file containing the actual hard copy of all opt-out forms completed by any employee who chose to opt-out of the Arbitration Agreement. J.A. p. 49. Ms. Lampo does not allege she opted out of the Arbitration Agreement, and Amedisys does not have an "opt out" form for her. J.A. pp. 49, 144-145. Rather, Ms. Lampo continued to work for Amedisys until March 2018 at which point Ms. Lampo alleges Amedisys terminated her employment. J.A. pp. 13-26.

Ms. Lampo has been unequivocal in her inability to recall anything about the Arbitration Agreement. J.A. pp. 144-45. As a result, she has no evidence disputing—or, even questioning, for that matter—that: (1) Amedisys assigned Ms. Lampo a unique username and password and a unique email account to which only she had access; (2) Ms. Lampo received—using her unique user name and password and email—the August 6, 2013 email advising employees they "must read" the email's contents; (3) Ms. Lampo clicked the hyperlink contained in the August 6, 2013 email; (4) Ms. Lampo received and reviewed the "Acknowledgment Form" after clicking the hyperlink; (5) Ms. Lampo clicked "Acknowledge" after being presented with the

"Acknowledgment Form," confirming her understanding that she was being provided access to and required to review the Arbitration Agreement and would be bound by its terms if she continued to work and did not opt out of it; (6) Ms. Lampo did not opt out of the Arbitration Agreement, despite having an unfettered ability to do so; and (7) Ms. Lampo continued to work for Amedisys until March 26, 2018. J.A. pp. 47-50, 52-60.

B. Relevant Procedural Background

On December 7, 2018, Ms. Lampo filed a four-count complaint alleging Amedisys violated South Carolina common law by "wrongfully discharging" her from her employment with Amedisys (Count I), tortiously interfered with her "prospective contractual relations" (Count IV), and that Amedisys and Ms. Neasbitt defamed Ms. Lampo (Counts II and III). J.A. pp. 12-26. Specifically, Ms. Lampo alleges that Amedisys "wrongfully" terminated her employment in violation of public policy after she purportedly made compliance-related reports to Amedisys' corporate office. J.A. pp. 15-18. Thereafter, Ms. Lampo alleges that Amedisys and Ms. Neasbitt "defamed" her by making false statements regarding Ms. Lampo that "lessened [Ms. Lampo's] standing in her profession." J.A. pp. 18-23. Ms. Lampo also alleges that Amedisys tortiously interfered with her "prospective employment" when some unknown person made unknown statement(s) to an unknown prospective employer preventing Ms. Lampo from obtaining an unknown job. J.A. pp. 18-19, 23-24.

On March 11, 2019, the Circuit Court denied Amedisys and Neasbitt's motion to compel arbitration holding that failing to opt out of the Arbitration Agreement did not evince Ms. Lampo's acceptance of the agreement. J.A. pp. 7-11. On August 10, 2022, the Court of Appeals unanimously reversed the Circuit Court's decision holding that, after having actual notice of Amedisys' offer to enter into an Arbitration Agreement, she accepted the Arbitration Agreement

by acknowledging receipt of the Agreement, failing to opt out, and continuing to work for the Company. J.A. 263-270. And, after the Court of Appeals denied Ms. Lampo's Petition for Rehearing (J.A. 284), she filed a Petition for *Writ of Certiorari* ("Petition") on September 29, 2022.

III. ARGUMENTS FOR DENYING CERTIORARI

As the Appellate Court Rules require, a *writ of certiorari* will be granted only where there are special and important reasons. *See* Rule 242(b), SCACR. No such reasons exist here. In fact, Ms. Lampo concedes that: (1) there is no dissent in the decision of the Court of Appeals; (2) the decision in the Court of Appeals is not in conflict with a prior decision of the South Carolina Supreme Court; (3) no constitutional issues are involved in this case; and (4) no federal question is included in the Court of Appeals' decision that conflicts with a decision of the United States Supreme Court. *See* Petition, *passim; see also* Rule 242(b)(2)-(5), SCACR. Rather, Ms. Lampo argues that this Court should grant *writ* solely to resolve a "novel issue of law pursuant to Rule 242(b)(1), SCACR." *See,* Petition, p. 1. Stripping away Ms. Lampo's conclusions, however, reveals that Ms. Lampo's Petition does not identify the presence of any such "novel issue." To the contrary, the entirety of Ms. Lampo's Petition reflects her disagreement with the Court of Appeals application of the *facts* of this case to well-established South Carolina contract law principles. *See* Petition, *passim.* Ms. Lampo's disagreement with the Court of Appeals' unanimous decision, however, does not give rise to "special and important reasons" warranting *certiorari.* Thus, this Honorable Court should deny Ms. Lampo's Petition.

A. The Evidence Establishing Ms. Lampo Accepted the Arbitration Agreement Does Not Present a "Novel Issue of Law."

Ms. Lampo's Petition fails to identify any "novel issue of law" the Court of Appeals erred in deciding. Rather, while squabbling with the wisdom of the Court of Appeals' unanimous

decision, Ms. Lampo attempts to manufacture the appearance of a "novel issue of law" by conflating the difference between bilateral and unilateral contracts and the latter's implication on the employment relationship.[2] For a valid contract to exist under South Carolina law, the three elements of offer, acceptance, and consideration must be present, and none of the recognized defenses to contract formation, such as fraud, duress, or unconscionability, should apply. *See, e.g.*, *Sauner v. Pub. Serv. Auth. of S.C.,* 354 S.C. 397, 406, 581 S.E.2d 161, 166 (S.C. 2003); *Young v. AMISUB of South Carolina, Inc.,* 2018 WL 5668619, *3 (D.S.C. 2018). The elements of contract formation are certainly not novel. Nor is the notion that most employment contracts are unilateral. *Prescott v. Farmers Tel. Coop., Inc*., 335 S.C. 330, 516 S.E.2d 923 (1999). "A unilateral contract has the following three elements: (1) a specific offer; (2) communication of the offer to the employee; and (3) performance of job duties in reliance on the offer." *Id*. at 336, 516 S.E.2d at 926. Thus, an employee who receives actual notice of an arbitration policy and continues to work is bound by the agreement. *See Reese v. Commercial Credit Corp.,* 955 F. Supp. 567, 570 (D.S.C. 1997) (citing *Small v. Springs Industries, Inc.,* 292 S.C. 481, 357 S.E.2d 452, 454 (S.C. 1987)).

These well-established principles are not novel. Nor is the Court of Appeals' application of them, which is consistent with existing law. For example, in *Towles v. United HealthCare Corp.,* the plaintiff signed an "Acknowledgment," that merely referenced an "Employment

[2] Ms. Lampo's Petition suggests—incorrectly—that the Appeals Court's decision "encourages a dangerous policy . . . where sophisticated business entities are rewarded for making proposed arbitration agreements less conspicuous than they already are." *See* Petition, p. 1. This is not true as the undisputed facts of this case establish that Ms. Lampo and Amedisys were already in employment privity at the time Ms. Lampo received the arbitration agreement, failed to opt out, and continued to work for Amedisys. The Court of Appeals ruling did not, as Ms. Lampo antagonizes, change or misapply South Carolina contract law in any way and its holding does not "encourage a dangerous policy." In fact, Amedisys' offer to Ms. Lampo to arbitrate, which included the ability for her to "opt out" at her choosing is far more favorable than what Amedisys could have offered under South Carolina law (i.e., agree to arbitrate or end your employment at the Company). Thus, the Court of Appeals' ruling actually reaffirms the opposite of Ms. Lampo's position: that South Carolina employers have the legal right to put their employees in a better decision-making position by permitting them to "opt out" of arbitration if they wish. Regardless, as established below, Ms. Lampo's actions—when juxtaposed against her existing relationship with and obligations to Amedisys—evince her acceptance of Amedisys' unilateral offer to arbitrate prospective claims. This is entirely consistent with South Carolina law and anything but "novel."

Arbitration Policy" found in the Company's Handbook. 338 S.C. 29, 40, 524 S.E.2d 389, 844-45 (S.C. Ct. App. 1999). After filing a lawsuit against his employer, the employer moved to compel arbitration. *Id.* In opposition, the plaintiff argued that he never received the actual provisions of the arbitration agreement, which he claimed precluded him from assenting to arbitration. *Id.* The Court of Appeals disagreed and held that after the plaintiff received and signed the "Acknowledgment," the defendant had no legal duty to explain the "Employment Arbitration Policy" or its contents to the plaintiff when he could learn the contents by simply reading the document. *Id.* Thus, finding that the "Acknowledgment" constituted a specific communication of an offer that conditioned the plaintiff's continued employment on his acceptance of the "Employment Arbitration Policy, the Court of Appeals determined that the plaintiff had accepted the offer by continuing to work and, thus, the "'Acknowledgment' constituted a binding arbitration agreement." *Id.* at 845.

The Court of Appeals application of South Carolina contract law in *Towles* is synonymous with its application here. To reiterate, it is undisputed that on August 6, 2013, while employed by Amedisys, Ms. Lampo received an offer to participate in Amedisys' alternative dispute resolution program. J.A. pp. 47-48, 52, 54, 57, 144-45. She does not and cannot dispute that upon clicking on a hyperlink contained in the August 6, 2013 email, Ms. Lampo received an "Acknowledgment," that identified "The Amedisys Arbitration Program" and instructed her that she was "required to review" a Cover Letter, the Arbitration Agreement, and a list of frequently asked questions (FAQs). J.A. pp. 47-48, 52, 54, 57. This is, after all, how most employers communicate policy changes to their employees. The "Acknowledgment" informed Ms. Lampo, in bold letters, that "**Unless you opt out of the [Arbitration] Agreement within 30 days of today's date, you will be bound by it, which will affect your legal rights**." J.A. p. 54 (bold in original). Thereafter,

using her unique username and password, Ms. Lampo clicked "Acknowledge" at 1:55 p.m. on August 6, 2013—a fact that Ms. Lampo does not dispute (*see* J.A. pp. 144-45)—thereby confirming that Amedisys had offered Ms. Lampo an opportunity to mutually agree to arbitrate any dispute arising from her employment relationship. J.A. pp. 47, 54, 57, 60, 62-69. Critically, the undisputed evidence established that: (1) by clicking "Acknowledge" after being presented with the "Acknowledgment Form," Ms. Lampo confirmed she was provided access to and required to review the Arbitration Agreement and would be bound by its terms if she continued to work and did not opt out of it; (2) Ms. Lampo did not opt out of the Arbitration Agreement, despite having an unfettered ability to do so; and (3) Ms. Lampo continued to work for Amedisys until March 26, 2018. J.A. pp. 30-31, 47-50, 52-58.

Against this backdrop, Ms. Lampo first argues that the Court of Appeals misapplied *Towles* because it did not consider the differences between the verbiage contained in the acknowledgment in *Towles* and the Acknowledgment here. *See* Petition, pp. 8-9. She does not explain how this purported misapplication is tantamount to a "novel issue of law." That aside, Ms. Lampo fails to understand *Towles* implication to the facts here. It is not the Acknowledgment that Ms. Lampo received and acknowledged that requires her to arbitrate her claims. It is the fact that the Acknowledgment unequivocally evidences—and, she has not denied otherwise—that she received the Arbitration Agreement, which does require her to arbitrate her claims. Whether she chose to ignore her acknowledged obligation to review the Arbitration Agreement or did not "scroll[] through or . . . click[] the link to the actual arbitration agreement" is inconsequential under South Carolina law and entirely consistent with *Towles* and other decisions. *See* Petition, p. 10; *see also* J.A. pp. 144-45; *Mid-Continent Refrigerator Co., v. Dean,* 256 S.C. 99, 180 S.E.2d 892 (1971) (holding that the decision not to read a written contract is no excuse for enforcement of contractual

provisions). Put simply, the purported differences in the actual wording of the acknowledgment in *Towles* and the Acknowledgment received by Ms. Lampo here is neither a "novel issue of law," nor does it suggest the Court of Appeals erred in its application of existing law.

Second, Ms. Lampo argues that because Amedisys provided Ms. Lampo with the option to "opt out" of the Arbitration Agreement, her decision to continue to work for the Company is not evidence of her acceptance. *See* Petition, pp. 8-9. Again, Ms. Lampo fails to explain how this presents a "novel issue of law."[3] And, even if it did present a "novel issue of law," she is wrong on the merits. The Arbitration Agreement,[4] of which Ms. Lampo acknowledged receipt, made clear that: "Should Employee fail to opt out of this Agreement within the 30-day period in the manner provided above, Employee's continuation of his or her employment with Company shall constitute Employee's and Company's mutual acceptance of the terms of this Agreement." J.A. pp. 67-68. Thus, when Ms. Lampo chose to not opt out and continue working, she manifested her assent to the Arbitration Agreement. Her decision in that regard is entirely consistent with *Towles* and numerous other courts who have considered the issue. *See Towles,* 338 S.C. at 39 (holding employee accepted arbitration offer by continued employment); *see also Hightower v. GMRI, Inc.* 272 F.2d 239, 242 (4th Cir. 2001) (employee's continued employment bound him to accept employer's arbitration procedure); *Small v. Springs Indus., Inc.,* 292 S.C. 481, 483-84, 357 S.E.2d 452, 454 (1987) (finding an employee accepted employer's offer by "performing the act on which the promise was impliedly or expressly based."); *Boerstler v. UHS of Delaware, Inc.,* 2022 WL

[3] Amedisys notes again that it employed Ms. Lampo at the time it sent her an email and, thus, they had an ongoing relationship. Within the confines of that relationship, Amedisys could have required Ms. Lampo (and all of its employees) to agree to the Arbitration Agreement as a condition of her (their) continued employment. *See Towles*, 524 S.E.2d at 845. Just because Amedisys gave its employees the less restrictive option of allowing them to opt out of the Arbitration Agreement should not somehow invalidate Ms. Lampo's acquiescence to the Arbitration Agreement when she chose to continue working thereafter.

[4] It is again critical to repeat that Ms. Lampo never denied receiving the Arbitration Agreement or reviewing its contents.

18802, at *2 (D.S.C. Jan. 3, 2022) (failure to opt out and continue working demonstrates assent); *Hughes v. Charter Communications, Inc.,* 2020 WL 1025687, at *10 (D.S.C. Mar. 2, 2020) (plaintiff's failure to opt out by the specified time results in her being bound by the arbitration agreement).

B. The Purported Existence of Fact Issues—Of Which There Are None—Does Not Present a "Novel Issue of Law."

In her Petition, Ms. Lampo argues, alternatively, that whether she had "actual notice" of the Arbitration Agreement or whether she "accepted" the Arbitration Agreement requires adjudication of fact issues by a jury. *See* Petition, pp. 9-13. To support her argument, Ms. Lampo submits that the Court of Appeals' observation, in *dicta,* that the manner in which Amedisys provided its employees notice of the Arbitration Agreement "may" be at the "outer limits of what constitutes a valid offer to modify the terms of an employment agreement . . ." as evidence of underlying fact issues. *See* Petition, p. 11. Ms. Lampo neither explains how such an observation by the Court of Appeals acknowledges the existence of fact issues, nor does she articulate how the Court of Appeals' observation evidences a "novel issue of law." When viewed in context, however, the Court of Appeals observation merely reaffirmed well-established certain legal boundaries to contract.

In this case, Ms. Lampo has no recollection of any pertinent events and is unable to deny (and has not denied) that she received or reviewed the Arbitration Agreement. J.A. pp. 144-45. Thus, her supposition that there is "no evidence in this case that [she] . . . scrolled through [], or even accessed [the Arbitration Agreement]" is untrue. In fact, Ms. Lampo indisputably acknowledged her understanding that she was required to read the Arbitration Agreement. *See* (J.A. 54-60). Presumably, she did so as there is no evidence in the record establishing the opposite. Regardless, whether Ms. Lampo chose to "scroll through" or "access" the Arbitration Agreement

is irrelevant. *See, e.g., Mid-Continent Refrigerator Co.,* 256 S.C. 99, 180 S.E.2d 892 (1971); *see also Towles*, 338 S.C. at 39, 524 S.E.2d at 845 (finding "[a]fter receiving and signing the Acknowledgment, [the employee] cannot legitimately claim [the employer] failed to provide actual notice of the arbitration provisions because the law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document"). In other words, Ms. Lampo's lack of any memory of the relevant issues does not put the facts in dispute. The Court of Appeals correctly decided that—as a matter of law—that Ms. Lampo agreed to arbitrate her claims. *See Hamlin,* 2017 WL 6034325, at *1 (finding the "failure to recall signing the agreement is insufficient to create an issue of fact as to the validity of the arbitration agreement"). Put simply, the purported existence of "fact issues" does not create a "novel issue of law" such that this Honorable Court should grant *cert.* And, even if it did, Ms. Lampo has failed to articulate the existence of any such fact issues.

IV. CONCLUSION

Ms. Lampo's Petition makes one thing clear: she disagrees with the decision of the Court of Appeals. Without more, however, Ms. Lampo's subjective disagreement neither establishes a "novel issue of law," nor does it warrant this Court granting *certiorari.* Accordingly, for the reasons established above, this Honorable Court should deny Ms. Lampo's Petition.

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Dated this 28th Day of October 2022