IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LEE CALEY, *et al.*, Plaintiffs—Appellants, v. GULFSTREAM AEROSPACE CORPORATION, *et al.*, Defendants—Appellees.	)))))))	Appeal Number 04-14462-GG
DIANNE JACKSON, *et al.*, Plaintiffs—Appellants, v. GULFSTREAM AEROSPACE CORPORATION, *et al.*, Defendants—Appellees.	)))))))	Appeal Number 04-14463-GG

On Appeal From The United States District Court
For The Northern District Of Georgia

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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March 1, 2005

Caley et al., v. Gulfstream Aerospace Corporations, et al.,
Appeal Number 04-14462-GG

Jackson et al, v. Gulfstream Aerospace Corporation, et al.,
Appeal Number 04-14463-GG

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rules 26.1 and 29(c), *Amici Curiae* Equal Employment Advisory Council and The Chamber of Commerce of the United States disclose the following:

1. The Equal Employment Advisory Council and The Chamber of Commerce of the United States have no parent corporations and no subsidiary corporations.

2. No publicly held company owns 10% or more stock in the Equal Employment Advisory Council or The Chamber of Commerce of the United States.

Respectfully submitted:

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March 1, 2005

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The Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit this brief as *amici curiae* contingent on the granting of the accompanying motion for leave. The brief urges the Court to affirm the decision below and thus supports the position of the Defendants-Appellees, Gulfstream Aerospace Corporation, *et al.*

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes 330 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation, representing an underlying membership

of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's and many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621 *et seq.*, Title I of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. §§ 12111-17, and other employment-related statutes and regulations. Collectively, EEAC's and the Chamber's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and other employment actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comply with Title VII and other applicable legal requirements.

Many of EEAC's and the Chamber's members have contracts with their employees governing some or all of the terms and conditions of

employment. Some of these contracts include agreements to arbitrate disputes arising out of the employment relationship.

EEAC's and the Chamber's members have an ongoing interest in preserving the enforceability of agreements calling for arbitration of employment-related disputes. Arbitration is a flexible, efficient, and effective alternative means of resolving discrimination claims and other employment-related issues. Agreements to arbitrate, like other privately negotiated contracts, afford parties to a dispute the right to establish clear standards and criteria against which their future conduct will be judged. It follows, then, that such agreements must be strictly enforced in the same manner and to the same extent as any other valid contract.

The issues presented in this appeal are extremely important to the nationwide constituency that EEAC and the Chamber represent. In keeping with the guiding principles established by the U.S. Supreme Court and this Court, the district court enforced an agreement to arbitrate employment disputes in the same manner as it would any other contract. The district court ruled correctly that continued employment can signify acceptance of an arbitration agreement when employees have received notice that their continued employment will constitute acceptance. The district court also concluded correctly that an arbitration agreement may preclude a class or

collective action, as this Court and others have held that the ability to bring a class or collective action is a procedural right that can be waived.

Because of their interest in the enforceability of arbitration agreements, EEAC and the Chamber have filed *amicus curiae* briefs in numerous cases before the U.S. Supreme Court[1] and this Court[2] supporting the enforceability of private agreements to arbitrate. Accordingly, EEAC and the Chamber are familiar with the legal and public policy issues presented to the Court in this case. Because of their significant experience in these matters, EEAC and the Chamber are uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE ISSUES

1. Did the district court rule correctly that Defendant's Dispute Resolution Policy (DRP), for which continued employment signified acceptance, was enforceable under the Federal Arbitration Act?

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[1] *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 111 S. Ct. 1647 (1991); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 121 S. Ct. 513 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302 (2001); *EEOC v. Waffle House*, 534 U.S. 279, 122 S. Ct. 754 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402 (2003).

[2] *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307 (11th Cir. 2002).

2. Did the district court rule correctly that the DRP's prohibition against class or collective actions did not make the agreement unconscionable?

STATEMENT OF THE CASE

In the summer of 2002, Gulfstream Aerospace implemented a new dispute resolution policy (DRP) for the resolution of employment disputes at its facility in Savannah, Georgia. (DOC 35, p. 4). The DRP culminates in mandatory, binding arbitration. (DOC 35, p. 5). The documentation stated explicitly that continuation of employment would constitute acceptance of the DRP. *Id*.

Gulfstream mailed copies of the DRP, an explanatory cover letter, and a question and answer sheet, to all Savannah employees. (DOC 35, p. 4). It also placed the document on its intranet, distributed the DRP electronically via e-mail, and posted notices throughout the facility. (DOC 35, p. 4-5).

In March 2003, Gulfstream modified the DRP to prohibit the bringing of claims as class or collective actions. (DOC 35, p. 7). Gulfstream distributed the new version of the DRP in the same manner that it had distributed the initial version, and stated that any employee who continued employment as of April 10, 2003, would be considered to have accepted the revised DRP. (DOC 35, p. 7-8).

Plaintiffs filed two putative class actions in November 2003 against Gulfstream Aerospace's Savannah facility and Gulfstream's parent company, General Dynamics.[3] (DOC 35, p. 2). One suit raises claims under the Age Discrimination in Employment Act (ADEA), the Fair Labor Standards Act (FLSA), and the Employee Retirement Income Security Act (ERISA). *Id*. The other raises race, gender, and retaliation claims under Title VII of the Civil Rights Act of 1964 (Title VII). *Id*.

After the Plaintiffs filed suit, Gulfstream moved to compel arbitration. (DOC 35, p. 2-3). The district court granted the motion, holding that the agreement to arbitrate was enforceable and, *inter alia*, rejecting the plaintiffs' arguments that continued employment could not be used as an indicator of acceptance and that the agreement's prohibition on class or collective actions made the agreement unconscionable. (DOC 35, p. 20-21). The plaintiffs appealed to this Court.

SUMMARY OF THE ARGUMENT

The district court ruled correctly that that the arbitration agreement at issue in this case was enforceable, correctly holding both that continued employment is a valid method of acceptance of an agreement to arbitrate

[3] The class action filed by plaintiff Caley is on behalf of an estimated class of two hundred workers, while the class action filed by plaintiff Jackson is on behalf of an estimated class of one hundred workers. (DOC 35, p. 2).

employment disputes, and that the ability to file a class action is one of many procedural rights that may be waived by an arbitration agreement.[4] The district court's decision reflects the strong federal policy that favors arbitration and requires that doubts be resolved in favor of enforcing arbitration agreements. Congress, the Supreme Court, and this Court have all endorsed the use of arbitration in resolving employment disputes. *See* Federal Arbitration Act, 9 U.S.C. §§ 1-16; Civil Rights Act of 1991, 42 U.S.C. § 1981 note (Alternative Dispute Resolution); *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 111 S. Ct. 1647 (1991); *Weeks v. Harden Corp*., 291 F.3d 1307 (11th Cir. 2002). Plaintiffs advocate a position that is contrary to this express policy and also completely overlooks the benefits of arbitration to employees.

The district court ruled correctly that the Plaintiffs' continued employment signified their acceptance of the arbitration agreement. Both Georgia state courts and federal appellate courts consistently have held that continued employment can constitute acceptance of an arbitration agreement.

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[4] Plaintiffs have put forth a variety of challenges to the DRP. This brief will focus on two specific challenges, Plaintiffs' claim that continued employment cannot constitute acceptance of the DRP and Plaintiffs' claim that the DRP's class action prohibition is unconscionable, as these issues are of particular importance to EEAC's and the Chamber's members.

The district court also correctly enforced the provision of the agreement waiving the ability to bring a class or collective action. As the district court correctly found, the ability to bring a lawsuit as a class action is a procedural right that generally can be waived. Plaintiffs have not proved that Congress intended to create a non-waivable right to bring any of the claims they have filed as class or collective actions. Moreover, employers have adopted mandatory arbitration programs partly as a means of reducing litigation costs. Allowing a case to proceed as a class action after the parties have agreed otherwise would fundamentally undermine the benefits of arbitration agreements by imposing on employers the very burdens they sought to avoid. In light of the federal policy favoring arbitration and the enforcement of agreements to arbitrate, this Court should affirm the district court's decision.

ARGUMENT

I. STRONG FEDERAL POLICY FAVORS ARBITRATION AND REQUIRES THAT DOUBTS BE RESOLVED IN FAVOR OF ENFORCING AN AGREEMENT TO ARBITRATE

A. Congress And The Supreme Court Have Established And Endorsed A Strong And Unequivocal Federal Policy Favoring Arbitration, Particularly In The Employment Context

Express federal policy favors arbitration as a means of resolving employment disputes. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S.

20, 111 S. Ct. 1647 (1991), the Supreme Court concluded that claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, can be subject to compulsory arbitration. Noting the "'liberal federal policy favoring arbitration agreements,'" the Court observed, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" 500 U.S. 20, 25-26, 111 S. Ct. 1647, 1651-52 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983)).

The Court reiterated its "'strong endorsement of the federal statutes favoring this method of resolving disputes.'" 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481, 109 S. Ct. 1917, 1920 (1989)). Indeed, the Court pointed out that the purpose of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Id.* at 24, 1651 (citations omitted). Thus, the Court in *Gilmer* made it clear that as a general rule, "'[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 26, 1652

(quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3354 (1985)).

The Court unequivocally rejected general challenges to the arbitration process as an adequate means of vindicating statutory rights, even those under statutes "designed to advance important public policies." 500 U.S. at 28, 111 S. Ct at 1653. Quoting *Mitsubishi Motors*, the Court held that "'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'" *Gilmer*, 500 U.S. at 28, 111 S. Ct. at 1653 (quoting *Mitsubishi Motors*, 473 U.S. at 637, 105 S. Ct. at 3359). As the Court pointed out, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Id.* at 26, 1652 (quoting *Mitsubishi Motors*, 473 U.S. at 628, 105 S. Ct. at 3354).

Shortly after *Gilmer*, Congress too endorsed the use of arbitration to resolve employment discrimination claims. Section 118 of the Civil Rights Act of 1991 urges employers and employees alike to use out-of-court methods, including arbitration, to resolve disputes arising under each of these statutes:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and *arbitration*, *is encouraged* to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. 102-166, § 118, codified as 42 U.S.C. § 1981 note (Alternative Means of Dispute Resolution) (emphasis added). The identical language appears in Section 513 of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12212, which applies to all titles of the ADA, including Title I, which prohibits disability discrimination in employment.

In 2001, the Supreme Court again reaffirmed the strong public policy favoring agreements to arbitrate employment disputes, acknowledging the "real benefits to the enforcement of arbitration provisions" while soundly rejecting "the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23, 121 S. Ct. 1302, 1312-13 (2001). As the Court reasoned, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id.* at 123, 1313.

B. This Court Also Adheres To The Federal Policy Favoring Arbitration Of Employment Disputes

Not surprisingly, this Court also recognizes the strong federal policy favoring arbitration. *See, e.g.*, *Hill v. Rent-A-Center, Inc.*, ___ F.3d ___, 2005 WL 268269, at *2 (11th Cir. Feb. 4, 2005) ("[t]he FAA embodies a "liberal federal policy favoring arbitration agreements") (citation omitted); *Jenkins v. First American Cash Advance of Georgia, LLC*, ___ F.3d ___, 2005 WL 388269, at *4 (11th Cir. Feb. 18, 2005) (noting the "liberal federal policy favoring arbitration agreements") (citation omitted).

That view extends, of course, to agreements to arbitrate employment disputes. In *Weeks v. Harden Manufacturing Corp*., 291 F.3d 1307, 1310 (11th Cir. 2002), this Court rejected an employee's claim that his refusal to agree to an arbitration provision constituted protected activity for the purposes of alleging a claim of retaliation. The Court found that refusal to enter into an arbitration agreement was not protected activity because "arbitration agreements to resolve disputes between parties have now received near universal approval, … [and] arbitration agreements encompassing claims brought under federal employment discrimination statutes have also received near universal approval." *Id*. at 1312-13.

The lesson of *Gilmer*, *Circuit City*, and *Weeks* is that if there is a way to enforce an agreement to arbitrate employment disputes, the court should do so, resolving doubts in favor of arbitration. In contrast, the plaintiffs advocate the same "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" that the Supreme Court described as "far out of step" with its current jurisprudence. *Gilmer*, 500 U.S. at 30, 111 S. Ct. at 1654 (quoting *Rodriguez de Quijas*) (internal quotations omitted). *See also Jenkins* __F.3d__, 2005 WL 388269, at *10 (noting the Supreme Court's rejection of such attacks on arbitration). The plaintiffs' argument thus directly contravenes the Supreme Court's unequivocal view that "[t]he Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law . . . ." *Circuit City*, 532 U.S. at 123, 121 S. Ct. at 1313.

II. ARBITRATION IS AN EFFECTIVE, INDEED PREFERABLE, METHOD OF RESOLVING EMPLOYMENT DISPUTES

In their zeal to avoid arbitration, the Plaintiffs completely overlook its benefits. As a practical matter, arbitration is a less costly, more efficient, and more effective means of resolving employment disputes.

Plaintiffs in federal employment litigation win only about 40 percent of jury verdicts.[5] And only a tiny fraction of cases even reach a jury. "Employers win 98 percent of cases which are resolved through summary judgment." Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, Dispute Resolution Magazine (Fall 1999), at 23-24.

Despite these odds, a prospective plaintiff in an employment-related lawsuit still has to anticipate fees and expenses as a cost of pursuing litigation. The federal statutes prohibiting employment discrimination provide an award of attorney's fees only for the *prevailing* party, 42 U.S.C. § 1988(b), and relatively few plaintiffs prevail. As a result, plaintiffs in employment-related cases must either pay their litigation expenses out of pocket or find an attorney willing to take the case on a contingent fee basis, which may be difficult given the limited chance of success.

For many individuals, the costs involved in litigation may be prohibitive. A recent empirical study of employment arbitration found that middle and lower income employees often do not have access to the courts because of the costs involved in litigation, frequently leaving private employment arbitration as "the only adjudicative forum which they can

[5] Database of Federal Trial Statistics, *available at* http://teddy.law.cornell.edu:8090/questtr7997.htm (results of trials from 1985-2000).

access as a practical matter." Elizabeth Hill, *Due Process At Low Cost: An Empirical Study Of Employment Arbitration Under The Auspices Of The American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 782-784, 794 (2003) (footnote omitted). As the Seventh Circuit has noted:

> Employees fare well in arbitration with their employers--better by some standards than employees who litigate, as the lower total expenses of arbitration make it feasible to pursue smaller grievances and leave more available for compensatory awards.

Oblix, Inc. v. Winiecki, 374 F.3d 488, 491 (7th Cir. 2004)

Moreover, employees are much more likely to get their "day in court" in arbitration than they are in the judicial system. "Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997). Employees also are more likely to get an explanation of the outcome in arbitration, since most employer-sponsored arbitration programs, as well as the applicable American Arbitration Association Rules, require the arbitrator to produce a written opinion. Mei L. Bickner *et al.*, *Developments in Employment Arbitration*, Disp. Resol. J. (Jan. 1997) *available in* WESTLAW Find 52-JAN DR. J8, at *81; American Arbitration Ass'n,

National Rules for the Resolution of Employment Disputes (Jan. 1, 2004), Rule 34.c[6]. A jury, of course, does not do so.

Not only are employees more likely to be heard in arbitration – they are more likely to succeed. "[F]ar more employees win in arbitration than in court, and overall, employees who take their disputes to arbitration collect more than those who go to court." Maltby at 24.

Moreover, the speed with which disputes are resolved through arbitration far outpaces the judicial system. The federal courts take an average of 23 months to complete a civil case through jury trial, and twelve percent of cases take more than 36 months. Table C-10[7], Administrative Office of the United States Courts (Sept. 2004). "An arbitration award usually is issued within nine months after the time an arbitrator is selected." Toby Brink, *Alternative Dispute Resolution: Pros and Cons*, Conn. Emp. L. Ltr. (Mar. 2000) *available in* WESTLAW Find 8 NO. 3 SMCTEMPLL 3. The alacrity benefits both sides, but particularly employees, who typically can less afford a lengthy battle.

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is able to engage an attorney on a contingency fee basis . . .

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[6] *Available at* http://www.adr.org/sp.asp?id=22075

[7] U.S. District Courts - Time Intervals From Filing to Trial of Civil Cases in Which A Trial Was Completed, by District, During the Twelve Month Period Ended Sept. 30, 2004. *See* Addendum.

> the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press 1997), at 153-54.

As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales at 159 (footnote omitted).

> Procedural rights, such as the right to trial by jury, extensive (and often excessive) discovery, and formal rules of procedure and evidence, mean little to employees who cannot find an attorney to take their case, and who, therefore, feel that the doors to justice are closed to them. Arbitration gives these employees a ready opportunity to have their claims heard.

Id.

"Over the years, there have been many things which everyone *knew* were true that turned out to be wrong. The idea that employees are better off in court than in arbitration may well be one of them." Maltby at 24.

III. THE DISTRICT COURT CORRECTLY RULED THAT PLAINTIFFS' CONTINUED EMPLOYMENT SIGNIFIED ACCEPTANCE OF THE ARBITRATION AGREEMENT

Under both Georgia state law and federal law, continued employment can constitute acceptance of a contract to arbitrate employment disputes. As both the district court's opinion and the Defendants' brief demonstrate, Georgia courts have held that continued employment can signify acceptance

of a contract as long as the employees have notice that their continued employment constitutes acceptance. *Caley v. Gulfstream Aerospace Corp.*, 333 F. Supp. 2d 1367, 1374 (N.D. Ga. 2004), Brief of Defendants/Appellees, at 25-26. The district court correctly concluded that Plaintiffs had notice that continuing to work would constitute acceptance of the agreement. 333 F. Supp.2d at 1375-77. Therefore, the district court correctly held that Plaintiffs accepted the DRP by continuing to work.

The district court's finding that Georgia law allows continued employment to constitute acceptance of an arbitration agreement is consistent with federal appellate court decisions. For example, in *Tinder v. Pinkerton Security*, 305 F.3d 728 (7th Cir. 2002), the Seventh Circuit found that Pinkerton, the employer, had secured employees' assent to an arbitration agreement by including a brochure with each employee's paycheck that explained the program and stated that any employee who remained employed by Pinkerton as of January 1, 1998 would have agreed to be covered. The court explained:

> The agreement provided expressly that by remaining employed at Pinkerton after the effective date of the arbitration program Tinder, like all other employees, agreed to submit her claims to arbitration ... Tinder remained on the job past the effective date of the program. Doing such evidenced her mutual promise to arbitrate her disputes with Pinkerton.

Id. at 734.

The Fourth and Fifth Circuits also have held that continued employment is effective acceptance of an arbitration agreement. In *May v. Higbee Co.*, 372 F.3d 757 (5th Cir. 2004), the Fifth Circuit held that an employee who received two documents indicating that continued employment would constitute acceptance of an arbitration agreement was bound to arbitrate her Title VII claim. Similarly, in *Hightower v. GMRI, Inc.*, 272 F.3d 239 (4th Cir. 2001), the Fourth Circuit enforced an arbitration agreement against a challenge by an employee who attended a "roll out" meeting where employees were told that if they continued to work after a certain date they would have accepted the agreement to arbitrate claims.[8]

Because the Plaintiffs were informed that their continued employment would constitute acceptance of the DRP, and they continued to work, they are bound to arbitrate their disputes.

[8] *Lee v. Red Lobster Inns of America, Inc.*, 92 Fed. Appx. 158, 163 (6th Cir. 2004) (unpublished), cited by Plaintiffs at Brief of Appellants, at 39, does not support their argument, but rather it supports Gulfstream. The employer in *Lee* did not notify employees that continuing their employment was acceptance of the arbitration agreement. In fact, the Sixth Circuit specifically noted that in cases where the employer communicated that continuing employment was acceptance of the arbitration agreement, then it *would* constitute acceptance of the agreement, "…an employee's remaining at work past the effective date of [an employer's DRP] was properly construed as manifestation of an agreement to be bound." 92 Fed. Appx. at 163 n.4.

IV. WAIVER OF THE ABILITY TO BRING A CLASS OR COLLECTIVE ACTION IS A VALID, INTEGRAL PART OF THE AGREEMENT AND WAS PROPERLY ENFORCED BY THE DISTRICT COURT

A. The DRP's Prohibition Of Class And Collective Actions Is A Valid Waiver Of Plaintiffs' Procedural Right To Bring Such Actions

1. The Ability To Bring A Lawsuit As A Class Or Collective Action Is A Procedural Right That Generally Can Be Waived

The U.S. Supreme Court observed in *Gilmer* that, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31, 111 S. Ct. at 1655 (citation omitted). In so doing, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3354 (1985) (quoted in *Gilmer*, 500 U.S. at 26, 111 S. Ct. at 1652).

The ability to bring a class action is one of the procedural rights that can be waived in an arbitration agreement. *Jenkins v. First American Cash Advance of Georgia, LLC*, ___ F.3d ___, 2005 WL 388269, at *8 (11th Cir. February 18, 2005) (noting that "[w]e have held . . . that arbitration agreements precluding class action relief are valid and enforceable" and

rejecting claim that agreement was unconscionable under Georgia law). The "right" to bring a class action "is merely a procedural one, arising under Fed.R.Civ.P. 23, that may be waived by agreeing to an arbitration clause." *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000). In *Johnson*, the Third Circuit said that the Supreme Court's treatment of class actions in the *Gilmer* case makes clear that "simply because judicial remedies are a part of a law does not mean that Congress meant to preclude parties from bargaining around their availability." *Id*. at 377. The Seventh Circuit also noted in *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 276 (7th Cir. 1995):

> When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of those "procedural niceties" is the possibility of pursuing a class action under Rule 23.

(citations omitted). *See also Lomax v. Woodmen of the World Life Ins. Soc.*, 228 F. Supp.2d 1360, 1365 (N.D. Ga. 2002) (holding that an arbitration clause that prohibits class-wide arbitration is not unconscionable under Georgia law); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (upholding arbitration agreement's waiver of right to bring Fair Labor Standards Action claim as a collective action); *Adkins v. Labor Ready, Inc*., 303 F.3d 496, 503 (4th Cir. 2002) (same).

Accordingly, the DRP's prohibition on bringing claims as class or collective claims is valid and enforceable.

2. Plaintiffs Have Not Shown That Congress Intended To Create A Non-Waivable Right To Bring Any Of The Claims They Have Filed As Class Actions

This Court has held that an arbitration agreement clause precluding class actions is invalid only if Congress intended to create a non-waivable right to bring claims under the statute in question as class actions. *Randolph v. Green Tree Financial Corp.--Alabama*, 244 F.3d 814, 817-18 (11th Cir. 2001); *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331, 1337-38 (11th Cir. 2000). This narrow exception to the general rule does not apply to the claims in this case.

Notably, plaintiffs seeking to utilize the exception cannot succeed by demonstrating merely that a statute specifically contemplates and encourages class actions. Rather, a party seeking to avoid a class action waiver must establish that Congress actually intended to prevent parties from waiving the right to pursue class actions. In *Randolph*, for example, this court said that the Truth in Lending Act (TILA) did not create a non-waivable right to class actions, though the text of TILA specifically contemplates class actions and the legislative history stressed the importance of class action procedures in the TILA scheme. 244 F.3d at 817. A number

of other courts also have held that a right to a class action can be waived when Congress has not explicitly created a non-waivable right to proceed as a class. For example, in *Adkins v. Labor Ready, Inc*., 303 F.3d 496, 503 (4th Cir. 2002) the Fourth Circuit denied an employee's challenge to an arbitration agreement's waiver of the right to a class action in a claim brought under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, saying that there is "no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute. [Plaintiff's] inability to bring a class action, therefore, cannot by itself suffice to defeat the strong congressional preference for an arbitral forum." *See also Gilmer*, 500 U.S. at 32, 111 S. Ct. at 1655 ("even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred") (citation and internal quotation omitted).

The burden of proving that Congress explicitly created a non-waivable right to bring a class action is on the plaintiff. *Randolph*, 244 F.3d at 816-17 (citing *Gilmer*, 500 U.S. at 26, 111 S. Ct. at 1652). Because of the strong presumption in favor of arbitration, "a party who agrees to arbitrate,

but then asserts that his or her statutory claim cannot be vindicated in an arbitral forum, faces a heavy burden." *Johnson*, 225 F.3d at 369. The Plaintiffs have put forth no evidence to meet their heavy burden of showing that Congress created a non-waivable right to bring the claims they have filed as class actions. Moreover, a review of the statutory language of the claims Plaintiffs have brought, under the FLSA, ADEA, Title VII, and ERISA, demonstrates that Congress did not create a non-waivable right to file any of these claims as class or collective actions. *See* 29 U.S.C. § 216 (FLSA); 29 U.S.C. § 626(b) (ADEA); 42 U.S.C. § 2000e-5 (Title VII); 29 U.S.C. § 1132 (ERISA).

Because Congress did not create a non-waivable right to proceed as a class or collective action in any of the claims that the Plaintiffs have brought, the district court ruled correctly that the DRP's waiver of the right to bring a class action is valid and enforceable.

B. The DRP's Prohibition On Class And Collective Actions Is An Integral Part Of The Parties' Agreement And Should Be Enforced

In addition to being a permissible term of an arbitration agreement, a class action waiver also is an integral part of many employers' arbitration agreements. One reason that employers have adopted mandatory arbitration programs has been to reduce litigation costs. Allowing an arbitration to

proceed as a class action after the parties have agreed to the contrary would undermine fundamentally the benefits of arbitration agreements by imposing on employers the very burdens they sought to avoid. In so doing, it would significantly discourage the use of arbitration, in contravention of the "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 25-26, 111 S. Ct. at 1651-52 (citation omitted).

Unlike the typical arbitration, employment class actions involving hundreds or thousands of class members can be extremely complex and time-consuming to defend. The significantly higher costs and exposure posed by class actions creates enormous pressure to settle rather than run even a small risk of catastrophic loss. This makes the potential for what this Court has called "judicial blackmail" even greater:

> Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement.

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added); *see also Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citing cases referring to the pressure on defendants to settle class actions as "judicial blackmail.")

Unfortunately, meritless class actions are nearly as likely to settle as

those that have merit, because the pressure to settle is largely independent of the merits of the underlying statutory claims:

> Once plaintiffs obtain class certification, the defendant's exposure, plus projected costs of defending hundreds or thousands of individual claims, places almost overwhelming and irresistible pressure on the defendant to settle, regardless of the merits of the claims. Even if individual plaintiffs' odds of prevailing in their specific cases are low, the risk to defendants remains extremely high. In the face of these numbers, companies often perceive that they have little choice but to cut their losses through settlement.

Gary Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-The-Board Employment Discrimination Cases*, 15 The Labor Lawyer [A.B.A. Sec. Lab. & Emp. L.] 415, 416 (2000) (footnotes omitted); *see also Castano*, 84 F.3d at 746 ("[a]ggregation . . . makes it more likely that a defendant will be found liable and results in significantly higher damage awards") (citations omitted). This dilemma is evident in the employment context, where several employers have settled large class action discrimination suits for hundreds of millions of dollars to avoid larger litigation costs. *See* Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 B.Y.U. L. Rev. 305, 344 (2001).

The risks of class actions give employers little choice but to cut their losses through settlement. Judge Posner observed in *In re Rhone-Poulenc*

Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995), that when companies face billions of dollars in potential liability and possible bankruptcy as a result of a class action, "[t]hey may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." 51 F.3d at 1298 (citation omitted).

These issues are even more acute in the context of arbitration, which by its very nature is designed to promote, rather than discourage, speedy, cost-effective resolution of individual claims in as non-adversarial a manner as possible. Allowing a class action to proceed where the parties have agreed not to do so thus defeats a primary purpose of the arbitration agreement. From an employee relations viewpoint, the informal nature of arbitration is a tremendous benefit to both employers and employees. Many employers view arbitration and other forms of alternative dispute resolution as an opportunity not only to resolve a specific dispute but also to preserve relationships with their employees, particularly those who will continue to work for them well after their claims are addressed.[9] In light of the federal

[9] Furthermore, an individual's waiver of class action procedures will not affect the ability of other private parties not subject to arbitration agreements or public enforcement agencies to pursue class-wide relief. *See EEOC v. Waffle House*, 534 U.S. 279, 122 S. Ct. 754 (2002) (allowing Equal Employment Opportunity Commission to seek victim-specific relief in court – whether on behalf of an individual or an entire class – even when employees have signed an arbitration agreement).

policy favoring the enforcement of arbitration agreements, this Court should affirm the district court's approval of the DRP's class and collective action waiver.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the decision below should be affirmed.

Respectfully submitted,

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*Counsel of Record

March 1, 2005

CERTIFICATE OF COMPLIANCE

I, Ann Elizabeth Reesman, hereby certify that the Brief *Amici Curiae* of the Equal Employment Advisory Council and The Chamber of Commerce of the United States In Support of Defendants-Appellees and In Support of Affirmance with the type-volume limitations set forth in Federal Rules of Appellate Procedure 32(a)(7)(B)(i) and 20(d). The brief contains 6,053 words in Times New Roman fourteen point typeface.

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ADDENDUM

TABLE C 10. U.S. DISTRICT COURTS
TIME INTERVALS FROM FILING TO TRIAL OF CIVIL CASES IN WHICH A TRIAL WAS COMPLETED, BY DISTRICT
DURING THE TWELVE MONTH PERIOD ENDED SEP. 30, 2004

CIRCUIT AND DISTRICT	TOTAL TRIALS NUMBER OF TRIALS	TOTAL TRIALS MEDIAN TIME INTERVAL IN MONTHS*	NONJURY TRIALS NUMBER OF TRIALS	NONJURY TRIALS MEDIAN TIME INTERVAL IN MONTHS*	JURY TRIALS NUMBER OF TRIALS	JURY TRIALS MEDIAN TIME INTERVAL IN MONTHS*
TOTAL...	3,744	22.6	1,334	20.5	2,410	23.2
DC.....	32	27.4	14	21.0	18	27.0
1ST...	184	23.2	69	23.8	115	23.5
ME.....	21	13.0	6	-	15	13.0
MA.....	85	31.7	33	27.0	52	33.7
NH.....	9	-	2	-	7	-
RI.....	18	25.0	10	17.0	8	-
PR.....	51	22.4	18	23.5	33	22.7
2ND...	421	31.4	141	28.5	280	33.4
CT.....	67	31.0	12	36.5	55	30.7
NY,N....	36	39.5	13	39.0	23	41.0
NY,E....	112	33.0	30	30.0	82	34.7
NY,S....	172	26.8	74	22.0	98	27.2
NY,W....	23	40.0	9	-	14	46.0
VT.....	11	36.0	3	-	8	-
3RD...	366	24.7	128	22.0	238	25.2
DE.....	40	26.0	24	24.0	16	32.0
NJ.....	83	33.4	26	29.0	57	33.8
PA,E....	117	16.0	37	15.0	80	17.5
PA,M....	61	22.8	17	20.0	44	22.4
PA,W....	58	29.0	21	24.0	37	31.0
VI.....	7	-	3	-	4	-

TABLE C 10. U.S. DISTRICT COURTS
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TRIALS.C10.SEP2004
DURING THE TWELVE MONTH PERIOD ENDED SEP. 30, 2004

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4TH...	257	18.2	85	14.7	172	20.6
MD.....	39	25.5	16	17.0	23	27.0
NC,E....	20	20.8	7	-	13	22.0
NC,M....	12	19.0	4	-	8	-
NC,W....	6	-	-	-	6	-
SC.....	79	20.0	13	18.0	66	20.4
VA,E....	56	9.2	29	9.0	27	10.5
VA,W....	27	16.4	8	-	19	18.4
WV,N....	8	-	2	-	6	-
WV,S....	10	27.0	6	-	4	-
5TH...	503	19.5	211	19.1	292	19.0
LA,E....	84	16.2	49	16.7	35	16.5
LA,M....	17	43.0	5	-	12	32.0
LA,W....	41	26.5	23	25.8	18	29.0
MS,N....	23	19.0	4	-	19	19.0
MS,S....	48	21.5	21	28.7	27	19.5
TX,N....	79	21.7	34	20.0	45	24.5
TX,E....	57	15.4	5	-	52	15.4
TX,S....	85	19.5	37	19.4	48	20.4
TX,W....	69	16.4	33	15.8	36	16.0
6TH...	264	23.1	68	21.2	196	23.5
KY,E....	14	21.7	3	-	11	22.0
KY,W....	21	20.3	7	-	14	20.4
MI,E....	56	22.0	11	22.0	45	23.0
MI,W....	19	24.0	6	-	13	26.5
OH,N....	38	20.7	7	-	31	20.7
OH,S....	30	26.0	6	-	24	28.0
TN,E....	22	21.5	9	-	13	19.5
TN,M....	30	23.0	10	21.0	20	24.0
TN,W....	34	20.0	9	-	25	20.0

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7TH..	244	25.3	80	23.0	164	26.0
IL,N....	116	28.4	35	32.0	81	27.5
IL,C....	28	25.4	12	22.0	16	29.7
IL,S....	16	20.0	5	-	11	22.0
IN,N....	29	28.0	10	17.0	19	29.5
IN,S....	25	25.0	8	-	17	23.5
WI,E....	11	22.0	2	-	9	-
WI,W....	19	10.5	8	-	11	11.0
8TH...	270	20.8	88	17.5	182	21.0
AR,E....	73	20.0	37	16.3	36	21.0
AR,W....	32	15.4	9	-	23	15.7
IA,N....	9	-	2	-	7	-
IA,S....	12	19.0	3	-	9	-
MN.....	26	22.0	7	-	19	23.5
MO,E....	42	20.4	9	-	33	21.0
MO,W....	21	21.5	4	-	17	20.0
NE.....	32	24.0	12	16.0	20	25.0
ND.....	8	-	1	-	7	-
SD.....	15	25.0	4	-	11	22.0
9TH...	530	23.9	249	20.8	281	27.2
AK.....	10	27.0	7	-	3	-
AZ.....	60	30.7	19	24.0	41	32.7
CA,N....	69	22.5	31	21.4	38	24.0
CA,E....	31	27.5	11	20.0	20	32.0
CA,C....	156	17.8	74	14.5	82	21.0
CA,S....	31	30.0	21	30.0	10	29.0
HI.....	9	-	6	-	3	-
ID.....	7	-	1	-	6	-
MT.....	14	24.0	4	-	10	24.0
NV.....	38	28.0	16	25.0	22	33.0
OR.....	41	20.5	18	16.4	23	22.0
WA,E....	17	20.0	8	-	9	-
WA,W....	44	16.4	31	18.5	13	15.0
GUAM....	1	-	1			-

NMI.....	2	1	1

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TABLE C 10. U.S. DISTRICT COURTS
TIME INTERVALS FROM FILING TO TRIAL OF CIVIL CASES IN WHICH A TRIAL WAS COMPLETED, BY DISTRICT
DURING THE TWELVE MONTH PERIOD ENDED SEP. 30, 2004

CIRCUIT AND DISTRICT	TOTAL TRIALS NUMBER OF TRIALS	TOTAL TRIALS MEDIAN TIME INTERVAL IN MONTHS*	NONJURY TRIALS NUMBER OF TRIALS	NONJURY TRIALS MEDIAN TIME INTERVAL IN MONTHS*	JURY TRIALS NUMBER OF TRIALS	JURY TRIALS MEDIAN TIME INTERVAL IN MONTHS*
10TH..	267	20.7	65	20.0	202	20.2
CO.....	80	26.4	20	24.0	60	26.0
KS.....	46	22.7	9	-	37	22.0
NM.....	44	20.5	11	18.0	33	21.0
OK,N....	17	20.5	5	-	12	18.0
OK,E....	7	-	2	-	5	-
OK,W....	32	13.0	9	-	23	13.0
UT.....	23	21.5	5	-	18	21.0
WY.....	18	11.2	4	-	14	12.0
11TH..	406	21.9	136	21.3	270	22.8
AL,N....	46	27.5	8	-	38	26.5
AL,M....	23	20.0	5	-	18	20.0
AL,S....	17	16.0	5	-	12	16.0
FL,N....	15	17.5	3	-	12	17.5
FL,M....	94	20.2	45	22.0	49	19.7
FL,S....	124	18.0	48	17.0	76	19.0
GA,N....	56	22.0	17	21.0	39	24.0
GA,M....	18	32.0	5	-	13	24.5
GA,S....	13	33.0	-	-	13	33.0

NOTE INCLUDES TRIALS CONDUCTED BY DISTRICT AND APPELLATE JUDGES ONLY.
ALL TRIALS CONDUCTED BY MAGISTRATES ARE EXCLUDED.
EXCLUDES THE FOLLOWING TRIALS: LAND CONDEMNATION; FORFEITURES AND PENALTY CASES; PRISONER PETITIONS
(HABEAS CORPUS, MOTIONS TO VACATE SENTENCE UNDER 28 U.S.C. 2255, HEARINGS ON EVIDENTIARY MATTERS); BANKRUPTCY PETITIONS; AND THREE JUDGE COURT CASES.

TIME INTERVALS COMPUTED ONLY WHERE THERE ARE 10 OR MORE TRIALS.

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2005 two true and correct copies of the foregoing Brief *Amici Curiae* of the Equal Employment Advisory Council and The Chamber of Commerce of the United States In Support of Defendants-Appellees were served via Federal Express Priority Overnight courier delivery on each of the following:

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