ALAN H. SCHORR, ESQUIRE
SCHORR & ASSOCIATES, P.C.
5 SPLIT ROCK DRIVE
CHERRY HILL, NEW JERSEY 08003
(856) 874-9090 FAX (856) 874-9080
e-mail: alanschorr@schorrlaw.com
Attorney for the Plaintiff
Atty ID# 016721993

JORVIA CATOR, Plaintiff, v. WRDC CORP.; WRDH MT. LAUREL OPERATIONS, LLC D/B/A THE HOTEL ML & COCO KEY WATER RESORT; WRDH HOLDINGS, LLC; ANDREW ALEXANDER; MICHAEL NOLEN; DESIREE WIRBICK; and JOHN DOES 1-10(fictitious names of entities and/or individuals whose identities are presently unknown), individually, jointly, severally and/or in the alternative, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON COUNTY CIVIL ACTION DOCKET NO.: BUR-L-728-17 **ORDER GRANTING SUMMARY JUDGMENT ON COUNT TWO ONLY OF PLAINTIFF' S COMPLAINT**

This matter having been opened to the Court upon the application of the law firm of Schorr & Associates, P.C., attorneys for Plaintiff, Jorvia Cator, and the Defendants having been represent by Kit Applegate, Esquire, and the Court having considered the moving papers, and any opposition thereto, and good cause having been shown;

IT IS on this 22nd day of ~~January~~ February, 2018, HEREBY ORDERED that summary judgment is hereby entered in favor of the Plaintiff and against the Defendants on Count Two of the

Plaintiff's Complaint. Discovery and preparation for trial shall continue on Count One of Plaintiff's Complaint.

It is further ORDERED that a copy of the within Order shall be served upon all counsel of record within 7 days of the date hereof.

HON. AIMEE L. BELGARD, J.S.C.

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
BURLINGTON COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-728-17

JORVIA CATOR,

Plaintiff(s),

v.

WRDC CORP.; WRDH MT. LAUREL OPERATIONS, LLC D/B/A THE HOTEL ML & COCO KEY WATER RESORT; WRDH HOLDINGS, LLC; ANDREW ALEXANDER; MICHAEL NOLEN; DESIREE WIRBICK; AND JOHN DOES 1-10 (FICTITIOUS NAMES OF ENTITIES AND/OR INDIVIDUALS WHOSE IDENTITIES ARE PRESENTLY UNKNOWN), INDIVIDUALLY, JOINTLY, SEVERALLY AND/OR IN THE ALTERNATIVE

Defendant(s).

Decided: February 2, 2018

Adam L. Schorr, attorney for plaintiff (Schorr & Associates, P.C., attorneys).

Kit Applegate, attorney for defendant.

BELGARD, J.S.C.

This comes before the court on plaintiff's motion for partial summary judgment on count two of the complaint.

After considering the papers submitted, those on file, and oral argument, the court holds, for the reasons set forth below, that plaintiff's motion is granted.

Plaintiff was hired by defendants WRDH Mt. Laurel Operations, LLC (defendants) on March 24, 2015, as a reservation agent at defendants' Hotel ML/Coco Key West Resort. Plaintiff is a black female. Plaintiff made complaints about race discrimination during her year-long employment. On one occasion, in July 2016, plaintiff called her supervisor a racist. Defendants acknowledged plaintiff's July allegation as a race discrimination complaint. Any disputes about the timing of the complaints are immaterial to this motion.

On April 20, 2016, defendants implemented a new policy mandating, as a condition of employment, that all current and future employees sign an arbitration agreement.

The Arbitration Agreement states, in pertinent part:

> Excluding claims which must, by statute or other law, be resolved in other forums, you and the Company each agree that all Claims between you and the Company will be exclusively decided by arbitration governed by the Federal Arbitration Act before one neutral arbitrator and not by a Court or Jury.

On August 5, 2016, plaintiff returned an unsigned copy of the arbitration agreement to defendants. On it, she handwrote "I do not wish to waive my right to sue for discrimination and therefor [sic] I do not agree to arbitrate my claims of discrimination."

Defendants did not allow plaintiff to return to work because plaintiff refused to sign the arbitration agreement.

Both parties agree this is the sole reason plaintiff was not and has not been allowed to continue to work for defendants. Defendants suspended plaintiff and told her she could not work unless and until she signed the arbitration agreement; nonetheless, defendants still considered plaintiff to be an active employee.

Plaintiff argues that defendants violated her rights under the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to -49, when defendants prohibited plaintiff from returning to work because she refused to relinquish her right to a jury trial. Plaintiff argues this was a retaliatory discharge and defendants cannot provide a non-retaliatory reason for the adverse employment decision. Plaintiff argues she is entitled to summary judgment because there are no genuine issues of material fact and she is entitled to judgment as a matter of law. Plaintiff argues further that the LAD creates a right to a trial by jury.

Defendants argue that the LAD creates a right to sue, but not a right to sue in court. Defendants also argue that plaintiff's reading of the LAD would cause the LAD to run afoul of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 -16, and that the FAA would preempt the LAD. Finally, Defendants argue that they merely implemented a policy change 'across the board' and plaintiff voluntarily chose not to participate; thus,

preventing her return to work.

Summary judgment should be granted if the materials on file show that there are no genuine issues of material fact and the moving party is entitled to a judgment or order as a matter of law. R. 4:46-2(c). In determining whether summary judgment is appropriate, the motion judge must view all factual evidence in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Under this standard, summary judgment is only appropriate where the court finds that the evidence presented is insufficient to allow a rational fact-finder to resolve the dispute in favor of the non-moving party. Zaza v. Marquess & Nell, 144 N.J. 34, 54 (1996).

To establish a prima facie case for retaliation, plaintiff must prove that: 1. she participated in a protected activity known to defendants; 2. she was subjected to an adverse employment decision by defendants; and 3. there was a causal link between prongs one and two. Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996). The ultimate burden of proof remains with the employee, although there is a temporary burden shift to the employer once a prima facie case has been established. Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67, 90 (2012) (citing McDonnel Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973)).

Plaintiff argues that she has met the first prong of the test because section 13 of the LAD protects her right to sue in court and being forced to sign an arbitration agreement as a condition of continued employment would constitute a waiver of that statutorily-granted right. Plaintiff argues she has met the second prong because she was not allowed to return to work for over a year as a result of her refusal to sign the arbitration agreement. Finally, she argues that the first and second prongs are causally related because, by defendants' admission, the only reason plaintiff could not return to work was because she did not sign the arbitration agreement, giving up her right to sue in court.

Defendants argue that plaintiff cannot meet the first prong of the test because she was not engaging in a protected activity, as the LAD does not protect plaintiff's right to sue in court.

Section thirteen of the LAD states, in pertinent part:

> Any person claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination may, personally or by an attorney-at-law, make, sign and file with the division a verified complaint in writing . . . . Upon receipt of the complaint, the division shall notify the complainant on a form promulgated by the director of the division and approved by the Attorney General of the complainant's rights under this act, <u>including the right to file a complaint in the superior court to be heard before a jury</u> . . . .
>
> [N.J.S.A. 10:5-13 (emphasis added)].

Additionally, it is unlawful to "take reprisals against any person because that person has opposed any practices . . . under this act . . . or to coerce, intimidate threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by this act" under the LAD. N.J.S.A. 10:5-12(d).

The New Jersey Supreme Court has found that persons alleging LAD violations have a "clear right to a trial by jury." Rodriguez v. Raymours Furniture Co., 225 N.J. 343, 358 (2016). It has also found that the purpose of an arbitration agreement is "to assure that parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Atalese v. U.S. Legal Servs. Group, L.P., 219 N.J. 430, 444 (2014) (citations omitted). Furthermore, the United States Supreme Court has recognized that arbitration is a matter of contract, and parties cannot be required to submit to arbitration disputes that the parties have not agreed to arbitrate. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986).

Plaintiff looks to Ackerman v. The Money Store, where the trial court found that the right to file a complaint with the Division or in Superior Court is a right granted to anyone who claims to be a victim of unlawful employment practices or discrimination. Ackerman v. The Money Store, 321 N.J. Super.

308, 318 (Law Div. 1998) (citing N.J.S.A. 10:5-13). In Ackerman, the plaintiff also refused to sign an arbitration agreement and her employer would not let her return to work as a result. Id. at 311-12, 318. However, the plaintiff in Ackerman did eventually sign the agreement, albeit with an accompanying note clarifying she did so "under protest." Id. at 312. Nonetheless, the plaintiff's employer did not accept the signature with the notation of protest, and she was fired. Ibid. The court concluded that the condition of continued employment imposed on the plaintiff, namely, signing the arbitration agreement, would have caused the plaintiff to relinquish her statutory rights under section thirteen of the LAD. Id. at 318-21. There was no allegation of discrimination in Ackerman. Id. at 319.

Defendants argue that this court should follow the precedent set by the Supreme Court of the United States when it interpreted the Credit Repair Organizations Act ("CROA"), 15 U.S.C. §§ 1679-1679j, in light of an arbitration agreement embedded in a credit card contract. See CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012). In CompuCredit, the Court considered whether a signed credit card agreement required the respondents' claims to be resolved by binding arbitration. Id. at 96-97. The Court found that the respondents did not retain the right to sue in court, despite language in the CROA such as

"right to sue," "court," "action," and "class action," that the respondents highlighted to argue that the statute provided an explicit right to sue in court. Id. at 100-01 (citing 15 U.S.C. § 1679q).

Defendants argue further that the LAD does not give plaintiff and similarly situated litigants the right to sue in a specific forum. Defendants argue that plaintiff's interpretation of the LAD would necessarily result in a situation where a district court judge could not hear a LAD case under diversity jurisdiction because the case would be reserved solely for the jurisdiction of the superior court. Defendants argue accordingly that plaintiff would not give up any statutory rights by signing the arbitration agreement. Defendants also argue against the Ackerman holding, as it is a Law Division case and because there have been subsequent developments in the law regarding arbitration agreements and FAA preemption in the Supreme Court of the United States.

Under traditional canons of statutory interpretation, "[the court] must give full effect to every word in the statute whenever possible and not presume that the Legislature intended any word in the statute to be inoperative, superfluous or meaningless, or to mean something other than its ordinary meaning." Matter of Estate of Post, 282 N.J. Super. 59, 72 (App. Div. 1995). Here, the plain language of the LAD explains

that the division must provide notice to a complainant "of the complainant's rights under the [LAD] act, including the right to file a complaint in the superior court to be heard before a jury." N.J.S.A. 10:5-13. This language, providing for a jury trial under the LAD, is more explicit than the repetition of certain discrete phrases and words that were debated in CompuCredit, 565 U.S. at 101. Moreover, there is no signed arbitration agreement creating a contractual obligation to arbitrate here, as there was in CompuCredit. See id. at 101-102. As such, and in accord with Rodriguez, 225 N.J. at 358, the court finds that LAD complainants - like plaintiff - have a right to a trial by jury under the New Jersey LAD.[1] Moreover, given this right to a jury trial, whether complainants have a right to sue in a specific forum is immaterial to the case at bar and need not be further addressed at this time.

Given the foregoing, plaintiff meets prong one of the retaliation test because she participated in a protected activity known to defendants when she preserved her right to a trial by jury, regardless of whether her claims of

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[1] The court also notes that the Seventh Amendment of the United States Constitution preserves litigants' rights to a civil trial by jury in federal court. U.S. Const. amend. VII. This right is further codified in the Civil Rights Act of 1991(with the exception of disparate impact cases). 42 U.S.C. § 1981 (granting right to jury trial to complainants under Title VII of Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17).

discrimination were existing or prospective. Plaintiff also meets prong two because there is no dispute that defendants' refusal to allow plaintiff to return to work, although not an outright termination, was an adverse employment decision. There is also no dispute that the reason defendants would not allow plaintiff to return to work was because she would not sign the arbitration agreement (and give up her right to sue in court under the LAD), meeting prong three. Plaintiff meets each prong of the retaliation test; accordingly, the court finds that plaintiff has set forth a prima facie case of retaliation.

Next, the court must determine if defendants provided a legitimate, non-retaliatory reason for the adverse employment decision against plaintiff. See Winters, 212 N.J. at 90 (citations omitted). Other than disputing the timing of plaintiff's first allegations of race discrimination, defendants have not set forth any non-retaliatory reasons for the adverse employment decision. The timing of plaintiff's discrimination allegation, however, has no bearing on defendants' adverse action following plaintiff's refusal to waive her right to a jury trial. Thus, the court finds that defendants have not provided an alternative reason to shift the burden back to plaintiff for rebuttal. See ibid.

Defendants argue instead that the FAA preempts New Jersey's LAD. Defendants quote the language of the FAA, that the statute

makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court of the United States found that contract defenses like fraud or unconscionability may apply to invalidate arbitration clauses, but not so with defenses that rest on "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" Kindred Nursing Ctrs. Ltd. v. Clark, 581 U.S. __, 137 S. Ct. 1421, 1426 (2017) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)). Thus, the FAA preempts state laws that discriminate on their face against arbitration. Ibid.

In another opinion, the Supreme Court found that "courts must place arbitration agreements on equal footing with other contracts." Concepcion, 563 U.S. at 339. Additionally, any state rules discriminating against arbitration covertly by disfavoring contracts that have the signifying features of arbitration agreements will be preempted. Kindred, 137 S. Ct. at 1426. The Supreme Court also determined that the FAA applies to the formation of arbitration agreements, as well as to their enforcement. Id. at 1428. "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule refusing to enforce those agreements once properly made." Ibid. (citing Concepcion, 563

U.S. at 341).

Defendants argue that if this court finds that requiring an arbitration agreement as a condition of employment is a violation of the LAD but does not find it would be a LAD violation if defendants had asked plaintiff, for example, to wear a uniform as a condition of employment instead, then the LAD would cause arbitration to be treated differently than other employer requests of employees. Thus, defendants contend that the LAD discriminates against arbitration.

Plaintiff differentiates Kindred from the present case because in Kindred, the Court's decision focused on whether or not a state could invalidate a signed arbitration agreement. Id. at 1428-29. There, two individuals with a general power of attorney over two nursing home residents signed an arbitration agreement on the residents' behalf. Id. at 1425. When the estates of the two residents brought posthumous lawsuits against the nursing home, the state courts in Kentucky found that there was no language specifically providing for the representatives with general powers of attorney to enter into arbitration agreements for their principals and to give up their principals' constitutional rights to sue in court. Id. at 1425-26. The Court then reversed in part and remanded in part, finding that the rule relied on by the Kentucky courts was discriminatory to arbitration agreements. Id. at 1428-29.

Although the Supreme Court remanded to have the state court determine if the contracts were properly formed in Kindred, id. at 1428, the matter in the case at bar concerns an agreement that was never formed at all, making that step unnecessary and, in fact, impossible. As previously stated, both parties here agree that plaintiff never signed the arbitration agreement. Moreover, plaintiff went a step further and added an explanation stating that she refused to sign because she would not agree to arbitrate her discrimination claim. Thus, the issue at bar is wholly different than the considerations of the Supreme Court in Kindred.

This court is not persuaded that a determination in favor of plaintiff here interferes with the general freedom to contract, or places signed arbitration agreements on an unequal plane relative to other contracts, or in some way disfavors contracts with the "defining features of arbitration agreements." Id. at 1423, 1426. There is nothing to suggest here that the LAD disfavors contracts that support arbitration. Rather, the LAD affords an employee the right to trial by jury. The employee can choose to waive that right by executing an arbitration agreement as a condition of employment, without any prohibition on that contractual right - either directly or covertly - by the LAD. Here, plaintiff was free to enter into an arbitration agreement and simply chose not to do so.

Plaintiff was already employed by defendants when given the proposed arbitration agreement to execute. This made the suggested agreement a condition of plaintiff's continued employment rather than of her prospective employment.

The court does not find that the FAA preempts the LAD simply because the LAD provides the right to sue in a trial by jury. This is especially so in light of the fact that there is no executed arbitration agreement in dispute here.

Given the foregoing, this court holds that defendants violated plaintiff's right to a jury trial and retaliated against her when she refused to waive this right. As such, partial summary judgment is entered in favor of plaintiff on count two of the complaint.