RECENT DEVELOPMENTS

*EEOC v. Waffle House, Inc.**

I. INTRODUCTION

One year ago we confidently declared that "[e]mployers need no longer worry that the arbitration agreements they include in contracts of employment will be subject to attack."[1] Now, however, the forecast is not so certain. Following closely on the heels of its decision in *Circuit City*,[2] the Supreme Court, in *EEOC v. Waffle House*, has added a new wrinkle to the employment contract arbitration clause issue—a wrinkle that does more to return the debate to the murky world of uncertainty than it does to provide predictability.[3]

In a 6-3 decision this spring, the Court ruled that the Equal Employment Opportunity Commission (hereinafter EEOC) is not barred from pursuing relief on behalf of an employee even though the employee has signed an arbitration agreement in conjunction with the employment contract.[4] With this decision, the Court answered at least one "hotly disputed and longstanding question" that remained in the wake of *Circuit City*—simply, "whether employees may be compelled to arbitrate statutory employment discrimination claims."[5] Now, employees are clearly not compelled to arbitrate these claims, and employers once again may have reason to worry.

Whereas *Circuit City* was generally seen as a victory for employers desiring binding arbitration of employment disputes, *Waffle House* can only be viewed as a victory for plaintiffs.[6] Now, after *Waffle House*, in addition to

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* Equal Employment Opportunity Comm'n v. Waffle House, Inc., 122 S.Ct. 754 (2002).

[1] Charity S. Robl, Recent Development, Circuit City Stores, Inc. v. Adams, 17 OHIO ST. J. ON DISP. RESOL. 219 (2001).

[2] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[3] This uncertainty appears to propagate from the divide on the Court between the traditionally conservative justices who favor uninhibited pursuit of arbitration clauses and the liberal justices who favor restrictions on this course of action. *See High Court Appears Divided on Arbitration Matter*, 12 WORLD ARB. & MEDIATION REP. 298 (2001).

[4] EEOC v. Waffle House, 122 S.Ct. 754 (2002).

[5] *See* Mitchell F. Dolin, *U.S. Arbitration Update*, SG046 ALI-ABA 883, 886 (February 7–9, 2002).

[6] *See* Erwin Chemerinsky, *One Defeat, One Victory for Civil Rights Plaintiffs*, 38 TRIAL, March, 2002 at 73. *But See* David L. Hudson, Jr., *EEOC Can Override ADR: Agency Isn't Bound by Arbitration Agreements, High Court Says*, 1 No. 2 ABA J. E-REPORT 3 (January 18, 2002) (arguing that the victory for employees may be limited, due

worrying whether their arbitration agreements will be honored in disputes with the EEOC, employers will also be concerned with the type of relief available to its former employees—as the Supreme Court has held that the EEOC is now able to pursue victim-specific relief under Title VII of the Civil Rights Act of 1964 and the Federal Arbitration Act.

II. FACTS AND PROCEDURAL HISTORY

Eric Baker went to work as a grill cook for Waffle House on August 10, 1994.[7] In order to obtain this job, Baker signed the required application and in doing so agreed to the included mandatory arbitration agreement.[8] On day sixteen of his employment, Baker suffered a seizure at his workplace and was "soon thereafter discharged."[9] Rather than seeking arbitration over his termination, Baker filed a timely charge with the EEOC claiming that Waffle House violated his civil rights under the Americans with Disabilities Act (hereinafter ADA).[10]

The EEOC conducted an investigation and attempted to reach conciliation with Waffle House, but was unsuccessful.[11] The EEOC subsequently filed suit in the Federal District Court for the District of South Carolina.[12] The claim was an enforcement action alleging that Waffle House had violated the ADA by terminating Baker by reason of his disability.[13] The EEOC sought as remedy injunctive relief and an order for specific relief "designed to make Baker whole, including backpay, reinstatement, and compensatory damages, and to award punitive damages for malicious and reckless conduct."[14]

Finding that a "valid, enforceable arbitration agreement" existed between Waffle House and Baker,[15] the Fourth Circuit Court of Appeals addressed

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to the basic fact that litigation does not produce the same likelihood of recovery—however small—that arbitration provides.).

[7] *Waffle House*, 122 S.Ct. at 758.

[8] *Id.* All applicants for employment with Waffle House must sign a similar application. *Id.*

[9] *Id.*

[10] *Id.* At no time during the resolution of his claim did Baker attempt to initiate arbitration.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 759.

[15] *Id.* This was in response to the district court's factual finding that Baker's employment contract did not actually contain a mandatory arbitration clause—and its

the effect that this agreement had in relation to the EEOC's complaint. Though recognizing the EEOC's "independent statutory authority to bring suit in any federal district court where venue is proper," the court of appeals held that the EEOC was not able to pursue victim-specific relief that it sought on behalf of Baker.[16] The court reasoned that "the federal policy [of the Federal Arbitration Act] favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed" when seeking "make-whole" relief for a complaining party.[17] The court further stated that only when the EEOC pursues "large-scale injunctive relief" will the "balance tip[] in favor of EEOC enforcement efforts"—and then, only because "public interest dominates the . . . action."[18]

In short, the court of appeals held that "permitting the EEOC to prosecute Baker's claim in court 'would significantly trample' the strong federal policy favoring arbitration because Baker had agreed to submit his claim to arbitration."[19] The EEOC petitioned the Supreme Court and the Court granted cert to determine this issue.

III. THE COURT'S HOLDING

Reversing the court of appeals, the Supreme Court held that mandatory arbitration agreements in employment contracts cannot preclude the EEOC from pursuing relief on behalf of a complaining employee, even if that relief is considered to be "victim-specific"—including such remedies as backpay, reinstatement, and damages.[20]

Rejecting the lower court's attempt "to balance the policy goals of the FAA against the clear language of Title VII and the agreement,"[21] the Court limited the question to whether the arbitration agreement between Baker and Waffle House limited the EEOC in its pursuit of remedies,[22] and based its ruling upon a textual examination of the basic function of the EEOC and the powers and limitations attributed to the agency by Congress through Title VII and the FAA, respectively.

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subsequent denial of Waffle House's motion under the Federal Arbitration Act to compel arbitration. *Id.*

[16] *Id.*

[17] EEOC v. Waffle House, 193 F.3d 805, 812 (4th Cir. 1999).

[18] *Id.*

[19] *Waffle House*, 122 S. Ct. at 762 (quoting *Waffle House*, 193 F.3d at 812).

[20] *Id.* at 760.

[21] *Id.* at 764.

[22] *Id.* at 766.

A. *The Purpose and Powers of the EEOC Under Title VII*

The Court began its analysis with an exploration of the powers of the EEOC under Title VII and the subsequent amendments and case law that followed the enactment of the Civil Rights Act of 1964. Justice Stevens began this analysis by stating that "Congress has directed the EEOC to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII . . . when it is enforcing the ADA's prohibitions against employment discrimination on the basis of disability."[23]

Although the EEOC was originally defined as "an investigative and conciliation agency,"[24] the Court explained that Congress's 1972 amendments[25] of Title VII "created a system in which the EEOC was intended 'to bear the primary burden of litigation.'"[26] As such, the EEOC was then permitted to pursue in court remedies such as injunctions and "appropriate affirmative action, which may include reinstatement, with or without backpay."[27] Additionally, these amendments gave the EEOC exclusive jurisdiction for one hundred and eighty days after a complaint is filed to determine whether it will seek a civil cause of action.[28] Although these amendments did not address the issue of arbitration, they did establish the basic framework from which the EEOC would operate for the next thirty years.

From there, the Court addressed the case law development of this basic framework and how this litigious power of the EEOC applies to the agency's actions on behalf of complaining employees. In doing so, the Court reestablished the independent authority of the EEOC to bring a cause of action in court. First citing *Occidental Life Insurance. Co. of California. v. EEOC*,[29] the Court stated that under the 1972 amendments "the EEOC does

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[23] *Id.* at 759 (citing 42 U.S.C. § 12117(a) (1994)).

[24] Rebecca K. Beerling, Comment, *Left Out of the Balance—The Public's Need for Protection Against Workplace Discrimination:* Waffle House *and* Kidder Peabody *Attempt to Limit the Remedies Available to the EEOC by Balancing Policies Not in Conflict*, 25 HAMLINE L. REV. 295, 300 (2002).

[25] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 1, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. 2000e (2000).

[26] *Waffle House*, 122 S. Ct. at 760 (quoting Gen. Tel. Co. of Northwest v. EEOC, 446 U.S. 318, 326, 100 S.Ct. 1698 (1980)).

[27] *Id.*

[28] *See* Beerling, *supra* note 24, at 301. ("Even if the EEOC opts not to pursue the complaint, the individual grievant may independently pursue a civil action[,]" or may be provided with a 'right to sue' letter before the [one hundred and eighty day period] has expired.").

[29] Occidental Life Ins. Co. of Cal. v. EEOC, 432 U.S. 355 (1977).

not function simply as a vehicle for conducting litigation on behalf of private parties,"[30] and explained that "[t]o hold otherwise would have undermined the agency's independent statutory responsibility to investigate and conciliate claims by subjecting the EEOC to inconsistent limitations periods."[31]

The Court further explained that under *General Telephone Co. of Northwest v. EEOC*[32] the EEOC has the "authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals" and that the agency "is not merely a proxy for the victims of discrimination."[33]

Finally, the Court addressed the type of remedy that the EEOC is able to pursue in court on behalf of a complaining party. The 1991 amendments to Title VII[34] permit "the recovery of compensatory and punitive damages by a 'complaining party.'"[35] The Court explained that the term "complaining party" is meant to "include both private plaintiffs and the EEOC," and that "the amendments apply to ADA claims."[36] According to the Court, in the context of Waffle House this "unambiguously authorize[d] the EEOC to obtain the relief that it seeks in its complaint if it can prove its case against respondent."[37]

The only remaining question, therefore, was to what extent these purposes and powers of the EEOC have been limited by the FAA.

B. *Limitations Placed Upon the EEOC by the FAA?*

1. *The EEOC's Ability to Seek Relief*

The Court began its discussion of the FAA by reasserting the policy in favor of arbitration and declared that the purpose of the act "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts."[38] Repeating

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[30] *Waffle House*, 122 S. Ct. at 761 (quoting *Occidental Life Ins. Co. of Cal.*, 432 U.S. at 355).

[31] *Id.*

[32] Gen. Tel. Co. of Northwest v. EEOC, 446 U.S. 318 (1980).

[33] *Waffle House*, 122 S. Ct. at 761 (quoting *Gen. Tel. Co. of Northwest*, 446 U.S. at 324, 326).

[34] The Civil Rights Act of 1991, Pub. L. No. 102-166 § 3, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e (2000)).

[35] *Waffle House*, 122 S. Ct. at 760 (quoting 42 U.S.C. § 1981a(a)(1) (1994).

[36] *Id.* (citing 42 U.S.C. §§ 1981a(a)(2), 1981a(d)(1), and 1981a(d)(2)).

[37] *Id.*

[38] *Id.* at 761 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

the rule from *Circuit City*, the Court then stated that "[e]mployment contracts, except for those covering workers engaged in transportation, are covered by the Act."[39]

Recognizing the "liberal federal policy favoring arbitration agreements,"[40] the Court appeared ready to continue the pro-employer trend of *Circuit City*. However, Justice Stevens continued by stating, "absent some ambiguity in the agreement . . . it is the language of the contract that defines the scope of disputes subject to arbitration."[41] According to the Court, "nothing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement."[42] And though the FAA does guarantee that private arbitration agreements will be enforced, because the EEOC—as a public agency—is not a party subject to the arbitration agreement, the statute "does not purport to place any restriction on [its] choice of judicial forum."[43] In essence, the FAA does not apply to the EEOC in instances such as this—as the EEOC is simply not a party to the case.

2. *Relief Available to the EEOC*

Finding no limitation in the FAA upon the EEOC's ability to bring suit, the Court likewise found no limitation in the type of relief that the EEOC may seek. Further asserting this "'independent statutory authority'" of the EEOC, the Court disagreed with the lower court's assessment that allowing the agency to "prosecute Baker's claim in court 'would significantly trample' the strong federal policy favoring arbitration."[44]

Rather than distinguishing between appropriate "broad injunctive relief" and inappropriate "victim-specific relief"—as the court of appeals opined—the Supreme Court declared that the FAA "clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake."[45] Therefore, regardless of the degree public interest, the EEOC is the sole determiner of whether it shall proceed in court and what remedies it shall seek; the courts have no ability to regulate this decision.[46]

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[39] *Id.* (citing *Circuit City* 532 U.S. 105 at 112).

[40] *Id.* at 762 (quoting *Gilmer*, 500 U.S. at 25) (citation omitted)).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* (quoting *Waffle House*, 193 F.3d at 812).

[45] *Id.* at 762–63.

[46] *See id.*

The Court disagreed with the dissent and with respondent's assertion that the EEOC is limited under Title VII to "appropriate" relief as determined by the courts—which specifically excludes victim-specific remedies such as those sought by the agency on behalf of Baker.[47] Once again, the Court arrived at the conclusion that "[t]he text of the relevant statutes . . . do[es] not authorize the courts to balance the competing policies of the ADA and the FAA or to second-guess the agency's judgment concerning which of the remedies authorized by law that it shall seek in any given case."[48]

Rather, the Court found that the Title VII reference to "appropriate" relief specifically refers to "a subcategory of claims for equitable relief, not damages" and does not permit a court to broadly prohibit a certain form of relief simply because an employee "has signed an arbitration agreement."[49] The Court once again objected to the court of appeal's distinction of some forms of remedy as being victim-specific and others as being simply injunctive, or broadly-based.[50] Instead, the Court viewed all remedies available to the EEOC as a means within the power of the agency to "vindicate a public interest, not simply [to] provide make-whole relief for the employee, even when it pursues entirely victim-specific relief."[51] This approach, the Court held, is more in keeping with the "detailed enforcement scheme created by Congress."[52]

C. *The Dissent*

The dissent—led by Justice Thomas—believed that the Court's opinion "conflicts with both the [FAA], and the basic principle that the EEOC must take a victim of discrimination as it finds him."[53] Because the majority

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[47] *Id.* The argument was based upon a reading of 2000e-5(g)(1), which states in part,

> the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1) (2001).

[48] *Waffle House, Inc.*, 122 S. Ct. at 766.

[49] *Id.* at 763.

[50] *Id.* at 764. According to the Court, this classification of certain remedies as "victim-specific . . . is both overinclusive and underinclusive." It is overinclusive because "punitive damages . . . serve an obvious public function," and "underinclusive because injunctive relief, although seemingly not 'victim-specific,' can be seen as more closely tied to the employees' injury than to any public interest." *Id.* at 764–65.

[51] *Id.* at 765.

[52] *Id.*

[53] *Id.* at 766 (Thomas, J., dissenting).

opinion allows the EEOC to seek victim-specific relief for a complainant that is unable to personally seek the same relief, the dissent felt that the Court now allows the EEOC to "do 'on behalf of [the victim]' that which he cannot do for himself."[54]

As with the majority, the dissent took a textual approach to Title VII and arrived at the opposite conclusion that the determination of appropriate remedies is reserved for "a court and not for the EEOC."[55] Additionally, the dissent found the absence of clear, unambiguous language to be determinative. Citing legislative history and Congress' prior efforts to grant federal agencies the authority to pursue and enforce particular remedies, the dissenting justices concluded that the legislature—knowing how to grant this "cease-and-desist" power—specifically chose not to do so with the EEOC.[56] Instead, the dissent declared, "[t]he statutory scheme enacted by Congress . . . entitles neither the EEOC nor an employee, upon filing a lawsuit, to obtain a particular remedy by establishing that an employer discriminated in violation of the law."[57]

The dissent further concluded that "it would [not] be 'appropriate' to allow the EEOC to obtain victim-specific relief."[58] Because the employee is the "ultimate benefactor" of any suit that the EEOC brings, the dissent felt that the agency should only be able to obtain the same relief that the employee could get on his own.[59] And, in the context of employment-related arbitration agreements, the dissent reasoned that this precludes the EEOC from obtaining certain victim-specific relief that the employee has specifically and voluntarily waived through the agreement to arbitrate.[60]

Finally, Justice Thomas argued that "allow[ing] the EEOC to obtain victim-specific relief . . . would contravene the 'liberal federal policy favoring arbitration agreements' embodied in the FAA."[61] Citing principles

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[54] *Id.* at 768.

[55] *Id.* The dissent found the plain language of § 2000e-5(g)(1) as expressly giving the discretion of appropriate remedies to the court. *Id.*

[56] *Id.* at 768–69 (According to the dissent, both the original House and Senate versions of the Equal Employment Opportunity Act of 1972 would have granted the EEOC these powers, as Congress had granted them to the National Labor Relations Board.).

[57] *Id.* at 769.

[58] *Id.*

[59] *Id.* at 769–70.

[60] *Id.*

[61] *Id.* at 772 (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

of res judicata and mootness,[62] the dissent warned against interpreting enforcement of the ADA "in a manner that undermines the FAA."[63] Essentially, the dissent feared that by ignoring the effect that the majority's opinion could have on arbitration agreements, the Court would discourage the use of arbitration agreements when Congress has expressly established a policy that favors their use.

IV. THE IMPACT OF THE COURT'S RULING

The question, then, is obvious: "Is the dissent correct?" Will this ruling in fact discourage the use of arbitration agreements in employment contracts? The answer, unfortunately, is not so readily evident. Certainly, when comparing the interests of employers against those of employees, *EEOC v. Waffle House*—as stated above—can only be seen as a victory for employees. What remains to be determined is the size and scope of this victory.

A. *The Scope of this Decision*

Once again, *Waffle House* facially appears to be a sharp break from the recent Supreme Court trend, typified by *Circuit City*, that has supported employer-mandated arbitration agreements. However, a careful examination of the scope of this decision may lead to an alternative conclusion.

First, it is important to note that the decision in *Waffle House* addresses only the EEOC's ability to seek victim-specific relief, and leaves to

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[62] *See id.* at 772–74. As to res judicata, the dissent cautions that an employer will now "face the prospect of defending itself in two different forums against two different parties seeking precisely the same relief," while their employees "will be allowed two bites at the apple—one in arbitration and one in litigation conducted by the EEOC—and will be able to benefit from the more favorable of the two rulings." *Id.* at 772–73. As for mootness, the dissent explains in response to the majority:

> It should go without saying that mootness principles apply to EEOC claims. For instance, if the EEOC settles claims with an employer, the Commission obviously cannot continue to pursue those same claims in court. An employee's settlement agreement with an employer, however, does not 'moot' an action brought by the EEOC nor does it preclude the EEOC from seeking broad-based relief. Rather, a settlement may only limit the EEOC's ability to obtain victim-specific relief for the employee signing the settlement agreement.

Id. at 773.

[63] *Id.* at 774.

speculation the ability of other agencies do the same.[64] The Court's assessment of this issue hinges in great detail upon the specific authority of the EEOC under Title VII and the ADA.[65] As such, the Court's analysis does not naturally extend to other federal or state enforcement agencies.[66]

From this point, it may be better said that *Waffle House* is not so much a victory for employees (or, subsequently, a defeat for employers) as it is a victory simply for EEOC. What the Court's decision appears to have really done is simply reinforce the powers of the EEOC and essentially grant the EEOC an "oversight" position in the few cases each year that are similar to *Waffle House*.[67] This, in turn, may go a long way towards ensuring that employment arbitration agreements are of the highest quality.[68] If the EEOC issues arbitration guidelines, only those employers who choose non-compliant arbitration methods will risk the results found in *Waffle House*.[69]

B. *The Existing Limitations on the EEOC*

Finally, from a purely practical standpoint, the effect of this decision is limited severely by two important self-imposed restrictions on the EEOC. First, as indicated by Justice Stevens in the majority's opinion, the EEOC is not able to pursue relief in court unless it first seeks conciliation.[70] Only after the EEOC satisfies this requirement can it seek victim-specific relief through litigation.

Second, even after passing the conciliation gate, the claim has to survive the EEOC's own selection process. Again, as the Court explained, the likely result will not be litigation—as the EEOC actually litigates less than one percent of the claims it receives each year.[71]

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[64] *See* Michael Delikat, *Discrimination Law Update*, *in* LITIGATING EMPLOYMENT DISCRIMINATION & SEXUAL HARASSMENT CLAIMS 2002 49, 74 (noting that "the decision does not directly affect enforcement efforts by the Department of Labor, the NLRB or state agencies").

[65] *See id.*

[66] *See id.*

[67] *See* Garry Mathiason & George Wood, *Arbitration in Employment Settings: Implications of* Circuit City *and* Waffle House, BENCH & B. MINN., Jul. 2002, at 21, 24.

[68] *See id.* (noting that now "the EEOC can bring important unresolved workplace discrimination issues into the federal courts to establish new case precedents . . . [which] guarantees that courts will remain available to provide guidance on important public policy issues").

[69] *See id.*

[70] *See* EEOC v. Waffle House, 122 S.Ct. 754, 762, n. 7 (2002) (citing 42 U.S.C. § 2000e-5(b) (1994)).

[71] *See id.* at 763, n.7.

Though not itself an argument of legal principle (as the dissent indicated[72]), this factor cannot be ignored when determining the practical effect of the Court's decision. Regardless of the potential negative effect that *Waffle House* may have on employers, as a purely practical matter the decision is not likely to create an environment where arbitration agreements are discouraged.

V. CONCLUSION

The only clear result of the Court's decision in *Waffle House* is that the EEOC is now able to pursue in court victim-specific relief for an employee that has signed an arbitration agreement in conjunction with his employment. This result, however, is limited. *Waffle House* does nothing to change the insipient notion that arbitration agreements are favored in the employment context.

Therefore, what appears to be a clear-cut victory for employers may in fact simply be a clear-cut victory for arbitration agreements in general—creating greater scrutiny over their creation and thereby potentially creating better arbitration agreements.

Although this *Waffle House* wrinkle is an important wrinkle, at the end of the day we may still confidently declare that employers have little cause to worry that their employment arbitration agreements will be subject to attack. Through the murk created by *Waffle House*, we may in fact see that the *Circuit City* trend is little changed.

Barry A. Naum

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[72] *See id.* at 775, n.14.