RECENT DEVELOPMENTS

*EEOC v. Waffle House, Inc.**

I. INTRODUCTION

As so often happens in American jurisprudence, two worthy and weighty considerations are being balanced to shape the law in courts across the states. More often than not, differing views on such considerations create splits in the circuits based on the same issue. The two considerations at work in *EEOC v. Waffle House, Inc.* are the purpose and function of the Equal Employment Opportunity Commission (EEOC) versus the strong emphasis federal courts place on arbitration as a means to resolve disputes through the Federal Arbitration Act (FAA). In the context of private arbitration agreements, the two require a balancing to be done by a court to satisfy both considerations.

In one of the most recent splits among the federal circuit courts of appeals, the United States Court of Appeals for the Fourth Circuit allied itself with the Second Circuit by refusing to allow the EEOC to sue in federal court for "make whole" relief on behalf of an employee that has signed a mandatory arbitration agreement. On the other side, the Sixth Circuit agreed that the EEOC has broad powers to sue outside of a private arbitration agreement, to the maximum extent of its powers. The effect was to allow the EEOC to sue not only for injunctive relief but also for "make whole" relief for an employee otherwise barred from doing so by his private arbitration agreement.

II. THE TENSIONS LEADING TO *WAFFLE HOUSE*

There are two main tensions that have led to this split in the circuits. The first is the federal emphasis on the FAA upholding arbitration agreements as a means to resolve employment disputes. The second is the broad power granted to the EEOC to sue on behalf of an employee for both class-wide relief and "make whole" relief. Both have been given substantial emphasis by the circuits, but to varying degrees.

A. *The Federal Arbitration Act*

The Federal Arbitration Act[1] provides that written, valid arbitration clauses in contracts involving interstate commerce are enforceable in the

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* 193 F.3d 805 (4th Cir. 1999).

United States. In the last several years it has been given broad acceptance and interest, especially by the Supreme Court.[2] Due to heavy docket loads and other reasons, the Supreme Court continuously has emphasized the need to interpret the FAA liberally, upholding arbitration agreements and allowing them in many situations.[3] The Court even has stated that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."[4]

Under such acceptance, it should be no surprise that employers increasingly are requiring potential employees to sign an arbitration agreement as a condition of employment.[5] Such agreements are seen by employers as a means to reduce the costs of potential claims as well as to speed their resolution.[6] Despite the acceptance of the FAA in the employment context, especially under collective bargaining agreements, only recently has it been accepted that the Americans with Disabilities Act (ADA) and Title VII claims can be adjudicated under a predispute arbitration agreement.[7]

First, courts collectively interpreted the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*[8] to mean that Title VII claims were not arbitrable.[9] The prevailing attitude toward arbitration was of distrust, but

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[1] 9 U.S.C. §§ 1–15 (1994).

[2] *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995) (stating that where issues are potentially susceptible to an arbitration agreement, all doubts should be resolved in favor of arbitration).

[3] *See* Kenneth R. Davis, *A Proposed Framework for Reviewing Punitive Damages Awards of Commercial Arbitrators*, 58 ALB. L. REV. 55, 66 (1994).

[4] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24 (1983).

[5] *See* Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining* Alexander v. Gardner-Denver *in the Wake of* Gilmer v. Interstate/Johnson Lane Corp., 1997 BYU L. REV. 591, 591–92.

[6] *See* Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 KAN. U. L. REV. 273, 326 (1999).

[7] *See id.* In spite of general acceptance of arbitration agreements, such acceptance of arbitration agreements in the context of statutory claims has been only very recent. Such agreements have been under attack in many courts, and they continue so to be. *See generally* Michael Delikat & Rene Kathawala, *Arbitration of Employment Discrimination Claims Under Pre-Dispute Agreements: Will Gilmer Survive?*, 16 HOFSTRA LAB. L.J. 83 (1998).

[8] 415 U.S. 36, 59–60 (1974) (holding that an arbitration agreement from a collective bargaining agreement could not keep a Title VII claim from federal court because Congress intended federal courts to have final enforcement over Title VII claims).

[9] *See, e.g.*, Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1188 (9th Cir. 1998).

that attitude softened in a series of cases during the 1980s. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[10] for example, stated that if a party made an arbitration agreement, it "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."[11]

A similar attitude toward the FAA was evidenced in *Shearson/American Express, Inc. v. McMahon*,[12] a case in which the plaintiff was alleging statutory claims arising from a dispute in stock transactions. The *McMahon* Court stated that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals should inhibit enforcement of the [FAA]."[13] The last case, *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[14] wherein claimants asserted that an arbitration clause was not enforceable in a claim of fraud, also came out in favor of arbitration.[15] The Court reasoned that "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."[16] The Court's reiteration of *Mitsubishi* in the subsequent cases reinforced the federal push toward upholding arbitration agreements.

The controversial *Gilmer v. Interstate/Johnson Lane Corp.*[17] furthered the Court's insistence on upholding arbitration agreements. Gilmer, an employee of Interstate, was terminated when he was sixty-two years old. He filed suit in federal court alleging violations of the Age Discrimination in Employment Act[18] and sought to get out of his arbitration agreement with his employer. The Supreme Court once again upheld the validity of the arbitration agreement.[19] The Court held that unless Congress clearly provided that courts could preclude arbitration agreements based on statutory rights, it hesitantly would set aside the FAA.[20]

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[10] 473 U.S. 614, 640 (1985) (holding that claims under the Sherman Act are arbitrable).

[11] *Id.* at 628–29.

[12] 482 U.S. 220, 242 (1987) (holding that claims under the Securities Exchange Act of 1934 are arbitrable).

[13] *Id.* at 226 (citing *Mitsubishi*, 473 U.S. at 626–27).

[14] 490 U.S. 477 (1989).

[15] *See id.* at 483, 486.

[16] *Id.* at 481 (citing *Mitsubishi*, 473 U.S. at 628).

[17] 500 U.S. 20, 35 (1991) (holding that an ADEA claim could be subjected to compulsory arbitration under the arbitration agreement in an employment application).

[18] 29 U.S.C. §§ 621–634 (1994 & Supp. II 1996).

[19] *See Gilmer*, 500 U.S. at 35.

[20] *See id.* at 26.

Since *Gilmer*, lower courts have expanded the circumstances in which an arbitration agreement is upheld when an employee's claims are based on statutory rights.[21] This, as well as other decisions, show that the Supreme Court has pushed strongly the acceptance of arbitration agreements in employment disputes, even if it is of complex Title VII or other statutory claims.[22]

B. *The Powers of the Equal Employment Opportunity Commission*

The powers of the EEOC are more than substantial. The purpose of the 1972 amendments to the Civil Rights Act of 1964 was to give the EEOC teeth in enforcing the inadequate voluntary approach of bringing suit by the employee.[23] The EEOC was given primary jurisdiction over employee complaints under Title VII.[24] For example, if an employee believes that the employer is breaking the law in its employment practices, the employee must first go to the EEOC before taking other action. The EEOC then provides a 180 day waiting period to decide if there was "reasonable cause" that the employer used unlawful employment practices.[25] The EEOC, if it finds that there is "reasonable cause," can sue either on its own behalf, or it can allow the employee to sue.[26] Either way, the EEOC makes the call as to whether it will sue or allow the employee to do so.[27]

The EEOC can sue for several forms of relief. It can seek injunctive relief, reinstatement or hiring of employees, back pay, and compensatory and punitive damages.[28] Precisely because Congress felt that the laws were not being enforced by employees, it gave the EEOC broad and sweeping powers to enforce compliance with employment practices.[29]

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[21] *See, e.g.*, Miller v. Public Storage Management, Inc., 121 F.3d 215, 218 (5th Cir. 1997) (holding that the plaintiff did not show that Congress did not intend to permit courts to uphold arbitration agreements under the Americans with Disabilities Act (ADA)); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 885–86 (4th Cir. 1996) (concluding that a union must arbitrate an ADA claim under an arbitration clause in its collective bargaining agreement).

[22] *See* Delikat & Kathawala, *supra* note 7, at 88.

[23] *See* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 455 (6th Cir. 1999).

[24] *See* General Tel. Co. v. EEOC, 446 U.S. 318, 333–34 (1980).

[25] 42 U.S.C. § 2000e-5(b) (1994).

[26] *Id.* § 2000e-5(f).

[27] *See id.*

[28] *See id.* § 2000e-5(g)(1).

[29] *See* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 457 (6th Cir. 1999).

III. *WAFFLE HOUSE*: FACTS AND HISTORY

On June 23, 1994, Eric Baker sought employment with Waffle House, Inc. ("Waffle House") in Columbia, South Carolina. He filled out an employment application that contained a clause that would submit to binding arbitration "any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment."[30] Baker did not accept employment at that particular Waffle House location, but he did accept it at another across town.[31]

He began work on August 10, 1994, and two weeks later he suffered a seizure while on the job. The seizure was apparently a result of a change in his medication that controlled a seizure disorder that he developed from a car accident years earlier. Baker was discharged from his employment with Waffle House on September 5, 1994. Only days later, he filed a complaint with the EEOC, which in turn filed an enforcement action against Waffle House claiming a violation of the Americans with Disabilities Act of 1990.[32]

The complaint by the EEOC sought to correct unlawful employment practices by Waffle House and to seek appropriate relief for Baker.[33] It sought a permanent injunction barring Waffle House from discriminatory practices on the basis of disability and an order requiring that Waffle House change its policies and carry out programs to create opportunities to halt the effects of disability discrimination.[34] On behalf of Baker, the EEOC sought back pay, compensation for pecuniary and nonpecuniary losses suffered by Baker, punitive damages, and reinstatement.[35]

Waffle House sought to compel arbitration of Baker's claim and to stay the litigation, as well as to dismiss the action under Federal Rule of Civil Procedure 12(b)(6).[36] The magistrate who was assigned the motion

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[30] EEOC v. Waffle House, Inc., 193 F.3d 805, 807 (4th Cir. 1999).

[31] *See id.* This became a point for reversal by the Fourth Circuit. The district court held that the application was inapplicable and thus that the arbitration clause likewise was inapplicable because the application was filled out at a different Waffle House location than the one at which he worked. *See id.* at 808. The Fourth Circuit overturned this decision, stating that "[t]he employment application Baker completed was the standard form application for employment with the corporation Waffle House, Inc., and not with an individual Waffle House facility." *Id.* (emphasis omitted).

[32] 42 U.S.C. §§ 12101–12213 (1994 & Supp. III 1997).

[33] *See Waffle House*, 193 F.3d at 807.

[34] *See id.*

[35] *See id.* at 807–08.

[36] *See id.* at 808; *see also* FED. R. CIV. P. 12(b)(6).

recommended to the court that the arbitration agreement be held valid and that the EEOC be required to arbitrate the agreement.[37] The district court declined to accept the magistrate's recommendation and denied Waffle House's motions, concluding that the arbitration agreement was inapplicable because Baker had signed the agreement at a different Waffle House.[38] Waffle House filed an interlocutory appeal challenging the district court's denial of a stay of the proceedings and its refusal to compel arbitration.[39]

IV. THE FOURTH CIRCUIT'S HOLDING

After finding that there was an enforceable arbitration agreement and thus reversing the district court, the United States Court of Appeals for the Fourth Circuit considered the significance that the arbitration agreement would have on the parties.[40] The EEOC argued that it never agreed to arbitrate its statutory claim and that under its statutory mandate, it has the power to bring an action in federal district court where venue is proper.[41] The Fourth Circuit agreed with the EEOC.[42]

The court discussed the power of the EEOC, emphasizing its statutory mandate and the purposes of enforcement of the antidiscriminatory employment laws. It also found that the "statutory structure of Title VII's enforcement remedies (and therefore those of the ADA) reflects the notion that the scope of the public interest exceeds that of the individual's interest."[43] Moreover, the court acknowledged that the Supreme Court implicitly recognized that under *Gilmer v. Interstate/Johnson Lane Corp.*,[44] the EEOC is not bound by private arbitration agreements when acting in its public role.[45] The Fourth Circuit emphasized that *Gilmer* stated that "it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief."[46]

In spite of finding such a broad mandate on behalf of the EEOC, the court nonetheless recognized that the EEOC's "role in vindicating in federal

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[37] *See Waffle House*, 193 F.3d at 808.

[38] *See id.*

[39] *See id.*

[40] *See id.* at 809.

[41] *See id.*

[42] *See id.*

[43] *Id.* at 810.

[44] 500 U.S. 20 (1991).

[45] *Waffle House*, 193 F.3d at 811.

[46] *Id.* (citing *Gilmer*, 500 U.S. at 32).

court the individual interests of the charging party implicates the competing federal policy favoring the enforcement of arbitration agreements."[47] After discussing the history and bias in the federal court system favoring arbitration agreements, the court decided that the balance struck by the Second Circuit, allowing the EEOC to pursue a person's claim in federal court only for large-scale injunctive relief, was the proper balance.[48]

V. ANALYSIS

Though the Fourth Circuit recognized such a strong emphasis on the power of the EEOC, it nevertheless struck the balance closer to the FAA than did the Sixth Circuit. Both courts recognized the importance of the powers of the EEOC, but the Fourth Circuit felt that the federal emphasis on upholding arbitration agreements would be served better by allowing the EEOC to sue only for large-scale injunctive relief rather than allowing them to sue not only for injunctive relief but also for "make whole" relief.[49]

The *Waffle House* court stated that "[t]o permit the EEOC to prosecute in court Baker's individual claim—the resolution of which he had earlier committed by contract to the arbitral forum—would significantly trample this strong policy favoring arbitration."[50] Herein lies the difference between the Fourth and Second Circuits' and the Sixth Circuit's view. It is the degree to which the emphasis on upholding arbitration agreements is viewed. In *EEOC v. Frank's Nursery and Crafts, Inc.*,[51] though recognizing that the interests of the FAA and the EEOC overlapped,[52] the Sixth Circuit emphasized the authority of the EEOC at the expense of the FAA. It stated, "[s]ignificantly, an individual may not, in an effort to effectuate her own interests, take away the enforcement authority of the EEOC even if she wishes to withdraw her charge of discrimination."[53] The "enforcement authority," as recognized by the Sixth Circuit, was the *entire* enforcement authority, and nothing short. Because the "EEOC [has] the right to represent an interest broader than that of a particular individual when it exercises its authority to sue," upholding arbitration "would grant that individual the

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[47] *Id.* at 812.

[48] *See id.*

[49] *See id.*

[50] *Id.*

[51] 177 F.3d 448, 455 (6th Cir. 1999).

[52] *See id.* at 461.

[53] *Id.* at 456.

ability to govern whether and when the EEOC may protect the public interest and further our national initiative against employment discrimination."[54]

Alternatively, the Fourth Circuit, though recognizing the EEOC powers as strong, did not feel that taking "make whole" relief from the EEOC would hamper considerably its power. The court stated that although the EEOC mandate is strong, it "cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims."[55] The view of the Fourth Circuit is that the EEOC retained sufficient power to fulfill its mandate through the class-wide injunction.[56]

Opposing this view, the Sixth Circuit found that as a matter of contract law, a party had no power to take the mandate of the EEOC. The court stated that "one individual cannot contractually waive the statutory rights of one who is not a party to the contract, and one individual cannot . . . waive the statutory right of a federal sovereign to vindicate the public interest unless the government agrees to such waiver."[57] The court concluded that if the plaintiff in *Frank's Nursery* completely contracted away the EEOC's right to sue, it "would completely undo Congress' effort."[58]

VI. CONCLUSION

As more employees sign arbitration agreements as part of their employment contracts, it appears likely that more courts will encounter the need to strike a balance between the considerations behind the EEOC and the FAA. Those decisions will come down to the same balancing between the competing emphasis of the FAA and the mandate of the EEOC. The balance will be struck depending, as it did in the Fourth, Second, and Sixth Circuits, upon whether the EEOC's full power is viewed as eclipsing the federal emphasis on the FAA. For now, employees in the Fourth and Second Circuits will have to arbitrate their statutory claims under their arbitration agreements, but employees in the Sixth Circuit, if the EEOC finds "reasonable cause" and chooses to sue, can let the EEOC do all the work for them.

Howard Gardner

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[54] *Id.* at 459.

[55] *Waffle House*, 193 F.3d at 812.

[56] *See id.*

[57] *Frank's Nursery*, 177 F.3d at 460.

[58] *Id.* at 461.