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Arbitration Agreements between Employers and Employees: The Sixth Circuit Says the EEOC Is Not Bound - EEOC v. Frank's Nursery & (and) Crafts, Inc.

Earl D. Kraus

Arbitration Agreements Between Employers and Employees: The Sixth Circuit Says the EEOC Is Not Bound

EEOC v. Frank's Nursery & Crafts, Inc.[1]

I. INTRODUCTION

If an employee attempts to forego arbitration and instead files a lawsuit, the employer can obtain a court order to compel the employee to arbitrate the dispute.[2] The employee, however, is not the only party that may have a dispute with the employer. The Equal Employment Opportunity Commission ("EEOC") has the authority to file suit against employers in order to promote the public interest of preventing employment discrimination.[3] Such action by the EEOC may include seeking monetary relief for the employee.[4]

In *Frank's Nursery*, however, the EEOC pursued court action against an employer that included monetary relief for the employee even though there was an individual arbitration agreement between the employer and employee.[5] Should the arbitration agreement restrict the EEOC from bringing such action? Currently, there is a split in the circuits on this issue. According to the Sixth Circuit in *Frank's Nursery*, the EEOC is not bound by the arbitration agreement and, therefore, can pursue court action against the employer that includes monetary relief on behalf of the employee.[6] The Second Circuit, however, has not allowed the EEOC to pursue monetary relief in this situation.[7] Considering that monetary relief is a valuable remedy for the EEOC in pursuing its goal of promoting the public interest of preventing unlawful employment discrimination and that this goal differs from the goal(s) of an individual employee, the Sixth Circuit properly found that an individual arbitration agreement between an employer and an employee should not limit the enforcement options of the EEOC.

1. 177 F.3d 448 (6th Cir. 1999).
2. 9 U.S.C. § 4 (1994). *See also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
3. 42 U.S.C. § 2000e-5(a) (1994).
4. 42 U.S.C. § 1981a (1994).
5. *Frank's Nursery*, 177 F.3d at 453.
6. *Id.* at 468.
7. EEOC v. Kidder, Peabody, & Co., 156 F.3d 298 (2d Cir. 1998).

II. FACTS AND HOLDING

Carol Adams, an African American woman, was hired as an Executive Assistant by Frank's Nursery & Crafts ("Frank's")[8] on August 30, 1993.[9] Prior to considering Adams for the position, Frank's required Adams to sign an agreement stating that all employment claims would be subject to compulsory arbitration.[10]

Adams worked at Frank's as an Executive Assistant for Leonard Cohen[11] until January of 1995, when Cohen was replaced with Carol Cox, a white female.[12] Cox created a new position called the Executive Administrative Assistant position and hired an outside applicant, Lorrain Kryszak, also white, to fill the position.[13] Cox claimed that "she needed to hire someone more qualified [than Adams] for the job."[14] "Adams continued to [assist] the Director of Human Resources and the Manager of Human Resources and continued receiving the same pay and benefits."[15] On Kryszak's first day of work, March 14, 1995, Adams filed a complaint of racial discrimination with the EEOC claiming that Frank's "bypassed" her for promotion to the Executive Administrative Assistant position because of her race.[16] Adams then resigned from Frank's on April 4, 1995.[17]

Upon investigation, the EEOC[18] determined that Frank's "failed to establish that Adams was not qualified for the position,"[19] "that Frank's did not even allow Adams to submit a formal application for the position,"[20] that Frank's failed to show that Kryszak was more qualified than Adams,[21] and concluded that Adams's race was the reason Frank's did not promote her.[22] After unsuccessful conciliation attempts with Frank's, the EEOC filed suit against Frank's alleging unlawful employment practices.[23] The EEOC claimed Frank's did not promote Adams to Executive Administrative Assistant because of her race and that Frank's unlawfully required Adams and other employment applicants to sign an agreement to arbitrate statutory

8. Frank's is a lawn and garden products retailer. *Frank's Nursery*, 177 F.3d at 452.
9. *Id.*
10. *Id.* at 452-53. Frank's required all applicants to complete and sign compulsory arbitration agreements prior to consideration for employment. In this agreement the employee agreed that arbitration would be the "exclusive remedy for any and all claims" and that claims would not be submitted later than six months after the employee's termination. Any statute of limitations to the contrary was also waived by the employee. *Id.*
11. Adams was Executive Assistant to Leonard Cohen, Vice President of Human Resources and also "provided administrative support" to the Director of Human Resources and the Manager of Human Resources. *Id.* at 453.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 453.
18. The EEOC has the power to prevent unlawful employment practices pursuant to 42 U.S.C. § 2000e-5 (1994).
19. *Frank's Nursery*, 177 F.3d at 453.
20. *Id.* at 453 n.1.
21. *Id.* at 453.
22. *Id.*
23. *Id.*

claims arising under Title VII.[24] The EEOC asked the court to award Adams backpay, prejudgment interest, compensatory damages, and punitive damages.[25] Adams did not independently pursue arbitration, a private settlement, a private lawsuit, nor intervention in the EEOC's lawsuit regarding her discrimination claim against Frank's.[26]

On November 21, 1996, Frank's petitioned the district court requesting that Adams be compelled to arbitrate in accordance with her pre-employment arbitration agreement.[27] The EEOC filed a response in opposition to Frank's petition, to which Frank's filed a reply and moved for summary judgment.[28]

The district court granted Frank's motion for summary judgment and motion to compel arbitration and the court dismissed the EEOC's entire complaint.[29] The district court found that (1) Adams's arbitration agreement was enforceable,[30] (2) "the EEOC was bound by Adams's agreement to arbitrate,"[31] and (3) in this case, the EEOC could not sue on behalf of a class of individuals.[32]

The EEOC appealed[33] and the Sixth Circuit Court of Appeals reversed, finding that the EEOC is not bound by Adams's arbitration agreement,[34] and the EEOC can pursue a claim for monetary relief on behalf of Adams.[35]

Judge Nelson, siding with the Second Circuit, dissented, in part, stating that monetary damages asserted by the EEOC on behalf of Adams would result in Adams getting around the arbitration agreement undermining the United States Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*[36]

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24. *Id.*

25. *Id.*

26. *Id.* The fact that six months had passed since Adams was bypassed for promotion and that six months had passed since Adams's resignation was not disputed by the EEOC. *Id.* The EEOC also did not dispute that the pre-employment arbitration agreement signed by Adams would bar any attempt by Adams to arbitrate any relief, since it contained a six-month limitation. *Id.*

27. *Id.* at 453-54. Frank's also claimed Adams must arbitrate pursuant to the Federal Arbitration Act ("F.A.A."). *Id.* Section 4 of the F.A.A. provides "[a] party aggrieved by the alleged failure . . . of another to arbitrate under a written agreement for arbitration may petition . . . United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4 (1994).

28. *Frank's Nursery*, 177 F.3d at 454.

29. *Id.*

30. *Id. See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that an employee may be compelled to arbitrate a discrimination dispute pursuant to the arbitration agreement).

31. *Frank's Nursery*, 177 F.3d at 454.

32. *Id.* The court did find that the EEOC generally could sue on behalf of a class of individuals, but the EEOC just could not do so in this case because they had not identified a class of individuals that suffered race discrimination through Frank's employment practices. *Id.*

33. *Id.* at 454-55. In the EEOC's appeal, they challenged the ruling that they were bound by Adams's arbitration agreement and, therefore, could not pursue "substantive relief such as compensatories, punitives, backpay and prejudgment interest." *Id.* at 454. The EEOC also disputed the district court's ruling that they could not gain general injunctive relief on the basis of racial discrimination because they did not identify a class of individuals who were subjected to such discrimination. *Id.* However, with regard only to this appeal, the EEOC assumed the enforceability of Adams's pre-employment arbitration agreement. *Id.* at 454 n.4.

34. The EEOC represents a broader public interest. *Id.* at 458-59.

35. *Id.* The Sixth Circuit also found that the district court "impermissibly [held] the EEOC to procedural requirements that restrain only private Title VII litigants." *Id.* at 459.

36. *Id.* at 471. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); EEOC v. Kidder, Peabody, & Co., 156 F.3d 298 (2d Cir. 1998).

III. LEGAL BACKGROUND

Although the EEOC now has exclusive jurisdiction over cases of unlawful employment discrimination,[37] this was not always the case. The EEOC, established by the Civil Rights Act of 1964, was originally authorized to resolve charges of employment discrimination only through informal conciliation efforts.[38] If the EEOC was unsuccessful in obtaining voluntary compliance from employers, further enforcement through legal action was left to the individual victims.[39] Congress later decided that the EEOC would need additional powers of enforcement so that employers would take the EEOC seriously.[40] The resulting Equal Employment Opportunity Act of 1972 authorized the EEOC to bring suit against employers in federal court after conciliation attempts were unsuccessful.[41] Although the statute at the time only authorized the EEOC to pursue injunctive relief,[42] the Supreme Court, in order to promote the public interest of preventing unlawful employment discrimination, allowed the EEOC to pursue monetary relief.[43] It was not until the Civil Rights Act of 1991 that Congress affirmed the Supreme Court's reasoning that the prospect of monetary damages is taken more seriously by employers than injunctive relief alone.[44] Accordingly, Congress authorized the EEOC to pursue compensatory and punitive damages against employers to "deter unlawful harassment and intentional discrimination in the workplace."[45]

Congress has also demonstrated a preference for enforcing private agreements to arbitrate.[46] Pursuant to the Federal Arbitration Act ("F.A.A."), when parties have agreed in writing to arbitrate, the aggrieved party may petition a federal court for an order requiring the non-complying party to arbitrate as agreed.[47] In 1991, the Supreme Court determined that an employer can compel an employee to arbitrate a collective bargaining agreement that required the employee to arbitrate statutory claims.[48] In *Gilmer*, the Court found that a securities representative employee who was required to sign an arbitration agreement as a condition of registration and

37. This includes pursuing injunctive relief (such as reinstatement or hiring of employees) as authorized under 42 U.S.C. § 2000e-5(g)(1) (1994), and pursuing compensatory and punitive damages on behalf of the individual employee(s) as authorized under 42 U.S.C. § 1981a(a)(1) (1994).

38. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a) (1994).

39. *Frank's Nursery*, 177 F.3d at 457.

40. Equal Employment Opportunity Act of 1972, H.R. REP. NO. 92-238, at 8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2144.

41. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 105 (1972).

42. Congress left the right to pursue monetary relief with the private victim(s). Employees were allowed to pursue private action, which could include monetary relief, after the 180-day exclusive jurisdiction period of the EEOC terminated and after receiving a "right to sue" letter from the EEOC. *See* 29 C.F.R. § 1601.28(b) (1977); *see also* Rivers v. Barberton Bd. of Educ., 143 F.3d 1029, 1032 (6th Cir. 1998) (finding that an individual cannot sue if no "right to sue" letter has been issued by the EEOC).

43. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

44. Civil Rights Act of 1991, 42 U.S.C. § 1981a (1994).

45. *Id.*

46. EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 459 (6th Cir. 1999).

47. 9 U.S.C. § 4 (1994).

48. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).

employment had to arbitrate his dispute as opposed to seeking private action under the Age Discrimination in Employment Act.[49]

The courts have grappled with the question of whether an individual's interaction with an employer, such as filing suit, agreeing to settle, or signing an arbitration agreement has any impact on the EEOC's ability to pursue relief against that employer. The Third and Seventh Circuits have found that where an individual has already litigated unsuccessfully, the EEOC is precluded from pursuing monetary relief on behalf of the individual.[50] In each of those cases, the courts found that the EEOC was acting in a representative capacity for the individual victim and that there was privity between the EEOC and the individual.[51] However, both circuits also found that the EEOC was not barred from seeking an injunction to prevent future violations.[52] Similarly, where an individual has waived her right to sue by settling with the employer, the EEOC is precluded from pursuing monetary relief (e.g., back-pay) on behalf of the employee, but the EEOC may still pursue injunctive relief (e.g., to protect a class of employees from discrimination).[53] The question remains whether the EEOC can pursue monetary relief on behalf of that employee where there has been no settlement, but where the individual has made an arbitration agreement with the employer.

In a case of first impression, the Second Circuit Court of Appeals has answered no."[54] In *EEOC v. Kidder, Peabody, & Co.*,[55] the court ruled that an arbitration agreement between an employee and employer precluded the EEOC from pursuing purely monetary relief on behalf of the employee, even where the employee had initiated no litigation, settlement or arbitration proceedings on his own.[56] The court stated that to allow such action would "permit an individual . . . to make an end run around the arbitration agreement by having the EEOC [sue on the individual's behalf]."[57] *Kidder* cited to the district court decision in *Frank's Nursery*,[58] as the "only other court to have addressed this issue [and] concluded that the EEOC was barred from seeking monetary or injunctive relief on behalf of the employee in the federal forum where the employee had signed an arbitration agreement."[59] However, in the instant decision, the Sixth Circuit Court of Appeals reversed the district court's decision in *Frank's Nursery*,[60] stating that the EEOC is not restricted by an individual's actions in that recovery may be pursued "through private action or an action by the EEOC . . . and the power to decide which route to follow rests in the hands of the EEOC, not the aggrieved employee."[61]

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49. *Id.*
50. *See* EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1291 (7th Cir. 1993); EEOC v. United States Steel Corp., 921 F.2d 489, 494-95 (3d Cir. 1990).
51. *See Harris Chernin*, 10 F.3d at 1292-93; *United States Steel*, 921 F.2d at 496-97.
52. *See* cases cited *supra* note 51.
53. EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1542-43 (9th Cir. 1987).
54. EEOC v. Kidder, Peabody, & Co., 156 F.3d 298, 303 (2d Cir. 1998).
55. *Id.*
56. *Id.* at 302-03.
57. *Id.* at 303.
58. EEOC v. Frank's Nursery & Crafts, Inc., 966 F. Supp. 500 (E.D. Mich. 1997).
59. *Kidder*, 156 F.3d at 300-01 n.2.
60. EEOC v. Frank's Nursery & Crafts, Inc., 966 F. Supp. 500 (E.D. Mich. 1997).
61. EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 466 (6th Cir. 1998).

IV. INSTANT DECISION

The Sixth Circuit in *Frank's Nursery* found that Adams's arbitration agreement does not bind the EEOC due to: (1) general principles of contract formation, (2) concerns of compliance with the F.A.A., (3) discernable Congressional intent, and (4) the inapplicability of preclusion resulting from the doctrine of res judicata. The court determined that the EEOC can pursue a claim for monetary relief on behalf of Adams because: (1) the scope of the EEOC's authority allows such relief, (2) *Gilmer* is not exclusive, and (3) waiver principles do not apply.[62] Additionally, the court found that the EEOC does not have to prove, as required by Federal Rule of Civil Procedure 23, the existence of a class prior to pursuing relief for a class of individuals, stating that "it is well settled that the EEOC need not comply with the procedural requirements of Rule 23 in seeking classwide injunctive relief."[63] The court goes on to find that the EEOC may seek class relief if able to prove only "one instance of discrimination that violates Title VII."[64]

According to the court, the arbitration agreement that Adams signed was a contract with Frank's, and since the EEOC was not a party to that contract, the EEOC was not bound by it.[65] The court went on to find that although a non-party can be held bound by a contract if privity exists between the non-party and one of the contracting parties, there was no such privity of contract between Adams and the EEOC.[66] Therefore, the district court could not require arbitration between the EEOC and Frank's because these parties never agreed to arbitrate.[67] Additionally, the court stated that this finding does not undermine the F.A.A. in that one purpose of the F.A.A. is to enforce private contracts to arbitrate. Since the EEOC was not a party to the contract, the F.A.A.'s purpose was not infringed.[68]

The court indicated that Congress, in authorizing the EEOC to file suit against employers to enforce Title VII, intended for the individual to keep their private right of action while giving the EEOC a right to act.[69] Since this presented the potential for duplicate proceedings, Congress provided that the EEOC, and not the private individual, would have the power to determine whether to file action on a dispute in federal court.[70] The individual can only pursue a private action after the 180-day period of exclusive jurisdiction of the EEOC had passed and after obtaining a "right to sue" letter from the EEOC.[71] The court indicated that such "exclusive

62. *Id.* at 455-68.

63. *Id.* at 467 (quoting General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 330 (1980)).

64. *Id.* at 468.

65. *Id.* at 460 (citing Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ., 489 U.S. 468, 475 (1989)).

66. *Id.* at 460 n.6.

67. *Id.* at 460.

68. *Id.* at 459-61. The court also found that their decision does not conflict with *Gilmer* for the same reasons. *Id.* at 461.

69. *Id.* at 457.

70. *Id.* at 457-58 (citing H.R. REP. NO. 92-238, at 11 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2148).

71. *Id.* at 456. A "right to sue" letter is written permission from the EEOC for an individual to file suit. This can be granted by the EEOC upon request by the individual if the EEOC cannot complete the processing of the charge within 180 days of the charge being filed or when the EEOC has decided to not

jurisdiction" is necessary to enable the EEOC to pursue the public interest concerns of Congress and therefore prevent individuals from controlling if and when the EEOC will file suit under Title VII.[72]

The court determined that the arbitration agreement contract between Adams and Frank's does not preclude the EEOC by the doctrine of res judicata from filing court action. First, the court reasoned that preclusion is inapplicable because Adams and the EEOC are not in privity.[73] Second, the interests and causes of action of Adams and the EEOC are not identical.[74] The court surmised that the EEOC's interest in furthering the general public good by preventing employment discrimination goes beyond the private interest of Adams.[75] Third, the court found that preclusion cannot apply because Adams had not initiated any arbitration proceeding, lawsuit, or other proceeding to which the doctrine of res judicata would apply.[76]

In finding that the EEOC can pursue a claim for monetary relief on behalf of Adams, the court pointed out that federal statutes enable the EEOC to seek injunctive relief as well as compensatory and punitive damages.[77] The court also recognized that even before compensatory and punitive damage remedies were explicitly provided to the EEOC in the Civil Rights Act of 1991, the Supreme Court had already allowed the EEOC to use these remedies pursuant to the Congressional purpose of protecting the public from unlawful employment discrimination.[78] The court also found that the Supreme Court's decision in *Gilmer*[79] does not limit the EEOC to only equitable relief just because an arbitration agreement is in place. The court explains that the Supreme Court was only responding to a specific suggestion that class actions and equitable relief were not allowed in arbitration proceedings and, therefore, the Supreme Court was not excluding all other remedies when it allowed class actions and equitable relief.[80]

The court also referred to the "exclusive jurisdiction" of the EEOC as allowing them to make claims for monetary relief.[81] The court states that "individuals cannot control . . . whether and when the EEOC will sue . . . ."[82] The court reasoned that Congress, by giving the EEOC discretion to sue on behalf of an individual regardless of the individual's wishes, "conferred upon the EEOC the discretion to take away the

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sue the employer and the EEOC has not reached a conciliation agreement with the employer to which the individual is a party. *See* 29 C.F.R. § 1601.28(b) (1999).

72. *Frank's Nursery*, 177 F.3d at 468. *See General Tel. Co.*, 446 U.S. at 326.

73. *Frank's Nursery*, 177 F.3d at 463.

74. *Id. See* EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1359 (6th Cir. 1975).

75. *Frank's Nursery*, 177 F.3d at 463. *See General Tel. Co.*, 446 U.S. at 331.

76. *Frank's Nursery*, 177 F.3d at 465.

77. *Id.* at 455. *See* 42 U.S.C. §§ 1981a(a)(1), 2000e-5(g)(1) (1994).

78. *Frank's Nursery*, 177 F.3d at 466.

79. *Gilmer* did allow employers to compel employees to arbitrate as agreed in their arbitration agreement and also stated that the existence of an arbitration agreement did not preclude the EEOC from pursuing equitable and class-wide relief. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24-33 (1991).

80. *Frank's Nursery*, 177 F.3d at 461.

81. *Id.* at 468.

82. *Id.*

right [of and individual] to resolve through arbitration Title VII matters that implicate the public interest."[83]

The court found also that the principle of waiver cannot be applied to *Frank's Nursery* because, in waiving her own right to sue, Adams cannot waive the EEOC's right to sue for reasons similar to that of preclusion.[84] The court reasoned that Adams did not pursue any type of remedy whatsoever[85] nor did she select the type of remedy that the EEOC chose to pursue.[86] Therefore, since she had not "waived, settled, or previously litigated the claim,"[87] waiver does not prevent the EEOC from pursuing monetary relief on her behalf, as occurred in *Kidder*.

Judge Nelson concurred in part, and dissented in part.[88] He agreed without elaboration with the majority in that the EEOC should not be prohibited from pursing general injunctive relief.[89] However, Judge Nelson sided with the Second Circuit Court of Appeals in stating that the claim for monetary relief should be precluded by the private arbitration agreement.[90] He reasoned that *Kidder* was correct in that allowing an employee to sign an arbitration agreement, but then pursue monetary damages via the EEOC, enabled the employee to get around an otherwise valid agreement.[91] Judge Nelson agreed with the Second Circuit in *Kidder,* which stated that failing to recognize the enforceability of the arbitration agreement goes against the Supreme Court's decision in *Gilmer*.[92]

Overall, however, the majority found that the need for the EEOC to effectively address the public interest concerns created by unlawful employment discrimination, as expressed by Congress, outweighed any concerns regarding an individual employee getting around a valid arbitration agreement.

V. COMMENT

Although the Sixth and Second Circuits are split, the Sixth Circuit correctly held that the EEOC may pursue monetary relief in court on behalf of an individual employee even where there is an arbitration agreement between the employer and the employee.[93] This decision allows the EEOC to further the public interest of preventing unlawful employment discrimination as directed by Congress. Since the goals of the EEOC are markedly different from the goals of an individual with a grievance towards their employer, the EEOC is not merely acting in the shoes of the individual employee when pursuing monetary relief, even though the action may be

83. *Id.*
84. *Id.* at 465-67.
85. Adams only filed a complaint with the EEOC - she did not initiate an arbitration, agree to a settlement, file a civil suit, or intervene in the EEOC's action. *Id.* at 453.
86. *Id.* at 464.
87. *Id.* at 465 (quoting EEOC v. Kidder, Peabody, & Co., 156 F.3d 298, 301 (2d Cir. 1998)).
88. *Id.* at 468-71.
89. *Id.* at 468.
90. *Id.*
91. *Id.* at 471 (citing *Kidder*, 156 F.3d at 303).
92. *Id.*
93. The courts in *Frank's Nursery* and *Kidder* are the only two courts that have addressed this issue directly.

on behalf of the employee. Therefore, unless restricted by another previously discussed legal principle, the EEOC should be free to pursue its goals through monetary relief regardless of an individual's action of signing an arbitration agreement with an employer. It is important to note that since no other circuits have addressed this specific issue and the Supreme Court has not ruled on this point, the issue is ripe for Supreme Court review.

It is well established that federal agencies like the EEOC are able to dictate what actions they will take in pursuing their goals as delegated by Congress. These goals are not the same as an individual's goals even though the remedy ultimately used to achieve the goal may be the same. This has been properly supported by the Supreme Court, which has recognized that "'the EEOC is not merely a proxy for the victims of discrimination,' and that 'when the EEOC acts, . . . it acts also to vindicate the public interest in preventing employment discrimination.'"[94] Thus, an individual's actions in such situations do not impact remedies available to the EEOC.

In protecting the independence and authority of the EEOC, the Sixth Circuit in *Frank's Nursery* relied heavily on the theory that an individual is not allowed to take away or circumvent the EEOC's enforcement authority by signing an arbitration agreement with an employer.[95] The court explains that "exclusive jurisdiction" was granted to the EEOC by Congress in cases of unlawful employment discrimination[96] and that Congress intended for the EEOC and not the individual to "have complete authority to decide which cases to bring to Federal district court."[97] This further supports the EEOC's independence of action.

On the other side of the argument, the Second Circuit in *Kidder* did not allow an employee who had agreed to arbitrate "to make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages on his or her behalf."[98] The Second Circuit stated that it had struck a balance between the EEOC's obligation to stop employment discrimination and the general interest in furthering arbitration, by allowing the EEOC to pursue injunctive relief but not monetary relief on behalf of the employee.[99] In practice, however, this balance comes out light on the EEOC's end of the scale, for it results in stripping the EEOC's ability to pursue monetary relief against employers who have entered into arbitration agreements with their employees. This directly conflicts with the reason Congress originally granted the EEOC the power to pursue monetary relief, i.e., to address its concern that employers "more often than not shrugged off the [EEOC's] entreaties and relied upon the unlikelihood of the parties suing them."[100] The potential for monetary damages is taken most seriously by employers and is, therefore, a valuable

94. *Id.* at 458 (quoting General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 326, 331 1980)).

95. *Id.* at 456.

96. *Id.*

97. *Id.* at 457-58 (quoting EEOC v. Kimberly-Clark Corp., 511 F.2d 1352, 1361 & n.12 (6th Cir. 1975)).

98. EEOC v. Kidder, Peabody, & Co., 156 F.3d 298, 303 (2d Cir. 1998).

99. *Id.*

100. *Frank's Nursery*, 177 F.3d at 457 (quoting H.R. REP. NO. 92-238, at 8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2144).

remedy for the EEOC. Without it, they lose their ability to effectively fulfill their reason for existence.

Although the Second Circuit in *Kidder* acknowledges that the Supreme Court has recognized the importance of pursuing monetary relief to prevent employment discrimination,[101] the court stated that they "see no reason to believe" that the deterrent value of an individual pursuing monetary relief through arbitration would be any less than that achieved by the EEOC pursuing monetary relief through court action.[102] However, in coming to this conclusion, the court failed to acknowledge the Supreme Court's finding that the EEOC and the individual are not pursuing the same interests, even if they are pursing the same relief.[103] Even the Second Circuit's own Judge Feinberg, in his concurring opinion, questioned this presumption of the court.[104] Overall, this argument of the Second Circuit is weak.

Looking to how other circuits have addressed the remedies available to the EEOC, the court in *Kidder* cited to court opinions where the EEOC was prevented from pursuing monetary relief because the individual had "waived, settled, or previously litigated the claim" thus invoking the doctrine of res judicata.[105] However, each of the cases cited by the Second Circuit is distinguishable from *Frank's Nursery*. In the Third and Seventh Circuit cases cited, there had been prior court action on the issue, in the Ninth Circuit case the employee had previously agreed to a settlement, and in the Fifth Circuit case, it was found that the principles of res judicata were not applicable.[106] In *Frank's Nursery*, the employee had not agreed to any settlement and had not pursued arbitration or litigation.[107] All she did was make a complaint to the EEOC.[108]

As Judge Feinberg stated in his concurrence with the Second Circuit in *Kidder*, the EEOC would not seed monetary relief merely to assist employees in avoiding arbitration nor would the F.A.A.'s purpose be undermined by allowing the EEOC to pursue monetary relief. Since Congress has decided to grant the EEOC the authority to pursue monetary relief on behalf of the individual,[109] and the Supreme Court has not addressed the issue, the EEOC should retain the authority to pursue monetary relief as long as monetary relief has not yet been settled, waived or pursued by the individual employee, and the EEOC has not expressly relinquished this power. The EEOC must be allowed to exercise its authority to pursue monetary relief so that it may effectively work towards its goal of preventing unlawful employment discrimination.

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101. *Kidder*, 156 F.3d at 302-03. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).
102. *Kidder*, 156 F.3d at 303.
103. General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 326 (1980).
104. *Kidder*, 156 F.3d at 304.
105. *Id.* at 301-02. *See* EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1291 (7th Cir. 1993); EEOC v. United States Steel Corp., 921 F.2d 489, 496 (3d Cir. 1990); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1543 (9th Cir. 1987); New Orleans Steamship Ass'n v. EEOC, 680 F.2d 23, 25 (5th Cir. 1982).
106. *See Harris Chernin*, 10 F.3d at 1291; *United States Steel*, 921 F.2d at 496; *Goodyear Aerospace*, 813 F.2d at 1543; *New Orleans Steamship Ass'n*, 680 F.2d at 25.
107. *Frank's Nursery*, 177 F.3d at 453.
108. *Id.*
109. 42 U.S.C. § 1981a (1994).

VI. CONCLUSION

In *Frank's Nursery*, the Sixth Circuit properly protected the EEOC's authority from outside control. In finding that the EEOC can pursue monetary relief on behalf of an employee despite the existence of an arbitration agreement, the Sixth Circuit appropriately relied on Congressional intent regarding the EEOC, the Supreme Court's opinion on the EEOC's scope of authority and the inapplicability of other legal principles due to distinguishable facts. However, because the Second Circuit disagrees with this determination, the resulting split must be resolved through clarification from the Supreme Court.

EARL D. KRAUS