



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

2007

Ruminations About the EEOC's Policy Regarding Arbitration

Michael Z. Green

Texas A&M University School of Law, mzgreen@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Law Commons](#)

Recommended Citation

Michael Z. Green, *Ruminations About the EEOC's Policy Regarding Arbitration*, 11 *Employee Rts. & Emp. Pol'y J.* 154 (2007).

Available at: <https://scholarship.law.tamu.edu/facscholar/625>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

RUMINATIONS ABOUT THE EEOC'S POLICY REGARDING ARBITRATION

Michael Z. Green*

I. INTRODUCTION: A DECADE AFTER THE EEOC'S POLICY STATEMENT AGAINST ENFORCEMENT OF EMPLOYER-MANDATED ARBITRATION

In 2007, several milestones have arisen regarding the intersection of federal employment discrimination law and ADR including the ten year anniversary of a policy statement issued by the EEOC.⁶⁰ In its policy statement issued on July 10, 1997, the EEOC, the federal agency charged with enforcing the key statutes that regulate workplace discrimination,⁶¹ specifically addressed the impact of mandatory arbitration of employment discrimination claims.⁶² That 1997 policy statement recognized that “[a]n

* Professor of Law, Texas Wesleyan University School of Law. I am grateful to Susan Ayres and Carol Brown for making suggestions that significantly improved this essay. I appreciate the financial support provided by the Texas Wesleyan University School of Law and the student research assistance provided by Anca Adams, Chris Baumann, Sandra Cortes, and Chris Norris.

60. See generally Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331 (2006) [hereinafter Bales, *Normative Consideration*] (describing events over the last fifteen years regarding enforcement of arbitration agreements signed as a condition of employment and covering statutory employment disputes). Typically, with arbitration, the parties select a neutral outsider as the final decision maker to resolve their dispute. This differs from other ADR methodologies, like mediation, where typically the neutral outsider is not a decision maker and only helps the parties craft their own resolution. Although there are other forms of ADR that may more resemble arbitration versus mediation or vice versa, the focus of this essay will be on arbitration as defined along with some mention of mediation as defined.

61. See Laws Enforced by the EEOC, <<http://www.eeoc.gov/policy/laws.html>> (last visited Mar. 15, 2007) (referring to the following laws, among others, that the EEOC enforces: Title VII of the Civil Rights Act of 1964, (EEOC enforcement authority codified at 42 U.S.C. §§ 2000e-4, e-5, e-12) (2000)); Age Discrimination in Employment Act of 1967 (ADEA) (EEOC enforcement authority codified at 29 U.S.C. § 628 (2000)); and Title I of the Americans With Disabilities Act of 1990 (ADA) (EEOC enforcement authority codified at 42 U.S.C. § 121116 (2000)).

62. See EEOC NOTICE NO. 915.002: POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT (July 10, 1997) [hereinafter, EEOC POLICY], available at <<http://www.eeoc.gov/policy/docs/mandarb.html>> (last visited Mar. 15, 2007). For a more critical analysis of this policy, see Beth M. Primm, Comment, *A Critical Look at the EEOC's Policy Against Mandatory Pre-Dispute Arbitration Agreements*, 2 U. PA. J. LAB. & EMP. L. 151 (1999). But see Joseph D. Garrison, *The Employee's Perspective: Mandatory Binding Arbitration Constitutes Little More Than A Waiver of A Worker's Rights*, DISP. RESOL. J., Fall 1997, at 15 (arguing that the EEOC's position opposing mandatory arbitration was well-deserved); see also Ellen J. Vargyas, *EEOC Explains Its Decision: Verdict On Mandatory Arbitration In Employment*, DISP. RESOL. J., Fall 1997, at 8, 10 (describing further the EEOC's explanation of the policy).

increasing number of employers are requiring as a condition of employment that applicants and employees give up their right to pursue employment discrimination claims in court and agree to resolve their disputes through binding arbitration.”⁶³

While being “[m]indful of the case law enforcing specific mandatory arbitration agreements, in particular, the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane*,”⁶⁴ the Commission still found “that such agreements are inconsistent with the civil rights laws.”⁶⁵ Unfortunately, with additional changes in the law and still many unanswered questions about the use of arbitration, the EEOC has failed to clarify or amend its 1997 policy statement. Despite reaching its fortieth anniversary in 2005, questions abound about whether the EEOC matters.⁶⁶

However, only five years ago, the Supreme Court made it clear that the EEOC matters when the issue involves the application of mandatory arbitration agreements to resolve statutory employment discrimination claims.⁶⁷ In *EEOC v. Waffle House*, the Court recognized the significant role the EEOC plays because it has the statutory mandate to vindicate the public interest in eradicating workplace discrimination regardless of any agreement between an employer and its individual employees to arbitrate statutory claims.⁶⁸ The Supreme Court’s 2002 acknowledgment in *Waffle House* of the EEOC’s important role in enforcing employment discrimination laws, and how that role prevails over mandatory arbitration agreements, signaled a major opportunity for the EEOC to update and clarify its 1997 policy statement.

In this Essay, I assert that the EEOC has failed in its responsibility to enforce employment discrimination laws by not advancing its position against mandatory arbitration since the 1997 policy statement. The EEOC failed to even make a change to clarify its 1997 policy after a major opportunity to address arbitration arose from the Supreme Court’s broad holding in the *Waffle House* decision in 2002. The EEOC has thereby ignored its obligation to play a major role in setting policy regarding

63. EEOC POLICY, *supra* note 62, § I.

64. 500 U.S. 20 (1991).

65. EEOC POLICY, *supra* note 62, § I.

66. See Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 702-03 (2005) (acknowledging that the issue of whether the EEOC matters still “arises” even after four decades of existence and asserting that the EEOC still “play[s] an irreplaceable role in the battle to eradicate employment discrimination”); Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 5-11 (1996) (discussing the impact of the EEOC).

67. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

68. *Id.* at 291-92.

employment discrimination on such an important topic, mandatory arbitration. This inaction also prevented the EEOC from using the *Waffle House* decision as a springboard to clarify further its policy on arbitration. Furthermore, by not setting any policy on arbitration since 1997, and sending mixed messages about the continued vitality of the 1997 policy, the EEOC has allowed mandatory arbitration to operate in a vacuum, given the lack of legal clarity. Only neutral arbitration service providers have acted to prevent employers from overreaching by requiring minimal procedures necessary to protect victims of workplace discrimination in the arbitral forum.⁶⁹ Meanwhile, those employers and employees who desired more guidance on the arbitration issues that have evolved since 1997 had to seek court resolution without knowing the EEOC's position on the matter.⁷⁰ In 2007, the question of how arbitration may effectively resolve employment discrimination matters may have reached a crucial convergence where continued failure by the EEOC to take a position may not bode well for any ongoing use of arbitration. And because arbitration has potential as a fair dispute resolution tool for employment discrimination matters, it would be a shame to watch that benefit waste away.

This Essay examines the issues related to enforcement of mandatory arbitration and the EEOC's role in that process. Part II recounts the events since 1991 regarding arbitration of statutory employment discrimination claims that led to the EEOC's 1997 policy and also resulted in the 2002 *Waffle House* decision. Part III highlights some of the issues that employees and employers are starting to raise about arbitration and how a failed response to their concerns threatens the continued use of arbitration in resolving employment discrimination disputes. Part III also identifies key remaining questions that still necessitate some EEOC guidance to

69. See Bales, *Normative Consideration*, *supra* note 60, at 341 (describing the Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes, developed by several groups representing employers, employees, and neutral organizations in 1995, and asserting that "[i]t has been adopted by the major arbitration service providers" who "will refuse to arbitrate cases under rules inconsistent with the . . . Protocol"). For more details about the Due Process Protocol, see Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165 (2005) [hereinafter, Bales, *Protocol at Ten*]; Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue In Need of A Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB POL'Y 173, 211-221 (1998). Due Process Protocols have addressed broad application of arbitration agreements beyond just employment but to consumer transactions as well. See generally Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 369-70 (2004) (describing the impact of the Protocols in employment and consumer dispute resolution).

70. Although neutral service providers have operated under the strictures of the Due Process Protocol, several challenging issues have developed, including many concerns that the drafters never contemplated, to which the lower courts have not provided consistent answers. See Bales, *Normative Consideration*, *supra* note 60, at 341; Bales, *Protocol at Ten*, *supra* note 69, at 184-85.

employers and employees.

Part IV explores the possible reasons why the EEOC has not set a policy on arbitration since 1997 and suggests why the EEOC should not let those reasons continue to hinder it from clarifying its current position regarding mandatory arbitration. Legitimate reasons may exist for the EEOC's failure to clarify its arbitration policy since 1997. The Essay explores three of those possibilities: first, that the Supreme Court's rejection of an underlying premise in the 1997 policy statement (asserting that contracts of employment were not subject to enforcement under federal arbitration law) ended up forestalling any momentum towards further arbitration clarification out of fear that additional EEOC statements might be completely rejected by the Court; second, that political forces both inside the EEOC and outside of it caused the inaction; and third, that a major focus on mediation as an ADR tool brought such positive publicity that efforts to clarify arbitration became less of a priority.

Part V concludes that the EEOC must take a position on the current concerns that remain regarding mandatory arbitration. This responsibility arises not just out of a need to give guidance to employers and employees but also as a necessary component of the EEOC's mandate to protect the public interest regarding matters of workplace discrimination.

II. THE JUDICIAL DEVELOPMENT OF EMPLOYER-MANDATED ARBITRATION AND THE ROLE OF THE EEOC: FROM *GILMER* TO *WAFFLE* *HOUSE*

Understanding the development of arbitration for statutory employment claims and how this form of arbitration has increased exponentially within the past sixteen years requires an understanding of how the law has expanded during this period. A number of circumstances converged in 1991. In that year, landmark changes in how the law viewed the arbitration of statutory employment discrimination claims began. Given the relatively short period since that major transformation in the law and our understanding today in 2007, a number of questions remain about the scope of arbitration for employment discrimination claims. Employers and employees still need to know exactly what is required to allow the arbitral forum to supplant the judicial forum for these claims. Such questions would seem to fall right within the province of the EEOC because of its prominent role in enforcing employment discrimination laws. And the Supreme Court has already validated the significant role that the EEOC plays through its statutory mandate to vindicate the public interest even when that might conflict with other strong federal policy supporting the

enforcement of agreements to arbitrate.

A. Gilmer v. Interstate/Johnson Lane Corp.

Before 1991, no employment law practitioner would have thought it possible that courts would enforce a predispute agreement requiring arbitration of statutory employment discrimination claims.⁷¹ The fifteen year anniversary just occurred last year in 2006 for the landmark 1991 decision of *Gilmer v. Interstate/Johnson Lane Corp.*⁷² in which the Supreme Court first authorized the use of arbitration for resolving a statutory employment discrimination claim. As a condition of his employment as a financial manager for Interstate/ Johnson Lane Corp., the plaintiff in *Gilmer* had to sign a registration application with the New York Stock Exchange (NYSE) which required that arbitrate any controversy with his employer.⁷³ Because he signed the application with the NYSE containing the arbitration provision, the plaintiff's employer filed a motion to compel arbitration several years later when Gilmer filed a statutory age discrimination claim under the Age Discrimination in Employment Act (ADEA).⁷⁴

Pursuant to the Federal Arbitration Act (FAA),⁷⁵ the Supreme Court in *Gilmer* compelled the arbitration of the ADEA claim.⁷⁶ The Court evaded the question of whether the scope of the provision in section 1 of the FAA, which excludes "contracts of employment" from FAA coverage, applied to the ADEA claim involving a discrimination dispute between an employer and an employee.⁷⁷ The Court found that the agreement to arbitrate was not part of a contract of employment between Gilmer and his employer, but instead an agreement between the NYSE and Gilmer; so the Court saved for "another day" the question of whether section 1 of the FAA excludes all employment contracts from FAA coverage.⁷⁸

Despite this uncertainty as to whether a direct agreement to arbitrate between an employer and an employee would be enforceable under the FAA after *Gilmer*, employers began to enter into employment agreements

71. See Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration For Discrimination Claims*, 31 RUTGERS L.J. 399, 408 & n.26 (2000) [hereinafter, Green, *Myth of Employer Advantage*].

72. 500 U.S. 20 (1991).

73. *Id.* at 23.

74. *Id.* at 23-24. The ADEA can be found at 29 U.S.C. §§ 621-34 (2000).

75. 9 U.S.C. §§ 1-15 (2000).

76. *Gilmer*, 500 U.S. at 24.

77. 9 U.S.C. § 1 (2000) ("[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.").

78. *Gilmer*, 500 U.S. at 25 n.2.

requiring arbitration of any employment disputes as a condition of employment. These so-called “mandatory” or employer-mandated predispute agreements to arbitrate have garnered much criticism over the past fifteen plus years as employers continued the expansive use of these agreements.⁷⁹ With the imprimatur of the *Gilmer* decision behind them, most lower courts enforced those mandatory arbitration agreements involving statutory employment discrimination claims.⁸⁰ The expansive use of mandatory arbitration agreements has continued to occur despite much legal uncertainty about their enforcement shortly after the *Gilmer* decision and even with some additional legal uncertainties still present today as discussed below.⁸¹

B. Civil Rights Act of 1991

Other forces were also conspiring to create more intersection concerns regarding employment discrimination and ADR in 1991. Shortly after the *Gilmer* decision in May 1991, President George Herbert Walker Bush signed the Civil Rights Act of 1991 (CRA of 1991)⁸² on November 21, 1991. During its 1988-89 term, the Supreme Court had decided several controversial cases regarding employment discrimination matters including: *Patterson v. McLean Credit Union*,⁸³ *Lorance v. AT&T Technologies*,⁸⁴ *Martin v. Wilks*,⁸⁵ *Price Waterhouse v. Hopkins*,⁸⁶ and *Wards Cove Packing Co. v. Atonio*.⁸⁷ These decisions, among others decided by the Court that term, caused concern for civil rights advocates, who mounted a legislative effort to reverse those decisions, which

79. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1632-34 (2005) [hereinafter Sternlight, *Creeping Mandatory Arbitration*] (describing the level of criticism of mandatory arbitration agreements and their expansive use). There is some debate about whether the term, “mandatory,” appropriately addresses how arbitration occurs, at least in the consumer setting. See *id.* at 1632 n.1 (identifying a debate between Professor Jean Sternlight and Professor Stephen Ware on that issue as to whether arbitration is really mandatory because consumers do have a choice); see also Bales, *Normative Consideration*, *supra* note 60, at 333 & n.6 (capturing the debate between Professors Sternlight and Ware). Regardless of the potential distinction, within this essay, the term, “mandatory arbitration” is used to refer to arbitration of employment discrimination claims when agreed to as an employer-mandated condition of employment.

80. See Green, *Myth of Employer Advantage*, *supra* note 71, at 411 & n.39, 412 & n.42 (citing cases).

81. See *infra* Part III.C.

82. Pub. L. No. 102-166, 105 Stat. 1071 (2001) (codified in scattered sections of 42 U.S.C.); see also <<http://www.eeoc.gov/policy/cra91.html>> (providing many of the provisions of the Civil Rights Act of 1991) (last visited Mar. 15, 2007).

83. 491 U.S. 164 (1989).

84. 490 U.S. 900 (1989).

85. 490 U.S. 755 (1989).

86. 490 U.S. 228 (1989).

87. 490 U.S. 642 (1989).

culminated with the successful passage CRA of 1991.⁸⁸

Under the new CRA of 1991, Congress granted employees the right to pursue compensatory and punitive damage claims along with the right to a jury trial for intentional discrimination claims brought pursuant to Title VII.⁸⁹ These new remedies were included in the proposed legislation to align Title VII claims with claims under Section 1981 of the Civil Rights Act of 1866,⁹⁰ which already allowed such remedies, but only for employment discrimination claims based on race.⁹¹ Initial legislation drafted to address the civil rights concerns regarding the 1989 decisions,⁹² the Civil Rights Act of 1990, failed as President Bush vetoed it because of purported concerns that quotas would be necessary for employers to protect themselves in light of the new remedies, along with theories of liability that were proposed.⁹³

The new CRA of 1991 also included a provision encouraging the use of ADR to resolve employment discrimination claims.⁹⁴ That provision stated:

Section 118. Where appropriate and to the extent authorized by law, the

88. See Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOWARD L.J. 937, 949 (2005) [hereinafter Green, *Addressing Race Discrimination*]; see also Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L. J. 431, 467 (2005).

89. See Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in pertinent part at 42 U.S.C. §§ 2000e-2 to 2000e-17 (2004)). The CRA of 1991 contained provisions that expanded Title VII remedies, based on the size of the employer, for intentional discrimination under Title VII. Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 101-102, 105 Stat. 1071-74 (1991) (codified in pertinent part at 42 U.S.C. §§ 1981a-b (2000)) (describing the right to compensatory and punitive damage remedies and the right to a jury trial made available to claimants filing claims of intentional discrimination under Title VII, as amended by the Civil Rights Act of 1991, but placing caps on recovery of \$50,000 for employers with less than 101 employees and then graduated monetary increases corresponding to the increasing number of employees in the workforce up to a maximum of \$500,000 for employers with more than 500 employees).

90. 42 U.S.C. § 1981 (2000).

91. See H.R. Rep. 102-40(I), at 14 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 552-53.

92. See *supra* notes 83-87.

93. Belton, *supra* note 88, at 467 & n.228 (referring to the veto); Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 69, 148-49 (1993); Green, *supra* note 89, at 948 n.54 (citing to a comment on the EEOC's website regarding its fortieth anniversary and referring to two reasons that were articulated as the basis for President Bush's veto of the 1990 legislation: "first, the reversal of [the analysis for] business necessity, and second, the right to jury trial with compensatory and punitive damages for intentional discrimination"). A few commentators have provided a detailed discussion of the failed 1990 civil rights legislation. See, e.g., Leland Ware, *The Civil Rights Act of 1990: A Dream Deferred*, 10 ST. LOUIS U. PUB. L. REV. 1 (1991); Cynthia L. Alexander, Note, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 VAND. L. REV. 595 (1991).

94. Section 118 of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1074 (1991) (codified as a note at 42 U.S.C. § 1981 (2000)), available at <<http://www.eeoc.gov/policy/cra91.html>> (last visited Mar. 15, 2007).

use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.⁹⁵

The legislative history behind this ADR provision in the CRA of 1991 did not clearly indicate whether Congress was endorsing the use of arbitration as an agreed condition of employment before a dispute has arisen or only when agreed to after the dispute has arisen.⁹⁶ The ADR provision was drafted before *Gilmer* as part of the Civil Rights Act of 1990 when the general understanding was that agreements to arbitrate statutory employment discrimination claims could not prevent an employee from pursuing resolution in court.⁹⁷

Thus, a little more than fifteen years ago the uncertainty about the application of *Gilmer* to predispute mandatory arbitration employment agreements was palpable. Nevertheless, employers began to use these mandatory arbitration agreements as a condition of employment. Because the new statutory regime from the CRA of 1991 now offered jury trials along with punitive and compensatory damages for claims of intentional discrimination, employers greatly feared large and unpredictable jury verdicts would start to affect resolution of employment discrimination claims.⁹⁸ Accordingly, employers enthusiastically embraced the use of arbitration after *Gilmer* by requiring that their employees agree to arbitrate employment discrimination claims as a condition of being employed.⁹⁹ In a recent study conducted by the Cornell Institute on Conflict Resolution, the researchers analyzed “200 field interviews on conflict management with

95. *Id.*

96. See Sara Lingafelter, Comment, *Lack of Meaningful Choice Defined: Your Job vs. Your Right to Sue in a Judicial Forum*, 28 SEATTLE U. L. REV. 803, 821-26 (2005) (describing analysis and legislative history of the ADR provision of CRA of 1991, Section 118, found at 42 U.S.C. § 1981 (statutory note)). *But see* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 753 (9th Cir. 2003) (finding the language in the ADR provision to be unambiguous and thus having no need to resort to meaning from legislative history suggesting that the ADR provision in Section 118 of the CRA of 1991 was only intended to have a post-dispute application).

97. Lingafelter, *supra* note 96, at 823.

98. See Frederick L. Sullivan, *Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration*, 26 W. NEW ENG. L. REV. 281, 317 (2004) (“Much of the advocating for arbitration on the part of employers results from verdicts that have been pursued before sympathetic-to-employee and hostile-to-employer juries in proceedings that have become known as ‘workplace lotteries.’”) (footnote omitted); *see also* David T. Lopez, *Realizing the Promise of Employment Arbitration*, 69 TEX. B. J. 862, 62 (2006) (“Employers have opted for mandatory, binding arbitration of employment disputes as a way to avoid the fear of disproportionate jury awards or jury bias, among other reasons”).

99. Green, *Myth of Employer Advantage*, *supra* note 71, at 454-59 (describing concerns about jury verdicts – albeit based on little data – as the concern for employers that led the rush into the use of arbitration).

managers and attorneys in nearly sixty U.S. corporations.”¹⁰⁰ From that study of the motivations of managers and attorneys in using ADR, “interviewees hardly ever uttered the word ‘fairness’” and “almost always reported that their major motivation was to avoid the costs associated with resolving disputes in court.”¹⁰¹

C. The EEOC's 1997 Policy Statement on Mandatory Arbitration

As the number of cases involving arbitration of statutory employment discrimination claims increased after *Gilmer*, the EEOC addressed the implications of using mandatory arbitration. As a result, approximately ten years ago in July 1997, the EEOC issued its policy statement on mandatory binding arbitration of employment discrimination disputes as a condition of employment.¹⁰²

In its 1997 policy statement, the EEOC clarified its position to all those who were unsure about the parameters of pursuing mandatory arbitration agreements after *Gilmer*. The 1997 policy statement also provided arguments in support of its position.¹⁰³ Professor Richard Bales has interpreted the EEOC Policy to include eight reasons for its opposition to mandatory arbitration including: 1) inability to develop judicial precedents; 2) lack of deterrent effect because arbitration awards are not published; 3) limited judicial review which prevents courts from correcting any arbitrator errors of statutory interpretation; 4) waiver of the right to a jury trial; 5) the availability of only limited discovery; 6) the structural advantage the employer has as a repeat player in the selection of the arbitrator and potential influence on the arbitrator due to the possible need to select the arbitrator for future cases; 7) improper influence by the employer as the party with the most bargaining power in drafting one-sided agreements; and 8) inability of the EEOC to perform its role if employees are not able to file charges.¹⁰⁴ In the policy statement, the EEOC ultimately concluded that mandatory arbitration agreements for employment discrimination claims should not be enforced.¹⁰⁵

100. See David B. Lipsky, *Resolving Workplace Conflict: The Alternative Dispute Resolution Revolution and Some Lessons We Have Learned*, PERSPECTIVES ON WORK, Winter 2007, at 11, 12 & n.3 (citing DAVID LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS (2003)).

101. *Id.* at 13.

102. EEOC POLICY, *supra* note 62.

103. *Id.*

104. See Richard A. Bales, *Compulsory Arbitration and the EEOC*, 27 PEPP. L. REV. 1, 20-26 (1999) [hereinafter Bales, *Compulsory Arbitration*].

105. EEOC POLICY, *supra* note 67, § I.

The fact that the EEOC took this position in 1997 was not surprising given the Commission's longstanding opposition to the use of arbitration even if case law might differ with the EEOC's position.¹⁰⁶ The EEOC had already issued a policy statement in 1995 opposing the use of mandatory arbitration agreements as a condition of employment.¹⁰⁷ So the 1997 statement merely "reiterated [the EEOC's] opposition to mandatory arbitration agreements and restated its commitment to challenging the legality of these agreements in the courts, even in cases where the employee has agreed to abide by such a contract."¹⁰⁸

Regardless of differences between the courts and the EEOC's position on an issue,¹⁰⁹ compliance with the complexities of employment discrimination law can be difficult,¹¹⁰ and employers still tend to look to the EEOC for guidance on how to comply with the complexities of employment discrimination law.¹¹¹ Also, employees look to the EEOC to help explain what protections are available to them under the law.¹¹² Small

106. Primm, *supra* note 62, at 151 (noting that it was "not surprising" for the EEOC to come up with a policy statement on mandatory arbitration at that time).

107. See Mark Hansen, *Contract Disputes: EEOC Reaffirms Policy Favoring Judges Over Arbitrators For Workplace Discrimination Claims*, A.B.A.J., Sept. 1997, at 26, 26.

108. *Id.*

109. Although beyond the scope of this essay, Professor Rebecca Hanner White has stressed the importance the courts should give to the EEOC's role in setting policy and the deference courts should give to the EEOC's interpretations regarding key policy issues. See, e.g., Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532 (2000); Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51.

110. See Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1468-82 (2004) [hereinafter Sternlight, *In Search of Best Procedure*] (suggesting that the following ten factors make individual employment discrimination claims difficult to resolve: complex laws; highly contested and confusing facts; involvement of significant non-legal as well as legal interests; societal need for correct determinations; societal need for clear and public precedents to guide future conduct and deter future misconduct; the need for adequate compensation of victims of discrimination; the societal need to punish wrongdoers; unavailability of a fair procedural mechanism to assert claims; the need for quick resolution of claims to allow parties to move forward with their lives and business; and the lack of resources alleged victims tend to have compared to the alleged perpetrators); Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 277-82 (noting that workplace inequities are becoming more complex and moving to a "second generation" requiring unique collaborative problem-solving skills).

111. See Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1953-54 (2006) (highlighting the complexities of the statutes that the EEOC administers; asserting how the EEOC has developed necessary expertise on various related subjects involved in enforcement; and describing numerous policy guidance materials that the EEOC generates commensurate with its responsibility to track tendencies and be a "repository for a wealth of information about the discrimination-related trends and concerns in workplaces around the country"); Primm, *supra* note 62, at 160 (referring to employer guidance given by the EEOC). The EEOC lists more than twenty different policies and guidances for employees and employers to consider on its website including its policy against mandatory arbitration. See Enforcement Guidances and Related Documents, <<http://www.eeoc.gov/policy/guidance.html>> (last modified Mar. 7, 2007).

112. Hart, *supra* note 111, at 1953-54 & n.95 (highlighting how employees can learn from the

businesses, not looking to spend the time and resources needed to challenge the EEOC's position, will likely use the EEOC's position on the matter to guide them in developing compliance policies.¹¹³ As one commentator has suggested, the EEOC's "guidances and policies . . . can serve as a model and comparison for less effective corporate policies."¹¹⁴

D. Wright v. Universal Maritime Services Corp.

A year after the 1997 EEOC policy statement, another case came to the Supreme Court, *Wright v. Universal Maritime Service Corp.*¹¹⁵ In that case, the Court addressed the issue of whether an agreement for mandatory arbitration of a statutory employment discrimination claim would be enforceable in a union setting involving a collective bargaining agreement.¹¹⁶ The Court decided that any union waiver of an individual employee's statutory right to pursue a discrimination claim in a judicial forum must be a clear and unmistakable.¹¹⁷

The significance of *Wright* relates to a pre-*Gilmer* precedent from a 1974 Supreme Court decision. In *Alexander v. Gardner-Denver Co.*,¹¹⁸ the Court found that an employee could pursue any individual claim he had under Title VII in court even if he had already used the grievance and arbitration process provided by the employer and his union pursuant to a collective bargaining agreement.¹¹⁹ According to the Court, by processing the employee's grievance through arbitration, the union had not waived the statutory rights of the employee to file a Title VII claim.¹²⁰ The Court also found that a union cannot agree to waive an individual employee's future pursuit of statutory rights in court.¹²¹ In the *Wright* decision's analysis of

many guidance materials created by the EEOC to help understand some of the complexities of the law).

113. The EEOC even targeted small business compliance as the purpose for upgrading its website in 1999 to make its guidances and policies more available and to present them in a more user friendly format. See Press Release, EEOC, EEOC Revamps Website (July 9, 1999), available at <<http://www.eeoc.gov/press/7-9-99.html>>. More information targeted for small business is available on the EEOC's website. See Information for Small Businesses, <<http://www.eeoc.gov/employers/smallbusinesses.html>> (last modified Feb. 13, 2001).

114. Adele Rapport, *Using EEOC Enforcement Guidelines and Policy Statements*, in 2 ATLA 2005 TORONTO ANNUAL CONVENTION PAPERS 2021 (2005).

115. 525 U.S. 70 (1998).

116. *Id.* at 72.

117. *Id.* at 79-80.

118. 415 U.S. 36 (1974).

119. *Id.* at 50 (finding that "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.").

120. See *id.* at 51-52.

121. *Id.* at 51. The Court subsequently banned prospective waivers by a union of an individual

the requirement that a union must effectuate a clear and unmistakable waiver of its members' statutory rights to file in court, the Court failed to explain whether the *Gilmer* decision had overruled the *Alexander* decision.

A number of courts have been uncertain about how to apply the *Wright* decision and determine whether a union has effectively made an unmistakable waiver of its employees' rights to pursue statutory claims in court, especially if the collective bargaining agreement contains anti-discrimination language.¹²² It is unlikely that a union would agree to provide a "clear and unmistakable" waiver of any individual employee's right to take his or her employment discrimination dispute into court.¹²³ But that may depend upon how a clear and unmistakable waiver is defined, as *Wright* only said that there was no proof of such a waiver in that case.¹²⁴

Many had hoped or expected that *Wright* would address the unanswered question about whether agreements to arbitrate made pursuant to a collective bargaining agreement would be subject to the mandates of *Gilmer*. The Supreme Court in *Wright* at least established that there are differences between agreements to arbitrate when made in a union setting but it muddled the boundaries of *Gardner-Denver* and *Gilmer* by not identifying what might constitute a clear and unmistakable waiver and whether a union can even make this waiver prospectively or before a dispute arises. Until further court explanation, the EEOC should clarify its policy when unions and collective bargaining arbitration are involved, since *Wright* arose after the 1997 EEOC policy and many questions remain about how to reconcile *Gilmer*, *Alexander*, and *Wright*.¹²⁵

employee's rights under other statutes in *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (banning waivers under 42 U.S.C. § 1983 (2000)) and *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (banning waivers under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19 (2000)).

122. *Compare* *Rogers v. New York Univ.*, 220 F.3d 73 (2000) (finding that a clear and unmistakable waiver can occur only when the collective bargaining agreement: 1) contains a provision whereby employees specifically agree to submit all federal causes of action arising out of employment to arbitration, or 2) language explicitly incorporating the statutory anti-discrimination laws into the agreement to arbitrate) with *Safrit v. Cone Mills Corp.*, 248 F.3d 306 (4th Cir. 2001) (finding that general anti-discrimination provision in collective bargaining agreement was enough to waive employees' statutory right to pursue employment discrimination claims in court).

123. *See* Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1842 (2001) (asserting that "unions will have a powerful disincentive to negotiate for antidiscrimination provisions in labor contracts because they risk waiving unit members' rights to proceed in court with statutory antidiscrimination claims").

124. *See generally* Martin H. Malin & Jeanne M. Vonhof, *The Evolving Role of the Labor Arbitrator*, 21 OHIO ST. J. ON DISP. RESOL. 199, 221-25 (2005) (discussing court decisions and analysis related to compelling arbitration of statutory claims pursuant to provisions of a collective bargaining agreement while acknowledging that most courts refuse to compel arbitration of statutory claims but a significant minority of courts are starting to compel them).

125. A number of commentators have raised concerns about the difficulties that arise when unions must face the prospects of dealing with their obligations in the context of a statutory employment

E. Circuit City v. Adams

At the time of the 1997 EEOC position statement, many questions were outstanding including one of the key issues that the *Gilmer* decision had not answered. That question was whether the FAA (the source of law for enforcing the agreement to arbitrate in *Gilmer*)¹²⁶ even applied when employers and employees directly contracted for arbitration.¹²⁷ Language in Section 1 of the FAA seemed to support the argument that “contracts of employment” were not covered by the FAA.¹²⁸ Accordingly, for a decade after *Gilmer*, there was still a debate regarding whether the strong endorsement of arbitration of statutory employment discrimination claims under the FAA encompassed agreements entered into directly between employers and employees as part of a contract of employment.

The 1997 EEOC policy statement¹²⁹ supported the position that contracts of employment should not be covered by the FAA. The EEOC’s position probably deterred some employers from pursuing such agreements or at least gave them some input about the risks involved in adopting these agreements. But the question that the *Gilmer* decision “saved for another day” finally saw that day come ten years later in 2001 when the Supreme

discrimination dispute. *See, e.g.*, Crain & Matheny, *supra* note 123, at 1841-45; Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513, 516-20 (2001); Eugene Scalia, *Ending Our Anti-Union Federal Employment Policy*, 24 HARV. J. L. PUB. POL’Y 489, 498 (2000); *see also* Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. PA. J. LAB. & EMP. L. 1, 9 (1999) (identifying conflicts for unions in pursuing the collective interests of the membership versus individual claims of employees alleging discrimination claims); Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L. 183, 226 (2006) (suggesting opportunities for unions even in non-union workplaces to help deal with employment disputes); Mary K O’Melveny, *One Bite of the Apple and One of the Orange: Interpreting Claims That Collective Bargaining Agreements Should Waive the Individual Employee’s Statutory Rights*, 19 LAB. LAW. 185 (2003) (asserting that unions should not be allowed to waive individual employee rights to statutory discrimination claims because of the conflicts posed) Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker’s Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135, 201–03 (2000) (same). *But see* Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 845-47 (1996) (asserting that unions should be able to waive individual employees’ Title VII claims in an agreement with an employer because, without that waiver, the prospect of allowing employees essentially another chance to adjudicate their claim discourages employers from entering into agreements to arbitrate).

126. 9 U.S.C. §§ 1-15 (2000).

127. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (describing how the arbitration agreement was not part of a contract of employment between an employer and an employee since *Gilmer*’s agreement to arbitrate was with the NYSE, not with his employer).

128. *See* 9 U.S.C. § 1 (2000).

129. *See* EEOC POLICY, *supra* note 62 (noting that the issue of whether employment contracts are subject to FAA coverage had not been resolved but also asserting that arbitration agreements should still not be enforced even if employment contracts involving arbitration agreements are covered by the FAA).

Court decided *Circuit City v. Adams*.¹³⁰

In *Circuit City*, the Court held that contracts of employment were subject to coverage under the FAA, and only a very narrow group of employees, those who literally work in commerce, would have their contracts of employment not subject to enforcement under the FAA. This decision made it very clear that agreements to arbitrate future employment disputes can be enforceable when entered into directly between an employer and an employee.¹³¹ In *Circuit City*, the employee plaintiff alleged discrimination and unfair treatment under the California Fair Employment and Housing Act and under state tort law.¹³² The Court held that Section 1 of the FAA, which excludes certain “contracts of employment” from FAA coverage, only applied to contracts of employees who are transportation workers based upon the Court’s interpretation of language related to “workers engaged in foreign or interstate commerce.”¹³³

The *Circuit City* decision clearly left the field for mandatory arbitration of statutory employment disputes wide open. Since the *Gilmer* decision in 1991, the Supreme Court has generally supported and endorsed the arbitration of all forms of agreements including many not involving employment discrimination matters.¹³⁴ But *Circuit City* has granted the strongest authority for employers to feel comfortable in getting their employees to enter into mandatory predispute arbitration agreements.

F. EEOC v. Waffle House, Inc.

Only five years ago in January 2002, the Supreme Court issued its important decision regarding agreements to arbitrate employment discrimination claims and the EEOC’s role in the enforcement of those agreements, *EEOC v. Waffle House*.¹³⁵ In this case, the Court had to decide whether a mandatory arbitration agreement between an employer and an

130. 532 U.S. 105 (2001).

131. *See id.* at 119.

132. *Id.* at 110.

133. *Id.* at 119.

134. *See* *Buckeye Cash Checking v. Cardegna*, 546 U.S. 440 (2006); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504 (2001); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000); *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57 (2000); *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866 (1998); *Wright v. Universal Marine Serv. Corp.*, 525 U.S. 70 (1998); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

135. 534 U.S. 279 (2002).

individual employee precluded the EEOC from taking the case forward. The Court found that the EEOC could still file a lawsuit against an employer and obtain individual relief despite the existence of an arbitration agreement.¹³⁶ Also, the Court was asked to address the question of whether an agreement to arbitrate limited the EEOC to only pursuing equitable remedies even if the EEOC was not precluded from taking the case forward.

The empowering *Waffle House* opinion attests to the importance of the EEOC's role in enforcing employment discrimination law. The Supreme Court held that even though the individual employee who filed the charge had agreed to arbitrate employment disputes, the EEOC could still pursue a discrimination lawsuit against the employer for all possible equitable and legal remedies under Title VII including back pay and reinstatement along with compensatory and punitive damages.¹³⁷ This decision highlighted the concern about the collective public rights that the EEOC must vindicate through its enforcement policies.¹³⁸ Because the EEOC is not a party to the arbitration agreement, it is not bound by the strictures of that agreement.¹³⁹ If the employee has already recovered remedies in arbitration, any amount received by the employee may limit the final award issued in the EEOC's court action.¹⁴⁰

Accordingly, under *Waffle House*, an employer may still end up in court defending itself and trying to prevent a large jury verdict. This can occur based upon a charge filed with the EEOC by an employee who had agreed to arbitrate pursuant to an agreement made as a condition of employment. The *Circuit City* decision made it clear that due to the general policy of favoring arbitration from the FAA, mandatory arbitration agreements for statutory employment discrimination claims would be enforceable. But the *Waffle House* decision established that the policy of favoring arbitration gives way to something else: the policy of having the EEOC independently vindicate statutory rights and enforce its public mandate for the collective interests of all employees.¹⁴¹

136. *Id.* at 292.

137. *Id.* at 297-98.

138. *See id.* at 290.

139. *Id.* at 292.

140. *Id.* at 296. In *Gilmer*, the Court had made clear that an individual subject to an arbitration agreement is still free to file an EEOC charge, and that arbitration agreements "will not preclude the EEOC from bringing actions seeking class-wide and equitable relief." *Gilmer*, 500 U.S. at 32.

141. *See* Crain & Matheny, *supra* note 123, at 1815 n.287 (discussing the implications of *Waffle House* and asserting that "[t]he underlying tension in *Waffle House* is between the federal pro-arbitration policy and the rights of individuals to contract freely with regard to the terms of their employment on the one hand, and the public interest in eradicating employment discrimination on the other" because "[t]he EEOC functions as more than just an enforcer for individual employee rights

*III. Employer-Mandated Arbitration Issues for the EEOC TO CONSIDER
SINCE WAFFLE HOUSE*

After the *Wright* and *Waffle House* decisions, employers really have no guarantee that an arbitration agreement will preclude an employee's claims from getting into court when unions or the EEOC are involved. The issuance of the *Circuit City*, *Wright*, and *Waffle House* decisions after the 1997 EEOC policy statement, at a minimum, would appear to warrant some clarification by the EEOC. Regardless of the uncertainty about what these cases would mean for mandatory arbitration, the *Waffle House* decision signaled the importance of the EEOC's role in addressing these issues. However, the EEOC has still not taken any position regarding mandatory arbitration in the five years since *Waffle House* nor within the ten years since its 1997 policy statement.

Instead, when the *Waffle House* decision was issued, then-EEOC Chair Cari M. Domínguez stated, "The [*Waffle House*] ruling embraces the view that, as the agency entrusted to enforce the federal statutes prohibiting discrimination in the workplace, the EEOC is not constrained in any way by a private arbitration agreement to which the EEOC is not a party."¹⁴² Although that statement might have indicated a new resilience on the part of the EEOC with respect to its role in addressing arbitration in the workplace and possibly a wholesale continuance of its 1997 policy against mandatory arbitration, then Domínguez also made the following comment which cast doubt about what the EEOC's policy on mandatory arbitration would now be: "The [*Waffle House*] decision also acknowledges, as does the EEOC, the goals of efficiency and economy that may be furthered in particular cases by the private arbitration system."¹⁴³ Unfortunately, the EEOC has not articulated any specific details about what particular cases would be furthered by arbitration and how that agreement to arbitrate would arise.

Shortly after the *Waffle House* decision, some commentators asserted that "*Waffle House*'s most significant effect on employers is that it strips them of the finality that was once achieved through . . . arbitration judgments."¹⁴⁴ On the other hand, some commentators have suggested that

against discrimination, it is the watchdog for the public's interest" and "the EEOC makes resource allocation decisions about which claims it will pursue based on its assessment of the most significant impact for workers as a whole").

142. See Press Release, EEOC, EEOC Comments on Supreme Court Ruling in *Waffle House* Case (Jan. 15, 2002), available at <<http://www.eeoc.gov/press/1-15-02.html>> (last visited Mar. 15, 2007).

143. *Id.*

144. See Jason A. McNiel, *The Implications of EEOC v. Waffle House: Do Settlement and Waiver Agreements Affect the EEOC's Right To Seek and Obtain Victim-Specific Relief?* 38 IND. L. REV. 761,

Waffle House would have little impact on employer efforts to mandate arbitration as a condition of employment because the EEOC only takes a small percentage of cases from charges that get filed.¹⁴⁵ Under this approach, the small likelihood of the EEOC pursuing a case that would have normally been arbitrated presents little deterrent for employers to resist their continued use of mandatory arbitration agreements. Therefore, an employer may be willing to take the risk of using mandatory arbitration agreements even if the EEOC could still pursue the matter in court. Certainly, up to the time of the *Waffle House* decision, employers were increasingly using arbitration at significant rates.¹⁴⁶ There have been no indicators that employers, in response to *Waffle House*, started cutting back on their arbitration efforts.¹⁴⁷

Although the general lack of EEOC cases filed suggests that *Waffle House* can have little impact, the real limit on the impact of *Waffle House* remains the fact that the EEOC has done nothing to capitalize on the victory from that decision by clearly articulating its current policy on the enforcement of employer-mandated arbitration agreements. The 1997 policy statement provided guidance to many employees and employers as to how the EEOC would deal with employer-mandated arbitration in the face of uncertain legal questions about enforcement of such agreements. Despite many unanswered questions about the enforcement of arbitration agreements that still remain, the EEOC has said nothing. Instead, the EEOC has continued to send mixed messages as to what its arbitration policy is. In 2003, the EEOC began to explore the impact of the *Circuit City* decision by holding meetings with several neutral arbitration service providers to understand what procedural requirements they had adopted in handling mandatory arbitration claims.¹⁴⁸

In 2004, the EEOC sent mixed signals at one point by suggesting that

785 (2005) (discussing the potential impact of *Waffle House* on agreements to arbitrate and settlement agreements).

145. See Chad Egan Burton, EEOC v. *Waffle House: Employers Win, Again*, 71 DEF. COUNS. J. 52 (2004) (asserting that *Waffle House* is a “hollow” victory because the EEOC files only a small percentage of cases); David H. Gibbs, *ADR After Waffle House, Arbitration Gets New Trilogy of Employment Law*, 20 ALTERNATIVES TO HIGH COST LITIG. 17 (2002) (referring to a small number of cases that the EEOC brings in terms of assessing the impact of *Waffle House*).

146. See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 900 (2004) (stating that the “American Arbitration Association (AAA) has claimed that between 1997 and 2002, the number of employees covered by AAA employment arbitration plans grew from 3 million to 6 million”).

147. There may be other reasons, besides any implications from *Waffle House*, that may start to make employers consider a reduction in the use of arbitration. See *infra* Part III.A (describing some complaints by employers about arbitration without mentioning anything about the EEOC or *Waffle House*).

148. See *EEOC Considers Policy Change*, DISP. RESOL. J., Aug./Oct. 2003, at 6.

it was not sure what its arbitration policy was after it supported a settlement agreement that allowed a law firm to continue its mandatory arbitration policy. This occurred after the implications of the *Circuit City* decision were addressed by the United States Court of Appeals for the Ninth Circuit in *EEOC v. Luce, Forward, Hamilton & Scripps*.¹⁴⁹ Although the appeals court found that the agreement to arbitrate was valid pursuant to *Circuit City*, it remanded the case to the trial court to address the EEOC's "novel" claim that the employer retaliated by refusing to hire someone who would not agree to arbitration as a condition of employment. A spokesperson for the EEOC admitted in July 2004 when commenting on the eventual settlement of the *Luce, Forward* case that the EEOC's 1997 policy was "still technically in effect" but there was "a lot of confusion" at the EEOC about how to apply its arbitration policy.¹⁵⁰

Cliff Palefsky, the attorney representing the plaintiff in the settled *Luce, Forward* case asserted that the EEOC's decision to drop the case instead of pursuing its "novel" retaliation claim was a "political one."¹⁵¹ As further support that any action by the EEOC regarding mandatory arbitration in the *Luce, Forward* case would have political implications, Democratic Senator Edward Kennedy had sent the EEOC Chair a letter signed by six other Democrats asking the EEOC to not drop the case after it had been remanded.¹⁵² Some of the political heat on the EEOC was ameliorated by the fact that the ultimate resolution in the *Luce, Forward* case was not presented directly to the Commission for a vote as the EEOC's General Counsel acted independently in making the decision to settle.¹⁵³

Regarding arbitration, the only position that the EEOC seems willing to push is its right, under *Waffle House*, to still file a suit despite the existence of an arbitration agreement.¹⁵⁴ Accordingly, the broader potential

149. 345 F.2d 742 (9th Cir. 2003) (en banc).

150. See Nancy Montwieler, *EEOC Accord Puts Its Stamp of Approval On Law Firm's Mandatory Arbitration Plan*, Daily Lab. Rep. (BNA) No. 132, at AA-1 (July 12, 2004).

151. *Id.*

152. *Id.*

153. *Id.*

154. See generally David L. Hudson, *Don't Stop Probes of Worker Complaints, EEOC Says, Two Courts Rule Arbitration Pact Can't Block Agencies' Investigations*, A.B.A. J. E-REPORT (Jan. 30, 2004). The EEOC has also thought enough about other areas related to its enforcement policies to come out with new guidance in those areas. See Hope Yen, *Workplace Guidelines on Bias Updated*, CHI. TRIB., Apr. 20, 2006, at D3 (discussing new guidelines issued by the EEOC "aimed at combating subtle forms of race discrimination, a persistent problem" in the workplace). Also, the EEOC has been at the forefront of a novel issue over the last few years through its suit against the law firm, Sidley Austin Brown & Wood, C.A., No. 05 C 0208 filed in the United States District Court for the Northern District of Illinois on January 13, 2005. See Martha Neil, *Suing Sidley Austin*, A.B.A. J., Jan. 2007, at 33. In that case, the EEOC has "embolden[ed] law firm partners to explore severance options" by filing a

impact of *Waffle House* was completely dropped, and the EEOC's 2004 actions suggested, without clearly stating so, that it was now creating a policy of endorsing employer-mandated arbitration. Thereby, it abdicated any responsibility for declaring a clear policy on the state of mandatory arbitration as of 2004. Essentially, its inaction and mixed messages have created an unwritten policy that merely said it will leave it up to the courts. Such inaction, regardless of the reasons,¹⁵⁵ represented a major failure of the EEOC when it seemed to be at a juncture after *Waffle House*, where it had a significant opportunity to guide employees and employers regarding the current issues of the day concerning employer-mandated arbitration.

Nevertheless, some key questions remain. The EEOC still has a chance to state an official policy regarding these matters. One could try to determine if there is a coherent approach from some of the cases filed by the EEOC and some of its amicus briefs. But that analysis does not offer the powerful guidance that employers and employees received from the EEOC when it first issued the 1997 policy statement.

In December 2003, a representative from an employer group asked the EEOC to reconsider its general opposition to mandatory arbitration and develop "a more moderate approach."¹⁵⁶ Although the EEOC has not responded, the EEOC can still in 2007 make its mark by updating its policy. As part of that process, it should also consider the perspectives of employers and employees about what works and does not work. There should be enough information about these perspectives given the number of years and the abundance of statutory employment discrimination disputes that have now been resolved through arbitration. Finally, this policy should also address the key legal questions that still remain unanswered.

A. Perspectives of Employers

As a whole, the general belief is that employers find mandatory arbitration to be an advantage because of savings in time, costs, and

"groundbreaking discrimination suit . . . against Sidley Austin a major Chicago-based law partnership" that asserts partners can be employees covered by anti-discrimination laws. *Id.*

155. See *infra* Part IV.

156. See Ann Elizabeth Reesman, General Counsel, Equal Employment Advisory Council, Remarks at EEOC Meeting on EEOC Mediation Program and the Workplace Benefits of Mediation (Dec. 2, 2003), <<http://www.eeoc.gov/abouteeoc/meetings/12-2-03/reesman.html>> (last visited Mar. 15, 2007) (referring to comments of Ann Reesman on behalf of an organization called Employers Employment Advisory Committee applauding the EEOC for expanding its mediation program but suggesting that "the lesson of *Gilmer*, *Circuit City* and their progeny is that if there is a way to enforce the agreement, the court (or, in this case, the Commission) should do so, resolving doubts in favor of arbitration").

privacy.¹⁵⁷ Also, the fact that mandatory arbitration prevents employers from having to be exposed to large and unpredictable jury verdicts represents a significant advantage for them.¹⁵⁸ And by having to resolve the matter in arbitration, it can foster earlier settlement without subjecting the employer to consideration of the nuisance value as the prospect of going to arbitration becomes the endpoint of the negotiations.¹⁵⁹

On the other hand, employers have already started to identify disadvantages when the time and cost savings do not register and employers find themselves tied up in costly and lengthy arbitration.¹⁶⁰ Although parties may debate about who is harmed most, the lack of formal discovery and rules of evidence can concern employers and especially their counsel who have unique expertise in how to win employment discrimination claims.¹⁶¹ Attorneys for employers use the rules of discovery and rules of evidence to their tactical advantage. Last minute surprises with witnesses testifying on crucial matters without the employer having any idea about what that person might testify to and the inability to use the rules of procedure and evidence to limit and control the information presented represents a key disadvantage.¹⁶²

Continued use of mandatory arbitration agreements also may cause morale problems possibly fostering union movements.¹⁶³ The limited review of arbitration decisions has rankled some employers when they discover arbitrators have made some fundamental errors. Employers have also still found themselves in courts either fighting the fairness of the arbitration agreement as a whole or they have been brought in through a lawsuit filed by the EEOC.

A recent study suggests that corporations do not value arbitration when dealing with each other as much as they do when dealing with

157. See Green, *Myth of Employer Advantage*, *supra* note 71, at 421-24 (discussing these purported benefits as reasons why employers adopt the programs but challenging whether there is much proof that supports these benefits); see also Leslie A. Gordon, *Clause for Alarm, As Arbitration Costs Rise, In-House Counsel Turn to Mediation or a Combined Approach*, A.B.A. J., Nov. 2006, at 19, 19 (stating that arbitration is “[t]raditionally praised for its flexibility, informality, confidentiality and ability to produce unique awards not available in traditional litigation”).

158. Green, *Myth of Employer Advantage*, *supra* note 71, at 454-59.

159. *Id.* at 422 & n.81.

160. *Id.* at 422-24 (describing “nightmarish experiences”); see also Gordon, *supra* note 157, at 19.

161. *Id.* at 438-40 (highlighting difficulties for employers due to lack of discovery).

162. *Id.* at 439 (referring to expertise of employer’s counsel and issues from a “Perry Mason” surprise at arbitration).

163. See Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 98-104 (2003) (discussing incentives that unions have to organize around message to employees centered on mandatory arbitration clauses).

individuals.¹⁶⁴ Although the “[c]ourts do in fact, enforce arbitration clauses” as corporate counsel “gain more experience in how mandatory clauses play out” they learn more about the pros and cons of using arbitration.¹⁶⁵ From that experience, some recent complaints by employers have suggested that they have become less inclined to use arbitration.¹⁶⁶ Within those recent complaints, some of the general disadvantages have become more prominent including: unpredictability of the arbitrator’s ruling; convoluted enforcement; increasing costs and delays; lack of discovery; lack of summary judgment; lack of meaningful judicial review; and an increasing preference for mediation as a tool to resolve these disputes.¹⁶⁷

B. Perspectives of Employees

While employers certainly have advantages and disadvantages in pursuing mandatory arbitration, employees have a number of the same issues. For employees, the benefits of time, and costs translate as equally well to them as they do for employers. Also, arbitration as an alternative to the courts can allow for some additional voice and procedural process that does not become available to an employee through the courts. Most importantly, given the dismal results in the court system and the opportunity for employees to potentially have better results in arbitration, there are certainly reasons for employees to not give up on this method of resolving employment discrimination disputes.¹⁶⁸

However, there are some disadvantages for employees as well. Plaintiffs’ employment attorneys have consistently criticized these

164. Theodore Eisenberg & Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335 (2007).

165. Gordon, *supra* note 157, at 19.

166. *Id.* at 19; see also Mary S. Diemer, *Profession Looks for Alternatives to Arbitration, Judicial Reference and Collaborative Law Gain Favor*, LITIG. NEWS, Nov. 2006, at 6 (asserting that “a growing number of attorneys across the country . . . believe that arbitration has become less effective as an inexpensive means of resolving disputes” while identifying “judicial reference and collaborative law” as “[t]wo new entries to the field of alternative dispute resolution” that are “gaining traction with lawyers who have grown dissatisfied with more traditional means of . . . (ADR, primarily arbitration”).

167. Gordon, *supra* note 157, at 19-21 (describing comments of in-house counsel for two corporations about why they have started to look down on using arbitration for their employment disputes and have embraced mediation).

168. See Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 BERKELEY J. EMP. & LAB. L. 321, 327-30 (2005) [hereinafter Green, *Tackling Employment Discrimination*] (suggesting benefits for employees in pursuing arbitration given the harsh results presented by the court system).

agreements as unfair.¹⁶⁹ Certainly, lack of attorney representation creates a problem both in arbitration and in the courts.¹⁷⁰ The most criticized aspect of mandatory arbitration involves the unknowing coercion into that forum to resolve statutory discrimination claims when an employer, the entity regulated by the statute, uses its overwhelming bargaining power in requiring an employee to agree to arbitration as a condition of employment.¹⁷¹

On the other hand, if employees agree to arbitrate after a dispute arises, very little criticism of that form of arbitration has occurred because such agreements tend to resemble the same process that occurs when employees decide to settle. While arbitration may offer many benefits for employees and employers, a focus on post-dispute rather than predispute agreements to arbitrate might change the parameters of arbitration.¹⁷² However, some question whether employers and employees would have the same incentives to agree to arbitrate after a dispute has arisen and believe that most employment disputes would not become the subject of a post-dispute agreement to arbitrate.¹⁷³ If post-dispute agreements to

169. See Cliff Palefsky, *Only a Start: ADR Provider Ethics Principles Don't Go Far Enough*, DISP. RESOL. MAG., Spring 2001, at 18, 20-23 (describing criticism of mandatory arbitration agreements by plaintiff's attorney who has consistently criticized the enforcement of such agreements and now challenges the inability of the parties and the free market system to regulate arbitrators' neutrality and ethics given that employers who are satisfied with arbitrators' performance will want to select those arbitrators repeatedly and thereby give them a large volume of business to the arbitrators); Richard C. Reuben, *Mandatory Arbitration Clauses Under Fire*, A.B.A. J., Aug. 1996, at 58, 58-60 (asserting challenges by the National Employment Lawyers Association (NELA) and threatened boycott of arbitration service providers).

170. See Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 64-66, 72-77 (2004) [hereinafter Green, *Finding Lawyers*] (describing difficulties for employees in obtaining legal counsel for employment disputes in court while also describing the same difficulties in alternatives to the court including mediation and arbitration).

171. Green, *Tackling Employment Discrimination*, *supra* note 168, at 330 & n.37 (citing articles advancing this criticism).

172. See generally Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 8 Nev. L.J. _____ (forthcoming 2007).

173. See Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861 (2004) (post-dispute agreements do not raise the same incentive concerns for employers as predispute agreements and "are different in kind"); Matthew Bodie, *Questions About the Efficiency of Employment Arbitration Agreements*, 39 GA. L. REV. 1 (2004) (post-dispute agreements to arbitrate provide a more efficient result for employees but employers can see a benefit to predispute agreements because it make it difficult and inefficient for employees through those agreements); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001) [hereinafter Estreicher, *Saturns for Rickshaws*] (finding post-dispute agreements to be an "illusory" alternative); Lewis Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313 (2003) (enforcing post-dispute agreements to arbitrate will not work well in practice); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1 (2003) (post-dispute agreements to arbitrate are unwise and not likely to occur).

arbitrate could occur, employees should be able to reap most of the rewards from arbitration that the courts do not offer and could do so with little criticism about enforcing the agreement to arbitrate.

Furthermore, additional complaints assert that mandatory arbitration does not provide the formality and opportunity for formal discovery and rules that employees benefit from in the courts when they want to gather information from the employer to help process their claims.¹⁷⁴ Also, on a broader perspective, lack of a public vindication and precedent hinders growth in the law and prevents employees from knowing about the opportunities for enforcement under employment discrimination law.¹⁷⁵

Employers usually maintain such a repeat player advantage, at least through their lawyers, which may present employees with a disadvantage given the overall expertise of employers' counsel in resolving employment disputes on a repeated basis.¹⁷⁶ And that repeat player lawyer advantage for employers becomes exacerbated in the court system and probably explains, in part, the dismal results for employees in the courts.¹⁷⁷ Accordingly, the repeat player lawyer advantage does not offer a worse scenario for employees in arbitration. There might also be a way to address the issue in arbitration so that it ends up becoming an advantage for employees compared to the courts because some employers offer legal service plan

174. Green, *Myth of Employer Advantage*, *supra* note 71, at 438 n.141; *see also* EEOC POLICY, *supra* note 62 (asserting that one of the reasons why the EEOC believes mandatory arbitration should not be enforced is because "[d]iscovery is significantly limited compared with that available in court and permitted under the Federal Rules of Civil Procedure").

175. EEOC POLICY, *supra* note 62 ("because decisions are private, there is little, if any, public accountability even for employers who have been determined to violate the law").

176. *See* Green, *Tackling Employment Discrimination*, *supra* note 168, at 339-41 & nn.70-80 (describing the depths of the repeat player lawyer advantage for employers).

177. *Id.* at 327 n.24 (citing the following as evidence of the poor results for employees in the court system: Kevin M. Clermont et al., *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547 (2003); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. ILL. L. REV. 947; Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 451-52 (2004) (describing "a troublesome anti-plaintiff effect in federal appellate courts" for employment discrimination claimants along with a bias against plaintiffs at the trial level) (emphasis in original); Theodore Eisenberg & Stewart J. Schwab, *Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals* 1, 1 (July 16, 2001) (describing an empirical study conducted at the request of two plaintiffs' employment discrimination firms and finding that "[e]mployment discrimination plaintiffs are far more likely than defendants to be reversed on appeal" because "only 5.8 percent [of defendants'] judgments are reversed; when "43.61 percent of [plaintiffs'] judgments are reversed"), available at <http://www.findjustice.com/files/Eisenberg_&Schwab_Report.pdf> (last visited July 2, 2007); *see also* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560-61 (2001) (asserting that employers prevail in 98 percent of federal court employment discrimination cases resolved at the pretrial stage).

benefits for their employees as part of their agreements to arbitrate.¹⁷⁸ However, the fact that the arbitrator may be called upon for future work represents a repeat player concern about the arbitrator as only the employer as a repeat player will have this potentially conscious or unconscious influence (of potential future selection and continued business opportunities) on the arbitrator.¹⁷⁹ Finally, in terms of the selection of the decision maker, the arbitrator, the employee does not have the constitutional protections that rest in the courts to make sure that the decision maker comes from a fair cross section of the population rather than from a racially or gender stratified pool.¹⁸⁰

Actual feelings of employees about their experiences in arbitration represents another area that is ripe for more analysis. One study analyzed the viewpoints of employees who had participated in arbitration under mandatory arbitration agreements at two companies, Travelers Corporation (now Citigroup) and Cigna Corporation.¹⁸¹ This study focused on the employees' perceptions of fairness and the effectiveness of the process in resolving their claims. A questionnaire was mailed to all employees who had filed a complaint under the Travelers and Cigna dispute resolution programs over a two-year period.¹⁸² They received a 31 percent response or a total of thirty-eight actual responses from Cigna complainants and a 39 percent response or a total of forty-three actual responses from Travelers complainants.¹⁸³ The results indicated that for "both programs, the number of persons who proceeded to arbitration was less than 5 percent of all complainants."¹⁸⁴ The researchers conducting the study concluded that the complainants did not consider the procedures as fair or effective unless they obtained the result that they had been seeking.¹⁸⁵ They also concluded

178. See generally Michael Z. Green, *Ethical Incentives for Employers in Adopting Legal Service Plans to Handle Employment Disputes*, 44 BRANDEIS L.J. 395 (2006).

179. Bales, *Normative Consideration*, *supra* note 60, at 384 (describing subconscious repeat player arbitration concern); Palefsky, *supra* note 170 (asserting similar concern about arbitrator repeat player influence).

180. See generally Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145 (2004); William B. Gould, IV, *Kissing Cousins: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609 (2006); Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Suits*, 4 J. AM. ARB. 1 (2005) [hereinafter Green, *Racially Biased Selection*]; E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 312 (1999).

181. See E. Patrick McDermott & Ruth Obar, *Workplace Dispute Resolution After Circuit City: A Complainant's Perspective on Employer Dispute Resolution Programs Requiring Mandatory Arbitration*, 48 WAYNE L. REV. 1157 (2002).

182. *Id.* at 1169.

183. *Id.* at 1169 nn.73-74.

184. *Id.* at 1174.

185. *Id.* at 1187.

that if there were fair procedures offered to employees and the employees' overall concerns about procedural due process were satisfied, then the employees were more willing to recommend the arbitration program to other employees.¹⁸⁶ Although there was some perception of fairness in having their day before the arbitrator, the most significant factor derived from the research was the finding that satisfaction with mandatory arbitration primarily ended up being outcome determinative.¹⁸⁷

Another study has recently asserted that although employees fare better in arbitration than in the courts, the "victories are considerably discounted in value."¹⁸⁸ Any ongoing analysis about the impact of employment arbitration on employees still requires more empirical study.¹⁸⁹ One of the leaders in performing empirical studies regarding employment claims and ADR, Lisa Bingham, has recently asserted that "[t]he field needs a well-designed empirical examination of how arbitration compares to the traditional litigation process, preferably using random assignment or matched pairs of cases" because "[t]his is information policymakers need in order to decide how to address competing claims about efficiency or bias in mandatory employment arbitration."¹⁹⁰ Thus, even though the consensus amongst scholars is that we need more empirical data, there is also a concern about whether the data sets to compare information about employment arbitration versus litigation can offer enough to come up with any definitive conclusions about the impact when employees resolve their claims through arbitration.¹⁹¹

186. *Id.*

187. *Id.* at 1189.

188. See Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL'Y REV. 573, 576-77 (2005) (asserting that employees tend to win in arbitration but the value of the award is much less than what the courts offer).

189. See David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557 (2005) (asserting the need for new directions in the development of empirical research regarding employment arbitration); Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 736 (2001) (identifying problems with sparse empirical information regarding employment arbitration and suggesting that the information that does exist offers little help in understanding the parameters of employment arbitration analysis).

190. See Lisa B. Bingham, *Employment Dispute Resolution: The Case for Mediation*, 22 CONFLICT RESOL. Q. 145, 161 (2004) [hereinafter Bingham, *Case for Mediation*]. Lisa Bingham's empirical work regarding both arbitration and mediation of employment disputes has resulted in several key articles. *Id.* at 168-69 (listing many of Bingham's articles); see also David B. Lipsky & Ariel C. Avgar, *Commentary: Research on Employment Dispute Resolution: Toward a New Paradigm*, 22 CONFLICT RESOL. Q. 175, 175 (2004) (stating that Lisa Bingham's "own research on the repeat-player effect in arbitration, the use of transformative mediation in the U.S. Postal Service, and other topics is testimony to the important role that research can play in an evolving field").

191. Bales, *Normative Consideration*, *supra* note 60, at 351-52 (describing difficulties in gathering and analyzing data from those empirical studies regarding the effect of arbitration on employees that have been conducted due to small sample sizes and high standard deviations).

C. Still Pressing Legal Uncertainties

Although there are many critics of the use of employer-mandated arbitration,¹⁹² there are many fine benefits to using arbitration that might still warrant serious consideration. This would require a thought process of changing arbitration as it currently exists rather than abandoning it completely so that you do not throw out the “bathwater with the baby” in trying to address concerns about employer-mandated arbitration.¹⁹³ As critics of those who favor the courts versus arbitration ask about such litigation romanticism, is arbitration so bad when compared to the courts?¹⁹⁴ Even some empirical studies have suggested that arbitration may provide better opportunities for employees when compared to the dismal results obtained from pursuing employment discrimination claims in the court systems.¹⁹⁵ And this is not a one-sided consideration as arbitration can still provide certainty and some opportunities for a fast and less expensive resolution than in the courts for employers.¹⁹⁶ By coming out with a clear policy, the EEOC will give employers what they so dearly

192. Most of that criticism has focused on concerns about being required as a condition of employment to arbitrate statutory claims rather than having a jury-based resolution despite little bargaining power to negotiate for a different outcome. See Sternlight, *Creeping Mandatory Arbitration*, *supra* note 79, at 1632-34 (describing criticisms).

193. See generally David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out The Bath Water, And Constructing A New Sink In The Process*, 2 U. PA. J. LAB. & EMP. L. 73, 99-100 (1999).

194. See Estreicher, *Saturns for Rickshaws*, *supra* note 173, at 563-66 (asserting that courts don't offer a better system than arbitration for employment discrimination plaintiffs and that empirical data suggests arbitration may outperform the courts and provide more realistic options for low income workers); Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. REV. 105, 106-107 (2003), [hereinafter Maltby, *Workplace Justice*] (arguing that there are some benefits to arbitration when compared with difficulties in the court system); Theodore J. St. Antoine, Gilmer in the *Collective Bargaining Context*, 16 OHIO ST. J. ON DISP. RESOL. 491, 499 (2001) (arguing same). Litigation romanticists tend to see the world with litigation-colored glasses while ignoring the problems of the litigation approach. See Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371, 385-86 (describing the litigation-romanticism phenomenon). Carrie Menkel-Meadow has consistently raised concerns about the narrow approaches of litigation romanticists. See Carrie Menkel-Meadow, *Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement*, 83 GEO. L.J. 2663, 2669 (1995) (criticizing “litigation romanticism” as involving “empirically unverified assumptions about what courts can or will do” and “a focus almost exclusively on structural and institutional values” while “giv[ing] short shrift to those who are actually involved in the litigation”); see also Sarah Kristine Trenary, *Rethinking Neutrality: Race and ADR*, DISP. RESOL. J., Aug. 1999, at 40, 44 (“many critics of ADR suffer from ‘litigation romanticism’” and fail to face that many of the problems that “they identify with ADR are also present in traditional adjudication”).

195. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 209-20 (1997); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 40 (1998); see also LeRoy, *supra* note 188, at 576-77 (asserting that employees tend to win in arbitration at a high percentage although men tend to win more than women in arbitration).

196. See generally Baker, *supra* note 173 (asserting that mandatory arbitration gives employers certain risk assessment benefits that are not available through other forms of dispute resolution).

desire: some certainty about how to proceed.¹⁹⁷ The main way to provide that certainty would be to have the EEOC provide guidance about the pressing legal issues that still remain regarding arbitration of employment discrimination claims.

1. Same Substantive Forum Rights: Costs and Class Actions

Despite the growth of arbitration, many concerns remain regarding the overall fairness of the arbitral forum when compared with the judicial forum. A judicial doctrine has developed to insure that statutory claims which have been moved out of the judicial forum through an arbitration agreement must still allow the claimant to “effectively vindicate” those claims in the arbitral forum for the agreement to be enforced.¹⁹⁸ One case that appeared to highlight this concern was the 1997 decision of the United States Court of Appeals for the District of Columbia in *Cole v. Burns International Securities Services*.¹⁹⁹ In *Cole*, the court enforced an agreement to arbitrate a Title VII discrimination claim and found that there needed to be certain “minimum standards” for arbitrations of statutory claims when the arbitration is a mandatory condition of employment. These standards include: a neutral arbitrator knowledgeable in relevant law; a fair method to obtain necessary information to establish a claim; affordable access to the process, which may require payment by employers of the full costs of the arbitrator’s fees when use of arbitration is imposed as a condition of employment, because having to pay for the arbitration would deter its use and “undermine Congress’s intent” when plaintiffs do not have to pay judges in the judicial forum; right to legal representation; right to the same remedies as those remedies available in litigation; a written opinion by the arbitrator explaining the reasons for the award; and the right to sufficient judicial review to ensure compliance with governing statutory rights.²⁰⁰

197. See Reesman, *supra* note 156 (asserting that employers would benefit from clarification of the EEOC’s policy on arbitration and asking that the EEOC identify fair procedures).

198. See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 397-98 (2006) (referring to the “effectively vindicate” doctrine as a creature of the court’s application of the FAA to allow statutory claims to be arbitrated); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 254, 269-273 (2006) (describing the “effectively vindicate” doctrine along with its origins and applications).

199. 105 F.3d 1465 (D.C. Cir. 1997).

200. *Id.* at 1482-83, 85 & n.11 (describing procedures). Other cases have followed *Cole* by requiring some of the minimum standards of fairness identified therein. See, e.g., *Ramirez-de-Arellano v. Am. Airlines, Inc.*, 133 F.3d 89, 91 (1st Cir. 1997) (requiring notice, discovery, unbiased arbitrators, and meaningful review for wage and hour claims); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997) (requiring “neutral arbitrators, adequate discovery” for Title VII claims).

All of the concerns addressed in *Cole* still arise today whether addressed directly from application of *Cole* or through the “effectively vindicate” doctrine. Essentially, the issue arises when employers decide to overreach and offer arbitration agreements that prevent employees from seeking the same remedies they would have in the courts or place additional burdens on them in arbitration that would not be heaped upon them in the courts.²⁰¹ Examples include attempting to bar attorney’s fees²⁰² and limiting access to punitive damages,²⁰³ though some concerns have become more prevalent than others.

For example, the question of who should pay for the costs of arbitration including arbitrator fees has reached a pervasive level. This issue might have been resolved by the Supreme Court in 2000, but instead, it created an analytical construct that has led to uncertainty and case-by-case analysis. In *Green Tree Financial Corp – Alabama v. Randolph*, the Supreme Court addressed the issue of whether “a party [can] invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive.”²⁰⁴ The Court held that the party who wants to invalidate the arbitration agreement must prove the likelihood that the costs would be prohibitively expensive.²⁰⁵ However, the Court did not make clear how the proponent might prove this. Although the case involved a consumer finance arbitration, rather than employment, the holding of the court has had significance in employment discrimination arbitration, too.²⁰⁶

201. See generally David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49 (2003) (identifying such agreements and arguing for measures that will prevent them from being enforced).

202. See, e.g., *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677 (7th Cir. 2002) (finding arbitration agreement unenforceable that barred the employee’s ability to recover attorney’s fees).

203. See, e.g., *Gannon v. Circuit City Stores*, 262 F.3d 677 (8th Cir. 2001) (finding that provision limiting punitive damages should be severed from arbitration agreement).

204. 531 U.S. 79, 92 (2000).

205. *Id.*

206. See *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 512 (6th Cir. 2004) (where the EEOC argued in an amicus brief and the court agreed that a “cost-splitting” provision in an arbitration agreement must invalidate the entire agreement to arbitrate or else it would not deter an employer from pursuing such clauses if it knew the worst penalty would merely be a severance and continuation of the arbitration); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 662 (6th Cir. 2003) (asserting that the mere possibility that an employee may be subjected to substantial costs will deter many employees from pursuing claims and should not be enforced); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234-36 (10th Cir. 1999) (denying enforcement of an arbitration agreement of an employment discrimination matter because it imposed a fee some where between \$1875 and \$5000 on an employee who was a janitor). A number of commentators have discussed the questions and scope of the concerns regarding arbitration costs. See, e.g., Reginald Alleyne, *Arbitrator Fees: The Dagger in the Heart of Mandatory Arbitration For Statutory Discrimination Claims*, 6 U. PA. J. LAB. & EMP. L. 1 (2003); Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729 (2006). The problems have not been clarified by the courts which now address these problems and burdens of costs for employment arbitration on a case-by-case basis. See, e.g., *Musnick v. King Motor*, 325 F.3d 1255 (11th Cir. 2003) (following case by case approach to issue and citing cases as following

Another pressing question in terms of the “effectively vindicate” doctrine and the *Cole* factors that has become the subject of much discussion²⁰⁷ is whether class actions may be resolved through arbitration or whether arbitration agreements essentially prohibit class actions. Again, the Supreme Court had an opportunity to provide some clarity on this issue in 2003 but failed to give a clear answer by suggesting that it should be up to the arbitrator to decide whether class actions may be viable in light of an agreement to arbitrate. In *Greentree Financial Corp. v. Bazzle*,²⁰⁸ the Supreme Court found that the question of whether an agreement to arbitrate encompassed the handling of class action claims in arbitration was subject to determination by the arbitrator.²⁰⁹ Similar to the Supreme Court’s handling of arbitration costs, the issue of class actions arose in a consumer finance setting. However, that case has application to employment discrimination arbitration, too.²¹⁰

2. Fair Procedures: Arbitrator Selection and Pool Diversity

Given that 95 percent of claimants in employment disputes are unable

same approach as to whether costs of arbitration will be prohibitive: *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002); *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 n.6 (5th Cir. 2002); *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 (4th Cir. 2001); *see also* Estlund, *supra* note 198, at 429 (criticizing the Supreme Court’s holding in *Randolph* that plaintiffs must prove arbitration fees and costs would be “prohibitively expensive” by stating “the Supreme Court failed” and its decision “is a supremely unhelpful approach to employers, employees, and lower courts evaluating the lawfulness of any particular fee schedule”); Laurie Leader & Melissa Burger, *Let’s Get a Vision: Drafting Effective Arbitration Agreements in Employment and Effecting Other Safeguards to Insure Equal Access to Justice*, 8 EMP. RTS. & EMP. POL’Y J. 87 (2004) (describing problems in courts’ assessment of impact from arbitration costs and fees); Michael H. LeRoy & Peter Feuille, *When is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143, 177-93 (2002) (analyzing sixty-two employment discrimination cases involving employee challenges to the enforcement of the arbitration agreement based on cost objections).

207. *See generally* Kenneth R. Pierce, *Down the Rabbit Hole: Who Decides What’s Arbitrable?* 21 J. INT’L ARB. 289 (2004) (criticizing the Supreme Court’s approach in *Bazzle* of letting the arbitrator decide whether class actions are subject to being resolved pursuant to the parties’ agreement to arbitrate); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?* 42 WM. & MARY L. REV. 1 (2000) [hereinafter Sternlight, *Arbitration Meets Class Action*] (lamenting the potential detriment to class actions by the continued use of mandatory arbitration agreements); Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711 (2006) (criticizing the increasing use of arbitration as having a detrimental impact on constitutional due process in class actions that protect non-participating class members when under *Bazzle* the arbitrator decides the propriety of class actions subject to an agreement to arbitrate).

208. 539 U.S. 444 (2003).

209. *Id.* at 451-52.

210. *See* John B. O’Keefe, Comment, *Preserving Collective-Action Rights in Employment Arbitration*, 91 VA. L. REV. 823, 824-25 (2005) (discussing the application of *Bazzle* in the employment setting).

to obtain legal counsel,²¹¹ the selection of the decision maker represents an essential component of justice. Others have recognized the importance of having diverse individuals be selected as the neutral dispute resolution professional.²¹² Anecdotal information in 2004 indicated that the National Academy of Arbitrators, one of the most experienced groups of arbitrators for handling such claims, had “no more than 2 percent” black members.²¹³ In recent information captured by William Gould regarding leading arbitration service providers, JAMS and the American Arbitration Association (AAA), he stated:

The fact is that a small percentage of arbitrators are blacks, other minorities, or women. The same minuscule representation is reflected in the membership rolls of the blue ribbon organization (the National Academy of Arbitrators) and it is reflected on the panels established by both AAA and JAMS. Of approximately 225 arbitrators on the JAMS list, 20-25 are women, 5 or 6 are black and another 5 are Asian. There appear to be a smaller number of Hispanics on the list. Thus, it is said that the typical arbitrator in a JAMS individual contract case is both white and male. The AAA has done somewhat better: Of the 664 members of [the] employment panel nationally, 220 are women. Of that same panel of 664, 54 have identified themselves as minority.²¹⁴

In civil matters, such as employment disputes, brought in courts, the public jury selection process comes with certain constitutional equal protection guarantees that allow the participants to challenge the use of stereotypes including race in selecting jurors.²¹⁵ These constitutional guarantees, called *Batson* challenges after the Supreme Court decision that first acknowledged the need for protection of the jury selection process against racial stereotypes, does not translate as well to private arbitration guarantees because of clear constitutional state actor issues that arise in the courts but do not appear in arbitration.²¹⁶ Because there are no

211. Green, *Finding Lawyers*, *supra* note 170, at 64 n.24 (finding that “[o]nly about five percent of those pursuing employment discrimination claims find attorneys to represent them in court” and citing articles).

212. See Isabelle R. Gunning, *Perceptions, Categorizations, and Impartiality: Arbitrators in Racial Equality in Arbitration*, 4 J. AM. ARB. 59, 70-77 (2005); Gould, *supra* note 181, at 654 (“Nothing is more integral to the process than the identity of the adjudicator!”).

213. Green, *Racially Biased Selection*, *supra* note 180, at 30 n.127 (citing anecdotal information from 1995 stating less than 1 percent black membership in the national academy and then my own survey from the list of 600 arbitrators on the national academy of arbitrators website and my finding in 2004 of “no more than 2%”).

214. Gould, *supra* note 180, at 658 (footnotes omitted).

215. See *Batson v. Kentucky*, 476 U.S. 79 (1986) (finding as a matter of constitutional equal protection requirements that prosecutors may not strike jurors from the jury pool on the basis of race); see also *Georgia v. McCollum*, 505 U.S. 42 (1992) (extending *Batson* to prevent defense counsel from employing the tactic of striking potential jurors on the basis of race); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (extending *Batson* prohibitions to civil cases).

216. See *Cole & Spitko*, *supra* note 180 (explaining the difficulties in translating *Batson* to

opportunities for challenge under current law in terms of *Batson*-type protections in arbitrator selections,²¹⁷ the EEOC should consider this concern about the need for a fair process to select arbitrators for statutory employment discrimination matters and provide guidance to address this lack of *Batson*-type protection in any future policy statement. At a minimum, the EEOC should assert that mandatory arbitration, as a substitute for court, should not deny certain protections including guarantees from *Batson* that employees would have if their claims were brought in the courts. The only distinction would be the selection of arbitrators versus jurors. Because both jurors and arbitrators act as the ultimate decision makers in employment discrimination matters in the respective judicial and arbitral forums, their selection processes should be transparent and not involve the use of racial stereotypes.

3. Roles for Unions and Clear and Unmistakable Waivers

Since the failure of the *Wright* decision to clarify the concept of clear and unmistakable waivers, the EEOC should address those concerns for employees covered by arbitration clauses in a collective bargaining agreement. Clearly, the EEOC will continue to operate pursuant to *Waffle House* in its belief that no employee should be precluded from filing a charge with the EEOC. However, the person filing the charge may have no incentive to do so if she knows that under *Wright*, she must pursue arbitration instead because her union has effectuated a clear and unmistakable waiver of her statutory right to file in court. Addressing concerns in this area may be a little more difficult because the EEOC does not enforce labor relations laws involving collective bargaining agreements. However, whether an employee represented by a union may pursue in court a claim under laws that the EEOC does enforce when the employee has not signed any agreement to arbitrate but her union has entered into a collective bargaining agreement with a non-discrimination clause represents an important issue where the EEOC's voice should be heard. Due to the broader public interest in not discouraging the filing of EEOC charges, which was highlighted as a concern before and after the *Waffle House* decision, the EEOC should identify exactly what would be considered a clear and unmistakable waiver and try to resolve any other uncertainties amongst the *Gilmer*, *Wright*, *Alexander*, and *Circuit City*

arbitration because of the lack of governmental actors necessary to raise the constitutional protections that *Batson* warrants).

217. Green, *Racially Biased Selection*, *supra* note 180, at 43-45 (yielding to the assumption that courts will not extend *Batson* analysis and its protections to the selection of private arbitrators).

decisions.

4. Compelling Arbitration for Res Judicata Versus Retaliation

Although the *Waffle House* decision allows the EEOC to still seek victim-specific relief despite the existence of an individual agreement to arbitrate, several cases have now addressed the issue of whether the employee must still pursue her claim in arbitration before the EEOC completes its investigation or before it obtains judicial relief. This argument, really an attempt to effectuate res judicata, arises from language in the *Waffle House* decision stating that “ordinary principles of res judicata, [and] mootness” may still apply.²¹⁸ Although one commentator has referred to this language about res judicata from *Waffle House* as “dicta,” the issue of whether employers may require that employees pursue arbitration even if the EEOC has taken the case remains an open question.²¹⁹

Accordingly, employers have started to develop strategies regarding the use of the res judicata and mootness argument as a tool to circumvent the impact of *Waffle House* by seeking to compel individual employees to arbitrate before the EEOC can complete its proceedings. Then arguably when the EEOC has completed its proceedings through a court action, any relief for the individual employee would be precluded as res judicata or moot.

For example, in *EEOC v. Circuit City Stores*,²²⁰ the United States Court of Appeals for the Sixth Circuit addressed the claim by the employer that the individual employee could still be compelled to seek exclusive relief in arbitration by having signed an agreement to arbitrate even if the EEOC has filed a lawsuit. The EEOC disagreed and argued that an employee who has signed an agreement to arbitrate only agrees to forego a judicial resolution when she initiates a lawsuit or the EEOC issued her a right-to-sue letter.²²¹ The Court agreed with the EEOC and held that there was no case or controversy regarding compelling arbitration because the EEOC had filed the lawsuit, not the employee.²²²

Other lower court cases seem to support the position that the EEOC may pursue its action even if the employee agreed to arbitrate and even suggest that the employee does not have to be compelled to arbitrate once

218. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 298 (2002).

219. McNeil, *supra* note 144, at 775.

220. 285 F.3d 404 (6th Cir. 2002).

221. *Id.* at 407.

222. *Id.*

the EEOC files suit. In *EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C.*,²²³ the EEOC argued that “requiring an employee to arbitrate after the EEOC has filed suit interferes with the EEOC’s right to enforce the law.”²²⁴ Likewise, in *EEOC v. Ralph’s Grocery Co.*,²²⁵ the employer sought to compel individual arbitration with a former employee who had filed a charge of discrimination and the employer requested a state court injunction to prevent a state agency from investigating the discrimination charge.²²⁶ In *Ralph’s Grocery*, the employer sent the former employee a letter after she filed a charge of discrimination with a state agency and the employer told her that she had to withdraw her charge because she had signed an arbitration agreement.²²⁷ Because of that letter, the plaintiff then filed a retaliation charge directly with the EEOC.²²⁸ The EEOC then sought an injunction in federal court to stop the employer’s state court injunction action and argued that if the state agency (working in tandem with the EEOC) was enjoined from investigating in order to allow arbitration, it would create a “chilling effect on the many employees who have a statutory right to file a charge with the EEOC or its sister state agencies.”²²⁹ The EEOC’s position in *Ralph’s Grocery* was that the employer’s state court injunction action was a form of retaliation against employees for exercising their right to file a charge.²³⁰ Both the state and federal courts relied on the *Waffle House* decision to assert that the agreement to arbitrate did not prohibit the employee from filing a charge with the EEOC or the equivalent state agency.²³¹ Those agencies have an independent authority to pursue those charges.

Similar attempts by employers to compel the employee to arbitrate after the EEOC brought suit have been asserted. A recent attempt to still compel the employee to arbitrate despite the EEOC’s pending suit occurred in *EEOC v. Physicians Service*²³² in the United States District Court for the Eastern District of Kentucky. Therein, the employer moved to compel arbitration and stay the court proceedings pending resolution in arbitration. The EEOC argued that its court proceedings should not be stayed even if

223. 273 F. Supp. 2d 260 (E.D. N.Y. 2003).

224. *Id.* at 263.

225. 300 F. Supp. 2d 637 (N.D. Ill. 2004).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 640.

230. Hudson, *supra* note 154 (discussing the results in both the state court and the federal court regarding the Ralph’s Grocery action seeking an injunction of the state agency charge investigation).

231. *Id.*

232. 425 F. Supp. 2d 859 (E.D. Ky. 2006).

the arbitration proceedings went forward.

The employer argued essentially that it could be a waste to proceed with the court proceedings if the matters were resolved in arbitration. But the EEOC, relying on *Waffle House* and other cases, argued that its suit was independent of the arbitration claims because the EEOC would be seeking vindication of the public interest.²³³ The district court found that the “*Waffle House* Court did not address [the] specific question of whether an intervening plaintiff must arbitrate his or her claims pursuant to an arbitration agreement because the aggrieved party in *Waffle House* never intervened in the EEOC’s action.”²³⁴ According to the district court’s analysis of *Waffle House*, “the majority in *Waffle House* was aware of the dissent’s objection to the EEOC doing on behalf of an employee that which an employee has agreed not to do for himself” and noted that the *Waffle House* Court accepted that consequence of its ruling.”²³⁵

Another particular case demonstrates the focus of the EEOC when it comes to efforts by the employer to get the employee to go forward with arbitration after the EEOC has decided to pursue the case.²³⁶ In the case of *EEOC v. Woodmen of the World Life Insurance Society*, brought in the United States District Court for the District of Nebraska, the employer sought to compel arbitration with the employee who had filed the charge even while the EEOC pursued its case against the employer in court.²³⁷ Initially, the EEOC did not express any opinion on the propriety of Rollins’ arbitration agreement while Rollins asserted that she could “pursue litigation regardless of any agreement because the EEOC . . . filed a lawsuit on her behalf.”²³⁸ The employee, without any help from the EEOC, asserted that compelling her to arbitrate “would unfairly undermine the EEOC’s right to enforce the law.”²³⁹ The court held that the agreement between the employee and her employer did not prevent the EEOC from proceeding with its suit against the employer, but it ordered Rollins to proceed with arbitration.²⁴⁰

Nine months after the court in *Woodmen* ordered the employee to arbitrate her claims, the case came back to the United States District Court for the District of Nebraska as the employee filed a motion for relief from

233. *Id.* at 860.

234. *Id.* at 861.

235. *Id.* at 862 (citing *EEOC v. Waffle House*, 534 U.S. 279, 298 (2002) (Thomas, J., dissenting)).

236. *See EEOC v. Woodmen of the World Life Ins. Soc’y*, 330 F. Supp. 2d 1049 (D. Neb. 2004).

237. *Id.* at 1051-52.

238. *Id.* at 1055.

239. *Id.*

240. *Id.* at 1056.

the order compelling arbitration.²⁴¹ The employee alleged that she was “primarily concerned with the costs of the arbitration” and contended that “her financial situation . . . made arbitration unaffordable.”²⁴² This time the EEOC decided to weigh in on the matter by asking the court to halt the arbitration because: 1) the employee had merely intervened and had no right to independently litigate her own claims; 2) arbitration would hinder the EEOC’s ability to litigate its own lawsuit; and 3) the EEOC’s ability to vindicate the public interest would be harmed if someone who had intervened was forced to arbitrate.²⁴³ The court expressed its displeasure with the EEOC by referring to the “failure of the EEOC to address this issue when it arose in 2004” as “[i]t would have been most helpful to the court had the EEOC submitted its argument to the court in a timely matter.”²⁴⁴

This was not the end of the *Woodmen* case. After the plaintiff filed for bankruptcy, the case was put on hold pending the bankruptcy action. The bankruptcy court released the case, and the employer filed an appeal, which was decided by the Court of Appeals for the Eighth Circuit on March 9, 2007.²⁴⁵ On appeal, it appears that the EEOC did not take as strong a position against compelling the employee to arbitrate as it had in the lower court and merely asserted its right to be able to pursue the case even if the employee was compelled to arbitrate. The court stated that in the appeal, “the EEOC seeks only to ensure that its enforcement action will not be stayed in the event we reverse the district court’s judgment relieving [the employee] of her obligation to arbitrate her claims.”²⁴⁶ Accordingly, the Eighth Circuit Court of Appeals ruled that it was speculative to not order arbitration because of the costs especially because the employer had agreed to pay the costs.²⁴⁷ Also, the Court found that there was no reason to prevent the employee from being compelled to arbitrate even if the EEOC had brought a lawsuit which it is allowed to do pursuant to *Waffle House*.²⁴⁸

There are still a number of outstanding legal questions concerning

241. See e.g., *EEOC v. Woodmen of the World Life Ins. Soc’y*, Case No. 8:03CV165, 2005 WL 2180071 (D. Neb. Aug. 25, 2005) (finding that the employee could not afford to take on the costs of arbitration as she had filed for bankruptcy and it would be permissible to allow her to “piggyback the discovery and the litigation costs that will be paid by the EEOC”), *rev’d and remanded*, 479 F.3d 561 (8th Cir. 2007).

242. *Id.* at *1.

243. *Id.* at *2.

244. *Id.*

245. See *Woodmen*, 479 F.3d at 561.

246. *Id.* at 568.

247. *Id.* at 566-67 (finding that *Woodmen* had “agreed to waive the fee-splitting provision and pay the arbitrator’s fees in full”).

248. *Id.* at 568.

arbitration including but not limited to: 1) arbitration costs; 2) use of class actions in arbitration; 3) limits on other statutory remedies while in arbitration that would be available in the courts; 4) the difficulties with race and gender stratified pools of arbitrators; 5) the uncertain legalities about clear and unmistakable waivers in the union setting; and 6) attempts to compel arbitration even in the midst of EEOC action involved with a case to achieve *res judicata*. The EEOC should clarify its position regarding these issues. Even the EEOC's court actions with respect to challenging attempts to compel arbitration while EEOC proceedings are pending requires more clarification about the EEOC's current position on that matter after the *Woodmen* case and the scope of its novel retaliation claims in response to such activity.

D. Final Step: EEOC Policy on Arbitration as a New Due Process Protocol

As mentioned, many issues still remain regarding employer-mandated arbitration. Although the EEOC has not made any clear statement about costs of arbitrators or prevention of remedies like punitive damages that would be allowed in the courts, it does appear that it will protect its right to pursue claims under *Waffle House*. However, the EEOC will take aggressive efforts to prevent an employer from trying to stop the EEOC's investigation and court proceedings while trying to get *res judicata* results through compelling arbitration of the individual employee's claims, and the EEOC may pursue injunctive relief and retaliation claims against an employer in its efforts to do so.

The Due Process Protocol for Mediation and Arbitration of Statutory Employment Disputes (Protocol)²⁴⁹ has provided the only real guidance to prevent employer overreaching and to suggest some framework for neutral arbitration service providers to deal with statutory fairness issues in arbitration, and it has not been addressed since 1995. There are too many unanswered issues and conflicting positions for employers and employees to feel any certainty about pursuing arbitration. And the prospects from mediation may overwhelm any ongoing growth of arbitration.

The Protocol "once served" its purpose by establishing a set of fair rules for dealing with statutory employment discrimination claims in arbitration, "but the Protocol is outdated" with "courts now increasingly fac[ing] issues not contemplated by the Protocol's drafters [more than] ten

249. See Bales, *Normative Consideration*, *supra* note 60, at 341-42 (discussing the Protocol); Bales, *Protocol at Ten*, *supra* note 69, at 174-84 (same); Green, *supra* note 69, at 211-21; Harding, *supra* note 69, at 369-70.

years ago.”²⁵⁰ As Cynthia Estlund has recently explained:

[I]t should be possible to devise a set of rules that makes the enforceability of a particular agreement quite predictable *ex ante*. In the relatively short period since *Gilmer*, the law has not yet generated those settled rules. But there is more reason²⁵¹ to hope that this will happen in the case of arbitration agreements. . . .

Now is the time for the EEOC to analyze all the pending legal issues that may affect employees’ rights to vindicate their statutory employment discrimination claims through the arbitration process.²⁵² After completing that analysis and obtaining input from all the key stakeholders, the EEOC should draft a new arbitration policy that becomes the equivalent of a modern day Protocol for parties seeking to use arbitration in resolving an employment discrimination dispute.²⁵³ This policy could recognize the limits of *Gilmer* and *Circuit City* while addressing many of the concerns that the lower courts are dealing with while emphasizing how the EEOC feels those matters should be addressed.

IV. FEAR, POLITICS AND MEDIATION: POSSIBLE EXPLANATIONS FOR THE EEOC FAILING TO ADDRESS ITS ARBITRATION POLICY

Of course, key administrative officials may find it exasperating for an academic to suggest that all the EEOC need do is update its arbitration policy, given the complexity of the issues. Furthermore, it is worth acknowledging that there may be some legitimate obstacles that have prevented the EEOC from acting. However, it has now become crucial for the EEOC to pick up the mantle regarding defining arbitration policy. Some of the limitations that may have been more problematic a few years ago should no longer be a hindrance.

A. Fear of Blanket Rejection By the Supreme Court After Circuit City

Clearly, there have been some hindrances to the EEOC in setting policy on arbitration. The 2001 *Circuit City* decision conflicted with the

250. Bales, *Normative Consideration*, *supra* note 60, at 390.

251. Estlund, *supra* note 139, at 426.

252. See Hart, *supra* note 111, at 1950 (describing how “EEOC statements do reflect considered judgment, informed by expert analysis and research, about application of open-ended or unclear statutory commands”).

253. Primm, *supra* note 62 (disagreeing with the EEOC’s 1997 policy and suggesting that mandatory arbitration may work with certain procedural safeguards already in place under the Due Process Protocol adopted by most ADR providers); see also Bales, *Normative Consideration*, *supra* note 60, at 391 (suggesting the need for a “successor” to the Protocol even though the Protocol did not have the force of positive law because “courts and conscientious employers relied on it for guidance on what was fair and what was not”).

1997 policy statement's position against mandatory arbitration as a whole. And once the EEOC realized that it had lost that fight, it had to seriously consider not wasting its resources on losing another uphill battle.²⁵⁴ The Supreme Court has seriously relied upon the EEOC's guidance in some instances while completely rejecting its view in others.²⁵⁵ Some have questioned whether the EEOC's Policy Statement would have any impact on the courts.²⁵⁶ However, the question for the EEOC may not necessarily be whether its clarified position will ultimately prevail in the courts. Although court approval should be part of the equation.

Some high profile cases have arisen in which the Supreme Court has rejected the EEOC's policies.²⁵⁷ In other cases, EEOC policy has been very helpful to the courts in addressing many unanswered legal questions regarding employment discrimination matters including some landmark issues regarding acceptance of the disparate impact theory of discrimination²⁵⁸ and defining sexual harassment as an actionable claim under Title VII.²⁵⁹ Also, in some instances when the Supreme Court has blatantly rejected the position of the EEOC, the outcry has resulted in Congress amending the statute to reverse the Supreme Court.²⁶⁰

Besides, there is a tension that exists between the Court and the EEOC especially when the EEOC has interpreted laws in a way that seems

254. See Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretation of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second-Class Agency?*, 60 OHIO ST. L.J. 1533, 1578-80 (1999) (suggesting that part of the EEOC's diminished impact results because their past failures "cast a shadow over [future] EEOC guidance" and due to those "failures of the agency in the past, courts may attach a mild presumption of invalidity to EEOC guidance").

255. Hart, *supra* note 111, at 1941-49.

256. Bales, *Compulsory Arbitration*, *supra* note 104, at 50 (finding it "unlikely that the courts will adopt the EEOC's position that employment arbitration agreements are unenforceable" because courts have already agreed that they are enforceable and the "EEOC lacks authority to interpret the FAA").

257. See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999) (rejecting the EEOC's interpretation regarding the definition of a disability under the ADA to be determined before applying mitigating measures); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-58 (1991) (rejecting the EEOC's interpretation regarding the application of Title VII law to citizens of the United States while they are employed in foreign countries); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 143-46 (1976) (rejecting the EEOC's interpretation of the meaning of sex under Title VII to include pregnancy).

258. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (referring to EEOC policy and interpretation regarding disparate impact theory in validating that theory as a possible way to bring a Title VII employment discrimination claim).

259. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (referring to EEOC policy and interpretation regarding the definition of harassment as supportive of the finding that harassment, while not explicitly stated in the statute, could be a form of discrimination on the basis of sex).

260. See Hart, *supra* note 111, at 1950 n.82. For example, Congress rejected the Supreme Court's interpretation in *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 143-46 (1976) by amending Title VII to include pregnancy within the definition of sex pursuant to the Pregnancy Discrimination Act in 1978. *Id.* Similarly, Congress rejected the Supreme Court's interpretation in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-58 (1991) by amending Title VII to extend extraterritorial coverage to United States citizens working overseas pursuant to Section 109 of the Civil Rights Act of 1991. *Id.*

favorable to employees.²⁶¹ At its root, this tension rests on political values associated with the legislature that first created the EEOC and changing views on the Supreme Court and Congress about the role of the EEOC.²⁶² Accordingly, the EEOC should not fear court rejection of its policy especially when potential rejection may have political overtones beyond the purview of the EEOC's consideration. Furthermore, the EEOC has a mandate to eradicate workplace discrimination and must continue its best efforts in pursuing that mandate. In any respect, even if the Supreme Court explicitly rejects the EEOC's opinion, the EEOC can rescind or clarify its policy accordingly. Instead, by not addressing its policy after landmark Supreme Court rulings including the 2001 decision in *Circuit City* and the 2002 decision in *Waffle House*, it has been left up to the parties to develop haphazard approaches to any remaining issues about mandatory arbitration through the courts, a process contrary to the whole purpose of agreeing to arbitration in the first instance.²⁶³

B. Political Winds Within and Outside the EEOC

During most of the time since 1991 when the growth of mandatory arbitration began, Congress was constantly being positioned to take a strong stance about the ability to enforce arbitration agreements against individual employees and consumers. Despite the important efforts of United States Senator Russell Feingold,²⁶⁴ and others,²⁶⁵ no legislation addressing mandatory arbitration has made it through the hallowed halls of Congress for signature by the President to date. Although recent congressional elections may bode well for some change,²⁶⁶ the obvious

261. *Id.* at 1959.

262. *Id.* at 1959-61.

263. Gordon, *supra* note 157, at 20-21 (noting comments of in-house counsel complaining that even though arbitration is used to stay out of the courts, you can't help but find yourself in court trying to enforce the agreement when it is challenged).

264. See Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 284, 298 (2002) (describing several attempts by Democratic, U.S. Senator Russell Feingold to offer legislation in Congress that would address the use of arbitration in statutory disputes including Title VII which have also failed over the last ten years); R. Larson Frisby, *Congress Considers Curbs on Mandatory Arbitration of Consumer and Employment Disputes*, DISP. RESOL. MAG., Fall 2002, at 31 (describing Senate consideration of legislation introduced by Senator Feingold to prevent enforcement of mandatory arbitration agreements).

265. Public Citizen, a consumer advocacy group, has long challenged the use of mandated arbitration in the employment and consumer setting. See Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen's Jeremiad on the Costs of Arbitration*, DISP. RESOL. J., Nov. 2002-Jan. 2003, at 8, 10-11 (discussing the Public Citizen opposition to the use of arbitration and disagreeing with the position of Public Citizen).

266. See Johanna Neuman, *Democrats Capture Control of Senate, Allen Concedes in Tight Virginia Race*, COURIER J., at A3 (Nov. 10, 2006) (describing results from November 2006 elections in which the Democratic party captured control of the House of Representatives and the Senate for the first time

political difficulties that were preventing Congress from taking action about arbitration must have impacted the EEOC's inability to address the matter.

Members of Congress have had no qualms about using congressional approval of the budget to fund the EEOC as a tool to limit the EEOC from pursuing any perceived policy focus that does not jibe with the party controlling the purse strings.²⁶⁷ For example, in 1998, GOP members of Congress apparently attempted to link funding increases for the EEOC to an agreement that would force the EEOC to stop pursuing one of its key enforcement tools, employing individuals as testers to examine the fairness of certain companies' hiring processes.²⁶⁸ Thus, the shadow of congressional oversight and potential recoil at any policy changes regarding arbitration would seem to have impacted the EEOC's decision of whether to clarify its arbitration policy at least by the time of the *Waffle House* decision in January 2002.

Also, the political make-up within the EEOC changed shortly around the time of the 2001 *Circuit City* decision and clearly after President George W. Bush was elected in 2000. Before then, the Commission was primarily "a Democratic-led Commission . . . dependent on funding from a Republican Congress."²⁶⁹ The Democratic Chair of the EEOC, Ida Castro, left the Commission in August 2001, "two years before the expiration of her five-year term."²⁷⁰ President Bush nominated a majority of Republican Commissioners along with the new Republican Chair, Cari Dominguez, who was unanimously confirmed in July 2001, and took over after successive reigns by Democratic-appointed Chairs, Gilbert Casellas, and Dominguez's immediate predecessor, Castro.²⁷¹ Due to political wrangling, the Bush appointments of Republican then Vice-Chair, Naomi Earp, and

since 1994 and how Senate Democratic leader, Harry Reid of Nevada, asserted "[t]he days of the do-nothing Congress are over").

267. See Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 314 n.18 (2001) (citing Deborah Billings, *Congressional Appropriators Move To Bar EEOC Pursuit of Employment Tester Program*, 131 Daily Lab. Rep. (BNA) D-7 (July 9, 1998) (describing efforts by GOP appropriators to link any overall increase in funding for the EEOC to an order or agreement "not to pursue any policy which would use testers as a standard practice").

268. *Id.*

269. See Nancy Montwieler, *Commission's Future Remains Unclear With Three Democrats at Leadership Helm*, Daily Lab. Rep. (BNA) No. 9, at C-1 (Jan. 12, 2001) (describing how the Commission with only three members, all Democrats, would function with incoming President Bush being ready to appoint a new Chair and how the EEOC while Democratic-led over the last five to six years had worked well with the Republican-led Congress).

270. See Nancy Montwieler, *Ex-EEOC Chairwoman Expresses Concern Over Agency Direction in Bush Administration*, Daily Lab. Rep. (BNA) No. 163, at B-1 (Aug. 23, 2001).

271. *Id.*

Republican Commissioner, Leslie Silverman, were not effectuated with a full Commission until late in 2003.²⁷² But when Democratic Commissioner, Stuart Ishimaru, was confirmed and sworn in on November 17, 2003, the Commission had its full five seats filled for the first time in seven years.²⁷³

In December 2003, then-Chair Dominguez noted that she was “delighted to now have a full compliment of Commissioners . . . [for] the first time in seven years.”²⁷⁴ Ironically, these comments were made at a meeting held to discuss the benefits of another form of ADR, mediation, not arbitration.²⁷⁵ At that meeting, however, representatives from employers’ groups both made statements about arbitration. First, Ann Reesman, General Counsel of the Equal Employment Advisory Council, whose “membership comprises a broad segment of the business community,” while praising mediation, asked the EEOC to remove its opposition to mandatory arbitration because there are some instances where it is fair.²⁷⁶ Specifically, Reesman stated with respect to mandatory arbitration:

While the EEOC has been consistent in its support of voluntary mediation and other forms of ADR, it has opposed the use of mandatory arbitration to resolve employment disputes, even though the U.S. Supreme Court, as well as every federal appellate court, including the Ninth Circuit, now has endorsed the legality of mandatory agreements to arbitrate. Given the unequivocal uniformity in the courts on this issue, we urge the EEOC to reconsider its anti-arbitration position in favor of a more moderate approach. . . . The lesson of *Gilmer*, *Circuit City* and their progeny is that if there is a way to enforce the agreement, the court (or, in this case, the Commission) should do so, resolving doubts in favor of arbitration. The EEOC continues to resist this principle, however, opposing mandatory arbitration under any circumstance. We believe that the time has come for the Commission to bring its views of mandatory arbitration in line with those of the federal appellate courts and rescind its 1997 policy statement opposing mandatory arbitration. We urge that it be replaced with reasonable “due process” guidelines that employers and charging parties would be able to use to gauge the validity of mandatory agreements to arbitrate on a case-by-case basis.²⁷⁷

272. *Vice-Chair Earp is Confirmed by Senate, Bringing EEOC to Full, Five-Member Strength*, Daily Lab. Rep. (BNA) No. 213, at A-1 (Nov. 4, 2003) (describing political difficulties with the confirming some of the Bush appointments with a previously Democratic-controlled Senate where nominations had been stalled for two years).

273. *Ishimaru Sworn in as EEOC Commissioner, Bringing Panel to Full Five-Member Strength*, Daily Lab. Rep. (BNA) No. 222, at A-9 (Nov. 18, 2003).

274. See Cari Dominguez, Chair, EEOC, Remarks in Meeting on EEOC Mediation Program and the Workplace Benefits of Mediation (Dec. 2, 2003), available at <<http://www.eeoc.gov/abouteeoc/meetings/12-2-03/transcript.html>> (last visited Mar. 15, 2007).

275. *Id.*

276. See Reesman, *supra* note 156.

277. *Id.*

Also, F. Peter Phillips, Vice-President of the CPR Institute for Dispute Resolution (a nonprofit coalition of corporate law departments, law firms, academics and agencies) spoke to the EEOC at this December 2003 meeting regarding the benefits of mediation. He concluded that it is a waste of time to focus on arbitration because a “critical finding” from their study of several corporate dispute resolution programs was that “nobody arbitrates anymore.”²⁷⁸ Similar to Reesman, Phillips also praised the EEOC’s mediation program while suggesting that the EEOC should defer to the private sector dispute resolution systems being used by employers and allow those systems enough time to work.²⁷⁹ Phillips also asserted:

The Commission should consider using its stature and authority to encourage the development of such systems by private employers. The Commission can make a signal contribution by promoting and educating employers on the business rationale of dispute management and avoidance, and not limiting its activities to the management, resolution and adjudication of the individual cases submitted to it.²⁸⁰

Clearly, employer representatives see value in having the EEOC take a more active and educational role when it comes to using arbitration and other forms of ADR in the workplace. No political winds seem to be currently impeding the EEOC’s progress despite the fact that Cari Dominguez resigned from her position as Chair after five years and Vice-Chair Naomi Earp became the Chair in August 2006.²⁸¹ The EEOC can still use its vast resources to clarify a policy on arbitration by taking the advice of its stakeholders and dealing with the current issues presented in some cohesive statement that offers fair procedures for implementing arbitration agreements.

C. *The Intoxicating Appeal of Mediation*

The EEOC has enthusiastically endorsed the use of mediation to resolve employment discrimination charges.²⁸² Mediation represents an

278. See F. Peter Phillips, Vice-President of the CPR Institute for Dispute Resolution, Remarks at Meeting on EEOC Mediation Program and the Workplace Benefits of Mediation (Dec. 2, 2003), available at, <<http://www.eeoc.gov/abouteeoc/meetings/12-2-03/transcript.html>> (last visited Mar. 15, 2007).

279. See *id.*

280. *Id.*

281. See Nancy Montwieler, *In Five Years Heading EEOC, Chair Dominguez Broadened Enforcement, Outreach Programs*, Daily Lab. Rep. (BNA) No. 167, at B-1 (Aug. 29, 2006).

282. See Robert E. Talbot, *A Practical Guide to Representing Parties in EEOC Mediations*, 37 U.S.F. L. REV. 627, 628-30 (2003) (lauding the EEOC’s mediation program); Julie Harders, *Too Good To Last? Budget Cuts Force the EEOC to Terminate Contract Mediators From its New, Highly Touted Program*, A.B.A. J., Apr. 2000, at 30; *EEOC’s Mediation Program Going Strong Despite Budget Shortfall, Coordinators Say*, Daily Lab. Rep. (BNA) No. 59, at B-1 (Mar. 27, 2000); see also Matthew A. Swendiman, Note, *The EEOC Mediation Program: Panacea or Panicked Reaction?*, 16 OHIO ST. J.

extremely satisfactory mechanism for resolving employment discrimination disputes according to the parties involved in charges filed with the EEOC.²⁸³ In a 2000 report, *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*,²⁸⁴ participants in the EEOC's mediation program expressed a high degree of satisfaction with the process.²⁸⁵ The report also stated that "nine out of 10 participants (96 percent of employers and 91 percent of charging parties) indicated that they would be willing to participate in [the] EEOC's mediation program again . . . [r]egardless of the outcome of their mediation."²⁸⁶

The EEOC's mediation program started as a pilot program conducted in four field offices in 1991.²⁸⁷ With the success of that program, the EEOC established a taskforce to review further use of the program.²⁸⁸ After the positive results from the pilot program and recommendations from the task force, the EEOC concluded that mediation was a viable tool and decided to implement an ADR program resulting in a fully implemented mediation program by April 1999.²⁸⁹ In evaluating its mediation program, the EEOC commissioned several reports and analyses that culminated with three specific studies of the excellent positive impact of the EEOC's mediation program.²⁹⁰

ON DISP. RESOL. 391 (2000) (describing benefits of the EEOC mediation program).

283. See Arup Varma & Lamont E. Stallworth, *Participants' Satisfaction With EEO Mediation and the Issue of Legal Representation: An Empirical Inquiry*, 6 EMP. RTS. & EMP. POL'Y J. 387, 392 (2002) (highlighting the preference and satisfaction with mediation in employment discrimination claims).

284. See MCDERMOTT ET AL., *supra* note 36.

285. See Press Release, EEOC, EEOC Mediation Program Scores High Marks in Major Survey of Participants (Sep. 26, 2000), available at <<http://www.eeoc.gov/press/9-26-00.html>> (last visited Mar. 15, 2007); see also Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 512 (2003) (finding that in employment mediation "many participants express contentment with the process – sometimes even without obtaining money or other tangible rewards").

286. See Press Release, *supra* note 286.

287. EEOC, History of the EEOC Mediation Program, <<http://www.eeoc.gov/mediate/history.html>> (last visited Mar. 15, 2007).

288. *Id.* The EEOC based its final decision on the recommendations of the taskforce and the outstanding leadership from Commissioners who led the taskforce. See Press Release, EEOC, Commission Votes to Incorporate Alternative Dispute Resolution Into Its Charge Processing System; Defers Decisions On State and Local Agencies (Apr. 28, 1995), available at <<http://www.eeoc.gov/press/4-28-95a.html>> (last visited June 10, 2007). At that time, then-EEOC Commissioner Paul Miller stated his belief that ADR would assist in charge processing because it would "facilitate early resolution where agreement is possible" and "it frees up our resources for use in identifying, investigating, and litigating more complex cases of employment discrimination." *Id.* Likewise, then Commissioner R. Gaull Silberman stated that she believed by making ADR a part of the EEOC's "charge processing system," it would "better serve . . . constituents" and the EEOC's "law enforcement . . . mission." *Id.*

289. EEOC, *supra* note 288.

290. See EEOC, Studies of the Mediation Program, <<http://www.eeoc.gov/mediate/mcd-intro.html>> (last visited June 10, 2007).

When Cari Dominguez became the Chair of the EEOC, she continued to expand efforts with the EEOC's mediation program.²⁹¹ During her five-year tenure at the EEOC, Dominguez focused on "expanded mediation" which "became a hallmark" of her leadership.²⁹² Upon reflection at the time of her departure, it was evident that Dominguez had achieved many positive gains for the EEOC by her dedication to the growth of the EEOC's mediation.²⁹³ In addition to the general publicity about the satisfaction that parties have when participating, the mediation program contributed significantly in helping the EEOC reduce its charge backlog for which the EEOC has received a tremendous amount of positive publicity.²⁹⁴ The continued focus on mediation during Dominguez's time as Chair and the fact that this focus was well-received is indicated by the fact that despite being one of the few EEOC chairs who was not a lawyer, she served as Chair longer than any other Chair besides Supreme Court Justice Clarence Thomas.²⁹⁵ Obviously, the broad appeal of mediation and the extremely satisfactory results obtained from the mediation program created a major incentive for Dominguez and the EEOC to stay focused on mediation during her tenure as Chair the past five years. Although outside the scope of this Essay, the emergence of mediation as a tool to resolve employment discrimination disputes may not be a bad thing.²⁹⁶

Accordingly, the EEOC's focus on mediation is not criticized; only its failure to continue to stay on top of the use of arbitration at the same time warrants criticism. By not addressing arbitration and focusing on mediation, Dominguez and the rest of the EEOC leadership failed. Quite possibly this failure occurred because of fears of court rejection, the political realities, the focus on mediation, or some combination thereof. In any respect, those matters should no longer present a hindrance to EEOC action. The overwhelming goodwill generated by the focus on mediation

291. See Nancy Montwieler, *With EEOC at Full Strength, Mediation, Call Center are Focus for 2004*, Daily Lab. Rep. (BNA) No. 18, at S-35 (Jan. 29, 2004).

292. *Id.*

293. Montwieler, *supra* note 281, at B-1.

294. See Nancy Montwieler, *EEOC Reaps Record \$415 Million in Benefits Resolutions, Charge Filings Drop Off in 2004*, Daily Lab. Rep. (BNA) No. 243, at A-1 (Dec. 20, 2004) (describing how 8000 charges were resolved through the EEOC's mediation program, which continues to grow since the EEOC began mediating charges several years ago).

295. *Id.*

296. See generally Bingham, *Case for Mediation*, *supra* note 190 (asserting that mediation provides efficiencies in resolving employment disputes that have failed to be established regarding arbitration). As part of her conclusion, Lisa Bingham also reviewed the success of the EEOC's mediation program which has become "institutionalized" and the EEOC's extensive evaluations suggest that there is a 90 percent satisfaction rate. *Id.* at 159. I have also asserted "that by the end of 2005, both victims of workplace discrimination and employers should move to embrace mediation as a potential mechanism for resolving their disputes." Green, *Tackling Employment Discrimination*, *supra* note 168, at 325.

should leave some room to develop a policy on arbitration. Any fears about rejection from the Supreme Court regarding any statements on arbitration by the EEOC should not be a concern especially in light of *Waffle House*. Even if political realities made the EEOC more cautious about bringing the issue of arbitration back to the forefront, those political realities do not appear to be a deterrent at this point. Unfortunately, concerns about arbitration shifted off the EEOC's radar screen and employers and employees have tried to navigate the courts for answers. The EEOC must now, under its mandate to enforce the preeminent laws banning discrimination in the workplace, establish a clear position regarding mandatory arbitration regardless of what criticism may occur.

V. CONCLUSION: SYSTEM INTEGRITY AND ITS PUBLIC INTEREST ROLE DEMANDS THE EEOC SET NEW POLICY REGARDING ARBITRATION

Given the many events that have transpired regarding mandatory arbitration since the EEOC's policy statement in 1997, the EEOC needs to address arbitration in a more concerted way in 2007. Essentially, the focus should be on the overall arbitration system's integrity in handling statutory employment discrimination claims subject to EEOC enforcement. Because employees lack much choice when entering into predispute agreements to arbitrate, the EEOC should identify fair agreements and procedures as a form of a modern day Due Process Employment Protocol to guide employers, employees, and service providers about what works and should not work.

But the lack of any clear policy has led to abuses and concerns by both employers and employees as the initial Protocol faces challenges that were not contemplated at the time. Neutral service providers have been left with the task of developing rules and procedures that might address many of the concerns and perspectives about the process of arbitration for handling employment discrimination matters. Nevertheless, the continued legal uncertainty has left employers and employees with many potential concerns. Because attempts to rectify these matters in Congress have proven unsuccessful, the EEOC should take a clear position now. The reality is that the agency charged with setting policy regarding employment discrimination must act on this matter. Without any real analysis and policy setting by the EEOC, major unanswered questions continue to languish in unsettled waters. Employers and employees who have little opportunity to challenge bad arbitration results because of limited judicial review available have started to fear that arbitration and arbitrators have no clear guidance about handling statutory employment discrimination claims.

Furthermore, similar to the EEOC's focus on mediation, employers have become more disenchanted with arbitration while expanding the scope of their efforts to embrace mediation. Again, the message being sent by the EEOC and its continued support for mediation and its lack of a formal message regarding arbitration should also be quite evident to employers and employees. Whether arbitration really can be used effectively for handling employment discrimination matters remains an important question. If the EEOC does not try to establish a clear position regarding these difficult questions of the day, and as long as ultimate resolution by the courts would be a timely and costly endeavor, then arbitration may become a dispute resolution tool that has lost its impact.

Maybe mediation really represents the panacea that some claim, and arbitration will fade off into oblivion no matter what position the EEOC takes. Whether the diminished use of arbitration as an employment dispute resolution tool is a deserved fate or not, the EEOC has abdicated its important enforcement responsibility by not weighing in officially on the matter when it is obligated to do so as the agency charged with eradicating workplace discrimination. Potential victims of discrimination and employers regulated by statutes banning discrimination expect that concerns about arbitration's overall system integrity as a tool to resolve workplace discrimination claims would warrant an official response by the EEOC.

Eventually, congressional amendment will likely be needed. Until then, the unregulated marketplace with employers and their dominant bargaining power suggests that arbitration will diminish as a dispute resolution tool while mediation continues to flourish. Despite the significant role that the EEOC can play and the wonderful opportunity that it had five years ago to take a major stance regarding arbitration after the *Waffle House* decision, no action has been taken. Clearly, the EEOC has found the wherewithal to take strong positions regarding other matters. As an example, it recently issued new workplace bias guidelines which were offered as a new chapter for its compliance manual and because they would "give employers, employees and lawyers better guidance on emerging areas of racial bias."²⁹⁷

The EEOC's continued failure to set policy regarding arbitration can have far reaching effects on overall dispute resolution of employment discrimination claims. The EEOC still sits at the threshold of a key opportunity with respect to setting policy regarding arbitration and if it is to achieve the major role that was contemplated for it in addressing workplace

297. Yen, *supra* note 154, at D3.

discrimination in our society, it must act soon by establishing some policy regarding the remaining legal concerns about mandatory arbitration. If politics has played a role, perhaps the recent political changes in Congress will allow the EEOC to now resume its analysis of the impact of arbitration rather than continue to let the 1997 policy statement lose its force amidst statements of uncertainty about whether it even continues to remain a viable statement of EEOC policy.

As the *Waffle House* decision passes its fifth anniversary and the EEOC policy on enforcement of mandatory arbitration moves past a decade of existence, the consequence of not taking a current position may be that arbitration of statutory employment discrimination will vanish from the dispute resolution equation. This could resemble the same impact that many have started to lament regarding the vanishing number of trials as a dispute resolution tool.²⁹⁸ Whether a diminished number of arbitrations would be good for victims of employment discrimination or not remains a question that the EEOC should weigh in on before it becomes too late for its position to have any impact. If that happens, it would represent a major failure for an agency charged with such an important task of protecting public interest regarding enforcement of federal statutes banning workplace discrimination.

298. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); see also Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 25. But see John Lande, *Shifting the Focus From the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution From Marc Galanter*, 6 CARDOZO J. OF CONFLICT RESOL. 191 (2005) (asserting that any claims of a vanishing trial are a myth).