

## **Having Your Waffle and Eating It Too: The EEOC's Right to Circumvent Arbitration Agreements**

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**D**uring the last three decades, employers have recognized that discrimination in the workplace will not be tolerated by either the courts or the court of public opinion. As the employment laws have evolved, employers have struggled to learn, develop and implement equal employment opportunity practices and policies. Notwithstanding these efforts, the number of discrimination charges and complaints continues to increase.

In order to limit the cost associated with discrimination lawsuits, some employers have turned to arbitration to resolve employment-related disputes. These employers believe that arbitration provides a quicker, less expensive alternative to litigating employment claims in federal court. Employers that choose to arbitrate such claims commonly insert an arbitration clause into employment applications or employment contracts, mandating the arbitration of all employment disputes and waiving the employee's statutory right to pursue such claims in court.

This column first examines the law surrounding the arbitration of employment disputes prior to the Supreme Court's recent decision in *Equal Employment Opportunity Commission v. Waffle House, Inc.* 2002 WL 46763 (January 15, 2002). Next, it examines the Supreme Court's *Waffle House* decision and questions the Court's analysis. Finally, this column discusses the affect the *Waffle House* decision will have on employers, and makes practical suggestions to ensure enforceability of arbitration agreements.

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### **THE LAW PRIOR TO WAFFLE HOUSE**

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Supreme Court addressed the issue of whether a discharged employee, whose grievance had been arbitrated pursuant to an arbitration clause in a collective bargaining agreement, was barred from subsequently bringing a Title VII action based upon the conduct that was the subject of his grievance. In holding that a union's collective bargaining agreement could not waive an individual's right to litigate a statutory employment claim, the Court stressed that an employee's contractual rights under a collective bargaining agreement were distinct and separate from the employee's statutory rights under Title VII. By bringing an action under Title VII, the Court noted that an employee is not making a contractual claim, but asserting a statutory right independent of the arbitration process. The Court also expressed concern that in an arbitration based upon a collective bargaining agreement, the interests of the individual employee may be subordinated to the collective interests of all of the employees in the bargaining unit.

### **The Federal Arbitration Act**

Recent judicial opinions have focused on the question of whether arbitration agreements are enforceable, and if so, to what extent. Employers have consistently argued that agreements mandating the arbitration of employment disputes are enforceable under the Federal Arbitration Act (FAA).<sup>1</sup> The purpose behind the enactment of the FAA was to reverse the longstanding hostility the courts had for the arbitration of disputes and to place arbitration agreements on the same footing as other contracts. However, the language of Sections 1 and 2 of the FAA generated disputes as to the application of the statute to employment contracts. Section 2 of the FAA broadly provides that agreements to settle disputes regarding a transaction involving commerce by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Despite Section 2's apparent broad coverage, Section 1 of the FAA, otherwise known as the exclusionary clause, provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This clause created a controversy as to which, if any, employment contracts, and by extension, arbitration agreements, were excluded from the FAA.

### **The *Gilmer* Decision**

In 1991, the Court addressed whether a statutory claim arising out of an employment dispute could be compelled to arbitration pursuant to an arbitration agreement. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), Gilmer's securities registration with the New York Stock Exchange required him to arbitrate any dispute arising out of his employment or termination of employment. When Gilmer's employment was terminated at age 62, he brought suit alleging a violation of the Age Discrimination in Employment Act (ADEA). His employer, Interstate, moved to compel arbitration. The Supreme Court held that Gilmer's ADEA claim could be subjected to compulsory arbitration.

The Court had previously addressed arbitration agreements relating to other statutes and had consistently held that those statutory claims could be the subject of an arbitration agreement enforceable pursuant to the FAA.<sup>2</sup> The Court reasoned that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>3</sup> Without Congress explicitly precluding arbitration in the text of the ADEA, the Court concluded that having made the bargain to arbitrate, the party should be held to the agreement, and that agreement was enforceable.

### **The EEOC Enforcement Guidance**

After *Gilmer*, the Equal Employment Opportunity Commission (EEOC) issued enforcement guidance on the arbitration of employment disputes.<sup>4</sup> The guidance took the position that "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in [civil rights laws]." <sup>5</sup> The EEOC's position was based upon its belief that Congress explicitly entrusted the federal courts with the primary responsibility for enforcing employment discrimination laws through construction and interpretation of the statutes, and applying the statutes to adjudicate claims and provide relief. According to the guidance, it was the courts that were responsible for developing, interpreting and enforcing the law.

The guidance explained that the body of employment discrimination law had been developed through adjudication and precedent. The EEOC reasoned that although the statutes set out the basic parameters of the law, it was the courts who interpreted the statutes

and developed the fundamental legal principles governing the fight against workplace discrimination. The EEOC also noted that these same court decisions provided guidance to employers and employees regarding their rights and responsibilities. Thus, the EEOC concluded that the courts play a crucial role of preventing and deterring violations of the law. The EEOC maintained that the courts could not fulfill this intended role if employment disputes were resolved through arbitration.

The guidance also articulated the EEOC's firm belief that the arbitral system was inferior and biased against applicants and employees. In support of its position, the EEOC argued that the arbitral process was private and arbitrators were not accountable to the public; that the lack of written decisions and judicial review did not allow for the development of the law; that there was limited discovery; that there was no possibility for a jury of peers; that the employer had a structural advantage because of repeat business with an arbitrator; and that arbitration systems had inadequate standards to ensure fairness. Moreover, the Commission maintained that arbitration agreements posed a significant threat to the EEOC's enforcement mission. The EEOC explained that effective enforcement could be undermined because most employees are probably unaware that arbitration agreements do not restrict employees from filing charges with the EEOC, and because employees will be discouraged from filing because they will be unable to litigate their claims individually in court. The EEOC concluded that without the filing of charges, it would lack knowledge of potential violations of the law, and, thus, be impeded in its ability to investigate and rectify discrimination.

### **The *Circuit City* Decision**

In *Gilmer*, the arbitration agreement at issue was contained in a securities registration and not in an employment contract. As a result, the Supreme Court reserved for another day the issue of whether the FAA's Section 1 exclusionary clause prevented mandatory arbitration of employment discrimination claims. A decade later, the Supreme Court specifically analyzed the provisions of the FAA and held that the FAA's section 1 exclusionary clause is limited to transportation workers.

In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), an employee signed an employment application that included an agreement to settle any and all claims arising out of his employment by arbitration. Construing the plain meaning of the statutory text, the

Court concluded that Congress intended for the FAA to apply to all contracts of employment except for those involving transportation workers. The Court reasoned that it was rational for Congress to cover workers in general by the FAA, while reserving solely for Congress the authority to specifically make legislation for, and govern the employment contracts of, transportation workers, which it subsequently did with the Railway Labor Act. As a result, the Court specifically held that agreements to arbitrate the employment disputes of non-transportation workers were enforceable under the FAA.<sup>6</sup>

### ***The Supreme Court's Waffle House Decision***

In *EEOC v. Waffle House, Inc.*, the Supreme Court held that an agreement between an employer and an employee to arbitrate employment disputes does not bar the EEOC from pursuing an independent lawsuit on the employee's behalf and seeking employee-specific judicial relief. This is the first time that the Supreme Court has addressed the EEOC's role in the arbitration of discrimination claims.

#### **Facts of the Case**

Eric Baker applied for a position as a grill operator at a Waffle House restaurant. In his application for employment, Baker agreed that "any dispute or claim" concerning his employment would be "settled by binding arbitration." As a condition of employment, all prospective employees were required to sign an employment application containing a mandatory arbitration agreement. Just 16 days after beginning his employment with Waffle House, Baker suffered a seizure at work and was discharged shortly thereafter. Instead of arbitrating his claim pursuant to the arbitration agreement, Baker filed a timely charge of discrimination with the EEOC alleging that his discharge violated the Americans With Disabilities Act (ADA). The EEOC investigated the claim and ultimately found probable cause that Waffle House's actions constituted a violation of the ADA. Accordingly, the EEOC filed suit against Waffle House in the Federal District Court for the District of South Carolina.

The EEOC's complaint alleged that Waffle House violated the ADA by discharging Baker because of his disability. However, Baker was not a party to this action. The EEOC sought both injunctive relief and specific relief on Baker's behalf to make him whole and to award punitive damages for Waffle House's conduct. Waffle House

filed a petition under the FAA to stay the EEOC's lawsuit and compel arbitration, or to dismiss the action. The District Court denied Waffle House's motion and ruled that the EEOC had the authority to proceed with the lawsuit.

On appeal, the Fourth Circuit Court of Appeals held that despite a valid, enforceable arbitration agreement between Baker and Waffle House, the agreement did not foreclose the enforcement action because the EEOC was not a party to the agreement and had independent authority to bring a lawsuit in federal district court. However, the Fourth Circuit concluded that the EEOC was precluded from seeking victim-specific relief, such as back pay, reinstatement and other damages for Baker. The Fourth Circuit reasoned that the FAA's policy of enforcing arbitration agreements required giving some effect to Baker's agreement not to seek such relief. Accordingly, the EEOC was precluded from obtaining such victim-specific relief and was restricted to seeking injunctive relief.

Prior to *Waffle House*, several Courts of Appeals had considered this issue and reached conflicting decisions.<sup>7</sup> The Supreme Court granted the EEOC's petition for certiorari to resolve this conflict.

### **The Court's Title VII Analysis**

The Court began its discussion by analyzing Title VII of the Civil Rights Act of 1964 and the statute's provisions that define the EEOC's authority. The Court noted that when Title VII was first implemented, the EEOC merely had the authority to investigate and conciliate charges of discrimination and could not bring actions under the statute. However, in 1972, Congress amended Title VII to authorize the EEOC to bring its own enforcement actions. The Court pointed out that the amendments authorized the courts to both enjoin employers from committing unlawful employment practices and to order affirmative action including reinstatement and back pay.<sup>8</sup> Title VII was also amended again in 1991 to allow complaining parties, defined as both private plaintiffs and the EEOC, to recover compensatory and punitive damages.<sup>9</sup> Therefore, the Court concluded that the statutes authorized the EEOC to bring suit and enjoin an employer from committing unlawful employment practices, as well as seek specific relief such as reinstatement, back pay and compensatory or punitive damages.

The Court's analysis also relied on its previous decisions recognizing the difference between an individual's private cause of action

and an enforcement action brought by the EEOC. In *Occidental Life Insurance Co. of Cal. v. EEOC*, 432 U.S. 355 (1977), the Court determined that EEOC enforcement actions are not subject to the same statutes of limitations that govern an individual's claim. The Court based its reasoning on the procedural structure created by the 1972 amendments, which gave the EEOC a statutory responsibility to bring its own enforcement actions, in addition to investigating and conciliating claims. The Court concluded that "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties." The Court reasoned that if the EEOC was held to California's one-year statute of limitations, it would undermine the agency's ability to spend the necessary time to investigate and conciliate claims.

The Court also noted that, in *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318 (1980), it held that the EEOC did not have to be certified as a class representative in order to bring a discrimination claim on behalf of a class of female employees employed in four states, and was not required to comply with Federal Rule of Civil Procedure 23 regarding class certification. Instead, the Court pointed to the plain language of section 706 of Title VII, which gave the EEOC authority to bring suit in its own name with the purpose of securing relief for a group of aggrieved individuals. Due to the EEOC's exclusive jurisdiction over a charge filed for a period of 180 days, the Court concluded that "the EEOC is not merely a proxy for the victims of discrimination and that [its] enforcement suits should not be considered representative actions subject to Rule 23."

Although the Court's previous decisions clarifying the distinction between an EEOC enforcement action and a private cause of action came before Congress' 1991 amendments to Title VII, the Court pointed out that Congress did not address this issue when it enacted the amendments. Instead, Congress chose to use the amendments to expand the remedies available in an EEOC enforcement action. The fact that Congress neglected to address the Court's previous decisions, which made a clear distinction between EEOC enforcement actions and private lawsuits, resonated with the *Waffle House* Court. In particular, the Court noted that "[t]here is no language in the statute or in either of these cases suggesting that the existence of an arbitration agreement between private parties materially changes the EEOC's statutory function or the remedies that are otherwise available." The Court then proceeded to examine the FAA's affect on the EEOC's authority under Title VII.

### **The Court's FAA Analysis**

As part of its analysis of the FAA, the Court reiterated that its *Circuit City* decision clearly stated that employment contracts, except for those involving transportation workers, are covered by the FAA. However, the Court gleaned that none of its previous decisions addressed the EEOC's role or the FAA's affect on the authority bestowed to the EEOC by Title VII. Therefore, the Court reviewed the competing policies behind Title VII and the FAA.

The Court began its analysis by reviewing the FAA's liberal policy favoring arbitration agreements. In particular, the Court stated that the provisions of "[t]he FAA provide for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, and for orders compelling arbitration when one party has failed or refused to comply with an arbitration agreement."<sup>10</sup> However, the Court noted that it is the contract's language that defines the scope of the dispute subject to arbitration. Accordingly, the Court concluded that the FAA does not compel the arbitration of issues or restrict parties not covered by the agreement. In fact, the Court stressed that the statute makes no mention of enforcement by public agencies such as the EEOC, but simply "ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty's choice of a judicial forum."

More importantly, the Court maintained that the FAA does not require parties to arbitrate claims when they have not agreed to do so. Although the FAA's policy clearly favors arbitration, the Court, utilizing long-standing construction, concluded that "[a]rbitration under the [FAA] is a matter of consent, not coercion." The Court noted that the FAA could not override the clear intent of the parties or bind a nonparty to a contract that it did not agree to. As the EEOC was not a party to the agreement between Baker and Waffle House, the Court reasoned that the FAA's pro-arbitration policy could not require the EEOC to relinquish its statutory authority to bring an enforcement action if it had not agreed to do so. Accordingly, the Court concluded that the FAA could not limit the EEOC's statutory enforcement authority under Title VII.

### **Relief Sought by the EEOC**

In its decision, the Fourth Circuit limited the EEOC's statutory authority to bring suit on behalf of Baker by restricting the agency to injunctive remedies. However, the Supreme Court refused to adopt

the line drawn by the Fourth Circuit between injunctive and victim-specific relief. The Court viewed the reasoning focused on victim-specific relief as both overinclusive and underinclusive. The Court explained that it was overinclusive because punitive damages served the public benefit of deterring further violations as well as benefiting the individual employee. On the flip side, it was underinclusive because injunctive relief is tied directly to the individual's injury as well as to the public interest. The Court refused to deal with such compromises.

The issue before the Court was whether the fact that Baker signed an arbitration agreement limited the remedies that were available to the EEOC. To resolve this issue, the Court simply looked at the statutory language of both Title VII and the FAA. The Court concluded that Title VII clearly grants the EEOC exclusive authority over the choice of forum and the prayer for relief once a charge has been filed with the agency. While Baker may have agreed to submit his claims to an arbitral forum, the Court reasoned that he did not waive the statutory prerogative of the EEOC to enforce his claims for whatever relief and in whatever forum the EEOC so desired. As neither statute authorized the courts to balance their competing policies or second-guess the EEOC's judgment concerning what relief it may seek in any given case, the Court concluded that the EEOC had the authority to pursue victim-specific relief, as well as injunctive relief, regardless of the forum that the employee and the employer have chosen to resolve their disputes.

Although the EEOC may seek relief on behalf of an employee, the Court commented that the employee's conduct may limit the relief the EEOC may obtain in court. The Court hinted that the concept of mitigation of damages is relevant in a suit brought by the EEOC. If the employee failed to mitigate his or her damages, any recovery by the EEOC could be limited accordingly. The Court also explained that any recovery could be subject to reduction by factors such as a monetary settlement, or if the employee refused a job substantially equivalent to the one at issue. The Court noted, however, that Baker did not individually seek arbitration of his claim or enter into settlement negotiations with Waffle House. Therefore, the Court left open the question of whether a settlement reached by the parties or a judgment by an arbitrator would affect the EEOC's claim or the relief the agency may seek.

### **Critique of the Supreme Court's Analysis**

The Court's analysis in concluding that the EEOC may seek employee-specific relief despite an agreement between the employee

and employer to arbitrate all employment disputes is subject to criticism. Baker signed an agreement to arbitrate all claims, such as his ADA claim, arising out of his employment with Waffle House. This agreement is enforceable pursuant to the FAA and clearly waives his right to bring suit against Waffle House in court and seek relief for himself. Contrary to this agreement, the EEOC now clearly has the authority to obtain specific relief for Baker that he himself waived. As noted by the dissent, the EEOC should not be able to obtain relief that the employee could not get for or by himself. As voiced by Justice Thomas, the ruling amounts to giving employees “two bites at the apple.”

The policy behind Title VII indicates that the EEOC should be limited to seeking only that relief that the individual employee is entitled to. An employee’s ability to recover damages should be limited by that employee’s own actions or circumstances. Damages awarded in private employment cases are consistently mitigated according to that employee’s actions or circumstances, regardless of whether he or she files an individual lawsuit or the EEOC files an action on behalf of the employee. Similarly, appellate courts have held that the EEOC may not recover victim-specific relief where the employee signed an agreement to settle or waive discrimination claims against an employer.<sup>11</sup> Unfortunately, the Supreme Court left open the question of what affect a settlement or an arbitration decision might have on the EEOC’s claim or the type of relief it may seek. Despite the Court’s refusal to address this issue, the lower court decisions support the basic principle that the EEOC may not obtain more relief for that employee than the employee could recover by bringing his or her own lawsuit. This principle should have been applied to mandatory arbitration agreements.

***The Aftermath of Waffle House:  
Some Practical Suggestions***

At first glance, *Waffle House* may raise immediate and serious concerns about whether employers should adopt mandatory arbitration agreements and the EEOC’s ability to trump them. However, the actual affect of the decision may be minimal. History and statistics demonstrate that the EEOC litigates but the smallest percentage of charges filed with the agency. Because the EEOC does not have the time, money or manpower to litigate every charge, the agency will continue to choose carefully those cases that it wishes to involve itself with. Generally, the EEOC only initiates those cases where the

outcome will affect the development of the law or a protected class, or the agency wants to make an example of a specific industry. Thus, it can be speculated that most employers will never have their arbitration agreements trumped.

It can also be speculated that employers who have mandatory arbitration will retain it, and that more employers will adopt it in the future. Accordingly, it is important for employers who have mandatory arbitration, or who wish to implement it, to review their policies and procedures. Employers need to establish fair and enforceable procedures to ensure the maximum benefits that arbitration may provide. It is well established that if the procedures are too one-sided in favor of the employer, the arbitration agreement will be found unenforceable.

To establish an enforceable arbitration agreement, employers should do the following:

- Use a separate arbitration agreement and do not include it as part of another agreement.
- Clearly state that there is consideration for the agreement and that the arbitration is exclusive and binding. Consider providing a cash payment, or other tangible benefit, to establish consideration.
- Clearly describe the types of claims that are subject to arbitration and those that are excluded. Remember that there are some claims that you may not want to cover by arbitration.
- State whether the employment is at-will.
- Explain how the arbitrator is selected and address payment of the arbitration's fees and costs. Requiring the employee to split the fees and costs of arbitration can be fatal to enforceability.
- Establish the location of the arbitration.
- Establish the procedural rules that are to govern issues not addressed by the arbitration agreement, such as the rules of the American Arbitration Association.
- State what law is to be applied.
- Provide for right to representation by counsel at the party's own expense.
- Establish pre-arbitration procedures, including the right to limited discovery, pre-hearing dispositive motions and post-hearing briefs.
- Provide for a fair hearing.

- Allow the arbitrator to award all available remedies and require a written opinion from the arbitrator specifying the factual and legal basis for the award. Limiting the remedies available may be fatal to enforceability.
- Do not preclude the employee from filing a charge with the EEOC.
- Take steps to ensure that the agreement is knowing and voluntary. Give the employee an opportunity to read the agreement before signing. Make sure the language is understandable. Translate and explain the agreement if necessary.
- Get a signed acknowledgement from the employee.
- Set time limits to file claims.

It is important that employers adopt and implement an arbitration process that can stand up to scrutiny from both the EEOC and the courts. Failing to do so may result in an unworkable and inefficient system, exposing an employer to needless and expensive lawsuits that it sought to avoid in the first place. When established properly, an arbitration system can potentially save employers time and money and be an effective tool to minimize the costs of resolving employment disputes.

### Notes

<sup>1</sup> 9 U.S.C. §1 *et seq.*

<sup>2</sup> See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

<sup>3</sup> *Gilmer*, 500 U.S. at 26, citing *Mitsubishi*, 473 U.S. at 628.

<sup>4</sup> *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, July 10, 1997.

<sup>5</sup> *Id.*

<sup>6</sup> On remand, the Ninth Circuit held that Circuit City's employment arbitration agreement was too one-sided to be enforceable. 2002 WL152986(9<sup>th</sup> Cir Feb. 4, 2002). Relying on California state contract law, the Court concluded that the agreement was lopsided and favored the employer, thus making it unconscionable and unenforceable. In particular, the agreement forced employees to arbitrate while giving employers a choice of venue to resolve the disputes, limited the damages recoverable by employees and forced employees to pay half the cost of arbitration unless they won.

<sup>7</sup> Compare *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6<sup>th</sup> Cir. 1999) (EEOC's independent authority to pursue injunctive and victim-specific relief is

not affected by arbitration agreement), with *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d. Cir. 1998) (EEOC can pursue injunctive relief but not monetary relief).

<sup>8</sup> 42 U.S.C. §2000e-5(g)(1)

<sup>9</sup> 42 U.S.C. §§1981a(a)(1), (d)(1)(A). These amendments applied to both Title VII and the ADA.

<sup>10</sup> See 9 U.S.C. §§ 3 and 4.

<sup>11</sup> See *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5<sup>th</sup> Cir. 1987); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539 (9<sup>th</sup> Cir. 1987).