

Casenote

***EEOC v. Waffle House, Inc.:* Employers Beware—the EEOC is now the “Master of its own Case”**

In *EEOC v. Waffle House, Inc.*,¹ the United States Supreme Court held that an otherwise enforceable employment agreement between a private employer and employee to arbitrate employment-related disputes did not bar the Equal Employment Opportunity Commission (“EEOC”) from pursuing victim-specific relief against the employer for an alleged violation of the Americans with Disabilities Act (“ADA”),² even though the employee was not a party to the suit.³ The Court rejected the Fourth Circuit Court of Appeals holding that the EEOC’s remedies in an enforcement action against an employer party to such an agreement should be limited to injunctive relief.⁴ Instead, the Supreme Court held that valid forum and remedy-limiting private arrangements between employer and employee do not restrict the EEOC’s authority to pursue enforcement in court and to seek the full range of remedies available

1. 534 U.S. 279 (2002).

2. 42 U.S.C. §§ 12,101 to 12,213 (2000).

3. 534 U.S. at 283, 285.

4. *Id.*

under the ADA and, by extension, Title VII of the Civil Rights Act of 1964.⁵

I. FACTUAL BACKGROUND

As a condition of employment, Eric Baker was required to sign a mandatory arbitration agreement like all other prospective Waffle House employees.⁶ The agreement stated “that any dispute or claim concerning Applicant’s employment with Waffle House, Inc., . . . or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration.”⁷ Sixteen days after Baker began working as a grill operator at a Waffle House, Baker suffered a seizure and was subsequently discharged. Instead of initiating arbitration proceedings in the seven years ensuing his discharge, Baker filed a timely charge of discrimination with the EEOC, alleging that his discharge violated the ADA.⁸

The EEOC investigated Baker’s discharge and attempted to conciliate with Waffle House, Inc. After the settlement attempt proved unsuccessful, the EEOC filed an enforcement action against the employer in the United States District Court for the District of South Carolina pursuant to 42 U.S.C. § 12,117(a)⁹ and 42 U.S.C. § 1981(a).¹⁰ The EEOC claimed that Waffle House engaged in employment practices that violated the ADA. Specifically, the EEOC contended that Waffle House discharged Baker because of his disability with malice or reckless indifference to Baker’s federally protected rights.¹¹

Not only did the EEOC’s complaint request injunctive relief to “eradicate the effects of . . . Waffle House’s past and present unlawful employment practices,”¹² the EEOC also requested that the district court order “specific relief designed to make Baker whole, including backpay, reinstatement, and compensatory damages, and to award punitive damages for malicious and reckless conduct.”¹³ Thus, the EEOC requested specific relief on Baker’s behalf even though Baker was not a party to the case.¹⁴

5. *Id.* at 285-88. Title VII of the Civil Rights Act of 1964 is codified as amended at 42 U.S.C. § 2000e-1 to -17 (2000).

6. *Id.* at 282-83.

7. *Id.* at 282 n.1.

8. *Id.* at 283.

9. 42 U.S.C. § 12,117(a) (2000).

10. 42 U.S.C. § 1981(a) (2000).

11. 534 U.S. at 283.

12. *Id.* at 283-84.

13. *Id.*

14. *Id.* at 283.

Contesting the validity of the EEOC's claim, Waffle House filed a petition under the Federal Arbitration Act ("FAA")¹⁵ to stay the EEOC's action and compel arbitration or, in the alternative, to dismiss the suit. The district court denied the motion, ruling that Baker's employment contract did not include the arbitration provision, and Waffle House appealed.¹⁶ On appeal, the Fourth Circuit held that a "valid, enforceable arbitration agreement" between Waffle House and Baker did exist.¹⁷ Addressing the effect on the EEOC of the binding arbitration agreement between Baker and Waffle House, the court of appeals held that the agreement did not entirely foreclose the enforcement action to the extent it sought injunctive relief because the EEOC was not a party to the employment contract.¹⁸ But, while confirming that the EEOC has independent statutory authority to bring suit in federal court, the Fourth Circuit also held "that the EEOC was precluded from seeking victim-specific relief in court because the policy goals expressed in the FAA required giving some effect to Baker's arbitration agreement."¹⁹ The Supreme Court granted the EEOC's petition for certiorari to resolve whether the EEOC should be precluded from seeking victim-specific relief when an employee has signed a mandatory arbitration agreement and reversed that aspect of the court of appeals decision.²⁰

II. LEGAL BACKGROUND

Arbitration was used as a means of dispute resolution long before Congress adopted the Federal Arbitration Act of 1925.²¹ Colonial merchants and trade associations favored arbitration because of its speed, privacy, informality, and expense.²² Although many associations and businesses favored arbitration, English and early American common

15. 9 U.S.C. §§ 1-16 (2000).

16. 534 U.S. at 284.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 285.

21. Roger S. Haydock & Jennifer D. Henderson, *Arbitration and Judicial Civil Justice: An American Historical Review and a Proposal for a Private/Arbitral and Public/Judicial Partnership*, 2 PEPP. DISP. RESOL. L.J. 141, 144-45 (2002); Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J.L. ECON. & ORG. 479, 482-83 (1995); STEPHEN PATRICK DOYLE & ROGER SILVE HAYDOCK, WITHOUT THE PUNCHES: RESOLVING DISPUTES WITHOUT LITIGATION 28 (1991); Bruce H. Mann, *The Formalization of Informal Law Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 443 (1984). The Federal Arbitration Act of 1925 is available at 43 Stat. 883.

22. Haydock & Henderson, *supra* note 21, at 145; Benson, *supra* note 21, at 482.

law shunned and disfavored the use of arbitration as a means of dispute resolution.²³ Arbitration did not receive legitimacy in the eyes of the American Judicial System until Congress passed the FAA in 1925 and then reenacted and codified the FAA in 1947 as Title 9 of the United States Code.²⁴

Congress intended the FAA to “reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”²⁵ The FAA was written to convey a “liberal federal policy favoring arbitration agreements.”²⁶ Section 3 of the FAA does this by allowing parties to stay any judicial proceeding when the issue they are disputing is referable to arbitration under a written arbitration agreement between the parties.²⁷

Although American courts addressed a wide array of arbitration issues after the FAA’s inception,²⁸ the Supreme Court did not address the FAA’s effect on government agencies like the EEOC until 1991.²⁹ In *Gilmer v. Interstate/Johnson Lane Corp.*,³⁰ a securities representative signed a registration application agreeing to arbitrate any dispute or claim against Interstate/Johnson Lane (“Interstate”). Six years later, at the age of sixty-two, the securities representative was terminated by Interstate.³¹ After filing a timely charge alleging violation of the Age Discrimination Employment Act (“ADEA”)³² with the EEOC, the

23. Haydock & Henderson, *supra* note 21, at 144-46 (citing Vynior’s Case, 4 Eng. Rep. 302 (1609); *Hobart v. Drogan*, 35 U.S. 108, 119 (1836)).

24. *Id.* at 148-51.

25. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985)).

26. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

27. 9 U.S.C. § 3 (2000). Section 3 specifically provides that:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

28. See, e.g., *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Moses H. Cone Mem’l Hosp.*, 460 U.S. 1; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

29. *Gilmer*, 500 U.S. 20.

30. *Id.*

31. *Id.* at 23-24.

32. 29 U.S.C. §§ 621-634 (2000).

securities representative instituted action in the United States District Court for the Western District of North Carolina. In response, Interstate filed a motion to compel arbitration based on the registration application. The district court denied Interstate's motion, and Interstate appealed.³³ The Fourth Circuit disagreed with the district court's decision, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements."³⁴

The Supreme Court granted certiorari to determine "whether a claim under the . . . [ADEA] . . . can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application."³⁵ The securities representative argued that allowing compulsory arbitration would weaken the EEOC's ability to enforce the ADEA.³⁶ The Supreme Court dismissed the argument, writing:

An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. Indeed, [the securities representative] filed a charge with the EEOC in this case. In any event, the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA "from any source," and it has independent authority to investigate age discrimination.³⁷

Thus, the Court in *Gilmer* held the private arbitration agreement enforceable and preclusive of a judicial action by the employee against the employer in advance of the agreed arbitration, notwithstanding the possibility of a separate and independent proceeding that might be brought by the EEOC.³⁸

The first case to address specifically whether the EEOC could seek victim-specific relief in court for an employee who had entered into an arbitration agreement was *EEOC v. Kidder, Peabody & Co.*³⁹ In *Kidder* the EEOC appealed a decision of the United States District Court for the Southern District of New York barring the EEOC from seeking monetary damages on behalf of individuals who had previously signed an agreement to submit all employment related claims to binding arbitra-

33. *Gilmer*, 500 U.S. at 23-24.

34. *Id.* at 24 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (4th Cir. 1990)).

35. *Id.* at 23.

36. *Id.* at 28.

37. *Id.*

38. *Id.* at 28-29.

39. 156 F.3d 298 (2d Cir. 1998).

tion. The EEOC sought backpay, liquidated damages, and reinstatement on behalf of seventeen former Kidder employees who had filed claims with the EEOC alleging they had been terminated on the basis of their age. Two years after filing suit, the EEOC stipulated with Kidder ("employer") that it would no longer seek injunctive relief. The employer then moved to dismiss the suit on the basis that the arbitration agreements signed by the former employees precluded the EEOC from seeking victim-specific relief.⁴⁰ The district court granted the employer's motion to dismiss and found that "the clear implication of the *Gilmer* decision is that the EEOC may not seek monetary relief on behalf of claimants who have entered into valid arbitration agreements."⁴¹ The district court further concluded that allowing the EEOC to seek victim-specific relief would undermine the purpose of the FAA by allowing employees to circumvent their arbitration agreements through EEOC intervention in federal court.⁴²

The Second Circuit affirmed the district court's decision and dismissed the action.⁴³ The Second Circuit likened the question of whether the EEOC could seek victim-specific relief on behalf of an employee who had previously signed a valid arbitration agreement to the question of whether the EEOC could sue on behalf of an individual who had previously waived or unsuccessfully litigated a claim.⁴⁴ The Second Circuit cited several decisions holding that the EEOC was precluded from seeking monetary relief for an individual who had unsuccessfully litigated the same claim.⁴⁵ The court recognized that the EEOC was not permitted to pursue monetary relief on behalf of an employee who had waived or unsuccessfully litigated a claim, but distinguished the EEOC's authority to seek injunctive relief, concluding that it could pursue injunctive relief when necessary to protect the public policies embedded in the federal statutes prohibiting discrimination in employment.⁴⁶ The court held, therefore, that the EEOC could seek only injunctive relief on behalf of an employee who had previously agreed to arbitrate all employment related disputes.⁴⁷

40. *Id.* at 299-300.

41. *Id.* at 300 (quoting *EEOC v. Kidder, Peabody & Co.*, 979 F. Supp. 245, 247 (S.D.N.Y. 1997)).

42. *Id.*

43. *Id.* at 303.

44. *Id.* at 301-03.

45. *Id.* at 301 (citing *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996); *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993); *EEOC v. U. S. Steel Corp.*, 921 F.2d 489 (3d Cir. 1990)).

46. *Id.*

47. *Id.*

Nine months later, the Sixth Circuit reached the opposite result.⁴⁸ In *EEOC v. Frank's Nursery & Crafts, Inc.*,⁴⁹ the United States Court of Appeals for the Sixth Circuit reversed a district court's decision dismissing the EEOC's claims for monetary and injunctive relief and compelling arbitration in accordance with the employee's arbitration agreement.⁵⁰ While applying for a position at Frank's Nursery and Crafts ("Frank's Nursery"), Adams signed a compulsory arbitration agreement encompassing all employment-related disputes. After being bypassed for consideration in a newly created position, Adams, an African-American, filed a complaint with the EEOC alleging that she was bypassed for promotion because of her race.⁵¹

Consequently, the EEOC filed a complaint in the United States District Court for the Eastern District of Michigan, seeking monetary and injunctive relief. Before answering the EEOC's complaint, Frank's Nursery moved to compel arbitration pursuant to the FAA and in accordance with Adams's employment contract. The district court granted Frank's Nursery's motion, dismissed the EEOC's complaint, and compelled arbitration. The EEOC appealed the district court's decision, arguing that the district court erred in finding that the employee's arbitration agreement precluded the EEOC from seeking injunctive or victim-specific relief.⁵²

The Sixth Circuit began by explaining that Title VII authorizes the EEOC to represent the national interest by suing in court.⁵³ The court reasoned that private agreements may not alter the EEOC's enforcement authority because any contract purporting to waive an individual's ability to file a charge with the EEOC is void as against public policy.⁵⁴ Explaining why private arbitration agreements should not affect the EEOC's ability to seek victim-specific relief, the court stated:

To empower a private individual to take away this congressional mandate, by entering into arbitration agreements or other contractual arrangements, would grant that individual the ability to govern whether and when the EEOC may protect the public interest and further our national initiative against employment discrimination, and to thereby undo the work of Congress.⁵⁵

48. See *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 468 (6th Cir. 1999).

49. 177 F.3d 448 (6th Cir. 1999).

50. *Id.* at 454-55.

51. *Id.* at 452-53.

52. *Id.* at 452-54.

53. *Id.* at 458-59.

54. *Id.* at 456.

55. *Id.* at 459.

The Sixth Circuit further held that an employee's contractual waiver, in the form of an arbitration agreement, of the employee's right to sue in a particular judicial forum is not binding on the EEOC because the EEOC is not a party to the contract.⁵⁶ The court reasoned that no individual, by waiving her own statutory right to sue, may "waive the statutory right of a federal sovereign to vindicate the public interest unless the government agrees to such a waiver."⁵⁷ The court concluded that allowing the EEOC to seek victim-specific relief on behalf of an individual who had previously signed an employment agreement did not undercut the FAA or the Supreme Court's decision in *Gilmer*.⁵⁸ The court determined that the public policy of protecting the federal statutory rights that the EEOC enforces, outweighs the interest of enforcing a private party's arbitration agreement against the EEOC.⁵⁹ Furthermore, the Sixth Circuit contended that *Gilmer* does not stand for the proposition that the EEOC is limited to injunctive relief whenever an employee has previously signed a compulsory arbitration agreement.⁶⁰ For all these reasons, the court in *Frank's Nursery* disagreed with the Second Circuit and held that the EEOC may seek victim-specific relief on behalf of an individual who has previously agreed to arbitrate all employment related disputes.⁶¹

In 2000 the Eighth Circuit rejected the Sixth Circuit's holding and reverted to the reasoning espoused in *Kidder*, holding that employee arbitration agreements prohibit the EEOC from seeking monetary, that is "victim-specific," relief.⁶² In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*,⁶³ the Missouri Commission on Human Rights ("MCHR") initiated a claim against Merrill Lynch ("employer") after an arbitration award was entered against an employee. The employer sued in federal court to enjoin the MCHR from proceeding with this action because an arbitration decision had already been entered against the employee. Although the district court allowed the MCHR to proceed with claims for

56. *Id.* at 460.

57. *Id.*

58. *Id.* at 461.

59. *Id.*

60. *Id.*

61. *Id.* at 468.

62. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814, 818 (8th Cir. 2000).

63. 210 F.3d 814 (8th Cir. 2000).

injunctive relief, the court enjoined the MCHR from seeking victim-specific relief.⁶⁴

One argument that the MCHR made on appeal was that even if the employee himself was barred from reasserting his claim in court, the MCHR as a separate administrative entity should not be precluded from seeking relief on the employee's behalf.⁶⁵ The court disagreed, citing *Kidder* for the proposition that "an arbitration agreement precludes the EEOC from seeking purely monetary relief for an employee but does not preclude it from seeking injunctive relief."⁶⁶ In making this determination, the court concluded that when the MCHR sought specific relief, it was acting like a representative of the employee instead of a distinct entity seeking to protect public rights.⁶⁷ The court also cited the Fourth Circuit's decision in *EEOC v. Waffle House, Inc.*,⁶⁸ for the proposition that an agency's efforts to seek monetary relief have less public importance than when the agency is seeking broad injunctive relief.⁶⁹ Therefore, the Eighth Circuit agreed with the Second and Fourth Circuits' decisions limiting the EEOC's damages to injunctive relief after an employee has entered into a voluntary, enforceable agreement to arbitrate his employment-related disputes.⁷⁰

Finally, in *Circuit City Stores, Inc. v. Adams*,⁷¹ the Supreme Court determined that 9 U.S.C. § 1,⁷² a provision of the FAA excepting to some degree the enforceability of arbitration agreements relating to employment contracts, applies only to employment contracts of transportation workers.⁷³ Therefore, the Supreme Court held that arbitration agreements contained in employment contracts in all vocations or industries other than transportation are enforceable under the FAA, putting to rest the argument that § 1 excludes employment contracts in general from the FAA's umbrella.⁷⁴

64. *Id.* at 816-17. The MCHR is the State of Missouri's functional equivalent of the EEOC. The MCHR is granted authority by the Missouri Human Rights Act to protect the interest of employees from discrimination in much the same capacity as Title VII gives the EEOC the statutory authority to protect the federal interests of employees. *See* MO. REV. STAT. §§ 213.010-213.137 (1996 & Supp. 2003).

65. 210 F.3d at 818.

66. *Id.*

67. *Id.*

68. 193 F.3d 805, 812 (4th Cir. 1999).

69. 210 F.3d at 818.

70. *Id.*

71. 532 U.S. 105 (2001).

72. 9 U.S.C. § 1 (2000).

73. 532 U.S. at 109.

74. *Id.*

III. THE COURT'S RATIONALE

In *Waffle House* the employer argued that the EEOC's action brought in the United States District Court for the District of South Carolina should be stayed and arbitration compelled because the employee signed an arbitration agreement to arbitrate all employment related disputes.⁷⁵ The Supreme Court relied on the following four reasons to reject the employer's contentions.

The Court began its analysis by noting that Congress, through 42 U.S.C. § 12,117(a), provides the EEOC the same "enforcement powers, remedies, and procedures" for enforcing ADA violations as those espoused in Title VII of the Civil Rights Act of 1964.⁷⁶ The Court further explained that Congress amended Title VII in 1991 for the purpose of allowing a complaining party to receive both compensatory and punitive damages.⁷⁷ Thus, the Court reasoned that Congress unambiguously gave the EEOC the power to seek victim-specific relief against employers who engage in unlawful conduct when it passed 42 U.S.C. § 1981a(a)(1).⁷⁸ Expounding on this point, the Court referenced two previous decisions in which a significant distinction had been drawn between an employee's private right of action and the role of the EEOC as an enforcer of congressional intent.⁷⁹ In both cases, the Supreme Court held that the EEOC is not merely a representative of the private individual for which the EEOC is seeking relief.⁸⁰ On the contrary, the EEOC is first and foremost a federal agency charged with its own separate and distinct statutory purpose.⁸¹ In light of this purpose, the Court in *Waffle House* reasoned that because the EEOC has a much more important role than merely serving as a substitute for private rights of action, the fact that an individual employee has signed an arbitration agreement should not in any way usurp the EEOC's ability

75. 534 U.S. at 284.

76. *Id.* at 285. Section 12117(a) of 42 U.S.C. specifically provides that:

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

77. *Id.* at 286-87 (citing 42 U.S.C. § 1981a(a)(1) (2000)).

78. *Id.* at 287.

79. *Id.* (citing *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1997); *Gen. Tel. Co. v. EEOC*, 446 U.S. 318 (1980)).

80. *Occidental*, 432 U.S. at 368; *Gen. Tel.*, 446 U.S. at 326.

81. *Id.*

to properly perform its function.⁸² The Court reasoned that neither these cases nor any language in § 12,117(a) suggest that a private arbitration agreement between an employer and employee should disallow the punitive and compensatory damage remedies that Congress made available to the EEOC in 1991.⁸³

Next, the Court noted that although the FAA does create significant policy considerations favoring arbitration agreements, absent ambiguity, the scope of contractual language governs arbitration disputes.⁸⁴ Therefore, the Court in *Waffle House* reasoned that nothing in the language of the FAA authorizes a court to compel arbitration of a party who is not previously covered in the private contractual agreement.⁸⁵ Although the FAA enforces private agreements to arbitrate, the Supreme Court held that the FAA does not mandate that public agencies, which are nonparties to private arbitration agreements, choose the judicial forum agreed upon by the private parties.⁸⁶ Therefore, while the employer and employee, as private parties, would be bound to arbitrate their employment disputes pursuant to the FAA, nothing in the FAA authorizes a court to mandate that the EEOC, as a public agency and nonparty to the contract, must choose the judicial forum agreed upon by the employer and employee.

The Supreme Court next discussed the court of appeals assertion that the EEOC's ability to seek victim-specific relief after private individuals have previously entered into arbitration agreements would render useless the effectiveness of arbitration agreements.⁸⁷ The court of appeals held that the public interest that the EEOC effectuates by seeking victim-specific relief is outweighed by the policy considerations favoring arbitration. The court of appeals further held that the EEOC's public interest in seeking victim-specific relief is always outweighed by the FAA's public interest in protecting arbitration agreements. Finally, the court of appeals held that the only time that the EEOC policy outweighs that of the FAA is when the EEOC is seeking broad injunctive relief.⁸⁸

Addressing the court of appeals policy assertions, the Supreme Court initially explained that the court of appeals failed to realize that many

82. 534 U.S. at 288.

83. *Id.*

84. *Id.* at 289.

85. *Id.*

86. *Id.*

87. *Id.* at 290-91.

88. *Waffle House*, 193 F.3d at 811-12.

pro-arbitration concerns are already built into EEOC enforcement.⁸⁹ First, the Court remarked that the EEOC, unlike individual employees, could not bring an action in court without attempting to settle the case through an expansive conciliation process.⁹⁰ Second, the Court observed that it is unlikely that the EEOC's ability to seek victim-specific relief will render arbitration agreements useless because the EEOC files suit in less than one percent of the charges that individuals file each year.⁹¹

Next, the Supreme Court recognized that the court of appeals attempt to balance the competing policies of the FAA and EEOC was inconsistent with a number of the Court's recent arbitration cases.⁹² These cases indicate that the purpose of the FAA is to ensure that arbitration agreements are placed on equal footing with other contracts, not to mandate that parties arbitrate absent express agreements to do so.⁹³ The Court cited *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁹⁴ for the proposition that courts should "look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement."⁹⁵ Thus, the Supreme Court held that while the policy goals of the FAA are very important, policy should only be examined absent an express contractual agreement between the parties.⁹⁶ In this case, the Court noted that the EEOC was not a party to the contract between the employer and employee and, therefore, the pro-arbitration policy goals of the FAA do not mandate that the EEOC forfeit its statutory authority to pursue victim-specific relief on behalf of the employee.⁹⁷ The Court concluded that the "solution reached by the [c]ourt of [a]ppeals turns what is effectively a forum selection clause into a waiver of nonparty's statutory remedies."⁹⁸

The Court completed its analysis by addressing the employer's contention that because employees can limit the EEOC's ability to seek relief on their behalf by accepting a monetary settlement or failing to mitigate, employees should also be able to limit the EEOC's choice of

89. 534 U.S. at 290 n.7.

90. *Id.*

91. *Id.*

92. *Id.* at 293-94 (citing *Volt Info. Scis., Inc., v. Bd. of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989); *Prima Paint*, 388 U.S. at 404 n.12).

93. *Volt*, 489 U.S. at 478; *Prima Paint*, 388 U.S. at 404 n.12.

94. 473 U.S. 614 (1985).

95. *Waffle House*, 534 U.S. at 294 (citing *Mitsubishi*, 473 U.S. at 626).

96. *Id.*

97. *Id.*

98. *Id.* at 295.

forum by agreeing to arbitrate all employment-related disputes.⁹⁹ The Supreme Court first noted that the only relevant issue in this case was whether the employee's contractual agreement to arbitrate employment related disputes precludes the EEOC from seeking victim-specific relief in federal court.¹⁰⁰ Nevertheless, the Court made clear that simply because an employee's conduct may affect the EEOC's ability to recover in certain circumstances, the EEOC's claims are not merely derivative.¹⁰¹ The Court provided several examples of when the EEOC did not simply stand in the employee's shoes¹⁰² to make the point that the EEOC has its own statutory authority and does not merely serve as a proxy for the employee.¹⁰³ Thus, the Court emphasized that the EEOC has independent statutory authority to pursue victim-specific relief in federal court that is not trumped by an employee's forum selection clause.¹⁰⁴

IV. RATIONALE OF THE DISSENT

Justice Thomas, joined by Justices Rehnquist and Scalia, dissented from the majority's holding on the basis that the EEOC should not be able to do for an employee what he cannot do for himself.¹⁰⁵ The dissent first attacked the majority's argument that the EEOC has statutory authority to obtain specific remedies.¹⁰⁶ While the dissent did not dispute that 42 U.S.C. § 2000e-5(f)(1)¹⁰⁷ gives the EEOC authority to bring suit, the dissent emphasized that § 2000e-5(g)(1)¹⁰⁸ establishes that courts, not the EEOC, have the ultimate authority to determine what relief is "appropriate."¹⁰⁹ The dissent then offered two reasons why it would not be appropriate for the EEOC to be awarded victim-specific relief on behalf of an employee who had previously signed an agreement to arbitrate.¹¹⁰

99. *Id.* at 296-97.

100. *Id.* at 297.

101. *Id.* at 298.

102. *Id.* at 297-98 (citing *Occidental Life*, 432 U.S. at 368; *Gen. Tel.*, 446 U.S. at 326; *Gilmer*, 895 F.2d at 197).

103. *Id.* at 298.

104. *Id.*

105. *Id.* (Thomas, J., dissenting).

106. *Id.* at 301-02 (Thomas, J., dissenting). The dissenters argued that the statutory language of 42 U.S.C. § 2000e-5(f)(1) (2000) gives the EEOC no statutory right obtain a particular remedy.

107. 42 U.S.C. § 2000e-5(f)(1) (2000).

108. 42 U.S.C. § 2000e-5(g)(1) (2000).

109. 534 U.S. at 301 (Thomas, J., dissenting).

110. *Id.* at 304, 308 (Thomas, J., dissenting).

The dissent reflected the general proposition in arbitration cases that the EEOC can obtain no greater relief in court for a specific individual than the individual could obtain himself.¹¹¹ Thus, the conduct of an individual can, in effect, prevent the EEOC from seeking relief on his behalf when the employee has settled or waived arbitration claims, failed to mitigate, or unsuccessfully litigated the claim.¹¹² The dissent concluded therefore that the EEOC “should not be able to obtain victim-specific relief for [employee] . . . when [employee] waived his right to seek relief for himself in a judicial forum by signing an arbitration agreement.”¹¹³

Next, the dissent argued that allowing the EEOC to obtain relief on behalf of the employee would contravene the liberal policy favoring enforceability of arbitration agreements by effectively freeing employees from their contractual obligations.¹¹⁴ The dissent reasoned that allowing the EEOC to be the “master of its own case” could give employees two bites at the apple by forcing an employer to defend claims in two separate forums.¹¹⁵ The employer would have to defend the employee’s claim in an arbitration proceeding and then defend the EEOC’s claim on behalf of the same employee in state or federal court.¹¹⁶ The dissent reads the majority’s holding as an authorization for employees to take the higher of the two awards and force judges to adjust damage awards to avoid double recovery.¹¹⁷ Such a decision could place the extra burden of defending two claims on employers who enter into arbitration agreements, thereby weakening employer incentives to agree to arbitration and, in turn, undermining the liberal arbitration enforcement policies underlying the FAA.¹¹⁸

V. IMPLICATIONS

The most significant implication of *Waffle House* is the concern that this decision could limit both the use and effectiveness of arbitration agreements.¹¹⁹ It is no secret that the EEOC disfavors pre-employ-

111. *Id.* at 305 (Thomas, J., dissenting).

112. *Id.* at 304-05 (Thomas, J., dissenting) (citing *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (waiver); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982) (failure to mitigate); *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (res judicata)).

113. *Id.* at 305 (Thomas, J., dissenting).

114. *Id.* at 308 (Thomas, J., dissenting).

115. *Id.* at 309-10 (Thomas, J., dissenting).

116. *Id.* at 310 (Thomas, J., dissenting).

117. *Id.* (Thomas, J., dissenting).

118. *Id.* (Thomas, J., dissenting).

119. *Id.* at 308-10 (Thomas, J., dissenting).

ment mandatory arbitration agreements (“PMAA’s”).¹²⁰ The EEOC has asserted that PMAA’s can never be knowing and voluntary because they effectively force an employee, with little bargaining power, to choose between getting a job and having the ability to litigate a claim.¹²¹ While the recent Ninth Circuit decision of *EEOC v. Luce*¹²² leaves the circuits opining on the question unanimous in holding that employers may require employees to sign agreements to arbitrate Title VII claims,¹²³ as Justice Thomas noted in the dissent, the fact that the EEOC has been termed the “master of its own case” should concern interested individuals that this decision effectively opens the floodgates to the EEOC’s ability to pursue victim-specific litigation in court, regardless of prior arbitration agreements, awards, or settlements.¹²⁴

The majority in *Waffle House* conceded that “[i]t is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC’s claim or the character of relief the EEOC may seek.”¹²⁵ The dissent interpreted this statement as authorizing the EEOC to seek victim-specific relief in court even after an employee has previously settled or arbitrated a dispute.¹²⁶ Furthermore, the EEOC argued that it should be authorized to pursue victim-specific relief after an individual has previously arbitrated a dispute.¹²⁷ The EEOC argued that its ability to do so would not allow the victim to receive windfall benefits for both an arbitration and judicial award because if the EEOC prevailed, a court could adjust the victim’s relief accordingly.¹²⁸ Yet, a principal reason employers demand arbitration agreements as a condition of employment is to avoid the costs, uncertainty, and inconvenience of litigation.

120. Christine M. Reilly, Comment, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1220-21 (2002) (citing EEOC Policy Statement on Mandatory Arbitration, Daily Lab. Rep. (BNA) No. 133, July 11, 1997, at E-4).

121. *Id.*

122. 303 F.3d 994 (9th Cir. 2002).

123. *Id.* at 997. In *Luce*, the Ninth Circuit reversed the decision of a federal district court and held that “employers may require employees to sign agreements to arbitrate Title VII claims as a condition of their employment.” *Id.*

124. 534 U.S. at 309-10 (Thomas, J., dissenting).

125. *Id.* at 297.

126. *Id.* at 308-10 (Thomas, J., dissenting). See Symposium, *ADR’s New Frontiers Mass Claims after Sept. 11; A State-of-the-Practice Arbitration Roundup, and More . . .*, 20 Alternatives to High Cost Litig. 65, 73 (2002).

127. Brief for Petitioner at 38, *Waffle House v. EEOC*, 534 U.S. 279 (2002) (No. 99-1823).

128. *Id.*

The dissent argued that subjecting employers to “the prospect of defending [themselves] in two different forums against two different parties seeking precisely the same relief” will significantly hamper the FAA’s liberal federal policy favoring arbitration.¹²⁹ Therefore, employers should be mindful of the fact that entering into PMAA’s with employees could potentially have the effect of contractually mandating that the employer both arbitrate a claim with an employee and litigate a claim against the EEOC. Thus, instead of creating such an obligation, one could foresee some employers taking their chances in court to avoid the costs of multiple defenses in multiple forums. Thus, the decision in *Waffle House* could be the EEOC’s first blow in the effort to abolish PMAA’s.

The majority was quick to point out that it is unlikely that this decision will have more than a ripple effect on the FAA because the EEOC brings suit in less than one percent of anti-discrimination charges filed every year.¹³⁰ Thus, although a few employers might refrain from seeking or demanding agreements to arbitrate as a result of the decision in *Waffle House*, the majority felt the fact that EEOC resources only allow the EEOC to file suit in a small number of claims each year should provide substantial comfort to employers contemplating whether to seek agreements to arbitrate Title VII claims from their employees.¹³¹

Another interesting implication of the decision in *Waffle House* could be the fact that this decision actually favors arbitration by establishing that all nine Justices now acknowledge that the FAA applies to employment contracts.¹³² The four dissenters in *Circuit City* joined the majority in *Waffle House* and cited *Circuit City* for the proposition that the pro-arbitration policies of the FAA apply to employment contracts.¹³³ Thus, contrary to the dissent’s view, there is a possibility that the decision in *Waffle House* may actually have solidified the role of the FAA in employment contracts.

More certainly, in *Waffle House*, the Supreme Court has made the EEOC the “master of its own case” subject to the court’s ultimate

129. 534 U.S. at 309 (Thomas, J., dissenting).

130. *Id.* at 290-91 n.7. The Court noted that for the 2000 fiscal year, the EEOC received 79,896 employment discrimination charges. Though the EEOC found reasonable cause in 848 charges, the EEOC only chose to file suit in 291 cases. *Id.*

131. *Id.*

132. See David H. Gibbs, *After Waffle House, Arbitration Gets ‘New Trilogy’ of Employment Law*, 20 *Alternatives to High Cost Litig.* 17, 22 (2002).

133. *Id.* Justices Souter, Stevens, Ginsburg, and Breyer all dissented in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). However, each of these Justices joined the majority in *Waffle House* and cited *Circuit City* for the proposition that employment contracts are covered by the FAA. 534 U.S. at 289.

authority under § 2000e-5(g)(1) of Title VII to decide what relief is appropriately awarded to the individuals on whose behalf the EEOC acts.¹³⁴

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134. 534 U.S. at 291.