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Employees Beware: Signing Arbitration Agreements May Limit Your Remedies in Suits Filed by the EEOC - Equal Employment Opportunity Commission v. Waffle House, Inc.

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Employees Beware: Signing Arbitration Agreements May Limit Your Remedies in Suits Filed by the EEOC

Equal Employment Opportunity Commission v. Waffle House, Inc.[1]

I. INTRODUCTION

Arbitration is used regularly to settle employment disputes, and federal policy supports these agreements between private parties. Federal statutes, however, also grant the Equal Employment Opportunity Commission the authority to pursue employment discrimination claims in court. These claims do more than vindicate the rights of individuals, they also safeguard the public interest in ending employment discrimination. A conflict may arise between these two policies when employees sign agreements to submit statutory discrimination claims to arbitration. This Note examines the split of authority on the issue of whether the Equal Employment Opportunity Commission should be permitted to seek money damages on behalf of individuals who have signed private arbitration agreements.

II. FACTS AND HOLDING

On June 23, 1994, Eric Baker applied for a job at a Waffle House restaurant in Columbia, South Carolina.[2] The application he filled out included an arbitration provision which stated that the applicant would submit to binding arbitration "any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment."[3] Baker was offered a job at that Waffle House, but he declined.[4] Instead, three weeks later, he called the manager of a nearby Waffle House in West Columbia where he was hired to work as a grill operator.[5]

Baker suffered from a seizure disorder, which he developed after a car accident in 1992.[6] Two weeks after starting his new job he had a seizure at home.[7] The seizure was apparently triggered by a change in his medication.[8] On the following

1. 193 F.3d 805 (4th Cir. 1999).
2. *Id.* at 807.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

day, he suffered another seizure at work.[9] He was fired on September 5, 1994.[10] A notice from Waffle House stated, "We decided that for [Baker's] benefit and safety and Waffle House it would be best he not work any more."[11] Baker complained to the Equal Employment Opportunity Commission ("EEOC"), alleging that his discharge violated the Americans With Disabilities Act of 1990.[12] In response, the EEOC filed an enforcement action against Waffle House stating that Waffle House had engaged in "unlawful employment practices at its West Columbia, South Carolina, facility."[13] The EEOC sought:

> (1) a permanent injunction barring Waffle House from engaging in employment practices that discriminate on the basis of disability; (2) an order that Waffle House institute and carry out anti-discrimination policies, practices and programs to create opportunities and to eradicate the effects of past and present discrimination on the basis of disability; (3) backpay and reinstatement for Baker; (4) compensation for pecuniary and non-pecuniary losses suffered by Baker; and (5) punitive damages.[14]

Waffle House filed a petition to compel arbitration and stay the litigation and, in the alternative, to dismiss the action.[15] A magistrate judge recommended to the district court that it find that Baker had entered into an arbitration agreement with Waffle House, and that the EEOC must arbitrate the claims that were filed on behalf of Baker.[16] Instead, the district court denied Waffle House's motions.[17] The court found that Baker was not bound by the arbitration agreement because he was not hired by the same restaurant where he filled out the application.[18]

Waffle House appealed, arguing that a valid arbitration agreement existed between the company and Baker.[19] In addition, Waffle House argued that the arbitration agreement bound the EEOC to "assert Baker's claim in an arbitral forum."[20]

The Fourth Circuit Court of Appeals held that the employment application did form a binding arbitration agreement between Baker and Waffle House;[21] that the EEOC cannot be forced to arbitrate its claims due to an arbitration agreement between the charging party and their employer, but the EEOC is prevented from seeking "make-whole" relief, such as backpay and reinstatement, in a judicial forum on behalf of an individual subject to an arbitration agreement.[22]

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 807-08.
15. *Id.* at 808.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 809.
22. *Id.* at 807.

III. LEGAL BACKGROUND

Congress passed the United States Arbitration Act in 1925, commonly known as the Federal Arbitration Act ("FAA").[23] Historically, arbitration was reserved for commercial disputes where contract rights and remedies were at issue.[24] In fact, the Supreme Court initially held that the FAA could not be used to compel arbitration of statutory or public law claims.[25] At the same time, the court expressed a "firm preference" for arbitration as a means to resolve labor disputes.[26] Until recently, however, employers could not compel employees to agree to arbitrate statutory discrimination claims.[27] In *Alexander v. Gardner-Denver Co.*,[28] the Supreme Court held that an employee was entitled to pursue a discrimination claim in court, despite denial of the claim by an arbitrator.[29] The Court stressed that an individual in a Title VII case vindicates the public interest against employment discrimination, along with his or her individual interests.[30]

There is a tension between the policy of enforcing private arbitration agreements and the policy of shielding employees from discrimination in the workforce.[31] The FAA, according to one jurist, is a statute that promotes individualism.[32] It serves the public interest by allowing parties to adopt alternatives to litigation that they believe will "cut red tape, take less time, and save litigation expense."[33] Statutes that prohibit discrimination in the workplace, however, promote collectivist interests.[34] They are less concerned with economic efficiency and stand for the proposition that state interests sometimes override individual choices.[35]

Put another way, Congress has determined that certain rights and obligations should not be bargained for solely between the parties.[36] The public interest in these "basic" rights requires some degree of involvement by the government, and the legislature protects these rights by enacting public laws.[37] These rights "cannot be abrogated by members of the general public, but are rights that inhere through the relationship between government and citizens."[38] Statutes prohibiting employment

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23. 9 U.S.C. §§ 1-16 (1994).

24. William H. Daughtrey, Jr., & Donnie L. Kidd, Jr., *Modifications Necessary for Commercial Arbitration Law to Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change*, 14 OHIO ST. J. ON DISP. RESOL. 29, 48 (1998).

25. *Id.*

26. *Id.* at 48-49.

27. Robert N. Covington, *Emp. Arbitration After Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMPLOYMENT L.J. 345, 346 (1998).

28. 415 U.S. 36 (1974).

29. Covington, *supra* note 27, at 346.

30. *Id.* at 347.

31. EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 470 (6th Cir. 1999) (Nelson, J., concurring in part and dissenting in part) (quoting EEOC v. Kidder, Peabody & Co., 156 F.3d 298, 303 (2d Cir. 1998)).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Daughtrey and Kidd, *supra* note 24, at 43.

37. *Id.* at 43-44.

38. *Id.* at 44.

discrimination are one important category of such laws.[39] While the employment-at-will doctrine generally gives employers a great amount of freedom in conducting business, Congress has enacted several statutes to protect employees from unjust discrimination in the workplace.[40] In prohibiting employers from discriminating on the basis of "age, gender, race, ethnicity, or disability," these statutes protect an "elementary public interest."[41]

Because of the public interest at stake in employment discrimination claims, Congress has given the EEOC independent authority to enforce anti-discrimination laws. In order to understand the scope of the EEOC's authority to pursue claims of disability-based discrimination, it is important to study the evolution of Title VII because Congress incorporated the enforcement mechanisms of Title VII into the Americans with Disabilities Act ("ADA").[42] The Civil Rights Act of 1964 created the EEOC to investigate charges of employment discrimination.[43] Under the original statute, the EEOC was only authorized to investigate charges of employment discrimination and to use informal conciliation to try to resolve such disputes.[44] If those methods failed, the EEOC's involvement in the case would end, and it was up to the charging party to sue in federal court within 30 days of receiving notice from the EEOC.[45]

In 1972, Congress realized that the voluntary approach to ending workplace racial discrimination was not working.[46] "[F]ailure to grant the EEOC meaningful enforcement powers [had] proven to be a major flaw in the operation of Title VII."[47] Stronger enforcement procedures were needed to put some teeth in the Civil Rights Act and allow the EEOC to more effectively protect employees from discrimination.[48] Congress amended Title VII, granting the EEOC the power to file suit in federal court under its own name.[49] Title VII, and by incorporation the ADA, requires an individual to file a charge with the EEOC for evaluation.[50] The EEOC will then evaluate the claim and either determine that the claim has no merit or grant the employee a letter to sue or file an action itself.[51] If the EEOC decides the claim has merit but chooses not to sue, it will issue the individual a "notice of right to

39. *Id.*

40. *Id. See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994) (prohibiting age discrimination); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994 & Supp. II 1996) and 47 U.S.C. § 225 (1994) (prohibiting discrimination based on certain disabilities); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000h-6 (1994) (prohibiting race and gender discrimination).

41. Daughtrey and Kidd, *supra* note 24, at 44.

42. *Waffle House*, 193 F.3d at 809 (citing 42 U.S.C. § 12117(a) (incorporating by reference 42 U.S.C. § 2000e-4, 5, 6, 8, 9)).

43. *Frank's Nursery*, 177 F.3d at 456.

44. *Id.*

45. *Id.* at 457.

46. *Id.*

47. *Id.* (quoting S. REP. NO. 92-415, at 4 (1971)).

48. *Id.*

49. *Waffle House*, 193 F.3d at 809.

50. Daughtrey and Kidd, *supra* note 24, at 46.

51. *Id.* at 46-47.

sue."[52] A party may not sue under Title VII if they do not receive such a letter from the EEOC.[53] The EEOC has 180 days to make its determination.[54]

The policy clash between federal arbitration law and anti-discrimination statutes took a new turn in 1991. The United States Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.* that an arbitration agreement in a securities registration application was enforceable where the clause required arbitration of statutory claims under the Age Discrimination in Employment Act ("ADEA").[55] In *Gilmer,* the employee filed a lawsuit in federal court after first filing an age discrimination complaint with the EEOC.[56] The Court reasoned that the burden was on Gilmer to show that Congress "intended to preclude a waiver of a judicial forum for ADEA claims," and Gilmer was unable to meet that burden."[57]

The Court stated that arbitration does not interfere with the role of the EEOC in enforcing ADEA claims, because employees who have signed arbitration agreements "will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action."[58] Gilmer also argued that arbitration is not an adequate procedure to serve the policies of the ADEA because it does not provide for broad equitable relief.[59] In response, the Court stated that enforcing such arbitration agreements between private parties did not "preclude the EEOC from bringing actions seeking class-wide and equitable relief."[60] The Court did not explicitly address the issue of money damages.[61]

The Second Circuit relied on the reasoning in *Gilmer* when it held in *EEOC v. Kidder, Peabody & Co.*[62] that the EEOC was limited to pursuing injunctive relief in court, while the employees in the case must abide by an arbitration agreement and submit their individual claims to arbitration.[63] In *Kidder, Peabody*, the EEOC sought money damages for nine employees who allegedly suffered discrimination on the basis of their age.[64] While the EEOC had originally sought injunctive relief, the business in question had discontinued investment banking, so the EEOC dropped its claim for an injunction and sought only money damages.[65] In a case of first impression, the court reasoned that to allow the EEOC to seek money damages for individuals who have "freely agreed to arbitrate all employment claims" would be the equivalent of allowing employees to "make an end run around the arbitration agreement."[66]

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52. *Frank's Nursery*, 177 F.3d at 456.
53. *Id.*
54. *Id.*
55. 500 U.S. 20, 35 (1991).
56. *Id.* at 24.
57. *Id.* at 26.
58. *Id.* at 28.
59. *Id.* at 32.
60. *Id.*
61. *Id.*
62. 156 F.3d 298 (2d Cir. 1998).
63. *Id.* at 300.
64. *Id.*
65. *Id.*
66. *Id.* at 303.

The court acknowledged that while the EEOC's right of action is independent from an individual employee's right of action, circuit courts have consistently held that the EEOC may not seek money damages on behalf of employees who have "waived, settled, or previously litigated the claim."[67] The court then took a closer look at the enforcement scheme of the ADEA, which allows an individual to sue in federal court but takes that right away if the EEOC decides to pursue the claim.[68] The court concluded that since an individual is prohibited from suing in federal court once the EEOC decides to pursue a case, Congress must have intended for the EEOC to serve as the individual's representative.[69] Therefore, in *EEOC v. United States Steel Corp.*, the court held that the EEOC may not seek money damages on behalf of an employee who had already unsuccessfully sued for damages, on grounds of res judicata.[70] The court reasoned that the EEOC acts as a representative for an individual when it seeks monetary relief for an individual.[71] The EEOC's role differs, however, when it attempts to protect a "broader interest" by seeking injunctive relief.[72] When the EEOC pursues broad injunctive relief it is acting on behalf of the public interest, not the individual, and courts have allowed the EEOC to seek injunctive relief even where an employee has settled, waived or litigated the claim.[73] The EEOC, in seeking broad injunctive relief, protects the interests of the "United States as sovereign" in ending employment discrimination.[74] When the EEOC seeks backpay for an individual, however, the public interest is minimal.[75] The court adopted the reasoning of *EEOC v. Goodyear Aerospace Corp.* and *United States Steel Corp.* in concluding that the public interest is strongest when the EEOC seeks broad injunctive relief and weakest when it seeks money damages on behalf of an individual.[76]

In a later decision, the Sixth Circuit rejected the reasoning in *Kidder, Peabody*, holding that the EEOC may seek monetary damages on behalf of employees who have signed arbitration agreements.[77] The difference in the outcome may be attributed to the way in which the Sixth Circuit framed the issue. The court stated that the precise issue was "whether a single employee may, by entering into a private arbitration agreement with her employer, divest the EEOC of its authority to remedy employment discrimination."[78] The court stressed the legislative history behind the amendments to Title VII and the dual enforcement scheme of the statute.[79] Title VII allows recovery through private action or action by the EEOC, and it gives the EEOC the power to decide which path to follow.[80] An employee does not have the

67. *Id.* at 302 (citing EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1543 (9th Cir. 1987)).
68. *Kidder, Peabody & Co.*, 156 F.3d at 301.
69. *Id.* at 302 (quoting EEOC v. United States Steel Corp., 921 F.2d 489, 495 (3d Cir. 1990)).
70. EEOC v. United States Steel Corp., 921 F.2d. 489, 496-97.
71. *Id.* at 495.
72. *Id.* at 496.
73. *Kidder, Peabody & Co.*, 156 F.3d at 302.
74. *Id.*
75. *Id.* (citing EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1543 (9th Cir. 1987)).
76. *Id.*
77. *Frank's Nursery*, 177 F.3d 448, 467 (6th Cir. 1999).
78. *Id.* at 455.
79. *Id.* at 466.
80. *Id.*

power to sue without authorization from the EEOC.[81] Therefore, "an individual cannot . . . override the power of the EEOC to sue in its own name" by signing an arbitration agreement.[82] The court saw no reason why the EEOC should be precluded from seeking money damages for individuals who otherwise could submit their claims for arbitration "just as it always has when suing on behalf of an individual."[83] The court added that limiting the EEOC to injunctive relief would "severely impede its ability to protect the public interest."[84] Monetary awards are often a stronger incentive for employers to eliminate discriminatory employment practices.[85] In addition, the court noted that while *Gilmer* explicitly stated that arbitration agreements do not preclude the EEOC from seeking class-wide and equitable relief, the opinion is silent on the issue of money damages.[86] The court concluded that *Gilmer* should not be read to exclude the possibility of money damages simply because it is silent on the issue.[87]

The above reading of *Gilmer* finds support from at least three commentators who write that it is "spurious to assume that a class-wide action seeking equitable relief represents the sole occasion upon which the EEOC may pursue a lawsuit on behalf of employees who have signed an arbitration agreement."[88] These commentators believe *Gilmer* should not be read to exclude the possibility of money damages on behalf of employees who have signed arbitration agreements because such a reading goes beyond the "plain language" of the court.[89]

A dissenting judge in *Frank's Nursery* wrote that the courts are operating without clear guidance from Congress in trying to resolve the conflict between Title VII and federal policy promoting arbitration.[90] In resolving the conflict "anything approaching certitude . . . is impossible."[91] Rather than create a split of authority, he would follow the Second Circuit because, in his mind, the balance struck in *Kidder, Peabody*, and followed by *Waffle House*, "makes sense."[92]

IV. INSTANT DECISION

In *Waffle House*, the Fourth Circuit Court of Appeals was faced with a split of authority on the issue of how an arbitration agreement between an employee and a corporation affects a claim filed by the EEOC on behalf of the employee.[93] The

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 461.
87. *Id.*
88. David Sherwyn et al., J. Bruce Tracey, and Zev J. Eigen, *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, 117 (1999).
89. *Id.*
90. *Frank's Nursery*, 177 F.3d at 471.
91. *Id.*
92. *Id.*
93. 193 F.3d at 809.

court rejected Waffle House's argument that the EEOC was bound by the arbitration agreement to submit its claim to arbitration.[94] Relying on the legislative history behind Title VII (and by incorporation the ADA), the court held that the EEOC "has independent statutory authority to bring suit in any federal district court where venue is proper."[95]

In reaching its decision, the court focused on the dual system of private and public enforcement created by amendments to Title VII.[96] The clear intention of the amendments was to place primary enforcement in the hands of the EEOC.[97] Unlike the individual charging party, the EEOC serves a public mission when it acts to enforce federal laws prohibiting discrimination in the workplace.[98] Therefore, the EEOC "does not act merely as a proxy for the charging party but rather seeks to 'advance the public interest in preventing and remedying employment discrimination.'"[99] The EEOC sues to "[v]indicate the public interest as expressed in the Congressional purpose of eliminating employment discrimination as a national evil rather than for the redress of the strictly private interests of the complaining party."[100]

The court found ample evidence in the Title VII enforcement scheme to support the conclusion that the "EEOC and the charging party are not interchangeable plaintiffs."[101] The EEOC has the authority to choose to litigate the cases that it believes most significantly affect the public interest.[102] A charging party is not allowed to sue in federal court until the EEOC has made its own determination about the merits of the claim and issued a right-to-sue letter.[103] If the EEOC chooses to file suit, the individual is limited to intervening.[104] When a private person sues, the court in certain cases may allow the EEOC to intervene to "protect the national interest."[105] Given the dual enforcement system established by statute, the court treated the interests of the EEOC and the charging party as independent in determining how an arbitration signed by an individual should affect a claim by the EEOC.[106]

The court noted that Title VII and the ADA do not require the EEOC to arbitrate.[107] In addition, the EEOC was not a party to the arbitration agreement between Waffle House and Baker.[108] Citing *Frank's Nursery* and *Kidder, Peabody*,

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94. *Id.*
95. *Id.*
96. *Id.*
97. *Id. See Joint Conference Committee, Section-by-Section Analysis*, 118 CONG. REC. 3462 (Mar. 6, 1972) (stating that Congress hoped that the vast majority of cases would be handled by the EEOC or Attorney General and that private lawsuits would be the exception); S. REP. NO. 92-415, at 4 (1971). (stating that Congress believed that the failure to grant the EEOC meaningful enforcement powers was a major flaw in Title VII).
98. *Waffle House*, 193 F.3d at 809.
99. *Id.* (quoting General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 331 (1980)).
100. *Id.* at 809-10. (citing EEOC v. General Elec. Co. 532 F.2d 559; 373 (4th Cir. 1976)).
101. *Id.* at 811.
102. *Id.* at 810.
103. *Id.* (quoting Davis v. North Carolina Dep't. of Correction, 48 F.3d 134, 138 (4th Cir. 1995)).
104. *Id.* (quoting 42 U.S.C. § 2000e-5(f)(1) (1994)).
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 811.

the court stated that neither of the circuits that have addressed the issue have concluded that such arbitration agreements permit courts to "force the EEOC into arbitration under the FAA."[109] The court also noted that the Supreme Court in *Gilmer* recognized that the EEOC, when acting in its "public role," is not bound by arbitration agreements signed by private parties.[110] The court noted that unlike a private action, a suit filed by the EEOC can combat "discrimination on a societal level."[111] Also, the court emphasized an assertion by the *Gilmer* court that arbitration agreements "will not preclude the EEOC from bringing actions seeking class-wide and equitable relief."[112] Therefore, the court held that the EEOC could not be compelled to arbitrate its claim against Waffle House.[113]

The court then noted that it is important to balance the EEOC's public role of ending employment discrimination with the federal policy favoring arbitration agreements.[114] Allowing the EEOC to pursue Baker's individual claim would "significantly trample this strong policy favoring arbitration."[115] In balancing these competing policies, the court adopted the reasoning of the Second Circuit in *Kidder, Peabody*, which held that the EEOC may seek injunctive relief in federal court for employees even when they have entered into arbitration agreements.[116] However, the EEOC may not seek purely monetary relief for such employees.[117] The court reasoned that when the EEOC seeks monetary relief for an individual, the public interest is minimal because the agency is suing primarily for the benefit of the charging party, and, therefore, the pro-arbitration goals of the FAA outweigh the EEOC's right to sue in court.[118] Only a more important policy would justify allowing the EEOC to pursue claims that the employee is barred from pursuing in court.[119] The EEOC's goal of eliminating employment discrimination "may be such a policy in *certain contexts* . . . ."[120] The court then concluded that the public interest the EEOC seeks to vindicate is highest when it is seeking "large-scale injunctive relief" and lowest when it is only seeking enforcement of an individual's claim.[121] When the EEOC seeks broad injunctive relief, the public interest is greater and so the policy of allowing the EEOC to sue in federal court to eradicate workplace discrimination outweighs the federal policy favoring arbitration agreements.[122]

The court went on to hold that the EEOC was permitted to seek a "permanent injunction enjoining [Waffle House] from discharging individuals and engaging in any other employment practice which discriminates on the basis of disability" and an order compelling Waffle House "to institute and carry out policies . . . which

109. *Waffle House*, 193 F.3d at 811.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 812.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices."[123] At the same time, the court held that the EEOC cannot sue in federal court to seek individual remedies for Baker.[124]

V. COMMENT

The Fourth Circuit struck a fair balance in *Waffle House* between the competing policies of upholding private arbitration agreements and preserving the EEOC's power to end employment discrimination. In striking this compromise, the court rejected Waffle House's argument that the EEOC must submit its claims to arbitration if the individual alleging discrimination has signed an arbitration agreement.[125] At the same time, the court refused to allow the EEOC to seek money damages on behalf of employees who have agreed to submit employment disputes to court.[126] In reaching its decision, the court followed the reasoning of the Second Circuit in *Kidder, Peabody*,[127] which was inspired by the holding of the United States Supreme Court in *Gilmer*.[128]

Two policies are at stake in *Waffle House*: the federal policy of enforcing arbitration agreements and the goal of the EEOC to eliminate employment discrimination. The conflict is in reaching a fair compromise that does not undermine the goals of either policy. A driving force behind the court's holding in *Waffle House* was its characterization of the EEOC's role as one of serving the "public interest" when it seeks to prevent employment discrimination.[129] From there, the court proceeded to identify those claims where the public interest was most significant — when the EEOC is seeking broad, injunctive relief — in an effort to determine when to tip the scales in favor of the EEOC.[130] There is nothing unique about this characterization. Other courts have already held that when an employee waives, settles, or litigates a claim, the EEOC is limited to seeking injunctive relief.[131] Therefore, the idea that an individual may limit the scope of relief that the EEOC may seek on her behalf, by settling or agreeing to waive a claim, is nothing new.

The Sixth Circuit believes this compromise undercuts the ability of the EEOC to guard the public interest against employment discrimination because injunctive orders are not a strong enough incentive to make employers avoid discriminatory practices.[132] The threat of a backpay award is what provides the motivation for many

123. *Id.*
124. *Id.*
125. *Id.* at 809.
126. *Id.* at 812.
127. 156 F.3d 298.
128. 500 U.S. 20.
129. 193 F.3d at 812.
130. *Id.*
131. *See Kidder, Peabody & Co.*, 156 F.3d at 302.
132. *Frank's Nursery*, 177 F.3d at 466 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975)).

employers to avoid discrimination.[133] The court found support for its view in the amendments to Title VII, which gave the EEOC power to sue in federal court.[134] The court found further support for its holding in the Civil Rights Act of 1991, which afforded the EEOC the remedies of compensatory and punitive damages.[135] "If Congress believed the EEOC could effectively eradicate employment discrimination through injunctive remedies alone, it would not have empowered the EEOC to obtain more."[136] The threat of a monetary penalty may, in fact, be a more effective deterrent to employment discrimination. An employee is still free, however, to seek monetary awards through arbitration. Once an employee has agreed to submit her claims to an arbitrator, however, it would undermine the agreement if the EEOC could then turn around and sue on her behalf for those very same claims.

Under the enforcement scheme of Title VII, it is the EEOC, and not the individual, who has the power to decide whether the EEOC will sue or whether it will be left to the individual to pursue the claim.[137] The Sixth Circuit appears to be concerned about giving individuals the right to sign agreements that trump the ability of the EEOC to sue in its own name. However, the holding in *Waffle House* does not take away the power of the EEOC to sue in its own name, it simply controls the remedy it may seek in court in those cases where an employee has signed a private arbitration agreement. The EEOC still retains the power to seek broad injunctive relief, and the court in *Waffle House* made it very clear that it recognized the independent authority of the EEOC to sue, regardless of the action taken by individuals. It is true that the holding in *Waffle House* limits the scope of the EEOC's action in cases where employees have signed arbitration agreements. The alternative, however, would be to give the EEOC the power to trump private arbitration agreements in cases where it decides to pursue money damages in court on behalf of employees who have already signed contracts stating they will submit their claims to arbitration. Such a policy would tip the scales completely in favor of the EEOC at the expense of federal policies favoring private arbitration agreements. The compromise in *Waffle House* does a better job of protecting both interests without allowing one policy to overshadow the other.

One final sticking point between the *Waffle House/Kidder, Peabody* courts and the *Frank's Nursery* court is their contrary interpretations of *Gilmer*. The court in *Frank's Nursery* reads *Gilmer* more narrowly, stating that while the *Gilmer* Court is silent on the issue of money damages, there is no reason to believe the Court meant to preclude the EEOC from seeking money damages on behalf of employees who sign arbitration agreements.[138] This may be true, but such a reading of *Gilmer* involves as much guesswork as does a broader reading. The fact is, the *Gilmer* Court simply did not address the issue. Therefore, it is unfair to imply that the *Waffle House* court based its holding entirely on a broader reading of *Gilmer*. Because of this gap in the law, the court turned to other sources, including the *Kidder, Peabody*

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 461.

and *Frank's Nursery* decisions, legislative history, and the policy issues at stake, before reaching its holding.[139]

At least two judges have asked for guidance from Congress on the issue of balancing the policies behind the FAA and employment discrimination laws.[140] Judge Feinberg gave unenthusiastic support for the *Kidder, Peabody* decision, concluding that the majority did not apply the law incorrectly, but adding that the law is unclear and needs to be re-examined.[141] Given the lack of guidance the courts have received from Congress in this area, the *Waffle House* court has done an adequate job of trying to strike a fair compromise. The arguments raised by *Frank's Nursery*, however, also have merit. Until Congress provides judges with more direction in this area, courts will be left to search for clues in legislative history, dicta and policy arguments. Using those sources, judges can find support for either side of this argument. Without clear guidance from Congress, this new split of authority will continue to confound this already complex area of the law, leaving the door open for judges to choose whichever policy argument they agree with most.

VI. CONCLUSION

Finding a common ground between federal policies aimed at protecting private arbitration agreements and the more collectivist goals of anti-discrimination laws is not an easy task. The *Waffle House* court, in choosing to follow *Kidder, Peabody*, has adopted a balancing test that preserves both policies. The public interest is greater when the EEOC is seeking broad injunctive relief than when it is simply seeking money damages on behalf of one individual. Allowing the EEOC to pursue injunctive relief, but not money damages, in cases where employees have signed arbitration agreements does little to compromise the anti-discrimination goals of federal statutes and also protects private arbitration agreements. The *Frank's Nursery* court raises a good argument in taking the position that the EEOC should not be limited by an individual's private arbitration agreement in deciding which remedies to seek. Without clear direction from Congress, however, the *Waffle House* court does a better job of balancing all the interests at stake.

SARAH BAXTER

139. *Waffle House*, 193 F.3d at 812.

140. *See Frank's Nursery*, 177 F.3d 448, 471 (Nelson, J. concurring in part and dissenting in part); *Kidder, Peabody & Co.*, 156 F.3d 298, 304 (Feinberg, J. concurring).

141. 156 F.3d at 304.