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# Does An Employee's Binding Arbitration Agreement Limit The Enforcement Powers Of The EEOC?: The Supreme Court Rules That it Does Not

*Equal Employment Opportunity Comm. v. Waffle House*<sup>1</sup>

## I. INTRODUCTION

The Federal Arbitration Act (“FAA”)<sup>2</sup> was adopted in 1925, with the purpose of reversing the trend of judicial hostility towards arbitration.<sup>3</sup> Over the past 75 years, the FAA has had a dramatic effect on litigation, as well as on alternative dispute resolution. However, since the FAA was reenacted and codified in 1947, the FAA has not been amended.<sup>4</sup> This lack of amendment has been the source of much controversy, because Acts that have been codified since 1947 have not always been consistent with the FAA.

One such Act is the Civil Rights Act of 1964.<sup>5</sup> Title VII of the Civil Rights Act of 1964 created the Equal Employment Opportunity Commission (“EEOC”).<sup>6</sup> Initially, the EEOC only had the power to investigate claims of workplace discrimination and to attempt a reconciliation between the employer and the employee, but the EEOC could not file suit.<sup>7</sup> In 1972 Congress adopted the Equal Employment Opportunity Act of 1972, which drastically expanded the power of the EEOC. One such change was to allow the EEOC to file a claim in its own name and to seek reinstatement as well as back-pay on behalf of the employee.<sup>8</sup> In 1991, Congress again amended Title VII to allow the recovery of compensatory and punitive damages by a “complaining party.”<sup>9</sup> This included individuals as well as the EEOC.<sup>10</sup> Therefore, the EEOC can effectively file a claim and recover damages, which will be paid to the injured employee, without the employee ever having filed a claim in court.

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

2. 9 U.S.C. § 1-16 (2000).

3. For an extended discussion see Joyce E. Taber, Student Author, *An Unanswered Question About Mandatory Arbitration: Should a Mandatory Arbitration Clause Preclude the EEOC From Seeking Monetary Relief on an Employee's Behalf in a Title VII Case?*, 50 Am. U. L. Rev. 281 (2000).

4. *Waffle House*, 534 U.S. at 288-289.

5. Pub. L. No. 88-352, 78 Stat. 241 (July 12, 1964).

6. 42 U.S.C. § 2000e-4 (2000).

7. See generally *Gen. Telephone Co. of the N.W., Inc. v. EEOC*, 446 U.S. 318, 325-326 (1980) (explaining the limited enforcement provisions originally granted the EEOC prior to the 1972 amendments).

8. 42 U.S.C. § 2000e-5(f) to (g) (2000).

9. 42 U.S.C. § 1981a(1) (2000).

10. 42 U.S.C. § 1981a(d)(1)(A) (2000).

The friction between the FAA and Title VII arises when an injured employee has signed an arbitration agreement with an employer and subsequently experiences discrimination in some fashion in the workplace. The FAA would require that the employee take the action to arbitration, whereas if the EEOC found probable cause, it could file in its own name and avoid the arbitration agreement. So, should the EEOC be allowed to recover on the behalf of an employee who has signed an arbitration agreement? A circuit split on this issue prompted the Supreme Court to grant certiorari in *EEOC v. Waffle House*.<sup>11</sup>

## II. FACTS AND HOLDING

On June 23, 1994, Eric Scott Baker ("Baker") applied for a job at a Waffle House in South Carolina.<sup>12</sup> As part of his employment application, Baker had to sign an arbitration agreement,<sup>13</sup> in which he agreed that "any dispute or claim" arising from his employment with Waffle House would be "settled by binding arbitration."<sup>14</sup> On August 10, 1994, Baker began working for Waffle House as a grill operator.<sup>15</sup> Just over two weeks later, Baker suffered an epileptic seizure while at work.<sup>16</sup> On September 5, 1994, Waffle House fired Baker.<sup>17</sup>

Baker did not seek arbitration, but instead filed a timely charge of discrimination with the EEOC, alleging that his discharge violated Title I of the Americans with Disabilities Act of 1990 ("ADA").<sup>18</sup> The EEOC commenced an investigation of the claim and found that there was probable cause.<sup>19</sup> After failing to negotiate a settlement between Waffle House and Baker, the EEOC filed a claim against Waffle House in federal district court pursuant to Section 107(a) of the ADA and Section

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11. To see the circuit split, compare *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 458-462 (6th Cir. 1999) (holding that the EEOC can seek both monetary damages and equitable relief when it sue on behalf of an employee who signed a mandatory arbitration agreement) with *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 300-301 (2d Cir. 1998) (holding that the EEOC can only seek injunctive relief when it files an independent suit based on the charges of an employee who signed an arbitration agreement) and *EEOC v. Waffle House*, 193 F.3d 805, 812 (4th Cir. 1999), *rev'd* 534 U.S. 279 (2002) (agreeing with the Second Circuit).

12. Resp.'s Br. 1823, 2 (1999).

13. *Waffle House*, 534 U.S. at 282. In particular the agreement states:

"The parties agree that any dispute or claim concerning Applicant's employment with Waffle House will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties. . . . The costs and expenses of the arbitration shall be borne evenly by the parties."

*Id.*

14. *Id.*

15. *Id.* at 283.

16. *Id.*

17. *Id.*

18. *Id.* See 42 U.S.C. § 12112(a) (2000). The ADA provides the following: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment."

19. *Waffle House*, 534 U.S. at 283.

102 of the Civil Rights Act of 1991.<sup>20</sup> Baker was not a party to the action.<sup>21</sup> The EEOC sought injunctive relief to “eradicate the effects of [respondent’s] past and present unlawful employment practices,” as well as make whole relief for Baker, including back pay, reinstatement, compensatory damages, and punitive damages.<sup>22</sup>

In response to the complaint, Waffle House filed a petition to compel arbitration and to stay proceeding pursuant to the FAA.<sup>23</sup> The District Court denied the motion after determining that Baker’s employment contract did not include the arbitration agreement.<sup>24</sup> Waffle House filed an interlocutory appeal, which was granted by the United States Court of Appeals for the Fourth Circuit.<sup>25</sup> The Fourth Circuit held that an enforceable arbitration agreement between Baker and Waffle House did exist.<sup>26</sup> The Fourth Circuit then decided, “what effect, if any, the binding arbitration agreement between Baker and Waffle House has on the EEOC, which filed this action in its own name both in the public interest and on behalf of Baker.”<sup>27</sup> The Court determined that the EEOC was not bound by the arbitration agreement and had independent statutory authority to bring suit in federal court.<sup>28</sup> However, the Court went on to find that the EEOC could not seek victim specific relief, but was instead limited to injunctive relief.<sup>29</sup>

The EEOC sought certiorari from the United States Supreme Court, and the Supreme Court reversed the holding of the Fourth Circuit.<sup>30</sup> The Supreme Court found that Title VII and the ADA “unambiguously authorize the EEOC to obtain relief that it seeks in its complaint [injunctive as well as make-whole relief specific to Baker] if it can prove its case against respondent.”<sup>31</sup> Furthermore, the Court held that, “[t]here is no language in the statute [Title VII] or in either of these cases [*Occidental Life*<sup>32</sup> and *General Telephone*<sup>33</sup>] 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.”<sup>34</sup>

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20. *Id.* See 42 U.S.C. § 12117(a) (2000); 42 U.S.C. § 1981(a)(2000).

21. *Waffle House*, 534 U.S. at 283.

22. *Id.* See 42 U.S.C. § § 2000e-5(f) to (g) (2000) (stating that EEOC can file a claim seeking back pay, reinstatement, compensatory damages, and punitive damages on behalf of employee).

23. *Waffle House*, 534 U.S. at 284.

24. *Id.* The district court based its decision on the fact the Baker had applied for a job at a Waffle House in Columbia, South Carolina, but was ultimately hired at a different Waffle House in West Columbia, South Carolina, without filling out a new employment application.

25. *Id.*

26. *Waffle House*, 193 F.3d at 808.

27. *Id.* at 809.

28. *Id.* at 811-12.

29. *Id.* at 812-13. The majority explained that, “[w]hen the EEOC seeks ‘make-whole’ relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC’s right to proceed in federal court because in that circumstance, the EEOC’s public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public, interests. On the other hand, when the EEOC is pursuing large-scale injunctive relief, the balance tips in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC’s action.” *Id.* at 812.

30. *Waffle House*, 534 U.S. at 285.

31. *Id.* at 287.

32. *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355 (1977).

33. *Gen. Telephone*, 446 U.S. 318.

34. *Waffle House*, 534 U.S. at 288.

In discussing the FAA, the Court noted that “nothing in the statute [the Federal Arbitration Act] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement.”<sup>35</sup> In its holding the Court stated:

[P]ursuant to Title VII and the ADA, whenever the EEOC chooses . . . to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make whole relief for the employee, even when it pursues entirely victim-specific relief. To hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not even contemplate the EEOC’s statutory function.<sup>36</sup>

The Court stated in plain language that: 1) the EEOC has independent statutory authority to seek victim specific relief; and 2) nothing in the FAA speaks of holding non parties to a private arbitration agreement, and therefore, the EEOC was free to seek all remedies available to it under federal law.<sup>37</sup>

### III. LEGAL BACKGROUND

#### A. The EEOC

The EEOC was originally created by Title VII of the Civil Rights Act of 1964.<sup>38</sup> As originally enacted, Title VII authorized only a private right of action by employees, and a public right of action by the Attorney General in cases involving a pattern or practice of discrimination.<sup>39</sup> The EEOC had the power to process claims of discrimination and to attempt conciliation with employers, but could not file suit.<sup>40</sup>

In 1972, Congress amended Title VII to allow the EEOC independent authority to bring suit in court, in both individual, and pattern or practice cases.<sup>41</sup> These 1972 amendments created a dual system of enforcement, in which the EEOC was to “bear the primary burden of litigation, but the private action previously available under § 706 was not superseded.”<sup>42</sup> Before any suit can be brought, a charge must be filed with the EEOC.<sup>43</sup> The EEOC will then investigate the claim, and determine if there is probable cause. If probable cause is found, the EEOC must attempt to conciliate the charge.<sup>44</sup> If conciliation fails, the EEOC may bring an enforcement action in its

35. *Id.* at 289.

36. *Id.* at 296. Compare with the Fourth Circuit’s holding in *Waffle House*, 193 F.3d at 805.

37. *Waffle House*, 534 U.S. at 288, 294.

38. Pub. L. No. 88-352, § 701, 78 Stat. 253 (1964).

39. See *Gen. Tel. Co.*, 446 U.S. at 325-326 (holding that EEOC may bring civil action against employer under Title VII claim).

40. *Id.* at 325.

41. 42 U.S.C. 2000e-5(a) (2000); 42 U.S.C. 2000e-5(f)(1) (2000); 42 U.S.C. 2000e-6(c) (2000).

42. *Gen. Tel.*, 446 U.S. at 326.

43. 42 U.S.C. § 2000e-5(b) (2000).

44. *Id.*

own name, or may issue a right-to-sue letter to the individual so that individual can then proceed in litigation.<sup>45</sup> If the EEOC decides to file in its own name, an employee may intervene, but may not initiate a suit in her own name.<sup>46</sup> Regardless of who brings the suit, whether it be the EEOC or the employee, the relief available is the same, which includes injunctive relief, back pay, and reinstatement.<sup>47</sup>

### B. *The FAA*

Congress enacted the FAA in 1925 to reverse a longstanding judicial hostility toward arbitration that American courts inherited from the English common law.<sup>48</sup> The purpose for its passage was to ensure judicial enforcement of privately made agreements to arbitrate.<sup>49</sup> The FAA accordingly provides that written agreements to arbitrate that are covered by the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract."<sup>50</sup>

The Supreme Court has recognized that the FAA manifests a "liberal federal policy favoring arbitration agreements."<sup>51</sup> Thus, when ruling on a petition to compel arbitration under Section Four of the FAA, a court must ask two questions: First, have the parties executed an arbitration agreement that covers the dispute in question? Second, has one of the parties refused to abide by the agreement?<sup>52</sup> If both of these questions are answered in the affirmative, then the court is compelled to grant the petition for arbitration.<sup>53</sup>

### C. *Friction between the EEOC and the FAA*

The United States Supreme Court strengthened the FAA in the case of *Gilmer v. Interstate/Johnson Lane Corporation*.<sup>54</sup> In *Gilmer*, the EEOC sued on behalf of an employee who alleged that his employer violated the Age Discrimination in Employment Act ("ADEA") by terminating him because of his age.<sup>55</sup> The employee, Gilmer, had agreed to arbitrate any employment disputes that he had with his employer.<sup>56</sup> The Supreme Court, relying in part on the FAA, held that the ADEA

45. 42 U.S.C. § 2000e-5(f)(1) (2000).

46. *Id.*

47. 42 U.S.C. § 2000e-5(g)(1) (2000).

48. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (holding that claim was subject to compulsory arbitration because of arbitration agreement).

49. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (holding that court should compel arbitration on issues where an arbitration agreement has been signed).

50. *Id.* at 218.

51. *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)).

52. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (holding that parties must arbitrate issues pursuant to arbitration agreement unless evidence shows parties meant to withhold issue from arbitration).

53. *Id.*

54. *Gilmer*, 500 U.S. at 20.

55. *Id.* at 23.

56. *Id.*

claim could not be litigated and had to be pursued through arbitration.<sup>57</sup> The Supreme Court noted: "it is clear that statutory claims may be the subject of an arbitration agreement, pursuant to the FAA,"<sup>58</sup> and "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."<sup>59</sup>

An employment discrimination suit in a judicial setting is both time consuming and expensive.<sup>60</sup> In an attempt to avoid the courtroom, many employers now require prospective employees to agree to arbitrate any employment dispute that the employee may have with his or her employer.<sup>61</sup> The question then is whether the EEOC can pursue compensatory and punitive damages in federal court on behalf of an employee who has waived his right to a judicial forum by signing an arbitration agreement with his or her employer.

#### D. The Circuit Split

On October 6, 1999, the Fourth Circuit joined the Second Circuit in holding that the EEOC is precluded from obtaining monetary relief on behalf of an employee who has signed an arbitration agreement, though the EEOC would still be free to pursue injunctive relief.<sup>62</sup> After finding that there was an enforceable arbitration agreement, the court then looked at the effect it had on the parties.<sup>63</sup> The EEOC argued that it never agreed to arbitrate its statutory claim, and that under its statutory mandate, it had power to bring an action in federal court where venue is proper.<sup>64</sup> The Fourth Circuit held in favor of the EEOC.<sup>65</sup>

The court's next step was to discuss the power of the EEOC, emphasizing its statutory mandate and the purposes of enforcement of the antidiscriminatory employment laws.<sup>66</sup> The Fourth Circuit found that the "statutory structure of Title VII's enforcement remedies reflects the notion that the scope of the public interest exceeds that of the individual's interest."<sup>67</sup> Moreover, the court acknowledged that the Supreme Court implicitly recognized that under *Gilmer*, the EEOC is not bound by private arbitration agreements when acting in its public role.<sup>68</sup>

Despite these findings, the Fourth Circuit went on to hold against the EEOC. The court determined that when the EEOC is seeking victim specific relief, the FAA

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57. *Id.* at 26-27.

58. *Id.* at 26.

59. *Id.* (quoting *Moses H. Cone*, 460 U.S. at 24).

60. An employment discrimination suit takes approximately two and a half years from the day the complaint is filed to the day the trial begins; the average cost for an employer to defend an employment discrimination suit is \$130,000. Steven A. Brehm, *Does EEOC v. Frank's Nursery & Crafts, Inc. Create an End Run Around Arbitration Agreements?: Whether an Employee's Binding Arbitration Agreement Precludes the EEOC From Seeking Back Pay and Damages on Behalf of the Employee*, 39 Brandeis L.J. 693, 696 (2001).

61. *Id.*

62. *Waffle House*, 193 F.3d 805; *Kidder*, 156 F.3d 298.

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

64. *Id.*

65. *Id.*

66. *Id.* at 809-810.

67. *Id.* at 810.

68. *Id.* at 811 (citing *Gilmer*, 500 U.S. at 32).

will outweigh the potential public benefits, and therefore, the EEOC would be precluded from seeking damages in court.<sup>69</sup>

In the United States Court of Appeals for the Second Circuit's case of *EEOC v. Kidder, Peabody & Company*, the EEOC sued an employer for discriminating against its employees by terminating employees over the age of 40.<sup>70</sup> The *Kidder, Peabody* court held that the EEOC was precluded from seeking monetary relief on behalf of an employee when that employee had signed an arbitration agreement with his employer.<sup>71</sup> To justify this, the Second Circuit asserted: "the FAA's liberal federal policy favoring arbitration agreements supports the conclusion that where the individual has freely agreed to arbitrate a claim, that decision, like the decision to waive or settle a claim, prevents the EEOC from pursuing monetary remedies on behalf of the individual."<sup>72</sup> The court did recognize that the threat of an award of monetary damages is important to the effective enforcement of employment discrimination statutes.<sup>73</sup> However, the Second Circuit stated that their decision "does not prevent the recovery of monetary damages; rather the employee is free to seek such remedies through the arbitral process."<sup>74</sup> The court reasoned that the possibility of a money judgment obtained by an individual through the arbitration process would not have any less "deterrent value" than the award in court.<sup>75</sup> The court concluded that to allow an individual who has agreed to arbitrate his claims "to make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages on his or her behalf would undermine the *Gilmer* decision and the FAA."<sup>76</sup>

On April 23, 1999, the United States Court of Appeals for the Sixth Circuit chartered a course different than that of the Second and Fourth Circuits. In the Sixth Circuit case of *EEOC v. Frank's Nursery & Crafts, Inc.*,<sup>77</sup> the court held that an arbitration agreement between an employee and her employer did not preclude the EEOC from seeking monetary relief on behalf of the employee for the employee's Title VII claims.<sup>78</sup> The *Frank's Nursery* court stated that allowing the EEOC to pursue monetary relief on behalf of the employee would not undermine the FAA or the Supreme Court's decision in *Gilmer*.<sup>79</sup> First, the *Frank's Nursery* court determined that "Congress crafted Title VII so that the EEOC would possess an independent right to sue in federal court to vindicate the public interest against employment discrimination."<sup>80</sup> Therefore, the court reasoned that the interest in protecting the EEOC's ability to control every Title VII action outweighs the interest in enforcing arbitration agreements.<sup>81</sup> Next, the court reasoned:

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69. *Id.* at 812.

70. *Kidder*, 156 F.3d 298.

71. *Id.* at 300-301.

72. *Id.* at 302 (quoting *Moses H. Cone*, 460 U.S. at 24).

73. *Id.* at 303.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Frank's Nursery*, 177 F.3d 448.

78. *Id.* at 459.

79. *Id.* at 461.

80. *Id.*

81. *Id.*

Presumably, under *Gilmer*, if an individual subject to an arbitration agreement filed a charge with the EEOC and ultimately received a right to sue letter, that individual would have a private cause of action that she agreed to waive by her prospective agreement to arbitrate. However, if an individual subject to an arbitration agreement filed a charge with the EEOC and put the EEOC on notice of employment practices violative of Title VII, and the EEOC in turn exercised its right to sue, that individual would no longer possess a private cause of action subject to her prior agreement to arbitrate. Rather, the EEOC would have a cause of action on behalf of that individual and the public interest would fall outside the arbitration agreement.<sup>82</sup>

The *Frank's Nursery* court also noted that their decision would not render arbitration agreements useless. The court concluded that the "[EEOC's] resources to pursue discrimination are limited, and the majority of employees who have signed arbitration agreements will therefore not have the benefit of EEOC involvement."<sup>83</sup>

#### IV. INSTANT DECISION

Within the first few lines of this rather short United States Supreme Court opinion, one could effectively surmise what the outcome would be.<sup>84</sup> The Supreme Court stated that the starting point of their analysis would begin with "the provisions of Title VII defining the EEOC's authority."<sup>85</sup> The Court then went on to describe those powers that had been given to the EEOC under federal statute. The Court specifically noted the numerous amendments to Title VII, with each granting added power to the EEOC.<sup>86</sup>

Next, the Court looked to the FAA, and noted that it has not been amended since the enactment of Title VII in 1964.<sup>87</sup> The Court emphasized that nothing in the FAA "mention[s] enforcement by public agencies . . . [and the FAA] does not purport to place any restriction on a nonparty's choice of a judicial forum."<sup>88</sup> From there, the Court criticized the Fourth Circuit's balancing test of "competing policies" on the grounds that the Fourth Circuit should have looked at the statutes and to the agreement itself.<sup>89</sup>

Additionally, the Court rejected the Fourth Circuit's finding that to allow the EEOC to pursue victim-specific relief "would significantly trample" the strong federal policy favoring arbitration.<sup>90</sup> This is because the EEOC only actually files

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82. *Id.* at 462.

83. *Id.* at 468 (quoting *Kidder*, 156 F.3d at 304).

84. I base this on the idea that had the Supreme Court opted to side with the FAA, then the Supreme Court would have began its analysis with the strong federal policy favoring arbitration, but instead the Court started with the powers of the EEOC.

85. *Waffle House*, 534 U.S. at 285-86.

86. *Id.* at 286-87.

87. *Id.* at 288-89.

88. *Id.* at 289.

89. *Id.* at 290

90. *Id.*

claims in very few cases, leaving the vast majority of arbitration agreements untouched.<sup>91</sup>

The Supreme Court boils its criticism of the Fourth Circuit's ruling down into one simple sentence: "[t]he compromise solution reached by the Court of Appeals turns what is effectively a forum selection clause into a waiver of a nonparty's statutory remedies."<sup>92</sup> The Court very simply found that the EEOC has the independent right to pursue victim-specific relief per Title VII, and nothing in the FAA prohibits such a finding.<sup>93</sup> Furthermore, the FAA only seeks to compel arbitration of parties who agree to arbitrate, and since the EEOC was not a party to the arbitration agreement, they cannot be prohibited from bringing a claim in federal court.<sup>94</sup>

### *A. The Dissent*

Justice Thomas wrote the dissent which was supported by Justice Scalia and Chief Justice Rehnquist. Justice Thomas began his analysis by pointing out that the EEOC had the power to *seek* certain damages, but that it is the job of the courts to determine what relief is appropriate.<sup>95</sup> Thomas then proceeded to state that victim-specific relief in this case is not appropriate for two reasons.<sup>96</sup> First, the EEOC must take a victim as they find her.<sup>97</sup> Second, finding for the EEOC in this case would "contravene the liberal federal policy favoring arbitration agreements embodied in the FAA."<sup>98</sup>

Under the first reason, Thomas pointed out that the "EEOC's ability to obtain relief is often limited by the actions of an employee on whose behalf the Commission may wish to bring a lawsuit."<sup>99</sup> Limiting factors include *res judicata*, an employee's failure to mitigate, and an employee settling the claim.<sup>100</sup> The dissent states:

In all of the aforementioned situations, the same general principle applies: to the extent that the EEOC is seeking victim-specific relief in court for a particular employee, it is able to obtain no more relief for that employee than the employee could recover for himself by bringing his own lawsuit.<sup>101</sup>

Under this reasoning, Thomas found that the EEOC should be precluded from seeking relief on behalf of Scott Baker, because Scott Baker could not seek it himself.<sup>102</sup>

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91. *Id.* at 290 n. 7.

92. *Id.* at 295.

93. *Id.* at 295-96.

94. *Id.* at 293-94..

95. *Id.* at 301-02..

96. *Id.* at 304.

97. *Id.*

98. *Id.* at 308.

99. *Id.* at 304.

100. *Id.* at 304-05.

101. *Id.* at 305.

102. *Id.* at 308.

Under the second reason, Thomas asserted that the majority asked the wrong question.<sup>103</sup> He stated that the real question is not whether the EEOC should be bound to the arbitration agreement, but rather, should a court give effect to the arbitration agreement entered into between Scott Baker and Waffle House.<sup>104</sup> Thomas found that allowing the EEOC to seek relief on behalf of Baker “eviscerates Baker’s arbitration agreement with Waffle House and liberates Baker from the consequences of his agreement.”<sup>105</sup> Therefore, Thomas found that the EEOC should not be allowed to recover on behalf of Scott Baker, because to allow recovery would go against the policy of the FAA.<sup>106</sup>

## V. COMMENT

“Clash of the Titans” would be a fitting title for this case. Since 1964, the enforcement powers of the EEOC and the strong federal policy favoring arbitration have been headed on a crash course. Congress has amended Title VII multiple times to allow the EEOC greater enforcement powers,<sup>107</sup> while employers are more frequently requiring potential employees to sign arbitration agreements.<sup>108</sup> FAA advocates say that by allowing the EEOC to seek victim-specific relief, arbitration agreements will become ineffective and meaningless. EEOC advocates assert that victim-specific relief is essential to fighting workplace discrimination, and that employers would brush off the EEOC if only faced with the threat of an injunction.<sup>109</sup>

The Supreme Court’s holding was in line with the EEOC position. The Court held: “[i]f injunctive relief were the only remedy available, an employee who signed an arbitration agreement would have little incentive to file a charge with the EEOC.”<sup>110</sup> Furthermore, the Court observed that the FAA would not be “trampled” for two reasons.<sup>111</sup> First, the EEOC has a statutory duty to engage in a conciliation process between the employer and the employee prior to filing a claim.<sup>112</sup> Therefore, alternative dispute methods are preserved and the employer may take advantage of them, prior to the EEOC filing a claim in court. Second, the Court noted that

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103. *Id.*

104. *Id.* at 308-09.

105. *Id.* at 309.

106. *Id.* at 308.

107. Title VII was amended in 1972 to allow the EEOC to file a claim, in its own name, in federal court. Prior to the amendment, the EEOC had no such power and it was up to the Attorney General to file in cases involving a pattern or practice of discrimination. 42 U.S.C. § 2000(e)(6) (1970). Title VII was again amended in 1991 to allow a “complaining party” to seek damages for employment discrimination. Congress specifically defined “complaining party” to include the EEOC. Br. for the Petr. at 18-19, 28 (n.d.).

108. *Waffle House*, 534 U.S. at 296 n. 11 (noting that there are an estimated 3.5 million employees covered by arbitration provisions).

109. For a critical analysis of this, see Brehm, *supra* n. 60; John Taylor, *Helping Those Who Help Themselves: The Fourth Circuit’s Treatment of Agreements to Arbitrate Statutory Employment Discrimination Claims in Brown v. ABF Freight Systems, Inc. and EEOC v. Waffle House, Inc.*, 79 N.C. L. Rev. 239 (2000); Taber, *supra* n. 3.

110. *Waffle House*, 534 U.S. at 296 n. 11.

111. *Id.* at 290 n. 7.

112. *Id.*

arbitration agreements across the board would hardly be affected, because the EEOC files in less than three percent of cases, thus leaving the vast majority of arbitration agreements intact.<sup>113</sup>

The Court's decision is sound for three reasons. First, it is consistent with the FAA and the Court's prior rulings. Second, it has ensured that the EEOC can continue to effectively deter work place discrimination. Third, the Court's ruling has given some sense of bargaining power back to employees and has perhaps slowed the movement toward favoritism of arbitration agreements.

### *A. Consistency with the FAA and Prior Decisions*

The Court's ruling is consistent with the purpose of the FAA, as well as the Court's prior decisions. The FAA is designed to enforce arbitration agreements as between parties that have agreed to arbitrate. The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it "does not require parties to arbitrate when they have not agreed to do so."<sup>114</sup> The purpose of the FAA is to make "arbitration agreements as enforceable as other contracts, but not more so."<sup>115</sup> Furthermore, "the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that arbitration proceed *in the manner provided for in [the parties'] agreement*."<sup>116</sup>

With this purpose and with prior decisions in mind, the Court reasoned that the first question to ask was whether the EEOC agreed to arbitrate.<sup>117</sup> After finding that the answer to this question was no,<sup>118</sup> the Court reasoned that the FAA would not force arbitration on a non-party.

### *B. The EEOC's Continued Power to Deter Discrimination*

The Court's decision ensures that the EEOC will continue to have effective powers to deter work-place discrimination. Prior to 1972, the EEOC could not file a claim on its own behalf.<sup>119</sup> In 1972, Congress realized that "the failure to grant the EEOC meaningful enforcement powers [had] proven to be a major flaw in the operation of Title VII."<sup>120</sup> Therefore, Congress granted the EEOC the power to litigate individual claims. In 1975, the Supreme Court noted that back pay does not simply make the individual victim whole; it provides "the spur or catalyst which causes employers . . . to endeavor to eliminate, so far as possible," their discriminatory practices.<sup>121</sup>

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113. *Id.*

114. *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Jr. U.*, 489 U.S. 468, 478 (1989).

115. *Prima Paint*, 388 U.S. at 404 n. 12.

116. *Volt*, 489 U.S. at 474-75 (emphasis added).

117. *Waffle House*, 534 U.S. at 294.

118. *Id.* The Court stated, "No one asserts that the EEOC is a party to the contract, or that it agreed to arbitrate its claims. It goes without saying that a contract cannot bind a nonparty."

119. *Frank's Nursery & Crafts*, 177 F.3d at 457.

120. *Id.*

121. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

In 1991, Title VII was amended to allow a “complaining party” to seek damages.<sup>122</sup> The first version of the amendment did not include the EEOC in the definition of “complaining party.” However, it was amended to specifically include the EEOC as a complaining party because Congress felt that the earlier version would, “undermine the [EEOC’s] ability to enforce Title VII.”<sup>123</sup>

Had the Court not allowed the EEOC to seek individual relief, the EEOC would return to the same ineffectual position it was in prior to 1972. The Court’s decision reinforces Congress’s goal to provide the EEOC with a full range of powers to effectively deter workplace discrimination.

### C. Employee Bargaining Power

The purpose of the FAA is to make “arbitration agreements as enforceable as other contracts, but not more so.”<sup>124</sup> The concept of a contract is that parties have come to an agreement, through equal bargaining powers. It seems difficult to believe that the average, non-business savvy employee has a lot of say when it comes to what they are *required* to sign before they are hired. It seems more reasonable to surmise that the average person does not have an understanding of an arbitration agreement, but rather is focused on obtaining a job. It is equally unlikely that a potential employee could do much bargaining when it comes to an arbitration agreement, because the local employer probably is ignorant as to what the corporate attorney has included in a contract filled with legalese, and therefore would have no way, and probably no authority, to negotiate.

Prior to this case, the federal policy governing arbitration was turning into a federal policy of arbitration favoritism. Instead of looking at arbitration agreements as any other contract that must be entered into willingly and with some sense of bargaining power, it appeared courts were willing to enforce any agreement that was signed. Here, the Supreme Court steps back and treats this arbitration agreement as it should be treated--as any other contract. The EEOC did not agree to arbitrate, and therefore, they could not be forced to do so.

## VI. CONCLUSION

The Court’s ruling is consistent with the purpose of the FAA as well as the Court’s prior decisions. It ensures that the EEOC will continue to have its full statutory powers to effectively fight work-place discrimination. To have held otherwise would have rendered the EEOC ineffective. While the Court did not agree with the holding of the Fourth Circuit, it did not entirely reject the principles advanced therein. The Court stated: “[E]ven if the policy goals underlying the FAA did necessitate some limit on the EEOC’s statutory authority, the line drawn by the Court of Appeals between injunctive and victim-specific relief creates an uncomfortable fit with its avowed purpose of preserving the EEOC’s public function

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122. 42 U.S.C. § 1981(a)(1)-(2) (2000).

123. Br. of Pet. at 18-19 (n.d) (citing 137 Cong. Rec. 28, 860-28, 861 (1991) (letter from EEOC Chairman Evan J. Kemp, Jr. to Sen. Kennedy)).

124. *Prima Paint*, 388 U.S. at 404 n. 12.

while favoring arbitration.”<sup>125</sup> This sentence seems to imply that the Court would not be opposed to any given limitation on the EEOC’s power, and may well be the focus of future cases that seek to limit the EEOC’s power.

ADAM W. GRAVES

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125. *Waffle House*, 534 U.S. at 294.

