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Will *EEOC v. Waffle House, Inc.* Signal the Beginning of the End for Mandatory Arbitration Agreements in the Employment Context?

Marc A. Altenbernt*

I. INTRODUCTION

Since the inception of several employment and discrimination statutes, arbitration has grown exponentially as an alternative for the adjudication of employment disputes. The reason for this has largely been due to the explosion in employment claims arising from violations of these statutes. Regarding these disputes, the Supreme Court has traditionally held that statutory claims are indeed arbitrable pursuant to a valid arbitration agreement under the Federal Arbitration Act ("FAA").

In an effort to end employment discrimination based on "race, color, religion, sex, or national origin," Congress enacted the Civil Rights Act of 1964 ("Title VII"). In order to adequately effect this calling, the Equal Employment Opportunity Commission ("EEOC") was created as the Act's primary enforcement mechanism. As a general rule, there have never been limi-

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2. *Id.* "Employment litigation has grown at a rate many times greater than litigation in general . . . . almost one thousand percent greater that the increase in all other types of civil litigation combined." *Id.* (quoting Evan J. Spelfogel, *Legal And Practical Implications Of ADR And Arbitration In Employment Disputes*, 11 HOFSTRA LAB. L.J. 247, 248 (1993)).
3. *Infra* notes 40-69 and accompanying text.
5. 42 U.S.C. § 2000e-2 (1994) (mandating that no employer shall hire or fire, or otherwise discriminate against an individual in any way, to adversely affect their employment under Title VII).
tations placed on the powers of the EEOC. However, while arbitration agreements under the FAA and the enforcement powers of the EEOC have been adequately examined separately by the Supreme Court, the issue of how the two directly effect one other had yet to be addressed.

As a result of the Court’s lack of direction concerning the above-mentioned issue, lower courts that have been presented with the problem have found for different results. Thus, when an employee who had signed a prior arbitration agreement was fired by a Waffle House franchise in violation of the Americans with Disabilities Act (“ADA”), the Supreme Court took the opportunity to decide exactly how the EEOC factored into the equation.

This Casenote will analyze the Supreme Court’s decision in EEOC v. Waffle House, Inc. and how it may ultimately effect employers and their use of arbitration agreements. Part II will discuss the evolution of the Court’s reasoning regarding both the EEOC and FAA. Part III discusses the facts of the case, while Part IV will analyze the opinions of the Justices. In Part V, I will examine the impact of the Court’s decision and the effect it may have on the arbitration of statutory claims. Finally, Part VI will conclude this Casenote with some thoughts regarding the Court’s decision.

II. THE HISTORIES OF THE FAA AND THE EEOC

A. The Federal Arbitration Act

The FAA was created with the explicit intent of initiating a federal policy that found arbitration to be an acceptable forum for the resolution of

8. Infra notes 87-110 and accompanying text.
9. The issue has largely been confined to what damages may be sought in which forum. Compare EEOC v. Frank’s Nursery & Craft’s, Inc., 177 F.3d 448 (6th Cir., 1999) (EEOC’s independent statutory authority to bring action against employer for injunctive relief and monetary damages in federal court not affected by employee signing arbitration agreement) with EEOC v. Kiddler, Peabody & Co., 156 F.3d 298 (2nd Cir. 1998) (allowing EEOC to bring action in federal court for injunctive relief, but precluding them from bringing monetary damages claim) Infra notes 112-147.
10. Infra notes 149-257 and accompanying text for facts and analysis of the Waffle House decision.
12. Infra notes 17-148 and accompanying text.
13. Infra notes 149-168 and accompanying text.
15. Infra notes 258-271 and accompanying text.
The Supreme Court eventually echoed this sentiment, stating that the purpose behind the FAA was to "reverse the longstanding judicial hostility to arbitration agreements . . . and to place [them] on the same footing as other contracts." Thus, with the inception of the FAA, Congress sought to effect the prejudice felt by courts towards arbitration. However, the Court's initial treatment of arbitration clauses formed under the FAA was less than amicable.

1. Wilko v. Swan

While Congress' purpose behind the enactment of the FAA was seemingly clear, the Court was slow to react in a manner reflecting this intent. In the 1953 case Wilko v. Swan, the Supreme Court was faced with a case involving a buyer of securities who had sued the seller claiming fraud in violation of section 12(2) of the Securities Act of 1933. Although a signed arbitration agreement existed, the Court held that the buyer could not be compelled to arbitrate his claim. It based its decision on the belief that the substantive rights afforded by the statute would be thwarted if the Court allowed a restriction as to the forum. In response to this holding, lower courts found that arbitration agreements involving statutory rights were largely voidable.

18. Pursuant to section two of the FAA, written arbitration agreements "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Id. at § 2.
23. Id. at 437-438.
24. Richard A. Bales, Compulsory Employment Arbitration and the EEOC, 27 PEPP. L. REV. 1, 11 (1999) (citing Richard G. Shell, The Role of Public Law in Private Dispute Resolution: Reflections on Shearson/American Express, Inc. v. McMahon, 26 AM. BUS. L.J. 397, 404 (1988); Michael G. Holcomb, Note, The Demise of the FAA's "Contract of Employment" Exception?, 1992 J. DISP. RESOL. 213, 216 (1992)). This idea was based on three theories: (1) courts could enforce statutory rights better than arbitrators; (2) it contravened public policy to permit a party to waive her statutory right to a judicial forum by signing a predispute arbitration agreement; and (3) the informality of arbitration made it difficult for courts to correct arbitral errors in statutory interpretation." Bales, supra note 25, at 11 (citing American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827 (2d Cir. 1968)).
2. Alexander v. Gardner-Denver Co.\textsuperscript{25}

Twenty-one years after the Wilko decision, the Supreme Court introduced a line of cases which addressed the arbitrability of civil rights actions brought under Title VII of the Civil Rights Act of 1964.\textsuperscript{26} In Alexander v. Gardner-Denver, the Court held that a union employee could not be compelled to arbitrate his Title VII claim, even though he had signed an arbitration clause as part of a collective-bargaining agreement.\textsuperscript{27} Inherent in the decision was the aforementioned hostility felt for arbitration.\textsuperscript{28}

In Gardner-Denver, the Court considered whether “an employee’s statutory right to a trial de novo under Title VII may be foreclosed by prior submission of his claim to final arbitration under the non discrimination clause of a collective bargaining agreement.”\textsuperscript{29} In support of its holding, the Court stated that the federal courts were granted the ultimate enforcement responsibility over Title VII claims,\textsuperscript{30} and, as a result, private parties played a less significant role in the actual enforcement of the statute.\textsuperscript{31} Furthermore, there was no suggestion in Title VII that a prior arbitral decision precluded the individual claimant from pursuing his claim in federal court.\textsuperscript{32} The Court concluded, after its examination of Title VII, that Congress intended it to “supplement rather than supplant” existing statutes regarding employment discrimination.\textsuperscript{33}

Additionally, a union could not waive an employee’s rights under Title VII.\textsuperscript{34} If it could, it “would defeat the paramount congressional purpose behind Title VII.”\textsuperscript{35} The Court reasoned that claims brought under Title VII were different than those brought under a collective-bargaining agreement.\textsuperscript{36} While rights under a collective-bargaining agreement were conferred for the economic benefit of all union members, Title VII claims concerned an indi-
individual’s right to equal employment opportunities. Finally, the Court found problematic the lack of structural competence of the arbitral process to resolve discrimination claims. Thus, the Court held that one does not forfeit his private cause of action under Title VII due to the signing of a prior arbitration agreement.

3. A Shift in Precedent: The Mitsubishi Trilogy

While the Court had refused to compel arbitration in Title VII cases, it was beginning to move towards the implementation of a wide-ranging policy in favor of agreements under the FAA. The beginning shades of this acceptance became more pronounced in three consecutive cases, known collectively as the “Mitsubishi Trilogy.” In these cases, the Court enforced arbitrations arising under antitrust, racketeering, and securities laws. While it refused to do so explicitly, the Court essentially overruled Wilko in these decisions. In doing so, the Court performed an about face and created a presumption of arbitrability under the FAA. Furthermore, this presumption could only be re-

37. Id. In this regard, the Court distinguished between the contractual rights under the collective-bargaining agreement and the statutory rights under Title VII. By filing a claim under the collective-bargaining agreement, the employee seeks contractual vindication, while filing a claim under Title VII, an employee asserts an independent claim afforded by Congress. Id. at 50.

38. Id. at 56-59. The Court questioned the arbitrator’s ability to preside over statutory claims as well as a lack of procedural safeguards. These safeguards include a record of the proceedings, rules of evidence, and the availability of “rights and procedures” which one would find typical in a civil trial such as discovery and sworn testimony. Id. at 57-58.

39. Id. at 48. The Court specifically stated that one does not forfeit his right to pursue his private grievance in court, even if he first submits his claim to arbitration. Id.


41. Bales, supra note 24, at 14.

42. Mitsubishi, 473 U.S. at 640 (compelling arbitration under agreement arising under the Sherman Antitrust Act).

43. McMahon, 482 U.S. at 238, 242 (compelling arbitration under agreement arising under both RICO and section 10(b) of the Securities Act of 1934).

44. Rodriguez, 490 U.S. at 485 (compelling arbitration under agreement arising under section 12(2) of the Securities Act of 1933).

45. Id. at 480.

46. Mitsubishi, 473 U.S. at 628. The Court stated: By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the court-
butted with a showing of contrary congressional intent by the party opposing arbitration.47

Possibly the most influential feature of the Court's decisions in the trilogy was its outright rejection of several criticisms formerly held by the Court regarding arbitration. First, the fact that an arbitration clause was formed out of a contract of adhesion was not enough to find it invalid.48 The opposing party must make a showing of fraud or undue influence to invalidate such an agreement.49 Second, the Court attacked the widely-held belief that arbitration was a deficient forum for complicated claims.50 Finally, because the arbitrators were typically "drawn from the legal as well as the business community," fear of incompetence was equally unfounded.51 While the Mitsubishi trilogy involved statutory rights sufficiently different from those arising under Title VII and similar statutes, the Court's shift regarding arbitration evidenced an overall policy shift which would ultimately invade the realm of employment discrimination.

4. *Gilmer v. Interstate/Johnson Lane Corp.*52

The Supreme Court's landmark decision in *Gilmer* is considered by some commentators to be the most important decision involving the mandatory arbitration of statutory claims.53 In it, the Court applied its recently expressed goodwill for arbitration, originally articulated in the Mitsubishi trilogy,54 to cases involving anti-discrimination statutes.55 In doing so, it rejected the substance of *Gardner-Denver* by compelling a plaintiff's Age Discrimination in Employment Act ("ADEA") claim to be arbitrated pursuant to a pre-dispute, mandatory arbitration clause.56

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49. *Id.* at 633.
51. *Mitsubishi*, 473 U.S. at 634.
53. Johnson, *supra* note 28, at 521. In his article, the author stated, "[Gilmer] is the capstone of an evolving affection the Supreme Court has developed for arbitration and is the watershed case in the area of statutory rights and the submission of these rights to arbitration." *Id.* (quoting Cole v. Burns International Security Services, 105 F.3d 1465 at 1467 (1997)).
54. *Supra* notes 40-51 and accompanying text.
55. *Gilmer*, 500 U.S. at 24 (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 n. 6 (1985)).
56. *Id.* at 34. Gilmer marked the first time the Court applied the strong federal policy favoring arbitration to claims brought under civil rights statutes. As discussed, the Court had earlier found claims brought under statutes of a different nature to be arbitrable. See *supra* notes 42-44.
In its decision, the Court reinforced the "liberal federal policy favoring arbitration agreements." In doing so, it refuted practically every argument it had made earlier, in support of its decision in **Gardner-Denver**. The Court began its analysis by explaining that arbitration may act as a proper forum for the resolution of statutory claims, because the rights afforded the resisting party are identical in arbitration and litigation. Furthermore, the Court resisted the common criticisms of the procedural risks that may accompany arbitration, and found it sufficient for the vindication of statutory rights.

While the Court itself recognized that not all claims were proper for arbitration, the burden was on the party seeking to escape arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. Regarding Gilmer's claim, the Court found no such intent to exist under the ADEA. Though the Court's holding dealt specifically with the ADEA, it opened the doors to the arbitration of statutory civil rights claims generally.

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57. **Gilmer**, 500 U.S. at 25 (quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983)). Further, the Court stated, "It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Id.* at 26.

58. **Gilmer**, 500 U.S. at 28 (quoting Mitsubishi, 473 U.S. at 637). The Court compared claims brought under the ADEA with earlier claims brought under the Sherman Act, RICO, or the Securities Act of 1933. **Gilmer**, 500 U.S. at 28. It explained that these laws were all designed to advance "important public policies, but, . . . are appropriate for arbitration." *Id.* In doing so, the Court did away with the largely held belief that arbitration was not a proper forum for the resolution of statutory claims which served broader public policies, such as civil rights. Thus, the Court rejected its earlier feeling that formal adjudication alone was capable of furthering the social purposes with which statutory civil rights claims were created to protect. See *supra* note 38 and accompanying text.

59. **Gilmer**, 500 U.S. at 30. The Court stated that concerns regarding discovery, lack of public record, and unequal bargaining power were insufficient to invalidate arbitration as a process. *Id.* at 30-31.

60. *Id.* at 26.

61. *Id.* (quoting Mitsubishi, 473 U.S. at 628). To establish such an intent, the party must go to the "text of the [statute], its legislative history," or show an "'inherent conflict' between arbitration and the [statute's] underlying purposes." **Gilmer**, 500 U.S. at 26 (quoting McMahon, 482 U.S. at 227). Additionally, throughout this inquiry, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." **Gilmer**, 500 U.S. at 26 (quoting Moses H. Cone, 460 U.S. at 24).

62. **Gilmer**, 500 U.S. at 34.

63. John W.R. Murray, *The Uncertain Legacy of Gilmer: Mandatory Arbitration of Federal Employment Discrimination Claims*, 26 FORDHAM URB. L. J. 281, 286 (1999). As evidence to this, several lower courts have applied the Court's holding to Title VII claims. See Koveleskie
In lieu of its holding, the Court recognized the inherent conflict created by its decisions in *Gardner-Denver* and *Gilmer*. In an effort towards resolution, the Court limited its holding in the former to cases involving collective-bargaining agreements.\(^{64}\) It pointed to several important distinctions that it believed to be relevant. First, *Gardner-Denver* dealt with whether the arbitration of contractual claims precluded subsequent judicial resolution of statutory claims, while the *Gilmer* Court dealt with the enforceability of the arbitration agreement itself.\(^{65}\) The Court reasoned that because the parties in *Gardner-Denver* had not agreed to arbitrate their statutory claims, and the labor negotiator did not have the authority to resolve such claims, employees were not precluded from seeking resolution of statutory claims judicially.\(^{66}\)

The second distinction found by the Court was that the individual’s rights may be subordinate to the collective rights found in a collective-bargaining agreement.\(^{67}\) This necessitated the ability of the individual to have a forum for the vindication of his own rights. Due to there being no collective-bargaining agreement in *Gilmer*, this conflict did not exist.

Finally, the Court stated that, unlike *Gilmer*, *Gardner-Denver* and its progeny were not decided under the FAA, which reflected a strong federal policy favoring arbitration.\(^{68}\) Thus, the Court’s decision in *Gilmer* adequately reflected this policy. With these distinctions, the Court felt that it had successfully resolved the conflict between *Gilmer* and *Gardner-Denver*.\(^{69}\)

### B. The Equal Employment Opportunity Commission

Throughout the Supreme Court’s jurisprudence concerning the arbitration of statutory claims, there have been no cases which directly involved the EEOC.\(^{70}\) While *Gilmer* briefly commented on the EEOC’s authority, the Court had never been presented with a case which involved both a privately

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64. *Gilmer*, 500 U.S. at 33-34.

65. Id. at 35.

66. Id.

67. Id.

68. Id.

69. Since *Gilmer*, practically all lower courts that have been presented with an issue of arbitrability concerning statutory claims have found for arbitration. However, there have been several courts which have found that the statutory claim at issue was not proper for arbitration. *Infra* note 271.

signed arbitration agreement and the EEOC as the claimant.\textsuperscript{71} Thus, until now, the Court had not had the opportunity to resolve the possible conflict between the EEOC and the FAA. For this reason, the Court's decision in \textit{Waffle House} will act as a benchmark for lower courts to follow in regards to the EEOC's role in conflicts involving arbitration agreements.

Congress enacted the Civil Rights Act of 1964 in order to put an end to employment discrimination\textsuperscript{72} on the bases on "race, color, religion, sex, or national origin."\textsuperscript{73} As the primary enforcer of Title VII claims, the EEOC was created to prosecute employers who violated the statute.\textsuperscript{74} However, the EEOC has not always possessed the ability to effectively fight discrimination in the workplace. Under the Civil Rights Act of 1964, the EEOC was limited to the investigation of claims and attempted conciliation of violations, while Congress relied solely on private parties' suits for enforcement.\textsuperscript{75} If attempts at conciliation failed, the EEOC's involvement ceased.\textsuperscript{76} Thus, in an effort to end noncompliance with the statute, Congress amended the Civil Rights Act of 1964 with the Civil Rights Act of 1972.\textsuperscript{77} In it, Congress created a multi-step enforcement scheme by which the EEOC would investigate a claim and ultimately enforce it in federal court.\textsuperscript{78} Under its revised enforcement scheme,

\textsuperscript{71} The \textit{Gilmer} Court did say, however, that an individual claimant under the ADEA who was bound to an arbitration agreement was still free to file a complaint with the EEOC. \textit{Gilmer}, 500 U.S. at 28.

\textsuperscript{72} 42 U.S.C. § 2000e-2 (1994) (mandating that no employer shall hire or fire, or otherwise discriminate against an individual in any way, to adversely affect their employment under Title VII).

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} 42 U.S.C. § 2000e-5(a) (1994). See also H.R. Doc. No. 88-914 (II), at 15 (1964) (stating Congress's intent was to grant the EEOC full responsibility for enforcing Title VII through private actions brought in federal court). The EEOC's enforcement scheme as part of Title VII was incorporated by Congress into the ADA at 42 U.S.C. § 12117(a) (1994).

\textsuperscript{75} Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 358-59 (1977).

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} General Telephone Co. of the NW v. EEOC, 446 U.S. 318, 325-26 (1980).

\textsuperscript{78} The procedure begins with the EEOC alleging that an employer has engaged in unlawful employment practice. Next, a charge must be filed by the EEOC within 180 days and notice must be served upon the employer within 10 days of filing the charge. 42 U.S.C. § 2000e-5(e). The EEOC is then required to investigate the charge and determine its merit. This determination must be made within 120 days from filing the charge. 42 U.S.C. § 2000e-5(b). If the EEOC finds reasonable cause of a violation, it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." \textit{Id.} If the EEOC is unable to secure a conciliation agreement, it may bring a civil action against the employer in federal court. 42 U.S.C. § 2000e-5(f)(1).
the EEOC now possessed the ability to sue employers directly in an effort to adequately enforce the anti-discrimination laws.\textsuperscript{79}

In addition to the EEOC’s general enforcement abilities, Congress granted the Commission the remedy of monetary damages in and effort to aid its enforcement.\textsuperscript{80} Included were back-pay\textsuperscript{81} and compensatory and punitive damages.\textsuperscript{82} The sole purpose behind these remedies, which were modeled on the back-pay provision of the National Labor Relations Act,\textsuperscript{83} was to “render a decree, which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.”\textsuperscript{84} Thus, the ability to seek monetary damages had been determined to greatly aid in the EEOC’s enforcement procedures, due to their compensatory and deterrent effects.

With the inception of the EEOC came its involvement in the resolution of employment discrimination claims. An important issue that accompanied this event was whether the EEOC was subject to the same rules and limitations that bound the individual claimant. The Court’s general response to this question was no. Its decisions in \textit{Occidental Life Insurance Co. v. EEOC}\textsuperscript{85} and \textit{General Telephone Co. of the NW v. EEOC}\textsuperscript{86} reflected this sentiment.

1. \textit{Occidental Life Insurance Co. v. EEOC}\textsuperscript{87}

In \textit{Occidental}, the EEOC brought an action against the insurance company, alleging violations of Title VII for sexually discriminatory employment practices.\textsuperscript{88} The charges were brought approximately three years and two months after the employee had complained to the EEOC.\textsuperscript{89} The District Court granted Occidental’s summary judgment motion, on the grounds that the EEOC has only 180 days to file a charge against an employer in federal court. Further, the Court stated that the Commission was subject to the state

\begin{itemize}
  \item 79. Bales, \textit{supra} note 24, at 7.
  \item 80. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).
  \item 83. \textit{Moody}, 422 U.S. at 419. Under the Act, “making the worker whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.” Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941). Thus, due to the express similarities between the two provisions, the purpose behind both provisions is similar, if not identical. \textit{Moody}, 422 U.S. at 419.
  \item 84. \textit{id.} at 418. (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)).
  \item 85. \textit{Infra} notes 87-100 and accompanying text.
  \item 86. \textit{Infra} notes 101-110 and accompanying text.
  \item 87. 432 U.S. 355 (1977).
  \item 88. \textit{id.} at 357-58.
  \item 89. \textit{id.} at 358.
\end{itemize}

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limitations period of one year. The Ninth Circuit reversed, stating that federal law did not impose a 180 day period on the EEOC, and that the Commission was not bound by any state statute of limitations. The Supreme Court affirmed.

In its decision, the Court cited to the Equal Employment Opportunity Act of 1972, which established the EEOC's ultimate authority to bring an action in federal court. Under the 1972 Act, the only time limitation imposed on the EEOC was a 30 day period after the charge was filed where the EEOC could not commence judicial action. The 180 day period in the statute referred to a time table in which the EEOC retained exclusive jurisdiction over the charge. As such, it did not constitute a statute of limitations.

Next, the Court responded to the state statute of limitations claim. In deciding that one does not apply to the EEOC, the Court stated that Congress envisioned the EEOC to bring an action in federal court only after it had "discharged its administrative duties." As one might imagine, these duties took time, and the Court believed it would not be appropriate to have the EEOC rely on state statutes of limitations for guidance. Additionally, the Court relied on congressional debates in which members of both Houses exhibited open concern about the back log which plagued the EEOC. Thus, forcing the EEOC to abide by time restrictions would seem to violate congressional intent.

90. Id.
91. Id.
92. Id. at 355.
93. For a detailed look at the EEOC's multi-layered approach to enforcement, see supra note 78.
95. Id. at 361. (citing 42 U.S.C. § 2000e-5(f)(1)).
96. Id. at 366.
97. Id. at 368. These duties include the opportunity to "settle disputes through conference, conciliation, and persuasion . . .," as well as investigating the claim. Id.
98. Id. The Court believed that under some circumstances, a state statute of limitations period may directly conflict with Congress' requirement that the EEOC fulfill these administrative duties. Id.
99. Id. at 369.
100. Id. at 370.
2. General Telephone Co. of the NW v. EEOC\textsuperscript{101}

In its decision in \textit{General Telephone}, the Supreme Court stated that the EEOC's purpose was to "prevent any person from engaging in any unlawful practice" as set forth in Title VII.\textsuperscript{102} In \textit{General Telephone}, the EEOC received complaints of sexual discrimination from four General Telephone employees.\textsuperscript{103} After it investigated, the EEOC found reasonable cause to suspect the discrimination being claimed and subsequently filed suit against General Telephone.\textsuperscript{104} The complaint alleged discrimination against females in the company's facilities in California, Idaho, Montana, and Oregon.\textsuperscript{105} General Telephone moved to dismiss the claim due to the EEOC's failure to certify the women as a class under Rule 23 of the Federal Rules of Civil Procedure.\textsuperscript{106}

The Supreme Court ultimately held that the Rule 23 certification requirements did not apply to the EEOC.\textsuperscript{107} It did so because the Commission was proceeding in its own name, pursuant to its statutory authority, and not on behalf of the women.\textsuperscript{108} While the effective enforcement of private rights was one goal with which the EEOC was created,\textsuperscript{109} it was not the only goal. The primary goal of Congress in creating the EEOC was to more effectively vindicate the public interest.\textsuperscript{110} Thus, the Supreme Court found in \textit{General Telephone} that the EEOC possessed the independent authority to investigate claims and enforce Title VII both as a representative of the individual plaintiff, and as a vehicle for the public interest.

When applying the Supreme Court's decisions concerning the EEOC's authority over employment discrimination claims, practically every circuit reflected these prior holdings.\textsuperscript{111} Thus, judicial response was seemingly clear

\begin{itemize}
  \item \textsuperscript{101} 446 U.S. 318 (1980).
  \item \textsuperscript{102} \textit{Id.} at 318.
  \item \textsuperscript{103} \textit{Id.} at 320.
  \item \textsuperscript{104} \textit{Id.}
  \item \textsuperscript{105} \textit{Id.} at 321. The discrimination included restrictions on maternity leave, access to craft jobs, and promotion to managerial positions. The EEOC sought injunctive relief and back pay. \textit{Id.}
  \item \textsuperscript{106} \textit{Id.} at 321-22.
  \item \textsuperscript{107} \textit{General Telephone}, 446 U.S. at 333-34.
  \item \textsuperscript{108} \textit{Id.} at 324.
  \item \textsuperscript{109} \textit{Id.} at 326.
  \item \textsuperscript{110} \textit{Id.}
  \item \textsuperscript{111} EEOC v. General Electric Co., 532 F.2d 359 (4th Cir. 1976) (confirming EEOC's purpose is broader in scope than interests of charging parties); EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529 (2nd Cir. 1996) (stating EEOC is authorized to pursue action against employer for violating ADEA even where no individual claimant exists); EEOC v. Tire Kingdom, Inc., 80 F.3d 449 (11th Cir. 1996) (confirming the EEOC's authority to conduct an investigation into alleged discrimination in the absence of a valid charge of discrimination); EEOC v. United Parcel Ser-  
\end{itemize}
when the EEOC’s statutory authority was questioned. However, as was the case in Waffle House, a question remained which concerned how the Supreme Court would resolve the conflict that existed between the strong federal policy favoring arbitration and the EEOC’s well-recognized authority.

C. The Circuits Attempt to Resolve the Conflict

1. EEOC v. Kidder, Peabody & Co.\textsuperscript{112}

In 1992, the EEOC filed suit against Kidder for alleged violations of the ADEA.\textsuperscript{113} It claimed that the company was in the practice of terminating its older employees on the basis of their age.\textsuperscript{114} The EEOC originally sought back pay, liquidated damages, reinstatement, and injunctive relief.\textsuperscript{115} However, in late 1994, Kidder had discontinued its investment banking operations, and as a result, the EEOC stipulated that it would no longer be seeking injunctive relief.\textsuperscript{116} The EEOC continued to seek back-pay and liquidated damages on behalf of nine of the original seventeen people terminated by Kidder.\textsuperscript{117}

As part of their employment agreement with Kidder, the former employees had signed an arbitration clause.\textsuperscript{118} Once the EEOC stipulated that it would no longer seek injunctive relief, Kidder sought to dismiss the Commission’s claim on the ground that the signed arbitration agreements precluded the EEOC from seeking back-pay and liquidated damages.\textsuperscript{119} The district court granted the motion,\textsuperscript{120} and the EEOC appealed.\textsuperscript{121}

In a case of first impression, the Second Circuit considered how a signed arbitration agreement should affect the EEOC’s authority to enforce discrimi-
nary employment practices and seek all available relief. The court ultimately affirmed the decision of the lower court and found that the EEOC was precluded from seeking monetary damages in federal court when a signed arbitration agreement existed.122 The Second Circuit came to its decision by aligning its reasoning with that of the Gilmer decision.123 In its analysis, the court reiterated the Supreme Court's statement that arbitration agreements would not preclude the EEOC from seeking class-wide or injunctive relief.124 Further, it cited the Ninth Circuit, stating that when the EEOC seeks injunctive relief, "'[i]t promotes the public policy and seeks to vindicate rights belonging to the United States as sovereign.'"125 However, where an "individual has contracted away, waived or unsuccessfully litigated a claim, 'the public interest in a back pay award is minimal.'"126 Finally, the Second Circuit applied the weighing standard utilized by the Ninth Circuit to the arbitration agreement involved in Kidder, and found that the EEOC's pursuit of monetary damages alone had a minimal effect on advancing the public interest.127 Ultimately, the Second Circuit's decision set the stage for the Fourth Circuit's decision in Waffle House, in that it found for bifurcating the forums, depending upon the type of remedy sought.128

2. EEOC v. Frank's Nursery & Crafts, Inc.129

While the Second and Fourth Circuits agreed on how to resolve the competing policy interests between the EEOC and the FAA, the Sixth Circuit did not, and created a split with its decision. Frank's Nursery involved an African American, Carol Adams, who was allegedly passed over for a promotion because of her race.130 Adams subsequently filed suit with the EEOC,

122. Id. at 303.
123. Id. at 301.
124. Kidder, 156 F.3d at 301. Most notably, the court cited to a line of cases that held an individual's settlement or waiver of a claim under the ADEA preempted a subsequent EEOC action on that claim seeking damages for the individual.
125. Id. at 302. (quoting EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1543 (1987)).
126. Id. (quoting Goodyear, 813 F.2d at 1543).
127. Id.
128. Id. at 303. The court found that compelling the claimant to arbitrate his monetary damages claim did not take away the EEOC's mission to further the public interest, or take away the deterrent effect monetary damages serve. Id. However, Judge Feinberg, in his concurring opinion, set the stage for a circuit split regarding the issue. The main thrust of his argument centered on concerns about whether ADEA rights could be adequately vindicated at arbitration. Id. at 304.
129. 177 F.3d 448 (6th Cir. 1999).
130. Id. at 453.
who ultimately brought the Title VII claim for unlawful business practices.\textsuperscript{131} As part of its complaint, the EEOC sought injunction and “make-whole” relief which included back-pay and compensatory and punitive damages.\textsuperscript{132}

Following the complaint, Frank’s moved to compel arbitration pursuant to the FAA and in accordance with the signed arbitration agreement.\textsuperscript{133} The district court found for Frank’s and dismissed the EEOC’s complaint in its entirety.\textsuperscript{134} It based its decision on three conclusions. First, the found the arbitration agreement was enforceable under \textit{Gilmer}\.\textsuperscript{135} Second, the EEOC was bound by Adams’ agreement to arbitrate.\textsuperscript{136} Third, while the EEOC could sue for injunctive relief generally, it could not in this case because it had not identified a class of individuals that suffered discrimination at Frank’s.\textsuperscript{137} The EEOC subsequently appealed to the Sixth Circuit.\textsuperscript{138}

In its appeal, the EEOC challenged only two of the district court’s findings. First, the EEOC argued that the Adams’ agreement to arbitrate did not preclude the EEOC from recovering monetary damages.\textsuperscript{139} Second, the EEOC argued that it should not be barred from seeking injunctive relief against Frank’s.\textsuperscript{140} The court began its analysis by examining the Title VII statute. The court recognized that there were very few limitations imposed on the EEOC’s power to file suit in federal court.\textsuperscript{141} The Sixth Circuit distinguished between the EEOC filing a suit itself in order to advance the public interest

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\textsuperscript{131} \textit{Id.} The precise complaint alleged that Frank’s (1) bypassed Adams for promotion because of her race; and (2) required Adams and other applicants to sign and abide by an application that conditioned employment on waiving statutory rights afforded them by Title VII. \textit{Id.}

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.} at 453-54.

\textsuperscript{134} \textit{Id.} at 454.

\textsuperscript{135} \textit{Frank’s Nursery,} 177 F.3d at 454.

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.} Because only Adams filed a suit with the EEOC, the lower court held that there was no wide-spread pattern of discrimination which necessitated an injunctive order.

\textsuperscript{138} \textit{Id.}

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} \textit{Id.}

\textsuperscript{141} \textit{Frank’s Nursery,} 177 F.3d at 455. The court then went to great lengths to evidence the EEOC’s authority over Title VII claims. During the 180 period after filing suit, the EEOC retains “exclusive jurisdiction over the subject matter of the charge.” \textit{Id.} (citing \textit{General Telephone,} 446 U.S. 318). The individual claimant can only intervene in the action once the EEOC accepts it. \textit{Id.} (citing 42 U.S.C. § 2000e-5(f)(1) (1998)). Also, the individual claimant may not withdraw his claim absent the EEOC’s permission. \textit{Id.} (citing 29 C.F.R. § 1601.10 (1998)). In sum, an individual may not take away the EEOC’s enforcement powers under Title VII.
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and cases where the agency permits the individual to file suit.\textsuperscript{142} In the latter instance, the EEOC issues a "right to sue" letter to the employee.\textsuperscript{143} Thus, as evidenced in Title VII itself, Congress intended the EEOC to have an independent right to sue separately from the individual's. Therefore, to allow the individual to contract away the EEOC's right to do that which it was intended to do would effectively strip it of its congressional purpose.\textsuperscript{144}

Finally, the court dealt with the issue of the EEOC's request for monetary damages.\textsuperscript{145} The court's argument concerning the EEOC's ability to seek monetary damages reflected its earlier contention concerning the EEOC's authority to bring Adams' claim in federal court. Because the EEOC was not a party to the arbitration agreement, it was not bound by it.\textsuperscript{146} Furthermore, the EEOC possessed an independent right to bring its claim in federal court as well as the authority to decide whether or not the claim should be brought at all.\textsuperscript{147} Thus, the court reasoned, the individual claimant could not divest the EEOC of its right to seek monetary damages nor could she override the EEOC's congressional power to sue in its own name.\textsuperscript{148}

III. FACTS OF THE CASE

On June 23, 1994, Eric Baker entered a Waffle House restaurant in Columbia, South Carolina.\textsuperscript{149} As part of the employment application, Mr. Baker was required to agree to an arbitration clause.\textsuperscript{150} Immediately subsequent to submitting his application, Mr. Baker walked into a second Waffle House in West Columbia, South Carolina and spoke to its manager.\textsuperscript{151} The West Columbia manager subsequently interviewed Mr. Baker and hired him.\textsuperscript{152} Mr. Baker began work as a grill operator on August 10, 1994.\textsuperscript{153}

Sixteen days after he began work for Waffle House, Mr. Baker suffered a

\textsuperscript{142} Id. at 456.
\textsuperscript{143} Id. See also 29 C.F.R. § 1601.28 (b) (explaining the process for issuing a right to sue letter by the EEOC).
\textsuperscript{144} Frank's Nursery, 177 F.3d at 458-59.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 460.
\textsuperscript{147} Id. at 466.
\textsuperscript{148} Id.
\textsuperscript{149} EEOC v. Waffle House, 193 F.3d 805, 807 (4th Cir. 1999).
\textsuperscript{150} Id. The clause stated that "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" had to submit to binding arbitration. Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Waffle House, 534 U.S. at 283.
seizure at his home.\textsuperscript{154} likely due to a change in medication prescribed to control the seizures.\textsuperscript{155} After arriving to work the following day, Mr. Baker suffered a second seizure.\textsuperscript{156} He was promptly terminated on September 5, 1994.\textsuperscript{157}

Following the termination, Mr. Baker filed a timely action with the EEOC, stating that his discharge violated the ADA.\textsuperscript{158} After an investigation and attempt at conciliation, the EEOC filed an action against Waffle House in the Federal District Court for the District of South Carolina.\textsuperscript{159} The complaint alleged that Waffle House had terminated Mr. Baker based on his disability, that the violation of the ADA was intentional, and "done with malicious or reckless indifference to [his] federally protected rights."\textsuperscript{160}

In response to the EEOC’s complaint, Waffle House sought to compel arbitration under the Federal Arbitration Act (FAA) and stay the EEOC from litigating its claim in federal court.\textsuperscript{161} The district court found in favor of the EEOC regarding its preclusion in federal court,\textsuperscript{162} and Waffle House appealed to the Fourth Circuit.\textsuperscript{163} The Fourth Circuit ultimately found for two distinct

\footnotesize{\textsuperscript{154} Id.
\textsuperscript{155} Waffle House, 193 F.3d at 807.
\textsuperscript{156} Id.
\textsuperscript{157} Id. In the separation notice, Waffle House stated, "We decided that for [Baker’s] benefit and safety and Waffle House it would be best he not work any more." Id.
\textsuperscript{158} Waffle House, 534 U.S. at 283.
\textsuperscript{159} Id. The EEOC filed its action pursuant to both the ADA, 42 U.S.C. § 12117 (a) and the Civil Rights Act of 1991, 42 U.S.C. § 1981 (a). Id.
\textsuperscript{160} Specifically, the EEOC sought as relief "(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 antidiscrimination policies, practices, and programs to create opportunities and to eradicate the effects of past and present discrimination on the basis of disability; (3) back pay and reinstatement for [Mr.] Baker; (4) compensation for pecuniary and non-pecuniary losses suffered by [Mr.] Baker; and (5) punitive damages." Waffle House, 194 F.3d at 807.
\textsuperscript{161} Waffle House, 534 U.S. at 284.
\textsuperscript{162} Id. The district court denied each of Waffle House’s motions, holding that the arbitration provision that Mr. Baker signed as part of his employment contract was inapplicable because he never signed it pursuant to employment at the West Columbia Waffle House, who ultimately hired and terminated him. Waffle House, 193 F.3d at 808.
\textsuperscript{163} Waffle House, 534 U.S. at 284. On appeal, Waffle House argued that "(1) a valid, enforceable arbitration agreement existed between [Mr.] Baker and Waffle House, and (2) its motion to compel arbitration under § 4 of the FAA should be granted because the arbitration agreement between [Mr.] Baker and Waffle House binds the EEOC to ‘assert [Mr.] Baker’s claim in an arbitral forum.'" Waffle House, 193 F.3d at 808.}

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holding. First, the court concluded that the agreement did not involve the EEOC, and thus, the EEOC possessed the independent statutory authority to bring its action in federal court.164 However, the court precluded the EEOC from seeking victim-specific relief in federal court, in an effort to give some effect to Mr. Baker’s signed arbitration agreement.165 Thus, while the EEOC could seek injunctive relief in federal court, make-whole relief remained subject to an arbitrator’s decision. Due to the conflict among the circuit courts that have considered this very issue,166 the Supreme Court granted certiorari167 to put an end to the confusion.168

IV. ANALYSIS OF THE COURT’S OPINION

A. Justice Stevens’s Majority Opinion

The Court framed the issue as “whether an agreement between an employer and an employee to arbitrate employment-related disputes bars the [EEOC] from pursuing victim-specific judicial relief, such as back pay, reinstatement, and damages, in an enforcement action alleging that the employer has violated Title I of the [ADA].”169 In an effort to answer this question, the Court began with an examination of the EEOC’s statutory authority as stipulated by Title VII.170 It cited to the amendments of the original Civil Rights Act of 1964 as being an express empowerment of the EEOC to seek monetary relief.171 Additionally, the Court recognized the 1991 amendments which allowed for the recovery of compensatory and punitive damages.172 As such, the Court acknowledged the clarity of the EEOC’s authority to seek monetary damages such as those sought in the instant case.173

164. Waffle House, 534 U.S. at 284.
165. Id. The Fourth Circuit stated, “When 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 . . . .” Id. (quoting Waffle House, 193 F.3d at 812).
166. Supra notes 112-148.
169. Id. at 282.
170. Id. at 285. The Court stated that the purpose behind the EEOC’s creation was “to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII of the Civil Rights Act of 1964 when it is enforcing the ADA’s prohibitions against employment discrimination on the basis of disability.” Id. (citing 42 U.S.C. § 12117 (a) (1994)).
171. Id. at 286. Damages include “injuries; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.” Id. n. 5 (quoting 42 U.S.C. § 2000e-5(g)(1) (1994)).
172. Id. at 287. (citing 42 U.S.C. § 1981a(a)(1) (1994)).
173. Waffle House, 534 U.S. at 287.

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The second line of argument that the Court utilized in its examination, was the EEOC's independent authority to bring a discrimination claim in federal court. The Court cited to its prior decisions in General Telephone and Occidental, where it refused to place limitations on the EEOC which would have been placed on an individual claimant. The Court's reasoning, which it extended to the instant case, was that the "EEOC does not function simply as a vehicle for conducting litigation on behalf of parties." Finally, the Court stated that while Congress expressly expanded the EEOC's authority with the 1991 amendments, there was no language to suggest that these abilities were to be limited by the existence of an arbitration agreement.

After examining the EEOC and its statutory authority, the Court went on to discuss the FAA and its purpose. It quoted to section two of the FAA, stating that a contract evidencing an arbitration agreement was presumptively valid. However, under the FAA (as with any contract), the intent of the parties must control. Ultimately, the FAA does not mention enforcement by public agencies and does not control a nonparty's choice of forum.

In the next section of its analysis, the Court directly attacked the Fourth Circuit's reasoning. In sum, it disagreed with the court's implementation of the Second and Ninth Circuit's public policy balancing test. The Court made clear that it was the EEOC's right as a public agency to decide what relief was appropriate and what would serve the public interest, not the individual claimant, and not the court. Further, once the EEOC decided what

174. Id.
175. Id. For a more detailed examination of the Court's decisions in these cases, see supra, notes 87-110 and accompanying text.
176. Id. at 287-88. (quoting Occidental, 432 U.S. at 368).
177. Id. at 288.
178. Id. at 289.
179. Waffle House, 534 U.S. at 289.
180. Id. "[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57.
181. Waffle House, 534 U.S. at 289.
182. Id. at 290.
183. Id. The Court stated that this framework assumes that, unless the EEOC's remedies are limited, the FAA will suffer. However, some benefits of arbitration are already built into the EEOC's statutory scheme. Examples of this are that the EEOC has essentially attempted to resolve the conflict outside of a judicial setting already as part of its mandated conciliation process. Id. at n. 7. For a more complete discussion of this balancing test, see supra, notes 125-127 and accompanying text.
184. Id. at 291-92.
relief was to be sought, it possessed the statutory right to seek it in federal court.\textsuperscript{185} Thus, any attempt made by a court to decide what relief served what public policy would be in violation of the EEOC's enforcement scheme.

In an attempt to further strengthen its opinion, the Court took aim at refuting several arguments relied upon by both the Respondent and Justice Thomas in his dissent.\textsuperscript{186} Both Respondent and Justice Thomas claimed that the language of Title VII supported the Fourth Circuit's decision because it limited the EEOC's possible recovery to that which was "appropriate" as determined by the court.\textsuperscript{187} Thus, according to the dissent, the court, not the EEOC, is to determine what type of remedy is appropriate.\textsuperscript{188} The Court found this reasoning flawed for two reasons. First, the term "appropriate" only applied to the subcategory of equitable relief claims.\textsuperscript{189} The allowance of compensatory or punitive damages was not covered by the language.\textsuperscript{190}

The dissent also stated that the term "may recover" in the statute governing punitive and compensatory damages also prohibited victim-specific relief.\textsuperscript{191} This led the Court to its second criticism of its opposition's reasoning. Under the plain reading of the language, the judge is allowed to determine which remedies are required at an ad hoc, case by case basis.\textsuperscript{192} If the rule were applied according to the Respondent's interpretation however, it would amount to a categorical limitation on the expressly authorized remedies available to a claimant who has signed an arbitration agreement.\textsuperscript{193}

The Court next focused on the Fourth Circuit's balancing test approach.\textsuperscript{194} While the majority acknowledged Congress' calling in the enact-

\textsuperscript{185} Id. at 292.
\textsuperscript{186} For a more detailed examination of Justice Thomas' dissent, see infra notes 210-257 and accompanying text.
\textsuperscript{187} Waffle House, 534 U.S. at 292. After the court finds liability, "[i]t may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." Id. (quoting 42 U.S.C. § 2000e-5(g)(1) (1994)).
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id. Punitive and compensatory damages are governed by 42 U.S.C. § 1981a(a)(1) (1994).
\textsuperscript{191} Waffle House, 534 U.S. at 292. "... the complaining party may recover compensatory and punitive damages . . . ." 42 U.S.C. § 1981a(a)(1) (emphasis added).
\textsuperscript{192} Waffle House, 534 U.S. at 292-93.
\textsuperscript{193} Id. at 293. The Court was quick to point out that while Justice Thomas recognized this distinction, the Court of Appeals did not. It made it an absolute rule that the EEOC could not seek victim-specific damages in federal court under any circumstances. Id. at n. 8. See also Waffle House, 193 F.3d at 812.
\textsuperscript{194} Id. For a description of the Fourth Circuit's test, see supra note 166.
The Court further stated that the Court of Appeals' division between injunctive relief and victim-specific relief was an "uncomfortable fit with its avowed purpose of preserving the EEOC's public function while favoring arbitration." As a persuasive example, the Court stated that while punitive damages often serve a greater function of deterrence than personal relief, they would be unattainable under the Fourth Circuit's balancing test. On the other hand, the test relegates injunctive relief to broad-based public interest, while it serves a "victim-specific" function as well. Thus, as the Court stated, "the category of victim-specific relief is both overinclusive and under-inclusive" in its definition.

The Court concluded its examination of the issue by stating that the Fourth Circuit's balancing test transforms a forum selection clause into a waiver of a nonparty's congressionally granted rights. However, if the federal policy favoring arbitration trumps the clear authority of the EEOC, the Commission should be barred from seeking any relief in the event an arbitration clause exists. Ultimately, the Court held that whenever the EEOC chooses to file an action against an employer, the Commission may seek to vindicate the public interest by pursuing all types of relief granted it by statute.
As a follow-up to its holding, the Court examined what effect Mr. Baker may have on the EEOC, should he decide to accept a settlement or refuse to mitigate his damages.\textsuperscript{206} The Court's response was a cautioned one, stating that this behavior may have an effect on the EEOC and the relief it may obtain in court.\textsuperscript{207} Further, the Court was explicit in evidencing its aversion to a court granting double recovery to an individual claimant.\textsuperscript{208} Still, because none of these possibilities occurred in the instant case, there was nothing limiting the EEOC's available remedies.\textsuperscript{209}

B. Justice Thomas's Dissenting Opinion (joined by the Chief Justice and Justice Scalia)

The dissenting opinion can essentially be broken up into three different sections. First, Justice Thomas questioned whether the EEOC had the authority to decide what damages were appropriate in any given case.\textsuperscript{210} Second, the dissent analyzed whether it would be appropriate to award the EEOC victim-specific relief on behalf of Mr. Baker.\textsuperscript{211} Finally, Justice Thomas concluded with a discussion of the practical implications of the Court's decision, and his recommendation to the Court.\textsuperscript{212}

1. Who decides damages?

Justice Thomas began by questioning the EEOC's statutory authority. According to the dissent, the EEOC sought victim-specific relief for which Mr. Baker could not have sought for himself.\textsuperscript{213} The dissent explained that Mr. Baker had signed away the ability to bring a claim against Waffle House in court, or to receive relief in such a forum.\textsuperscript{214} Further, the EEOC stated that all relief received would be done so directly by Mr. Baker, and that their representation was on behalf of Mr. Baker.\textsuperscript{215} Thus, because Mr. Baker waived

\textsuperscript{206} Waffle House, 534 U.S. at 296-97.
\textsuperscript{207} Id. at 297.
\textsuperscript{208} Id. (quoting General Telephone, 446 U.S. at 333).
\textsuperscript{209} Id. The Court was very hesitant to limit the EEOC's authority to seek any remedy it chose to. The majority made clear that the EEOC did not act merely as a proxy for the individual, and its statutory authority granted it the sole authority over its choice of charges. \textit{Id}. This reluctance seemed to open the door to questions concerning the EEOC's authority over previously arbitrated claims, and similar circumstances.
\textsuperscript{210} See \textit{infra} notes 213-219 and accompanying text.
\textsuperscript{211} See \textit{infra} notes 220-249 and accompanying text.
\textsuperscript{212} See \textit{infra} notes 250-257 and accompanying text.
\textsuperscript{213} Waffle House, 534 U.S. at 300.
\textsuperscript{214} Id. at 299-300. The Court did not dispute that the arbitration agreement fell under the FAA. \textit{Id}.
\textsuperscript{215} Id. at 300. The EEOC stated in their responses to interrogatories and directives that,
his ability to bring suit in court, and because the EEOC was admittedly acting on behalf of Mr. Baker, the Court was allowing the EEOC to do for Mr. Baker what he could not do for himself.216

The dissent's next step was to refute the majority's justification for allowing the EEOC to seek victim-specific relief on behalf of Mr. Baker. While the Court believed the EEOC's statutory authority to be clear regarding remedies, Justice Thomas disagreed. Though the EEOC had the right to bring suit, it lacked the authority to obtain a particular remedy.217 Only a court had the discretion to choose which remedy was "appropriate."218 Further, if Congress had wished to grant the EEOC the ability to decide what type of damages to seek, it would have done so.219 Thus, Justice Thomas believed the limitation on the EEOC's seeking of remedies to be clear.

2. Is victim-specific relief appropriate?

The second issue that the dissent focused on was whether it would be appropriate for a court to allow the EEOC to seek victim-specific relief on behalf of Mr. Baker.220 Justice Thomas stated that the victim-specific relief lacked appropriateness for two reasons.221 First, the EEOC must take its claimant as it finds them.222 Mr. Baker signed an agreement to arbitrate any claim arising out of his employment with Waffle House. Justice Thomas believed this to limit the EEOC's enforcement of Mr. Baker's claim, in a man-

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"All amounts recovered from Defendant Employer in its litigation will be received directly by Mr. Baker based on his charge of discrimination against Defendant Employer." Id.
216. Id. at 300.
217. Id. at 301.
218. Id. (citing 42 U.S.C. § 2000e-5(g)(1)). He stated, "it is a court's role to decide whether 'to enjoin the respondent ... and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate.'" Waffle House, 534 U.S. at 301. For a detailed examination of the Court's response to Justice Thomas' "appropriateness" argument, see supra, notes 187-193 and accompanying text.
219. Waffle House, 534 U.S. at 302. The dissent examined both the House and Senate versions of the Equal Employment Opportunity Act of 1972. While the original versions granted the EEOC the authority to both prosecute a claim and implement a remedy, the final version only allowed the EEOC the ability to adjudicate a claim in court. Id. at 302-03. (citing H.R. 1746, 92d Cong., 1st Sess., § 706(h) (1971) and S. 2515, 92d Cong., 1st Sess., § 4(h) (1971)).
220. Id. at 303-04.
221. Id. at 304.
222. Id.
ner similar to a prior settlement or a refusal to mitigate damages. Because Mr. Baker waived his right to bring a lawsuit in a judicial forum, so should the EEOC have had to lose that right.

In response to the dissent's argument, the majority correctly stated that the EEOC's claim is not "merely derivative" of the individual claimant's. However, Justice Thomas believed the issue was not whether the EEOC "stands in the employee's shoes," but whether the EEOC's ability to obtain relief is in any way dependent on the employee's ability to do so. Once Justice Thomas altered the issue, he quickly did away with the Court's supporting precedent.

Justice Thomas spent significant time debunking the Court's cited precedent, General Telephone and Occidental. In its examination of General Telephone, the dissent stated that nothing in the decision would allow the EEOC to seek relief which the claimant could obtain for himself. Further, the dual roles which the EEOC occupies do not suggest that the EEOC aids the public interest in seeking victim-specific relief.

In response to the majority's use of the Occidental decision as support, Justice Thomas criticized the Court's analysis and how it related to the instant case. To begin, by precluding the EEOC from seeking victim-specific relief

223. Id. at 304-05 (citing Ford Motor. Co. v. EEOC, 458 U.S. 219, 231-232 (1982). For examples of other ways a private claimant could limit the EEOC's enforcement abilities, see EEOC v. Cosmair, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987); Goodyear, 813 F.2d at 1543 (9th Cir. 1987); EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1291 (7th Cir. 1993).

224. Id. at 305.

225. Id.

226. Waffle House, 534 U.S. at 305.

227. Id.

228. Id. at 306. The majority cited to Gilmer, 500 U.S. 20 (1991), General Telephone, 446 U.S. 318, and Occidental, 432 U.S. 355 as support for its notion that the EEOC does not act merely as a proxy for litigation for the individual claimant.

229. Justice Thomas quickly addressed the majority's use of Gilmer. While the Gilmer Court stated that an arbitration agreement would not preclude the EEOC from bringing a claim in court, it said nothing of whether the EEOC could seek victim-specific relief on behalf of an employee who had previously signed an arbitration agreement. Id. at 306 (citing Gilmer, 500 U.S. at 32). For a detailed examination of the Gilmer decision, see supra notes 52-69 and accompanying text.

230. Id. at 306-07. Supra notes 101-110 and accompanying text.

231. Id. When the EEOC exercises its statutory authority, it does so to personally vindicate the charging party, and to vindicate the public interest inherent in employment discrimination. Id. See also EEOC Compliance Manual N:2346. In the note material, Justice Thomas recognized the deterrent effect monetary damages possessed. Id. at 307 n. 10. However, he essentially adopted the balancing test of the Second Circuit, by claiming that the public interest is best vindicated when injunctive relief is sought, not victim-specific relief. Id. at 307.

in litigation, the Court would still be allowing for the discharge of the EEOC’s administrative duties under its enforcement scheme. Additionally, arbitration would allow for what Justice Thomas believed to be the underlying policy of Occidental: “that employment discrimination claims should be resolved quickly and out of court.” Thus, the dissent believed it had sufficiently refuted the Court’s use of the above-mentioned cases, while maintaining the integrity and purpose of the EEOC.

The second reason given by the dissent for why it would be inappropriate for the EEOC to seek victim-specific damages is that it would contravene the strong federal policy favoring arbitration. Justice Thomas began by evidencing the validity of Mr. Baker’s arbitration agreement under the FAA. Here, the dissent reformulated the issue by asking whether the Court should allow the EEOC to seek monetary damages in federal court, thereby reducing the arbitration agreement to a nullity. Justice Thomas believed the FAA demanded a negative response to this question.

According to Justice Thomas, under the majority’s ruling, the EEOC is allowed to “eviscerate” the arbitration agreement and rescue Mr. Baker from its limitations. Further, not only would the Court’s ruling harm Waffle House because of its having to defend itself in federal court, it also open Waffle House up to defending itself in both court and arbitration. This dual defense would then create prospect of double recovery. This possibility was found in the Court’s refusal to decide whether a prior arbitral judgment would

233. Id. at 308. In Occidental, the Court cited a statute of limitations as limiting the EEOC’s ability to discharge its administrative duties. Supra notes 87-100 and accompanying text.
234. Id. (quoting Occidental, 432 U.S. at 368). The dissent seemed to lose the forest in the trees with its critical analysis of these cases. While the specific contours of each case may be up for debate as to how they relate to the instant case, the overarching purpose of both General Telephone and Occidental was to release the EEOC from the same limitations that bind individual plaintiffs. This was done with the realization that the EEOC seeks both an individual remedy and a public one.
235. Id. (citing Moses H. Cone, 460 U.S. at 24).
236. Id. (citing to Part I of the dissent; supra note 214).
237. Id. at 308-09.
238. Id. at 309.
239. Id.
240. Id.
241. Id. at 309-10. “[E]mployees will be allowed two bites at the apple — one in arbitration and one in litigation conducted by the EEOC — and will be able to benefit from the more favorable of the two rulings.” Id. at 310.
affect the EEOC’s ability to seek relief in federal court.242 However, the dissent believed the handwriting was on the wall due the majority’s emphasis that the EEOC is the “master of its own case.”243 Due to the Court’s analysis, the dissent found it hard to believe that an individual’s prior arbitration could in any way affect the EEOC’s independent authority over the matter.244 The logical conclusion, therefore, placed the employer at a serious disadvantage and would be contrary to the federal policy favoring arbitration agreements under the FAA.245

Justice Thomas concluded his dissent by summarizing his position. Ultimately, the Court’s decision has no logical stopping point.246 Under the Court’s analysis, a prior settlement by the individual claimant would not render the EEOC’s action moot, nor would it preclude them from seeking broad-based relief.247 Further, there was nothing in the decision to suggest that the EEOC could be barred from seeking victim-specific relief in the event of a prior settlement.248 Thus, the dissent believed that the Court’s ruling will discourage employers from trying to settle cases at all, fearing a later decision in favor of the EEOC.249

3. The dissent’s recommendations

Following its criticism of the majority opinion, the dissent gave its own recommendations. Justice Thomas believed that the EEOC’s statutory authority under the ADA could be reconciled with the FAA.250 Instead of placing the FAA in a position subordinate to the ADA, Congress stated explicitly that arbitration was encouraged under the ADA.251 The dissent took issue with the EEOC’s belief that agreements to arbitrate were enforceable only when it was

242. Waffle House, 534 U.S. at 309. See also supra notes 206-208 and accompanying text.
243. Id. at 310. See also supra notes 184-185 and accompanying text.
244. Id. If an individual claimant’s actions could affect the EEOC’s authority, it would create a discrepancy in the Court’s feeling that the EEOC is “the master of its own case.”
245. Id.
246. Id. at 311.
247. Id. Of course, if the EEOC settles its own claim with an employer, than mootness principles apply. Id.
248. Waffle House, 534 U.S. at 311. However, the dissent did state that it may be possible that a prior settlement by the individual claimant could limit the EEOC’s ability to seek victim-specific damages. Id.
249. Id.
250. Id. at 313. This is important because courts “are not at liberty to pick and choose when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” Id. (quoting Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives’ Ass’n., 491 U.S. 490, 510 (1989)).
251. Id. (citing 42 U.S.C. § 12212 (1994)).
not involved.\textsuperscript{252} Nowhere in the EEOC's statutory scheme is this limiting principle articulated.\textsuperscript{253} Finally, the dissent found no indication that Congress intended the EEOC to undermine enforceable arbitration agreements.\textsuperscript{254}

Justice Thomas concluded by recognizing the inherent conflict between the Court's prior decisions favoring arbitration under the FAA and the instant case.\textsuperscript{255} While he did not specifically endorse the Court's prior opinions, Justice Thomas saw no reason why that pattern should not continue here.\textsuperscript{256} Ultimately, the dissent's conclusion found that the majority's decision was rooted in the idea that employment discrimination claims were to be treated differently than arbitration in other contexts.\textsuperscript{257}

V. THE FUTURE OF ARBITRATION AGREEMENTS IN THE EMPLOYMENT CONTEXT

The Court's decision in \textit{Waffle House} was a surprising one, due to its break from a long line of precedent.\textsuperscript{258} While this case can be distinguished from earlier cases due to the direct involvement of the EEOC, the practical effects of the decision will ultimately highlight this divergence. Due to the unanswered questions left by the Court, the only way to resolve \textit{Waffle House} with the Court's past decisions may be to question the adequacy of arbitration itself as a forum for the vindication of discrimination claims.

In his dissenting opinion, Justice Thomas recognized some of the problems inherent in the Court's decision.\textsuperscript{259} The first of these considered what was to become of the signed arbitration agreement?\textsuperscript{260} This is quite pos-

\begin{footnotes}
\item 252. Id. at 314.
\item 253. Id.
\item 254. \textit{Waffle House}, 534 U.S. at 314.
\item 255. Id.
\item 256. Id. "The Court should not impose the FAA upon States in the absence of any indication that Congress intended such a result (quoting \textit{Southland Corp. v. Keating}, 456 U.S. 1, at 25-30 (1984) (O'Connor, J., dissenting)), yet refuse to interpret a federal statute in a manner compatible with the FAA." \textit{Waffle House}, 534 U.S. at 314-15.
\item 257. Id. at 315. As the dissent noted, this policy is directly contrary to the Court's decision in \textit{Gilmer}, which found that arbitration agreements under the ADEA could be enforced without concern for "important social policies." Id. (quoting \textit{Gilmer}, 500 U.S. at 27-28).
\item 258. For an examination of this precedent, see supra notes 40-69 and accompanying text. That precedent had continued through 2001 with Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (stating that arbitration agreements under the FAA can be enforced without contravening the policies granted employees to protect them against discrimination).
\item 259. Supra notes 210-257 and accompanying text.
\item 260. \textit{Waffle House}, 534 U.S. at 309.
\end{footnotes}
ibly the most important question created by the Court’s decision because of its practical consequences. While the decision will ultimately influence few cases,\(^\text{261}\) it still seems to place the legitimacy of arbitration agreements at the discretion of the EEOC. The Court stated that the FAA is “at bottom a policy guaranteeing the enforcement of private contractual arrangements.”\(^\text{262}\) However, it is reasonable to believe that if an employee does not wish to arbitrate his discrimination claim, he now possesses the possibility of having the EEOC litigate it in federal court. If this were true, then the private contractual arrangement would be nullified. If not, then an entirely different problem would be raised.

As the dissent noted, there was nothing in the opinion to suggest that double recovery would not be possible under the Court’s reasoning.\(^\text{263}\) While the Court expressed a distaste for double recovery,\(^\text{264}\) if the EEOC is truly the “master of its own case,” then there is no reason to think that there is any action which an individual claimant could take to limit the EEOC’s authority over the matter. Not only would this place the employer in a precarious position, it would further discourage him from utilizing an arbitration agreement.

In its decision, the Court refused to recognize a conflict between the EEOC’s statutory scheme and arbitration agreements under the FAA. It merely stated that, because the EEOC was not a party to the agreement, it was not bound to arbitrate.\(^\text{265}\) Additionally, under its scheme, the EEOC has the authority to control its own case.\(^\text{266}\) While both of these justifications are accurate, the Court should also have considered whether allowing a non-party to effectively nullify a perfectly valid contract is consistent with the FAA. As such, it seems a different question should be raised; what is to be gained from the EEOC’s involvement in Mr. Baker’s claim? The Court balked at ad-

\(^{261}\) Backlog is already a problem for the EEOC as the numbers of employment discrimination claims continue to rise. Julie W. Waters, Does the Battle Over Mandatory Arbitration Jeopardize the EEOC’s War In Fighting Workplace Discrimination, 44 ST. LOUIS U. L. J. 1155, 1156 (2000) (citing Evan J. Spelfogel, Mandatory Arbitration vs. Employment Litigation, 54 DISP. RES. J. 78 (1999)). In 2000, the EEOC received 79,896 charges of employment discrimination, and found reasonable cause in 8,248 of them. However, it filed only 291 lawsuits, or 3.5% of claims found to be supported by reasonable cause. Waffle House, 122 S.Ct. at 754 n.7. (citing Equal Employment Opportunity Commission, Enforcement Statistics and Litigation http://www.eeoc.gov/stats/enforcement.html (last visited Nov. 18, 2001)).

\(^{262}\) Waffle House, 534 U.S. at 294 (quoting Mitsubishi, 473 U.S. at 625) (emphasis added).

\(^{263}\) Id. at 309-10.

\(^{264}\) Id. at 297.

\(^{265}\) Id. at 290.

\(^{266}\) Id. at 288.
dressing this question, and it necessitates looking to Congress's intent behind the creation of the EEOC.

In enacting the employment discrimination statutes, such as the ADA, Congress sought to put an end to workplace discrimination. Further, the Court stated that the federal courts were entrusted with the primary jurisdiction over these matters. It is clear, as evidenced by the Court, that Congress intended employment discrimination claims to be dealt with in the federal courts. This intent was made manifest in the creation of the EEOC. The reason for this may be found in the inadequacies that are inherent in the use of arbitration as a forum for hearing discrimination claims. Since Gilmer, several circuits have held, for varying reasons, that arbitration is not proper in the discrimination context. However, these are all issues that the Court left unresolved. It is likely, though, that the Court will have the opportunity to examine these questions in future cases.

269. The Court has stated that the EEOC is authorized under Title VII to bring actions against employers in federal court. Occidental, 432 U.S. at 363.
270. The EEOC has largely rejected the use of mandatory arbitration agreements due to its possibilities for bias against employees and its lack of precedent-making decisions. First, because the employer acts as a source of future income for the arbitrator, and because the employer has more experience in the forum, arbitration can prove to be bias in favor of employers. Excerpts from Text: EEOC Rejects Mandatory Binding Employment Arbitration, 52 DISP. RES. J. 11, 13 (1997) (hereinafter referred to as "Excerpts"). Additionally, arbitrator’s have "no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties . . . ." Id. at 12 (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) (citation omitted)). Further, because arbitration decisions are not required to be written or reasoned, they are not public, and as such, are neither precedential nor open to public debate. Excerpts at 12-13.
271. Cole, 105 F.3d 1465 (DC Cir. 1997) (discouraging arbitration absent procedural safeguards); Duffield v. Robertson Stephens & Comp., 144 F.3d 1182, 1190 (9th Cir. 1998) (holding that mandatory, pre-dispute arbitration agreements violate the congressional intent behind the ADA and Title VII); Prudential Insurance Co. of Am. v. LaI, 42 F.3d 1299, 1304 (9th Cir., 1994) (rejecting an arbitration agreement because the claimant did not knowingly waive her ability to bring her claim to trial); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 170 F.3d 1, 20-21 (1st Cir. 1999) (holding that arbitration cannot be compelled when not "appropriate" under language of Title VII).
VI. CONCLUSION

The Court's decision in Waffle House, while relatively unexpected, was appropriate. As the Court stated, the EEOC's ability to bring employment discrimination claims in federal court was clear. As such, the case stands for the EEOC's continued authority over these matters, and their ability to enforce their statutory scheme has been assured. However, the decision also marks a slight contraction of the Court's formerly broad policy favoring the enforcement of private arbitration agreements.

While the facts of Waffle House were distinct from the Court's past decisions involving arbitration agreements, its holding does call some formerly well-recognized conclusions regarding such agreements into doubt. The enforceability of future arbitration agreements and the overall adequacy of the forum are uncertain. Furthermore, the decision may signal a trend that retreats from the general acceptance felt for mandatory arbitration agreements in every context. However, the ultimate effect of Waffle House should be the realization that the only way to resolve the workplace discrimination statutes with the FAA is to find that the two were never meant to interact. As such, the decision may evidence the Court's recognition that employment discrimination claims were considered by Congress to be different from other claims, and should be treated accordingly.