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An Employment Arbitration Agreement Does Not Bar the Equal Employment Opportunity Commission from Seeking Victim-Specific Relief in a Suit Alleging a Violation of Title I of the Americans with Disabilities Act: *Equal Employment Opportunity Commission v. Waffle House, Inc.*

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An Employment Arbitration Agreement Does Not Bar the Equal Employment Opportunity Commission From Seeking Victim-Specific Relief in a Suit Alleging a Violation of Title I of the Americans with Disabilities Act: *Equal Employment Opportunity Commission v. Waffle House, Inc.*

EMPLOYMENT DISCRIMINATION - AMERICANS WITH DISABILITIES ACT - ARBITRATION AGREEMENTS - VICTIM-SPECIFIC RELIEF - The United States Supreme Court held that the existence of an arbitration agreement in an employment contract does not preclude the Equal Employment Opportunity Commission from seeking victim-specific relief in a discrimination suit; The EEOC may seek victim-specific relief when the alleged violation infringes on the employee's rights via Title I of the Americans with Disabilities Act.

Equal Employment Opportunity Commission v. Waffle House, Inc., 534 U.S. 279 (2002).

Eric Baker, a prospective Waffle House employee, completed an application for employment that included an arbitration clause to settle "any dispute or claim" concerning his employment.[1] Shortly after becoming a grill operator at a Waffle House location, Baker

1. Equal Employment Opportunity Commission v. Waffle House, Inc., 534 U.S. 279, 282 (2002); *see also* Appellant's Brief at 56, *Equal Employment Opportunity Commission* (No. 99-1823). Waffle House required all employees to sign applications containing an arbitration agreement. *Id.* The arbitration agreement signed by Baker read:

> The parties agree 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, including whether such dispute or claim is arbitrable, 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, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

Appellant's Brief at 59.

suffered a seizure at work and was subsequently discharged.[2] While Baker failed to initiate arbitration proceedings after his discharge, he did file a timely complaint with the Equal Employment Opportunity Commission ("EEOC").[3] The complaint alleged that Waffle House discriminated against Baker in violation of the Americans with Disabilities Act ("ADA").[4]

The EEOC, on its own initiative and without Baker as a party, filed an enforcement action against Waffle House in Federal District Court for the District of South Carolina.[5] The complaint alleged that Baker was intentionally discharged because of his dis-

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2. Appellant's Brief at 43-44. Baker had only worked for Waffle House for 16 days. *Id.*

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

4. *Id.*

5. *Id.* The EEOC did attempt to conciliate the dispute following its investigation. *Id.* The EEOC brought its action pursuant to § 107(a) of the ADA, 42 U.S.C. § 12117(a) (1994), and § 102 of the Civil Rights Act of 1991, as added, 105 Stat. 1072, 42 U.S.C. § 1981(a) (1994). *Id.*

Note: The original suit, brought by the EEOC on behalf of Baker, was referred to a United States Magistrate Judge to determine whether Baker and Waffle House in fact entered into an arbitration agreement. The judge denied Waffle House's motion to dismiss and recommended that the arbitration agreement should be honored. On appeal, the district court denied both the motion to dismiss and the motion to compel arbitration, citing the fact that no employment contract existed between the parties when Baker decided to take the position. Filing an interlocutory appeal, Waffle House questioned the district court's denial of the motion to compel arbitration in an attempt to stay the EEOC from bringing suit in court on Baker's behalf. The Court of Appeals for the Fourth Circuit first determined that there was in fact an employment contract between the parties, disagreeing with the District Court's determination that no contract was created. The court of appeals examined cases on point from several other circuits, where the opinions varied significantly. Appearing to agree with the logic developed in the Second Circuit, the court of appeals determined that the EEOC could continue to pursue broad public interest relief, but would have to refrain from pursuing victim-specific relief for Baker. *See* EEOC v. Waffle House, 193 F.3d 805, 807-812.

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

7. *Id.* at 283-84. The make-whole remedy for Baker included backpay, reinstatement, compensatory damages and punitive damage. *Id.*

8. *Id.*

9. Equal Employment Opportunity Commission v. Waffle House, Inc., 193 F.3d 805, 808 (1999).

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

11. *Id.* at 812. The majority explained their balancing test:

> When the EEOC seeks 'made-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 the EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action.

Id.

ability, in violation of the ADA.[6] The EEOC requested both injunctive relief, to abolish the effects of Waffle House's previous and current unlawful employment practices, and specific, make-whole relief to compensate Baker.[7]

The district court denied Waffle House's motion to stay the EEOC's action under the Federal Arbitration Act ("FAA") after determining that no arbitration agreement existed in Baker's employment contract.[8] The Court of Appeals for the Fourth Circuit reversed, holding that the action against Waffle House by the EEOC was prohibited by the arbitration clause because the EEOC was not a party to the contract.[9] Balancing the EEOC's right to proceed with the FAA's policy regarding the validity of arbitration agreements, the court alternatively decided that in order to avoid nullifying the arbitration agreement, the EEOC should be prevented from pursuing victim-specific relief.[10] Due to the signed arbitration agreement between Baker and Waffle House, the court limited the EEOC's remedy to injunctive relief.[11]

Citing a split between the various courts of appeals on this issue,[12] the Supreme Court granted the EEOC's petition for *certiorari* to determine whether an arbitration agreement between employer and employee limits the EEOC's ability to pursue victim-specific judicial relief in a suit alleging the employer has violated Title I of the ADA.[13] The majority, led by Justice Stevens in a 5 to 3 decision, held that the EEOC has exclusive statutory authority to pursue victim specific relief once a charge has been filed.[14]

The Supreme Court began its analysis by examining Title VII of the Civil Rights Act of 1964, which granted the EEOC the authority to enforce the ADA's rules concerning employment discrimina-

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12. *Waffle House,* 534 U.S. at 285
13. *Id.*
14. *Id.* at 298.
15. *Id.* at 285-86. Section 12117 (a) of Title VII provides:
The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8 and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.
Id. at 760, n. 4.

tion.[15] A congressional amendment to Title VII in 1972 permitted the EEOC to bring enforcement actions in federal court[16] to prohibit employer discrimination and determine the appropriate affirmative action.[17] A further amendment in 1991 permitted the EEOC, as a "complaining party," to recover compensatory and punitive damages.[18]

The majority, citing both *Occidental Life Ins. Co. v. EEOC* and *General Telephone Co. v. EEOC,* contended that the statutory authority given to the EEOC indicated that the Commission does not serve as a substitute for the employee.[19] According to Justice Stevens, an arbitration agreement between employee and employer does not change the EEOC's role in enforcing the employment discrimination aspects of the ADA.[20]

The majority noted that the FAA was implemented "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American Courts, and to place arbitration agreements on the same footing as other contracts."[21] The extent to which disputes are subject to arbitration depend on the contract involved—the

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16. General Telephone Co. v. EEOC, 446 U.S. 318, 325 (1980). Prior to the 1972 amendment, the EEOC was primarily an investigative agency for discrimination actions. *Waffle House,* 534 U.S. at 286.

17. *Waffle House,* 534 U.S. at 286. The statutory language of 42 U.S.C. § 2000e-5(g)(1) (1994) provides:

> (g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders
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> (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court 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 (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from the date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. 42 U.S.C. 2000e-5(g)(1)(1994 ed).

Id. at 286.

18. *Waffle House,* 534 at 287.

19. *Id.* In *Occidental,* the Court held that the EEOC should not be held to California's one year statute of limitations because the Commission had a duty to investigate and attempt to conciliate before bringing an action. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977). In *General Telephone,* the EEOC was not held to Fed. Rule of Civ. Pro. 23 with regard to class certification before bringing suit. *General Telephone,* 446 U.S. at 321-22.

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

21. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

FAA does not authorize the court to impose arbitration on parties if it does not exist within their agreement.[22]

The court of appeals' decision recognized that the EEOC was not a party to the arbitration contract, but nevertheless limited the EEOC's remedy to injunctive relief.[23] The court of appeals balanced the "competing policies" between the ADA and the FAA,[24] deciding that the policy promoting arbitration outweighed the EEOC's public interest to pursue victim-specific relief.[25]

The majority would have agreed with the court of appeals' analysis had Baker still retained control over the proceedings.[26] However, once an employee files a complaint with the EEOC, the employee is required to refrain from bringing suit for 180 days.[27] Justice Stevens determined that the Commission, through its investigation and evaluation, should decide if the public's interest would be best served by bringing an enforcement suit and likewise should be left to determine whether public resources should be utilized to recover victim-specific relief.[28]

Waffle House and the dissent argued that the language of Title VII[29] instructed the courts to determine what constituted appropriate relief.[30] The majority rejected this reading of the statute, instead concluding that the policy interests of the EEOC were superior even when the EEOC was not a party to the arbitration agreement.[31] Justice Stevens cited *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, where the Court explicitly prohibited forced arbitration in situations where the parties did not agree to do so.[32]

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22. *Waffle House,* 534 U.S. at 289.

23. *Id.* at 290.

24. *Id.* Justice Stevens disapproved of the Court of Appeals' failure to examine the language of the arbitration agreement and the statutes granting the Commission's authority in its analysis. *Id.*

25. *Id.* The majority noted that the EEOC, as per 42 U.S.C. § 2000e-5(b), was required to make a conciliation attempt prior to filing a claim. Justice Stevens also pointed out that the number of employment discrimination cases actually pursued by the EEOC represents a small fraction of the antidiscrimination claims filed every year. *Id.* at 290, n. 7.

26. *Id.* at 291.

27. *Waffle House,* 534 U.S. at 291. The employee can sue during the 180 day waiting period if he receives a right-to-sue letter from the EEOC. *Id.*

28. *Id.* at 291-92.

29. 42 U.S.C. § 2000e-5(g)(1). *See also supra* note 17 and accompanying text.

30. *Waffle House,* 534 U.S. at 292.

31. *Id.* at 293. The court of appeals never reached this issue. *Id.*

32. Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989). *See also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, n. 12 (1967).

The majority struggled with the court of appeals' extreme generalization that victim-specific relief was purely an individual remedy, while injunctive relief was seen as a purely-public interest remedy that could be achieved even in light of an arbitration employment agreement.[33] According to the Court, the balance suggested by the court of appeals disregarded the power victim-specific relief has in curtailing unlawful discriminatory behavior by employers.[34] Justice Stevens reasoned that the court of appeals' "competing policies" decision could limit the number of employees involved in arbitration agreements that come forward with their complaints to the EEOC if securing victim-specific relief was unattainable.[35]

The majority concluded by admitting that on some occasions an employee's actions can affect the EEOC's ability to obtain relief; however, Baker's situation did not fall into such a category.[36] Baker did not attempt to arbitrate or enter into any settlement independent of the EEOC action.[37] Justice Stevens, joined by Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer, held that the EEOC was permitted by statute to seek victim-specific relief for Baker.[38]

Justice Thomas, in his dissent, contended that when an employee agrees to arbitration, the EEOC should honor that agreement and refrain from pursuing victim-specific relief.[39] The dissent agreed with the majority that Baker's arbitration agreement with Waffle House precluded Baker from bringing his action to court.[40] Therefore, Baker could not recover damages for himself without going through the arbitration process.[41]

The dissent noted that, while the EEOC has the statutory right to bring suit (§ 2000e-5(f)(1)), its right to secure a selected remedy

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33. *Id.* at 294-95. *See also* Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-270 (1981).

34. *Waffle House,* 534 at 295-96. *See Occidental Life Ins. Co. v. EEOC,* 432 U.S. at 383.

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

36. *Id.* at 296-97. *See also* Ford Motor Co. v. EEOC, 458 U.S. 219 (1982); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1542 (9th Cir. 1987); EEOC v. U.S. Steel Corp., 921 F. 2d 489, 495 (3d. Cir. 1990); *General Telephone,* 446 U.S. at 333.

37. *Waffle House,* 534 U.S. at 297.

38. *Id.* at 297-98.

39. *Id.* at 298. In his opening remarks, Justice Thomas stated that the EEOC "must take a victim of discrimination as it finds him." *Id. See also* Federal Arbitration Act (FAA), 9 U.S.C § 1 *et seq.*

40. *Waffle House* , 534 U.S. at 299.

41. *Id.* at 299-300.

was not supported by the statutory language in § 2000e-5(g)(1).[42] Justice Thomas explained that the grant of authority as to the selection of a remedy should be left to the court, as Congress' intent was illustrated by the statutory language.[43] Citing examples of statutory language where the Congressional intent was "appropriateness of a remedy," Justice Thomas concluded that the EEOC's statutory authority fell short of allowing the Commission to determine remedies.[44]

The dissent further stated two reasons why victim-specific relief would not be appropriate under the circumstances.[45] First, as stated above, Justice Thomas argued that an employee who signs an arbitration agreement should not receive more benefits simply because the EEOC has taken the suit.[46] The dissent, citing situations where the conduct of the employee can affect what relief is sought by the EEOC,[47] argued that, "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." [48]

The dissent contended that Baker should not recover victim-specific relief through the EEOC's action.[49] Justice Thomas argued that since the EEOC has a dual role to represent both the public interest and the individual interest of the claimant, the EEOC does in fact serve as a proxy for the employee.[50] While victim-specific relief can have an impact on the public interest,[51] the

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42. *Id.* at 300-01.

43. *Id.* at 301. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-416 (1975); Selgas v. American Airlines, Inc., 104 F.3d 9, 13, n. 2 (1st Cir. 1997).

44. *Waffle House,* 534 U.S. at 301. *See also supra* note 17 and accompanying text. The dissent contended that the language of 42 U.S.C. § 2000e-5(g)(1) (1994 ed.) expressly reserved the right of the court to determine whether or not relief is granted and whether or not the relief is appropriate. Justice Thomas further contended that if Congress wanted to give that power to the EEOC, the statute would have been constructed differently. *Id* at 302-03.

45. *Id.* at 304.

46. *Id.*

47. *Id. See also* EEOC v. Cosmair, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987); EEOC v. Goodyear Aerospace Corp, 813 F.2d 1539, 1543 (9th Cir. 1987); Ford Motor Co. v. EEOC, 458 U.S. 219, 231-32 (1982).

48. *Waffle House,* 534 U.S. at 305.

49. *Id.* at 305-06. *See also Gilmer,* 500 U.S. at 24; *General Telephone,* 446 U.S. 318, 325; *Occidental,* 432 U.S. at 368.

50. *Waffle House,* 534 U.S. at 306-07.

51. *Id.* at 771, n. 10. *See* McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 357-358 (1995).

dissent was quick to point out that the impact is limited to the EEOC's role of seeking sweeping relief for the public at large.[52]

The second reason noted by the dissent that victim-specific relief was inappropriate was that such a remedy would nullify the arbitration agreement and hinder the FAA's policy of promoting arbitration.[53] The dissent interpreted the majority's decision to mean that if the EEOC is the master of its own case, it could ultimately lead to the decision that the EEOC has the authority to change an arbitration settlement through litigation after the fact.[54] Justice Thomas argued that such a system discourages arbitration agreements by employees and contradicts the policies of the FAA.[55] As a result, Justice Thomas predicted there would be fewer settlement agreements, moving more cases back into the courtroom and ignoring the judicial economy aspect of the FAA.[56]

The solution, according to Justice Thomas, was for the courts to reconcile the two statutes so that both could be effective.[57] Because the language of the ADA expressly encourages arbitration and alternative methods of dispute resolutions, Justice Thomas found it difficult to imagine that Congress would limit arbitration of ADA actions where the EEOC decided not to litigate.[58] The dissent was not impressed with the statistical data provided by the majority concerning the small percentage of cases the EEOC actually litigates every year.[59] The fact that only a small amount of arbitration agreements would be disregarded was not an acceptable argument where statutory language instructed the EEOC to honor the agreements.[60]

The ADA, passed in 1990, represented a watershed moment in the lives of millions of Americans suffering from disabilities.[61] The

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52. *Waffle House,* 534 U.S. at 307, n. 10.

53. *Id.* at 308. *See* Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

54. *Waffle House,* 534 U.S. at 310 (Thomas, J., dissenting).

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

56. *Id.* at 312 (Thomas, J., dissenting).

57. *Id.* at 313 (Thomas, J., dissenting). *See* Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Assn., 491 U.S. 490, 510 (1989).

58. *Waffle House,* 534 U.S. at 313 (Thomas, J., dissenting).

59. *Id.* at 314 and note 14 (Thomas, J., dissenting).

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

61. LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW 13 (1992). Congress' decision for passing the ADA stemmed in part from research showing the existence of over 43 million disabled Americans. *Id.* at 1. Developments prior to the passing of the ADA include: accessibility to federal buildings and mass transit, equal protection for handicapped children in public schools, the creation of advocacy resources for the disabled, the inclusion of conta-

purpose of the ADA is to "prohibits discrimination on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation, and telecommunications."[62] The term "disability," as described by the ADA, includes: (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individuals; (b) a record of such an impairment; or (c) being regarded as having such an impairment.[63] The number of Americans living with a disability is on the rise, as technological advances prolong lives while new diseases hinder others.[64]

The ADA's prohibition against employment discrimination of disabled individuals covers a wide variety of employment activities, including job application procedures.[65] The EEOC is granted power via the ADA to enforce the statute in the workplace.[66] Coordinating with the Attorney General and the Office of Federal Contract Compliance Programs, the EEOC has enforcement authority over employment discrimination claims filed with the Commission.[67]

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gious diseases as disabilities, and handicapped persons added as a protected class under the Fair Housing Act. *Id.* at 11-13.

The leading act in the area of disabilities prior to the passing of the ADA was the Rehabilitation Act of 1973. The Act's provisions focused on federal involvement in programs: nondiscrimination/affirmative action by federal employees and in employment requirements on federal contractors. Section 504 of the Act, seen as the most significant disability protection prior to the passing of the ADA, applies to federal finance assistance, requiring nondiscrimination and reasonable accommodations. The Architectural and Transportation Barriers Compliance Board (ATBCB) also grew out of this Act. In 1978, § 505 was added to the Rehabilitation Act to provide remedies, procedures and rights under Title VI of the Civil Rights Act. *Id.* at 3-13.

62. United States Department of Justice (A Guide to Disability Rights Law), *available at* http://www.usdoj.gov/crt/ada/cguide (Aug. 2001).

63. 42 U.S.C. § 12102(2) (1990). This definition of disability mirrors the definition of "an individual with a handicap" under the Rehabilitation Act. ROTHSTEIN, *supra* n. 70, at 18.

64. ROTHSTEIN, *supra* note 70, at 2. The author refers to the influx of Acquired Immune Deficiency Syndrome (AIDS) into society along with life-saving spinal cord procedures as examples of the reason for increased disabilities in America. *Id.*

65. 42 U.S.C. § 12112(a) (1990). The rule also covers "the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.*

66. *See text supra* note 15 and accompanying text.

67. 42 U.S.C. § 12117(b) (1990). The role of the EEOC prior to the 1972 amendments of Title VII of the Civil Rights Act of 1964 was an informal and usually ineffective conciliation attempt at best. The Attorney General served as the enforcement authority. The 1972 amendments gave the EEOC the ability to enforce Title VII more effectively, both from a public interest standpoint and a supplemental vehicle for private actions. (*General Telephone,* 446 U.S at 326-328).

An unsettled issue prior to *Waffle House* was whether the EEOC served merely as a proxy for an individual plaintiff.[68] A pair of cases suggested that this was not the case, and that the EEOC could pursue relief on its own in the public interest.[69] In *Occidental Life Insurance Company v. EEOC*, the United State Supreme Court was asked to determine whether the state statute of limitations could bar the EEOC from bringing suit.[70] While the EEOC must wait thirty days before invoking its judicial power, neither Section 706(f) nor any other portion of Title VII required the EEOC to conclude investigation and conciliation within the state's statute of limitations in order to bring a "timely" suit.[71] There were instances that allowed the state statute of limitations to take effect when federal statutes were silent in terms of the amount of time to bring suit.[72] However, this practice was not automatic, and the policy behind the EEOC's function under the amended Section 706 still required an investigation and an attempt at an alternative resolution prior to filing suit.[73] This Court also cited its decision in *Albermarle,* arguing that when a private individual causes an inexcusable delay in filing, thus prejudicing the defendant, the court can provide relief.[74] The Court believed that the same should be exercised when the EEOC is the plaintiff, but only with regard to the time frame between the end of conciliation and the filing of a lawsuit.[75] The Court in *Occidental* held that the EEOC does not serve as a mere substitute for the employee.[76]

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

69. *Id.*

70. 432 U.S. 355, 357 (1977).

71. *Id.* at 360.

72. *Id.* at 367.

73. *Id.* at 367-68

74. *Id.* at 373. In *Albemarle*, a delay in the request for backpay in a Title VII discrimination case was remanded to the district court to determine whether the delay did in fact prejudice the defendant. 422 U.S at 424.

75. *Occidental*, 432 U.S. at 373. The language of Title VII, including its policy, allows the EEOC to investigate and conciliate before bringing a suit, regardless of the length of the state statute of limitation. *Id.*

76. *Id.* at 368-70.

77. 446 U.S. 318, 323 (1980).

78. *Id.* The Court in *General Telephone* cited the pertinent language of § 706 (f)(1) of Title VII of the Civil Rights Act of 1964:

> If within thirty days after a charge is filed with the Commission . . . , the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . . If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty

In the second case, *General Telephone Co. v. EEOC*, 446 U.S. 318, 325 (1980), the Court determined that the EEOC was not required to certify a class under Federal Rule of Civil Procedure 23 when bringing a suit in federal court against an employer who allegedly participated in discriminatory practices against women.[77] In reaching this holding, the Court looked at the language and the legislative intent of Title VII, both before and after the 1972 amendments.[78] Prior to 1972, the Attorney General served as the authority for discrimination suits.[79] During this time, the Attorney General was never perceived as standing in the place of an individual.[80] Even when victim-specific relief was granted, the Attorney General was not obligated to certify the class.[81]

Because of the difficulties surrounding the enforcement of Title VII, the EEOC was given enforcement power via the 1972 amendments.[82] Congress' intent behind giving the EEOC the ability to bring civil actions in federal court was to overcome "a major flaw in the operation of Title VII" which only allowed for investigation and remedial mediation.[83] The authority given to the Attorney General was transferred to the EEOC with the passing of

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days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Id. at 321.

79. *General Telephone*, 466 U.S. at 327.

80. *Id.* at 328.

81. *Id.* at 327-28.

82. *Id.* at 325.

83. *Id., quoting* S. Rep. No. 92-415, 4 (1971).

84. *General Telephone*, 466 U.S. at 328-29. The Senate, when discussing the 1972 Amendment, expressly intended for the actions of the EEOC to be the same as those brought by the Attorney General. *Id.*

85. Ford Motor Co. v. EEOC, 458 U.S. 219, 220 (1982). In *Ford*, a woman who believed she was passed over for a position because of her gender, filed suit against Ford Motor Company. *Id.* at 221-23. Following the commencement of the suit, Ford offered the woman a position, which she refused to accept. *Id.* at 222-23.

the 1972 amendments, and it could bring class action suits without certifying the class under Rule 23.[84]

Another issue in *Waffle House* surrounded the impact of an employee's actions on the EEOC's ability to bring suit. In *Ford Motor Co. v. EEOC*, the United States Supreme Court had to determine whether backpay continued to accrue after the applicant was offered an opportunity to accept the position previously denied because of discrimination.[85] The majority held that once the applicant rejected the unconditional offer, the accrual of any potential backpay ceased.[86] The Court relied, in part, on the policy behind Title VII, which promoted returning victims to the workforce expediently.[87]

In *EEOC v. Goodyear Aerospace Corp.*, the Court of Appeals for the Ninth Circuit examined whether the EEOC may pursue any claims once the employee settles.[88] The court reversed the order of the district court regarding the EEOC's independent public interest claim, allowing the EEOC to pursue broad injunctive relief.[89] Title VII's policy of eradicating employment discrimination allowed the EEOC to pursue its independent public interest claim, with the court determining that such a claim is not moot despite the employee settlement.[90] In *EEOC v. Cosmair, Inc.*, the employee was terminated and given severance pay and benefits for a fixed period of time in exchange for signing an agreement not to file any claims against the employer.[91] When the employee filed an age discrimination claim with the EEOC, his former employer discontinued the severance package.[92] Viewing this turn of events

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86. *Id.* at 232.

87. *Id.* at 228. The main objective of Title VII is to "end [employment] discrimination." *Id.* at 230. The EEOC was barred from pursuing further backpay because of the actions of the employee in rejecting the job offer. *Id.* at 241.

88. EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1541 (9th Cir., 1987).

89. *Id.* at 1544. Summary judgment, without investigating Goodyear's liability, left questions of fact that the court needed to resolve. *Id.*

90. *Id.* at 1542-43. The EEOC could not recover victim-specific relief following the settlement. *Id.*

91. EEOC v. Cosmair, 821 F.2d 1085, 1087 (5th Cir. 1987).

92. *Id.*

93. *Id.*

94. *Id.* The injunction sought by the EEOC looked to bar Cosmair from ceasing the severance payments, from forming similar agreements with other employees, and from discriminating against those employees who participate in the investigation and/or bring an age discrimination suit of their own. *Id.* at 1087-88.

95. *Cosmair*, 821 F.2d at 1090. The court contended that the public interest in the EEOC's authorityto enforce the ADEA outweighed the settlement interest. *Id*

as retaliation for his age discrimination claim, the employee filed another claim with the EEOC, this time asserting that the former employer unlawfully retaliated by eliminating the severance package.[93]

When the EEOC was granted a preliminary injunction, the employer appealed and the court was forced to decide if such an agreement prevented the EEOC from bringing suit.[94] The U.S. Court of Appeals for the Fifth Circuit held that while the employee could waive his rights to bring suit, it went against public policy to allow an employee to waive his right to file a claim with the EEOC.[95] The court pointed out that the employee could waive not only his right to bring a claim but also his right to recover damages recovered by the EEOC on his behalf.[96]

A final issue in *Waffle House* was to determine the FAA's role in general and employment contracts. As guidance, the Court examined its previous decision in *Volt Information Sciences, Inc. v. Board of Trustees.*[97] The issue in *Volt* was whether the California

96. *Id.* at 1091. The injunctive relief was upheld, minus the portion disallowing the employer from obtaining waivers from other employees. *Id.* at 1091-92.

97. 489 U.S. 468, (1989).

98. *Id.* at 470. The contract contained both a choice of law clause and an arbitration clause, with the California Arbitration Act serving as the governing law. *Id.* Through contract, the California Arbitration Act could preempt the Federal Arbitration Act, provided that the language of the arbitration clause reflected such an agreement between the parties. *Id.*

99. *Id.* at 472-73.

100. *Id.*

101. *Id.* at 485.

Arbitration Act preempted the FAA.[98] In examining the language of the FAA, the Court stated that the policy behind the act was to enforce private arbitration agreements when applicable.[99] The act was not designed to force arbitration in situations where there was no pre-existing agreement, or to compel arbitration when the rules of arbitration established by the parties did not lead to arbitration given the circumstances.[100] The Court held that the parties could contract to put California arbitration rules into their agreement.[101] Provided that the terms of the agreement were enforced, the Court concluded that the outcome not to arbitrate was acceptable under the FAA.[102]

In analyzing the battle between the power of the EEOC and the policy goals of the FAA, the Supreme Court's decision in *Waffle House* appears to follow its former line of reasoning: EEOC claims will at times receive special consideration. In both *Occidental* and *General Telephone*, the Supreme Court allowed the EEOC to side step certain procedural and statutory rules that conflicted with the EEOC's statutory authority.[103] While such a power is not expressly written within the EEOC's statutory language, the Court interpreted the Commission's power broadly.

A case can be made that the nature of the EEOC claim, giving rise to discrimination in the workplace, justifies such a broad interpretation. While the majority was only called upon to rationalize the difference, or lack thereof, between injunctive and make-whole relief, had the Court in fact announced the supremacy of the EEOC to bring suit and determine remedies? As pointed out by the majority, only a small fraction of those cases filed with the EEOC will go to trial.[104] If the small number of cases, coupled with the nature of the alleged infractions, allow the EEOC to have greater power than the private citizens who enter into employment contracts, the underlying theme insinuates that such extraordinary protection must be afforded to balance the reality of

102. *Volt Information*, 489 U.S. at 476-79.
103. *Waffle House*, 534 U.S. at 287-88.
104. *Id.* at 290, n. 7.

boilerplate contracts created to protect the employer. While the decision was a reflection of a public welfare stance by the Court, the dissent viewed the decision as lessening the validity of an individual employee/employer arbitration agreement.

The question remains whether such a decision will have a detrimental affect on employers in their usage of arbitration agreements. The short answer is that this does not appear likely. Neither does it appear that the decision will hinder judicial efficiency. The majority's decision stated that there are times when victim-specific relief cannot be obtained by the EEOC based on the actions of the employee.[105] Signing an agreement to arbitrate, according to the Court, is not one such action unless there is the potential for double recovery or unjust enrichment.

The decision in *Waffle House* places employees, along with their attorneys, on notice that broad arbitration agreements will not generally provide protection against EEOC suits for either injunctive *or* victim-specific relief. Arbitration agreements will continue to find their way into employment contracts, with the vast majority of suits being settled via arbitration. The effectiveness and efficiency of arbitration far outweighs the minimal risk of an EEOC action.

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105. *Id.* at 296-297.