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## ‘Waffle House’: Long View

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On JAN. 15, THE U.S. Supreme Court issued a significant ruling addressing the Equal Employment Opportunity Commission’s role in the arbitration of discrimination claims. In *EEOC v. Waffle House Inc.*, No. 99-1823, 2002 U.S. Lexis 489 (U.S. Jan. 15, 2002), the court held by a 6-3 vote that the EEOC retains the right to pursue an independent enforcement lawsuit on an employee’s behalf even when the employee has signed an agreement to arbitrate all statutory discrimination claims. The court ruled that an arbitration agreement between an employer and an employee does not restrict the EEOC’s ability to pursue claims on behalf of an individual employee.

Despite its seemingly limited holding, *Waffle House* demonstrates a clear acceptance by the Supreme Court of arbitration in resolving disputes in the workplace, even for claims arising under federal statutes designed to protect employees. While disagreeing over the EEOC’s authority to seek victim-specific relief, all of the justices agree that an employer may now require its employees to arbitrate claims under the Americans With Disabilities Act (ADA) and the Age Discrimination in Employment Act. The jus-

tics also implicitly agree that an employer may require employees to arbitrate claims under other federal antidiscrimination laws, such as Title VII of the Civil Rights Act of 1964. In *Waffle House*, the court accepts as routine that arbitration is an appropriate forum for resolving statutory discrimination claims as affirmed in *Circuit City v. Adams*, 532 U.S. 105 (2001), last year.

The majority in *Waffle House* recognized that the EEOC has a significant role in protecting the public interest. This is true generally and specifically in a workplace with an alternative dispute resolution (ADR) program leading to binding arbitration. The majority views the EEOC as the proper vehicle for bringing important unanswered workplace discrimination issues into the federal courts to establish new precedent, and it recognizes the EEOC as the potential overseer of the appropriate use of arbitration.

These powers are predicated on the Supreme Court’s understanding that in the vast majority of cases the EEOC will not intervene. Accordingly, private arbitration agreements will be the exclusive vehicle for litigating disputed discrimination claims, except for a small subset of

cases attracting EEOC intervention. While it has always been important to take EEOC charges seriously and to respond properly, now it is imperative.

### The facts behind the case, and the court rulings

Eric Baker, an employee of Waffle House, was required to sign an arbitration agreement when he began his employment. Sixteen days after he started as a grill operator, he suffered a seizure at work. Waffle House terminated his employment shortly thereafter. Despite his agreement to arbitrate any claims against the company, Baker filed a charge with the EEOC alleging that his termination violated the ADA. After investigating the claim, the EEOC found probable cause to support an ADA violation and filed an enforcement lawsuit in federal district court; Baker was not a party to the lawsuit. The EEOC’s complaint sought both injunctive relief and damages on Baker’s behalf.

The district court ruled that the EEOC had authority to proceed with the suit. On appeal, the U.S. Court of Appeals for the 4th Circuit held that Baker’s arbitration agreement did not restrict the EEOC

from bringing an enforcement action seeking broad injunctive relief against Waffle House, but precluded the EEOC from seeking “victim-specific relief,” such as back pay, reinstatement and other damages for Baker. 193 F.3d 805, 812-13 (4th Cir. 1999). Because the arbitration agreement precluded him from bringing suit to obtain relief specific to him, the 4th Circuit reasoned, the FAA also precluded the EEOC from obtaining such relief.

The 4th Circuit ruled that when the EEOC seeks victim-specific relief, the policies favoring arbitration outweigh the EEOC’s public interest, since the EEOC is seeking primarily to vindicate only private rights. When, however, the EEOC is pursuing “large-scale injunctive relief,” the balance tips in the EEOC’s favor because then “public interest dominates the EEOC’s action.” The EEOC sought review of this decision by the Supreme Court. The Supreme Court agreed to review the 4th Circuit’s decision in light of a split of opinion in various federal circuit courts.

The Supreme Court reversed the 4th Circuit’s decision relating to the EEOC’s right to pursue victim-specific relief. The court decided that an arbitration agreement between an employer and an employee does not restrict the EEOC from bringing a lawsuit seeking victim-specific relief on behalf of the employee. The court concluded that the enforcement authority Congress granted the EEOC under the ADA and Title VII permits it to pursue claims for specific relief even though the employee-victim may have limited his own rights to do so by signing an arbitration agreement.

In reaching this conclusion, the Supreme Court relied on two primary factors. The first is the broad scope of the EEOC’s enforcement authority under the ADA and Title VII. The second is the scope of the FAA and the undisputed fact that the EEOC was not a party to Baker’s arbitration agreement.

The importance of *Waffle House* resides not only in its treatment of Baker’s claim, but also in the many legal assumptions about the workplace that are stated or implied. These include: acceptance that Waffle House had a valid agreement mandating arbitration of employment disputes; agreement that the FAA would enforce an arbitration agreement between the parties; and application of “compulsory arbitration” to claims under the ADA

and implicitly under Title VII. All nine justices debating the EEOC’s role assume that an individual’s private right of action may properly be confined to the arbitration forum.

The majority accepted that a public policy exists favoring the ability of the EEOC to litigate precedent-setting cases and to police situations when the public interest is not being served by a particular arbitration agreement. It was assumed that the EEOC would carry out this role by involving itself in very few actual cases. The EEOC currently participates in litigation involving only 1% of the charges that are filed. Clearly the court views arbitration agreements and ADR as an established part of the workplace’s legal landscape.

*Waffle House* is a short-term setback for employers because it permits the EEOC to trump private arbitration agreements even with respect to individual relief. It may be, however, that Waffle House does more than any other decision to make ADR and compulsory arbitration the most common methods of resolving workplace disputes. By giving the EEOC an oversight role, two of the most difficult arguments against binding arbitration are answered. First, the EEOC can still bring important unresolved workplace-discrimination issues into the federal courts to establish new case precedents. No matter how ubiquitous arbitration agreements become, this power of the EEOC guarantees that there will continue to be court-directed guidance on important public policy. These precedents in turn will give guidance to arbitrators, who are likely to be handling the vast volume of disputed cases.

Second, whenever the media or plaintiffs’ attorneys attack ADR and mandatory arbitration as abusive or “rough justice,” a ready answer is now available. ADR backed up with arbitration can resolve 99% of cases in which an EEOC charge is filed. For the small number of cases that involve an important unresolved question of law or a defective ADR policy, the employee has access to the EEOC. In appropriate cases, the EEOC can open the door directly to the courts.

It is now clear that the EEOC’s role is changing. Its previous policy of uniformly opposing arbitration of Title VII claims, impliedly discredited by the high court in *Waffle House*, must be abandoned in favor of coexistence

and/or review of such policies. The EEOC will now almost surely issue guidelines on acceptable arbitration procedures under Title VII and other antidiscrimination laws within its jurisdiction. Employers that might be tempted to adopt draconian arbitration procedures will be subject not only to a court’s refusal to defer to arbitration, but also to the EEOC’s right to intervene and litigate in its own name.

### Accepting the EEOC’s new role regarding ADR

After *Waffle House*, the question is how well employers and the EEOC will handle this new opportunity to incorporate arbitration into the enforcement of the nation’s antidiscrimination laws.

Employers should keep in mind the following practical recommendations: Make a decision about ADR -- determine whether the organization should implement an ADR program and mandatory arbitration; create or review an ADR policy -- establish balanced procedures for implementing ADR or review the existing policy to ensure its fairness can be defended before the EEOC: place even greater importance on EEOC charges; invest resources in seeking a no-cause finding from the EEOC; affirmatively seek EEOC deferral to an ADR policy; and identify a responsible in-house representative for keeping an ADR policy current.

During the next few years, it is entirely possible that employer counsel will view *Waffle House* more favorably than will plaintiffs’ attorneys. The role of ADR in the employment context will no doubt increase in light of this decision. Additionally, reasonable national ADR guidelines promulgated by the EEOC could standardize minimum due process requirements and eliminate some of the current enforcement uncertainty. The Supreme Court has made it possible for the EEOC to take on a new oversight role in accomplishing its mission. How the EEOC responds to this invitation may determine its effectiveness during this decade and beyond.