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Employers' Mandatory Arbitration Agreements Do Not Bar The EEOC From Seeking Victim-Specific Relief On Behalf Of Employees

By Leigh Anne Ciccarelli, Esq.

"The Court noted that "[t]o hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not contemplate the EEOC's statutory function."

On January 15, 2002, the U.S. Supreme Court issued a 6-3 decision in *EEOC v. Waffle House, Inc.*, No. 99-1823, ___ U.S. ___ (2002), holding that a private mandatory arbitration agreement entered into between an employee and employer does not prevent the Equal Employment Opportunity Commission (EEOC) from seeking victim-specific relief in a separate civil action brought by the agency on the employee's behalf. This Alert discusses the *Waffle House* ruling and the potential effects the ruling will have on the use of arbitration agreements in the employment setting.

Status of the Law Before *Waffle House*

With the proliferation of employment litigation over the last decade, employers increasingly have turned to the use of pre-dispute mandatory arbitration agreements as a way to keep litigation costs under control. Typically, these agreements include language providing that both parties agree to use binding arbitration for any and all disputes that arise in the context of an individual's employment, thereby waiving the right to a jury trial. Not surprisingly, the use of such agreements has been challenged in court by employees and employee advocacy groups – with varying degrees of success and inconsistent rulings among the courts. Much of the uncertainty in this area of employment law

was cleared up in March of 2001, when the U.S. Supreme Court held in *Circuit City v. Adams* that employment disputes could be subject to mandatory arbitration. (See our GT Alert, April 2001.)

Because the *Circuit City* decision gave sanction to the use of arbitration agreements, many employers who previously had refrained from using them for fear of the legal uncertainty, began to implement such agreements with confidence that they would be upheld in the courts. However, the *Circuit City* decision left undecided (at least) one important issue – the relationship between these private arbitration agreements and the remedial power of the EEOC. Several lower federal courts addressed the issue, and reached contradictory holdings regarding what effect, if any, private arbitration agreements had on the EEOC's enforcement powers, and what remedies, if any, the EEOC could pursue on behalf of an employee who has signed a binding agreement to arbitrate employment disputes.

The Facts in *Waffle House*

When Eric Baker applied for a job at Waffle House restaurants, he was required to sign an arbitration agreement, providing that "any dispute or claim" regarding his employment would be "settled by binding arbitration." Shortly after Baker started working at the restaurant, he suffered a seizure; shortly after the seizure, he was discharged. Baker subsequently filed a discrimination charge with the EEOC. He did not initiate arbitration under the agreement. After an investigation, the EEOC filed suit in its own name, both in the public interest and on Baker's behalf. Waffle House sought to stay the lawsuit and compel arbitration pursuant to the agreement. This request was denied by the district court. On appeal, the Fourth Circuit Court of Appeals held that a valid, enforceable arbitration agreement did exist, but that the EEOC still had independent authority to file its own lawsuit. However, the Fourth Circuit also held that the EEOC's remedies were limited to injunctive relief only, and that the agency could not seek victim-specific relief on behalf of Baker.

The Supreme Court's Decision

The issue presented to the U.S. Supreme Court was whether a binding arbitration agreement between an employer and an employee bars the EEOC from pursuing victim-specific relief, such as backpay, reinstatement and damages, in an enforcement action. Reversing the Fourth Circuit's decision, a six-justice majority of the Court found that private arbitration agreements do not limit the EEOC to seeking only injunctive relief and that the EEOC, as the "master of its own case," has the authority to alone determine whether it will commit its resources to the recovery of victim-specific relief.

In reaching this decision, the Court explained that despite the federal policy favoring arbitration, the EEOC cannot be bound by a private arbitration agreement to which it was not a party. According to the Court, the EEOC is not required to "relinquish its statutory authority if it has not agreed to do so." The Court noted that "[t]o hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not contemplate the EEOC's statutory function."

Recognizing the growing use of arbitration agreements in the employment context, the Court reasoned that if injunctive relief were the only remedy available, employees who sign such agreements would have little incentive to file a charge with the EEOC. The Court noted its reluctance to issue a judicial ruling that would jeopardize the agency's ability to investigate and select cases for prosecution.

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While the Court was very specific that the EEOC could pursue relief on behalf of individual victims, it pointed out that there remained the "open question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek." While the Court did cite cases holding that EEOC recovery would be limited where an employee had failed to mitigate damages or had accepted a monetary settlement, the Court did not address this question as it was not properly before the Court.

The Effect of the Ruling

As noted by Justice Thomas in dissent, the ruling in *Waffle House* will likely discourage the use of arbitration agreements in the employment setting. If an employer is faced with the prospect of defending itself in an arbitration against an employee and then again in court against the EEOC, where both parties are seeking much the same relief, it is difficult to see the incentive in having an arbitration agreement at all.

The Court's majority sought to minimize this argument by pointing out the statistically low percentage of cases the EEOC decides to litigate on its own behalf as compared to the actual number of claims filed each year. In our opinion, however, the majority's statistical argument fails to consider that many employers may not want to take the risk that one of their employee's EEOC claims might happen to be one of the few that the EEOC chooses to litigate. Employers will now need to consider this risk and weigh it against the potential benefits that binding arbitration agreements offer.

In light of the *Waffle* House ruling, employers might consider other options, such as implementing (or amending their existing) arbitration agreements so as to limit the types of claims subject to mandatory arbitration. For example, if federal discrimination claims are exempted, the employer will not be confronted with the potential "two-front war" that the *Waffle House* employer faced. However, such a broad exemption clearly weakens the arbitration agreement, so much so that many employers may decide there is little benefit to using such an agreement.

The bottom-line: Absent Congressional action "overruling" the Court's decision, employers will need to re-evaluate under what circumstances they wish to require employees to agree to mandatory arbitration of workplace disputes.

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For more information, please contact one of the following experienced attorneys:

Allen Altman Atlanta
678.553.2640 altmana@gtlaw.com
George M. Belfield Los Angeles
310.586.7730 belfieldg@gtlaw.com
Lorence Jon Bielby Tallahassee
850.425.8509 bielbyl@gtlaw.com
Howard Bregman West Palm Beach
561.650.7910 bregmanh@gtlaw.com
Mary E. Bruno Phoenix
602.445.8506 brunom@gtlaw.com
Leigh Anne Ciccarelli Phoenix
602.445.8516 ciccarellil@gtlaw.com
Scott D. Cousins Wilmington
302.661.7373 cousinss@gtlaw.com
Craig A. Etter Washington, D.C.
703.749.1315 etterc@gtlaw.com
Robert S. Fine Miami
305.579.0826 finer@gtlaw.com
Joseph Z. Fleming Miami
305.579.0517 flemingj@gtlaw.com
Paul T. Fox Chicago
312.456.8420 foxp@gtlaw.com
Kenneth S. Gluckman Orlando
407.418.2388 gluckmank@gtlaw.com
Jerrold F. Goldberg New York
212.801.9209 goldbergj@gtlaw.com
Bradford D. Kaufman West Palm Beach
561.650.7901 kaufmanb@gtlaw.com
Steven B. Lapidus Miami
305.579.0509 lapiduss@gtlaw.com
Michael L. Lehr Philadelphia
215.988.7808 lehrm@gtlaw.com
Elizabeth L. Lewis Tysons Corner
703.749.1321 lewise@gtlaw.com
Jeffrey D. Mamorsky New York
212.801.9336 mamorskyj@gtlaw.com
Jeffrey R. Mann New York
212.848.1011 mannj@gtlaw.com
Roderick MacLeish, Jr. Boston
617.310.6014 macleishr@gtlaw.com
Terry L. Moore* New York
212.801.6534 mooreterry@gtlaw.com
Mary E. Pivec Washington, D.C.
202.452.4883 pivecm@gtlaw.com
Lawrence Rosenfeld Phoenix
602.445.8502 rosenfeldl@gtlaw.com
Ronald M. Rosengarten Miami
305.579.0519 rosengartenr@gtlaw.com
John F. Scalia Tysons Corner
703.749.1380 scaliaf@gtlaw.com
Steven L. Schwarzberg West Palm Beach
561.650.7906 schwarzbergs@gtlaw.com
Diana P. Scott Los Angeles
310.586.7711 scottd@gtlaw.com
Frank Scruggs Fort Lauderdale
954.768.8262 scruggsf@gtlaw.com
Marc I. Sinensky Boca Raton
561.912.3211 sinenskym@gtlaw.com
David B. Spanier New York
212.801.9279 spanierd@gtlaw.com
Kenneth S. Witt Denver
303.572.6510 wittk@gtlaw.com
Jeffrey H. Wolf Phoenix
602.445.8410 wolfj@gtlaw.com

**director, not admitted to the practice of law*

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