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ESSAY

MANDATORY PRE-EMPLOYMENT ARBITRATION AGREEMENTS: THE SCATTERING, SMOTHERING AND COVERING OF EMPLOYEE RIGHTS

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I. INTRODUCTION

Mandatory arbitration provisions in employment contracts[1] are generally embraced by the federal courts.[2] In the end, the federal courts sanction what amounts to the waiver of employees' enforcement of Title VII and other important statutory claims through the courts.[3] This result is problematic for employees because the federal court decisions limit the statutory rights that Congress established to address the important social issues recognized in Title VII. Consequently, mandatory arbitration in the employment context conflicts with the statutory rights of employees. The

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1. Reginald B. Henderson, *Pre-Dispute Mandatory Arbitration Agreements and Erisa Fiduciary Claims: The Courts Unfortunately Declare Them a Perfect Match*, 26 AM. J. TRIAL ADVOC. 27, 28 (2002).

2. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that the Age Discrimination in Employment Act is subject to arbitration); Circuit City Stores, Inc. v. Saint Clair Adams, 532 U.S. 105, 111 (2001) (recognizing that employment contracts, with the exception of those covering transportation workers, are covered by the FAA); EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) (embracing the arbitration of an ADA claim, but finding that an arbitration clause does not prevent the EEOC from filing a workplace discrimination lawsuit or from seeking victim-specific reliefs). Similarly, other federal appellate courts have embraced arbitration of employment-related statutory claims. *See* Desiderio v. NASD, 191 F.3d 198 (2d Cir. 1999) (embracing arbitration for Title VII claims); Williams v. Cigna Fin. Advisors, 56 F.3d 656 (5th Cir. 1995) (embracing arbitration for Older Workers Benefit Protection Act claims); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994) (embracing arbitration for pregnancy discrimination claims); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) (embracing arbitration for sexual harassment claims); Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir. 1992), *cert. denied*, 506 U.S. 986 (1992) (embracing arbitration for Employee Polygraph Protection Act claims).

3. A host of statutory claims including claims under the Age Discrimination in Employment Act, are subject to resolution through arbitration. By reasoning that arbitration agreements deal with the method of enforcing employees' substantive rights rather than limiting their substantive rights, courts are able to rationalize enforcement of arbitration agreements. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (2002).

> It is by now clear that statutory claims may be the subject of an arbitration agreement . . . . Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under the Sherman Act . . . [, claims arising under] the civil provisions of the Racketeer Influenced and Corrupt Organizations Act . . . [, and claims arising under] the Securities Act of 1933. In these cases we recognized that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."

Id. at 26 (citations omitted).

use of mandatory arbitration in the employment context must be examined to ensure that employees have an effective and meaningful enforcement mechanism for their Title VII rights.

The need for reform is exacerbated when considering the routine use of mandatory arbitration in employment matters. The use of mandatory arbitration, in employment disputes regarding Title VII, has increased a great deal since 1991 due to the enhanced remedies provided under the Civil Rights Act of 1991.[4] The number of lawsuits in this area has grown[5] and the use of arbitration to resolve these disputes has likewise risen.[6]

This Article provides an overview of mandatory arbitration provisions in the employment context. It analyzes the benefits and drawbacks of this practice, the legal basis for such agreements emphasizing recent Supreme Court jurisprudence, and the practical and public policy concerns with the current state of the law. The Article concludes with a call for reform.

II. MANDATORY ARBITRATION IN THE EMPLOYMENT CONTEXT

A. *Mandatory Arbitration Generally*

Mandatory arbitration clauses in the employment context are in collective bargaining agreements or individual employment contracts.[7] The focus of this Article is the latter type situations. Mandatory arbitration is not as problematic in the collective bargaining context because the parties

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4. Marcela Noemi Siderman, Comment, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L. REV. 1885, 1886 (2000).

5. Rebecca K. Beerling, Comment, *Left Out of the Balance—The Public's Need for Protection Against Workplace Discrimination:* Waffle House *and* Kidder Peabody *Attempt to Limit the Remedies Available to the EEOC by Balancing Policies Not in Conflict*, 25 HAMLINE L. REV. 295, 296 (2002) (noting that in the year 2000 there were nearly eighty thousand claims of discrimination filed with the EEOC, and that sexual harassment complaints with the EEOC have continually increased at a rate of over five thousand a year since 1992).

6. Siderman, *supra* note 4, at 1886. *See also* Patricia Lynch et al., *Employment Arbitration Agreements in the Non-Union Workplace: Failure to Meet Minimal Standards of Fairness?*, EMP. & LAB. L.Q., Fall 2001, at 3 (recognizing the significant increase in the use of compulsory arbitration agreements in the employment context over the last decade); Kate Andrias, *What do* Circuit City, Waffle House, *and* Labor Ready *Have in Common? The Companies All Force Employees to Sign Away Their Rights to Court*, LEGAL AFF., June 2004, at 27 (recognizing that over 600 companies, covering seven million workers, received dispute resolution services from the American Arbitration Association).

7. Henderson, *supra* note 1, at 30.

entering into the contract are on a relatively even playing field;[8] however, this is not the case in most individual employment contracts.

Employers routinely require employees to enter into pre-employment contracts wherein the employee gives up the right to pursue any claims against the employer, including Title VII and other statutory claims.[9] These are largely "take it or leave it" employment contracts and the employee has little to no bargaining power.[10] Often, the signing of a mandatory arbitration agreement is a condition of employment,[11] and in some cases, it is included in the employment application.[12] Applicants who are limited in employment options are essentially required to sign such agreements.[13]

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8. *See, e.g.*, Ann C. Hodges, *Arbitration of Statutory Claims in the Unionized Workplace: Is Bargaining with the Union Required?*, 16 OHIO ST. J. ON DISP. RESOL. 513, 538-39 (2001).

9. Siderman, *supra* note 4, at 1877; *see* Andrias, *supra* note 6 (recognizing that the potential liability faced by national employers in nationwide lawsuits has led these employers to take measures limiting liability in litigation by requiring employees to waive their right to pursue claims in court as a condition of employment).

10. Siderman, *supra* note 4, at 1877.

11. Henderson, *supra* note 1, at 31.

12. *See* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002). Likewise, in *Circuit City Stores, Inc. v. Adams*, an employee signed an arbitration provision as a part of an application. 532 U.S. 105 (2001). The provision was broad and subjected a wide range of statutory rights to arbitration. *See id.* The arbitration agreement provided as follows:

> I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort.

Id. at 109-10.

13. Lynch et al., *supra* note 6, at 3.

> The employer requires the employee to agree to the arbitration provision as a condition of employment (or continued employment) and the employee is left with little choice if she or he wants the job, . . . The implicit coercion arises when the employee's livelihood is interwoven with his or her agreement to the private arbitration provision.

Id.

When a dispute arises and such an arbitration agreement is in place, the parties will present their case to an arbitrator[14] in an arbitration hearing.[15] Although the Federal Rules of Evidence do not apply, the arbitrator will hear the dispute, consider the written and oral arguments, and render a decision.[16] The arbitrator's decision is binding; however, there are limited grounds for appeal based on egregious conducts including bias, corruption, and fraud.[17]

B. *Benefits of Mandatory Arbitration*

For the court system, mandatory arbitration increases judicial efficiency by reducing the courts' dockets.[18] For employers, the informality and flexibility of mandatory expeditious, and less expensive than proceeding through the court system.[19] Mandatory arbitration saves the employer large amounts of money as compared to protracted litigation.[20]

However, mandatory arbitration can also be an efficient and effective way to resolve employment disputes for employees.[21] Litigation can take years, and it is often difficult for employees to retain competent legal counsel for routine and marginal cases.[22] Consequently, many employees are not able to enforce their rights and resolve their disputes.[23] Relying solely on the court system may leave many employees without means to

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14. An arbitrator is "a neutral third party who renders a decision between two contending parties who cannot mutually arrive at a satisfactory resolution of their conflict." Lynch et al., *supra* note 6, at 5 (citing DOUGLAS M. MCCABE, CORPORATE NONUNION COMPLAINT PROCEDURES AND SYSTEMS 65 n.14 (1988); Michael R. Holden, *Arbitration of State-Law Claims by Employees: An Argument for Continuing Federal Arbitration Law*, 80 CORNELL L. REV. 1695, 1699 (1995)).

15. Henderson, *supra* note 1, at 32-33.

16. *Id.* at 33.

17. Lynch et al., *supra* note 6, at 6; Henderson, *supra* note 1, at 33; *see also* Matthew David Disco, Note, *The Impression of Possible Bias: What a Neutral Arbitrator Must Disclose in California*, 45 HASTINGS L.J. 113 (1993).

18. Beerling, *supra* note 5, at 308.

19. *Id.*

20. Jennifer N. Manuszak, *Pre-Dispute Civil Rights Arbitration in the Nonunion Sector: The Need for a Tandem Reform Effort at the Contracting, Procedural and Judicial Review Stages*, 12 OHIO ST. J. ON DISP. RESOL. 387, 389 (1997) (noting that employers generally embrace arbitration as a "cost-effective forum for resolving employment related disputes").

21. Siderman, *supra* note 4, at 1894; *see also* Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 7-8 (1998).

22. Siderman, *supra* note 4, at 1894.

23. *Id.* at 1894-95.

resolve their disputes, but a mandatory arbitration system provides employees with a forum to have their problems addressed.[24]

C. *Drawbacks of Mandatory Arbitration*

Despite these benefits, when mandatory arbitration is applied to Title VII rights or other statutory rights, the end result is problematic. One problem is that there is a lack of public accountability in mandatory arbitration because "[a]rbitrators are not required to issue written decisions."[25] Without written decisions, judicial review is nonexistent and the protections afforded under Title VII are diminished.[26] Related to this concern is the absence of a jury in mandatory arbitration.[27] If mandatory arbitration is the way Title VII matters are routinely handled, then employees' lose their right to have their cases heard by a panel of their peers. The loss of that right runs counter to the Civil Rights Act of 1991 which made the right to jury trial available in employment cases.[28]

Another problem is that there is limited discovery in mandatory arbitrations.[29] Because most Title VII claims are difficult hard to prove without substantial discovery, many Title VII claims are lost in the arbitration process due to a lack of evidence.[30] Additionally, even if an employee wins a case in mandatory arbitration, the damages available may be limited by the arbitration provision.[31] Again, this disadvantage cut against the Civil Rights Act of 1991 which permits the recovery of both compensatory and punitive damages in Title VII cases.

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24. *Id.* at 1894. For a discussion of the benefits of mandatory arbitration of employment disputes, see generally David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73 (1999).

25. Siderman, *supra* note 4, at 1911.

26. *Id.* at 1911-12.

27. *Id.* at 1914-15.

28. *Id.*

29. *See, e.g.*, W. Scott Simpson & Omer Kesikli, *The Contours of Arbitration Discovery*, 67 ALA. LAW. 280, 280-81 (2006) (recognizing the limited nature of discovery in arbitration proceedings).

30. Siderman, *supra* note 4, at 1913.

31. *Id.* at 1917.

III. LEGAL BASIS FOR MANDATORY ARBITRATION IN THE WORKPLACE

A. *Federal Arbitration Act*

Generally, most mandatory arbitration employment provisions are upheld.[32] In specific cases, the provisions may be unenforceable under general contract defenses, such as substantive and procedural unconscionability,[33] but these cases are rare.[34] The Federal Arbitration Act (FAA),[35] which was originally enacted in 1925, allows the federal courts to uphold mandatory arbitration provisions in employment agreements.[36] The FAA expressly provides as follows: "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . . ."[37] Prior to

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32. *Id.* at 1894-95.

33. Lynch et al., *supra* note 6, at 17.

34. Siderman, *supra* note 4, at 1894.

35. 9 U.S.C. § 2 (1925). This Article addresses only the FAA and the enforcement of pre-employment arbitration agreements regarding federal substantive rights. Many states have statutes that are based on the Uniform Arbitration Act of 1955 and embrace the enforcement of arbitration clauses generally. *See* J. Kirkland Grant, *Securities Arbitration: Is Required Arbitration Fair to Investors*, 24 NEW ENGLAND L. REV. 389, 469-70 (1989) (recognizing that the uniform law validates arbitration agreements and forty-five states have enacted some variation of the uniform law). Historically the states, and the federal courts prior to the FAA, played a parental role by passing laws that expressly forbade the enforcement of agreements that required arbitration of future disputes. Alabama, for example, has such a statute. ALA. CODE § 8-1-41 (1975). However, courts have found that when interstate commerce is impacted by the application of such state statutes, the statutes are pre-empted by the FAA. *See* Cent. Reserve Life Ins. Co. v. Fox, 869 So. 2d 1124, 1125, 1127 (Ala. 2003). In reality, these state law provisions become virtually meaningless because federal courts tend to broadly interpret interstate commerce. *See id.*

36. 9 U.S.C. § 2 (1925).

37. *Id.* The section provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id.

the FAA, courts were hostile toward the enforcement of arbitration provisions.[38] However, federal courts have interpreted the FAA's language to constitute a "liberal federal policy favoring arbitration agreements."[39] In fact, the Supreme Court has expressly found that, under the FAA, Congress "declared a national policy favoring arbitration."[40]

B. *Supreme Court Jurisprudence*

Several Supreme Court cases have applied FAA analysis to mandatory arbitration provisions in the employment context. In 1974, the Supreme Court considered whether employees can prospectively waive their Title VII rights in the context of a collective bargaining agreement.[41] In *Alexander v. Gardner-Denver Co.*,[42] the Court refused to ignore an employee's right to a trial of a Title VII claim even though the employee's claim was submitted to arbitration under a collective bargaining agreement.[43] The Court reasoned that "federal courts have been assigned plenary powers to secure compliance with Title VII,"[44] and that cutting off such rights through a contractual waiver impeded the powers of the federal courts.[45] Although *Alexander* involved a collective bargaining agreement with a mandatory arbitration provision, it can be used to support the argument that individual employment contracts with prospective waivers of Title VII rights should not eliminate an employee's right to seek redress in federal courts.

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38. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001) ("Congress enacted the FAA in 1925. As the Court has explained, the FAA was a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice."); *see also* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989))).

39. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

40. Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 286 (2002) (quoting to Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)).

41. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

42. *Id.*

43. Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Considered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 496 (2001).

44. *Alexander*, 415 U.S. at 445.

45. *See id.*

Despite the *Alexander* decision, in 1991,[46] the Supreme Court embraced mandatory arbitration of Title VII claims.[47] In *Gilmer v. Interstate Johnson Lane Corp.*,[48] as a condition of employment, an employee was required to sign a securities industry registration form which included an arbitration agreement to resolve all disputes.[49] Thereafter, the employee was fired and he asserted an Age Discrimination in Employment Act (ADEA) claim. Even though the arbitration agreement was a part of the securities industry registration form to which the employer was not a signatory,[50] the employer was successfully able to argue that the ADEA claim should be resolved by arbitration. The Court enforced the arbitration agreement relying on the presumption in favor of contractually-based arbitration agreements,[51] and the strong FAA policy favoring arbitration.[52] The *Gilmer* Court clearly embraced mandatory arbitration of statutory rights, but it did not decide whether the same holding would be applied to mandatory arbitration provisions in employment contracts.[53] Nevertheless, many lower federal courts have used *Gilmer* as authority to enforce mandatory arbitration provisions regarding employment law claims.[54] However, those lower federal courts were not in agreement and their decisions generated a clear split of authority.[55]

In 2001, the Supreme Court decided to mend the split.[56] In *Circuit City Stores, Inc. v. Adams*,[57] the Court addressed whether the broad policy in favor of arbitration found in the FAA should be applied to mandatory arbitration in the employment context.[58] The Court examined the pro-arbitration policy of the FAA and recognized that there are significant benefits from enforcing arbitration provisions in the employment context.[59]

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

47. Beerling, *supra* note 5, at 311.

48. 500 U.S. 20 (1991).

49. *Gilmer*, 500 U.S. at 23.

50. *Id.* at 23-24.

51. *Id.* at 24, 35.

52. Beerling, *supra* note 5, at 311.

53. *Id.* at 312. The arbitration provision in question was not part of an employment contract. *See id.*

54. Silverstein, *supra* note 43, at 497-98.

55. Susan W. Kline & Ellen E. Boshkoff, *Survey of Employment Law Developments for Indiana Practitioners*, 35 IND. L. REV. 1369, 1411 (2002).

56. Beerling, *supra* note 5, at 312.

57. 532 U.S. 105 (2001).

58. *Id.*

59. Henry S. Kramer, *Alternative Dispute Resolution in the Workplace*, § 1.02, http://www.westlaw.com (retrieved Sept. 21, 2008).

Furthermore, the Court did not want to open the gates of litigation when the FAA was enacted to avoid litigation.[60] In its 5-4 decision, the *Circuit City* Court interpreted the broad congressional mandate of the FAA to apply to all contracts of employment unless the contract was exempt by the FAA.[61] The Court's decision reinforced the case law from lower federal courts that encouraged the use of mandatory arbitration.[62]

The *Circuit City* decision clarified the broad scope of the FAA[63] and seemed to affirm employers' use of mandatory arbitration provisions in employment contracts. Following *Circuit City*, many employers felt confident that they did not need to "worry that the arbitration agreements they include in contracts of employment will be subject to attack."[64] However, this confidence was short lived. In 2002, the Supreme Court added another wrinkle to the use of mandatory arbitration provisions in employment contracts with its *EEOC v. Waffle House, Inc* decision.[65] The ramification of *Waffle House* is a matter of debate. Some scholars have argued that the pro-employer decision of *Circuit City* was tempered by the pro-employee *Waffle House* decision.[66] However, only time will demonstrate the true impact of the *Waffle House* decision on mandatory arbitration provisions in employment contracts.

C. EEOC v. Waffle House, Inc.[67]

Under *Circuit City*, it is settled that absent some state law defense to a mandatory arbitration provision in an employment contract, employees are bound by the provision.[68] However, an important issue left open was whether the Equal Employment Opportunity Commission (EEOC) would be bound by a mandatory arbitration agreement entered into by the employee and thus, precluded from enforcing statutory claims under Title VII. This was the issue presented to the Supreme Court in *Waffle House*.[69]

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60. *Id.*

61. *Id.* at 123-24. The FAA provides a limited exemption applicable only to employment contracts of transportation workers. *Id.* at 122-23.

62. *Id.* at 112.

63. Kline & Boshkoff, *supra* note 55, at 1412.

64. Barry A. Naum, EEOC v. Waffle House, Inc., 18 OHIO ST. J. ON DISP. RESOL. 225, 225 (2002) (quoting Charity Robl, *Recent Development,* Circuit City Stores, Inc. v. Adams, 17 OHIO ST. J. ON DISP. RESOL. 219 (2001)).

65. 534 U.S. 279 (2002).

66. *See* Naum, *supra* note 64, at 225.

67. 539 U.S. 279 (2002).

68. *Circuit City Stores, Inc.*, 532 U.S. 105.

69. *Waffle House*, 534 U.S. at 282.

In *Waffle House*, an employee, as a condition of employment, signed an arbitration agreement which provided that "any dispute or claim" would be "settled by binding arbitration."[70] The employee began work at Waffle House, and a few weeks later had a seizure at work. Shortly thereafter, the employee was terminated.[71] The employee did not initiate arbitration over the termination; however, the employee did file a complaint of discrimination with the EEOC asserting that he was terminated in violation of the Americans with Disabilities Act (ADA) of 1990.[72] The EEOC, failing to conciliate the dispute, filed an action in federal court alleging that Waffle House terminated the employee because of the employee's disability.[73] The complaint, to which the employee was not a party,[74] sought injunctive relief to stop the alleged discriminatory practice, victim-specific relief "designed to make [the employee] whole,"[75] and "damages for [Waffle House's] malicious and reckless conduct."[76] Waffle House sought to compel the EEOC to arbitration of the claims.[77]

The lower court denied Waffle House's request to compel arbitration. The court of appeals held that a valid arbitration agreement in place between the employer and employee "did not foreclose the enforcement action because the EEOC was not a party to the contract, and it has independent statutory authority to bring suit."[78] The court of appeals qualified this holding by making a distinction between the EEOC seeking injunctive relief, and the EEOC seeking victim-specific relief.[79] The court of appeals ruled that the EEOC was not permitted to seek victim-specific relief in light of the arbitration agreement.[80] However, the court of appeals explained that when the EEOC is seeking to pursue injunctive relief, the public interest overrides the arbitration agreement, and the EEOC is permitted to seek injunctive relief even if the employee has entered into a valid arbitration agreement.[81]

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70. *Id.* (quoting the mandatory arbitration agreement at issue).
71. *Id.*
72. *Id.*
73. *Waffle House*, 534 U.S. at 283.
74. *Id.*
75. *Id.* at 283-84. Victim-specific reliefs include back-pay, reinstatement, and compensatory damages. *Id.*
76. *Id.* at 284.
77. *See id.*
78. *Id.* at 284.
79. *Id.* at 534 U.S. 284-85.
80. *Id.*
81. *Id.*

In a 6-3 holding, the Supreme Court reversed the court of appeals.[82] The Court agreed that the EEOC can certainly seek injunctive relief, but held that mandatory arbitration provisions "in employment contracts cannot preclude the EEOC from pursing relief on behalf of a complaining employee, even if that relief is considered to be 'victim-specific' . . . ."[83]

In reaching this holding, the Court balanced the competing policies of the FAA and Title VII. The Court found that Title VII "makes the EEOC the master of its own case," and that the FAA "does not mention enforcement by public agencies; it [only] ensures the enforceability of private agreements to arbitrate . . ."[84]

D. *Practical Ramifications of Waffle House*

There are several practical ramifications of the *Waffle House* decision. The case appears to be a break in the line of decisions that favored mandatory arbitration provisions in the employment context, but the end result may be just the opposite.[85] The decision may lead to an increase in the use of mandatory arbitration in the workplace.[86] First, the decision embraced mandatory arbitration generally. This was slightly qualified by the Court for claims sharing *Waffle House*'s limited fact pattern involving an EEOC enforcement of important public rights protected by Title VII and the ADA.[87] In those situations, the EEOC would not be bound by the arbitration agreement.[88] However, it is not clear whether other public agencies can use the *Waffle House* decision to enforce other statutory rights when there is a valid arbitration agreement between the employee and the employer.[89]

Second, in most situations, the EEOC does not litigate cases. The EEOC files only less than one percent of enforcement suits annually.[90] Thus, the *Waffle House* decision will certainly not open the floodgates of

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82. Gary Mathiason & George Wood, *'Waffle House': Long View*, 24 NAT'L L.J. A23 (2002).

83. Naum, *supra* note 64, at 227 (quoting *Waffle House*, 122 S. Ct. at 760).

84. *Id.* at 289.

85. Naum, *supra* note 64, at 233.

86. Mathiason & Wood, *supra* note 82.

87. Naum, *supra* note 64, at 23–34.

88. *Id.*

89. *Id.* at 234.

90. *Id.*

litigation. Rather, the decision will probably have little impact on discouraging the use of mandatory arbitration in the employment context.[91]

Third, the decision undermines one of the strong arguments against mandatory arbitration in the workplace: lack of judicial review of the underlying dispute.[92] *Waffle House* protects the oversight role of the EEOC in workplace-discrimination issues.[93] Even with a valid arbitration agreement in place, the EEOC's oversight role will most likely present opportunities for the federal courts to give guidance on workplace-discrimination issues when the EEOC seeks relief.[94] After *Waffle House*, it can be argued that arbitration, coupled with the EEOC's oversight, an adequate safeguard against abusive employer practices,[95] will lead to a fair resolution of most Title VII cases.[96]

Finally, the decision changes the role of the EEOC.[97] The EEOC has traditionally opposed mandatory arbitration in the workplace.[98] Now, the EEOC will most likely issue guidelines regarding mandatory arbitration in the workplace which will help standardize due process requirements and eliminate some of the enforcement barriers to mandatory arbitration provisions.[99] Arguably, such guidelines will help smaller companies and less sophisticated employers implement mandatory arbitration into employment contracts.

Beyond these effects on the system generally, the *Waffle House* decision will impact the behavior of both employees and employers. It will encourage employees to file complaints with the EEOC even if they have arbitration agreements.[100] Thus, the decision, in effect, gives employees two bites at an apple: one bite through the arbitration process and another

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91. *Id.* at 235.

92. Mathiason & Wood, *supra* note 82.

93. *Id.*

94. *Id.*

95. *Id.* This supports the Court's distinction in *Gilmer* between substantive rights and selecting a mechanism for resolving disputes. *See* Gilmore v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991). Employers can now argue with good authority that substantive rights under Title VII are adequately protected even when employees are required to sign mandatory arbitration provisions. *See id.* Employers can claim that their employees' substantive rights are protected by the arbitration process and EEOC's oversight. *Id.*

96. *Id.*

97. Mathiason & Wood, *supra* note 82.

98. *Id.*

99. *Id.*

100. Kline & Boshkoff, *supra* note 55, at 1413.

through the EEOC. However, the second bite at the apple is tenuous in light of the EEOC's history of limited enforcement.[101]

In addition, there are several practical implications for employers to consider in light of *Waffle House*. Employers are encouraged to take advantage of the Supreme Court's general approval of mandatory arbitration, and they are encouraged to develop an alternative dispute resolution program that includes mandatory arbitration.[102] The program should include procedures that are balanced between the employer and employee so that the program can be defended against EEOC initiated claims.[103] Particularly, employers should ensure that the same basic remedies available in litigation are also available in arbitration.[104] They should also allow limited discovery and allow employees to participate in the process of selecting an arbitrator.[105] Furthermore, the employer should have an employee responsible for keeping the program and its policies current;[106] a greater emphasis should be placed on EEOC charges and the employer should invest resources to resolve matters with the EEOC prior to litigation.[107] These mechanisms would add validity to the arbitration process. Nevertheless, in the long run, *Waffle House* will likely benefit employers,[108] and at a minimum, it will represent a victory for arbitration generally.[109]

IV. PUBLIC POLICY ISSUES

The *Waffle House* decision is a half blessing for employees. While it provides the opportunity for the EEOC to pursue victim-specific remedies, those cases are not common.[110] Moreover, at its core, the decision is an endorsement of the use of mandatory arbitration in the employment

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101. *See* Naum, *supra* note 64, at 234.

102. Mathiason & Wood, *supra* note 82.

103. *See id.*

104. O. LEE REED ET AL., THE LEGAL & REGULATORY ENVIRONMENT OF BUSINESS 470-71 (13th ed. 2005).

105. *Id.*

106. *See* Mathiason & Wood, *supra* note 82.

107. *See id.*

108. *See id.*

109. Naum, *supra* note 64, at 235.

110. Statistics indicate that the EEOC only brings suit in a small number of cases, perhaps as low as 1%. *See* Joyce E. Taber, Comment, *An Unanswered Question About Mandatory Arbitration: Should a Mandatory Arbitration Clause Preclude the EEOC from Seeing Monetary Relief on an Employee's Behalf in a Title VII Case?*, 50 AM. U. L. REV. 281, 317-18 (2000).

context. The Court's endorsement raises serious public policy issues regarding Title VII and other statutory claims.

Mandatory arbitration of such vital rights threatens an employee's constitutional right of access to the courts.[111] The decisions of *Waffle House* and earlier cases essentially eliminate this right for employees subject to mandatory arbitration provisions.[112] The requirement to resolve disputes, even disputes regarding vital matters,[113] without a trial trumps the employees' right to have their disputes heard by a jury.[114] It may be a wise public policy to encourage alternative dispute resolution techniques.[115] However, when that particular public policy trumps the opportunity for a jury trial, a more serious public policy concern exists.

Another issue is raised when Title VII rights such are resolved through mandatory arbitration.[116] Although *Waffle House* permits the EEOC to bring victim-specific claims, the decision strikes an individual's right to bring such claims on their own by endorsing mandatory arbitration provisions in employment contracts.[117] As a result, the Court weakens the employees' abilities to eliminate or curb employment discrimination through individual action. Additionally, under some mandatory arbitration provisions employees may be required to pay the costs and fees of the arbitration process if they lose. Such requirements may chill the employees' willingness to enforce their substantive rights in large legal expenses at the end of the process.[118]

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111. Feingold, *supra* note 40, at 288.

112. *See, e.g., id.* at 290-92 (discussing the prior Supreme Court jurisprudence in the employment and arbitration arena, and how such cases have led to an expansion of mandatory arbitration in the employment context).

113. Such as age discrimination, sexual harassment or employment discrimination. *See id.* at 291.

114. *See, e.g., id.* at 290 (alluding that this result is based on statutory rights to a jury trial being eliminated through pre-dispute arbitration agreements in the employment domain).

115. *Id.* at 283-84.

> Because such [arbitration] alternatives streamline adjudicative procedures and allow parties to have their case heard long before a possible court trial, these alternatives enable parties to resolve disputes expeditiously. These alternatives, thus, have merit when they provide efficiency and the voluntary choice of whether or not to go to court.

Id.

116. Lynch et al., *supra* note 6, at 18.

117. *See, e.g., id.*

118. *See* Stephani Armour, *College Grad Confront Tough Job Market*, USA TODAY, June 12,

Additionally, the use of mandatory arbitration provisions in employment applications[119] creates an uneven playing field between employers and potential employees. Including such provisions in applications for employment is a major flaw, and it is unfair to employees.[120] Most potential employees have no bargaining power, and even if they are aware of the provision and its ramifications, they must accept it.[121] Despite these concerns, most courts embrace the validity of these provisions absent some specific contract law defense.[122] Pre-employment mandatory arbitration agreement raises strong public policy issues regardless of the availability of specific contract law defenses.

These considerations make mandatory arbitration in the employment context difficult to justify. Nevertheless, the preference for arbitration is entrenched in the law and its use is not considered a contravention of public policy.[123] In fact, the Supreme Court has held that "there is no broad judicial power to set aside an arbitration award as against public policy."[124] The values of equity, fairness, and justice appear to be lost in favor of efficiency. Perhaps, over time the dominant values of efficiency and economy will shift, and justice will become the courts' primary focus.

V. CONCLUSION

Congress has the ability to address the public policy concerns that arise from the application of the FAA to mandatory arbitration provisions in

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2001, at 1B. Some estimate that arbitrator fees for enforcement of employee statutory rights range from $3000 to $25,000, and perhaps much more than this in complex cases. *See* Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. EMP. L. 685, 697-98 (2004). Certainly the risk of incurring such costs will serve to chill the advancement of some claims by employees. For a discussion of the courts, differing views on this issue, see generally *Effect of Agreements to Arbitrate Generally*, 8 EMP. COORD. EMPLOYMENT PRACTICES § 95:71 (Sept. 2008).

119. For example, *Circuit City Stores, Inc.* includes mandatory arbitration provisions in employment applications. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109-10 (2001).

120. Lynch et al., *supra* note 6, at 14.

121. Granted the potential employee does not have to sign the agreement, however, if the employee wishes to be considered for the job, they need to complete the application. There does not seem to be a great deal of bargaining power in the typical job application process so that the terms of the application, included mandatory arbitration provisions, can be negotiated.

122. *Id.* at 17.

123. The Supreme Court recently recognized the strong national public policy in favor of arbitration in both state and federal courts. *See* Preston v. Ferrer, 128 S. Ct. 978, 983 (2008).

124. Lynch et al., *supra* note 6, at 18-19 (quoting United Pipeworker Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987)).

individual employment contracts. There is pending legislation, the Arbitration Fairness Act of 2007,[125] in both the House and Congress, which would eliminate the viability of predispute mandatory arbitration in employment disputes.[126] The Arbitration Fairness Act of 2007 is based on findings that the FAA was intended to resolve disputes of commercial entities with the same bargaining power and level of sophistication, and that the Supreme Court has extended the FAA to disputes between parties with limited bargaining power.[127] Congress should make this legislation law and properly balance the policy goals of the FAA and Title VII. An emphasis on values other than efficiency and economy is needed. Mandatory arbitration provisions in the context of pre-employment contracts should be made illegal in regard to Title VII statutory rights. There have been prior attempts by some members of Congress to overturn some of the holdings that embrace mandatory employment arbitration, but these attempts have been unsuccessful.[128] It seems that the desire to embrace arbitration and the policy goals of FAA have overshadowed all other concerns. There needs to be a rebalancing of interests: efficiency and economy versus the protection of important substantive rights. Hopefully, this reform effort will be more successful than past endeavors.

The lack of successful congressional reform has probably been the result of Congress's inability to properly define the problem[129] in a way that envinces broad support. Today, employers appear to control the policy process in this area, and they do not see mandatory arbitration as a problem. They view litigation to be the problem; in their view, litigation is a never-ending battle with an unpredictable outcome and costs.[130] The employers' solution to this is to implement pre-employment arbitration

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125. Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007).

126. American Association for Justice, *Momentum Builds in Congress to End Mandatory Arbitration*, 44 TRIAL 12 (2008).

127. *See* Joseph M. Matthews, *Are Florida Courts Really Parochial When it Comes to Arbitration?*, 81 FLA. B.J. 29, 33 (2007).

128. Kline & Boshkoff, *supra* note 55, at 1412.

129. Problem definition is arguably the most important part of any policymaking process. The definition of the problems leads policymakers to a particular solution. For a discussion of this in the consumer bankruptcy policy domain, see generally Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle Over Problem Definition*, 33 U. MEM. L. REV. 509 (2003).

130. *See, e.g.*, Steven M. Kaufmann & John A. Chanin, *Directing the Flood: The Arbitration of Employment Claims*, 10 LAB. LAW. 217, 218-19 (1994) (recognizing the increased number of employment law cases in federal court which are driven by the availability of damage awards and recognizing the benefits of arbitration of such claims in terms of time, cost and predictability).

provisions.[131] The FAA and case law interpreting the FAA in employment, related matters embrace this solution.[132]

As in many policy areas, there appears to be a lack of power on the part of the groups most harmed by the current policy. Thus, meaningful well-balanced reform must take place. Employees do not have the ability to re-characterize the problem. Employees whose rights are contracted away are the ones that may seek reform, but their lack of power and their inability to organize leave their interests largely unrepresented.

Until Congress articulates a clear change in the law as proposed in the Arbitration Fairness Act of 2007, the case law will continue to produce inconsistent results that will continue down individual employee rights in favor of mandatory arbitration. The interest of the "public," as a whole, has been placed second to the interests of employers with power, money, and time to control the public policy process. Hopefully, the current interest of Congress in reforming the FAA will lead to meaningful legislative changes.[133] Unfortunately, this has not been the case to date. Absent a successful reform effort, employees will continue to have their statutory rights "scattered, smothered, and covered" with no more care or concern given to them than that of an order of hashbrowns at Waffle House.

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131. For a discussion of the benefits of arbitration for the employer, see generally Kaufman & Chanin, *supra* note 130, at 219. These benefits certainly help make arbitration a viable solution to the problem of unpredictable and costly litigation.

132. As with most policy domains, Kingdon's streams analogy is applicable. For a discussion of Kingdon's streams analogy, see J.W. KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES (1984). The "policy solution to a perceived problem can only be obtained by the convergence of the political stream, policy stream and problem stream so that a window of opportunity opens for reform to occur." Robert J. Landry, III, *An Empirical Analysis of the Causes of Consumer Bankruptcy: Will Bankruptcy Reform Really Change Anything?*, 3 RUTGERS BUS. L.J. 2 n.3 (2006). Here, the solution is a more permissive use of mandatory pre-employment arbitration, and is a politically acceptable solution due to the disdain of our overly litigious society. *See, e.g.*, Lance P. McMillian, *The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 224 & 226 (2007) (discussing the general consensus of litigation abuse as perceived by society). Until the nature of the problem is redefined, the solution and political streams will not change. For a discussion of the streams analogy, see generally THOMAS A. BIRKLAND, AFTER DISASTER: AGENDA SETTING, PUBLIC POLICY AND FOCUSING EVENTS 6-10 (1997).

133. For a discussion of the current interest of Congress and need for reform, see generally Jean R. Sternlight, *Introduction: Dreaming About Arbitration Reform*, 8 NEV. L.J. 1 (2007).