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Binding Employee Arbitration

The Equal Employment Opportunity Commission v Waffle House, Inc *decision makes it not so final and binding after all*

On January 15, 2002, the United States Supreme Court issued its decision in *Equal Employment Opportunity Commission v Waffle House, Inc.* The Court held that an agreement between an employer and employee requiring that all employment disputes be decided by binding arbitration did not preclude the Equal Employment Opportunity Commission (EEOC) from bringing suit and seeking "victim specific" relief—including back pay and other money damages—on behalf of the employee.

The decision was promptly criticized by some, including the dissenters, as sounding a death-knell for arbitration agreements. (For example, the decision will "discourag[e] the use of arbitration agreements" and reduce arbitration agreements to "all but a nullity.")[1] The *Waffle House* holding does have the effect of diminishing, at least to some extent, the ultimate utility for employers of arbitration agreements. For Michigan employers, however, the decision does not signal a significant change in the legal status quo, and therefore should not result in employers abandoning wholesale the use of employment arbitration agreements.

In *Waffle House*, the initial employment application the employee signed included a statement that any dispute or claim regarding employment would be settled by binding arbitration. The employee was discharged only a few days after beginning employment, following a seizure he suffered at work. The employee never initiated arbitration proceedings, but did file a charge with the EEOC claiming a violation of the Americans With Disabilities Act (ADA).

The EEOC ultimately filed an enforcement action in Federal District Court in its own name against Waffle House. The employee was not a party to that litigation, although the EEOC sought "victim specific" relief, including back pay and other compensatory damages, which it was undisputed would have gone directly to the employee. Waffle House petitioned to stay or dismiss the EEOC's suit, pursuant to the Federal Arbitration Act, or to compel arbitration.

The Court's decision was primarily based on two fairly straightforward findings. First, the EEOC was not a party to the arbitration agreement, and "[i]t goes without saying that a contract cannot bind a nonparty."[2] The Court was also persuaded that notwithstanding any policy arguments, the EEOC was statutorily empowered to pursue such claims: "[T]he statute specifically grants the EEOC exclusive authority over the choice of forum and the prayer for relief once a charge has been filed."[3] Therefore, the majority concluded that an arbitration agreement between employer and employee did not preclude the EEOC from filing suit and seeking damages on behalf of an individual employee.

It was already clear that under Michigan law an arbitration agreement could not preclude an employee from filing an agency charge with the EEOC.[4] In that regard *Waffle House* will not change the landscape for Michigan employers who have, or are considering, arbitration policies. Additionally, the Sixth Circuit had already held that not only could the EEOC pursue litigation against an employer notwithstanding an arbitration agreement with its employees, but that the EEOC could pursue victim-specific relief.[5]

An important fact, which will distinguish *Waffle House* from many other situations, was that the employee did not pursue arbitration, but instead opted to file an EEOC charge exclusively. The Court indicated that had the matter be decided by an arbitrator, principles of res judicata would have precluded obtaining individual relief in a subsequent EEOC claim.[6] The EEOC files litigation in only a very small percentage of cases—according to the majority opinion, less than two percent of all federal discrimination claims.[7]

An employee would be bucking long odds if he or she intentionally declined to pursue arbitration in the hope that it would be one of those two percent of claims. It is far more likely that an individual will both pursue arbitration and also file a charge with the EEOC. Given the relative speed of arbitration, it is likely that the arbitral decision would typically be issued before the EEOC makes a decision to pursue litigation, and that therefore the arbitrator's decision would have preclusive effect.

Employers that already have arbitration policies in place are not likely to abandon those policies because of the small statistical chance that the EEOC may also decide to pursue a claim. However, any employer that is considering instituting an arbitration policy will need to consider the possibility, whether likely or not, that if an arbitration policy is adopted, the employer might face a two-front battle: arbitration with the employee and litigation with the EEOC. Because the law is not yet well settled regarding what arbitration provisions may be enforceable under the tests set out in *Rembert*, employers who adopt arbitration policies may also face litigation over whether the policy itself is enforceable.

Speed and cost are generally considered to be among the primary advantages of arbitration over litigation. The possibility of facing both litigation and arbitration—even if statistically remote—particularly when the

This column addresses proceedings before the United States Supreme Court that are of interest to *Michigan Bar Journal* readers. The column is edited by Leonard M. Niehoff.

litigation may involve victim specific damages, may well cause employers who do not yet have arbitration policies to delay adopting such policies.

Perhaps more troubling for employers than the possibility of facing litigation and arbitration, are the implications *Waffle House* may have on the effects of settlements in discrimination claims. The majority opinion specifically declined to address this issue, stating "[i]t is an 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."[8]

Further clouding the issue was the statement that had the employee "accepted a monetary settlement, any recovery by the EEOC would be limited accordingly" and the citation to an appellate decision for the proposition that an employee's settlement "rendered her personal claims moot." The dissenters clearly believe that the *Waffle House* decision allows the EEOC to seek victim-specific relief on behalf of an employee who has already settled a claim and received monetary compensation. As the Court noted, the EEOC continues to take the position that a settlement cannot bar an individual from filing an EEOC charge or bar the EEOC from bringing a claim in its own name: "in fact, the EEOC takes the position that it may pursue a claim on the employee's behalf even after the employee has disavowed any desire to seek relief."[9]

It appears clear that a settlement with an individual cannot preclude the EEOC from litigating a claim in its own name involving the same issues, since the EEOC is not a party to any settlement between employer and employee. *Waffle House* certainly leaves open the possibility that the EEOC could pursue victim specific remedies, even if there had been a settlement with an individual. The small chance of facing litigation against the EEOC may not dissuade many employers from maintaining or adopting arbitration policies. However, the chance of facing litigation after paying money to obtain a release from an employee may well discourage settlement, or at least be a factor that may affect the cost-benefit analysis of settlement.

It is unlikely that employers who had already instituted arbitration policies will abandon those policies as a result of the *Waffle House* decision. If an employer were considering adopting such a policy because it had concluded that it would benefit from the speed and cost savings of arbitration, the small chance of defending litigation against the EEOC will likely not dissuade adoption of an arbitration agreement. The additional uncertainty resulting from *Waffle House* will no doubt cause at least some employers who were still balancing the pros and cons of arbitration to conclude that the scales are now tipped against arbitration.

The risks and economic reality of litigation are such that many employment disputes will continue to be resolved by settlements. However, employers will need to be reminded that even an economic settlement with an employee cannot ensure complete finality. An employee can still pursue a timely EEOC charge and the EEOC can still pursue litigation in its own name, with the possibility remaining open that it can recover victim-specific relief.[10] ✦

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FOOTNOTES

1. Dissent, pp 16, 12.
2. Opinion, p 14.
3. Opinion, p 18.
4. See *Rembert v Ryan's Family Steak Houses*, 235 Mich App 118 (1999).
5. *EEOC v Frank's Nursery & Crafts, Inc*, 177 F3d 448 (CA 6, 1999).
6. Opinion, p 17.
7. Opinion, p 10, n 7.
8. Opinion, p 17.
9. Opinion, p 11. See also, EEOC Enforcement Guidance on non-waivable employee rights.
10. This article is based in large part on an article that recently appeared in *Labor and Employment Lawnotes*, the publication of the Labor and Employment Law Section of the State Bar.