Labor and Employment Bulletin

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Introduction

Nearly a year ago, in a decision widely heralded as a boon for alternative dispute resolution, the Supreme Court decided that mandatory arbitration provisions were fully enforceable in the employment context. Circuit City Stores, Inc. v. Adams . Some employers who had been reluctant to incorporate arbitration provisions in their employment applications and contracts scurried to adopt them in the hope of reducing litigation expenses, avoiding runaway jury awards and stemming the negative publicity attendant to discrimination trials.

On January 15, 2002, in *EEOC v. Waffle House, Inc.*, the Supreme Court switched gears and poured a bit of cold water (or maple syrup) on the effectiveness of arbitration provisions. The Court decided that even if an employer and employee agree to arbitrate, the EEOC may still file suit and obtain victim-specific relief on that employee's behalf. As the dissent in *Waffle House* pointed out, this result permits the EEOC to do for the employee "that which he has agreed not to do for himself." While the decision, at first blush, appears to undermine the effectiveness of arbitration provisions, the paucity of discrimination claims actually pursued by the EEOC greatly limits the impact of the Court's holding. Accordingly, for most employers, arbitration provisions remain an appropriate and viable tool which should be considered as the cornerstone of a broader alternative

dispute resolution system.

History of the Waffle House Decision

Waffle House's employment application contained a mandatory arbitration clause providing that any dispute between an employee and Waffle House regarding the employment relationship would be resolved by binding arbitration. Eric Baker, who had signed this employment application, was fired by Waffle House shortly after suffering a seizure on the job. Mr. Baker ignored his agreement to arbitrate and instead filed a charge of disability discrimination with the EEOC.

After investigating Mr. Baker's claim, the EEOC sued Waffle House, alleging that its treatment of Mr. Baker violated the Americans With Disabilities Act ("ADA"). The EEOC's complaint sought an injunction against Waffle House requiring it to comply with the ADA, punitive damages for its willful violation of the ADA, and back pay, reinstatement, and compensatory damages designed "to make Mr. Baker whole." Mr. Baker was not a party to the EEOC's lawsuit.

In response to the EEOC's complaint, Waffle House filed a petition under the Federal Arbitration Act (the "FAA") to compel arbitration. The District Court denied the petition, holding that the arbitration clause in the employment application was not included in Mr. Baker's employment contract and, thus, was unenforceable. The Court of Appeals for the Fourth Circuit reversed and held that the arbitration agreement was enforceable but that it did not preclude the EEOC from suing Waffle House for *injunctive relief* . The Fourth Circuit reasoned that since the EEOC has a broad mandate to vindicate the public interest (in this case, enforcement of the ADA), an injunction requiring Waffle House to comply with the ADA would serve this public interest. On the other hand, the Fourth Circuit also held that the EEOC could not pursue "victim-specific relief" for Mr. Baker (i.e. back pay, reinstatement, compensatory damages) because such an award would not vindicate the public interest, but only Mr. Baker's private

interest. In addition, such victim-specific relief would undo the bargain between Mr. Baker and Waffle House to arbitrate claims between them and, as such, would undermine the FAA's goal of promoting arbitration. In weighing the competing interests of the FAA and the EEOC, the Fourth Circuit concluded that while the FAA's goal of promoting arbitration is subordinate to the EEOC's protection of the public interest, it trumps the EEOC's pursuit of remedies on behalf of individual complainants.

The Supreme Court's Decision

The Supreme Court, in a 6-3 split, reversed the Fourth Circuit. The Court held that the EEOC was not a party to the arbitration agreement between Mr. Baker and Waffle House and could not, therefore, be bound by its terms. The Court rejected the Fourth Circuit's attempt to balance the policy goals of the FAA and the ADA, concluding that Title VII clearly defines the scope of the EEOC's remedies, and nothing in the FAA purports to affect the rights of persons who are not parties to arbitration agreements.

The Court also limited the impact of its holding in at least two ways. First, the Court acknowledged that an employee's conduct may limit the damages that the EEOC may recover for him. If, for example, Mr. Baker had failed to mitigate his damages, then the EEOC's recovery on his behalf would have to be reduced accordingly. Second, the Court noted that its decision did not resolve the issue of how a settlement or an arbitration judgment would affect the EEOC's rights or remedies. Accordingly, the concern that *Waffle House* might upend a settlement agreement or permit an employee two bites at the apple (or waffle, as the case may be) is probably overstated.

The Impact of the Supreme Court's Decision

The Supreme Court's decision poses more of a theoretical hurdle than a practical impediment to the promise of finality that arbitration provisions offer. Because the EEOC pursues fewer than 1% of the charges filed with it every year, the odds of any employer's arbitration provision being trumped by the EEOC are quite remote. Moreover, the EEOC is unlikely to devote

its limited resources to a matter involving a single employee or to a case that has been settled or fairly arbitrated.

In light of the Supreme Court's broad enforceability of arbitration provisions and the skyrocketing costs associated with employment litigation, every employer should consult with their labor and employment counsel whether to adopt arbitration as part of a broader alternative dispute resolution system. On balance, the *Waffle House* decision should not factor heavily, if at all, into this equation.

CLIENT SEMINAR

As discussed above, recent U.S. Supreme Court decisions have paved the way for employers to require employees to submit employment disputes, including statutory discrimination claims, to mandatory arbitration -- instead of litigating in Court or at a government agency. On its face, the thought of a quicker, cheaper, stream-lined resolution in a private forum with an arbitrator rather than a jury deciding the case is attractive. The Hale and Dorr LLP Labor and Employment Department will be holding a client seminar at their Boston Office on **Tuesday, May 7, 2002 at 9:30 a.m.** to address such questions as:

- Is mandatory arbitration beneficial for your company?
- What are the advantages and disadvantages to mandatory arbitration?
- Should mandatory arbitration be part of a broader alternative dispute resolution system?
- How does an employer design an alternative dispute resolution system that is right for its company?
- How should an employer respond to an employee's legal challenge to mandatory arbitration?

During this seminar, Jonathan Rosenfeld, Esq. and Catherine Stockwell, Esq. of Hale and Dorr LLP will answer these questions and offer their views on mandatory arbitration and alternative dispute resolution for resolving employment disputes.

If you would like to attend this seminar, please email or call Louise Rothery at +1 617 526 5606,

louise.rothery@haledorr.com and a reservation will be made. This seminar is provided to the clients of Hale and Dorr LLP for informational purposes and at no cost to the attendees.

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