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Julie L. Waters

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DOES THE BATTLE OVER MANDATORY ARBITRATION JEOPARDIZE THE EEOC'S WAR IN FIGHTING WORKPLACE DISCRIMINATION?

I. INTRODUCTION

Carol Adams, an African-American, began working as an executive assistant at Frank's Nursery and Crafts (Frank's) in 1993.¹ When her boss left in 1995, Adams was not offered a new executive assistant position that had been created.² Instead, this position was offered to a Caucasian woman who was an outside applicant.³ Management did not give Adams the opportunity to submit a formal application for this position.⁴ She filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that she had been passed over for the position because of her race.⁵ The EEOC investigated the matter and concluded that Frank's had discriminated against Adams. The EEOC determined that Frank's could not establish any valid reason why Adams was not qualified for the position.⁶ It decided to file charges under Title VII.⁷ The EEOC's case appeared to be strong. However, Adams, like all employees at Frank's, signed an arbitration agreement mandating that she would settle all disputes arising out of her employment through arbitration.⁸ Frank's moved to dismiss the EEOC's claim and to compel Adams to arbitrate, pursuant to this arbitration agreement.⁹

Adam's situation raised several issues that had not been addressed by any court. Should the EEOC have the ability to file a court claim on Adams' behalf notwithstanding her agreement to arbitrate? If so, should the EEOC have the ability to pursue all remedies, although Adams could gain individual relief through arbitration? It seems that these questions could be answered very simply through litigation. However, courts have demonstrated difficulty

1. EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 452 (6th Cir. 1999).

2. *See id.* at 453.

3. *See id.*

4. *See id.*

5. *See id.*

6. *Frank's Nursery*, 177 F.3d at 453.

7. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-332, 78 Stat. 259 (codified as amended at 42 U.S.C. § 2000e-5 (1994 & Supp. III 1997)). Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin. *Id.*

8. *See Frank's Nursery*, 177 F.3d at 452-53.

9. *See id.* at 453.

in resolving precisely what the EEOC's role should be in fighting workplace discrimination when an employee has signed a binding arbitration agreement.¹⁰

In 1998, employment discrimination claims were filed twenty-five times more often than in 1970.¹¹ Presently, the increase in employment claims is approximately 100% greater than the increase in all other types of civil litigation.¹² With the enormous growth in employment discrimination claims, there is an understandable fear that these claims will clog the federal courts, and create a backlog for the EEOC.¹³ Backlog is already a problem, and the number of claims continues to rise.¹⁴ It is for this reason that many employers have attempted to use other mechanisms to resolve employment discrimination claims. One popular alternative to litigation is to require that each employee sign a binding arbitration agreement.¹⁵ Often, these agreements provide that an employee is required to submit any claims arising from employment to an arbitrator, in lieu of litigating the claim.¹⁶ Arbitration has allowed for an expansion in the kinds of claims that may be resolved, and also provides a forum to resolve disputes outside the judicial process and without the EEOC.¹⁷ Employers are able to use the less costly and more efficient arbitration process

10. See *Frank's Nursery*, 177 F.3d at 452. Compare *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999); *EEOC v. Kidder, Peabody & Co.* 156 F.3d 298 (2d Cir. 1998). These cases illustrate the circuit split that will be discussed throughout this Comment.

11. Evan J. Spelfogel, *Mandatory Arbitration vs. Employment Litigation*, 54 DISP. RESOL. J. 78 (1999).

12. See *id.* at 78.

13. See also Theodore J. St. Antoine, *Mandatory Arbitration of Employment Discrimination Claims: Unmitigated Evil or Blessing in Disguise?* 15 T.M. COOLEY L. REV. 1, 2 (1998).

14. See Spelfogel, *supra* note 11, at 78. Spelfogel notes that "There is currently a backlog of over 50,000 employment discrimination cases at the EEOC and thousands more at state and local government agencies." *Id.*

15. See Mei L. Bickner et al., *Developments in Employment Arbitration*, 52 DISP. RESOL. J. 8 (1997). The popularity of arbitration agreements has become quite evident in many areas. The rise of arbitration has been seen in private schools arbitrating with students, and businesses arbitrating with clients, as well as arbitration in employment. *Id.* at 10.

16. See Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 221, 226 (1997).

17. See *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985). This was the first Supreme Court case to hold that statutory claims, not just contractual claims, could be arbitrated in a workplace context. *Id.* at 640. See also John W.R. Murray, *The Uncertain Legacy of Gilmer: Mandatory Arbitration of Federal Employment Discrimination Claims*, 26 FORDHAM URB. L.J. 281, 295-96 (1999). A benefit of arbitration over the judicial process is that claims that may not be pursued by the EEOC in court proceedings because they are considered relatively insignificant, involving only one employee or isolated incidents, will be heard in an arbitration proceeding. *Id.* at 296-97.

in almost any work-related claim, making these agreements valuable and explaining their growth in popularity among employers.¹⁸

With the current expansion of arbitration in the workplace, courts have attempted to determine the validity and utility of various arbitration agreements.¹⁹ Without an arbitration agreement, when an employee wishes to file a complaint claiming discrimination, the enforcement of the claim is delegated to the EEOC by statute.²⁰ However, when an employee has signed a binding arbitration agreement, the role of the EEOC changes. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that binding mandatory arbitration agreements *are* enforceable with regard to employment discrimination claims.²¹ The Court's holding in *Gilmer* is important because it answered several questions relating to the role of the EEOC and the position arbitration should play in employment discrimination disputes.²²

While explaining that arbitration agreements are enforceable regarding employment discrimination claims, the *Gilmer* majority did not discuss the extent to which a binding arbitration agreement prevents the EEOC from bringing a claim to a judicial forum.²³ When there is no arbitration agreement, the EEOC may seek a variety of equitable and legal remedies through litigation.²⁴ However, the effect of a binding arbitration agreement on the EEOC's authority to pursue all statutory remedies is unclear.

There has generally been agreement that the EEOC may seek equitable relief on behalf of the public interest, notwithstanding a binding arbitration

18. See Spelfogel, *supra* note 11, at 80. Spelfogel notes, "[I]n the past several years, more than 40 well-known employers have set up mandatory arbitration programs covering over two million employees." *Id.* at 81.

19. See Samuel Estreicher, *PreDispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.L. SCH. L. REV. 1344, 1344 (1997).

20. 42 U.S.C. § 2000e-5 (1994 & Supp. III 1997). A litigant must first gain a right to sue by filing a charge with the EEOC. The EEOC then investigates the claim. If the EEOC believes that discrimination took place, it may prosecute the claim in its own name, or it may allow an individual claimant to pursue the claim on his or her own behalf. *Id.*

21. See generally *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). See also *infra* notes 118-45 and accompanying text (discussing the *Gilmer* decision).

22. See *Gilmer*, 500 U.S. at 35.

23. See *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 461 (6th Cir. 1999) (citing *Gilmer*, 500 U.S. at 32). Although the *Gilmer* majority stated that an individual claimant could still file charges with the EEOC notwithstanding a binding arbitration agreement, it did not discuss which remedies would be available to the EEOC pursuant to its authority. See *Frank's Nursery*, 177 F.3d at 461.

24. 42 U.S.C. § 2000e-5(g). The EEOC may seek injunctive relief, reinstatement of the employee into his or her former position, or a comparable position. Additionally, the EEOC may seek monetary damages, including back pay and/or punitive relief on behalf of the employee claiming discrimination. See *id.*

agreement.²⁵ However, a disagreement has developed regarding whether the EEOC is able to recover damages on an employee's behalf. The Second and Fourth Circuits agree that the EEOC is precluded from seeking a monetary remedy on behalf of an individual who has signed a binding arbitration agreement.²⁶ The Sixth Circuit, however, reached the opposite conclusion, holding that the EEOC may exercise its delegated authority to pursue *all remedies*, including monetary damages on an employee's behalf.²⁷ The EEOC typically argues that because Congress has delegated to it the authority to obtain equitable and legal remedies, the EEOC should have the ability to seek these remedies, notwithstanding a binding arbitration agreement.²⁸ Additionally, the EEOC argues that it must have the ability to seek monetary damages so it can properly protect the public interest in eliminating workplace discrimination.²⁹ The EEOC concluded that equitable relief simply cannot further its goal of protecting the public interest adequately.³⁰

In contrast, employers typically argue that the EEOC serves the public interest sufficiently through equitable relief.³¹ Supporting this argument, employers are able to point to the federal policy favoring enforcement of arbitration agreements, thus requiring the Court to "rigorously enforce agreements to arbitrate."³² Employers have also argued that by allowing the EEOC to pursue damages on an individual's behalf, arbitration agreements will become almost completely ineffective.³³ Clearly, there are competing interests regarding the goals of the EEOC and the strong federal policy of encouraging arbitration. Thus, the question remains, what effect does a binding arbitration agreement have on the EEOC's authority to pursue all available remedies?

25. See *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 806-07 (4th Cir. 1999). Courts have allowed the EEOC to pursue injunctive relief even if an individual has previously waived or settled a claim because injunctive relief assists the EEOC in its goal of pursuing the public interest. *Id.* at 811.

26. See generally *EEOC v. Kidder Peabody, & Co.*, 156 F.3d 298, 300 (2d Cir. 1998). See also *Waffle House*, 193 F.3d at 807.

27. See *Frank's Nursery*, 177 F.3d at 468.

28. See generally *EEOC Notice* (visited Feb. 22, 2000) <<http://www.eeoc.gov/docs/mandarb.text>> (describing EEOC's policy statement on mandatory arbitration as of July 10, 1997) [hereinafter *EEOC Notice*]. See generally *Frank's Nursery*, 177 F.3d at 461.

29. See *EEOC Notice*, *supra* note 28. The EEOC argues that the courts play a "crucial role" in defining workplace discrimination, making it part of the public record, and deterring future discrimination for the public. *Id.*

30. *Id.*

31. See *Kidder*, 156 F.3d at 302.

32. See *id.* (citing *Moses H. Cone Mem'l Hosp. v. Mercury Const. Co.*, 460 U.S. 1, 24 (1983)).

33. See *Frank's Nursery*, 177 F.3d at 465-66 (citing *Kidder*, 156 F.3d at 303). Employers and courts have argued that by allowing the EEOC to seek monetary damages on an individual's behalf, the individual is able to "make an end run around the arbitration agreement by having the EEOC pursue back pay . . ." *Id.* at 466 (quoting *Kidder*, 156 F.3d at 303).

This Comment will examine the effect that binding arbitration has on the right of the EEOC to obtain a monetary remedy on the employee's behalf. Part II will include a historical discussion of the statutes, cases, and policies leading to this remedies problem.³⁴ Part III, an analysis of the opinions by three circuits attempting to resolve this issue, demonstrates the strong disagreement among the circuits.³⁵ Part IV, the Critical Analysis, will discuss why it is not logical or beneficial to allow the EEOC to pursue monetary damages after an employee has signed a mandatory arbitration agreement. It will also discuss why it is extremely important in the EEOC's fight against discrimination in the workplace that the EEOC have the ability to pursue injunctive relief.³⁶ Part V will conclude this Comment by forecasting the success of this solution. Additionally, this section will offer ideas for successful implementation of this solution.³⁷

II. HISTORY OF ARBITRATION AGREEMENTS AND THE EEOC'S ENFORCEMENT OF ANTI-DISCRIMINATION POLICIES

The problem regarding what relief the EEOC may recover on behalf of an individual who has signed a binding arbitration agreement has arisen recently.³⁸ Precedence has played a substantial role in bringing this specific issue to the courts. A discussion regarding the Federal Arbitration Act (FAA),³⁹ the statutes delegating authority to the EEOC,⁴⁰ and courts' interpretations of these statutes, provides a historical background as to the evolution of this problem.

A. *The Civil Rights Act of 1964 and the Birth of the EEOC*

Following the enactment of the Civil Rights Act of 1964, the EEOC began operating as the primary enforcement agency to stop employment discrimination.⁴¹ When Congress enacted The Civil Rights Act, the EEOC's

34. See *infra* notes 38-205 and accompanying text.

35. See *infra* notes 206-68 and accompanying text.

36. See *infra* notes 269-322 and accompanying text.

37. See *infra* notes 323-30 and accompanying text.

38. See *Kidder*, 156 F.3d at 300-01. This was the first appellate decision to reach this issue. It was delivered by the Second Circuit on August 28, 1998. *Id.*

39. See generally Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1994 & Supp. IV 1998).

40. 42 U.S.C. § 2000e-5 (1994 & Supp. 1997); Americans With Disabilities Act (ADA), 42 U.S.C. § 12117(a) (1994 & Supp. III 1997); Age Discrimination in Employment Act, 29 U.S.C. § 621 (1994). These are the statutes that will be discussed throughout this Comment. They are enforced by the EEOC, although there are other statutes delegating authority to the EEOC as well.

41. See *U.S. Equal Employment Opportunity Commission: An Overview* (visited Feb. 29, 2000) <<http://www.eeoc.gov/Overview.html>>.

authority was restricted compared to the authority that it has today.⁴² At that time, Congress authorized the EEOC “to investigate charges of employment discrimination and to pursue informal methods of conciliation in efforts to resolve those charges.”⁴³ The EEOC’s involvement ended after using informal methods to resolve workplace discrimination.⁴⁴ Consequently, if the EEOC did not correct discrimination by informal methods,⁴⁵ the individual complaining of discrimination was responsible for bringing his or her claim to court.⁴⁶ In this way, The Civil Rights Act of 1964, in its original form, left formal enforcement of anti-discrimination statutes largely to the discretion of individual employees.⁴⁷

In 1972, Congress recognized that the authority granted to the EEOC was inadequate to fight discrimination.⁴⁸ In *General Telephone Co. v. EEOC*, the Supreme Court noted: “[T]he most striking deficiency of the 1964 Act is that the EEOC does not have the authority to issue judicially enforceable orders to back up its findings of discrimination . . . [this] burden of obtaining enforceable relief rests upon each individual victim of discrimination. . . .”⁴⁹ Congress noted that this was a burdensome, expensive, and time-consuming process for individuals.⁵⁰ Therefore, The Civil Rights Act of 1964 was amended to allow the EEOC to bring employment discrimination claims in federal court after informal attempts at conciliation had failed.⁵¹ However, these amendments only authorized the EEOC to sue for specific relief, such as reinstatement or back pay.⁵² Consequently, the remedies and actions available to the EEOC were still quite limited. Additionally, the amendments allowed aggrieved employees to retain the right to bring their own claims. Still, the EEOC enjoyed a 180-day period of exclusive jurisdiction.⁵³ After the 1972

42. See generally *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 455-59 (6th Cir. 1999). Here, the court demonstrates the evolution of the EEOC since 1964, when it was first promulgated by statute. *Id.*

43. *Frank’s Nursery*, 177 F.3d at 456 (citing The Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 259 (codified as amended in 42 U.S.C. § 2000e-5(a) (1994 & Supp. III 1997)).

44. § 706(a), 78 Stat. at 259.

45. The EEOC was statutorily delegated to use informal methods of persuasion. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984).

46. *Id.*

47. § 706(a), 78 Stat. at 259. See also *Frank’s Nursery*, 177 F.3d at 457.

48. See *General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980). The purpose of the 1972 amendments to the Civil Rights Act of 1964 “was to secure more effective enforcement of Title VII.” *Id.*

49. *Id.* at 326 n.7.

50. *Id.*

51. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

52. See *id.*

53. See *id.*

amendments, the EEOC was able to bring actions in federal court, instead of simply trying to work with employers and employees on an informal basis. In addition, public court proceedings played a great role in stopping present discrimination and in deterring future discrimination.⁵⁴

The Civil Rights Act of 1991 allowed for more expansive remedies, such as punitive damages in situations involving intentional discrimination.⁵⁵ These amendments also endorsed the use of alternative dispute resolution methods, including arbitration, to resolve claims arising under anti-discrimination statutes “where appropriate and to the extent authorized by the law.”⁵⁶ This legislation demonstrated Congressional recognition that arbitration should be used in at least some employment discrimination claims. Passage of The Civil Rights Act of 1991 demonstrated awareness that not all employment discrimination claims must be heard in federal court in order to obtain a valid and just result.

B. *The Federal Arbitration Act*

In order to analyze arbitration concerning the EEOC, it is necessary to look at the historical framework of the Federal Arbitration Act. Congressional recognition of arbitration began much earlier than the EEOC’s.⁵⁷ Neither the public nor the courts accepted arbitration in the employment discrimination context until long after the first federal laws relating to arbitration were promulgated.⁵⁸ Federal acceptance and approval of arbitration had its

54. See generally *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 456-57 (6th Cir. 1999).

55. The Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

56. § 118, 105 Stat. at 1081. It is important to note that this bill to amend the Civil Rights Act of 1964 was signed by President Bush only a few months after the decision in *Gilmer* was delivered by the Court. The amendments demonstrate an attempt by Congress to allocate greater control over workplace discrimination to the EEOC. Karen Halverson, *Arbitration and The Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445, 446-48 (1999).

It has also been argued that Section 118 of the Civil Rights Act of 1991 was enacted to give employers *less* of an opportunity to use arbitration agreements and to effectively overrule the holding in *Gilmer*. See *id.* In 1998, in *Duffield v. Robertson Stephens & Co.*, the Ninth Circuit decided that §118 meant that any mandatory arbitration agreement, very similar to that in *Gilmer*, should *not* be upheld because it is compulsory upon accepting employment. 114 F.3d 1182 (9th Cir. 1998). So far, it does not appear that other circuits have followed this line of reasoning. See generally Robert S. McArthur, *Arbitrary Civil Rights? The Case of Duffield v. Robertson Stephens*, 32 LOY. L.A. L. REV. 881 (1999). See generally *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998). The *Seus* decision demonstrates a strong disagreement with the *Duffield* court on the meaning of the Civil Rights Act of 1991 and its arbitration policy. *Id.* at 183.

57. See *Wilko v. Swan*, 367 U.S. 427, 429 (1953) (discussing the history of the Federal Arbitration Act).

58. See *id.* at 430. This was the first Supreme Court decision regarding arbitration in an employment context. In *Wilko*, the Court determined that an agreement to arbitrate could not

beginnings in 1925, when Congress approved the United States Arbitration Act.⁵⁹

When Congress originally enacted this statute, it expressed a policy favoring arbitration in the business community.⁶⁰ In 1947, Congress reenacted the law, naming it the Federal Arbitration Act (FAA).⁶¹ Courts have acknowledged that Congress enacted the FAA “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”⁶² Courts have since held that the FAA demonstrates a Congressional policy favoring arbitration.⁶³ Should the EEOC’s right to bring a claim for all remedies be hindered when arbitration agreements are upheld in an employment discrimination context? The evolution of the cases and public perception concerning employment discrimination are discussed in the sections that follow.

C. *The EEOC and Arbitration: Two Competing Interests Collide*

In 1974, the authority granted to the EEOC collided with a strong policy favoring arbitration in *Alexander v. Gardner-Denver, Co.*,⁶⁴ a case involving a mandatory arbitration agreement in the collective bargaining context.⁶⁵ Alexander, a discharged African-American worker wanted to file a lawsuit under Title VII⁶⁶ for wrongful termination and discriminatory practices.⁶⁷ However, Alexander was a union member, and, therefore, was covered under the union’s collective bargaining agreement.⁶⁸ This agreement mandated arbitration in all disputes arising from employment.⁶⁹ After arbitrating in

preclude an employee from going to court based on the same claim. *Id.* at 438. *See also* Halverson, *supra* note 56, at 453.

59. The Federal Arbitration Act of 1925, 9 U.S.C. §§ 1-14 (1994 & Supp. IV 1998).

60. *See generally* Moses H. Cone Mem’l Hosp. v. Mercury Const. Co., 460 U.S. 1, 24 (1983). *See generally* Gilmer v. Interstate/Johnson Lane, Corp., 500 U.S. 20, 39 (Stevens, J., dissenting). In his dissent, Justice Stevens discusses the fact that when the FAA was enacted, it was for the purpose of giving merchants a right to arbitrate damages if they wanted to do so. *Id.*

61. 9 U.S.C. §§ 1-14.

62. *See Gilmer*, 500 U.S. at 24 (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985)).

63. *See generally* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987). *See also* Moses H. Cone Mem’l Hosp., 460 U.S. at 24.

64. 415 U.S. 36 (1974).

65. *See id.* at 39.

66. 42 U.S.C. § 2000e-5 (1994 & Supp. III 1997). In order to bring an action under Title VII, the claimant must first obtain a “right to sue letter” from the EEOC. *Id.*

67. *Alexander*, 415 U.S. at 39.

68. *Id.*

69. *See id.* at 39-42. The collective bargaining agreement stated that disputes had to be submitted to a “multistep grievance procedure” which culminated at compulsory arbitration. *Id.*

accordance with the collective bargaining agreement, the arbitrator found that Alexander was discharged for proper reasons.⁷⁰ The EEOC subsequently dismissed Alexander's claim.⁷¹ Alexander then filed a Title VII action in federal court.⁷²

The issue presented to the Court was whether Alexander had a right to bring his claim under Title VII, despite the mandatory arbitration clause contained in the collective bargaining agreement.⁷³ In *Alexander*, the Court held that an employee could bring the Title VII claim although he was a union member.⁷⁴ Justice Powell's majority opinion distinguished employee claims involving employment contracts from those claims involving an individual's statutory rights.⁷⁵ Justice Powell reasoned that an individual's statutory rights, such as those granted under Title VII, could not be relinquished through a collective bargaining agreement to arbitrate.⁷⁶ Furthermore, the majority found that the agreement in *Alexander* did not clearly state that the arbitration clause would cover statutory claims in addition to covering contractual issues.⁷⁷ The *Alexander* majority also expressed a general skepticism regarding the arbitration process. Justice Powell's majority opinion demonstrated distrust in arbitrators, stating that arbitrators may not be qualified to handle situations involving statutory rights, like those promulgated under Title VII.⁷⁸ The majority also noted deficiencies in fact-finding in arbitration.⁷⁹ For these reasons, the majority concluded that Alexander's claim under Title VII could be pursued in federal court, notwithstanding the collective bargaining

70. *Id.* at 42.

71. *See Alexander*, 415 U.S. at 42. In his decision, the arbitrator failed to mention any of the employee's claims of racial discrimination regarding his discharge, stating only that the employee had been "discharged for just cause." *Id.* at 42-43.

72. *Id.* at 43.

73. *See id.* Gardner-Denver argued that the arbitration was a sufficient remedy, and moved to dismiss the lawsuit. *See id.*

74. *See Alexander*, 415 U.S. at 60. The Court stated that the EEOC's important interest in stopping discrimination indicated that the federal courts should be allowed to determine Title VII claims and that "deferral to arbitral decisions would be inconsistent . . ." *Id.* at 56.

75. *See id.* at 51-52. The Court stated that because the employee wanted to bring his claim under Title VII, this was a statutory or individual claim that had not been clearly covered by the collective bargaining agreement. *See id.*

76. *Id.* at 52. It was not clear at this time whether the distinction between statutory and contract claims would also be applied if an individual entered into a binding arbitration contract, without the presence of a collective bargaining agreement. *See generally Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 (1991).

77. *Alexander*, 415 U.S. at 47 n.6 ("[W]e hold that the federal policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII.").

78. *See id.* at 57 ("[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.").

79. *Id.* at 57.

agreement mandating arbitration.⁸⁰ For many years, the *Alexander* holding was cited for the proposition that *no arbitration agreement* could prevent an employee from bringing a discrimination claim in federal court.⁸¹

In the early 1980s, the Supreme Court upheld and expanded the *Alexander* decision, allowing employees to bring statutory claims against their employers despite having a valid arbitration agreement in place.⁸² In *Barrentine v. Arkansas-Best Freight Systems Inc.*, the Court allowed employees to bring an action in federal court alleging that their employer had violated the Fair Labor Standards Act despite finding that employees were covered by a binding arbitration agreement.⁸³ As in *Alexander*, employees were able to bring statutory claims, even when they had previously arbitrated the claims unsuccessfully.⁸⁴ The Court stood by its rationale in *Alexander*, stating that statutory claims would not be foreclosed by participation in an arbitration agreement even when the agreement called for arbitration as the exclusive remedy.⁸⁵

In 1984, the Court decided *McDonald v. City of West Branch*, which also allowed employees to bring statutory claims notwithstanding a collective bargaining agreement.⁸⁶ As in *Alexander*, the Court in *McDonald* continued to question the qualifications and expertise of arbitrators in arbitrating individual statutory rights.⁸⁷ This evidenced the Court's hesitancy to allow arbitration as a final option for employees.

An examination of Supreme Court decisions beginning in 1985 demonstrate that the judicial attitude toward arbitration agreements in employment began to shift significantly to a policy favoring arbitration.⁸⁸ In *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*,⁸⁹ the Court enforced an

80. *Id.* at 59-60.

81. *See* McArthur, *supra* note 56, at 888-89 (citing *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 194 (D. Mass. 1998)).

82. *See generally* *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981). *See also* *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

83. 450 U.S. at 728-31.

84. *See id.* at 734. After employees submitted a claim to arbitration through the collective bargaining agreement and received an adverse result, the Court allowed the claim to be heard in federal court. *Id.*

85. *Id.* at 745-46.

86. *See McDonald*, 466 U.S. at 292. The Court stated that the full faith and credit did not require the courts to give a preclusive effect to arbitration awards when an employee claimed that his statutory rights had been violated. *See id.*

87. *See id.* at 290. The Court stated that an arbitrator does not have the expertise required to solve the "complex legal questions" that may arise in statutory actions. *See id.*

88. *See* *Moses H. Cone Mem'l Hosp. v. Mercury Const. Co.*, 460 U.S. 1, 24-25 (1983) *See also* *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985). *See generally* *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

89. 473 U.S. 614 (1985).

arbitration agreement for antitrust claims brought under the Sherman Act.⁹⁰ Citing *Alexander*, Soler argued that because there was a statutory claim at issue and because that claim was not specified in the agreement to arbitrate, Soler should not be compelled to arbitrate the dispute.⁹¹ The Court disagreed with Soler's argument, holding that there was a federal policy favoring arbitration, which required the Court to "rigorously enforce agreements to arbitrate."⁹² The Court additionally held that there was no legislative history preventing a party from including or excluding statutory claims in an arbitration agreement.⁹³

In *Mitsubishi*, the Court also stated it was no longer suspicious or skeptical of the arbitration process.⁹⁴ This suggested that the courts might generally uphold arbitration agreements involving statutory employment claims. The Court stated that by entering an agreement to arbitrate, a party has not foreclosed any rights delegated by federal statute.⁹⁵ The Court held, instead, the party has merely agreed to settle the dispute in an alternative forum.⁹⁶ In *Mitsubishi*, the Court concluded that it would uphold arbitration agreements unless there was a clear intent that Congress favored a waiver of judicial remedies for a particular statute.⁹⁷ Thus, the Court demonstrated a newly-found willingness to enforce arbitration agreements for statutory claims. With the *Mitsubishi* decision, exceptions to what would be considered arbitrable in an employment context started to dwindle.⁹⁸

90. *Id.* at 619-20.

91. *Id.* at 626. The arbitration agreement, as provided in Paragraph IV of the sales agreement states, "All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to [other articles of employment contract] . . . shall be finally settled by arbitration. . . ." *Id.* at 617.

92. *Id.* at 626 (quoting *Dean Witter Reynolds*, 470 U.S. at 221).

93. *Mitsubishi*, 473 U.S. at 628. Compare this to the holding in *Alexander*, where the Court seemed to infer that arbitration agreements would only be enforced for statutory claims if statutory claims were explicitly mentioned in the arbitration agreement.

94. *See Mitsubishi*, 473 U.S. at 626-27. Additionally, the *Mitsubishi* Court stated that it was past the time when judicial suspicion of arbitration and the competence of arbitrators should inhibit court enforcement of agreements. *Id.*

95. *See id.* at 628.

96. *Id.*

97. *Id.* at 650.

98. There were two other Supreme Court decisions that upheld enforcement of arbitration agreements in a statutory context. *See generally* *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987). *See also* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). *Rodriguez de Quijas* expressly overruled the Supreme Court's decision in *Wilko v. Swan*. *Id.* *See supra* note 58 and accompanying text.

These described cases have become known as "The Mitsubishi Trilogy." *See* Justin M. Dean, *Going, Going, Almost Gone: The Loss of Employees' Rights to Bring Statutory Discrimination Claims in Court*, 63 MO. L. REV. 801, 810 (1998) ("The Mitsubishi Trilogy provided a new foundation for the Supreme Court's evolving view on the role of arbitration in the

There are several reasons for this shift in attitude. In *Mitsubishi*, the Court reasoned that arbitration agreements could either include or exclude statutory claims.⁹⁹ Thus, if employers wanted to include statutory claims and the legislative history did not indicate an intent to exclude such claims, the Court would enforce the arbitration agreement.¹⁰⁰ The Court looked to the legislative history and reasoned that if Congress did not intend specific claims to be arbitrated, the statute would so provide.¹⁰¹ A new-found trust and acceptance of arbitrators also accounts for the Court's acceptance of arbitration of statutory claims.¹⁰² Additionally, a change in the composition of the Court that decided *Alexander* set the stage for the changing views regarding arbitration.¹⁰³

Although the Court's acceptance of arbitration was quite significant in *Mitsubishi*, the decision did not overrule *Alexander*. Unlike *Alexander*, the issues in *Mitsubishi* did not involve a collective bargaining context. This difference also seemed to factor into the Court's decision.¹⁰⁴ *Gilmer v. Interstate/Johnson Lane Corp.* demonstrates the profound impact on the individual employee's ability to bring employment discrimination claims to court when that employee signs an arbitration agreement.¹⁰⁵

D. Arbitration and the EEOC's Anti-Discrimination Laws Collide in *Gilmer*

1. Setting the Stage for *Gilmer*

The *Mitsubishi* decision made clear the Court's willingness to enforce arbitration agreements when statutory claims were involved.¹⁰⁶ Simultaneously, the Court was reacting to the EEOC's significant increase of authority granted by the 1972 amendments to The Civil Rights Act of 1964.¹⁰⁷ In *General Telephone Co. v. EEOC*, the Supreme Court carefully examined the 1972 amendments to the Civil Rights Act, holding that the EEOC had a right to

employment context. These cases established that statutory claims were arbitrable. The next step was to allow arbitration of statutory employment discrimination claims.”).

99. *Mitsubishi*, 473 U.S. at 627.

100. See *Rosenburg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 995 F. Supp. 190, 195-96 (D. Mass. 1998) (citing *Mitsubishi*, 473 U.S. at 626-27).

101. *Mitsubishi*, 473 U.S. at 626.

102. See *id.*

103. See Robert L. Duston, *Gilmer v. Interstate/ Johnson Corp.: A Major Step Forward for Alternative Dispute Resolution, or a Meaningless Decision?* 7 LAB. LAW. 823, 832 (1991). Duston comments on how these decisions gave the Rehnquist Court the opportunity to reexamine *Alexander*. *Id.*

104. See generally McArthur, *supra* note 56, at 889 (discussing the Court's maintenance of precedence in *Alexander*).

105. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

106. See *supra* notes 88-103 and accompanying text.

107. See *supra* notes 48-54 and accompanying text. The 1972 amendments delegated the EEOC significantly more authority, allowing it to pursue claims in its own name.

sue independent of any individual employee's rights.¹⁰⁸ This meant that the EEOC could sue on its *own behalf*, and did not have to sue on behalf of the individual employee, nor could an individual employee stop the EEOC from pursuing the claim.¹⁰⁹

Additionally, in *Occidental Life Insurance Co. v. EEOC*, the Court interpreted the 1972 amendments to confer exclusive jurisdiction on the EEOC over an employment discrimination claim for 180 days.¹¹⁰ The EEOC demonstrated broad authority to police workplace discrimination when courts began to interpret Title VII to mean that an individual could not withdraw a charge from the EEOC without the EEOC's permission.¹¹¹ Additionally, several courts have observed that an individual may not "agree to deny to the EEOC the information it needs to advance . . . public interest. A waiver of the right to file a charge is void as against public policy."¹¹² Courts have also interpreted the 1972 amendments to state that the EEOC has complete authority to decide what cases to bring in federal court.¹¹³

Clearly, the decisions reached in the seventeen years between *Alexander* and *Gilmer* illustrate a considerable change in judicial attitude, giving the EEOC greater power to stop discrimination for the public interest, and for the interest of individual employees.¹¹⁴ At the same time, courts no longer demonstrated a judicial suspicion regarding competency of arbitrators and their ability to resolve statutory claims.¹¹⁵ However, the Supreme Court still had not determined whether individual employment agreements mandating arbitration would be consistently enforced. Congress had recently delegated additional authority to the EEOC in the battle against workplace discrimination, and following the 1972 amendments, and the courts also expanded the EEOC's authority.¹¹⁶ In the context of collective bargaining, it seemed well settled that statutory claims, such as those authorizing the EEOC to act, could be heard in federal court.¹¹⁷

108. See *General Tel. Co. v. EEOC*, 466 U.S. 318, 329 (1980). In *General Telephone*, the Court held that, because of the broad power of the 1972 amendments to The Civil Rights Act, the EEOC could seek class-wide relief without being certified. *Id.* at 320.

109. See *id.* at 331.

110. 432 U.S. 355, 366 (1977).

111. See *EEOC v. Goodyear Aerospace*, 813 F.2d 1539, 1544 (9th Cir. 1987) (citing 29 C.F.R. § 1601.10 (1991)).

112. *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987). See generally *Goodyear Aerospace*, 813 F.2d at 1542-43.

113. *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1363 (6th Cir. 1975).

114. See *supra* notes 82-105 and accompanying text.

115. See *supra* notes 94-98 and accompanying text. The *Mitsubishi* decision recognizes that there is no longer any reason to be skeptical of arbitration agreements.

116. See *supra* notes 48-54 and accompanying text.

117. See *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 49 (1974).

2. *Gilmer v. Interstate/Johnson Lane Corp.*: The Court's Expanding View in *Mitsubishi* Extends to Employment Discrimination Claims

In *Gilmer v. Interstate/Johnson Lane Corp.*, an employee working as a manager in a financial service corporation was required to sign a mandatory binding arbitration agreement as a condition of his employment.¹¹⁸ This agreement stated that he would resolve any work-related controversy through arbitration.¹¹⁹ At age sixty-two, Gilmer's employment was terminated and he wanted to bring a claim stating that his employer had violated the Age Discrimination in Employment Act (ADEA).¹²⁰ When Gilmer filed his complaint with the EEOC, his employer filed a motion to compel arbitration.¹²¹ For the first time, the Supreme Court decided whether a claim brought by the EEOC under the ADEA could be subjected to a compulsory arbitration agreement signed by an individual employee.¹²²

In a 7-2 decision, Justice White's majority opinion held that Gilmer's discrimination claim was subject to compulsory arbitration.¹²³ The majority further noted that Gilmer was still free to file charges with the EEOC despite signing this agreement.¹²⁴ Justice White was not persuaded by Gilmer's argument that the role of the EEOC to protect the public would be undermined by arbitration.¹²⁵ The majority reasoned that the EEOC had a mission of furthering public and social policies, as well as individual rights.¹²⁶ The EEOC could, therefore, still pursue its goal in protecting the public interest even if individuals who signed mandatory arbitration agreements were forced to arbitrate accordingly.¹²⁷ The majority concluded that nothing in statutes or

118. 500 U.S. 20, 23 (1991). Gilmer's employment required that he register with several stock exchanges. His registration for the New York Stock Exchange contained a provision which stated that any controversy arising out of employment must be submitted to arbitration. *Id.*

119. 29 U.S.C. § 621 (1994). *See Gilmer*, 500 U.S. at 23-24.

120. *See id.*

121. *Id.* The employer relied on an arbitration agreement in the registration application, and, additionally, on the Federal Arbitration Act. *Id.* at 24 (citing 9 U.S.C. § 1 (1994 & Supp. IV 1998)).

122. *See Gilmer*, 500 U.S. at 23.

123. *Id.*

124. *See id.* at 28.

125. *Id.* The court stated that it found the employee's argument that enforcing arbitration would undermine the purpose of the EEOC very unpersuasive. The individual would still have the ability to file charges with the EEOC, even though the private action now had to be settled through arbitration. The EEOC's authority remains regardless of any arbitration agreement. *Id.*

126. *Gilmer*, 500 U.S. at 27.

127. *Id.* at 28. Here, Justice White relied on *Mitsubishi*, holding that, "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* (quoting *Mitsubishi*, 473 U.S. at 637).

legislative history demonstrated that Congress intended to preclude arbitration as a remedy in ADEA cases.¹²⁸

Gilmer argued that the Court's decision in *Alexander* precluded arbitration of employment discrimination claims.¹²⁹ The majority explained that Gilmer's reliance on *Alexander* and the decisions that followed its reasoning was unfounded for two reasons.¹³⁰ First, it distinguished *Gilmer* from *Alexander* because *Alexander* involved a collective bargaining agreement.¹³¹ In *Gilmer*, the employee signed an individual agreement with the New York Stock Exchange (NYSE) to arbitrate all claims arising out of his employment.¹³² The Court stated that, unlike the claim in *Alexander*, Gilmer's individual statutory claim had *not* been undermined by a collective bargaining agreement.¹³³ The *Gilmer* majority further stated that statutory rights are individual rights that may be undermined by a group interest in a collective bargaining agreement.¹³⁴ This reasoning implies there is no such concern in individual agreements.¹³⁵ The *Gilmer* majority further distinguished the case from *Alexander*, stating that Gilmer had signed a clear agreement to arbitrate *all* claims.¹³⁶ The *Gilmer* Court interpreted Gilmer's agreement to include both statutory and contractual claims;¹³⁷ whereas in *Alexander*, the Court held that the collective bargaining agreement at issue *clearly* called for arbitration of only contractual claims.¹³⁸

Finally, the Court reiterated its endorsement of arbitration as a satisfactory process under which an employee can bring an ADEA claim.¹³⁹ Looking to its opinion in *Mitsubishi*, the majority emphasized the capability of arbitrators to

128. *Id.* at 28-29. ("[T]he mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration.")

129. *Id.* at 33. *See also* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 (1974).

130. *See generally* *Gilmer*, 500 U.S. at 34-35.

131. *Gilmer*, 500 U.S. at 34. *See Alexander*, 415 U.S. at 39.

132. *Gilmer*, 500 U.S. at 23 (citing *Mitsubishi*, 473 U.S. at 637).

133. *Id.* at 34. The Court distinguished an employee's contractual rights from his statutory rights. The Court stated that statutory rights are individual rights that may be undermined by a collective bargaining agreement because it is for the benefit of the entire group, instead of individuals. Contractual rights in a collective bargaining agreement can be pursued through arbitration because they will look out for the best possible interest of the contracting group, which is also acceptable for individuals. *See id.*

134. *Id.*

135. *Id.* at 34. The *Gilmer* majority reasoned, "[T]he interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *See id.* (citing *Alexander*, 415 U.S. at 58 n.19).

136. *See id.* at 35.

137. *Gilmer*, 500 U.S. at 35.

138. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-50 (1974).

139. *Gilmer*, 500 U.S. at 30 (citing *Rodriguez de Quijas v. Shearson American Express, Inc.*, 490 U.S. 477, 481 (1987)). Several rules ensure that arbitrators are acting prudently, and not fraudulently. *See id.* at 30.

arbitrate statutory claims.¹⁴⁰ The Court noted that *Mitsubishi* clearly established arbitration as a fair process.¹⁴¹ Additionally, the majority pointed out that the NYSE had promulgated several rules to ensure fairness in arbitration.¹⁴² Thus, the Court held that there was no valid reason for Gilmer to forego arbitration.¹⁴³

What did the *Gilmer* decision mean to the future of arbitration agreements in an employment discrimination context? Courts have generally interpreted *Gilmer* to mean that mandatory arbitration agreements must be enforced, not only in cases involving ADEA claims, but also in cases involving the Americans with Disabilities Act and Title VII.¹⁴⁴ However, several post-*Gilmer* decisions continue to raise issues regarding the adequacy of specific employment arbitration agreements.¹⁴⁵

140. *Gilmer*, 500 U.S. at 30-31 (citing *Mitsubishi*, 473 U.S. at 624). See also *Moses H. Cone Mem'l Hosp. v. Mercury Const. Co.*, 460 U.S. 1, 24 (1983); *Mitsubishi Motor Corp., v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

141. *Gilmer*, 500 U.S. at 30-31. The *Gilmer* decision discusses preceding cases, which state that arbitration is a fair and just forum for employment discrimination; FAA provisions that protect against biased arbitrators; and NYSE rules set out to make arbitration a fair process in the securities industry. *Id.* at 30 (citing 9 U.S.C. § 10(b) (1994 & Supp. IV 1998)).

142. *Id.* at 31-32. The *Gilmer* majority recognizes several NYSE rules that were enacted to make the arbitration process fair in the securities industry, stating that "The NYSE rules, however, do require that all arbitration awards be in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued." *Id.* The *Gilmer* majority also recognizes several N.Y.S.E. provisions designed to make the discovery process adequate for the arbitration proceedings. See *id.* at 31.

143. *Id.* at 35.

144. See *supra* note 56 and accompanying text. *But cf.* *Duffield v. Robertson, Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998). The Ninth Circuit decision in *Duffield* is the exception to this general rule that arbitration agreements must be enforced regarding employment discrimination claims. *Id.* at 1194-96.

See 42 U.S.C. §12101 (1994); 42 U.S.C. 2000e(5) (1994 & Supp. III 1997). See generally *Austin v. Owens-Brockway Glass Containers, Inc.*, 78 F.3d 875, 880-82 (6th Cir. 1999); *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

145. For example, in *Cole v. Burns International Security Services*, the Court of Appeals for the District of Columbia held that an employer could not require an employee to arbitrate every dispute arising from employment, without some mechanism for meaningful judicial review. Additionally, the Court held that an employer could not require an employee to pay all or part of fees involved in arbitration. See *Cole*, 105 F.3d at 1468-69.

Additionally, in *DeGaetano v. Smith Barney, Inc.*, the court held that attorney's fees could not be denied in disregard of Title VII, because the employee had arbitrated instead of using the judicial process. 983 F. Supp 459, 460 (S.D.N.Y. 1997).

Recently, in *Hooters of America, Inc. v. Phillips*, the Fourth Circuit recognized that pre-dispute agreements to arbitrate would be enforced. However, the court held that when the agreement is illusory, or has no consideration, it is unenforceable, just like any other contract. 173 F.3d at 940.

E. The Aftermath: Reactions to Gilmer

The *Gilmer* decision prompted reactions from various special interest groups. These reactions are important to identifying remedies available to the EEOC because each group demonstrated and hypothesized the effects that mandatory arbitration would have on the EEOC's ability to stop discrimination. Some suggest that one way to alleviate these effects is to allow the EEOC to pursue all remedies, without regard to an agreement mandating arbitration.¹⁴⁶ However, others have argued that this would only make the situation more complicated because arbitration agreements are helpful, in some way, to employers, employees, and the EEOC.¹⁴⁷ These reactions also demonstrate the effects of mandatory arbitration on the public interest.

1. The EEOC's View

Understandably, the EEOC has expressed a strong opinion about the enforcement of mandatory arbitration agreements.¹⁴⁸ In a 1997 Policy Statement, the EEOC expressed a strong disapproval of binding mandatory arbitration agreements.¹⁴⁹ The Policy Statement was issued during a time when a growing number of employers required applicants to sign arbitration agreements as a condition of employment.¹⁵⁰ The EEOC explained its belief that Congress enacted the Civil Rights Act of 1964 to make enforcement of anti-discrimination laws in the workplace a top priority.¹⁵¹ The Policy Statement asserted that the federal government has primary responsibility for enforcement of employment discrimination laws for the private interest and the public interest.¹⁵² The Policy Statement also opined that courts are responsible to develop and interpret laws governing the EEOC and employment discrimination.¹⁵³

It is important to observe that many of the EEOC's arguments in its 1997 Policy Statement focus on the EEOC's role in protecting the public interest, rather than its role in protecting individual employees from discriminatory

146. See *infra* notes 148-62 and accompanying text.

147. See *infra* notes 173-84 and accompanying text.

148. See generally *EEOC Notice*, *supra* note 28.

149. *Id.* The 1997 Policy Statement states that "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in [U.S. employment discrimination] laws." *Id.*

150. See *id.*

151. See *id.* (citing *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)); H.R. REP. NO. 88-914, pt. 2 (1963) (separate views of Rep. McCullough et al.).

152. See *EEOC Notice*, *supra* note 28. The 1997 Policy Statement states that statutory considerations should be the concern of the court, and that because the EEOC is set forth by statute, the federal courts should have the ultimate responsibility in constructing the meaning of its duties. *Id.*

153. *Id.*

behavior.¹⁵⁴ The Policy Statement reasons that because courts contain public records, and are a significant part of public life, judicial decisions are necessary for the EEOC's enforcement scheme because they promote non-discriminatory behavior in two ways. First, the public nature of litigation ensures that the public will observe awards meant to punish a discriminating employer.¹⁵⁵ In this way, judicial decision-making forces employers to be accountable to the public for their actions.¹⁵⁶ Second, employers will observe the legal consequences of workplace discrimination.¹⁵⁷ In this way, litigation helps deter future discrimination by other employers and protects the public interest.¹⁵⁸ The EEOC claims that mandatory arbitration does not fulfill either of these goals because the very nature of arbitration is *private* instead of public.¹⁵⁹

Additionally, the EEOC argues that arbitration awards cannot be overturned by the same mechanism used by courts in overturning decisions.¹⁶⁰ According to the EEOC, arbitration does not create precedent, nor does it expand and reinterpret law, like a court decision.¹⁶¹ In this way, the EEOC argues that arbitration does not effectively serve the public interest.¹⁶²

154. *Id.*

155. *Id.* The EEOC Policy Statement discusses the nature of the judicial process and litigation by stating:

Through its public nature [the judicial process as opposed to arbitration proceedings]—manifested through published decisions—the exercise of judicial authority is subject to public scrutiny and system-wide checks and balances. . . [w]hen courts fail to interpret or apply the anti-discrimination laws in accord with the values underlying them, they are subject to correction by higher level courts and by Congress.

Id.

156. *Id.*

157. *See EEOC Notice, supra* note 28. The EEOC policy statement explains that it has been proven many times that the “risks of negative publicity and blemished business reputation can be powerful influences on behavior.” *Id.*

158. *See id.*

159. *Id.* The EEOC policy statement notes that arbitral decisions are not published and, therefore, do not assist in stopping discriminatory behavior the same way that published court opinions do. *Id.*

160. *See id.*

161. *Id.*

162. *EEOC Notice, supra* note 28. In its latest policy statement on the matter, the EEOC fails to discuss the limited judicial review of arbitration awards. The Court may overrule an arbitrator's decision when there is evidence of fraud or corruption by the arbitrators, or by a demonstration that the arbitrator has a bias against one of the parties. *See generally* 9 U.S.C. § 10(a) (1994 & Supp. IV. 1998). This section of the Federal Arbitration Act states:

In any of the following cases the United States court in and for the district wherein the [arbitration] award was made may make an order vacating the award upon the application of any party to the arbitration—(1) Where the award was procured by corruption, fraud, or undue means. (2) Where there was evident partiality or corruption in the arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone

2. The National Academy of Arbitrators' View

The National Academy of Arbitrators (the Academy) is another group that has taken notice of the *Gilmer* holding. In 1997, the Academy issued a statement opposing the use of mandatory arbitration in employment discrimination claims.¹⁶³ However, the Academy stated that as long as the *Gilmer* standard governing mandatory arbitration agreements in individual employment is still the law, it will continue to arbitrate employment discrimination disputes pursuant to such agreements.¹⁶⁴

3. The Commission on the Future of Worker Management Relations' View

In a 1994 report, the Commission on the Future of Worker-Management Relations (the Commission) also spoke out on mandatory arbitration agreements, stating that binding arbitration agreements should not be enforceable.¹⁶⁵ The Commission stated that there should be several routes that an employee may take when he or she has a discrimination complaint.¹⁶⁶ The Commission further recognized that the use of mandatory arbitration agreements is likely to continue, and that due process guarantees must be protected.¹⁶⁷ Consequently, the Commission listed goals for employers in creating an arbitration system to be used relating to employment discrimination claims.¹⁶⁸ The Commission stated that in order to provide sufficient due process, arbitration agreements needed to allow for remedies equal to those

the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (4) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Id.

163. See National Academy of Arbitrators, *Statement of the National Academy of Arbitrators On Individual Contracts Of Employment and Guidelines on Arbitration of Statutory Claims Under Employer- Promulgated Systems* (last visited Mar. 19, 2000) <<http://www.naarb.org/guidelines.html>> [hereinafter, *National Academy of Arbitrators*]. (“The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights.”) See also FitzGibbon, *supra* note 16, at 220-21.

164. See generally *National Academy of Arbitrators*, *supra* note 163.

165. See generally *Commission on the Future of Worker-Management Relations*, U.S. Dep’t of Commerce and Labor, Commission on Future of Worker-Management Relations, *Report and Recommendations* (Dec. 1994) [hereinafter *Dunlop Report*]. The Commission was headed by John Dunlop, former Secretary of Labor.

166. See *id.* at 28.

167. See *id.* at 31. Among the guarantees suggested were: a jointly selected neutral arbitrator, adequate discovery, cost-sharing, and a written opinion of the award granted. See *Dunlop Report*, *supra* note 165, at 31.

168. See *id.*

available through the judicial process.¹⁶⁹ It also stated that the arbitration process should allow for a neutral arbitrator who, “knows the laws in question and understands the concerns of the parties.”¹⁷⁰ Furthermore, the Commission recognized that because of the EEOC’s severe backlog, it is necessary to have alternatives to the judicial process, otherwise, not all claims would be resolved adequately.¹⁷¹ Clearly, the Commission recognized that arbitration agreements in employment discrimination serve a useful purpose.¹⁷²

4. Other Important Policy Views

Several important policy arguments also support mandatory arbitration for employment discrimination claims. One benefit of mandatory arbitration is that it ensures that all claims of discrimination are addressed in some manner.¹⁷³ In 1997, the EEOC received over 80,000 charges of discrimination, and its backlog has soared in the past few years.¹⁷⁴ Also in 1997, only slightly over 11,000 of these cases were resolved on the merits through the judicial process.¹⁷⁵

In an attempt to alleviate this problem, the EEOC started classifying cases according to importance.¹⁷⁶ This means that many valid discrimination claims may not receive resolution for several years.¹⁷⁷ Some even suggest that the EEOC should not handle individual charges and, instead, “use the limited resources for routing out systemic unlawful practices.”¹⁷⁸ Additionally, proponents of arbitration for use in employment discrimination claims argue that the judicial process is too costly for many individual employees, and for smaller employers.¹⁷⁹ Arbitration is a less costly way to resolve complaints of discrimination.¹⁸⁰

169. See FitzGibbon, *supra* note 16, at 240-42 (citing *Dunlop Report*, *supra* note 165).

170. See *Dunlop Report*, *supra* note 165, at 31.

171. See *id.* at 25.

172. *Id.* In the report, the Commission recognized that there was value to arbitration in employment, stating that arbitration was more cost efficient and time efficient for employers than the judicial process in many situations. Additionally, the Commission recognized that arbitration is useful for an employee who wants to bring a claim, yet, wants the chance to remain in his/her current position. See *id.* at 25-26.

173. See FitzGibbon, *supra* note 16, at 245.

174. See The U.S. Equal Employment Opportunity Commission, *All Statutes* (last visited Jan. 10, 2000) <<http://www.eeoc.gov/stats/all.html>>.

175. See *id.*; see also FitzGibbon, *supra* note 16, at 247.

176. See Theodore St. Antoine, *supra* note 13, at 8.

177. See *id.*

178. *Id.* at 9. (“The situation [regarding the backlog of cases at the EEOC] is so bleak that Professor Maurice Munroe of the Thomas M. Cooley Law School has recommended, quite understandably, that the EEOC get out of the business of handling individual charges. . . .”)

179. *Id.* at 7-8. The process of arbitration, being simpler and cheaper than the judicial process, is very practical for many individuals. *Id.* See also FitzGibbon, *supra* note 16, at 224.

180. See FitzGibbon, *supra* note 16, at 251.

These arguments regarding the fairness and practicalities inherent in the judicial process and arbitration help illustrate the problem of what remedies the EEOC should be able to seek when there is a binding arbitration agreement. The EEOC asserts that it should have the ability to collect monetary relief on an individual's behalf in court, because it views mandatory arbitration as being inherently unfair.¹⁸¹ However, others have demonstrated valid counter-arguments regarding the fairness and efficiency of arbitration.¹⁸² Additionally, allowing the EEOC to obtain any remedy for an individual employee inhibits the finality of the arbitrator's decision.¹⁸³ If there is no finality for the remedies granted through arbitration, it is unlikely that employers will even continue to set forth these agreements.¹⁸⁴ Court decisions, coupled with these policy arguments, demonstrate the impact that binding arbitration has on the EEOC's request for remedies and why it has become an important problem that must be solved.

F. What Does Gilmer Mean for the EEOC's Broad Right to Seek Remedies?

Policy decisions favoring and disfavoring arbitration contribute to the problem surrounding the EEOC's ability to gain monetary relief when there is a binding arbitration agreement.¹⁸⁵ One must also examine cases following *Gilmer*, relating to the EEOC and its right to seek certain damages, in order to gain insight as to what remedies should be available. Lower courts have issued many decisions discussing when the EEOC has the ability to bring a claim after an individual has previously litigated a dispute.¹⁸⁶ These decisions give insight to what should occur when an individual enters a binding arbitration agreement, regarding the EEOC's right to remedies.

Several circuits have stated that the EEOC is not completely barred from bringing a claim, even after an individual has previously litigated the same employment discrimination claim.¹⁸⁷ The rationale for this is that the EEOC

181. *See supra* notes 148-62 and accompanying text.

182. *See supra*, notes 173-80 and accompanying text.

183. *See generally* St. Antoine, *supra* note 13, at 8.

184. *See id.*

185. *See supra* notes 148-80 and accompanying text.

186. *See infra* notes 187-88 and accompanying text.

187. *See New Orleans Steamship Ass'n v. EEOC*, 680 F.3d 23, 26 (5th Cir. 1982). The Fifth Circuit held that the EEOC could bring a claim for an action previously litigated by individual parties if the EEOC's challenge was different in some way (e.g. different investigation, different relief being sought). *Id.* at 25-26.

See also EEOC v. Harris Chernin, Inc., 10 F.3d 1286 (7th Cir. 1993). Here, the court affirmed the district court opinion, stating the EEOC could not obtain individual monetary relief when an individual had previously litigated his claim. However, the court stated that prospective injunctive relief was still available to the EEOC because it furthered the EEOC's goal in eradicating discrimination for the public interest. *Id.* at 1291.

brings a claim not only for a private individual's interest, but also for the public interest.¹⁸⁸ However, these cases draw substantial lines as to what remedies the EEOC may seek when a claim has been previously litigated.¹⁸⁹

In *EEOC v. U.S. Steel Corp.*, an employee pursued an ADEA claim in federal court, receiving an adverse result.¹⁹⁰ The EEOC then pursued a discrimination claim relating to the same events.¹⁹¹ In *U.S. Steel*, the Third Circuit stated that, "if a person first litigates in his own behalf, that person may be precluded from claiming any of the benefits of a judgment in a subsequent action that is brought or defended by a party representing him."¹⁹² The court held that the doctrine of res judicata applies when the EEOC is representing the interests of a private individual.¹⁹³ The court also reasoned that it would not express any view about whether res judicata applies when an individual shares

See also *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 496-97 (3d Cir. 1990). In *U.S. Steel*, the court held that individuals who had fully litigated claims pursuant to the ADEA could not obtain individual relief in actions by the EEOC. *Id.* at 495.

188. *See Harris Chernin*, 10 F.3d at 1291. The EEOC emphasized that there is a difference between suing on behalf of the employee's personal interest, and suing on behalf of the public interest. The court stated that an individual could not further the public interest by his litigation in the same way that the EEOC could further the public interest. Therefore, the court held that the EEOC could still sue on behalf of the public interest. *Id.* *See also U.S. Steel*, 921 F.2d at 495.

189. *See supra* notes 187-88.

190. *U.S. Steel*, 921 F.2d at 491.

191. *Id.* Several employees filed a class action alleging that their employer had violated the ADEA regarding the payment of a pension. *Id.* The EEOC also filed an action alleging unlawful employment practices under the ADEA, regarding the same pension payments. *Id.* *U.S. Steel* argued that some of these employees were not entitled to further retroactive relief because they had settled their ADEA claims and were, therefore, precluded by the doctrine of *res judicata* from receiving other remedies. *Id.* The EEOC conceded that the employees who had previously settled their claims should not receive prejudgment interest from the EEOC action. *Id.* at 492. Accordingly, the question before the Third Circuit was "whether res judicata bars the award of individual relief for the former employees who previously litigated their ADEA claim and suffered an adverse final judgment." *Id.* at 490.

192. *Id.* at 493.

193. *See id.* at 494. The doctrine of res judicata, or claim preclusion, has been applied in this case. In order to show that a claim should be precluded, it is necessary to demonstrate that "there has been 1) a final judgment on the merits in a prior suit involving 2) the same claim and 3) the same parties or their privies." *Id.* at 493 (citing *United States v. Athlone Ind., Inc.*, 746 F.2d 977, 983 (3d Cir. 1984)). The court decided that the first two elements were present because there was a final judgment on the merits by an individual claimant, and it related to the same issues for which the EEOC is suing. However, the parties are not in privity when the EEOC is suing for the public interest. *See U.S. Steel*, 921 F.2d at 496.

See id. at 494-95. The court stated that it was convinced that Congress would not have cut off the right of an individual to institute a private action once the EEOC has instituted an action unless it believed that the EEOC could adequately represent the interest of the individual, enforcing the individual's rights. *Id.*

in the benefits of an EEOC claim, because then, the EEOC was attempting *only* to serve the public interest.¹⁹⁴

The Seventh Circuit followed the *U.S. Steel* rationale and held that an adverse judgment in an individual's ADEA claim precluded the EEOC from seeking monetary relief on an employee's behalf.¹⁹⁵ The court determined that the EEOC was not barred from bringing a claim for equitable relief, such as an injunction prohibiting future discrimination, because the public interest in stopping discrimination in the workplace would be served.¹⁹⁶ Furthermore, the court addressed the apparent inconsistency of allowing the EEOC to pursue one type of relief and not another.¹⁹⁷ The court reasoned that a private individual could not adequately represent the interest of the EEOC in protecting the public from an employer's discriminatory behavior.¹⁹⁸ Only the EEOC could pursue this interest adequately, by seeking equitable relief against future violations.¹⁹⁹ Consequently, the EEOC was not barred from seeking injunctive relief by *res judicata* principles.²⁰⁰

Through the examination of statutory authority granted to the EEOC and the case law interpreting these statutes, it is clear that the EEOC has been delegated an increasingly substantial amount of authority to stop workplace discrimination.²⁰¹ This authority protects the public interest, and the interests of private individuals.²⁰² Through judicial decision-making and federal statutes, it is also clear that the EEOC may be barred from claiming damages for an individual if that individual has already fully litigated his claim.²⁰³

194. *Id.* at 496.

195. *See* EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1290-91 (7th Cir. 1993) (citing *U.S. Steel*, 921 F.2d at 493).

196. *See U.S. Steel*, 921 F.2d at 496; *Harris Chernin*, 10 F.3d at 1291. In *Harris Chernin*, the court affirmed that individual litigation barred the EEOC from seeking back pay and other individual damages. However, it allowed the EEOC to sue for injunctive relief, as long as the EEOC could demonstrate a violation of the ADEA against the employee. *See id.*

197. *Id.*

198. *See id.* The court in *Harris Chernin* noted the distinction made by the *U.S. Steel* court between the individual protections provided by the EEOC and the public interest protections provided by the EEOC. Then, the *Harris Chernin* court reached the conclusion that the EEOC could not be barred when seeking an injunction to prevent further violations because this remedy protects the public interest, not the interests of the private individual. *Id.*

199. *See Harris Chernin*, 10 F.3d at 1291.

200. *Id.* It is noteworthy that the EEOC has the ability to represent adequately all of the interests of individual employees. *See* EEOC v. Kidder, Peabody & Co., 156 F.3d 298, 301 (2d Cir. 1998) (quoting EEOC v. Goodyear Aerospace, 813 F.2d 1539, 1543 (9th Cir. 1987)).

201. *See supra* notes 42-63 and accompanying text.

202. *See generally* EEOC v. U.S. Steel Corp., 921 F.2d 489, 494-95 (3d Cir. 1990).

203. *See supra* notes 187-200 and accompanying text.

No court has held that the EEOC should be bound to arbitrate when an employee has signed a binding arbitration agreement.²⁰⁴ However, two recent decisions have precluded the EEOC from obtaining the monetary remedy in court because individuals entered a binding arbitration agreement; a third decision disagreed, creating a split in authority. These decisions are discussed in Part III.²⁰⁵

III. A CIRCUIT SPLIT DEVELOPS

A. *The Second and Fourth Circuits Views: The EEOC Cannot Seek Monetary Relief on behalf of an Individual who has Signed a Binding Arbitration Agreement*

1. The Second Circuit: *EEOC v. Kidder, Peabody and Co.*

In 1992, the EEOC claimed that Kidder, Peabody & Company (Kidder), violated the ADEA by engaging in a pattern of terminating older employees because of their age. The EEOC sought liquidated damages, back pay, and reinstatement on behalf of seventeen former Kidder employees.²⁰⁶ As a requirement of employment at Kidder, nine of those employees had signed agreements mandating arbitration.²⁰⁷ Three of those nine employees arbitrated their claims. The arbitrator did not award any damages and stated that Kidder had not violated the ADEA.²⁰⁸ The EEOC later stipulated that it only sought monetary damages on behalf of the nine employees who had signed arbitration agreements.²⁰⁹ Kidder filed a motion to dismiss stating the EEOC should be precluded from obtaining any monetary remedy on behalf of an employee who had signed a binding arbitration agreement.²¹⁰ Additionally, Kidder argued that under *Gilmer*, the employees who signed agreements to arbitrate had waived their right to a monetary award from the court.²¹¹ The district court

204. *See EEOC v. Waffle House, Inc.*, 193 F.3d 805, 811 (4th Cir. 1999). The court recognized that Title VII and the ADA do not imply that the EEOC must participate in arbitration. Here, the EEOC was not even a party to the arbitration agreement, so it could not be forced to arbitrate for any reason. *Id.*

205. *See infra* notes 206-68.

206. *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 300 (2d Cir. 1998). *See also EEOC v. Kidder, Peabody, & Co.*, 979 F. Supp. 245, 245 (S.D.N.Y. 1997).

207. *See Kidder*, 156 F.3d at 300. The arbitration agreement that the employees signed was the same agreement signed in *Gilmer*. It is called the U-4 registration form and is used by the NYSE. *Id.*

208. *Id.*

209. *Id.* at 300. The EEOC changed the remedies it was seeking because Kidder discontinued its business in investment banking, therefore, there was no need for equitable relief, such as reinstatement. The EEOC sought liquidated damages and back pay. *Id.*

210. *See Kidder*, 156 F.3d at 300.

211. *Kidder*, 979 F. Supp. at 247 (citing *Gilmer*, 500 U.S. at 28).

agreed with Kidder's argument and granted its motion to dismiss the claim.²¹² The court held that "to allow the EEOC to recover monetary damages would frustrate the purpose of the FAA because an employee, having signed the agreement to arbitrate, could avoid arbitration by having the EEOC file in the federal forum seeking back pay on his or her behalf."²¹³ The EEOC appealed.²¹⁴

In a case of first impression, the Second Circuit decided how a binding arbitration agreement should impact the EEOC's power to enforce anti-discrimination laws and seek all statutory remedies. The majority opinion held that the EEOC could not pursue purely monetary relief on behalf of an employee who signed a binding arbitration agreement and dismissed the claim.²¹⁵ The majority stated that the "clear implication of *Gilmer* is that the EEOC may not seek monetary relief on behalf of claimants who have entered valid arbitration agreements."²¹⁶ The majority recognized that in *Gilmer*, arbitration agreements did not preclude the EEOC from investigating a charge of discrimination, nor did these agreements prevent individuals from filing charges with the EEOC.²¹⁷ Additionally, the court looked to previous decisions to determine that the EEOC could not seek a monetary remedy on behalf of an employee who has settled, waived, or previously litigated his or her discrimination claim.²¹⁸ The court reasoned that this also meant that a prior submission by an individual to an arbitration agreement precluded the EEOC from seeking monetary relief on an employee's behalf.²¹⁹

The majority recognized that the EEOC had a valid interest in protecting the public by stopping discrimination and in serving the needs of private individuals.²²⁰ However, the majority reasoned that the EEOC would still have

212. *See id.*

213. *See EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 300 (2d Cir. 1998) (citing the district court opinion in *Kidder*, 979 F. Supp. at 247).

214. *Id.*

215. *See id.* at 303. In *Kidder*, the court stated that by allowing an individual to reap the benefits of a suit by the EEOC through receipt of monetary damages, that individual is able to make an "end run around the arbitration agreement . . . undermin[ing] the *Gilmer* decision and the FAA." *Id.*

216. *Id.* at 301.

217. *See Kidder*, 156 F.3d at 301.

218. *See id.* (citing *Coventry v. U.S. Steel Corp.*, 856 F.2d 514, 522 (3d Cir. 1988); *Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1033 (8th Cir. 1986); *Runyan v. Nat'l Cash Register Corp.*, 787 F.2d 1039, 1045 (6th Cir. 1986), *cert. denied* 479 U.S. 850 (1986)).

219. *See Kidder*, 156 F.3d at 301.

220. *See id.* at 303. The court concluded, stating, "In sum, this case presents competing public interests—the interest in allowing the EEOC broad authority to pursue actions to eradicate and prevent employment discrimination and the interest in encouraging parties to arbitrate." *Id.* The court further stated that monetary relief does not affect the public interest to the same degree as injunctive relief. *See id.* at 301.

the ability to serve the public interest without pursuing any monetary remedy because it had several equitable remedies available in protecting the public from discriminatory behavior.²²¹ The majority explained that this decision struck the right balance between the EEOC's interest and the policy favoring the enforcement of arbitration agreements.²²²

Finally, the court stated that its decision was a sound one because an individual who signed an arbitration agreement should not be permitted to gain any relief from a court action by the EEOC.²²³ This would allow the individual to "make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages."²²⁴ The court implied that by allowing this, the arbitration process would become meaningless and agreements would be ineffective, thereby undermining *Gilmer* and the FAA.²²⁵

Judge Feinberg's concurrence in *Kidder* is interesting because it foreshadows the possibility of a split in opinions regarding whether the EEOC is able to seek individual monetary relief. The concurrence raised additional arguments regarding the EEOC's right to obtain monetary damages.²²⁶ Judge Feinberg started his opinion by stating that he believed the decision was correct, given the governing case law.²²⁷ However, he went on to conclude that he would have decided the case differently if the court had written on a "clean slate."²²⁸ Judge Feinberg's opinion expressed concerns about whether ADEA rights could be thoroughly vindicated in arbitration. He expressed concerns as to whether monetary relief is as useful as equitable relief for the EEOC in pursuing its goal of protecting the public from discriminatory behavior.²²⁹ He noted that smaller monetary awards are usually received through arbitration rather than through the court process.²³⁰ Additionally, Judge Feinberg disagreed with the majority that allowing monetary damages would cause individuals to make an "end run around the arbitration

221. *See id.*

222. *See id.* The court recognized that this decision does not eliminate the possibility of monetary damages altogether. Instead, it limits the individual who has signed a binding arbitration agreement to receive monetary damages only through the arbitration process. *See id.*

223. *See id.*

224. *Kidder*, 156 F.3d at 303.

225. *See id.* at 302-03.

226. *See id.* at 304 (Feinberg, J., concurring).

227. *See id.* Judge Feinberg stated, "I concur because I believe that the majority opinion correctly reads the import of *Gilmer* . . ." *Id.*

228. *Id.*

229. *See Kidder*, 156 F.3d at 304.

230. *See id.* Judge Feinberg stated, "I find it eminently plausible that on the risk of a single, large award, in an EEOC case brought on behalf of multiple employees would be a greater deterrent to illegal conduct than the risk of multiple smaller awards obtained by the employees through arbitration . . ." *Id.*

agreement.”²³¹ He discussed the large caseload and the limited resources of the EEOC,²³² suggesting that the EEOC simply would not have the ability to pursue a majority of discrimination claims by individuals who entered mandatory arbitration agreements.²³³ Therefore, it would be unlikely that individuals could make an “end run around” an arbitration agreement.²³⁴ He concluded by suggesting that a uniform solution to this problem should be reached quickly. However, Judge Feinberg left it to Congress or the Supreme Court to promulgate this solution, not the Second Circuit.²³⁵

2. The Fourth Circuit: *EEOC v. Waffle House, Inc.*

On October 6, 1999, the Fourth Circuit interpreted and followed *Kidder*, stating that an employee who signed a binding arbitration agreement could not recover monetary damages when the EEOC pursued the claim in its own name.²³⁶ In *EEOC v. Waffle House, Inc.*, employee Eric Baker was discharged after suffering a seizure at work.²³⁷ The separation notice stated that for “[the employee’s] benefit and safety and [the safety of] Waffle House, it would be best he not work here anymore.”²³⁸ After termination, Mr. Baker filed charges with the EEOC.²³⁹ The EEOC sued under the ADA, requesting a permanent injunction to bar Waffle House from any future discrimination based on disability, back pay and reinstatement on behalf of the former employee, compensation for losses, and punitive damages.²⁴⁰ Waffle House responded by filing a petition to compel arbitration arguing that the employee signed a binding arbitration agreement before he was hired.²⁴¹ Waffle House contended that the EEOC had no right to sue because it was bound by the employee’s

231. See generally *Kidder*, 156 F.3d at 303. Compare with *Kidder*, 156 F.3d at 304 (Feinberg, J., concurring) (disagreeing with the majority on the issue of whether a claim by the EEOC would allow an employee to circumvent an arbitration agreement).

232. *Id.*

233. See *id.* at 303.

234. *Id.* Judge Feinberg disagrees with the majority by stating, “I do not think it is likely that the EEOC will pursue monetary damages simply to accommodate employees seeking to avoid arbitration. . . .” *Id.*

235. *Id.*

236. See *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 806-07 (4th Cir. 1999).

237. *Id.* at 807.

238. See *id.* The belief is that the employee suffered the seizure due to a change in medication that could have been easily corrected. *Id.*

239. *Id.*

240. See *id.*, 193 F.3d at 807-08.

241. See *Waffle House*, 193 F.3d at 808.

arbitration agreement.²⁴² The EEOC argued that it had never agreed to arbitrate, and should be allowed to pursue all remedies available by statute.²⁴³

The Fourth Circuit majority held that when the EEOC pursued equitable relief, it was protecting the public interest.²⁴⁴ The court allowed the EEOC to seek equitable relief, notwithstanding a binding arbitration agreement.²⁴⁵ The court, however, refused to allow the EEOC to obtain monetary damages on behalf of Mr. Baker because of the arbitration clause.²⁴⁶ The majority stated that nothing in the ADA, or any other statute delegating authority to the EEOC, implies that the EEOC is held to an arbitration agreement when an employee has entered this type of agreement.²⁴⁷ The court stated that under *Gilmer*, the individual could arbitrate to receive individual remedies.²⁴⁸ For these reasons, the *Waffle House* court determined that the EEOC could not seek a monetary remedy on an individual's behalf.²⁴⁹

A. *A New View of Binding Arbitration Agreements: The Sixth Circuit View in EEOC v. Frank's Nursery and Crafts*

The Sixth Circuit, in *EEOC v. Frank's Nursery & Crafts, Inc.* repeated many of the same arguments articulated by Judge Feinberg in *Kidder* to reach a conclusion opposite to those reached by the Second and Fourth Circuits.²⁵⁰ In

242. *See id.* On appeal, Waffle House argued that the arbitration agreement between Mr. Baker and Waffle House binds the EEOC to pursue any connected claims in arbitration. *Id.*

243. *See id.* at 809.

244. *Id.*

245. *Id.* The court stated:

Thus, we hold that to the extent that the EEOC seeks 'a permanent injunction enjoining [Waffle House] from discharging individuals and engaging in other employment practice which discriminates on the basis of disability' the EEOC is pursuing the public interest in a discrimination-free workplace, and it must be allowed to do so in federal court, as authorized by the ADA

See id. at 812-13.

246. *Waffle House*, 193 F.3d at 809. In *Waffle House*, the court recognized that the EEOC has never entered an agreement to arbitrate, and thus cannot be held to the employee's arbitration agreement. Additionally, the court recognized that in *Gilmer*, the Supreme Court demonstrated that "the EEOC, acting in its public role, is not bound by private arbitration agreements." *Id.* In *Waffle House*, the court went on to state that this means that the EEOC can file a suit to accomplish societal goals of protecting the public interest. *See id.* at 811.

However, the court then holds that the EEOC cannot "trample this strong [federal] policy favoring arbitration" by pursuing damages on the individual's behalf. *Id.* at 812.

It is noteworthy that one Judge did dissent in *Waffle House*. However, his dissent related to the belief that the mandatory arbitration agreement was faulty, and, therefore, non-binding on Mr. Baker. *See id.* at 813-18 (King, J., dissenting).

247. *See id.* at 809.

248. *See id.* at 807.

249. *See id.*

250. *See EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 468 (6th Cir. 1999).

Frank's Nursery, the Sixth Circuit held that the EEOC was not barred from bringing a claim requesting injunctive *or* monetary relief on the employee's behalf.²⁵¹ As was stated in the Introduction, Carol Adams, an African-American employee, signed an arbitration agreement as a condition of her employment at Frank's.²⁵² After being passed over for a new position, Adams filed a complaint with the EEOC alleging that she had been passed over because she was an African-American.²⁵³ After failed conciliation attempts, the EEOC sued Frank's in the district court requesting equitable relief, back pay, and compensatory and punitive damages on Adams' behalf.²⁵⁴ Frank's moved to dismiss, stating that Adams was obligated to arbitrate and to receive any remedy through arbitration, as set forth by the agreement.²⁵⁵

The Sixth Circuit reversed the district court's decision dismissing all of the EEOC's claims regarding injunctive and monetary relief.²⁵⁶ The court first discussed the EEOC's right to pursue injunctive relief, holding that several other courts have recognized the EEOC's right to gain this relief after an individual had previously litigated.²⁵⁷ The court reasoned that this meant the EEOC could receive injunctive relief notwithstanding an employee's arbitration agreement.²⁵⁸ The court analyzed previous decisions to hold that without an ability to pursue this type of relief, the EEOC could not properly protect the public interest.²⁵⁹

The court also stated that there was no inconsistency between the holding of *Gilmer* and allowing the EEOC to pursue monetary relief on Adams' behalf.²⁶⁰ The Sixth Circuit held that *res judicata* principles are inapplicable to binding arbitration agreements and the EEOC's right to sue for monetary damages for two reasons. First, the court stated that the EEOC cannot be barred by *res judicata* principles because the EEOC and the individual

251. *See id.* at 453.

252. *See supra* notes 1-9 and accompanying text.

253. *See Frank's Nursery*, 177 F.3d at 452-53.

254. *See id.* at 452. The EEOC requested an injunction to prevent future discrimination at Frank's, and it requested an order by the court to institute policies providing equal employment opportunities to African-Americans, as well as damages. *See id.*

255. *Id.*

256. *See id.*

257. *See supra* note 187.

258. *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 459 (6th Cir. 1999).

259. *See id.* The court stated that the interest of the EEOC in protecting the public outweighs the private promise to arbitrate. *See id.*

260. *See id.* at 461. The majority in *Frank's Nursery* held that "While *Gilmer* stated that 'arbitration agreements will not preclude the EEOC from bringing actions seeking class wide or equitable relief,' we do not read the Court's language as excluding other kinds of relief." *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

employee do not share the same interests.²⁶¹ Second, the court distinguished this situation from prior cases where *res judicata* barred the second suit in a discrimination claim, by explaining that all of the previous cases involved a previously litigated or settled claim.²⁶² In *Frank's Nursery*, Adams had not previously litigated the claim, nor did she give up her right to back pay or other damages through settlement.²⁶³

Finally, the majority rejected the Second Circuit's view, that by allowing the EEOC to pursue a monetary remedy, a private individual could "make an end run around the arbitration agreement."²⁶⁴ Similar to the argument in Judge Feinberg's concurring opinion in *Kidder*, the Sixth Circuit stated that the EEOC has the power to decide what claims it will litigate and what claims it will not pursue.²⁶⁵ An individual has no way of knowing if the EEOC will bring an action on his behalf.²⁶⁶ The *Frank's Nursery* majority concluded by stating that Congress would not have delegated the EEOC any authority to obtain monetary damages if it thought that the EEOC could effectively eliminate employment discrimination with only injunctive relief.²⁶⁷

The differences between litigation and arbitration make the ultimate resolution of this issue important to the EEOC, employers, and employees. Although the opinions vary greatly, all three opinions rely on valid judicial decision-making, statutory evidence, and policy arguments to reach different conclusions.²⁶⁸ Additionally, the opinions in all three circuits are concerned with the EEOC's role in protecting the public interest and the individual's interest. Each also expresses a desire to conform to the strong federal policy favoring the enforcement of arbitration agreements. What is the best way to resolve this split in authority for the benefit of all involved parties?

261. *See id.* at 463. The EEOC serves two competing interests so it must be authorized to "proceed in a unified action and to obtain the most satisfactory overall relief . . ." *Id.* (citing *General Tel. Co. v. EEOC*, 446 U.S. 318, 331 (1980)).

262. *See id.* ("[T]here is no question that the present case does not involve a prior suit or even a prior arbitration that raised or resolved the issues raised in the EEOC's complaint.")

263. *See Frank's Nursery*, 177 F.3d at 463.

264. *See id.* at 468 (quoting *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 303 (2d Cir. 1998)).

265. *Id.* at 468 (citing *General Tel.*, 446 U.S. at 326).

266. *See id.*

267. *Id.* at 467. The majority in *Frank's Nursery* believes that injunctive and monetary relief are both necessary in the EEOC's goal of protecting the public interest. *Id.*

268. *See generally supra* notes 206-35 and accompanying text; *supra* notes 236-49 and accompanying text; *supra* notes 250-67 and accompanying text. These notes and text highlight the different arguments that could be raised regarding the remedies problem.

IV. THE EEOC'S ENFORCEMENT OF ANTI-DISCRIMINATION POLICIES IN THE WORKPLACE: A CRITICAL ANALYSIS

By balancing the federal interest in enforcing arbitration agreements and the EEOC's interest in protecting individuals and the public, the best solution to this problem is the Fourth Circuit's approach in *Waffle House*.²⁶⁹ Here, the Fourth Circuit allowed the EEOC to seek equitable relief on behalf of the public interest.²⁷⁰ The Fourth Circuit has also adequately balanced the interest favoring arbitration by barring the EEOC from seeking a monetary remedy when there is a binding arbitration agreement.²⁷¹ The decision in *Waffle House* is logical because it allows the EEOC to enforce general anti-discrimination principles, while demonstrating that courts should enforce binding arbitration agreements.²⁷² Additionally, this decision provides a result that is beneficial to the EEOC, employers, and employees.²⁷³

In this section, Part A will explain why the EEOC must be allowed to seek injunctive relief and how this benefits employers, employees, and the EEOC.²⁷⁴ The necessity for barring the EEOC from its pursuit of monetary relief, after an employee has signed a binding arbitration agreement, is discussed in Part B.²⁷⁵

A. *The Importance of the EEOC's Ability to Seek Injunctive Relief on Behalf of the Public Interest, notwithstanding an Arbitration Agreement*

The EEOC must have an ability to seek equitable relief for the protection of the public interest, in order to effectively enforce anti-discrimination laws.²⁷⁶ It is widely recognized that "the EEOC cannot be viewed as merely an institutional surrogate for individual victims of discrimination."²⁷⁷ The EEOC must also protect the public interest through its enforcement of anti-discrimination laws.²⁷⁸ Availability of equitable relief on behalf of the public allows the EEOC to combat discrimination at a societal level, without

269. See *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 806 (4th Cir. 1999); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 303 (2d Cir. 1998).

270. See *Waffle House*, 193 F.3d at 813.

271. *Id.*

272. See *id.*

273. See *infra* notes 295-308 and accompanying text.

274. See *infra* notes 276-94 and accompanying text.

275. See *infra* notes 295-322 and accompanying text.

276. See *EEOC v. Waffle House*, 193 F.3d 805, 812 (4th Cir. 1999). These equitable remedies include, but are not limited to, an injunction prohibiting an employer from discriminating in the future or an order to carry out anti-discrimination policies. See *id.*

277. See *id.* (citing *General Tel. Co. v. EEOC*, 446 U.S. 318, 331 (1980)).

278. See *General Tel.*, 446 U.S. at 326.

undermining the federal policy favoring enforcement of arbitration agreements.²⁷⁹

Additionally, allowing the EEOC to seek equitable relief to protect the public interest is consistent with judicial decision-making.²⁸⁰ As Justice White's majority opinion in *Gilmer* recognized, an individual who signs a binding arbitration agreement is not prevented from filing a charge with the EEOC.²⁸¹ Additionally, the majority in *Gilmer* held that the EEOC is not prevented from investigating that charge.²⁸² *Gilmer* recognized that when an individual signs an arbitration agreement, the EEOC does not lose all power to enforce anti-discrimination principles.²⁸³

Allowing the EEOC to obtain equitable relief on behalf of the public interest is also consistent with decisions after *Gilmer*.²⁸⁴ In *EEOC v. Harris Chernin*, the Seventh Circuit held that the EEOC could seek injunctive relief on behalf of the public interest, even after an individual had litigated his claim following the rationale set forth by the Third Circuit in *U.S. Steel*.²⁸⁵ However, in *Harris Chernin* the Seventh Circuit stated that the EEOC could not seek relief on the individual's behalf when the individual had previously litigated and received an adverse judgment.²⁸⁶ The court stated that it was necessary to allow the EEOC to seek injunctive relief to adequately enforce anti-discrimination laws for the public interest.²⁸⁷ Therefore, providing for equitable relief on behalf of the public interest, notwithstanding a binding arbitration agreement, is consistent with judicial decision-making.

Additionally, permitting injunctive relief promotes the EEOC's interest in having access to the judicial process notwithstanding an individual employee's agreement to arbitrate.²⁸⁸ In its 1997 Policy Statement, the EEOC stated that one reason it disapproved of arbitration for employment discrimination claims was due to the private nature of arbitration.²⁸⁹ By allowing the EEOC to seek

279. See *Waffle House*, 193 F.3d at 811-12 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

280. See *Waffle House*, 193 F.3d at 811-12.

281. See *id.* (citing *Gilmer*, 500 U.S. at 32).

282. See *Gilmer*, 500 U.S. at 28.

283. *Id.*

284. See *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990); see also *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993). See generally *supra* notes 185-200 and accompanying text.

285. *Harris Chernin*, 10 F.3d at 1291. See *supra* notes 195-200 and accompanying text.

286. See *id.*

287. See *Harris Chernin*, 10 F.3d at 1291.

288. See *EEOC Notice*, *supra* note 28. One of the reasons that the EEOC opposes mandatory arbitration agreements in employment discrimination is because it believes that arbitration takes away from the publicity associated with the judicial process and discrimination claims. *Id.*

289. See *supra* notes 154-59.

relief on behalf of the public interest, an employer's discriminating behavior is exposed to the public through the court process.²⁹⁰

Finally, it has been recognized that an individual's workplace discrimination suit is not intended to accomplish the EEOC's interest in protecting the public.²⁹¹ Only the EEOC can adequately protect this interest.²⁹² Therefore, the EEOC must have the ability to file its own claim on behalf of the public interest in enforcing anti-discrimination laws.²⁹³

Balancing the strong federal policy favoring arbitration and the EEOC's interest in enforcing anti-discrimination principles, it is clear that the EEOC must have the ability to seek equitable relief on the public's behalf for the reasons stated above.²⁹⁴ However, the EEOC's ability to seek damages on an individual's behalf undermines the policy favoring arbitration in a way that cannot be advocated.

B. The EEOC Should Not have the Ability to Seek Damages on Behalf of an Individual who Enters a Binding Arbitration Agreement

A policy barring the EEOC from obtaining a monetary remedy is beneficial and logical. This policy benefits employers, employees, and the EEOC in substantial ways. There are several reasons why an individual monetary remedy should not be allowed in this situation.

1. Binding Arbitration Agreements: Beneficial to Employers *and* Employees

Although many special interest groups do not authorize the use of mandatory arbitration agreements,²⁹⁵ the number of employers using, or considering the use of these kinds of agreements is rising.²⁹⁶ In determining

290. *Id.*

291. *See* EEOC v. Waffle House, Inc., 193 F.3d 805, 809 (4th Cir. 1999) (citing *Harris Chernin, Inc.*, 10 F.3d at 1291). In *Waffle House*, the majority held, that, "[I]nterests are broader than those of the individuals injured by discrimination. . . private litigants cannot adequately represent the government's interest in enforcing the prohibitions of federal statutes." *Waffle House*, 193 F.3d at 809 (quoting *Harris Chernin*, 10 F.3d at 1291).

292. *See* *Waffle House*, 193 F.3d at 811.

293. *See generally id.*

294. *See supra* notes 276-93 and accompanying text.

295. *See supra* notes 148-72 and accompanying text. These groups include the EEOC, the National Academy of Arbitrators, and the Dunlop Commission, although the Dunlop Commission states that there are benefits to binding arbitration agreements. *See supra* notes 165-72 and accompanying text.

296. *See* Spelfogel, *supra* note 11, at 80. Many employers have been prompted to use arbitration because it is typically more predictable, faster, and less costly than the judicial process. *See also* FitzGibbon, *supra* note 16, at 235-36. Here, Professor FitzGibbon states that "[w]hether increasing numbers of employers will offer or mandate arbitration to resolve these [employment]

what remedies should be available to the EEOC when there is a binding arbitration agreement, it is important to analyze why employers find value in these agreements.²⁹⁷ Employers use mandatory arbitration agreements because they want finality in disputes involving their employees.²⁹⁸ If the EEOC is able to seek monetary damages, arbitration agreements will lose the finality aspect that makes them appealing to employers.²⁹⁹ If employers realize that the EEOC has an ability to seek damages on behalf of employees, employers may discontinue use of these agreements.³⁰⁰

It is important that employers use arbitration agreements because they are not only beneficial for employers, but they are also beneficial for employees.³⁰¹ Suppose an employee brings a claim that the employer believes is insignificant and lacks merit. Due to the EEOC's backlog, there is a great probability that if the EEOC decides to pursue the claim, this claim may not receive the EEOC's attention for several years.³⁰² The EEOC has extremely limited resources and a large caseload.³⁰³ These two factors combine to make it highly improbable that an individual could "make an end run around the arbitration agreement,"³⁰⁴ as was suggested by the majority in *Kidder*.³⁰⁵ However, given the EEOC's large caseload, an alternate forum should be encouraged for the benefit of all parties, including the EEOC.³⁰⁶ Arbitration agreements actually help many employees with claims that may not be addressed by the EEOC in court.³⁰⁷ If agreements are not binding, an employer may recognize the EEOC's backlog and realize that an employee filing with the EEOC would

disputes is an open question" *Id.* However, it is still recognized that employers are considering mandatory arbitration as one option in resolving work-related disputes. *See id.*

297. *See supra* notes 174-80 and accompanying text. Some of the major reasons that employers use mandatory arbitration agreements are because they can be cost-efficient and speedy, when compared with the judicial process. Additionally, employers like the finality of mandatory arbitration agreements. *See id.*

298. *See id.*

299. Notwithstanding limited judicial review of arbitration awards, employers use arbitration agreements with a belief that after the arbitration process has ceased, the claim has been resolved with finality. If the EEOC is able to seek damages, this would not be the case. *See generally* note 184 and accompanying text.

300. *See generally* FitzGibbon, *supra* note 16, at 248.

301. *See* St. Antoine, *supra* note 13, at 7. Professor St. Antoine summarized that, "The case for allowing mandatory arbitration—permitting employers to condition employment upon an employee's agreement to arbitrate rather than litigate workplace claims, including statutory rights against discrimination—is counter-intuitive and highly practical." *Id.*

302. *See generally* McArthur, *supra* note 56, at 882.

303. *See generally* <<http://www.eeoc.gov/stats/all.html>>. Between 1992 and 1998 the EEOC has received between approximately 72,000 and 92,000 cases each year. *Id.*

304. *See* EEOC v. Kidder, Peabody & Co., 156 F.3d 298, 303 (2d Cir. 1998).

305. *See id.*

306. *See* St. Antoine, *supra* note 13, at 7.

307. *See id.*

likely become lost in thousands of claims waiting to be investigated and litigated.³⁰⁸ Employees are protected by the binding nature of arbitration agreements, because this assures a forum in which they may proceed with all employment discrimination claims.

2. Barring the EEOC's Pursuit of a Monetary Remedy: Enforcing Anti-Discrimination Principles and Enforcing Agreements to Arbitrate

Barring the EEOC from seeking damages on behalf of an employee who has signed a binding arbitration agreement is also consistent with judicial decisions. The majority opinions in *Mitsubishi*³⁰⁹ and *Gilmer*,³¹⁰ advocate the arbitration of statutory claims, unless Congress demonstrates a statutory intent not to allow arbitration.³¹¹ In *Gilmer* and *Mitsubishi*, the Supreme Court described the healthy regard for the "liberal federal policy favoring arbitration . . .," demonstrating that this policy would be undermined if the Court did not enforce the agreements to arbitrate.³¹²

When the EEOC is trying to obtain damages on an individual's behalf, the EEOC's interest in protecting the public is minimal.³¹³ In *Waffle House*, the majority repeated the statement from *Gilmer* that the EEOC could investigate an individual's claims of discriminatory behavior.³¹⁴ Additionally, in *Harris Chernin*, the court recognized that the EEOC could obtain relief on behalf of the public interest when an individual had previously litigated a claim.³¹⁵ The court in *Harris Chernin* allowed the EEOC to seek only equitable relief, stating that this relief adequately fulfilled the EEOC's goal of protecting the public interest from workplace discrimination.³¹⁶ Although the problem involving a binding arbitration contract is different from a situation where an individual has litigated a claim, the implication from the *Harris Chernin* decision is that equitable relief is sufficient to protect the public interest.³¹⁷

308. *See id.*

309. *See supra* notes 89-102.

310. *See supra* notes 118-43.

311. *See Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 646 (1985). Here, the court states that if there is nothing in the legislative history or the text precluding arbitration as a remedy, it should not be precluded. *Id.* *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991).

312. *See Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Co.*, 460 U.S. 1, 24 (1983)).

313. *See generally EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 303 (2d Cir. 1998).

314. *See EEOC v. Waffle House, Inc.*, 193 F.3d 805, 811 (4th Cir. 1999) (quoting *Gilmer*, 500 U.S. at 32).

315. *See EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993).

316. *Id.*

317. *Id.*

Additionally, courts have demonstrated that there is no longer a justified fear or suspicion regarding arbitration.³¹⁸ Several courts have recognized that there are safeguards in place to ensure fairness.³¹⁹ As long as these safeguards continue to be in place, there is no reason why these arbitration agreements should not be enforced.

It is true that barring the EEOC from seeking damages on behalf of an individual who has signed a binding arbitration contract *does* take away one of the EEOC's methods of enforcing anti-discrimination principles.³²⁰ Under the proposed solution, however, the EEOC is still able to seek injunctive relief on behalf of the public interest.³²¹ It follows that this should be an adequate remedy to protect the public interest when an employee has signed a binding arbitration agreement. Additionally, if employees entering a binding arbitration agreement are able to gain remedies through the EEOC, it will destroy the finality and efficiency purposes for having the agreement in the employer's eyes.³²²

V. CONCLUSION

The proposed solution is fair for all parties involved in the scenario beginning this Comment. It ensures that the employee's termination because of her race may be vindicated by the EEOC's pursuit of equitable relief. This type of relief also enables the EEOC to protect the public and enforce federal anti-discrimination provisions. At the same time, enforcement of the agreement to arbitrate strengthens the federal policy promoting arbitration, as well as allowing each party to pursue his or her own interests efficiently and justly while still resolving the claim with finality.

Allowing the EEOC to pursue only equitable relief on behalf of the public interest when an individual has signed a binding arbitration agreement is a solution that is also consistent with judicial decision-making.³²³ It is also beneficial to the EEOC, employers, and employees.³²⁴ Therefore, the solution has a substantial chance of being successfully implemented at the national level. However, in order for this solution to work, it is important to realize that employers must take safeguards to ensure fairness, efficiency, and due process

318. See *Gilmer*, 500 U.S. at 30 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 634 (1985)).

319. See *supra* note 162 and accompanying text. In the FAA, there are provisions providing for judicial review of arbitration decisions. *Id.* Additionally, the NYSE has adopted its own regulations to ensure fairness in arbitration. See generally *Gilmer*, 500 U.S. at 30-31.

320. See *supra* notes 154-59 and accompanying text.

321. See *supra* notes 280-83 and accompanying text.

322. See *supra* notes 307-08.

323. See *supra* notes 280-87.

324. See *supra* notes 295-319.

for all parties.³²⁵ There have already been steps taken to ensure this fairness in the FAA and the NYSE rules regarding arbitration.³²⁶ The suggestions made by the Dunlop Commission would also assist employers in ensuring that arbitration is fair to all parties.³²⁷

This solution should be implemented on a national level because it involves arbitration in employment, a national issue.³²⁸ Because the EEOC enforces anti-discrimination practices throughout the nation it is very important to have a uniform implementation of remedies when the EEOC seeks relief in the context of a binding arbitration agreement. There is also a substantial public interest in stopping employment discrimination that should be treated equally throughout the United States.³²⁹ Thus, as Judge Feinberg opined in *Kidder*, the decision should be regulated by statute or by the Supreme Court to ensure its uniformity.³³⁰

JULIE L. WATERS

325. See generally *Dunlop Report*, *supra* note 165.

326. See *id.* at 31.

327. See *id.*

328. See *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 304 (2d Cir. 1998) (Feinberg, J., concurring).

329. *Id.*

330. *Id.*

