

# THE IMPLICATIONS OF *EEOC v. WAFFLE HOUSE*: DO SETTLEMENT AND WAIVER AGREEMENTS AFFECT THE EEOC'S RIGHT TO SEEK AND OBTAIN VICTIM-SPECIFIC RELIEF?

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## INTRODUCTION

On January 15, 2002, the Supreme Court surprised both business leaders and employment law attorneys with its decision in *EEOC v. Waffle House, Inc.*,<sup>1</sup> which held that the Equal Employment Opportunity Commission (EEOC) could seek victim-specific relief on behalf of an individual even when that individual had previously signed a mandatory arbitration agreement.<sup>2</sup> The Court's decision resolved a circuit split<sup>3</sup> and overturned several lower court holdings, which had limited the EEOC's choice of remedies to general injunctive relief when the charging employee had agreed to settle all employment related claims through arbitration.<sup>4</sup>

However, despite the Court's guidance concerning mandatory arbitration agreements, the logic of the majority opinion raised several questions that have yet to be addressed by the Court.<sup>5</sup> Among these questions is whether *Waffle House* allows the EEOC to recover victim-specific relief, including back pay, compensatory and punitive damages, on behalf of an employee who has settled or signed a waiver agreement with his or her employer. This Note addresses that question and explains why the Court's holding in *Waffle House* extends to situations where an employee has previously settled or waived his or her claim. Part I of this Note provides a brief description of the EEOC's responsibilities, procedures, and remedies as created under Title VII of the Civil Rights Act of

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1. 534 U.S. 279 (2002).

2. *Id.* at 288.

3. Compare *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 459 (6th Cir. 1999) (holding that the EEOC may seek both victim-specific and injunctive relief where an individual has signed a mandatory arbitration agreement), with *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 302 (2d Cir. 1998) and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814, 817 (8th Cir. 2000) (holding that the EEOC or its state government equivalent may seek injunctive relief but not victim-specific monetary relief where an employee has submitted himself to an arbitration agreement).

4. See *Kidder*, 156 F.3d at 302; *Nixon*, 210 F.3d at 817.

5. See Richard T. Seymour, What Hath Waffle House Wrought? (ABA Section of Labor and Employment Law ADR Committee, Midwinter Meeting, Feb. 12, 2002) (discussing various questions raised by the Court's holding in *Waffle House*).

1964,<sup>6</sup> the Equal Employment Opportunity Act of 1972<sup>7</sup> and the Civil Rights Act of 1991.<sup>8</sup> Additionally, Part I introduces the relevant enforcement statutes and discusses two Supreme Court holdings which helped to define the scope of the EEOC's power leading up to *Waffle House*. Part II of this Note, focuses on *Waffle House*. It includes a summary of the lower court cases, which led to the Supreme Court's granting of certiorari, lays out the facts of the case, analyzes Justice Steven's majority opinion, and looks at Justice Thomas's dissent. Finally, Part III explains why *Waffle House* extends to situations where an individual has settled or waived his or her claim. It examines possible ways that a court might sidestep *Waffle House*, and discusses the case's implications.

## I. TITLE VII AND THE EEOC

### A. *The History and Purpose of the EEOC*

Congress enacted Title VII as part of the Civil Rights Act of 1964 with the purpose of ridding the workplace of discrimination on account of an individual's "race, color, religion, sex, or national origin."<sup>9</sup> The original enforcement scheme of Title VII created the EEOC and charged it with the duty of preventing "any person from engaging in any unlawful [discriminatory] employment practice."<sup>10</sup> Despite this charge, the Commission, as created by the 1964 Act, could not bring its own enforcement actions.<sup>11</sup> Instead, it only had authority to utilize informal methods of conciliation when attempting to resolve charges of discrimination.<sup>12</sup> If such informal methods failed, the EEOC's involvement in the dispute ended and the aggrieved party had thirty days to file a private cause of action.<sup>13</sup> This enforcement scheme however, proved to be ineffective due to employers who consistently "shrugged off the [EEOC's] entreaties and relied upon the unlikelihood of the parties suing them."<sup>14</sup> Thus, in an effort to strengthen the original scheme and to encourage compliance with the Act, Congress amended Title VII in 1972 to allow the EEOC to file enforcement actions on its own.<sup>15</sup> This new scheme gave the EEOC exclusive jurisdiction over a claim for 180 days, but allowed an individual to pursue a private cause of action once that

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6. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as 42 U.S.C. § 2000e (2000)).

7. Equal Employment Opportunity Act of 1972 § 701, 42 U.S.C. § 2000e (2000) (authorizing the EEOC to bring its own enforcement actions).

8. 42 U.S.C. § 1981a(a)(1) (2000) (expanding the relief available to a 'complaining party' to include compensatory and punitive damages).

9. *Id.* § 2000e-2(a)(1).

10. *Id.* § 2000e-5(a).

11. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259.

12. *See id.*

13. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(e), 78 Stat. 241, 260.

14. H.R. REP. NO. 92-238, at 8 (1972).

15. *Id.*

period had expired.<sup>16</sup> Despite allowing for a private cause of action, the intention of the 1972 amendments was for the EEOC, and not individual private parties, to “bear the primary burden of litigation.”<sup>17</sup>

### B. EEOC Investigatory and Enforcement Procedures

The current scheme, as created by the Civil Rights Act of 1964, and as amended by the Equal Employment Opportunity Act of 1972,<sup>18</sup> and the Civil Rights Act of 1991,<sup>19</sup> allows the EEOC to file suit against an employer only after attempting to resolve the dispute through conciliation.<sup>20</sup> However, before a suit can even be filed under Title VII, a charge must be filed with the EEOC alleging that the employer “has engaged in an unlawful employment practice.”<sup>21</sup> A charge can be filed by a discrimination victim or by a member of the EEOC and must be filed within 180 days of the alleged unlawful practice.<sup>22</sup> Upon receiving the charge, the EEOC must notify the employer and then perform an investigation.<sup>23</sup> EEOC investigations are often time consuming and expensive for an employer.<sup>24</sup> They may involve on-site visits, witness interviews, requests for statements of position, or requests for personnel policies and files.<sup>25</sup>

If, after the investigation is performed, the EEOC concludes that there is reasonable cause to believe that the charge is legitimate, the Commission has thirty days to eliminate the alleged unlawful employment practice through informal conciliation.<sup>26</sup> After thirty days, if the informal conciliation process has not rendered a solution satisfactory to the EEOC, the Commission can file suit in federal court.<sup>27</sup> The aggrieved victim has the right to intervene in that lawsuit; however, he is barred from filing his own separate suit.<sup>28</sup> If no reasonable cause is found, the Commission will issue a “right-to-sue” letter to the aggrieved individual and that person has ninety days to file a private suit against the employer.<sup>29</sup>

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16. See 42 U.S.C. § 2000e-5(f)(1) (2000).

17. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 286 (2002) (quoting *Gen. Tel. Co. of Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980)).

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

19. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

20. See 42 U.S.C. § 2000e-5(f)(1).

21. *Id.* § 2000e-5(b).

22. *Id.* § 2000e-5(e)(1).

23. *Id.* § 2000e-5(b).

24. The average EEOC investigation lasts 182 days. EEOC, *EEOC Investigations—What an Employer Should Know*, at <http://www.eeoc.gov/employers/investigations.html> (last modified Mar. 3, 2003).

25. *Id.*

26. See 42 U.S.C. § 2000e-5(f)(1).

27. *Id.*

28. *Id.*

29. *Id.*

Once in court, the EEOC (or in a private action the aggrieved individual) can generally request both injunctive<sup>30</sup> and compensatory relief.<sup>31</sup> The original Act allowed only for injunctive relief.<sup>32</sup> It permitted the court, upon a finding of discrimination, to “enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.”<sup>33</sup> In 1991, Congress amended the Act to allow a “complaining party”<sup>34</sup> in a discrimination suit to recover both compensatory and punitive damages in addition to the remedies already available.<sup>35</sup>

### C. EEOC's Enforcement Powers

1. *Relevant Statutes.*—The statutes that are relevant to this Note include those that grant the EEOC the power to bring a discrimination claim in federal court, as well as those that specify the remedies available to the EEOC. The statute granting the EEOC the power to file suit in federal court is 42 U.S.C. § 2000e-5(f)(1) of the Civil Rights Act of 1972.<sup>36</sup> The sections dealing with remedies include § 2000e-5(g)(1) of the Civil Rights Act of 1964,<sup>37</sup> which gives the EEOC the authority to seek broad injunctive relief as well as reinstatement and back pay for affected employees, and § 1981a(a)(1) of the Civil Rights Act of 1991,<sup>38</sup> which permits the Commission to obtain compensatory and punitive

30. *Id.* § 2000e-5(g)(1).

31. *Id.* § 1981a(a)(1).

32. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g)(1), 78 Stat. 241, 261.

33. *Id.*

34. A “complaining party” includes both the EEOC and the aggrieved individual. 42 U.S.C. § 2000e.

35. *Id.* § 1981a(a)(1).

36. *Id.* § 2000e(5)(f)(1) states:

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

37. *Id.* § 2000e-5(g)(1) states:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

38. *Id.* § 1981a(a)1 states that a “complaining party may recover [from the respondent] compensatory and punitive damages as allowed in subsection (b), in addition to any relief

damages on behalf of injured individuals.

2. *Supreme Court Decisions Interpreting the Scope of the EEOC's Enforcement Powers.*—

a. *Occidental Life Insurance Co. of California v. EEOC.*—In *Occidental Life Insurance Co. of California v. EEOC*,<sup>39</sup> the Supreme Court dealt with the issue of whether the EEOC is bound by state statutes of limitation when bringing a discrimination suit in federal court.<sup>40</sup> It held that state statutes of limitation do not bind the Commission because such limitations would undermine the enforcement scheme created by Congress to rid the workplace of discrimination.<sup>41</sup>

The Court based its opinion, in part, on its analysis of the complex enforcement scheme created by the 1972 amendments to Title VII. It noted that the scheme created a system where the EEOC “does not function simply as a vehicle for conducting litigation on behalf of private parties.”<sup>42</sup> Rather, the Court noted, the Commission “is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.”<sup>43</sup> The EEOC is in fact prohibited by law from filing suit before it has attempted conciliation and performed its administrative duties.<sup>44</sup> Thus, the Court argued that applying state statutes of limitations to EEOC actions would undermine the EEOC’s duty to conciliate and frustrate the intent of Congress in creating the enforcement scheme.<sup>45</sup>

b. *General Telephone Co. v. EEOC.*—In *General Telephone Co. of the Northwest, Inc. v. EEOC*,<sup>46</sup> the Supreme Court addressed the issue of “whether the [EEOC] may seek classwide relief under [42 U.S.C. § 2000e-5(f)(1)] . . . without being certified as the class representative under Rule 23 of the Federal

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authorized by section [2000e-5(g)(1)] of the Civil Rights Act of 1964.” Subsection (b) establishes the guidelines for punitive damages:

A complaining party may recover compensatory and punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

In addition to setting out the circumstances under which a “complaining party” may recover punitive damages, subsection (b) also includes caps for the amount of punitive damages that may be awarded under the statute. The caps are determined by the number of employees working for the company, and max out at \$300,000 for companies of 500 employees or more. *Id.* § 1981a(b)(3).

39. 432 U.S. 355 (1977).

40. *Id.* at 366-67.

41. *Id.* at 368-69.

42. *Id.* at 368.

43. *Id.*

44. *Id.*

45. *Id.* at 368-69.

46. 446 U.S. 318 (1980).

Rules of Civil Procedure.”<sup>47</sup> The Court held that Rule 23 does not bind the EEOC when it brings an enforcement action under the statute.<sup>48</sup> Its holding was based on the plain meaning of the statute as well as the legislative history and purpose of Title VII and its amendments in 1972.<sup>49</sup>

The Court found that 42 U.S.C. § 2000e-5(f)(1) plainly provides the EEOC with the “authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals.”<sup>50</sup> Because the EEOC’s authority is derived from § 2000e-5(f)(1), the Court found that its claim is in no way contingent upon Rule 23.<sup>51</sup>

According to the Court, this interpretation of the statute is not only consistent with its plain meaning, but it is also in accord with the purpose of the 1972 amendments to Title VII.<sup>52</sup> Those amendments were intended to correct the deficiencies of the Civil Rights Act of 1964 by creating more effective federal enforcement measures.<sup>53</sup> The Court noted that under the enforcement scheme created by the 1972 amendments, “[t]he EEOC’s civil suit was intended to supplement, not replace, the [employee’s] private action.”<sup>54</sup> Congress’s retention of the private action, according to the Court, was proof that “the EEOC is not merely a proxy for the victims of discrimination.”<sup>55</sup> Despite the EEOC’s authority to pursue individualized relief, “the agency is guided by the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.”<sup>56</sup>

In sum, both *Occidental*, and *General Telephone* upheld the idea that the EEOC’s cause of action is distinct and independent of an employee’s private cause of action. However, these cases did not decide whether that independence entailed absolute discretion in the remedies that the EEOC may seek. Specifically, this question became important in situations where employees had agreed to resolve their discrimination claims through arbitration.

## II. EEOC V. WAFFLE HOUSE

### A. Circuit Split: The Cases Leading to Waffle House

1. EEOC v. Kidder, Peabody & Co.: *The Second Circuit*.—In *EEOC v. Kidder, Peabody & Co.*,<sup>57</sup> the Second Circuit held that the EEOC could not seek

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47. *Id.* at 320.

48. *Id.* at 333-34.

49. *Id.* at 323.

50. *Id.* at 324.

51. *Id.*

52. *Id.* at 325.

53. *Id.*

54. *Id.* at 326.

55. *Id.*

56. *Id.* (citation omitted).

57. 156 F.3d 298 (2d Cir. 1998).

victim-specific relief on behalf of an individual in an ADEA suit when that individual had signed a mandatory arbitration agreement.<sup>58</sup> The case involved seventeen investment bankers who filed a charge with the EEOC alleging that Kidder had unlawfully terminated them on account of their age. At the start of their employment with the company, each employee had signed a securities industry arbitration agreement (U-4 registration) stating that any claims arising out of their employment would be settled by binding arbitration. When Kidder discontinued its investment banking operations making it impossible for the EEOC to seek injunctive relief, the EEOC indicated that it would continue to seek back pay and liquidated damages on behalf of nine of the seventeen individuals. Kidder moved to dismiss the suit alleging that the arbitration agreements signed by the employees barred the EEOC from seeking victim-specific relief on their behalf.<sup>59</sup>

In reaching its decision, the court relied on the Supreme Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>60</sup> as well as several lower court holdings involving victims of discrimination who had previously settled, waived, or litigated their discrimination claims.<sup>61</sup> The court found that the EEOC serves a dual role when prosecuting an employment discrimination charge. Specifically, the court reasoned that the EEOC serves as a representative of the public when it seeks broad-based injunctive relief, but it acts primarily as a representative of private individuals when it seeks victim-specific relief (i.e., back pay, compensatory and punitive damages) on behalf of an employee.<sup>62</sup> The court cited both the Third and Ninth Circuits<sup>63</sup> in asserting that an individual's actions cannot affect the EEOC's right to perform its first role as the representative of the public interest.<sup>64</sup> The court noted that the EEOC's right to seek class-wide injunctive relief "promotes public policy and seeks to vindicate rights belonging to the United States as sovereign."<sup>65</sup> However, the court reached a different conclusion in regard to the EEOC's right to seek victim-specific relief on behalf of the employees. Citing the same lower court cases, the court concluded that "in seeking individual monetary relief, as opposed to class-wide injunctive relief, the EEOC does not represent the public interest to the same degree."<sup>66</sup> Although the

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58. *Id.* at 303.

59. *Id.* at 300.

60. 500 U.S. 20, 26 (1991) (holding that ADEA claims can be resolved through arbitration).

61. *See* *New Orleans Steamship Ass'n v. EEOC*, 680 F.2d 23, 25 (5th Cir. 1982) (holding that res judicata precludes the EEOC from recovering on behalf of an employee who has waived, settled, or previously litigated his claim); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (holding that the EEOC's claim is "moot" when it attempts to recover victim-specific relief on behalf of an employee who has previously settled his claim).

62. *See* *Kidder*, 156 F.3d at 302-03.

63. *See* *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990); *Goodyear Aerospace Corp.*, 813 F.2d at 1543.

64. *Kidder*, 156 F.3d 298 at 302.

65. *Id.* at 302 (quoting *Goodyear Aerospace Corp.*, 813 F.2d at 1543).

66. *Id.* at 301.

court did recognize that victim-specific relief could also benefit the public-at-large, such benefits, the court felt, would be the same regardless of whether they were obtained by the individual (in arbitration) or by the EEOC.<sup>67</sup> Allowing the individual to ignore his agreement to arbitrate would permit him “to make an end run” around his contract with his employer, and would violate both the Federal Arbitration Act (FAA)<sup>68</sup> and the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>69</sup>

2. *EEOC v. Frank’s Nursery & Crafts: The Sixth Circuit.*—In *EEOC v. Frank’s Nursery & Crafts, Inc.*,<sup>70</sup> the Sixth Circuit disagreed with the reasoning set forth by the Second Circuit in *Kidder*, and held that the EEOC could seek victim-specific relief in a Title VII suit on behalf of an employee who had signed a mandatory arbitration agreement with his employer.<sup>71</sup> The case involved a charge filed by Carol Adams, an African-American employee of Frank’s Nursery who claimed that she was passed over for promotion because of her race. Adams had signed a mandatory arbitration agreement upon commencing her employment with the company. The EEOC filed a lawsuit under Title VII alleging unlawful discrimination on the part of the company. In its complaint, the EEOC sought both class-wide injunctive relief and individual relief on behalf of Adams. Frank’s then moved to compel Adams to arbitration in accordance with the signed agreement and with the FAA. Additionally, Frank’s moved to dismiss the EEOC suit on the grounds that the arbitration agreement precluded the Commission from bringing the suit. The district court granted the motion to dismiss relying on *Gilmer* and on a finding that the EEOC had not identified a class of individuals who had suffered from discrimination.<sup>72</sup>

In the first part of its opinion, the appellate court used Title VII’s enforcement scheme and legislative history to support its finding that the EEOC has “complete authority to decide which cases to bring to Federal district court.”<sup>73</sup> The court then looked to the Supreme Court’s holdings in *Occidental* and *General Telephone* and determined that “the EEOC is not merely a proxy for the victims of discrimination” and that “when the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.”<sup>74</sup> After deciding that the EEOC did have the authority to bring suit in federal court, the court moved on to the question of the EEOC’s right to seek monetary relief on behalf of the employee. The court first noted that the EEOC was not bound by an arbitration

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67. *Id.* at 302-03.

68. Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (2000).

69. 500 U.S. 20, 26 (1991) (holding that an ADEA claim can be resolved through arbitration).

70. 177 F.3d 448 (6th Cir. 1999).

71. *Id.* at 455.

72. *Id.* at 454.

73. *Id.* at 458 (quoting *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir. 1975)).

74. *Id.* (quoting *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980)).

agreement to which it was not a party.<sup>75</sup> It then rebutted the arguments made in *Kidder*, which asserted that the EEOC, by seeking victim-specific relief on behalf of an individual, does not seek to benefit the public as a whole. Rather, the court argued, “the EEOC never ceases to represent the public interest as well. Indeed, whenever the EEOC sues in its own name, it sues both for the benefit of specific individuals and the public interest.”<sup>76</sup> Based on this finding, the court held that Title VII authorized the EEOC to seek victim-specific relief on behalf of the employee, despite the fact that she had signed a mandatory arbitration agreement with her employer.<sup>77</sup>

3. *Merrill Lynch v. Nixon: The Eighth Circuit.*—In *Merrill Lynch, Pierre, Fenner & Smith, Inc. v. Nixon*,<sup>78</sup> the Eighth Circuit addressed a case, which, like the cases discussed above, involved a discrimination charge filed by an employee who had previously signed a mandatory arbitration agreement. Anthony Hoskins, a stockbroker, lost his discrimination claim in arbitration and then filed an administrative claim with the Missouri Commission on Human Rights (MCHR), the Missouri state equivalent of the EEOC.<sup>79</sup> The Commission then filed suit claiming that Merrill Lynch had unlawfully discriminated against Hoskins when it terminated his employment with the company. Merrill Lynch argued that the employee’s arbitration judgment precluded the agency from bringing a separate suit.

The court relied heavily on the Second Circuit’s holding in *Kidder* in finding that the state agency could seek class-wide injunctive relief but could not seek victim-specific relief.<sup>80</sup> Referring to the holding in *Kidder*, the court reasoned that victim-specific relief is “highly individual in nature,” and that by seeking such relief, the state agency “acts more as a representative for [the aggrieved employee] than as a separate entity seeking to vindicate public rights.”<sup>81</sup>

### B. EEOC v. Waffle House: *The Facts*

In the wake of *Kidder*, *Frank’s Nursery*, and *Nixon*, the Fourth Circuit was presented with the case of *EEOC v. Waffle House, Inc.*<sup>82</sup> In *Waffle House*, Eric

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75. *Id.* at 460.

76. *Id.* at 458.

77. *Id.* at 468.

78. 210 F.3d 814 (8th Cir. 2000).

79. The EEOC and state Fair Employment Practice Agencies (FEPAs) utilize worksharing agreements and a dual filing system to prevent duplicative investigations. Under 42 U.S.C. § 2000e-5(c), the EEOC must defer jurisdiction to FEPAs for sixty days or until the state proceedings have terminated. This section was designed to give state FEPAs an opportunity to resolve the dispute before the EEOC became involved. Brooks William Conover, III, *Jurisdictional and Procedural Issues Under the Texas Commission on Human Rights Act*, 47 BAYLOR L. REV. 683, 688 (1995).

80. *Nixon*, 210 F.3d at 818.

81. *Id.*

82. 193 F.3d 805 (4th Cir. 1999).

Baker, a former employee of the company, signed an agreement that stated that "any dispute or claim" regarding his employment would be settled by binding arbitration.<sup>83</sup> Sixteen days after signing this agreement, Baker suffered a seizure while at work and was subsequently fired. Baker never initiated an arbitration hearing, however he did file a timely charge of discrimination with the EEOC alleging that his discharge violated the Americans with Disabilities Act of 1990 (ADA).<sup>84</sup> The EEOC thereafter performed an investigation and filed an enforcement action against Waffle House in the Federal District Court for the District of South Carolina pursuant to § 107 of the ADA.<sup>85</sup> The complaint requested injunctive relief as well as victim-specific relief, including back pay, reinstatement, compensatory, and punitive damages.<sup>86</sup>

Waffle House filed a Federal Arbitration Act (FAA) petition and requested that the court compel arbitration or dismiss the EEOC's action altogether. The district court denied this request and held that the agreement was not valid because it was not found in Baker's actual employment contract.<sup>87</sup> The court of appeals then granted an interlocutory appeal and found that Baker's employment contract did in fact contain a valid, enforceable arbitration agreement. The court then proceeded to address the question of whether the binding agreement between Baker and Waffle House in any way affected the EEOC's right to seek victim-specific relief in court on Baker's behalf.

The court of appeals found that the EEOC could seek injunctive relief but not victim-specific relief in its claim against Waffle House.<sup>88</sup> This decision was reached by balancing the goals of EEOC with the FAA. The court acknowledged the EEOC's "independent statutory authority to bring suit."<sup>89</sup> However, it held that allowing the commission to seek victim-specific relief would undermine the court's "strong policy favoring arbitration."<sup>90</sup> Further, it reasoned that when victim-specific relief is sought, "the EEOC's public interest is minimal, as [it]

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83. The language of the agreement was as follows:

The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

*Id.* at 814 n.1.

84. Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12212 (2000).

85. 42 U.S.C. §12117(a).

86. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 283-84 (2002).

87. *Waffle House*, 193 F.3d at 308.

88. *Id.* at 812.

89. *Waffle House*, 534 U.S. at 284 (citing *Waffle House*, 193 F.3d at 809-12).

90. *Waffle House*, 193 F.3d at 812.

seeks primarily to vindicate private, rather than public interests.”<sup>91</sup> Thus, the appellate court’s holding asserted that when an employee had signed a mandatory arbitration agreement, the EEOC’s remedies were limited to broad-based injunctive relief.<sup>92</sup> The EEOC appealed and the Supreme Court granted certiorari in order to answer the question of “whether an agreement between an employer and an employee to arbitrate employment related disputes bars the [EEOC] from pursuing victim-specific judicial relief . . . in an enforcement action alleging that the employer has violated Title I of the [ADA] of 1990.”<sup>93</sup>

### C. *The Majority Opinion*

While the court of appeals based its decision on policy implications, the Supreme Court chose to focus on the plain language of the statute. Perhaps foreshadowing its ultimate holding, the Court began its opinion with a history of Title VII and the EEOC very similar to that found in the Sixth Circuit’s analysis in *Frank’s Nursery*.<sup>94</sup> Of particular importance to the Court were Congress’s 1972 and 1991 amendments to Title VII, which gave the EEOC the right to bring its own enforcement actions, and the power to recover compensatory and punitive damages. According to the Court, these new powers were intended to strengthen Title VII and give rise to an enforcement scheme where “the EEOC was intended ‘to bear the primary burden of litigation.’”<sup>95</sup> To further support these assertions the Court turned to its holdings in *Occidental Life Insurance Co. of California v. EEOC*<sup>96</sup> and *General Telephone Co. of the Northwest, Inc. v. EEOC*<sup>97</sup> which had dealt with the conflict between the EEOC’s enforcement role and an injured party’s private cause of action. According to the Court, these cases showed that the EEOC’s enforcement role and the injured party’s cause of action are not one in the same.<sup>98</sup> Thus, when the EEOC seeks to prosecute a discrimination suit in federal court it “is not merely [acting as] a proxy for the victims of discrimination.”<sup>99</sup> The Court then noted that the 1991 amendments (allowing for recovery of punitive and compensatory damages) were passed by Congress after the Court’s holdings in *Occidental* and *General Telephone*.<sup>100</sup> Despite Congress’s knowledge that the Court had interpreted the EEOC’s

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91. *Id.*

92. *Id.*

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

94. *Compare id.* at 285-88, with *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 455-59 (6th Cir. 1999).

95. *Waffle House*, 534 U.S. at 286.

96. 432 U.S. 355, 368-69 (1977) (holding that the EEOC is not bound by a state’s statute of limitations even where it seeks monetary and injunctive relief on behalf of an injured employee).

97. 446 U.S. 318, 324 (1980) (holding that Rule 23 of the Federal Rules of Civil Procedure does not apply to the EEOC when it seeks class wide relief).

98. *Waffle House*, 534 U.S. at 287.

99. *Id.* at 288 (quoting *Gen. Tel.*, 446 U.S. at 326).

100. *Id.*

authority to be independent of an employee's private cause of action, it gave no indication that the EEOC's authority to seek compensatory or punitive damages should be limited by a mandatory arbitration agreement.<sup>101</sup> Hence, the Court inferred that the unambiguous language of Title VII and the holdings in *Occidental* and *General Telephone* give the EEOC the power to bring a discrimination suit and to seek both monetary and injunctive relief.<sup>102</sup> Further, without proof of a contrary intent by Congress, the Court found that these powers cannot be affected by an employee's agreement to arbitrate his own discrimination claims.<sup>103</sup>

The Court next responded to the dissent's argument that the language of the relevant statutes limits the remedies available to the EEOC to "appropriate" relief as determined by the court.<sup>104</sup> According to the Court, the dissent's interpretation of the statutes was flawed for two reasons. First, the Court argued that the EEOC's authority under 42 U.S.C. § 1981a(a)(1) to obtain compensatory and punitive damages could not be limited by the term "appropriate" found in § 2000e-5(g)(1)—a totally separate section of the statute.<sup>105</sup> Second, the contention that § 1981a(a)(1)'s use of the phrase "may recover" was not, as the dissent alleged, language limiting the EEOC to remedies considered "appropriate" by the court.<sup>106</sup> Instead, the Court argued, these terms "refer to the trial judge's discretion in a particular case to order reinstatement and award damages in an amount warranted by the facts of the case."<sup>107</sup> They were not to be interpreted to permit "judge-made, *per se* rules."<sup>108</sup>

The Court then proceeded to address the court of appeal's contention that the FAA limits the types of relief that the EEOC may seek when a mandatory arbitration agreement has been signed. Specifically, the Court disagreed with the lower court's assertion that "[w]hen the EEOC seeks 'make-whole' relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court."<sup>109</sup> The Court noted that by resorting to policy considerations, the court of appeals had ignored precedent,<sup>110</sup> which required that the court first look "to whether the parties agreed to arbitrate a dispute . . . to determine the scope of an agreement."<sup>111</sup> Further, Title VII's statutory scheme makes the court of appeal's balancing test unnecessary because it unambiguously makes the EEOC the

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101. *Id.*

102. *Id.*

103. *Id.* at 288.

104. *Id.* at 292.

105. *Id.*

106. *Id.*

107. *Id.* at 292-93.

108. *Id.* at 292.

109. *Id.* at 284 (quoting *EEOC v. Waffle House*, 193 F.3d 805, 812 (4th Cir. 1999)).

110. *See Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

111. *Waffle House*, 534 U.S. at 294.

“master of its own case” and puts it “in command of the process” once it receives a charge of discrimination.<sup>112</sup> Thus, without textual support to the contrary, the EEOC, and not the court, has the power “to determine whether public resources should be committed to the recovery of victim-specific relief.”<sup>113</sup>

Next, the Court pointed out that even if the court of appeals was correct in resorting to policy considerations in reaching its decision, the line it drew between injunctive and victim-specific relief was unacceptable.<sup>114</sup> Because victim-specific relief can also benefit the public and because injunctive relief can often be linked to an individual’s injuries, the Court found the categorization created by the court of appeals to be both overinclusive and underinclusive.<sup>115</sup> The Court found that the EEOC’s statutory scheme allows that the Commission may be seeking a public benefit even where it seeks victim-specific relief.<sup>116</sup>

Finally, in dicta, the Court acknowledged that an employee’s conduct could have the effect of limiting the relief available to the EEOC in court.<sup>117</sup> As examples, the Court recognized that lower courts have in the past limited relief to the EEOC where an employee has failed to mitigate his damages, where he has settled with his employer, or where he has previously litigated his claims.<sup>118</sup> These cases recognize that “it goes without saying that the courts can and should preclude double recovery by an individual.”<sup>119</sup> However, the Court noted that “[i]t is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC’s claim or the character of relief [that] the EEOC may seek.”<sup>120</sup>

#### D. The Dissent

The dissent, written by Justice Thomas, argued that the majority opinion was flawed for two reasons: (1) it conflicted with the language of the FAA and Title

112. *Id.* at 291.

113. *Id.* at 291-92.

114. *Id.* at 294.

115. The categorization is overinclusive because victim-specific relief such as punitive damages are, by their very nature, intended to punish tortfeasors and to benefit the public by deterring future unlawful conduct. *Id.* at 294-95. The categorization is underinclusive because “while injunctive relief may appear more ‘broad based,’ it nonetheless is redress for individuals.” *Id.* at 295 (quoting *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 383 (1977)).

116. *Id.* at 296.

117. *Id.*

118. See *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982) (holding that an employee cannot recover under Title VII if he has failed to mitigate his damages); *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990) (holding that res judicata precludes the EEOC from recovering victim-specific relief on behalf of an employee who has previously litigated his claim); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542 (9th Cir. 1987) (holding that the EEOC’s claim to victim-specific relief is “mooted” by the injured employee’s settlement with his employer).

119. *Waffle House*, 534 U.S. at 297 (quoting *Gen. Tel. Co.*, 446 U.S. at 333).

120. *Id.*

VII; and (2) because it violated the basic principle that the EEOC “must take a victim of discrimination as it finds him.”<sup>121</sup>

According to the dissenters, the language of Title VII leaves it in the hands of the courts to decide which remedies are “appropriate.”<sup>122</sup> Specifically, Justice Thomas argued that 42 U.S.C. § 2000e-5(g)(1) which gives the courts power to order “such affirmative action as may be appropriate” applies not only to injunctive relief, but also to the compensatory and punitive damages authorized by 42 U.S.C. § 1981a(a)(1).<sup>123</sup> Thus, according to Justice Thomas, the court, and not the EEOC, is vested by Title VII with the power to determine the remedies available to the Commission in a discrimination suit.<sup>124</sup>

The dissent next argued that the majority’s decision violated the language of the FAA. The true question, argued Justice Thomas, was not “whether the EEOC should be bound by Baker’s agreement to arbitrate. Rather, it was whether a court should give effect to the arbitration agreement . . . or whether it should instead allow the EEOC to reduce that arbitration agreement to all but a nullity.”<sup>125</sup> The dissenters felt that the FAA required that the agreement be given effect.<sup>126</sup>

In addition to the language of the statute, the dissent argued that the majority’s decision violated the accepted principle that the EEOC “must take a victim of discrimination as it finds him.”<sup>127</sup> In short, according to this principle, the EEOC’s ability to seek victim specific relief is dependent upon the victim’s ability to obtain such relief for himself.<sup>128</sup> This is so, Justice Thomas argued, because “when the EEOC is seeking [victim-specific relief] it is only serving the public interest to the extent that an employee seeking the same relief for himself through litigation or arbitration would also be serving the public interest.”<sup>129</sup> Consequently, the dissent argued that it is only when the EEOC seeks broad-based injunctive relief, “that its unique role in vindicating the public interest comes to the fore.”<sup>130</sup>

Lastly, the dissent raised concerns as to the possible implications of the majority’s decision. In particular, Justice Thomas worried about the effect that the decision could have on private settlements and arbitration judgments. He noted that “after this decision . . . an employee’s decision to enter into a settlement agreement with his employer no longer will preclude the EEOC from obtaining relief for that employee in court.”<sup>131</sup> Also, in regard to arbitration

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121. *Id.* at 298.

122. *Id.* at 301.

123. 42 U.S.C. § 2000e-5(g)(1) (2000); 42 U.S.C. § 1981a(a)(1).

124. *Waffle House*, 534 U.S. at 301.

125. *Id.* at 308-09.

126. *Id.* at 298-99.

127. *Id.* at 298.

128. *Id.* at 305.

129. *Id.* at 307.

130. *Id.*

131. *Id.* at 311.

judgments, he commented that “[a]ssuming that the Court means what it says, an arbitral judgment will *not* preclude the EEOC’s claim for victim-specific relief from going forward, and courts will have to adjust damages awards to avoid double recovery.”<sup>132</sup> These concerns, Thomas argued, further supported the position that in drafting Title VII, Congress intended that the EEOC must take a victim of discrimination as it finds him.<sup>133</sup>

### III. *WAFFLE HOUSE* EXTENDED TO PRIVATE SETTLEMENTS AND ARBITRATION JUDGMENTS

#### A. *The Issue*

*Waffle House* established that, at least where a mandatory arbitration agreement has been signed, the EEOC does not have to “take a victim of discrimination as it finds him.”<sup>134</sup> The Court asserted that the EEOC is the “master of its claim” and that it can seek victim-specific relief in court even where the victim, because of a mandatory arbitration agreement, cannot legally do so himself. However, dicta found at the end of the opinion seems to limit the Court’s findings. Specifically, the Court’s acknowledgment that a victim’s conduct “may have the effect of limiting the relief that the EEOC may obtain in court”<sup>135</sup> raises the question of whether the EEOC is truly the “master of its claim.”<sup>136</sup> Is the lofty title of “master” taken away when an employee waives his claim or chooses to settle with his employer without EEOC approval? If the employee can affect the EEOC’s choice of remedies is the Commission really in “command of the process?”<sup>137</sup> The Court in *Waffle House* warned that the EEOC’s choice of remedies might be limited in certain circumstances by the mootness doctrine and by *res judicata*.<sup>138</sup>

#### B. *Potential Limits to Waffle House*

According to dicta found in *Waffle House*, “ordinary principles of *res judicata*, [and] mootness . . . may apply to EEOC claims.”<sup>139</sup> While it is true that the lower courts have used these doctrines to deny victim-specific relief to the EEOC,<sup>140</sup> there is no language in Title VII to indicate that they can or should be enforced against the Commission. Despite the straightforward language of the statute, courts have attempted to limit its scope to prevent the seemingly unfair

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132. *Id.* at 310 (emphasis in original).

133. *See id.* at 298.

134. *Id.*

135. *Id.* at 296.

136. *Id.* at 291.

137. *Id.*

138. *Id.* at 296-97.

139. *Id.* at 298 (emphasis added).

140. *See supra* note 118.

situation where an employee gets “two bites at the apple.”<sup>141</sup> However, in light of the Supreme Court’s warning, it is necessary to look at how courts have applied these doctrines in an effort to prevent double recovery.

1. *Mootness Doctrine*.—The mootness doctrine could potentially limit the EEOC’s ability to seek victim-specific relief on behalf of an employee who has settled or waived his claim. The doctrine applies to an action where “the issues are no longer live or the parties lack a legally cognizable interest in the outcome.”<sup>142</sup> The *Waffle House* majority cited the Ninth Circuit’s decision in *EEOC v. Goodyear Aerospace Corp.* as an example of how the doctrine of mootness may be applied to the EEOC and its choice of remedies.<sup>143</sup>

In *Goodyear*, the EEOC filed suit on behalf of Marshaline Pettigrew, a black Goodyear employee, claiming that the company had violated § 706(f)(1) of Title VII of the Civil Rights Act of 1964. In its claim, the Commission sought injunctive relief, as well as back pay under 42 U.S.C. § 2000e-5(g)(1). Shortly after the EEOC filed the suit, Pettigrew reached a settlement agreement with Goodyear. The settlement gave Pettigrew the promotion she sought, as well as a promise from Goodyear not to retaliate. In return, Pettigrew signed an agreement releasing Goodyear from all claims. The company then moved to dismiss, claiming that the settlement agreement had rendered the EEOC’s suit moot. The court held that the EEOC could go forward with its request for injunctive relief; however, it found that the Commission’s claim for back pay was moot.<sup>144</sup> The court reasoned that Pettigrew had contracted away her right to recover, and that “the public interest in a back pay award [was] minimal.”<sup>145</sup>

The logic used by the *Goodyear* court in applying the mootness doctrine is doubtful in light of *Waffle House*. In fact, the court based its holding on two arguments that were explicitly rejected by the *Waffle House* majority. First, the court argued that the EEOC could not recover on behalf of Pettigrew because Pettigrew had contracted away her right to recover from Goodyear.<sup>146</sup> However, *Waffle House* made it clear that the EEOC could not be bound by an agreement to which it was not a party.<sup>147</sup> Second, the court in *Goodyear*, drew the same distinction between broad-based injunctive relief and victim-specific relief that was criticized by the Court in *Waffle House*.<sup>148</sup> The *Goodyear* court’s argument that back pay provides only a minimal benefit to the public was rejected by the

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141. *Id.* at 310.

142. *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542 (9th Cir. 1987).

143. *Waffle House*, 534 U.S. at 296-97 (citing *Goodyear*, 813 F.2d at 1542).

144. *Goodyear*, 813 F.2d at 1543.

145. *Id.*

146. *Id.* at 1542.

147. *Waffle House*, 534 U.S. at 294 (stating “[i]t goes without saying that a contract cannot bind a non-party”).

148. *Goodyear*, 813 F.2d at 1572; *Waffle House*, 534 U.S. at 294 (“[T]he line drawn by the Court of Appeals between injunctive and victim-specific relief creates an uncomfortable fit with its avowed purpose of preserving the EEOC’s public function while preserving the EEOC’s public function while favoring arbitration.”).

*Waffle House* majority which stated that “we are persuaded that . . . whenever the EEOC chooses . . . to bring an enforcement action in a particular case, [it] may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief.”<sup>149</sup>

In short, the applicability of the mootness doctrine depends on whether an employee’s private settlement or waiver agreement will, in all cases, vindicate the public interest represented by the EEOC. If in fact, there are situations where the public is not vindicated by a private settlement, then the mootness doctrine should not apply. The Supreme Court has yet to directly address this issue. However, it has given hints as to how it might be resolved in future cases. Specifically, the Court has indicated that an individual’s monetary interest in a discrimination claim might not be equal to the interest of the public. In *General Telephone*, the Supreme Court noted that every EEOC suit included the EEOC’s claim “to vindicate the public interest in preventing employment discrimination.”<sup>150</sup> Further, the Court noted that the EEOC’s interests could potentially conflict with individual interests, and that the EEOC may not be an adequate representative for injured individuals.<sup>151</sup> If the EEOC is not an adequate representative for an individual, it would seem that the opposite should also be true—an individual may not be an adequate representative for the EEOC because his individual interests may well conflict with the interests of the public. Thus, in light of the Court’s reasoning in *Waffle House* and *General Telephone*, the mootness doctrine should not be utilized to bar EEOC recovery where an employee has settled or waived his or her claims. This assertion is further supported by the language, history, and purpose of the statutes as discussed in Part III.C.

2. *Res Judicata*.—Another way that courts have attempted to limit the EEOC’s ability to seek victim specific relief is by invoking the doctrine of res judicata (claim preclusion).<sup>152</sup> Res judicata has typically been used in situations where an employee has previously litigated or arbitrated his or her claim. However, the doctrine might also be invoked in situations involving a court supervised settlement agreement. “Claim preclusion . . . requires a showing that

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149. *Waffle House*, 534 U.S. at 295-96; see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (“If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a back pay award that ‘provides the spur or catalyst which causes employers and unions to self-examine and to self evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.’”) (citing *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

150. *Gen. Tel. Co. of Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980).

151. *Id.* at 331; see also *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 458 (6th Cir. 1999) (citing *Gen. Tel. Co.*, 446 U.S. at 331).

152. See *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (holding that the doctrine of res judicata precludes the EEOC from filing suit and seeking victim-specific relief where an individual has previously litigated his claim); *EEOC v. U.S. Steel Corp.*, 921 F.2d 489 (3d Cir. 1990).

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.”<sup>153</sup> In applying claim preclusion as it relates to this issue, courts have recognized the fulfillment of the first two requirements, but have disagreed on whether the third is satisfied.<sup>154</sup> Thus, the question to be answered is whether Congress, in passing Title VII, intended to create an enforcement scheme where the EEOC and injured employees are in privity. The Court’s reasoning in *Waffle House* raises doubts as to whether such a relationship was intended.

The *Waffle House* Court cited *EEOC v. U.S. Steel Corp.*, as an example of how claim preclusion might be applied.<sup>155</sup> In *U.S. Steel*, the EEOC filed a complaint on behalf of several employees who, upon termination, had been required to sign an agreement releasing the company of all claims before receiving a lucrative benefits package. Prior to the filing of the EEOC suit, several employees included in the EEOC suit had unsuccessfully sued the company on the same claims. The district court held that res judicata did not bar the EEOC from seeking both injunctive and victim-specific relief in court.<sup>156</sup> However, the Third Circuit reversed and held that res judicata did preclude the EEOC from seeking victim-specific relief on behalf of the employees, but it left undecided the issue of whether the doctrine could be used to limit the Commission’s right to obtain broad-based injunctive relief.<sup>157</sup>

The *U.S. Steel* court’s reasoning is, again, strikingly similar to the line of reasoning rejected by the Supreme Court in *Waffle House*. Essentially, the Third Circuit argued that the EEOC acts as a representative of, and is in privity with, an aggrieved employee when it seeks victim-specific relief on the victim’s behalf. Thus, the Commission is precluded by representative claim preclusion from seeking such relief where that employee has previously litigated his claim or submitted it to arbitration.<sup>158</sup> However, in *Waffle House* the Court found that the EEOC and Baker were not in privity for the purposes of a mandatory arbitration agreement.<sup>159</sup> If the EEOC is not in privity with an employee who contracts away his right to recover in court, it should follow that no privity exists between the Commission and an employee who chooses to litigate his claim or submit it to arbitration. This reasoning is consistent with the Court’s finding that “the EEOC is not merely a proxy for the victims of discrimination.”<sup>160</sup> Further, the *U.S. Steel* court’s argument supporting the use of res judicata appears to be at odds with the Supreme Court’s finding that victim-specific relief is intended to benefit both the

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153. *U.S. Steel Corp.*, 921 F.2d at 493.

154. *Compare id.*; *Harris Chernin, Inc.*, 10 F.3d at 1291, with *Frank’s Nursery & Crafts, Inc.*, 177 F.3d at 463.

155. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002).

156. *U.S. Steel Corp.*, 921 F.2d at 492.

157. *Id.* at 496.

158. *Id.*

159. *Waffle House, Inc.*, 534 U.S. at 294.

160. *Id.* at 288 (quoting *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980)).

injured employee as well as the general public.<sup>161</sup> The Supreme Court has stated that even when the EEOC acts on behalf of an individual, “it acts also to vindicate the public interest in preventing employment discrimination.”<sup>162</sup> This language indicates that the EEOC, as a representative for the public, is not in privity with private individuals under the enforcement scheme of Title VII. As with the mootness doctrine, this assertion is further supported by statutory language, history, and purpose, discussed in Part III.C.

### C. *The Implications of Waffle House*

#### 1. *Statutory Interpretation—*

a. *Section 2000e-5(f)(1): The EEOC’s Authority to Bring a Discrimination Suit on Its Own.*—Section 2000e-5(f)(1) lays out the circumstances under which the EEOC is permitted to bring a discrimination suit in federal court.<sup>163</sup> The statute simply states that a civil suit may be filed against “any respondent”<sup>164</sup> whenever the EEOC has been unable to reach a settlement through conciliation that is “acceptable to the Commission.”<sup>165</sup> Two important points can be taken from this language. First, Congress did not choose to condition the EEOC’s power to file suit against “any respondent,” on whether an injured employee had decided to privately satisfy her claims. Rather, the plain language of the statute gives the Commission an independent cause of action and permits it to bring suit on any occasion where conciliation has failed. Second, Congress made it clear that unless a settlement agreement is “acceptable to the Commission” the EEOC will be permitted to bring a civil action. Thus, it follows that if a private settlement is not agreeable to the EEOC, then the Commission will not be barred from filing suit. This interpretation is embraced in the Court’s findings in *General Telephone* and *Occidental* and has been virtually unquestioned by the lower courts.<sup>166</sup> However, while it is accepted that the EEOC has been given an independent cause of action, there has been no such consensus on the types of remedies that the Commission may request in situations where an employee has taken private action to satisfy her claims.

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161. *Id.* at 296.

162. *Gen. Tel. Co.*, 446 U.S. at 326.

163. *See* 42 U.S.C. § 2000e-5(f)(1) (2000).

164. Suit may be filed except for cases where the respondent is a government, governmental agency, or political subdivision named in the charge. *Id.*

165. *Id.*

166. *See, e.g., Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 324 (1980); *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 368 (1977); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814, 817 (8th Cir. 2000) (holding that the EEOC or its State government equivalent may seek injunctive relief but not victim-specific monetary relief where an employee has submitted himself to an arbitration agreement); *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 459 (6th Cir. 1999) (holding that the EEOC may seek victim-specific on behalf of an individual who has signed a mandatory arbitration agreement); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 302 (2d Cir. 1998).

*b. Section 2000e-5(g)(1) and § 1981a(a)1: The Remedies available to the EEOC.*—Congress has provided two separate provisions that set out the EEOC's choice of remedies in discrimination cases. The first provision, 42 U.S.C. § 2000e-5(g)(1), permits a court, upon a finding of discrimination, to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be *appropriate*, which may include . . . reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief that the court deems *appropriate*."<sup>167</sup> The second remedies provision, § 1981a(a)(1), states that in addition to the remedies made available by § 2000e-5(g)(1), a "complaining party *may* recover compensatory and punitive damages."<sup>168</sup> These statutes and their use of the discretionary terms "appropriate" and "may recover" have caused some confusion in the courts. In particular, they raise the question of whether this language permits a court to deny "victim-specific" relief to the EEOC on a *per se* basis.<sup>169</sup> Several courts in reaching their holdings have appeared to rely on such *per se* rules.<sup>170</sup>

However, in light of *Waffle House*, these holdings are now in doubt. In *Waffle House*, the Court seemed to distinguish between the EEOC's statutory authority to seek victim-specific relief, and its authority to obtain such relief. The Court made it clear that "[a]bsent textual support for a contrary view, it is the public agency's province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief."<sup>171</sup> Because Congress has not expressly limited the EEOC's power to seek victim-specific relief on behalf of an employee who has settled his claim, it should follow that no such limitation exists. Thus, "the statutory text unambiguously authorizes [the EEOC] to proceed in a judicial forum."<sup>172</sup>

In determining the EEOC's statutory authority to obtain victim-specific relief when it has proved its case of discrimination, it is necessary to look to the discretionary language of the statutes. According to *Waffle House*, the terms "appropriate" and "may recover" do not authorize an interpretation, which permits "judge-made, *per se* rules."<sup>173</sup> Such an interpretation would, in effect, strip the agency of the discretion granted to it by Congress in seeking victim-specific relief. The proper interpretation, according to the Court, gives discretion

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167. 42 U.S.C. § 2000e-5(g)(1) (emphasis added).

168. *Id.* § 1981a(a)(1) (emphasis added).

169. *See* EEOC v. *Waffle House, Inc.*, 534 U.S. 279, 292-93 (2002).

170. *See, e.g., Kidder, Peabody & Co.*, 156 F.3d at 303 ("[T]o permit an individual . . . to make an end run around the arbitration agreement by having the EEOC pursue back pay or liquidated damages on his or her behalf would undermine the *Gilmer* decision and the FAA."); *Merrill Lynch*, 210 F.3d at 818 ("We agree, however, with . . . Equal Employment Opportunity Commission v. *Kidder, Peabody and Company, Inc.* . . . which held that in circumstances similar to ours an arbitration agreement precludes the EEOC from seeking purely monetary relief for an employee but does not preclude it from seeking injunctive relief.");

171. *Waffle House*, 534 U.S. at 291-92.

172. *Id.* at 292.

173. *Id.*

to a trial judge “in a particular case to order reinstatement and award damages in an amount warranted by the facts of that case.”<sup>174</sup> It does not however, “permit a court to announce a categorical rule precluding an expressly authorized form of relief as inappropriate in all cases.”<sup>175</sup>

In short, the Court’s interpretation of § 2000e-5(g)(1) and § 1981a(a)(1) seems to authorize the EEOC to seek victim-specific relief on behalf of an employee who has previously settled or waived his or her claim so long as the Commission determines that it is in the public’s best interest to do so. The question still unanswered, however, is whether a court can ever find that “victim-specific” relief is “warranted by the facts” of a case, where an employee has reached a settlement agreement with his or her employer. While the EEOC can clearly seek victim-specific relief, a finding that the relief is warranted is necessary for the EEOC to obtain that relief on behalf of an employee. The Court’s reasoning in *Waffle House*, *General Telephone*, and *Albemarle Paper* seem to indicate that a court would be justified in making such a finding.

In *Albemarle Paper*, the Court stated that when deciding whether to grant or deny back pay under § 2000e-5(g)(1), a judge should make his decision “in light of the large objectives of the Act.”<sup>176</sup> Those objectives, according to the Court, are 1) “to achieve equality of employment opportunities”<sup>177</sup> and 2) “to make persons whole for injuries suffered on account of unlawful employment discrimination.”<sup>178</sup> In appropriate cases, a court could promote both of these objectives by permitting the EEOC to recover victim-specific relief for an employee who settled with his employer.

In regard to the first objective, the Supreme Court has made it clear that “the [EEOC] may be seeking to vindicate a public interest . . . even when it pursues entirely victim-specific relief.”<sup>179</sup> The Court has also recognized that the interests of an employee may not be equal to the interests of the public.<sup>180</sup> Because the private and public interests may not be the same, there exists a real possibility that a private settlement will not sufficiently satisfy the public interest. Extending *Waffle House* to waivers and settlement agreements would allow the EEOC to satisfy the public interest in these situations.

In regard to the second objective of the Act, allowing the EEOC to recover victim-specific relief despite the existence of a settlement or waiver agreement, would ensure that injured employee is truly “made whole” by his compensation. “[T]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard

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174. *Id.* at 292-93.

175. *Id.* at 293.

176. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975).

177. *Albemarle Paper Co.*, 422 U.S. at 418 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)).

178. *Id.*

179. *Waffle House*, 534 U.S. at 296.

180. *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 333 (1980).

by which the former is to be measured.”<sup>181</sup> In certain instances, the high costs involved in litigating a discrimination claim may force an employee to give up his or her claim or accept a lower than adequate settlement payout.<sup>182</sup> This cost factor strongly favors employers who are more likely to have the financial resources to thoroughly litigate a claim.<sup>183</sup> However, allowing the EEOC to recover victim-specific relief would help to prevent these inequitable situations and will ensure that the compensation paid to the employee is equal to the injury inflicted. This, when coupled with the strong public policy in favor of ridding the workplace of discrimination, gives additional justification for allowing the EEOC to recover on behalf of employees who have reached settlements deemed unacceptable by the Commission. Thus, if an employee has settled for less than he or she is entitled to, and the EEOC decides that it would be in the public’s best interest to seek additional relief on that employee’s behalf, the Commission should be entitled to seek such relief. By allowing the EEOC to take such action, the court would be furthering the public interest as well as ensuring the injured employee full recovery for his injuries.

This assertion does not mean that an employee should be permitted double recovery for his injuries. The Court has made it clear that it “goes without saying that the courts can and should preclude double recovery by an individual.”<sup>184</sup> However, the discretionary language of 42 U.S.C. § 2000e-5(g)(1) and § 1981a(a)(1) unambiguously give a judge the power to limit the EEOC’s recovery of victim-specific relief by the amount of the employee’s prior settlement agreement. Thus, if an employee settles his or her claims for \$10,000, and the EEOC later receives \$100,000 on his or her behalf in court, the judge would be permitted under § 2000e-5(g)(1) and § 1981a(a)(1) to reduce the award of damages by \$10,000.<sup>185</sup> This approach would allow both the employee and the public to receive compensation equal to their injuries. The employer, who will likely be in court anyway,<sup>186</sup> will simply be forced to pay the amount that it should have paid in the first place. Thus, an employer cannot argue that it has been “improperly and substantially prejudiced” by the court’s action.<sup>187</sup> As the Supreme Court held, “[o]f course, Title VII defendants do not welcome the prospect of backpay liability; but the law provides for such liability and the

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181. *Albemarle Paper Co.*, 422 U.S. at 418.

182. Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, KAN. J.L. & PUB. POL’Y 141, 158 (2001).

183. *Id.*

184. *Waffle House*, 534 U.S. at 297.

185. *See id.* at 310.

186. Where the EEOC has found reasonable cause to believe that discrimination has taken place, courts have uniformly allowed the Commission to seek broad-based injunctive relief. *EEOC v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 468 (6th Cir. 1999). Thus, even if employers were shielded from victim-specific liability where an employee had previously settled, they would likely still face the litigation costs related to an EEOC action seeking injunctive relief. *See Senich v. American-Republican, Inc.*, 215 F.R.D. 40, 45 (D. Conn. 2003).

187. *Albemarle Paper Co.*, 422 U.S. at 424.

EEOC's authority to sue for it."<sup>188</sup>

Nor does such an approach significantly undermine settlement agreements between an employer and an employee. As the Court in *Waffle House* noted, "[w]hen speculating about the impact this decision might have on the behavior of employees and employers, we think it is worth recognizing that the EEOC files suit in less than one percent of the charges filed each year."<sup>189</sup> Instead of undermining the sanctity of settlement agreements, this approach would have the effect of strengthening the EEOC and its ability to pursue the public interest.

2. *The Furtherance of Congressional Intent.*—Allowing the EEOC to pursue victim-specific relief despite the existence of a settlement agreement or waiver would not only further the general purposes of Title VII, but it would also give the Commission the power and discretion that Congress originally intended. As noted in Part I, *supra*, the original Act, as written in 1964, merely permitted the EEOC to investigate claims of discrimination and to seek voluntary settlements through informal conciliation measures.<sup>190</sup> Because this arrangement proved to be ineffective in enforcing the Act, Congress decided to overhaul the enforcement scheme.<sup>191</sup> Hence, in 1972 Congress passed the Equal Employment Opportunity Act which created a new enforcement scheme in which "[t]he EEOC was to bear the primary burden of litigation."<sup>192</sup> This new scheme granted the EEOC its own enforcement action while retaining the employee's private action.<sup>193</sup> Concerned with duplicative proceedings, Congress granted the EEOC exclusive jurisdiction over all claims for 180 days after a discrimination charge is filed.<sup>194</sup> However, recognizing that the Commission would be unable to successfully resolve all claims, Congress allowed injured employees to file suit after that 180-day period had expired.<sup>195</sup> The result of this complicated scheme is that most discrimination suits continue to be brought by private individuals, while the EEOC, with its limited resources, selects for litigation only those charges that most effectively further the public interest in enforcing the Act.<sup>196</sup> Thus, for the Commission to most fully represent the public, it must have a representative pool of discrimination charges to select from.<sup>197</sup>

Consequently, any rule tending to limit the EEOC's pool of charges also works to undermine the complicated enforcement scheme created by Congress.<sup>198</sup> For this reason, the Supreme Court has "generally been reluctant to approve rules

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188. *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 324 (1980).

189. *Waffle House*, 534 U.S. at 290 n.7.

190. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 241, 259.

191. See *Frank's Nursery & Crafts, Inc.*, 177 F.3d at 457.

192. *Gen. Tel. Co.*, 446 U.S. at 326.

193. See *Frank's Nursery & Crafts*, 177 F.3d at 457.

194. See 42 U.S.C. § 2000e-5(f)(1) (2000).

195. See *Frank's Nursery & Crafts*, 177 F.3d at 457.

196. Although 21,032 employment discrimination lawsuits were filed in 2000, only 291 were filed by the EEOC. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290 n.7 (2002).

197. See *id.* at 296 n.11.

198. *Id.*

that may jeopardize the EEOC's ability to investigate and select cases from a broad sample of claims."<sup>199</sup> Because employees would no longer have an incentive to file a charge with the EEOC, the denial of victim-specific relief to the Commission would have exactly this type of limiting effect. An employee does retain the right to file a claim with the EEOC even after signing a settlement agreement.<sup>200</sup> However, without the prospect of additional damages, the incentive to do so is severely reduced. The result will be that fewer individuals will take the step of filing a charge with the EEOC. This has the effect of completely cutting the Commission out of the enforcement process. Not only is it prohibited from pursuing its statutorily authorized remedies, but it is also left unaware that the discrimination ever took place. Denying victim-specific relief thus undermines the enforcement scheme put in place by Congress by deterring the filing of discrimination charges and limiting the pool of charges from which the EEOC can choose.

3. *Practical Effects of Waffle House.*—

a. *The EEOC and society.*—The EEOC and the public at large stand to benefit the most from an extension of *Waffle House* to settlement agreements. Although once labeled a “toothless tiger,”<sup>201</sup> the EEOC today is responsible for enforcing four federal anti-discrimination Acts.<sup>202</sup> In enforcing these acts, the Commission depends heavily on the discretion granted to them by Congress in choosing to litigate discrimination cases that most effectively further the public interest.<sup>203</sup> By upholding the EEOC's right to seek victim-specific relief, the courts would ensure that the Commission has a truly representative pool of claims from which to choose. Additionally, because the EEOC “is guided by ‘the overriding public interest in equal employment opportunity’”<sup>204</sup> the public will benefit when the Commission is permitted to perform its duty effectively.

From a practical standpoint, such an extension will not likely have a significant effect on the enforcement priorities of the EEOC. Admittedly, cases where an employee has already settled will often be less attractive to the Commission. This point, when coupled with the EEOC's litigation history, makes it unlikely that the Commission will bring a significant amount of cases involving a prior settlement. It is more probable that the EEOC will only pursue such a case in those rare instances where the public interest can be furthered, despite the existence of a settlement agreement or waiver. These instances will

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199. *Id.*

200. *See* EEOC v. Cosmair, Inc., 821 F.2d 1085, 1090 (5th Cir. 1987).

201. *See* ALFRED W. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW 59 (1971).

202. The EEOC enforces Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), and the Americans With Disabilities Act (ADA). EEOC, *National Enforcement Plan* para. I, available at <http://www.eeoc.gov/abouteeoc/plan/nep.html> (last modified Jan. 15, 1997) [hereinafter *National Enforcement Plan*].

203. *Id.* at para. II.C.

204. *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1980) (quoting 118 Cong. Rec. 4941 (1972)).

likely involve cases where an employee has accepted an unreasonably low settlement, or waived his or her claims without just compensation.<sup>205</sup>

The EEOC's strong support for voluntary dispute resolution provides additional comfort to employers who fear a significant shift in the Commission's enforcement policies. Because the EEOC cannot litigate every claim that is filed, it is forced to rely heavily on conciliation and alternative dispute resolution in performing its duties. The Commission has issued a pre-*Waffle House* policy statement stating that an "employer will be shielded against any further recovery by the charging party" in cases where a waiver or settlement agreement has been signed.<sup>206</sup> Although *Waffle House* seems to have altered the EEOC's view towards waivers and settlements,<sup>207</sup> it will probably take a strong case to convince the Commission to pursue litigation where a waiver or settlement is involved.

*b. Employers.*—*Waffle House*'s most significant effect on employers is that it strips them of the finality that was once achieved through settlement agreements and arbitration judgments. This lack of finality could potentially lead to several reactions: 1) employers may be less likely to settle or arbitrate discrimination claims, 2) employers may lower the amounts paid to employees in discrimination settlement agreements in an attempt to compensate for the possibility of a double payout, 3) employers may begin to seek supervised settlements with the EEOC,<sup>208</sup> and finally, 4) employers may seek to provide fairer settlement offers which specifically address the claims of charging employees.

Given the small number of cases that the EEOC brings each year, *Waffle House* will probably not significantly affect employers' willingness to settle or arbitrate a claim. From a financial standpoint, it is probably still in the employers' best interest to settle his or her claim rather than risk a large jury verdict. The EEOC chooses to pursue litigation for only a very small percentage of the charges that it receives.<sup>209</sup> Although the EEOC does not keep track of how

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205. See *Senich v. American-Republican, Inc.*, 215 F.R.D. 40, 44-45 (D. Conn. 2003) (holding that a waiver signed by employees did not bar the EEOC from seeking victim-specific relief on their behalf, in part because their injuries were not fully compensated).

206. *Enforcement Guidance on Non-Waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes*, in 2 EEOC COMPLIANCE MANUAL 915.002 (Apr. 10, 1997).

207. See *Senich*, 215 F.R.D. at 42.

208. Coolidge, Wall, Womsley & Lombard, Co. L.P.A., *Enforceability of Severance Agreements Against the EEOC*, at 3 (2003), at <http://www.coollaw.com/documents/228.pdf> [hereinafter Coolidge].

209. In 2002, the EEOC only filed suit for 364 of the 61,459 complaints that it received. However, for those employers who the EEOC does choose to target, the price can be steep. In 2002, the average employer sued by the EEOC paid \$145,575. This is down from 1997 and 1998 when employers paid an average of \$345,575 and \$232,360 respectively. See *EEOC Litigation Statistics, FY1992 through FY2004*, available at <http://www.eeoc.gov/stats/litigation.html> (last modified Jan. 27, 2005) [hereinafter *EEOC Litigation Statistics*].

many suits are filed against employers who have already settled their claim with the employee, it is a safe bet that very few of those suits involve a waiver.<sup>210</sup> Also important is the fact that by signing a waiver as part of a settlement agreement, an employee effectively bars himself or herself from filing his or her own private discrimination suit.<sup>211</sup> This means that in a very large percentage of cases "the employer's increased exposure will be limited to the cost of investigating and defending discrimination claims at the administrative level."<sup>212</sup> Even if an employer is forced to pay out twice, the damages that it will be forced to pay will likely be reduced by the amount paid to the employee in the settlement agreement or arbitration judgment.<sup>213</sup> Thus, total payouts by employers will be limited and employees will be precluded from collecting windfall judgments. There is a possibility that as plaintiffs' lawyers begin to catch on to *Waffle House* and its holding that they will encourage their clients to accept a settlement agreement and then subsequently file a suit with the EEOC.<sup>214</sup> However, even such an increase in charges filed does not change the fact that the EEOC pursues litigation for less than one percent of the charges received.<sup>215</sup>

Although employers will probably not be deterred from entering settlement agreements, they may begin to lower settlement offerings in anticipation of an EEOC suit.<sup>216</sup> By lowering discrimination settlement payouts, employers might be able to offset the risk of an EEOC suit and negative judgment. There is however a downside to this approach. First, lower settlement offerings would likely lead to increased litigation costs as employees opt to file suit in court instead of settling their claims. Second, by offering an employee significantly less than he or she deserves, an employer opens himself or herself up to higher scrutiny by the EEOC.

A third approach that might be taken by employers would be to seek supervised settlements with the EEOC.<sup>217</sup> Under this approach, the employer might simply require employees to file a claim with the EEOC prior to offering a settlement where discrimination is a potential issue.<sup>218</sup> After the claim has been filed, the employer can work with both the EEOC and the employee to reach an agreement that is acceptable to all sides. While this approach might lead to higher settlement costs, it would also likely give employers more certainty by bringing the EEOC into a settlement negotiation where discrimination is a

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210. See Coolidge, *supra* note 208, at 2.

211. *Id.*

212. *Id.*

213. See EEOC v. Waffle House, Inc., 534 U.S. 279, 297 (2002) (stating that an employee's failure to mitigate damages or his acceptance of a monetary settlement will limit amount recovered by the EEOC).

214. See Coolidge, *supra* note 208, at 2.

215. EEOC Litigation Statistics, *supra* note 206.

216. See Coolidge, *supra* note 209, at 3.

217. *Id.*

218. *Id.*

potential issue.<sup>219</sup>

A fourth and final possibility is that employers may begin to exercise more care by offering fairer settlements in situations where discrimination likely occurred. Although offering fair settlement amounts does not guarantee that the EEOC will not pursue litigation, it makes it less likely.<sup>220</sup> Given the EEOC's litigation history and policy of strategically choosing its cases to pursue, it seems unlikely that a fair settlement would be targeted by the Commission.

c. *Employees*.—Of all the parties involved, the employee will be the least affected by an extension of *Waffle House* to settlement agreements. An employee who has settled or waived his or her claims is not permitted to file a private discrimination suit against his or her employer. Thus, in order to receive compensation in addition to the settlement amount, the employee will be forced to file a charge with the EEOC and then hope that the Commission decides to litigate the case.<sup>221</sup> Given the EEOC's litigation history, the odds of this happening are extremely low. However, the possibilities of additional recovery will likely cause employees to file charges with the Commission despite their settlement or waiver agreement. It costs nothing to file a discrimination charge and plaintiff's lawyers will likely encourage such action once the holding in *Waffle House* becomes more widely known.<sup>222</sup> Finally, an extension of *Waffle House* to settlements and waivers would give the EEOC authority to seek compensation on behalf of employees who have been discriminated against and denied just compensation. While the Commission's limited resources would prohibit it from litigating every case involving an inadequate settlement payout, it could use strategic enforcement methods to encourage fair settlements.

#### E. *Sign of Things to Come?* *Senich v. American-Republican, Inc.*

The issue raised in this Note is not merely hypothetical. In fact, the arguments put forward by the EEOC in *Waffle House* indicate that the Commission believes that it has statutory authority to seek victim-specific relief, despite the existence of a private settlement agreement.<sup>223</sup> In March 2003, the EEOC won its first victory on this issue in *Senich v. American-Republican*,

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219. The limited resources available to the EEOC makes it necessary for the Commission to strategically choose the cases in which it resorts to litigation. Because it is in the public interest to have employers report their own potential illegal acts of discrimination, it is probably less likely that the EEOC would make an example of them by pursuing litigation. *National Enforcement Plan*, *supra* note 202, at para. II.C.

220. In deciding which cases to litigate, the EEOC looks at both "the issue raised and an assessment that the strength of the case supports the decision to proceed." *Id.* at para. II.E. Given these criteria, a case where an employee has accepted a low settlement offer for a discrimination claim will likely be considered stronger than a case where the employee has accepted fair compensation and therefore will be more likely to be targeted by the EEOC for litigation.

221. See Coolidge, *supra* note 208, at 2.

222. See *id.*

223. Seymour, *supra* note 5, at 7.

*Inc.*,<sup>224</sup> which became the first case to extend *Waffle House* to waiver agreements.

In *Senich*, the EEOC attempted to amend its complaint in an ADEA suit to include five employees on whose behalf the Commission sought victim-specific relief. American-Republican objected to the complaint amendment because the employees previously signed a waiver of their right to sue in exchange for payments under a special severance program. The EEOC argued that the Court's holding in *Waffle House* applied to waivers and therefore gave the Commission "good cause" to amend its complaint. The court agreed with the EEOC and held that *Waffle House* did extend to instances where an employee has signed a waiver or release.<sup>225</sup> It reasoned that the argument that the EEOC seeks only private benefits when seeking victim-specific relief was rejected by *Waffle House* and therefore the underlying justification for the limitation no longer existed. Absent this justification, the court found that "*Waffle House* can be read to end the limitation on the EEOC to seek victim-specific relief on behalf of employees who sign a waiver or release."<sup>226</sup>

#### CONCLUSION

Although *Waffle House* was decided in the context of mandatory arbitration, its scope should be interpreted much more broadly. *Waffle House* upholds the independence of the EEOC's cause of action. It asserts that an individual's actions in pursuance of his or her own interests do not take away the EEOC's duty to represent the public interest;<sup>227</sup> and further, it tells us that the EEOC represents the public even when it seeks victim-specific relief on behalf of a private individual.<sup>228</sup> These findings support the proposition that the EEOC should have the discretion to seek-victim specific relief, even on behalf of employees who have signed a settlement or waiver agreement. As *Waffle House* acknowledged, it is the EEOC, and not the court, that has the discretion to decide which discrimination cases to litigate and what remedies to seek.<sup>229</sup> This discretion is not only mandated by the plain language of the statutes, but it is also central to the complex enforcement scheme created by Congress. To take away the EEOC's discretion would undermine the enforcement scheme and deny to the public the vindication promised to it by Congress. In short, because Title VII makes the EEOC "the master of its own case,"<sup>230</sup> it should be permitted to seek and obtain victim-specific relief on behalf of employees who previously signed a settlement or waiver agreement.

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224. 215 F.R.D. 40, 45-46 (D. Conn. 2003).

225. *Id.* at 46.

226. *Id.*

227. *See* EEOC. v. *Waffle House, Inc.*, 534 U.S. 279, 296 (2002).

228. *See id.*

229. *Id.* at 291-92.

230. *Id.* at 281.