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Retaliatory Employment Arbitration

Michael Z. Green[†]

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[†] Professor of Law, Texas A&M University School of Law. I would like to thank the Employee Rights Advocacy Institute for Law & Policy and the Berkeley Journal of Employment and Labor Law ("BJELL") for co-sponsoring the program on "Forced Arbitration in the Workplace: A Symposium," held on February 27, 2014. At that Symposium, I presented the paper that became this Article, as part of a panel on "Emerging Legal Issues in Forced Arbitration: Collective Rights & Retaliation in the Workplace." The *BJELL* editors provided thoughtful comments and offered important edits that made this Article measurably better and I am grateful for all their hard work and assistance. Also, I thank the Symposium Committee members for inviting me to speak, and especially appreciate the efforts of Carmen Comsti for her work in coordinating the Symposium. I am pleased to have received comments from Symposium participants including Catherine Fisk, Michael Rubin, and Cliff Palefsky. I appreciate the financial support provided by the Texas A&M University School of Law and the dedicated student research assistance from Keri Ward, LaJoi Murray, Bethany Moore, Casandra Johnson, and Eniola Akinrinade.

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INTRODUCTION:

FORCED ARBITRATION IN 2014 AND THE WAFFLE HOUSE EXCEPTION

In 2014, we reach a key milestone with the fiftieth anniversary of the passage of Title VII of the Civil Rights Act of 1964 (“Title VII”).¹ This landmark federal legislation, which prohibits discrimination in the workplace, also created the Equal Employment Opportunity Commission (“EEOC”).² This Article focuses on the use of arbitration, a form of alternative dispute resolution (“ADR”), to decide federal employment discrimination claims brought under that and related statutes.³ Specifically, this Article addresses the use of so-called “mandatory,” “forced,”

1. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2–2000e-17 (2012)); see also *Celebrating the 40th Anniversary of Title VII: First Principles - Enacting the Civil Rights Act and Using the Courts to Challenge and Remedy Workplace Discrimination*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (June 22, 2004), <http://www.eeoc.gov/eeoc/history/40th/panel/firstprinciples.html> (describing the legislative history of Title VII culminating with its “pass[age] in June 1964 by strong bipartisan majorities in both houses [of Congress], and signed into law by President [Lyndon Baines] Johnson on July 2, 1964”).

2. 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-12 (2012); see *Laws Enforced by EEOC*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/statutes/index.cfm> (last visited Dec. 31, 2013) (referring to the laws the EEOC enforces, including Title VII as amended).

3. Any discussion of the use of ADR in addressing employment discrimination claims has historically started with arbitration especially after employers began pursuing arbitration as a strategy to circumvent jury trials allowed by Title VII’s amendment in 1991. See Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L.J. 937, 942 (2005) [hereinafter Green, *Addressing Race Discrimination*]. Typically, with arbitration, the parties select a neutral outsider to resolve their dispute as the final decision maker. See Martin Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 295 (2012) (quoting the benefits of arbitration from a plaintiff’s attorney, Paul Tobias, because the employee can “tell the story to a neutral party” instead of being subjected to summary judgment”). Arbitration differs from other ADR methodologies, such as mediation, where typically the neutral outsider is not a decision-maker and only helps the parties craft their own resolution. Although there are other forms of ADR that may more closely resemble arbitration versus mediation or vice versa, this Articles focuses on arbitration as described. See *infra* note 4.

4. There is some debate about whether the term “mandatory” appropriately addresses how arbitration occurs, at least in the consumer setting. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1632 n.1 (2005) [hereinafter Sternlight, *Creeping Mandatory Arbitration*] (identifying a debate between Professor Jean Sternlight and Professor Stephen Ware on whether arbitration is really “mandatory” because consumers do have a choice); see also Richard A.

“employer-mandated,” or “pre-dispute” or “compelled” agreements to arbitrate that have garnered much attention and criticism over the past twenty years.⁵ The Supreme Court’s decisions under the Federal Arbitration Act (“FAA”)⁶ since 1991 have overwhelmingly endorsed arbitration⁷ as a dispute resolution tool to resolve statutory claims, including employment discrimination claims brought pursuant to Title VII.⁸ Out of the key Supreme Court cases involving arbitration of statutory employment discrimination claims since 1991, only one of those decisions still represents a loss for the employer.⁹

In 2002, the Supreme Court assessed the importance of the EEOC, the federal agency charged with enforcing the key statutes that regulate

Bales, *Normative Consideration of Employment Arbitration at Gilmer’s Quinceañera*, 81 TUL. L. REV. 331, 333 & n.6 (2006) (capturing the debate between Professors Sternlight and Ware). Regardless of the potential distinction in what such terms as “mandatory” or “forced” or “employer-mandated” or “pre-dispute” could mean, when those terms are used within this Article they are all considered synonymous and representative of arbitration where the employer’s effort to require an employee to agree to arbitration as a condition of employment occurs before the dispute arises.

5. See generally Bales, *supra* note 4, at 335 (describing the history of enforcement of these agreements to arbitrate); Richard A. Bales & Mark B. Gerano, *Oddball Arbitration*, 30 HOFSTRA LAB. & EMP. L.J. 405, 405-06 (2013) (referring to broad judicial enforcement of agreements to arbitrate employment claims); Michael Z. Green, *Reading Ricci and Pyett to Deliver Racial Justice Through Union Arbitration*, 87 IND. L.J. 367, 408-12 (2012) [hereinafter Green, *Reading Ricci*] (referring to “extremist” viewpoints for and against the Court’s broad enforcement of arbitration of employment disputes); Roger B. Jacobs, *Fits and Starts for Mandatory Arbitration*, 67 DISP. RESOL. J. 39, 46-52 (2013) (describing the history of enforcement of employment contracts under the FAA); Sternlight, *Creeping Mandatory Arbitration*, *supra* note 4, at 1632-34 (describing the level of criticism of mandatory arbitration agreements and their expansive use).

6. 9 U.S.C. §§ 1-14 (2012).

7. See generally Sara Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 481-91 (2011) (describing recent arbitration decisions by the Supreme Court under the FAA); Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 139-45, 155-58 (2012) (describing jurisprudence under the FAA); Jeffrey Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 821-81 (2012) (providing a detailed and critical discussion of the Supreme Court’s jurisprudence under the FAA and its overwhelming support of arbitration); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 94-95, 102-07 (2012) (describing judicial favoring of arbitration); Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 730-31 (2012) (“The Supreme Court’s Federal Arbitration Act (FAA) jurisprudence has been, to put it mildly, much maligned. . . . [The FAA has arguably been] transformed by the Court into a source of substantive federal arbitration law that governs and favors the enforcement of virtually every arbitration agreement entered into in the United States and displaces otherwise applicable state law.”).

8. Bales, *supra* note 4, at 335 (providing an overview of the Supreme Court’s enforcement of arbitration agreements as a condition of employment regarding statutory employment disputes); see Jacobs, *supra* note 5, at 46-52 (describing enforcement of employment agreements under the FAA).

9. See *EEOC v. Waffle House*, 534 U.S. 279 (2002). The other cases, all involving employer wins, are discussed *infra* Part I.C-E. But see *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1988) (involving an employer loss). However, a subsequent decision essentially changed the reasoning in *Wright*. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009) (rendering an employer win); see *infra* Part I.D.

workplace discrimination,¹⁰ in conjunction with the strong policy of enforcing arbitration agreements to resolve statutory employment discrimination claims.¹¹ In *EEOC v. Waffle House*, the key issue before the Court was whether a mandatory arbitration agreement between an employer and an individual employee precluded the EEOC from pursuing the employee's charge in court.¹² In answering the question, the Court reviewed policy concerns about the collective public rights that the EEOC must vindicate through its enforcement policies,¹³ and held that the EEOC could file a lawsuit against an employer and obtain individual relief despite the existence of an arbitration agreement.¹⁴ The ruling placed the significant public policy favoring the EEOC as the government agency that eradicates workplace discrimination ahead of any agreement between an employer and its individual employees to arbitrate statutory claims.¹⁵ The decision also addressed whether an agreement to arbitrate limited the EEOC to pursuing only equitable remedies because the individual employee had agreed to arbitrate legal relief. The Court held that the EEOC could still pursue all equitable and legal remedies available under Title VII, including back pay and reinstatement, along with compensatory and punitive damages.¹⁶

The Supreme Court's acknowledgment in *Waffle House* of the EEOC's important role in enforcing employment discrimination laws establishes a clear, albeit narrow, path to maneuver around the Court's wide endorsement of mandatory arbitration under the FAA. Because of *Waffle House*, an employer cannot completely force arbitration of all statutory employment discrimination claims with an employee. If the EEOC chooses to pursue those employment discrimination claims, the employer may still face a jury trial with the potential for compensatory and punitive damages awards, despite the employer's attempt to circumvent those options through mandatory arbitration. As a result of *Waffle House*, the established "national policy favoring arbitration" under the FAA gives way to something else: the policy favoring EEOC vindication of statutory rights and the Agency's public mandate to protect the anti-discrimination interests of all employees.¹⁷

10. See *Laws Enforced by EEOC*, *supra* note 2.

11. See *Waffle House*, 534 U.S. at 279.

12. *Id.* at 282.

13. *Id.* at 285-88.

14. *Id.* at 292.

15. See *id.* at 291-92.

16. *Id.* at 297-98.

17. See Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 Cal. L. Rev. 1767, 1815 n.287 (2001) ("The underlying tension in *Waffle House* is between the federal pro-arbitration policy and the rights of individuals to contract freely with regard to the terms of their employment on one hand, and the public interest in eradicating employment discrimination on the other" because "[t]he EEOC functions as more than just an enforcer for individual employee rights against discrimination, it is the watchdog

This Article's review of several lower court decisions after *Waffle House* demonstrates that employers may have responded to that case by seeking to force arbitration after the EEOC became involved. These employer responses create a chilling effect that deters employees from further filing of discrimination charges. Moreover, as this Article asserts, forcing arbitration in these instances represents an illegal form of retaliation¹⁸ that is proscribed by statutory requirements and inconsistent with the Supreme Court's jurisprudence providing enthusiastic support to enforcement of retaliation claims.¹⁹ This Article examines the use of retaliation claims to resolve employment discrimination matters as an effective response to an employer's action to force arbitration as a purported response to *Waffle House*. Also, the Article explains how decisions involving similar retaliation matters filed with the National Labor Relations Board ("NLRB"),²⁰ the agency which enforces charges filed pursuant to the National Labor Relations Act ("NLRA"),²¹ may also help employees respond to forced arbitration actions.

In Part I, this Article reviews the Supreme Court's vigorous enforcement of arbitration of statutory employment discrimination claims under the FAA and related matters regarding the EEOC's policy during that timeframe. Part II explores the implications from the primary Supreme Court case, *EEOC v. Waffle House*, where employee interests prevailed over the Court's pro-arbitration standards established pursuant to FAA jurisprudence. In examining lower court decisions since *Waffle House*, Part II also exposes employer efforts to circumvent the Court's analysis through actions to compel employees to arbitrate after a charge with the EEOC has been filed and how this action retaliates against employees by deterring them from filing agency charges. Part III considers potential claims to be developed by agencies, through the courts, and by legislative action in Congress to combat employer efforts to chill employee filings of charges

for the public's interest" and "the EEOC makes resource allocation decisions about which claims it will pursue based on its assessment of the most significant impact for workers as a whole.").

18. In this Article, retaliation represents an employer's decision to enforce a mandatory arbitration policy in a way that forecloses an agency from completely seeking relief for the employee who filed a charge with the agency. This Article asserts that such retaliation will create a chilling effect by dissuading employees from filing charges with agencies. Relative to other employees, these employer actions also send the message that no employees should file charges with agencies because the employer will seek to prevent the agency from being directly involved in the resolution of those charges by compelling arbitration.

19. See *infra* Part III.B (discussing the Supreme Court's retaliation decisions). Although this Article focuses on retaliation claims as a tool to challenge forced arbitration, others believe that Congress may also rectify any harms related to forced arbitration. See, e.g., Art Hinshaw, *Sternlight: Tide Turning a Bit on Mandatory Arbitration Through Recognition that Process Suppresses Claims*, ADR PROF BLOG (Dec. 16, 2003), <http://www.indisputably.org/?p=5292> (referring to arguments by Professor Jean Sternlight that federal legislation in 2014 may bode well for consumers and employees).

20. See 29 U.S.C. § 153 (2012) (discussing the responsibilities of the NLRB).

21. 29 U.S.C. §§ 151-69 (2012).

with the EEOC and the NLRB by trying to compel arbitration before final agency action can occur, what this Article terms “retaliatory employment arbitration.”

In Part IV, this Article proposes that the EEOC and NLRB continue to adopt and enforce clear policies aimed at responding to retaliation from forced arbitration to achieve sufficient regulation of employer usage of arbitration. By reference to the terms of a consent order in a case that the EEOC settled in federal court, the Article’s thesis suggests the parameters that employees may use to frame a retaliation challenge to unfair employer efforts to force arbitration of statutory employment discrimination claims. Likewise, Part IV discusses a recent NLRB administrative law judge decision that identifies the parameters in which employees may challenge retaliation through forced arbitration efforts under labor law. In concluding, this Article suggests that if agencies and employees are not allowed to challenge retaliatory employment arbitration, then the public interest in eradicating discrimination in the workplace, as referenced in *Waffle House*, will be diminished.

I.

OVERWHELMING SUPREME COURT ENFORCEMENT OF AGREEMENTS TO ARBITRATE STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS

At the dawn of the fiftieth anniversary of Title VII, employees face a daunting task in trying to challenge agreements for forced arbitration. Legal changes wrought between 1990 and 2014 explain the development of arbitration for statutory employment discrimination claims and how this form of arbitration has become pervasive. A number of circumstances converged in 1991, namely, the passage of the Civil Rights Act of 1991 (“CRA of 1991”) and the Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.* As a result, that year saw landmark changes in the legal approach to the arbitration of statutory employment discrimination claims. Thereafter, as detailed in this Part, the FAA’s broad enforcement of arbitration clauses to resolve statutory employment disputes suggests that there remain almost no real legal options for individual employees who desire to circumvent forced arbitration.

A. *The Civil Rights Act of 1991 and Gilmer v. Interstate/Johnson Lane Corp.*

Before 1991, no employment law practitioner would have thought it possible that courts would enforce an agreement requiring arbitration of

statutory employment discrimination claims.²² Even earlier, when the FAA was passed in 1925, it is unlikely any “legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship.”²³ Although this quoted language appears in the dissenting opinion in the landmark decision in *Gilmer v. Interstate/Johnson Lane Corp.*, then-Supreme Court Justice John Paul Stevens captures the general thinking about arbitration of statutory employment discrimination claims before 1991.²⁴

In *Gilmer*, the Supreme Court first authorized the use of arbitration for resolving a statutory employment discrimination claim. As a condition of his employment as a financial manager for Interstate/Johnson Lane Corporation, the plaintiff in *Gilmer* had to sign a registration application with the New York Stock Exchange (“NYSE”), which required that he agree to arbitration over any controversy with his employer.²⁵ Because he signed the application with the NYSE containing the arbitration provision, the plaintiff’s employer filed a motion to compel arbitration several years later, when *Gilmer* filed a claim against his employer under the Age Discrimination in Employment Act (“ADEA”).²⁶

Pursuant to the FAA, the Supreme Court in *Gilmer* compelled arbitration of the ADEA claim. However, the Court refused to answer whether section 1 of the FAA, which excludes “contracts of employment” from FAA coverage, applied to the ADEA claim.²⁷ Because the Court found that the agreement to arbitrate was not part of a contract of employment between *Gilmer* and his employer, but instead an agreement between the NYSE and *Gilmer*, it saved for “another day” the resolution of that question.²⁸ Despite the uncertainty as to whether a direct agreement to arbitrate between an employer and an employee would be enforceable under the FAA after *Gilmer*, employers began to require as a condition of employment that employees enter into employment agreement requiring arbitration of all employment disputes. At the urge of employers and with

22. See Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration For Discrimination Claims*, 31 RUTGERS L.J. 399, 408 & n.26 (2000) [hereinafter Green, *Debunking the Myth*].

23. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42-43 (1991) (Stevens, J., dissenting).

24. *Id.*

25. *Id.* at 23.

26. *Id.* at 23-24; see also Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2012).

27. Federal Arbitration Act § 1, 9 U.S.C. § 1 (2012) (“[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”).

28. *Gilmer*, 500 U.S. at 25 n.2.

the authority of *Gilmer* behind them, many lower courts enforced those agreements.²⁹

The CRA of 1991 also helped foster a move to arbitral resolution of statutory discrimination claims. Shortly after the *Gilmer* decision in May 1991, President George Herbert Walker Bush signed the CRA of 1991 into law.³⁰ During its 1988-89 term, the Supreme Court had decided several controversial cases employment discrimination cases, including *Patterson v. McLean Credit Union*,³¹ *Lorance v. AT&T Technologies*,³² *Martin v. Wilks*,³³ *Price Waterhouse v. Hopkins*,³⁴ and *Wards Cove Packing Co. v. Atonio*.³⁵ These decisions, among others, caused concern among civil rights advocates, who mounted a successful legislative effort to reverse those decisions.³⁶

Under the CRA of 1991, Congress granted employees the right to pursue compensatory and punitive damages along with the right to a jury trial for intentional discrimination claims brought under Title VII.³⁷ These new remedies were included in the CRA of 1991 to align Title VII claims with section 1981 of the Civil Rights Act of 1866 ("section 1981")³⁸ claims that already allowed such remedies—but only for employment discrimination claims based on race.³⁹ Because the new statutory regime now offered jury trials along with punitive and compensatory damages for certain claims, employers greatly feared that large and unpredictable jury verdicts would result.⁴⁰ Accordingly, employers enthusiastically embraced

29. See Green, *Debunking the Myth*, *supra* note 22, at 411 n.39, 412 n.42 (citing cases).

30. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991) (codified in pertinent part at 42 U.S.C. §§ 1981a, 1981b (2012)).

31. 491 U.S. 164 (1989).

32. 490 U.S. 900 (1989).

33. 490 U.S. 755 (1989).

34. 490 U.S. 228 (1989).

35. 490 U.S. 642 (1989).

36. See Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 285-89 (2011); see also Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L. J. 431, 467 (2005); Green, *Addressing Race Discrimination*, *supra* note 3, at 949.

37. See Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 101-02, 105 Stat. 1071 (1991) (codified in pertinent part at 42 U.S.C. §§ 1981a, 1981b (2012)) (describing the right to a jury trial made available to claimants filing for intentional discrimination under Title VII and in particular the right to compensatory and punitive remedies, which the Civil Rights Act of 1991 limits by capping the total damages that an employer could recover, starting at \$50,000 in damages for employers with fewer than 101 employees and gradually increasing to a total maximum of \$500,000 for employers with more than 500 employees).

38. 42 U.S.C. § 1981 (2012).

39. See H.R. REP. NO. 102-40(I), at 14 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 552-53.

40. See Green, *Debunking the Myth*, *supra* note 22, at 422-24, 454-59 (discussing concerns about nuisance settlement of employment discrimination claims due to unpredictable jury verdicts as a concern of employers that led to increase of mandatory arbitration); see also Leslie A. Gordon, *Clause for*

the use of arbitration after *Gilmer* by requiring that their employees agree to arbitrate these and other disputes as a condition of being employed.⁴¹

*B. The EEOC Response to Gilmer: 1997 Policy Statement on
Mandatory Arbitration*

As an initial response to mandatory arbitration, the EEOC issued a policy statement in 1997 that specifically criticized the use of mandatory arbitration for employment discrimination claims.⁴² That policy statement recognized that “[a]n increasing number of employers are requiring as a condition of employment that applicants and employees give up their right to pursue employment discrimination claims in court and agree to resolve their disputes through binding arbitration.”⁴³ While remaining “[m]indful of the case law enforcing specific mandatory arbitration agreements, in particular, the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane*,”⁴⁴ the EEOC still found “that such agreements are inconsistent with the civil rights laws.”⁴⁵ In the policy statement, the EEOC ultimately concluded that mandatory arbitration agreements for employment discrimination claims should not be enforced.⁴⁶

Alarm, As Arbitration Costs Rise, In-House Counsel Turn to Mediation or a Combined Approach, 92 A.B.A. J. 19, 19 (Nov. 2006) (stating that arbitration is “[t]raditionally praised for its flexibility, informality, confidentiality and ability to produce unique awards not available in traditional litigation”); David T. Lopez, *Realizing the Promise of Employment Arbitration*, 69 TEX. B. J. 862, 862 (2006) (“Employers have opted for mandatory, binding arbitration of employment disputes as a way to avoid the fear of disproportionate jury awards or jury bias, among other reasons.”); Frederick L. Sullivan, *Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration*, 26 W. NEW ENG. L. REV. 281, 318 n.224 (2004) (“Much of the advocating for arbitration on the part of employers results from verdicts that have been pursued before sympathetic-to-employee and hostile-to-employer juries in proceedings that have become known as workplace lotteries.”).

41. Green, *Debunking the Myth*, *supra* note 22, at 454-59 (describing employers’ concerns about jury verdicts—albeit based on little data—as leading to the rush to use arbitration). *But see* Gordon, *supra* note 40, at 19-20 (suggesting that some employers are now moving away from arbitration due to unexpected results and because they see more value in mediation).

42. See *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 2 EEOC Compl. Man. (BNA) No. 915.002, at 281-87 (July 10, 1997) [hereinafter *EEOC Policy*], available at www.eeoc.gov/policy/docs/mandarb.html; see also Joseph D. Garrison, *The Employee’s Perspective: Mandatory Binding Arbitration Constitutes Little More Than A Waiver of A Worker’s Rights*, 52 DISP. RESOL. J. 15 (Fall 1997) (arguing that the EEOC’s position opposing mandatory arbitration was well-deserved); Ellen J. Vargyas, *EEOC Explains Its Decision: Verdict On Mandatory Arbitration In Employment*, 52 DISP. RESOL. J. 8, 10 (Fall 1997) (referring to further explanation of the EEOC’s policy). *But cf.* Beth M. Primm, Comment, *A Critical Look at the EEOC’s Policy Against Mandatory Pre-Dispute Arbitration Agreements*, 2 U. PA. J. LAB. & EMP. L. 151 (1999).

43. *EEOC Policy*, *supra* note 42.

44. 500 U.S. 20 (1991).

45. *EEOC Policy*, *supra* note 42.

46. *See id.*

Unfortunately, several more Supreme Court decisions have arisen after *Gilmer*⁴⁷ that further support the use of arbitration for statutory employment discrimination claims. With questions still lingering about the overall fairness of mandatory arbitration on Title VII's fiftieth anniversary,⁴⁸ the EEOC's continued failure to clarify or amend its 1997 policy statement at this important time for reflection on the effectiveness of the Agency only adds to the challenges faced by employees seeking to address workplace discrimination.⁴⁹

On March 8, 2011, after drafting a preliminary plan for comprehensive and retrospective review of its existing rules, the EEOC sought public comment on the plan and suggestions regarding specific rules that it ought to include.⁵⁰ In its public comment, the Chamber of Commerce urged repeal of the EEOC's 1997 Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment.⁵¹ The AARP and the National Employment Lawyers Association ("NELA") disagreed.⁵²

On May 24, 2011, after considering public comments in light of certain legal and operational factors and its available resources, the EEOC identified five rules for review in its Preliminary Plan for Retrospective Analysis, none of which addressed its policy on mandatory arbitration.⁵³ At the EEOC's July 18, 2012 meeting to discuss its Strategic Enforcement Plan, NELA submitted a written document that included a November 7, 2011 e-mail attachment arguing that the EEOC should communicate "immediately to all EEOC offices reaffirming the commitment of the Commission to implement its 1997 guidance on mandatory pre-dispute

47. See *infra* Part II.C-E.

48. See Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2348 (2012); Stephen A. Plass, *Mandatory Arbitration as an Employer's Contractual Prerogative: The Efficiency Challenge to Equal Employment Opportunity*, 33 CARDOZO L. REV. 195, 223 (2011); see generally Jean R. Sternlight, Professor, Univ. of Nev., Las Vegas Boyd Sch. of Law, Testimony to the U.S. Senate Committee on the Judiciary: Federal Arbitration Undermines Enforcement of Federal Laws by Suppressing Consumers' and Employees' Ability to Bring Claims (Dec. 17, 2013) [hereinafter Sternlight Testimony], available at <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1000&context=congtestimony>.

49. See Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1238-39 (2010) (describing how "[t]he EEOC is an agency that has failed its mission to eradicate discrimination in the workplace" and referring to "several ways in which the EEOC has not fulfilled its potential").

50. See *Equal Employment Opportunity Commission Preliminary Plan for Retrospective Analysis of Existing Rules*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (May 24, 2011), http://www.eeoc.gov/laws/regulations/retro_review_plan.cfm.

51. *Id.*

52. See *id.*

53. See *Equal Employment Opportunity Commission Plan for Retrospective Analysis of Existing Rules*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (July 29, 2011), http://www.eeoc.gov/laws/regulations/retro_review_plan_final.cfm (discussing the lack of an ongoing plan by the EEOC to update its 1997 policy on mandatory arbitration).

arbitration to the maximum extent permissible and consistent with current law.”⁵⁴ However, a lack of action indicates that these efforts fell on deaf ears.

Even in the year 2014, the EEOC has failed to clarify its policy on arbitration. Regardless of differences between the courts and the EEOC on the issue,⁵⁵ compliance with employment discrimination law can be difficult⁵⁶ and employers still tend to look to the EEOC for guidance on how to comply.⁵⁷ Similarly, employees look to the EEOC to help explain the protections available under the law.⁵⁸ Small businesses, lacking the time and resources needed to challenge the EEOC’s position, will likely follow its guidance in developing compliance policies.⁵⁹ In sum, the EEOC’s failure to clarify its position on mandatory arbitration deprives all of these actors the benefits of their guidance.

54. See *Written Testimony of Daniel Kohrman, National Employment Lawyers Association*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/meetings/7-18-12/kohrman.cfm> (last visited Feb. 11, 2014) (including Nov. 7, 2011 e-mail asking the EEOC to reaffirm its 1997 policy to address “Forced Arbitration”).

55. See, e.g., Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L. REV. 532 (2000) (stressing the importance the courts should give to the EEOC’s role in setting policy and the deference courts should give to the EEOC’s interpretations regarding key policy issues); Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51 (1995).

56. See Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1468-82 (2004) [hereinafter Sternlight, *In Search of*] (suggesting that the following ten factors make individual employment discrimination claims difficult to resolve: complex laws, highly contested and confusing facts, involvement of significant non-legal as well as legal interests, societal need for correct determinations, societal need for clear and public precedents to guide future conduct and deter future misconduct, the need for adequate compensation of victims of discrimination, the societal need to punish wrongdoers, unavailability of a fair procedural mechanism to assert claims, the need for quick resolution of claims to allow parties to move forward with their lives and business, and that alleged victims tend to have less resources than the alleged perpetrators); Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 277-82 (2002) (noting that workplace inequities are becoming more complex and moving to a “second generation” requiring unique collaborative problem-solving skills).

57. See Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1953-54 (2006) (highlighting the complexities of the statutes that the EEOC administers; asserting how the EEOC developed necessary expertise on various related subjects involved in enforcement; and describing numerous policy guidance materials that the EEOC generates commensurate with its responsibility to track tendencies and be a “repository for a wealth of information about the discrimination-related trends and concerns in workplaces around the country”); Primm, *supra* note 42, at 160 (referring to employer guidance given by the EEOC). The EEOC lists more than twenty different policies and guidances for employees and employers to consider on its website, including its policy against mandatory arbitration. See *Enforcement Guidances and Related Documents*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (April 2012), http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm.

58. Hart, *supra* note 57, at 1953-54 n.95 (highlighting how employees can learn from the many guidance materials created by the EEOC to help understand some of the complexities of the law).

59. See *EEOC Launches Small Business Task Force* EQUAL EMP’T OPPORTUNITY COMM’N (Dec. 15, 2011), <http://www.eeoc.gov/eeoc/newsroom/release/12-15-11.cfm> (discussing EEOC efforts to reach out to businesses that are too small to afford lawyers or human resources as a focus for guidance).

C. Circuit City Stores, Inc. v. Adams

The *Gilmer* Court left unanswered whether the FAA made enforceable arbitration agreements in the employment context.⁶⁰ Language in section 1 of the FAA appeared to support the argument that “contracts of employment” were excluded from the FAA’s scope.⁶¹ Accordingly, for a decade after *Gilmer*, judges and scholars debated whether the Court’s increasingly strong endorsement of arbitration encompassed agreements entered into directly between employers and employees.

The Court’s 2001 *Circuit City Stores, Inc. v. Adams* decision⁶² answered that question, and made very clear that agreements to arbitrate employment disputes are enforceable.⁶³ In *Circuit City*, the employee alleged discrimination and unfair treatment under the California Fair Employment and Housing Act and state tort law.⁶⁴ The employer sought to compel arbitration under a forced arbitration agreement.⁶⁵ The Court specifically held that section 1 of the FAA, which excludes from enforcement certain “contracts of employment,” only applied to contracts of employees who are transportation workers.⁶⁶ The Court based its conclusion on its interpretation of language related to “workers engaged in foreign or interstate commerce.”⁶⁷

As a result of *Circuit City*, only a very narrow group of employees, those who literally work in commerce, would have their contracts of employment exempted from FAA coverage. Since the *Gilmer* decision, the Supreme Court has generally supported and endorsed the arbitration of all forms of agreements, including many not involving employment discrimination matters.⁶⁸ But *Circuit City* provided to date the strongest

60. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (describing how the arbitration agreement was not part of the employment contract because *Gilmer* had agreed to arbitrate with the NYSE and not with his employer).

61. See 9 U.S.C. § 1 (2012).

62. 532 U.S. 105 (2001).

63. See *id.* at 119.

64. *Id.* at 110.

65. *Id.* at 105.

66. *Id.* at 119.

67. *Id.*

68. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012); *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Granite Rock Co. v. Int’l Brotherhood of Teamsters*, 561 U.S. 287 (2010); *Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *EEOC v. Waffle House*, 534 U.S. 279 (2002); *Circuit City Stores, Inc.*, 532 U.S. 105(2001); *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504 (2001); *E. Ass’n. Coal Corp. v. United Mine Workers*

authority to use when employers seek to force their employees into arbitration agreements as a condition of employment.

D. 14 Penn Plaza v. Pyett

Several years later, in 2009, the Supreme Court decided *14 Penn Plaza LLC v. Pyett*,⁶⁹ where it held that a collective bargaining agreement (“CBA”) may waive an individual employee’s statutory rights to pursue age discrimination claims in court.⁷⁰ The *Pyett* plaintiffs were three union members, all over forty years of age, who sued their employer for age discrimination after being reassigned to less desirable and lower paying jobs.⁷¹ The union initially pursued the age discrimination claims on behalf of the employees as grievances through the CBA’s preliminary dispute resolution procedures. However, the union declined to pursue arbitration of the claims when the grievance process failed because the union concluded that the claims lacked a legitimate basis as the union had agreed with the employer to make the reassignments in question.⁷²

In considering whether to enforce the CBA’s waiver of judicial remedy, the Court addressed complex issues that coalesce across various statutory regimes, including the FAA,⁷³ the ADEA,⁷⁴ and the NLRA,⁷⁵ along with prior Court interpretations of those statutes.⁷⁶ Ultimately, the court held that the claims could only be pursued through arbitration due to the CBA’s unusually clear language regarding discrimination claims.⁷⁷

of Am., 531 U.S. 57 (2000); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Air Line Pilots Ass’n v. Miller*, 523 U.S. 70 (1998); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); see also Christopher R. Drahozal, *Error Correction and the Supreme Court’s Arbitration Docket*, 29 OHIO ST. J. ON DISP. RESOL. 1, 10 (2014) (describing many of the arbitration cases decided by the Supreme Court under the FAA since 1991) (citing Michael L. Rustad et. al, *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service*, 34 U. ARK. LITTLE ROCK L. REV. 643, 684 app. B (2012) (listing most Supreme Court Cases involving arbitration from 1998 to 2012)).

69. 556 U.S. 247 (2009).

70. *Id.* at 251, 274.

71. *Id.*

72. *Id.* at 252-53.

73. 9 U.S.C. §§ 1-16 (2012).

74. 29 U.S.C. §§ 621-34 (2012).

75. 29 U.S.C. §§ 151-69 (2012).

76. *Pyett*, 556 U.S. at 255-60, 266-69.

77. *Id.* at 252. I consider this language as “unusually clear” because it literally refers to arbitration as the “sole and exclusive remedy,” which is unusual language for a union and an employer to agree to with respect to a nondiscrimination clause in a collective bargaining agreement. Such unusual language suggested the parties’ intent to waive court access to remedy statutory claims. See *id.*

Before *Pyett*, a strange anomaly existed where an individual employee with no bargaining power was subjected to mandatory arbitration as a result of *Gilmer* while employees represented by a union did not have to agree to mandatory arbitration. This result had raised questions as to whether an employer could force individual employees in a union setting to arbitrate their statutory claims despite the presence of a union.⁷⁸ The individual employees in *Pyett* were being forced into arbitration by the employer's argument that it had agreed with the union to arbitrate their claims even though the union in *Pyett* had refused to pursue the individual employees' age discrimination claims in arbitration. The *Pyett* case represents another remarkable example of how the Supreme Court has enforced employer efforts to force individual employees to arbitrate their statutory claims rather than pursue those claims in court. In denying access to the courts for employment discrimination plaintiffs, the *Pyett* Court ruled that a waiver of an individual employee's right to pursue claims in court must be clear and unmistakable, and can be achieved by a union's explicit agreement in the CBA to resolve those claims under the CBA's labor arbitration process.⁷⁹

Despite its precarious reasoning,⁸⁰ *Pyett* is wonderful in illuminating the Court's pro-arbitration stance over the last two decades. The decision underscores the very real removal of judicial involvement in the resolution of statutory discrimination claims. The Court, in fact, declined to consider the "speculation" that the decision would insulate a union's failure to pursue arbitration of an individual's discrimination claim,⁸¹ thereby robbing employees of every forum or just resulting in another way in which individual employees, such as the plaintiffs in *Pyett*, are forced to arbitrate employment discrimination claims. This potential result, among others, remains a key concern after *Pyett*.⁸²

78. See Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 85-86 (2003) (discussing the "anomaly" in broad bargaining power protections for union employees against enforcing mandatory arbitration agreements and no protection for non-union employees and how employers sought to force individual employees in the union setting into pursuing arbitration of statutory claims separate from labor arbitration under the collective bargaining agreement).

79. 556 U.S. at 260.

80. For example, in my 2012 review of *Pyett*, I asserted that the decision was part and parcel of a plan to circumvent without overruling thirty-five years of precedent. See Green, *Reading Ricci*, *supra* note 5, at 392-93.

81. *Pyett*, 556 U.S. at 273-74 ("Respondents also argue that the CBA operates as a substantive waiver of their [statutory] rights because it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims. . . . [W]e are not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from effectively vindicating their federal statutory rights in the arbitral forum, . . . [as] [r]esolution of this question at this juncture would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation.") (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

82. Justice David Souter asserted that the *Pyett* decision may have no impact due to its failure to address this concern: "On one level, the majority opinion may have little effect, for it explicitly reserves

E. Rent-A-Center, West, Inc. v. Jackson

In *Rent-A-Center, West, Inc. v. Jackson*,⁸³ the Supreme Court added to a long line of precedent favoring the enforcement of pre-dispute agreements to arbitrate employment discrimination claims. The *Jackson* decision considered whether the court or the arbitrator rules on challenges to arbitration agreements as unconscionable, when the arbitrator obtains his or her authority to decide from the agreement itself. The Supreme Court held that the arbitrator makes the decision if the agreement so provides.⁸⁴

The arbitration agreement at issue provided for “arbitration of all ‘past, present or future’ disputes arising out of Jackson’s employment with Rent-A-Center, including ‘claims for discrimination’ and ‘claims for violation of any federal . . . law.’”⁸⁵ The agreement also included a delegation provision stating that the “[t]he Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including, but not limited to any claim that all or part of this Agreement is void or voidable.”⁸⁶ Before the Court, Jackson claimed that

the question whether a CBA’s waiver of a judicial forum is enforceable when the union controls access to and presentation of employees’ claims in arbitration . . . which is usually the case . . .” *Pyett*, 556 U.S. at 285 (Souter, J., dissenting) (internal citation omitted). This concern may not ever be addressed by the Court because the association representing the employer and the union representing the employees in *Pyett* have entered into a private agreement, a “Post-*Pyett* Protocol,” that focuses on mediation and arbitration of any disputes and requires that both parties will not seek a court resolution regarding the application of the arbitration clause when the union decides to not pursue a discrimination claim in arbitration. See Terry Meginniss & Paul Salvatore, *Response to an Unresolved Issue from Pyett: The NYC Real Estate Industry Protocol in THE CHALLENGE FOR COLLECTIVE BARGAINING: PROCEEDINGS OF THE NEW YORK UNIVERSITY 65TH ANNUAL CONFERENCE ON LABOR*, Ch. 11, at 11-7—11-10 (Michael Z. Green ed., 2013) (providing the specific details of the parties’ Post-*Pyett* Protocol). While I applaud the efforts of the employer and the union in *Pyett* to find ways that work for them in resolving statutory employment discrimination claims through mediation and arbitration under their Post-*Pyett* Protocol, I also have concerns about how an individual’s statutory claim will be handled when the union chooses to not pursue the claim in arbitration. See Michael Z. Green, *A Post-Pyett Collective Bargaining Agreement to Arbitrate Statutory Discrimination Claims: What is it Good For?—Could it be Absolutely Nothing or Really Something?* in *THE CHALLENGE FOR COLLECTIVE BARGAINING: PROCEEDINGS OF THE NEW YORK UNIVERSITY 65TH ANNUAL CONFERENCE ON LABOR*, *supra*, at Ch. 12, 12-11 (criticizing the Post-*Pyett* Protocol for not providing for full vindication of an employee’s claim in court when the union chooses to not pursue the claim in arbitration and asserting that the “Protocol appears to agree to something that was not clearly required after *Pyett* and may even end up in supporting an argument that [the union] has agreed to waive an individual employee’s right to pursue statutory claims in in court when [the union] has declined to pursue the claim”). Further and consistent with the concerns expressed in this Article about forced arbitration dissuading employees from filing claims, the parties to the Post-*Pyett* Protocol have acknowledged what I consider to be an unacceptable consequence of their agreement: instead of processing employee claims filed with agencies and courts, those entities have deferred resolution of those claims to be handled by the Protocol’s forced individual employment arbitration process. See Meginniss & Salvatore, *supra*, at 11-5.

83. 561 U.S. 63, 130 S. Ct. 2772 (2010).

84. 130 S. Ct. at 2779.

85. *Id.*

86. *Id.* at 2776.

the agreement to arbitrate was unenforceable because it was unconscionable under state law. Rent-A-Center argued that the arbitrator must decide the issue, and pointed to the delegation provision for support.

The Supreme Court ruled that, because the parties had clearly and unmistakably delegated questions of arbitrability to the arbitrator, and Jackson had failed specifically to challenge the validity of that delegation provision, the unconscionability issue must be put to the arbitrator.⁸⁷ The Court reasoned that the delegation provision was “an agreement to arbitrate threshold issues concerning the arbitration agreement” and “simply an additional, antecedent agreement” to arbitrate challenges to the overall arbitration agreement.⁸⁸ Thus, the delegation provision could be severed from the overall agreement to arbitrate and may only be displaced by a specific challenge. Otherwise, the provision remained in effect and left the validity of the whole arbitration agreement to the arbitrator.

In a dissenting opinion, his last challenge to the Court’s expansive treatment of arbitration under the FAA before his retirement, Justice Stevens argued that the majority erred in its severability analysis, and asserted that the Court should have addressed Jackson’s unconscionability challenge to the overall arbitration agreement. He criticized the Court for adding “a new layer of severability—something akin to Russian nesting dolls,” by deciding to “pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator.”⁸⁹ Justice Stevens also argued that this “new layer” erroneously carved out a court’s responsibility to decide whether an agreement to arbitrate was unconscionable before sending any matters to the arbitrator.⁹⁰

The *Jackson* decision, as with *Pyett*,⁹¹ strongly supports the continued application of mandatory arbitration agreements to resolve statutory employment discrimination claims. Combined with earlier precedents like *Gilmer* and *Circuit City*, and the EEOC’s hesitance to get involved in a meaningful way, forced arbitration provisions increasingly curtail employee access to the courts, often as a condition of employment. The *Jackson* decision’s endorsement of removing judicial consideration at the outset of general contract defenses—such as fraud, duress, or unconscionability—that would defeat enforcement of an agreement to arbitrate statutory discrimination claims underscores that, today, employees facing forced arbitration have few places to turn.

87. *Id.* at 2779-81.

88. *Id.* at 2777.

89. *Id.* at 2786.

90. *Id.*

91. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

II.

EMPLOYER EFFORTS TO CIRCUMVENT *WAFFLE HOUSE* AS RETALIATION

In representing one of the key chinks in the FAA's armor, the *Waffle House* decision seems to have rankled employers as they seek to tighten the vise grip they hold on mandatory arbitration of employee statutory disputes. In a review of mandatory arbitration five years after *Waffle House*, I argued that the EEOC had erred by failing to develop a coherent update to its arbitration policy in light of the powerful opportunity presented by the Court's decision.⁹² At that time, the promise of *Waffle House* was still considered a significant check on employer exuberance for forced arbitration of statutory employment discrimination claims.⁹³ As many speculated, the EEOC's inability to pursue more than a small percentage of charges filed as court claims suggests that *Waffle House* may have had very little impact.⁹⁴ Yet, with a change in the enforcement regime—signaled by Barack Obama assuming the Presidency in 2009—one would have hoped that the EEOC would finally update its arbitration policy as part of an overall enforcement regime that captured the broad implications of the *Waffle House* decision.⁹⁵ Unfortunately, however, the EEOC has remained silent. Absent any update to its official arbitration policy, a limited number of cases discussing EEOC action involving an arbitration agreement provide the only indications of whether *Waffle House* still offers some hope for employees seeking to avoid forced arbitration. Those cases suggest that employers have adopted a clear response to the *Waffle House* decision: taking preemptive steps to limit the prospect of litigation by forcing the

92. See Michael Z. Green, *Ruminations About the EEOC's Policy Regarding Arbitration*, 11 EMP. RTS. EMP. POL'Y J. 154 (2007).

93. See Marc A. Altenbernt, Note, *Will EEOC v. Waffle House, Inc. Signal the Beginning of the End for Mandatory Arbitration Agreements in the Employment Context?*, 3 PEPP. DISP. RESOL. J. 221, 250 (2003) (suggesting the decision “may signal a trend that retreats from the general acceptance felt for mandatory arbitration” because of the “slight contraction” of the Court's broad endorsement of arbitration and a recognition that “employment discrimination claims” should now be treated “different from other claims”); Jason A. McNiel, Note, *The Implications of EEOC v. Waffle House: Do Settlement and Waiver Agreements Affect the EEOC's Right To Seek and Obtain Victim-Specific Relief?*, 38 IND. L. REV. 761, 786 (2005) (discussing the potential impact of *Waffle House* on agreements to arbitrate and settlement agreements).

94. See Chad Egan Burton, *EEOC v. Waffle House: Employers Win, Again*, 71 DEF. COUNS. J. 52, 52 (2004) (asserting that *Waffle House* is a “hollow” victory because the EEOC files only a small percentage of cases and the “likelihood of a lawsuit”); David H. Gibbs, *ADR After Waffle House, Arbitration Gets New Trilogy of Employment Law*, 20 ALTERNATIVES TO HIGH COST LITIG. 17, 22 (Feb. 2002) (referring to a “minuscule number of cases brought by the EEOC” in assessing the impact of *Waffle House*). One commentator recently noted that out of 99,922 charges of discrimination filed with the EEOC in 2010, the EEOC filed only 271 suits. See J. Scott Pritchard, Comment, *The Hidden Costs of Pleading Plausibility: Examining The Impact of Twombly and Iqbal on Employment Discrimination Complaints and the EEOC's Litigation and Mediation Efforts*, 83 TEMP. L. REV. 757, 769 (2011).

95. See Green, *Reading Ricci*, *supra* note 5, at 370 n.12 (discussing how many had hoped for the pursuit of an aggressive pro-employee legislative agenda during the Obama presidency and how delays and politics have prevented those pursuits).

employee involved to arbitrate before the EEOC can take any official action.⁹⁶

In an era where the EEOC has been limited by politics, it is perhaps unsurprising that the Agency has sent mixed messages as to the precise content of its arbitration policy. Nevertheless, despite the uncertainty, the possibility of using retaliation claims to circumvent forced arbitration has been lurking in the background since at least 2004. In that year, the Ninth Circuit held in *EEOC v. Luce, Forward, Hamilton & Scripps*⁹⁷ that an agreement to arbitrate was valid pursuant to *Circuit City*, but it remanded the case to the trial court to address the EEOC's "novel" claim that the employer had retaliated by refusing to hire a job candidate who would not agree to arbitration as a condition of employment.⁹⁸ Rather than pursuing the theory further, the EEOC supported a settlement agreement that allowed a law firm to continue to enforce its mandatory arbitration policy. When commenting on the eventual settlement of *Luce*, a spokesperson for the EEOC admitted that the EEOC's 1997 policy was "still technically in effect," but that there was "a lot of confusion" at the Agency about how the policy applied.⁹⁹

Accordingly, the EEOC bypassed a chance to establish this "novel" retaliation theory. This may owe only to political circumstances at that time. Cliff Palefsky, the attorney representing the plaintiff in *Luce*, asserted that the EEOC's decision to settle the case instead of pursuing its "novel" retaliation claim in the district court was a "political one."¹⁰⁰ Supporting Palefsky's claim was the fact that the EEOC Chair, a Republican appointee, ignored a letter by Democratic Senator Edward Kennedy and six other Democrats asking that the EEOC not drop the case after it was remanded.¹⁰¹ Some of the political heat on the EEOC was ameliorated because the ultimate decision to settle was not presented directly to the EEOC as the EEOC's General Counsel acted independently in making the decision.¹⁰²

As the EEOC has not again pursued the retaliation theory of arbitration, one reading of these circumstances—supported by its settlement

96. See *infra* Part II.B.1.

97. 345 F.2d 742 (9th Cir. 2003) (en banc).

98. For further discussion of the possible "novel" claim of retaliation from *Luce*, see Kiran Dosanjh Zucker, *Retrieving What Was Luce: Why Courts Should Recognize Employees' Refusal of an Employer's Mandatory Arbitration Agreement As "Protected Activity" Under Title VII's Antiretaliation Provision*, 22 LAB. LAW. 233, 244-49 (2006).

99. See Nancy Montwieler, *EEOC Accord Puts Its Stamp of Approval On Law Firm's Mandatory Arbitration Plan*, DAILY LAB. REP. (BNA) No. 132, at AA-1 (July 12, 2004).

100. *Id.*

101. *Id.*

102. *Id.* Cliff Palefsky has continued to pursue this retaliation theory by recently filing a complaint alleging that when an employee filed a charge of discrimination under the ADA, his employer attempted to force arbitration of that charge as retaliation. See *Bayer v. Neiman Marcus Group, Inc.*, No. 4:13-CV-04487 (N.D. Ca. Sep. 27, 2013) (copy of complaint on file with author).

action—is that the EEOC now endorses employer-mandated arbitration, or does not consider efforts to compel arbitration as retaliatory. If this is the true result, the broader potential impact of *Waffle House* remains completely diffused by EEOC inaction. But the stronger possibility is that, given the political considerations, the EEOC has decided to challenge mandatory arbitration as a form of retaliation in court actions without adopting an express arbitration policy or expressly arguing the retaliation theory espoused by this Article. A review of cases adjudicated after *Waffle House* featuring EEOC involvement demonstrates that, even where arbitration agreements are present, the EEOC is clearly focused on pursuing discrimination claims in court.

These cases also reveal that, although *Waffle House* allows the EEOC to seek victim-specific relief despite the existence of an individual agreement to arbitrate, whether employers may compel arbitration where the EEOC has taken the case remains an open question.¹⁰³ Indeed, employers are seeking to compel arbitration with individual employees with some success.¹⁰⁴ The employer's strategy in many of these cases—really, an attempt to effectuate res judicata—essentially arises from language in the *Waffle House* decision stating that “ordinary principles of res judicata, [and] mootness” may still apply.¹⁰⁵ By compelling individual employees to arbitrate before the EEOC can complete its proceedings and obtain court relief, the employer can assert that any relief won by the EEOC pursuant to *Waffle House* has been precluded due to the arbitration result.

Judicial response to these arguments varies. Some courts reject the employer's attempts to compel arbitration by discussing the various problems that arise from the conclusion that arbitration of the employee's claim must be compelled.¹⁰⁶ Other courts focus only on the EEOC's right to

103. McNiel, *supra* note 93, at 775.

104. See Matthew Kane, *A Crack in the Waffle House Armor: U.S. Court of Appeals Holds Employers Can Enforce Arbitration Agreements Against Employees Who Intervene in EEOC Enforcement Actions*, MCGUIREWOODS NEWSLETTER (McGuireWoods LLP, Richmond, Va.), Mar. 7, 2007, available at http://www.lorman.com/newsletters/article.php?article_id=680&newsletter_id=148 (providing suggestion from management law firm that “even after the Supreme Court's decision in *Waffle House*, having arbitration agreements with employees for employment-related claims can have strategic value for employers in EEOC enforcement actions” while referring to a case in the United States Court of Appeals for the Eighth Circuit that allowed the employer to require that an employee seeking to intervene in an EEOC action arbitrate his claims even if the EEOC could proceed in court).

105. EEOC v. *Waffle House*, 534 U.S. 279, 298 (2002).

106. See, e.g., EEOC v. *Ranir*, No. 1:10-cv-965, 2012 WL 381339 (W.D. Mich. Feb. 6, 2012) (denying the employer's motion to dismiss an employee's attempt to intervene, and refusing to compel arbitration where the employee signed an arbitration agreement, filed a charge of discrimination under the ADA with the EEOC, and attempted to intervene in the EEOC's court action); EEOC v. *SWMW Mgmt., Inc.*, No. CV-08-0946-PHX-GMS, 2009 WL 1097543 (D. Ariz. Apr. 21, 2009) (refusing to compel arbitration and stay the EEOC's enforcement action when the EEOC brought suit on behalf of the defendant's former employees on the basis of race and gender discrimination, constructive discharge, and retaliation; reasoning that the former employees were not parties to this action and,

pursue claims, consistent with *Waffle House*, and on allowing the employer to compel arbitration of the individual employee's claims without allowing the employee to either intervene in the EEOC court action or stay the arbitration until the court proceedings have been completed.¹⁰⁷

For example, in *EEOC v. Circuit City Stores*,¹⁰⁸ the Sixth Circuit addressed the employer's claim that the individual employee must be compelled to seek exclusive relief in arbitration because the employee had signed an agreement to arbitrate, notwithstanding that the EEOC alone had filed the lawsuit. The EEOC disagreed, arguing that only the signatory employee, and not the EEOC, agreed to forego a judicial resolution.¹⁰⁹ The court ruled in favor of the EEOC, rejecting the employer's argument as "unpersuasive."¹¹⁰ Specifically, the court held that that it and the district court lacked jurisdiction over Circuit City's motion to compel arbitration, brought in a separate suit filed against the employee by Circuit City for that sole purpose, because the employee was not seeking to bring an individual claim.¹¹¹ Hence, there was no case or controversy in that suit and the district court had properly granted judgment on the pleadings.¹¹² That the EEOC had filed the lawsuit, not the employee¹¹³ in the end made all the difference.

Several lower court cases support the *EEOC v. Circuit City Stores* result—that the EEOC may pursue an action even if the employee earlier agreed to arbitrate, and have even suggested that compelled arbitration is

pursuant to *Waffle House*, the court may not stay the proceedings and could not order a stay even if some of the former employees had intervened); *EEOC v. Taco Bell of Am., Inc.*, No. 8:06-cv-1792-T-30MAP, 2007 WL 809660 (M.D. Fla. Jan. 23, 2007) (refusing to compel arbitration when the EEOC brought suit against Taco Bell, which sought to compel the EEOC to arbitrate, because the EEOC was not a party to the arbitration agreement and the EEOC had not yet issued a "Right to Sue" letter to the charging party; holding that the charging party had no jurisdiction and should not be compelled to arbitrate); *EEOC v. GMRI, Inc.*, 221 F.R.D. 562 (D. Kan. 2004) (finding employee who filed charge could intervene in EEOC's suit for sex discrimination and rejecting employer's argument that the charging party's complaints must be resolved through arbitration).

107. *EEOC v. Cheesecake Factory, Inc.*, No. CV 08-1207-PHX-NVW, 2009 WL 1259359 (D. Ariz. May 6, 2009) (compelling arbitration and staying individual's trial to allow arbitration where the EEOC had filed a suit on behalf of the charging parties under a sexual discrimination claim, but charging parties had signed an arbitration agreement with their employer); *EEOC v. Hooters of Am., Inc.*, No. 06-CV-6138CJS, 2007 WL 64163 (W.D.N.Y. Jan. 9, 2007) (granting employer's motion to compel arbitration of intervenor's action where the EEOC filed an ADA discrimination claim based on plaintiff's charge, but allowing the EEOC to proceed independently, as allowed under *Waffle House*); see also *EEOC v. Fry's Elecs., Inc.*, No. C10-1562RSL, 2011 WL 666328 (W.D. Wash. Feb. 14, 2011) (finding that once an employee intervenes, the employer may seek to compel arbitration even though the court granted the motion of the employee to intervene and denied the employer's motion to compel arbitration and motion to stay because of the need to first resolve a factual dispute about whether the employee had agreed to arbitrate).

108. 285 F.3d 404 (6th Cir. 2002).

109. *Id.* at 406-07.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

not required once the EEOC files suit.¹¹⁴ In *EEOC v. Physicians Services*,¹¹⁵ for example, the court denied the employer's motion to compel arbitration in a suit involving the EEOC. The employer moved to compel arbitration and stay the court proceedings pending the resolution of claims in arbitration on the argument that the instant proceeding would be inefficient as all matters would be resolved in arbitration. By contrast, the EEOC argued that its court proceeding should not be stayed even if the arbitration proceedings went forward. Relying on *Waffle House* and other cases, the EEOC argued that its suit existed independently of the arbitration claims because the suit would be seeking vindication of the public interest.¹¹⁶

The court accepted the EEOC's position. It explained that the "*Waffle House* Court did not address [the] specific question of whether an intervening plaintiff must arbitrate his or her claims pursuant to an arbitration agreement because the aggrieved party in *Waffle House* never intervened in the EEOC's action."¹¹⁷ According to the Court's analysis of *Waffle House*, "the majority in *Waffle House* was aware of the dissent's objection to the EEOC doing on behalf of an employee that which an employee has agreed not to do for himself and noted that the *Waffle House* Court accepted that consequence of its ruling."¹¹⁸ As a result, the court denied the motion to compel arbitration.¹¹⁹

The Eighth Circuit reached a contrary result in *EEOC v. Woodmen of the World Life Insurance Society*.¹²⁰ There, the court addressed a motion by the employer to compel arbitration of an employee's individual Title VII claims, as well as her cross-claims filed as an intervenor in a lawsuit filed by the EEOC in that action. The district court, which had allowed intervention, denied the employer's motion to stay the cross-claims and compel arbitration.¹²¹ The district court supported that result because the employee "could not afford arbitration"; arbitration here "would interfere with the EEOC's ability to pursue its interests on behalf of the public"; and the employee had filed for bankruptcy.¹²²

The Eighth Circuit reversed and compelled arbitration. First, because the bankruptcy court lifted the bankruptcy stay on the Title VII proceedings,

114. See *supra* note 107 (citing cases).

115. 425 F. Supp. 2d 859 (E.D. Ky. 2006).

116. *Id.* at 861-62.

117. *Id.* at 861.

118. *Id.*

119. *Id.*; see also *EEOC v. Riverview Animal Clinic*, 761 F. Supp.2d 1296, 1305 (N.D. Ala. 2010) (pregnancy discrimination case where employer argued that the claim was subject to arbitration and the court dismissed and allowed the EEOC to proceed under *Waffle House* without addressing whether an employee could intervene or had to arbitrate claim even if the EEOC did not have to arbitrate).

120. 479 F.3d 561 (8th Cir. 2007).

121. *Id.* at 563-64.

122. *Id.* at 564.

the court considered the district court bankruptcy concern alleviated.¹²³ Second, the employer's offer to pay for the arbitrator's costs ameliorated any concern with expense.¹²⁴ Also, the court found no limitation on the EEOC's ability to pursue interests on behalf of the public through an enforcement action if the employee were required to arbitrate her claims.¹²⁵ Further, the court found that the Supreme Court's caveat in *Waffle House* 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 the EEOC may seek" suggested that the Supreme Court had not "intended to preclude an employee from asserting claims in arbitration against the employer concurrently with the EEOC enforcement action."¹²⁶

As with the competing line of cases, lower courts have followed the Eight Circuit's approach and compelled arbitration after an employer's motion, even though the EEOC had filed suit. For example, in *EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C.*,¹²⁷ the court compelled arbitration of the employee's claims, and stayed the employee's claims as an intervenor in the court action while allowing the EEOC to proceed with its court action.¹²⁸ In so ruling, the court disagreed with the EEOC's argument that "requiring [an employee] to arbitrate her [or his] claims interferes with the EEOC's right to enforce the law."¹²⁹

In short, the results from these post-*Waffle House* cases show the extent to which employees may be discouraged from filing EEOC charges if employers seek to compel arbitration while a charge is still pending with and unresolved by the EEOC. By attempting to compel arbitration before the EEOC has completed its process, the employer is seeking to prevent the employee from benefitting from the EEOC's investigation and potential independent lawsuit. These employer efforts send a message to employees that the filing of the charge was useless and the employee, by being compelled to arbitrate, sits in the exact same position as he or she would have been had no charge been filed. As a result, immediately compelling arbitration before the EEOC can complete its process, dissuades employees from even filing a charge. Why file a charge if the employer will be able to immediately force the employee to arbitrate? Accordingly, the EEOC should be more concerned about this type of retaliation where employers send a message to employees that the only benefit of having filed a charge is that the employer will aggressively seek to arbitrate and attempt to cut the

123. *Id.* at 561 n.1.

124. *Id.* at 566-67.

125. *Id.*

126. *Id.* at 569-70 (citing *EEOC v. Waffle House*, 534 U.S. 296, 297 (2002)).

127. 273 F. Supp. 2d 260 (E.D.N.Y. 2003).

128. *Id.* at 264-65.

129. *Id.* at 263.

employee off from any relief that the EEOC may obtain on behalf of the employee.

III.

RETALIATION CLAIMS AS THE REMAINING OPTION FOR RESPONDING TO FORCED ARBITRATION AND SEEKING WORKER FAIRNESS

With the continued growth of mandatory arbitration,¹³⁰ employees and their advocates must determine the remaining options for bringing claims. Retaliation claims offer a viable option not yet rejected by the Supreme Court. This Part first considers prior actions by the EEOC and the NLRB in the arbitration context. Specifically, both agencies have already intimated or expressed that forcing arbitration may deter or prevent employees from filing charges with those agencies.¹³¹ These are the bases for possible retaliation claims in light of current retaliation jurisprudence, which this Part next explores.

In light of the concerns identified by the EEOC and the NLRB, the Supreme Court's strong Title VII retaliation rationale suggests that employees should attempt to file charges with those agencies and bring claims in court on the basis that employer efforts to force arbitration are, in fact, retaliation for protected activity under Title VII and the NLRA.¹³² Finally, this Part closes by urging legislative advocacy aimed at Congress, especially as it continues to discuss amending the FAA to expressly exclude employment and consumer claims.¹³³ Adding language that would prevent the usage of arbitration as a form of retaliation could be included in pending legislation.

A. Agency Pursuits

Some recent EEOC and NLRB actions may offer options for employees seeking ammunition in the battle against forced arbitration. Going forward, both agencies should consider how employers' mandatory arbitration policies, as well as their efforts to compel arbitration while

130. See Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. DISC. 164 (2013) ("[A] study of the most prominent firms in the telecommunications, credit, and financial services industries found that nearly 93 percent of these businesses routinely insert arbitration clauses into their employment contracts.") (citing Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 886 (2008)).

131. See *infra* Part II.A.

132. See *infra* Part II.B.

133. See Hinshaw, *supra* note 19 (discussing Professor Jean Sternlight's views on possible legislation); Sternlight Testimony, *supra* note 48 (testimony given to U.S. Senate Committee by Professor Jean Sternlight advocating for future legislation); see also *infra* Part III.A.

charges are still pending, can represent a form of retaliation in deterring employees from filing charges.

1. *Forcing Arbitration as Interference with Filing EEOC Charges*

Employees with claims under Title VII, asserting that they have been aggrieved because of employment discrimination, must file a charge in writing with the EEOC to exhaust administrative remedies.¹³⁴ Employees may also file charges with state fair employment agencies where those agencies exist.¹³⁵ In those cases where the EEOC proceeds to a “cause” finding, the agency tries to “conciliate” or settle the charge with the employer. If no resolution is achieved, the EEOC may choose to file a lawsuit on behalf of the charging party.¹³⁶ The charging party has the right to retain her own lawyer and intervene in the EEOC’s lawsuit.¹³⁷

The fiftieth anniversary of Title VII is the right time for the EEOC to analyze the pending legal issues that may affect employees’ abilities to vindicate their statutory employment discrimination claims through the arbitration process,¹³⁸ and consider what more it might do in effecting its purpose. This Article asserts that the EEOC should adopt an aggressive policy of pursuing retaliation claims when employers seek to compel employees to arbitrate their statutory discrimination dispute even though the EEOC is still involved in the matter, so as not to dissuade workers from pursuing charges that might be brought under *Waffle House*.¹³⁹ As a start, the EEOC could update its 1997 arbitration policy to take the position that when an employee files a charge of discrimination, the EEOC will consider actions to compel arbitration with the employee as intended to be a form of retaliation by creating a chilling effect that will deter employees from filing charges with the EEOC. A cease and desist order would be the most likely remedy for such behavior if no other actions have been taken other than an attempt to compel arbitration.

Taking into account the broad standards for establishing retaliation when an employer dissuades a reasonable employee from filing a charge, the EEOC has an opportunity to effectuate the policy from *Waffle House* by not allowing employers to immediately force arbitration on employees who file EEOC charges. Then employers cannot attempt to create a *res judicata*

134. See 29 C.F.R. §§ 1601.7-1601.12 (2010).

135. 29 C.F.R. § 1601.13 (2010).

136. See 42 U.S.C. § 2000e-5(f)(1) (2010).

137. A charging party may also obtain a right to sue letter and file suit in federal court first. In that instance, the EEOC may then intervene in the private lawsuit.

138. See Hart, *supra* note 57, at 1950 (“EEOC statements do reflect considered judgment, informed by expert analysis and research, about application of open-ended or unclear statutory commands.”).

139. See *infra* Part IV.

end run around the recovery that the Supreme Court determined was so important for the individual employee in *Waffle House*. Further, employees will not be led to immediately believe that their filing of an EEOC charge was worthless if they are placed in the same position of facing arbitration as they would have held without filing the charge. Except now the employer is trying to force that arbitration to occur immediately.

2. *Forcing Arbitration as Interference with Filing Unfair Labor Practice Charges*

Section 7 of the NLRA provides: “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”¹⁴⁰ Under Section 8(a)(1) of the NLRA, it is an unfair labor practice that can be prosecuted by the NLRB if an employer acts to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”¹⁴¹ Section 7 of the NLRA has no temporal limitations. It applies when a union is engaged in an organizing campaign; when a union is the collective bargaining representative of the employees; and also when there is no union present at all.¹⁴²

Given the limited number of employees who work in a union setting, the application of Section 7 to the non-union workplace represents an important right for all workers. Non-union employers are just starting to see the significance of Section 7 of the NLRA in their workplaces. The NLRB has started to examine various employer policies to determine whether they may chill employees in exercising their Section 7 right to mutual aid or protection.¹⁴³ To the extent an employer seeks to enforce a mandatory arbitration policy that is invalid under the NLRA for chilling employees in their exercise of their Section 7 rights, an employer may also violate the NLRA’s retaliation provision, Section 8(a)(4), which provides that an

140. 29 U.S.C. § 157 (2012).

141. 29 U.S.C. § 158(a)(1) (2012).

142. See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems With Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2024 (2009) (“Section 7 could be read as providing general antiretaliation protection for all forms of worker activism, so long as the activism is ‘concerted’ and for ‘mutual aid or protection.’”). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. *Triangle Elec. Co.*, 335 N.L.R.B. 1037, 1038 (2001); *Meyers Indus.*, 268 N.L.R.B. 493, 497 (1984).

143. See James McDonald, Jr., *Has the NLRB Outlawed Courtesy?*, LAW360 (Oct. 26, 2012), <http://www.law360.com/articles/387035/has-the-nlr-b-outlawed-courtesy> (referring to comments by management attorney regarding NLRB decisions that have caused concern for employers); see also Michael Z. Green, *How the NLRB’s Light Still Shines on Anti-discrimination Law Fifty Years After Title VII*, 14 NEV. L.J. __ (forthcoming 2014) (describing several NLRB decisions involving non-union employers where the NLRB examined a broad range of policies to assess whether those policies would chill employees in the exercise of their Section 7 rights).

employer commits an unfair labor practice if it chooses: “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.”¹⁴⁴

The NLRB made a splash¹⁴⁵ into the mandatory arbitration debate in 2012 when it issued its decision in *D.R. Horton*.¹⁴⁶ In that case, the Board found that employer efforts to compel individual arbitration and prevent class arbitration hampered employees’ abilities to exercise their rights to concerted activity under section 7 of the NLRA.¹⁴⁷ The arbitration agreement, signed by non-union employees, required individual arbitration and expressly waived the right of employees to seek class arbitration. Furthermore, the arbitration agreement provided that an arbitrator may not consolidate employees’ claims or otherwise award relief to a “group” or “class” of employees in a single arbitration proceeding. The NLRB concluded that the class waiver language “reasonably would lead employees to believe that they were prohibited from filing charges with the Board” and thereby chill employees’ exercise of their statutory collective rights, and, moreover, this conclusion did not conflict with the FAA.¹⁴⁸

After the NLRB decision issued, several courts were asked to address the validity of the decision within their jurisdictions as cases involving arbitration policies that banned class or collective arbitration were subjected to challenge in light of *D.R. Horton*. Many of those courts refused to follow the NLRB’s decision, and so, too, did the Fifth Circuit when it was asked to review the *D.R. Horton* decision on appeal in December 2013.¹⁴⁹ In rejecting the NLRB’s decision, the court held that the Board’s FAA

144. 29 U.S.C. § 158(a)(4) (2012).

145. The splash reflects the important commentaries and court responses to the NLRB’s *D.R. Horton* case. See Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013) (discussing lower court cases responding to *D.R. Horton* and asserting that the decision should be affirmed as within the broad powers given to the NLRB to protect employees involved in concerted activity under the NLRA). Other commentaries about *D.R. Horton* indicate the importance of the decision. See, e.g., Craig Becker, *The Continuity of Collective Action and the Isolation of Collective Bargaining: Enforcing Federal Labor Law in the Obama Administration*, 33 BERKELEY J. EMP. & LAB. L. 401 (2012); Adam Klein & Michael Scimone, *Arbitration vs. Labor Law: An Imagined Conflict*, in THE CHALLENGE FOR COLLECTIVE BARGAINING: PROCEEDINGS OF THE NEW YORK UNIVERSITY 65TH ANNUAL CONFERENCE ON LABOR, *supra* note 82, at Ch. 9; Samuel Estreicher & Katherine Huibonhoa, *The Board Lacks Authority for its D.R. Horton Decision*, in THE CHALLENGE FOR COLLECTIVE BARGAINING: PROCEEDINGS OF THE NEW YORK UNIVERSITY 65TH ANNUAL CONFERENCE ON LABOR, *supra* note 82, at Ch. 10; Michael D. Schwartz, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 FORDHAM L. REV. 2945 (2013); Austin Leland Fleishour, “*Horton (Helps) A Who?*” *Playing Linguistic Hopscotch with the NLRB and Discussing Implications for Employees’ Section 7 Rights*, 80 TENN. L. REV. 449 (2013).

146. 357 N.L.R.B. No. 184 (2012), *rev’d in part sub nom.* *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

147. *D.R. Horton*, 357 N.L.R.B. No. 184, at *17.

148. *Id.* at *2.

149. *D.R. Horton Inc. v. NLRB*, 737 F.3d 344, 359-362 (5th Cir. 2013).

analysis was flawed, and failed to accommodate the FAA's broad policy requiring enforcement of arbitration agreements.¹⁵⁰

But embedded within its rejection of the Board's decision in *D.R. Horton* is a silver lining: namely, the court's statement that arbitration here "would lead employees to a reasonable belief that they were prohibited from filing unfair labor practice charges."¹⁵¹ This recognition affirmed a key proposition established by prior cases cited in *D.R. Horton* that certain employer policies can chill employee exercise of rights including rights specifically addressed by a mandatory arbitration policy.¹⁵²

The Board in *D.R. Horton* had relied on its *U-Haul Co. of California*¹⁵³ decision for that proposition. There, the Board found impermissible interference with section 7 rights by a broadly worded arbitration policy that was "reasonably read to require employees to resort to the [employer's] arbitration procedures instead of filing charges with the board."¹⁵⁴ The NLRB in *U-Haul* was careful to limit its decision "to the specific clause at issue in this case, which we have determined would be reasonably read to restrict the filing of unfair labor practice cases with the board."¹⁵⁵

Other Board decisions have also found that mandatory arbitration policies would violate the NLRA for discouraging employees from filing unfair labor practice charges including decisions in *Supply Technologies*,¹⁵⁶ *Bill's Electric*,¹⁵⁷ and *2 Sisters Food Group*.¹⁵⁸ Because the Fifth Circuit in *D.R. Horton* did not unsettle this understanding, a fair reading is that arbitration agreements or policies, if not clearly worded to inform employees that they may still file charges with the NLRB will be in violation of the NLRA.¹⁵⁹ To protect employees from being forced into

150. *Id.* at 362.

151. *See id.* at 363.

152. *See* David L. Hudson, Jr., *Arbitration Clause Can't Block NLRB Complaints*, A.B.A. J. E-REPORT, July 14, 2006 (discussing Board finding that mandatory arbitration agreement was unlawful in its *U-Haul* decision and examining its impact). Pursuant to *U-Haul*, once a charge has been filed with the Board, an employer's action to compel arbitration could violate section 8(a)(4). *See U-Haul Co. of Cal.*, 347 N.L.R.B. 375, 388 (2006); Nicole Cuda Perez, *Too Many Arbitrators Do Spoil the Soup: NLRB Charges Filed By Non-Unionized Employees Should Not Be Subject to Mandatory Pre-Dispute Arbitration Agreements*, 23 LAB. LAW. 285, 296-97 (2008) (arguing that non-union employees who file unfair labor practices should not be deemed to have waived those charges because of agreements to arbitrate (citing *U-Haul*, 347 N.L.R.B. at 376-77) (finding that "the arbitration policy . . . violates the Act because it would reasonably tend to inhibit employees from filing charges with the Board" and that "employees could reasonably believe that they are precluded from filing such charges with the Board"))).

153. 347 N.L.R.B. at 377.

154. *Id.*

155. *Id.* at 378 n.11.

156. 359 N.L.R.B. No. 38 (Dec. 14, 2012).

157. 350 N.L.R.B. 292, 296 (2007).

158. 357 N.L.R.B. No. 168 (Dec. 29, 2011).

arbitration, the NLRB must continue to enforce its decisions that make it unlawful to seek to compel enforcement of arbitration agreements that deter employees from filing NLRB charges.

B. Retaliation Claims in the Courts

The Supreme Court has an interesting history of enforcing retaliation claims, especially under Chief Justice John Roberts.¹⁶⁰ For example, the Court has read a broadly worded civil rights statute, section 1981, to include an anti-retaliation remedy.¹⁶¹ In *CBOCS West v. Humphries*, the Court held that section 1981¹⁶²—which declares that all persons “shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens”—prohibits not only racial discrimination but also retaliation against those who oppose it.¹⁶³ In another case, *Gómez-Pérez v. Potter*,¹⁶⁴ the Court likewise read an anti-retaliation remedy component into the broad wording of the federal-employee provisions of the ADEA.¹⁶⁵

159. Hudson, *supra* note 152 (discussing comments of Katherine Stone about possible mandatory arbitration clauses that may not be a problem, such as the clause at issue in *U-Haul*); but see Liquita Lewis Thompson, *Arbitrators—Unlike Too Many Cooks—Do Not Spoil the Soup! Making the Case for Allowing Pre-Dispute Mandatory Arbitration of Unfair Labor Practice Charges in Non-Union Workforces*, 23 LAB. LAW. 301, 314-315 (2008) (arguing that NLRB decisions finding mandatory arbitration policies which fail to clearly define that an employee is not waiving the right to file an unfair labor practice charge should not be used to prevent non-union employees from proceeding to arbitration).

160. See generally Michael Zimmer, *A Pro-Employee Supreme Court?: The Retaliation Decisions*, 60 S.C. L. REV. 917 (2009); David Long-Daniels & Peter N. Hall, *Risky Business: Litigating Retaliation Claims*, 28 ABA J. LAB. & EMP. L. 437, 440-42 (2013). Long-Daniels and Hall describe a trio of Supreme Court cases expanding the scope of retaliation claims: *Burlington Northern & Santa Fe Railway Co.*, 548 U.S. 53 (2006); *Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271 (2009); and *Thompson v. North American Stainless, L.P.*, 131 S. Ct. 863 (2011). However, the Roberts Court may be losing its affection for retaliation claims. The only key Supreme Court case decided by the Roberts Court that denied victory for the employee was its most recent decision, which found that Title VII's retaliation provision is different from the discrimination provision in Title VII, at least with respect to the standard of causation required. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013). Retaliation scholars, however, were already predicting that the Court's support for retaliation claims would soon begin to wane. See, e.g., Alex B. Long, *Employment Retaliation and the Accident of Text*, 90 ORE. L. REV. 525, 526-29 (2011) (noting that going into the Supreme Court's 2010 term, “nearly every case adopted an interpretation of a statutory antiretaliation provision that favors employees” while also asserting that these decisions may be “lulling proponents . . . into a false sense of security” as employees will “start losing” these claims).

161. See *CBOCS W., Inc. v. Humphries*, 553 U.S. 442-53 (2008).

162. 42 U.S.C. § 1981 (2012).

163. *CBOCS*, 553 U.S. at 445.

164. 553 U.S. 474 (2008).

165. *Id.* at 479, 487 (“All personnel actions affecting [federal] employees . . . who are at least 40 years of age . . . shall be made free from any discrimination based on age” . . . “ (quoting 29 U.S.C. § 633a(a) (2012)); see also *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 173, 179 (2005) (finding anti-retaliation remedy in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 235 n.3, 237 (1969) (finding anti-retaliation remedy in 42 U. S. C. § 1982)).

The Court's 2006 decision in *Burlington Northern & Santa Fe Railway Co. v. White*¹⁶⁶ evinces a similar pro-employee stance of the Roberts Court with respect to retaliation. Title VII's express anti-retaliation provision, section 704(a), prohibits an employer from "discriminat[ing] against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII, or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.¹⁶⁷ In *White*, the Court addressed the type of retaliatory acts covered by section 704(a).¹⁶⁸

As the court explained at the outset, a retaliation claim is broadly aimed at "prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers."¹⁶⁹ Accordingly, it held "that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace."¹⁷⁰ A section 704(a) plaintiff must show that the employer's retaliatory action was "materially adverse" in that the action would have "dissuade[d] a reasonable person from making or supporting a charge of discrimination."¹⁷¹ The focus is on the "materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position."¹⁷²

In other words, as stated by Justice Breyer, "[c]ontext matters."¹⁷³ As an example, the Court reasoned that "[a] supervisor's refusal to invite an employee to lunch" could be so trivial as to not be actionable, "[b]ut to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination."¹⁷⁴

166. 548 U.S. 53 (2006).

167. *Id.* at 56. Section 704(a) provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (2012).

168. 548 U.S. at 56-57 (referring to 42 U.S.C. § 2000e-3(a) (2006)).

169. *Id.* at 68.

170. *Id.* at 57.

171. *Id.* at 68.

172. *Id.* at 69-70. The materially adverse analysis is not limited to materially adverse changes in the terms and conditions of employment, such as termination, demotion, and reassignment, among others. Instead, the question is whether the retaliatory action would be materially adverse to a reasonable employee.

173. *Id.* at 69.

174. *Id.*

In applying the broad retaliation standard of *White* to employer efforts to force arbitration when employees have pending charges before the EEOC or the NLRB, this approach would seem to yield the conclusion that these actions would deter reasonable persons from pursuing their statutory rights to file charges. Employees would have no incentive to file charges if they would ultimately be compelled to arbitrate their claims. Helpfully, some federal appeals courts have accepted that compelled, or pursued, arbitration can chill the exercise of legal rights.

For example, in *EEOC v. Board of Governors of State Colleges and Universities*,¹⁷⁵ the Seventh Circuit held that the very language of a CBA dissuaded employees from pursuing administrative relief in violation of section 4(d) of the ADEA, which mirrors Title VII's retaliation provision.¹⁷⁶ Specifically, the CBA stated: "[i]f . . . while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to . . . proceed further with the matter pursuant to this grievance procedure."¹⁷⁷ Because the CBA effectively required an employee to choose between filing under the grievance process provided or with the EEOC,¹⁷⁸ the language was retaliatory on its face because it penalized the employee for choosing to file with the EEOC by eliminating the employee's right to use the internal grievance process.

In *Goldsmith v. Bagby Elevator Co.*,¹⁷⁹ the Eleventh Circuit addressed whether illegal retaliation occurred where an employer terminated an employee for refusing to sign an arbitration agreement offered to the employee when he had a charge of discrimination pending with the EEOC. In a prior decision, *Weeks v. Harden Manufacturing Corp.*,¹⁸⁰ the court had ruled that an employee's refusal to sign an arbitration agreement as a condition of employment upon hiring failed to establish a retaliation claim because refusing to sign an arbitration agreement was not a protected activity.¹⁸¹ *Weeks* similarly reasoned that terminating employees for their failure or refusal to sign an arbitration agreement who had not yet filed or threatened to file EEOC charges could not be retaliation because the

175. 957 F.2d 424 (7th Cir.1992).

176. See Lorne Fienberg, Note, *Retaliation Claims Under § 4(d) of the ADEA*: *EEOC v. Board of Governors of State Colleges*, 34 B.C. L. REV. 413, 413 n.4 (1993) (citing 42 U.S.C. § 2000e-3(a) (1988) and *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1088 (5th Cir. 1987)).

177. *Board of Governors*, 957 F.2d at 426.

178. *Id.* at 429-30.

179. 513 F.3d 1261 (11th Cir. 2008).

180. 291 F.3d 1307 (11th Cir. 2002).

181. *Id.* at 1316-17.

“plaintiffs could not have had an objectively reasonable belief that their refusal was a statutorily protected activity.”¹⁸²

The *Goldsmith* court distinguished *Weeks*, however, on the grounds that the employee had a pending EEOC charge.¹⁸³ Hence, when the employer sought the employee’s agreement to arbitrate “all past, present, and future” claims against the employer as a condition of employment, the employee would have been giving up his ability to pursue his pending charge with the Agency and making it mandatorily arbitrable.¹⁸⁴ Perhaps influencing the court’s conclusion that seeking to compel such arbitration was retaliatory was the employer’s rejection of the employee’s request to limit arbitration to only future disputes.¹⁸⁵ In any case, *Goldsmith* provides further support for the notion that courts recognize the potential of employer-compelled arbitration to interfere with statutory rights. In joining the analysis in *Goldsmith* with the analysis in *White*, the employee would be able to receive all rights and remedies as a result of an employer’s retaliatory action of trying to force arbitration when the EEOC was still involved in handling a discrimination charge.

C. Congressional Reforms

Past congressional efforts to amend the FAA have not been effective, despite the many calls for legislative action to respond to the growing FAA Goliath.¹⁸⁶ Despite this lack of legislative success, the ongoing debate about mandatory arbitration has continued to dovetail with the debate about the Arbitration Fairness Act (“AFA”), a piece of legislation that has repeatedly been reintroduced in Congress for the past half-decade and is still now pending before it.¹⁸⁷ The AFA would make pre-dispute agreements to

182. *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1278 (2008) (discussing *Weeks*, 291 F.3d at 1307).

183. *Id.*

184. *Id.* at 1271-72.

185. *Id.*

186. See Cole, *supra* note 7; Hinshaw, *supra* note 19; Sternlight Testimony, *supra* note 48.

187. See, e.g., Hinshaw, *supra* note 19 (describing “new cause for optimism” in curbing forced arbitration against a backdrop of the AFA); Sternlight Testimony, *supra* note 48 (written testimony to the U.S. Senate Judiciary Committee in support of passage of the Arbitration Fairness Act of 2013); Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82 (2007) (describing arguments for and against a prior version of the Arbitration Fairness Act). For the current and prior versions of the AFA, see Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (2013) (introduced May 7, 2013, in U.S. Senate as S. 878 by Senator Al Franken (Democrat, Minnesota) along with 24 cosponsors, and introduced in the U.S. House of Representatives as H.R. 1844 by Congressman Henry C. “Hank” Johnson (Democrat, Georgia) along with seventy-one co-sponsors); Arbitration Fairness Act of 2012, H.R. 4181, 112th Cong. (2012) (introduced by Rep. Robert Anderson (Democrat, New Jersey); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011) (introduced by Senators Al Franken and Richard Blumenthal (Democrat, Connecticut)); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011) (introduced by Congressman Hank Johnson); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009). Congress continues to take additional efforts through annual

arbitrate statutory employment discrimination claims unenforceable. It would also prohibit enforcement of arbitration provisions in agreements between unions and employers (as allowed by *Pyett*) that waive individual employee rights to pursue claims arising under a statute or the U.S. Constitution.¹⁸⁸

With respect to reforms that ban the enforcement of mandatory arbitration for certain statutory disputes without directly addressing the FAA, Congress has already passed legislation. The Franken Amendment to the 2010 Department of Defense Appropriations Act prevents federal contractors with a contract of at least \$1,000,000 from entering into pre-dispute agreements to arbitrate statutory or tort claims involving sexual harassment or assault.¹⁸⁹ Also, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),¹⁹⁰ passed by Congress and signed by President Obama in 2010, bans mandatory arbitration of retaliation claims by those who report securities fraud, commodities fraud, or other claims covered by the Dodd-Frank Act's retaliation provisions.¹⁹¹ Further attempts to ban mandatory arbitration agreements involving customers and investor disputes may soon be addressed pursuant to the Dodd-Frank Act.¹⁹² The results from both the Franken Amendment and the Dodd-Frank Act underscore that the severity of the situation has not completely escaped congressional attention.

hearings to raise discussion about this potential legislation. Bales & Gerano, *supra* note 5, at 416 (discussing renewed—yet unsuccessful—efforts to have hearings about potential legislation after the Arbitration Fairness Act of 2012 was introduced).

188. H.R. 1844, 113th Cong. § 3 (2013) (proposing a new section 402(b) to be added to the FAA that precludes waivers of individual employee statutory rights or rights under the U.S. Constitution in collective bargaining agreements).

189. See Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409, 3454-55 (2009).

190. See 15 U.S.C. § 78(o) (2012).

191. See 15 U.S.C. § 1514A(e) (2012).

192. Preliminary results from the Consumer Financial Protection Bureau, pursuant to Dodd-Frank, suggest that most large banks use arbitration, small banks use arbitration much less than large banks, most arbitration clauses include class waivers, and few consumers file claims in arbitration. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028 (A) STUDY RESULTS TO DATE 12-15 (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf; see Jill I. Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1178 (2010) (describing Dodd-Frank provisions authorizing changes to mandatory arbitration for financial consumers); Paul Kirgis, *CFPB Preliminary Results on Study of Arbitration Clauses in Consumer Contracts*, ADR PROF BLOG (Dec. 12, 2013), <http://www.indisputably.org/?p=5283>; Ann Carns, *Consumer Agency Looking into Mandatory Arbitration*, N.Y. TIMES BUCKS BLOG (Apr. 25, 2012, 2:27 PM), <http://bucks.blogs.nytimes.com/2012/04/25/consumer-agency-looking-into-mandatory-arbitration/> (referring to the requirement in section 1028(a) of the Dodd-Frank Act that the Consumer Financial Protection Bureau study and provide a report to Congress about agreements to arbitrate future disputes with consumers and how the Bureau requests public comments as part of its study); see also Hinshaw, *supra* note 19 (referring to Professor Jean Sternlight's assessment of the Consumer Financial Protection Bureau report and Paul Kirgis's assessment of activities related to the Consumer Financial Protection Bureau's findings on arbitration as support for legislative change).

As a result, hope springs eternal for those who want Congress to finally provide protection for employees to rival the effective protection the Supreme Court has afforded employers who have sought enforcement of arbitration agreements since 1991. At least one commentator, Professor Jean Sternlight, remains optimistic that legislative reform will occur in 2014.¹⁹³ If the current version of the AFA passes, there will be no need for employees to assert retaliation claims in response to employer efforts to force arbitration. Those agreements to arbitrate will no longer be enforced.

However, because President Obama's political party does not have control of the House of Representatives and lacks a sufficient number of Senators to prevent legislation from being blocked in committees, passage of the AFA seems unlikely.¹⁹⁴ Perhaps, at minimum, Congress could embrace the opportunity of *Waffle House* and pass narrower legislation to ensure that once a charge is filed with either the EEOC or the NRLB, no party can force arbitration until the agency process is completed.¹⁹⁵ Such legislation would stop the retaliatory actions of employers to force arbitration that have been occurring as a response to *Waffle House*.

IV.

DEFINING THE PARAMETERS OF RETALIATORY EMPLOYMENT ARBITRATION

Employers (and possibly politicians and employer-interest groups) could easily balk at the notion that their efforts to enforce legal mandatory arbitration policies by attempting to compel an employee to arbitrate could result in a successful retaliatory employment arbitration action.¹⁹⁶ Under the Supreme Court's broad approach to retaliation in *White* and the Eleventh Circuit's analysis in *Goldsmith*, the central question for a retaliation claim

193. See Hinshaw, *supra* note 19.

194. See Green, *Reading Ricci*, *supra* note 5, at 370 n.12 (describing political difficulties that derailed the development of employment legislation during President Obama's first term); see also Rona Kaufman Kitchen, *Off-Balance: Obama and the Work-Family Agenda*, 16 EMP. RTS. & EMP. POL'Y 211, 269-70 (2012) (describing enforcement problems of the EEOC during President Obama's first term and suggesting this result stems from the EEOC being "stubbornly resistant to change according to presidential political affiliation"). But see Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 425-27, 434-35 (2010) (describing how the EEOC has acted more independently as a pro-employee agency due to initial efforts to limit its enforcement powers and suggesting that the EEOC has been more responsive to changes by pro-employee special interest groups than to opposing changes posed by presidents or Congress).

195. As described earlier, narrower legislation aimed at the specific type of disputes that may be banned from mandatory arbitration rather than attempts to amend the FAA have already successfully occurred pursuant to the Franken Amendment and the Dodd-Frank Act. See *supra* notes 192-194 and accompanying text.

196. See, e.g., *Weeks v. Harden*, 291 F.3d 1307, 1316-17 (11th Cir. 2002) (finding that there is no valid retaliation claim for an employer's efforts to pursue mandatory agreements to arbitrate, which the Supreme Court has endorsed as legal activity).

based on an employer's motion to compel is whether the action would deter a reasonable person from pursuing his or her right to file a charge of discrimination. Filing an EEOC charge would, of course, be useless if the employer could compel arbitration and remove the employee from the EEOC process. Hence, such an employer action would deter a reasonable employee from pursuing the EEOC process and therefore satisfies the *White* standard. The *Waffle House* decision refers to the importance of public interest vindication, and that public interest is harmed when employees are deterred from filing charges.

Employers may be left wondering what, if anything, they can do to prevent a retaliatory employment arbitration charge from being successful.¹⁹⁷ The answer to that question is quite straightforward. If a dispute involves a charge that could be filed with a public agency such as the EEOC or the NLRB, the employer needs to make sure that employees are not prohibited from or deterred from filing charges with those agencies or from participating in those agencies' actions as a result of the employer's arbitration policy. Also, the employer cannot attempt to force an employee to arbitrate the dispute when the agency is still involved in reviewing the matter or has brought a further action to enforce the charge.¹⁹⁸ If the agency has dismissed the charge and the employee is pursuing the matter independently, then the employer would have every right to compel arbitration without raising a concern about retaliation.¹⁹⁹

197. I thank Professor Catherine Fisk for suggesting that a response to the thesis in this Article may be that employers cannot be subject to retaliation for merely pursuing legal activity to enforce their valid mandatory arbitration agreements by seeking to compel arbitration. See *Bill Johnson Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (finding that a lawsuit filed cannot result in retaliatory action unless it is frivolous); *BE&K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 530–33 (2002). However, NLRB decisions have held that the *Bill Johnson* doctrine does not apply where the objective of the suit is illegal under federal law independent of its retaliatory intent. As a result, if the NLRB finds that a particular practice such as an overly broad mandatory arbitration policy is independently illegal under the NLRA, then an action to compel enforcement of that policy is an exception to *Bill Johnson* as noted in footnote 5 of that case. See *Bill Johnson*, 461 U.S. at 738 n.5 (finding no protection for a law suit that is “illegal under federal law”). This analysis was described recently by an ALJ decision applying *D.R. Horton*. See *Neiman Marcus Grp.*, No. 31-CA-074295, 2014 WL 495797 (NLRB Div. of Judges Feb. 6, 2014).

198. The NLRB has a policy of deferring disputes to be resolved through arbitration under its longstanding *Collyer* deferral policy. This policy would not affect the matters discussed here because, in such actions, the NLRB has decided to resolve the matter by deferring to arbitration instead of the employee being compelled to arbitrate to prevent the NLRB from pursuing the matter. This Article concerns the latter activity—retaliatory employment arbitration. Also, in 2012, the NLRB General Counsel changed the Board's approach to *Collyer* by first asking whether the dispute could be resolved within a year and deciding not to defer to arbitration if the matter would not be resolved within that timeframe. See Memorandum from Lafe E. Solomon, Acting Gen. Counsel, NLRB, to All Reg'l Directors, Officers-in-Charge, and Resident Officers, NLRB, Concerning *Collyer* Deferral Where Grievance-Resolution Process is Subject to Serious Delay, GC 12-01 (Jan. 20, 2012) available at http://www.crowell.com/files/GC_12_01_Guideline_Memorandum_Concerning_Collier_Deferral.docx [1].pdf.

199. See, e.g., *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 3–4 (1st Cir. 2005) (relying on *EEOC v. Waffle House*, 534 U.S. 279 (2002), to find that an employer has not waived its right to seek

*EEOC v. Ralph's Grocery Co.*²⁰⁰ is instructive with respect to developing the parameters of a retaliatory employment arbitration claim. In bringing such claims, employees and even the EEOC may benefit from pursuing the rationale employed by the EEOC in that case—and hence, employers would be wise to learn from it. Likewise, those seeking to bring such claims should frame their actions to be consistent with the concerns expressed in that case. Prior to that instant action in *Ralph's Grocery*, the employer had unsuccessfully sought in federal court to compel arbitration and enjoin a state human rights agency investigation of a discrimination charge filed by a former employee.²⁰¹ The employer also sought the same result in a state court and sent the employee a letter indicating that she had to withdraw her state agency discrimination charge because of the arbitration agreement.²⁰² She responded by filing a retaliation charge directly with the EEOC.²⁰³

Before the state court ruled, however, the EEOC moved in *Ralph's Grocery* to enjoin the state court from granting the employer's motion to compel and stay the investigation. The EEOC argued that a federal injunction was appropriate because the employer's actions would "interfere with an individual's right to file a charge" and "because such state court action is illegal retaliation that is contrary to public policy."²⁰⁴ The court accepted the EEOC's argument. It reasoned that the employer's state court action and motion to compel, which would ultimately stay the state agency's investigation (conducted in tandem with the EEOC), would create a "chilling effect on the many employees who . . . have a statutory right to file a charge with the EEOC or its sister state agencies."²⁰⁵

Tellingly, the EEOC took the position in *Ralph's Grocery* that the employer's state court injunction action and motion to compel arbitration was a form of retaliation against employees for exercising their right to file a charge.²⁰⁶ In accepting that contention, the court relied on *Waffle House* to assert that the agreement to arbitrate could not prohibit the employee from filing a charge with the EEOC or the equivalent state agency.²⁰⁷ After the

arbitration by waiting until after an EEOC charge has been dismissed and an employee has filed a court claim to be able to demand arbitration at that time).

200. 300 F. Supp. 2d 637 (N.D. Ill. 2004).

201. *Id.* at 639.

202. *Id.*

203. *Id.*

204. David L. Hudson, Jr., *Don't Stop Probes of Worker Complaints, EEOC Says, Two Courts Rule Arbitration Pact Can't Block Agencies' Investigations*, A.B.A. J. E-REPORT, Jan. 30, 2004 (discussing the results in both the state court and the federal court regarding *Ralph's Grocery's* action seeking an injunction of the state agency charge investigation).

205. *Ralph's*, 300 F. Supp. 2d. at 640.

206. Hudson, *supra* note 204.

207. *Id.*

state court injunction proceedings were enjoined, the EEOC filed a subsequent federal court action²⁰⁸ to pursue the retaliation charge. However, the parties settled pursuant to a consent decree.²⁰⁹ As a result, the case gives no dispositive authority on the viability of these claims.

Nevertheless, the terms of the consent decree lend support to the retaliatory employment arbitration theory.²¹⁰ It established an injunction against the employer and its employees for “retaliation against any person because such person has opposed any practice made unlawful under Title VII or the ADA, filed a charge . . . or coercing an employee who files a charge.”²¹¹ The employer agreed to “train employees on filing charges without retaliation and not use lawyers involved in creating its arbitration clause.”²¹² Finally, the employer could no longer “maintain an arbitration agreement that deters or interferes with employees’ right to file charges with the EEOC.”²¹³

The consent decree terms specified that the employer’s arbitration policy would have to provide specific language in “bold print as a separate paragraph in a font-size of at least twelve point” the following:

Nothing in this Agreement infringes on an Employee’s ability to file a charge or claim of discrimination with the U.S. Equal Employment Opportunity Commission or comparable state or local agencies. These agencies have the authority to carry out their statutory duties by investigating the charge, issuing a determination, filing a lawsuit in Federal or state court in their own name, or taking any other action authorized under these statutes. Employees retain the right to participate in such action.²¹⁴

As a result, the consent agreement terms highlight the importance of allowing the employee to participate in the EEOC’s process including court actions and suggest that employer efforts to compel arbitration to prevent the employee from participating would represent unlawful retaliation. The consent agreement terms from *Ralph’s Grocery*, as well as the way in which the courts in *White* and *Goldsmith* analyzed these issues, provides

208. See Defendant’s Memorandum in Support of Motion to Dismiss, or In the Alternative, to Stay the Case, *EEOC v. Ralph’s Grocery Co.*, No. 1:07CV05110, 2007 WL 5039322 (N.D. Ill. Nov. 9, 2007) (noting that the underlying charge was eventually dismissed by the state agency and addressing the charge of retaliation that the EEOC filed under the ADA and Title VII in response to the employer’s actions in contacting the employee to compel arbitration after the employee had filed the charge when the employer argued that enforcement of its arbitration policy justified its contact with the employee).

209. Consent Decree, *EEOC v. Ralph’s Grocery Co.*, No. 1:07CV05110 (N.D. Ill. May 22, 2008).

210. See Consent Decree, Ex. B, *EEOC v. Ralph’s Grocery*, No. 1:07CV05110 (N.D. Ill. May 5, 2008).

211. *Id.* at 2.

212. *Id.* at 5.

213. *Id.* at 6.

214. *Id.* at 12 (original bolding emphasis removed).

several takeaways for employers facing potential of retaliatory employment arbitration claims. First, employers should adopt clear language in their arbitration agreements to inform employees that the employer will not retaliate against employees for pursuit of EEOC enforcement, as in *Ralph's Grocery*. Second, once a dispute becomes known, the employer can offer arbitration as a voluntary recourse to the employee, rather than waiting for the employee to file an EEOC charge or waiting for an indication that the EEOC will be involved in the case. But, if the EEOC becomes involved, employers should refrain from moving to compel arbitration because it may lead to a retaliation charge—in addition to the underlying charge of discrimination. If employers act proactively, they can reduce their own liability potential while also respecting the rights of their employees and the EEOC under federal law. However, when employers attempt to force employees to arbitrate as a means to circumvent an agency's process, employees should be able to bring a successful claim of retaliatory employment arbitration.

Likewise, the NLRB's Administrative Law Judge ("ALJ") decision in *The Neiman Marcus, Group, Inc.*²¹⁵ is instructive with respect to actions that an employee may take to get the NLRB to respond to an employer's actions to compel arbitration. In *Neiman Marcus*, the ALJ, following *D.R. Horton*, found that an employer's mandatory arbitration policy violated the NLRA.²¹⁶ When the employee chose to file a class action lawsuit in state court against the employer, the employer responded by seeking to compel arbitration.²¹⁷ Because the NLRB had clearly held in *D.R. Horton* that an arbitration policy banning an employee from pursuing collective arbitration and also failing to make it clear that employees could file charges with the NLRB violates the NLRA in coercing employees in the exercise of their Section 7 rights,²¹⁸ the ALJ ordered as a remedy that the employer rescind its mandatory arbitration policy and cease and desist from attempting to enforce that policy by compelling arbitration in the state court proceeding.²¹⁹ In another recent ALJ decision in January 2014, the ALJ, in adhering to *D.R. Horton*, found that an employer's attempt to file a motion to compel arbitration in a state court proceeding violated the NLRA when

215. No. 31-CA-074295, 2014 WL 495797 (N.L.R.B. Div. of Judges Feb. 6, 2014) (decision by NLRB administrative law judge, Eleanor Laws, finding that an employer's attempt to compel enforcement of its mandatory arbitration policy in state court action brought by employee was an unfair labor practice and the judge ordered, among other things, that the employer cease and desist from seeking to enforce its mandatory arbitration policy).

216. *Id.*

217. *Id.*

218. *Id.* (citing *D.R. Horton*, 357 N.L.R.B. No. 184 (2012)).

219. *Id.*

based upon an arbitration agreement that was invalid for suggesting to employees that they could not file charges in *Leslie's Poolmart, Inc.*²²⁰

Although the *Ralph's Grocery* and *Neiman Marcus* cases reflect actions involving two different agencies, the EEOC and the NLRB, the teaching from these cases is that mandatory arbitration policies that chill employees from exercising their rights under Title VII and the NLRA by discouraging the filing of charges represents an ongoing challenge that employees may pursue. Further, to the extent that an employer attempts to force an employee to arbitrate the dispute when the agency involved is still processing the claim, the employee may pursue actions by filing retaliation charges with those agencies to stop the employer from forcing arbitration.

CONCLUSION

This Article highlights an important and still-developing aspect of the Supreme Court's *Waffle House* decision: the potential for retaliation by employers through compelling arbitration. The EEOC, as the agency charged with the enforcement of various statutory employment discrimination laws, must be allowed to pursue its statutory enforcement process regardless of whether the employee who filed the charge of discrimination had agreed to arbitrate her statutory discrimination claims. Although the EEOC rarely takes filed charges to litigation, the EEOC needs employees to file those charges to accomplish its enforcement objectives.

This Article proposes that once a charge is filed, any attempt to arbitrate should be tabled until the agency proceedings can proceed as expected pursuant to the statutes that created those agencies. If the EEOC dismisses the charge, then the employer may seek to compel arbitration consistent with the Court's FAA jurisprudence supporting the arbitration of statutory claims. But as the EEOC investigates and takes the case, employers who seek to compel arbitration should be deemed as retaliating against employees under the standard set by *White* as those actions dissuade employees from filing charges. In deterring the filing of charges, broader concerns materialize as legitimate charges that need to be brought to vindicate strong public interests will not be brought. Likewise, if the NLRB dismisses the matter or decides to defer to the arbitration process because it has determined that the arbitration policy involved does not violate the NLRA, then the employer may go forward with pursuing arbitration of the dispute.

Importantly, this Article's proposed role for the EEOC—of investigating and pursuing claims for retaliatory employment arbitration—comports with the Agency's goal as stated in *Waffle House*. The EEOC should not be limited in pursuing its statutory duties and must take every

220. No. 21-CA-102332, 2014 WL 204208 (NLRB Div. of Judges Jan. 17, 2014).

step to prevent employers from forcing arbitrations that will deter an employee from even filing a charge of discrimination with the EEOC. The EEOC can achieve this objective by pursuing retaliatory employment arbitration claims—whether that pursuit ends in cease-and-desist orders or full-blown litigation. Likewise, this Article’s proposed role for the NLRB—of continuing to expand upon the goals for managing the fair enforcement of mandatory arbitration policies within the boundaries of Section 7 activity and pursuing claims for retaliatory employment arbitration comports with the goals of NLRB decisions such as *U-Haul Co. of California*, *Bill’s Electric*, and *Supply Technologies* as they were highly publicized by *D.R. Horton*, should continue.

As discussed, the *Ralph’s Grocery* consent decree identifies certain parameters that employees and employers should consider before and after the filing of an EEOC charge when an agreement to arbitrate is involved. Employees may be able to circumvent the arbitration agreements if the employer fails to take safeguards to make sure that employees know that they can still pursue their EEOC charges despite agreements to arbitrate. Further, once the employee files a charge, any arbitration process should be delayed until a final EEOC action has occurred. Regardless, employers are still free to pursue enforcement of their mandatory arbitration agreements if the EEOC dismisses the charge. Also, as discussed, the *Neiman Marcus* administrative law judge decision suggests certain parameters that employees and employers should consider before and after the filing of an NLRB charge when an agreement to arbitrate is involved. Employer failure to make sure the employees are not coerced in pursuing charges or other concerted activity under the arbitration policy could open the door to a valid NLRB charge by an employee seeking to prevent enforcement of the arbitration policy. Further, once a charge has been filed or when an employer seeks to compel arbitration of the dispute in some other jurisdiction without any final approval by the NLRB, an employee may be able to obtain an NLRB order stopping the employer from attempting to compel arbitration.

When employers use arbitration policies that make employees reasonably believe that they cannot bring charges with an agency or when employers respond to employee charges or other actions by seeking to compel or force arbitration, these employer efforts result in retaliatory employment arbitration actions. The chilling effect from retaliatory employment arbitration efforts that deters or dissuades reasonable employees from filing charges represents an important public and agency interest that must be protected despite the ongoing judicial support for enforcing arbitration agreements. As part of a comprehensive approach to responding to forced arbitration agreements at the fiftieth anniversary of Title VII, employees should pursue claims through the EEOC and NLRB

agencies along with the courts to prevent employers from taking retaliatory employment arbitration actions while also continuing to seek narrowly-tailored legislative responses.