

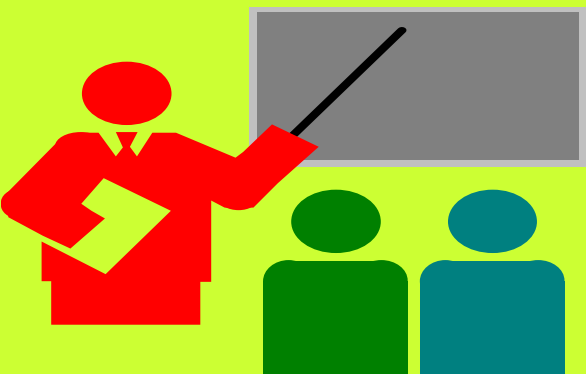
Third Annual Dispute Resolution Section Works in Progress Conference

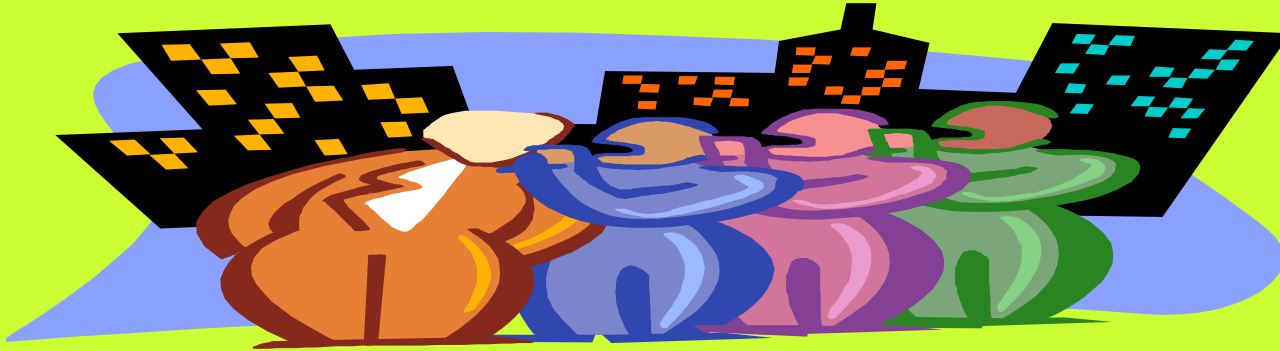
Harvard Law School

Cambridge, Massachusetts

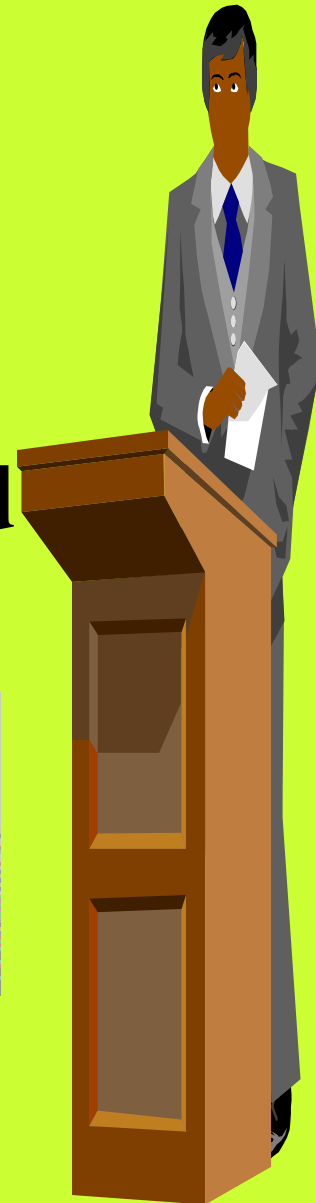
Friday, November 13, 2009

Saturday, November 14, 2009





Employment Discrimination After the Supreme Court's 2009 Term: A Retaliatory Check on Employers and the Arbitration Monster



Professor Michael Z. Green
Texas Wesleyan University

Employment Discrimination and Pre-Dispute Arbitration Merger: Viewed Under the Lens of Workplace Justice in 2010

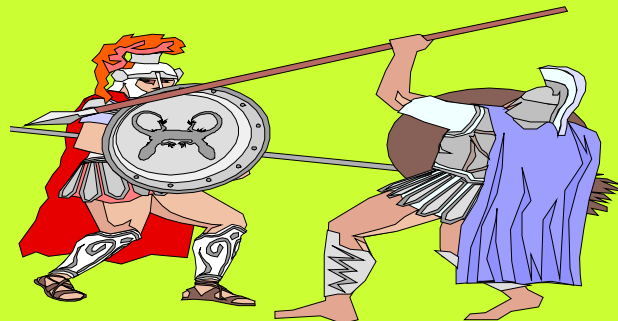


- **Is This Workplace Justice?**
 - The Supreme Court's expansive enforcement of pre-dispute agreements to arbitrate statutory discrimination claims as a condition of employment.
 - The Supreme Court's increasingly complex analysis of employment discrimination and the divisiveness involved in resolving these claims through the courts.
 - Should Congress regulate arbitration involving statutory discrimination claims and if so, what would that regulation look like?
 - Absent such legislation, any legal maneuvers left to provide checks and balances on arbitration gone wild with discrimination claims?

The Federal Arbitration Act (FAA) at 85 in 2010: Significant Judicial Amendment By Applying it to Statutory Employment Discrimination Claims Via Pre-Dispute Agreements to Arbitrate

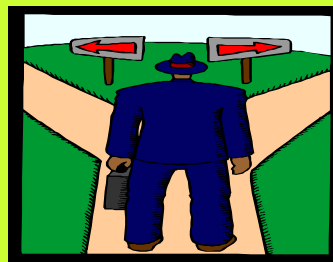
“When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship. In recent years, however, the Court ‘has effectively rewritten the statute’ and abandoned its earlier view that statutory claims were not appropriate subjects for arbitration.”

Dissent by Supreme Court Justice John Paul Stevens in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 42-43 (1991) (footnote omitted).



Chronology: FAA and Employment Discrimination Claims

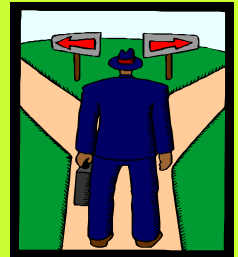
- 1925: FAA originally enacted, 43 Stat. 883.
- Reenacted and codified in 1947 as Title 9 of the United States Code.
- Purpose was to reverse longstanding judicial hostility to enforcement of arbitration agreements and allow merchants to use arbitration as a method to resolve their basic remedial claims.
- 1974: Alexander v. Gardner-Denver: arbitration of Title VII disputes under a collective bargaining agreement may not be compelled and claimant may still pursue statutory claim in court.



Chronology: FAA and Employment Discrimination Claims (Cont.)



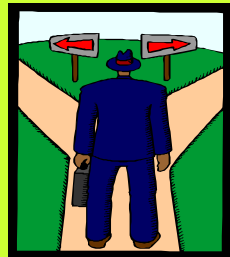
- Pre-1991: It is assumed from Gardner-Denver that statutory employment discrimination claims cannot be compelled to arbitration.
- 1991: Gilmer decision by the Supreme court opens the door to pre-dispute arbitration agreements for employment discrimination claims.
- 1991: Civil Rights Act of 1991 adds jury trial, compensatory/punitive damages up to \$300,000 for intentional discrimination with the assumption that private suits are still the primary mechanism for enforcement and while encouraging the use of ADR without distinguishing pre versus post dispute.
- 1997: EEOC issues policy statement critical of using mandatory arbitration to resolve statutory employment discrimination claims.



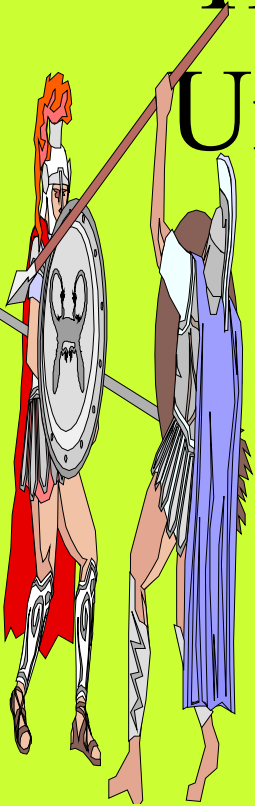
Chronology: FAA and Employment Discrimination Claims (Cont.)



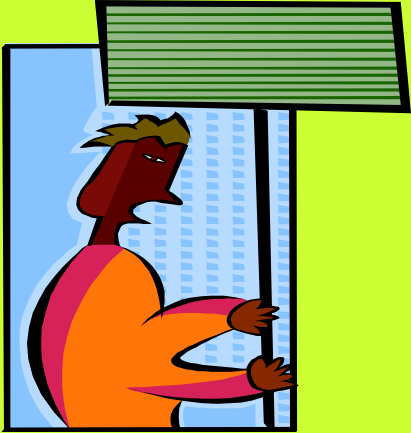
- 1998: In Wright v. Universal the Supreme Court finds a difference between Gilmer and Gardner-Denver by requiring a clear and unmistakable waiver to compel arbitration in the union setting.
- 2001: In Circuit City v. Adams, the Supreme Court adopts broad application of FAA to employment disputes narrowly reads exclusion for contracts of employment.
- 2002: In EEOC v. Waffle House, the Supreme Court finds that the EEOC may still pursue all forms of statutory relief in court even if individual employees have agreed to arbitrate.
- 2009: In 14 Penn Plaza v. Pyett, the Supreme Court identifies a clear and unmistakable waiver in the union setting and compels arbitration for the first time.



How Mandatory Arbitration in the Union Setting Worked Before *Pyett*



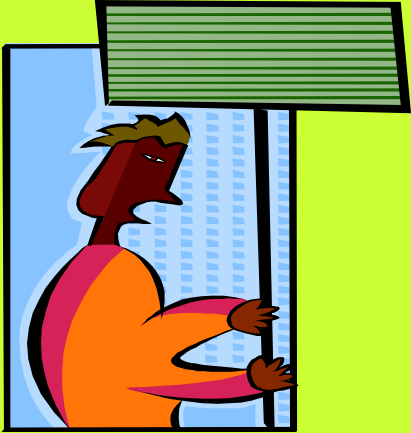
- **Anomalous Result:** Individual employees with no bargaining power can be compelled to arbitrate through agreements with employers as adhesion agreements; whereas, unionized employees represented by a union with tremendous bargaining power may not be compelled to arbitrate at all or at least absent clear and unmistakable waivers.



Wright v. Universal



- **Must an employee represented by a union with a collective bargaining agreement encompassing a grievance and arbitration procedure file an employment discrimination claim in arbitration instead of the courts?**
- **Answer: Possibly, but the union must obtain a clear and unmistakable waiver to preclude individual employees from pursuing their statutory rights, the individual employees may still seek statutory relief in courts. But the court punted on what such a waiver would look like. Just not present here.**



Wright v. Universal



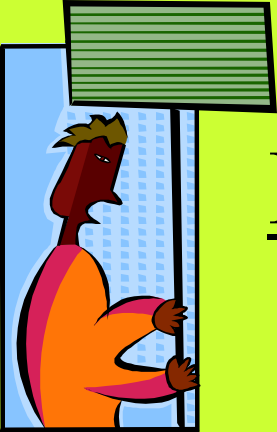
- With Unions' bargaining power, is it unlikely to see such a clear and unmistakable waiver?
- **Gardner-Denver:** A union and employer cannot agree in a CBA to a prospective/future waiver of employees' statutory rights pursuant to Title VII.
- **Wright:** "whether or not *Gardner-Denver's* seemingly absolute prohibition on union waiver of employees' forum rights survives *Gilmer*, *Gardner-Denver* at least stands for the proposition that the right to a...judicial forum [must] be protected against less-than-explicit union waiver in a CBA."¹⁰
Is this conflicting language?




ALPA v. Northwest Airlines



- **ALPA v. Northwest Airlines: “clear rule of law emerging from [Gardner-Denver] and Gilmer: Unless Congress has precluded his doing so, an individual may prospectively waive his statutory right to a judicial forum, but his union may not.”**
- **If the union cannot waive it, then it can’t bargain about it .**
- **If it can’t bargain about it, then it is not a mandatory subject and employers may unilaterally seek Gilmer agreements with individual employees even if represented by a union.**
- **Key Concern: addressing the merger of labor law and employment discrimination law via union arbitration of statutory discrimination claims.**



Is ALPA v. Northwest Airlines Correctly Decided?



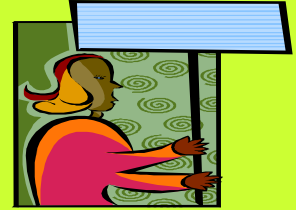
- **Yes: A Union should never be able to waive statutory rights of an individual.**
 - Protects individual from sweetheart and discriminatory CBA deals.
 - Protects the union which may now have a heavy burden in providing representation for all statutory claims in conflict with its duty of fair representation or issues pitting member v. member. *Alleyne*
- **No: Clearly involves working conditions of employees and allows the employer to circumvent the union and unilaterally obtain *Gilmer*-type agreements in a union setting through direct dealing with individuals.**
 - Applies only to RLA? Concerted activity -NLRA ?



After Wright v. Universal

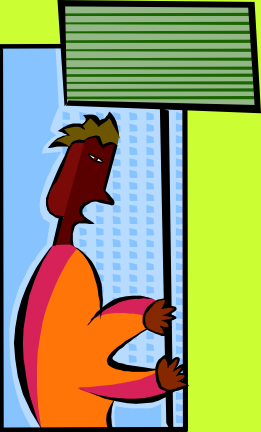


- Most courts (except 4th Cir. Safrit) found that some antidiscrimination language in CBAs does not constitute clear and unmistakable waiver.
- 2nd Circuit had suggested two requirements must exist for a clear and unmistakable waiver:
 - 1) the CBA contains a provision whereby employees specifically agree to submit all federal causes of action arising out of employment to arbitration, or
 - 2) the CBA contains language explicitly incorporating the statutory anti-discrimination laws into the agreement to arbitrate. Rogers.
- The question of whether waivers may occur at all was still unanswered despite what *Wright* may have forecasted.




14 Penn Plaza v. Pyett

- In 2007, the 2nd Circuit found in *Pyett* that a union may never waive an employee's right to pursue a statutory employment discrimination claim following the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver*.
- In a reversal of that decision issued by Justice Clarence Thomas on April 1, 2009, the Supreme Court stated:
“We hold that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate [statutory age discrimination] claims is enforceable as a matter of law.”
- The Court rejected as dicta any readings of Gardner-Denver that suggested no prospective waivers.



2009 Supreme Court Term: Penn Plaza v. Pyett (5 to 4)



- Language in the CBA: “There shall be no discrimination against any present or future employee by reason of race, creed, age, disability, national origin, sex, union membership, or any characteristic protected by law, including but not limited to claims made pursuant to Title VII of the Civil Rights Act, ... or other similar laws. All such claims shall be subject to the grievance and arbitration procedures ... as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.”



14 Penn Plaza v. Pyett



- Is this a clear and unmistakable waiver of the individual employees' statutory rights to pursue the claims in court? YES, according to the Court, and language.
- I'm still not there yet. Because the language does not address the Union's ability under its discretionary duty of fair representation (DFR) to pursue some claims but not all to arbitration as long as not acting arbitrary or capricious.
- Must address some opportunity for the employee to still be able to vindicate statutory rights if the union uses its DFR to decide not to arbitrate.
- Can't be unilaterally required by employer.



14 Penn Plaza v. Pyett



- Many questions remain for parties in a union setting to to resolve before arbitrating discrimination claims:
 - Will employers seek to bargain about these waivers?
 - How will courts deal with this issue if the union chooses not to pursue the statutory claim within the scope of its DFR obligations?
 - Will employees be able to effectively vindicate their rights given different processes (short time to file grievance versus statute of limitations; arbitrator's ability to fashion remedies versus statutory remedies; arbitrator's difficulties in applying or understanding the law versus no effective means of appeal)
 - Are these waivers a mandatory subject of bargaining and if so may an employer insist to impasse and unilaterally impose?

Alexander Employment Discrimination Arbitrations After *Wright*?



- **William Gould, former NLRB Chairman, current law professor and labor and employment arbitrator, has argued that *Alexander* type arbitrations should mesh employment discrimination claims with CBA union-based labor arbitration. *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 *Emory L.J.* 609 (2006).**
- **Gould asserted that the problem with *Wright* was that the focus should not be on the language but on the skills and abilities of the arbitrators to handle statutory discrimination disputes and in doing so,¹⁸ more judicial review should be allowed.**

Alexander Employment

Discrimination Arbitrations

- Gould referred to his involvement in two pre-*Alexander* arbitrations under a special procedure:
 - The Union represented the Grievant
 - The Grievant was also represented by counsel of choosing because of statutory Title VII claims.
 - Arbitrator given same authority as a federal judge.
- Gould's suggestion is consistent with what I have suggested about having unions provide independent representation for employees in discrimination claims.
- Two Supreme Court cases involving CBA and statutory discrimination claims suggest opportunities: *Wright* and retaliation case *Burlington Northern v. White*. Unions wanted the employees to pursue statutory claims.
- Recent *Pyett* case also shows that unions are punting on these issues and suggesting that employees bring court claims when court resolution options appear dismal.



Other 2009 Term 5 to 4 Decisions Involving Employment Discrimination Highlight the Complexities Involved in Resolving These Disputes



- In Gross v. FBL Financial Services, Inc., the Court found that age discrimination plaintiffs have the burden to prove discrimination and that burden never shifts to the employer even when mixed motive has been established. The Court took the unusual step of answering a question not originally asked when granting certiorari and created a distinction in how proof works in age discrimination versus Title VII claims.**
- In Ricci v. DeStefano, the Court found that firefighters who were not certified for promotion based upon test results had been subjected to intentional discrimination despite the purported concerns of the employer that the test created a disparate impact for its minority employees. The Court took the unusual step of creating a new test based on constitutional law to determine whether the employer acted appropriately and then reversed the lower court's finding for the employer and ruled in favor of the plaintiffs without a remand.**
- Such decisions suggest complications for arbitrators in understanding how to apply discrimination law.**



Employment Discrimination and Pre-Dispute Arbitration 2010: A Hail Storm of Criticism and No Congressional Response in Nineteen Years



- **Royal Criticism of Pre-Dispute Arbitration Still Exists:**

- Just reached the twelve year anniversary of the EEOC's Critical Policy Statement on Mandatory Arbitration from July 1997.
- *Most* scholarly analysis remains very critical of pre-dispute agreements to arbitrate as being unfairly adopted by excessive use of employer bargaining power to prevent court adjudication at a time when Congress had just authorized jury trials, compensatory and punitive damage claims for employment discrimination claimants.
- Supreme Court expands while Congress fiddles and eighty five year FAA anniversary looms.



Employment Discrimination and Pre-Dispute Arbitration 2010: Congress Sleeps While Major Pressing Issues Continue



- **Many Congressional Attempts to Address the Arbitration Monster the Supreme Court has Created By Enforcing Pre-Dispute Agreements to Arbitrate Under the FAA Have Failed Miserably Since 1991**
 - **Some legislation has passed involving armed forces members that banned their pre-dispute agreements to arbitrate.**
 - **Many FAA arbitration bills in Congress have just languished for years.**
- **Many Issues Still Need to Be Addressed Including:**
 - **How do unions play a role in employment discrimination arbitration after *Pyett*?**
 - **What would be a fair process to select arbitrators for employment discrimination matters that addresses the lack of Batson-type protection?**
 - **Who pays for the costs of arbitration and arbitrator fees?**
 - **How do employment discrimination class actions work with arbitration?**

Query Whether Congress is Finally Ready to Take Action: The Arbitration Fairness Act (AFA) of 2009 as a Response to Soothe the Savage Mandatory Arbitration Beast

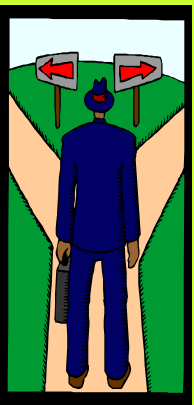


- The AFA would address current concerns about pre-dispute agreements to arbitrate statutory employment discrimination claims by making these agreements unenforceable.
- H.R. 1020 introduced in the House on February 10, 2009 before *Pyett* excludes a CBA from coverage.
- Later S. 931, introduced in the Senate in May 2009 responds to ban *Pyett* agreements, too.
- If passed, will arbitration of employment discrimination disputes come to a halt?

Absent Congressional Action, the Ongoing Role of Arbitration in Employment Discrimination is Subject to Drastic Change and Diminishment

- Mediation is becoming much more of a preferred tool for employers after little regulation by courts, service providers and Congress during arbitration's growth.
- For arbitration to have any long term potential in resolving employment discrimination disputes, some legislative action would help but politics may prevent any action.
- Given the difficulties presented by the court system and the inability of mediation to be the cure-all it is purported to be, efforts to make arbitration amenable to employers and employees should be explored beyond just legislative actions that may never occur or may have a harsher impact on the use of arbitration as a whole.





Using Key Supreme Court Employment Discrimination Law Decisions to Foster Fair Arbitration and as a Retaliatory Check

- **EEOC v. Waffle House and the Power of the EEOC.**
- **Burlington v. White and the Power of retaliation claims.**
- **Most recent decision in Crawford v. Metropolitan Gov't Nashville and Davidson Cty also highlights how the current Supreme Court is willing to expand the scope of protections available through retaliation claim analysis.**



EEOC v. Waffle House



- Can the EEOC seek both legal and equitable victim-specific relief against an employer in court for an individual under Title VII when there was a mandatory arbitration agreement?
- Yes. Even though individuals have signed agreements to arbitrate, the EEOC is seeking to vindicate the broader public interest through its enforcement action authority and may seek full relief in court as the EEOC did not agree to arbitrate.
- Court leaves consequences of prior adjudication in arbitration open by saying “ordinary principles of res judicata, [and] mootness” may still apply.
- Consequences: Mandatory arbitration agreements are not full-proof. But, chances EEOC will take the case are not high either. Nearly seven years after *Waffle House*, it is still not clear what the EEOC’s policy on mandatory arbitration enforcement is.

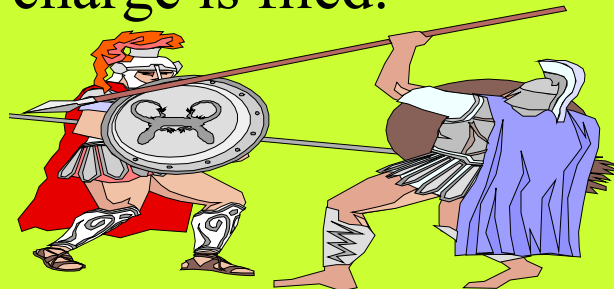


EEOC Arbitration Power: Osmosis, Inaction and Informality

- In 2004, the EEOC acknowledged it was evaluating its 1997 arbitration policy critical of mandatory arbitration which was still “technically in effect” but there was a “lot of confusion” at the EEOC about its application after June 18 settlement of Luce, Forward.
- By not addressing its 1997 arbitration policy after landmark decisions including a 2001 decision in Circuit City v. Adams and the 2002 EEOC v. Waffle House decision, it has been left to the parties to develop haphazard approaches through the courts.
- Congress has not successfully passed legislation to provide clarity.
- Neutral service providers have acted as best they can without any real regulation or guidance.
- Congressional inaction highlights political difficulties that may have played a critical role in the EEOC not taking any formal action.
- Thus, the EEOC has taken a hit and miss approach in some lawsuits where they either raised or supported the position that mandatory arbitration agreements should not be enforced.

Hit and Miss Approaches of the EEOC to Addressing Mandatory Arbitration Via Litigation

- After *Waffle House*, Employers appear to have taken notice of the res judicata language (dicta?) in the case by responding to subsequent cases that involve EEOC action or potential action by seeking to prevent individual claimants from joining the EEOC suit and instead compelling them to arbitrate.
- Several EEOC cases since *Waffle House* have involved challenges to still compel arbitration by individuals regardless of the EEOC's efforts to pursue the case. See, e.g., EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C. (N.Y.); EEOC v. Woodmen of the World Life (Neb.); EEOC v. Ralph's (Ill.); and EEOC v. Physician Services (Ky.).
- But the EEOC's policy is unclear. Just pursue the right to still proceed under *Waffle House* or challenge efforts to compel individuals to arbitrate after charge is filed.



Burlington Northern v. White (2006):

Expands and Opens the Door to Retaliation Claims

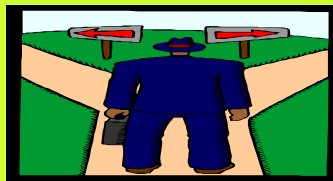


- In evaluating retaliation claims, “context matters” as stated by Justice Breyer.
- The plaintiff must show that the employer’s retaliatory action was “materially adverse” and that it would have “dissuaded a reasonable person from making or supporting a charge of discrimination.”
- The focus is on the “materiality of the challenged action and the perspective of a reasonable person in the plaintiff’s position.”
- Materially adverse analysis is not limited to materially adverse changes in terms and conditions of employment.
- Instead the question is whether the retaliatory action would be materially adverse to a reasonable employee.
- This standard does not focus on whether the employee actually received an adverse change in conditions of employment, i.e., termination, demotion, reassignment, etc.



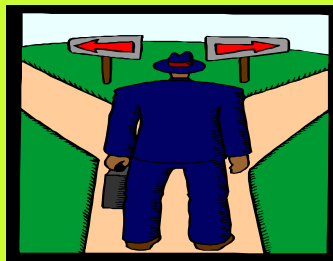
Intersecting *White* and *Waffle House* Leads to the Development of a Viable Claim of Retaliation When Employers Try to Compel Arbitration After An Employee Files A Charge

- Bd of Governors, 7th Circuit found it retaliation when agreement to arbitrate prohibits filing of EEOC charges because arbitration is required.
- Luce, Howard, the EEOC had alleged in a 9th Circuit case that it was retaliation when a law firm denied employment to the plaintiff who refused to sign an arbitration agreement. The 9th Circuit remanded it back to the district court allowing the EEOC to pursue its “novel theory” which had not been developed on appeal. But the EEOC settled the case on June 18, 2004.
- Now after *White*, one can ask would the act of attempting to compel arbitration deter a reasonable person from pursuing their right to file a discrimination charge? By compelling arbitration as a response to EEOC charge filing, wouldn't that deter a reasonable person from filing a discrimination charge with the belief that filing such a charge would be useless if the employer can just compel arbitration?
- *Waffle House* talks about the importance of public interest vindication.
- That public interest would be harmed if employees are deterred from filing charges.



A Lower Court Example: EEOC v. Ralph's Consent Decree Entered 2008

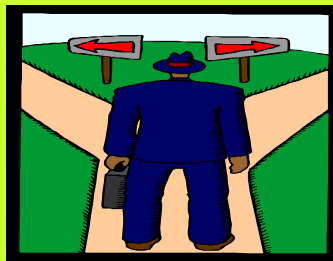
- Doris Martinez employed Dec. 2002-Feb. 2003.
- At hire, she signed arbitration agreement.
- After being terminated Feb. 25, 2003, she filed a discrimination charge with Illinois Department of Human Rights (IDHR) which was jointly filed with the EEOC.
- Ralph's petitioned in federal court and then in state court to stay IDHR process and compel arbitration.
- EEOC moved to enjoin Ralph's petition based primarily on *Waffle House* finding of the EEOC need to vindicate public interest and “chilling effect on other employees” if Ralph's could prevent EEOC's investigation and the motion was granted.



EEOC v. Ralph's

Consent Decree Entered May 22, 2008

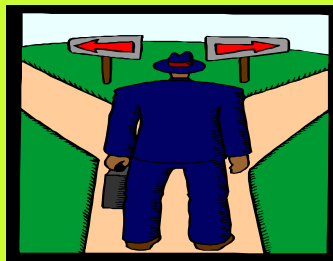
- Martinez filed two more charges in June 2003 and September 2003 alleging now that Ralph's had retaliated against her by trying to compel her to arbitrate after filing her discrimination charge and by petitioning the IDHR to cease its process..
- In granting the injunction preventing Ralph's efforts to compel arbitration and cease the IDHR investigation, the court focused on the chilling effect and the meaningless that filings would have for other employees who are covered by arbitration agreements.
- So can Ralph's efforts to compel arbitration as an end-run to prevent the EEOC from pursuing the matter under *Waffle House* represent a valid claim of retaliation under Title VII.
- We don't ultimately know because Ralph's settled.

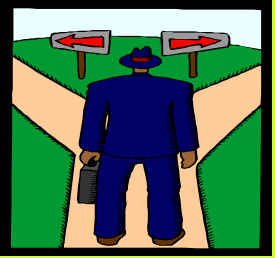


EEOC v. Ralph's

Consent Decree Entered May 22, 2008

- But the terms of the consent decree are quite interesting:
- The EEOC alleged that Ralph's retaliatory acts were:
 - “sending Martinez a threatening letter and filing suit against her in both federal and state court claiming that her filing of a charge...violated Defendant's mandatory arbitration policy.”
 - “as to a class of employees...maintaining a mandatory arbitration policy that interfered with the right of employees to file charges of discrimination.”
- Ralph's denied the allegations.





EEOC v. Ralph's

Consent Decree Entered May 22, 2008

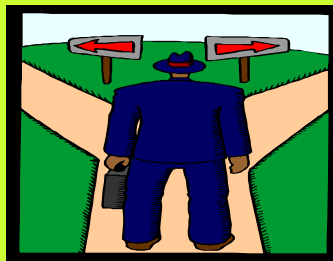


- But the consent decree establishes an injunction against Ralph's and its employees for "retaliation against any person because such person has opposed any practice made unlawful under Title VII or the ADA, filed a charge ... or coercing an employee who files a charge."
- Ralph's has to pay Martinez \$70,000.
- Ralph's must train employees on filing charges without retaliation and not use lawyers involved in creating arbitration clause.
- "Ralph's...shall not maintain an arbitration agreement that deters or interferes with employees' right to file charges with the EEOC...."
- Finally Ralph's must modify its mandatory arbitration policy as follows:

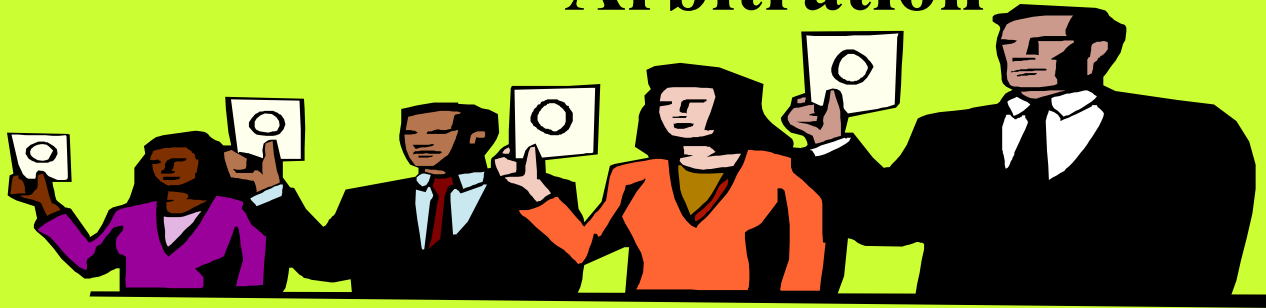
EEOC v. Ralph's

Consent Decree Entered May 22, 2008

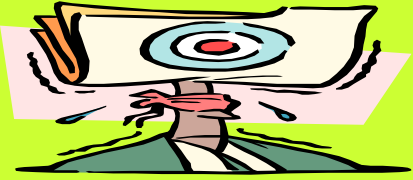
- New required language in bold to be inserted into mandatory arbitration policy agreement: **“Nothing in this Agreement infringes on an employee’s ability to file a charge or claim of discrimination with the U.S. Equal Employment Opportunity Commission or comparable state or local agencies. These agencies 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.*”** [italics added].



The Legal Solution – Addressing Retaliatory Actions Through Employer Efforts to Compel Arbitration



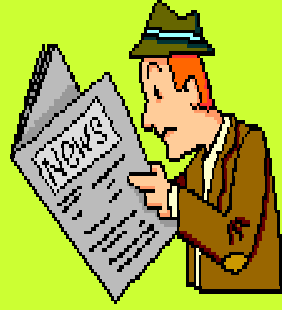
- Agreements to arbitrate should have language banning retaliation as in *Ralph's*.
- Once dispute becomes known, employer should offer arbitration rather than waiting for EEOC charge to be filed and certainly before any indications that the EEOC is going to pursue the case.
- If EEOC still in the picture, employer should not pursue compelling individual arbitration.



CONCLUSION



- Pre-dispute arbitration, as a substitute for court, should not deter employees from filing charges of employment discrimination or else it will be unlawful retaliation.
- If the EEOC was unclear about its approach before *White*, the merger of principles from *White* and *Waffle House* suggest a clearer approach rather than an informal, ambiguous EEOC approach to enforcement of mandatory arbitration agreements.
- If arbitration is to maintain any value as a dispute resolution tool for statutory employment discrimination disputes, employers should seek to use it as soon as possible rather than a shield to an EEOC-driven action.
- Using retaliation as a check and balance to the arbitration monster may provide a win-win result for all involved.³⁷



For Additional Background

- “EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment” (July 10, 1997) available at www.eeoc.gov/policy/docs/mandarb.html
- William B. Gould, IV, “Kissing Cousins: The Federal Arbitration Act and Modern Labor Arbitration,” 55 Emory L.J. 609 (2006).
- “Leslie A. Gordon, “Clause for Alarm, As Arbitration Costs Rise, In-House Counsel Turn to Mediation or a Combined Approach,” 92 ABA J. 19 (Nov. 20006).
- Mary S. Diemer, ‘Profession Looks for Alternatives to Arbitration, Judicial Reference and Collaborative Law Gain Favor,’ 32 Litig. News 6 (Nov. 2006).
- EEOC Considers Policy Change, 58 Disp Resol. J. 6 (Aug.-Oct. 2003).
- EEOC Contravenes Policy, Allows Law Firm to Continue Mandatory Arbitration Plan, 73 U.S. L. W. (BNA) 2043-44 (July 20, 2004).
- See generally David L. Hudson, 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, (Fri. Jan. 30, 2004).



The End

