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IN THE SUPREME COURT OF THE UNITED STATES

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EQUAL EMPLOYMENT OPPORTUNITY :
COMMISSION, :
Petitioner :
v. : No. 99-1823
WAFFLE HOUSE, INC. :
- - - - -X

Washington, D.C.
Wednesday, October 10, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Petitioner.
DAVID L. GORDON, ESQ., Atlanta, Georgia; on behalf of the
Respondent.

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2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 99-1823, Equal Employment Opportunity
5 Commission v. Waffle House, Inc.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Mr. Chief Justice, and may it
10 please the Court:

11 Respondent Waffle House and Eric Baker agreed to
12 arbitrate rather than litigate disputes between them.
13 That agreement precludes Waffle House and Baker from
14 having an action take place between them in court. But
15 the EEOC was not a party to that agreement. Accordingly,
16 the agreement does not preclude the EEOC's ability to
17 bring a public enforcement action against Waffle House,
18 nor does it limit the remedies available to the EEOC in
19 such an action.

20 Title VII gives the EEOC a public enforcement
21 action that's independent of and, in many respects,
22 superior to the individual employee's cause of action.

23 QUESTION: Mr. Clement, suppose the individual
24 employee had settled with the employer, not just an
25 agreement to arbitrate, but there had been a complete

1 settlement. They said, you know, in exchange for so much
2 money, I waive any cause of action I had. Would the
3 Government still has -- have a cause of action for
4 damages?

5 MR. CLEMENT: We believe the Government would
6 still have a cause of action in that case, though we admit
7 it would be a much more difficult case.

8 QUESTION: Wow.

9 MR. CLEMENT: Because in the case of settlement,
10 of course, judicial or arbitral resources have already
11 been expended. There's an agreement of the parties that
12 specifically extinguishes the individual's right --

13 QUESTION: What are the damages? The Government
14 gets damages that have already been paid to the individual
15 to -- I don't understand. And these damages go to the
16 individual?

17 MR. CLEMENT: The -- the damages could go to the
18 individual. I think, to give you an example of the kind
19 of case --

20 QUESTION: So, if he'd settle and get the
21 damages, and then -- and then he'd get additional damages
22 recovered for him by the EEOC.

23 MR. CLEMENT: That's right. But let me give you
24 an example of the kind of case we have in mind, and it may
25 help illustrate why the Government thinks it still may

1 have a cause of action in that situation.

2 If you can imagine a case where an employer has
3 retaliated against an employee and -- simply for filing a
4 charge with the EEOC, and then that employee settles that
5 retaliation claim for a nominal amount of money, without
6 any judicial supervision, let's say, it may be that in
7 that kind of case, the EEOC has a legitimate public
8 interest in, nonetheless, bringing an action, getting some
9 additional amount of damages to really take the
10 employer --

11 QUESTION: Well, but that's -- that's a separate
12 wrong. I don't know if that's a really fair answer to
13 Justice Scalia's question. If there's retaliation, I -- I
14 would think that's a separate component.

15 But just suppose a case with no retaliation.
16 The -- the employee recovers \$10,000 and then the EEOC can
17 recover \$20,000 more?

18 MR. CLEMENT: Well, in a case like that, I'm
19 sure as a matter of its prosecutorial discretion, the EEOC
20 would not bring that case.

21 QUESTION: Well, let's say the prosecutor
22 doesn't exercise his discretion that way that day.

23 MR. CLEMENT: Well, in that case I think they
24 would have cause of action.

25 But again, I want to make clear that we think

1 that's --

2 QUESTION: And what -- and what happens --

3 MR. CLEMENT: -- a much more difficult case.

4 QUESTION: What would happen -- what would
5 happen if the employee recovered \$10,000 in the
6 arbitration, then only \$5,000 in the litigation? Does he
7 have to give \$5,000 back?

8 MR. CLEMENT: I don't think that would follow.

9 But again, I want to make clear that's a much
10 more difficult case because there there's been --

11 QUESTION: Well, but -- but we're asking what
12 the -- what the logical consequences of -- of your
13 position are, and that's why we're putting the more
14 difficult case so we can test the general proposition.
15 And the general proposition, it seems to me, has to
16 withstand some analysis under these more difficult
17 instances.

18 MR. CLEMENT: Well, let me do -- let me make two
19 responses. One, let me try one more time to defend the
20 general principle, which is simply that Congress in Title
21 VII gave the EEOC a distinct cause of action, and so the
22 extinguishment of the individual employee's cause of
23 action shouldn't automatically extinguish the EEOC's cause
24 of action.

25 But let me hone in on why I think that's so much

1 more of a difficult case because in that case, the
2 individuals settled their claim, so they have no claim to
3 damages in an arbitration proceeding. And so, it might
4 make some sense to say that the EEOC has no claim to
5 damages in a litigation proceeding.

6 What is so anomalous about the decision below
7 and the rule that respondent seeks in this case is that it
8 seeks to limit the EEOC's ability to get victim-specific
9 remedies in court even though those victim-specific
10 remedies are available to the employee in the arbitration.
11 All of the cases that respondent cites --

12 QUESTION: Well, here we have a case where the
13 employee did not settle, but we were really discussing
14 with you the possibility not presented in this case of a
15 full settlement or a judgment in arbitration, disposing of
16 the victim-specific relief, and asking you why then should
17 EEOC continue to have a cause of action for the victim-
18 specific relief, as opposed to broad injunctive relief, to
19 address the overall problem.

20 MR. CLEMENT: And I guess I do think there are
21 two reasons why they would still have a cause of action in
22 that situation. One is that Title VII does give the EEOC
23 an independent cause of action. It's quite a remarkable
24 statute in that respect. It's unlike statutes this Court
25 has analyzed in, say, the Newport News Shipbuilder case

1 where it specifically contrasted Title VII as being the
2 rare statute that gives the EEOC a duplicative cause of
3 action to the individual.

4 The second reason, though, is that generally, as
5 a matter of privity, res judicata principles, the reason
6 that you hold one party in --in -- to a judgment that they
7 didn't participate in to the consequences of that is
8 because the party in the first action adequately
9 represented the interests of the party that wasn't
10 present. I --

11 QUESTION: Well, why did the EEOC decide to get
12 into this case? Is there some sort of a pattern or
13 practice involved that goes beyond this individual
14 establishment?

15 MR. CLEMENT: My understanding is that the EEOC
16 picked this case because this case -- the events here took
17 place in 1994. So, the ADA was still quite new at the
18 time that this -- that this case took place, and I think
19 the EEOC was concerned that employers were not sure of
20 what their obligations under the ADA were. So, they
21 picked this case to litigate to help establish what
22 employers' obligations were under the EEOC --

23 QUESTION: This is -- this is not any broad
24 pattern or practice. This is simply honing in on an
25 individual case?

1 MR. CLEMENT: That's fair enough. But again,
2 Congress has specifically allowed the EEOC to use its
3 modest litigation resources to vindicate the public
4 interest both in pattern and practice cases or cases that
5 seek injunctive relief and victim-specific cases where
6 there's some aspect of the case that helps illustrate an
7 important principle of law.

8 QUESTION: Mr. --

9 QUESTION: Mr. Clement, may I ask you to back up
10 on how we would get to the point of having a settlement
11 after -- or an arbitral determination? I thought when the
12 EEOC sues, then the individual has no right to come to
13 court, that EEOC would be the exclusive litigator. And
14 so, I think it's clear that the -- the individual employee
15 couldn't bring a suit, a rival suit, in -- in court.

16 Doesn't that extend to arbitration as well? I
17 thought that the -- giving the primacy to the EEOC meant
18 it would control this entire claim in all of its aspects,
19 but you answered the question as though, even though the
20 EEOC had filed, the employee could go on on a separate
21 track.

22 MR. CLEMENT: Well, I had taken the import of
23 the hypothetical as being that the individual had already
24 sued and settled and then, only after that had taken
25 place, that the EEOC decided to initiate a duplicative

1 action.

2 But your question certainly highlights the
3 anomaly of having this predispute arbitration agreement --

4 QUESTION: Can the individual bring a suit? I
5 mean, is the -- within the 180 days, doesn't EEOC have
6 total control?

7 MR. CLEMENT: That's absolutely right. The
8 statute gives the EEOC the exclusive right to initiate a
9 cause of action for the first 180 days and then, for an
10 extended period, until a right to sue letter issues.

11 And that's why in light of the -- the
12 congressional determination that -- that EEOC had not only
13 a different action, but one that took primacy, that they
14 had the right to initiate the action once they found that
15 there was a determination that the suit would serve the
16 public interest, it seems particularly --

17 QUESTION: Once they -- once they do initiate
18 the action, though, the individual cannot also bring an
19 action. Right? So, what you're saying is that the --
20 that the EEOC suit is independent of the individuals, but
21 somehow the individual suit is not independent of the
22 EEOC's.

23 MR. CLEMENT: Well, allow -- allow me to make
24 two responses. One is it's clear that under the ADA and
25 Title VII, it's not that the EEOC's filing of a suit

1 simply extinguishes the individual's cause of action
2 entirely. They -- the individual has a absolute right to
3 intervene in the EEOC's action. So, if those actions were
4 100 percent duplicative, there would be no need to allow
5 the individual to intervene in the suit.

6 QUESTION: Exactly. I -- I don't know why you
7 think that cuts in your favor rather than against you. It
8 seems to me the whole structure of the thing indicates
9 that there's one cause of action. It can be brought by
10 the EEC or by the individual, but not by both.

11 MR. CLEMENT: I mean --

12 QUESTION: Not by both successfully, anyway.

13 MR. CLEMENT: I respectfully disagree because,
14 unlike the ADA, the ADA does not make the EEOC suit the
15 exclusive vehicle and extinguish any cause of action or
16 any basis to get into court for the individual. They can
17 still intervene in the EEOC's action.

18 QUESTION: So, you're saying that if the EEOC
19 brings an action in circumstances such as this, an
20 individual who has agreed to arbitrate the claim can
21 intervene and not be bound? The individual is not bound
22 by the arbitration agreement?

23 MR. CLEMENT: No, we do not take that position.
24 To the contrary, we think that the arbitration agreement
25 does preclude in this case Mr. Baker from intervening in

1 the EEOC's action. And I think that's quite a persuasive
2 answer to the argument that the other side has made that
3 somehow allowing the EEOC to sue in these circumstances
4 renders the arbitration agreement a dead letter. It
5 doesn't.

6 QUESTION: It's a very strange use of the
7 Article III courts to have litigation proceeding in which
8 one of the real parties in interest is not permitted to
9 intervene. That --

10 MR. CLEMENT: Well --

11 QUESTION: -- that strikes me as a -- a
12 distortion of the whole case in controversy rule.

13 MR. CLEMENT: It may be, but I think that is the
14 consequence of the arbitration agreement and the
15 implication of the FAA.

16 QUESTION: Well, if it is a distortion of the
17 case in controversy rule, then we're in real trouble,
18 aren't we?

19 MR. CLEMENT: Well, even if you disagree with me
20 on -- on that particular point and you say that the FAA
21 does not prevent Baker from intervening on this action,
22 it's still true that the arbitration agreement is -- has a
23 meaningful benefit to Waffle House because before Waffle
24 House entered that arbitration agreement with Baker, it
25 was subject to a suit in court by either the EEOC or

1 Baker. The agreement with Baker limited Baker to an
2 arbitral forum. But absent a similar agreement with the
3 EEOC, Waffle House has simply no expectation and no basis
4 to keep the EEOC out of court or to limit its remedies in
5 court.

6 QUESTION: Do you think it is -- do you think it
7 is going to be very comfort to Waffle House to know that,
8 yes, it can't be sued in court by the individual, but the
9 entire prosecutorial power of the United States can be
10 brought to bear on it in -- in a suit in court? What
11 Waffle House wants to do is to stay out of court, and
12 that's what they're getting at when they talk about
13 undercutting the -- the -- in effect, the arbitration
14 agreement.

15 MR. CLEMENT: Well, with respect, if Waffle
16 House wants to stay out of court, then it needs to reach
17 an agreement with every party that has a statutory right
18 to get them into court. And as a practical matter, I
19 still think --

20 QUESTION: Unless one statutory right is
21 derivative of the other. I mean, that's the -- that's the
22 whole issue in the case.

23 MR. CLEMENT: Yes, and we think there are
24 good --

25 QUESTION: And you -- you keep saying the

1 Government has an independent right to sue, but you know,
2 that begs the question. That -- that's the whole issue.
3 It is given a right to sue, but is -- is that right to sue
4 derivative of the individual's right so that it disappears
5 when the individual's does?

6 MR. CLEMENT: And I do not think it is. And
7 it's -- and I think in fact the text of Title VII is quite
8 clear.

9 QUESTION: Then I think your answer has got to
10 be that the settlement clearly does not bind the
11 Government.

12 MR. CLEMENT: That's exactly right, and that's
13 -- that's a well-established principle. I mean, look at
14 -- look at Firefighters Local No. 93 against -- against
15 the City of Cleveland. The Court says it's a fundamental
16 principle that a settlement cannot bind non-parties to the
17 litigation.

18 QUESTION: How does this compare with the Fair
19 Labor Standards Act where the Secretary of Labor could sue
20 or the individual could sue, say, for a wage and hour
21 violation? Or let's take a violation of the Equal Pay
22 Act. How -- how does that work when the Secretary brings
23 a suit?

24 MR. CLEMENT: I think in all of those cases, the
25 statutory scheme works effectively the same. There are

1 independent causes of action given to the Government
2 entity and to the individual. And this Court held in the
3 Tony and Susan Alamo Foundation case that just because the
4 individual forswears a cause of action or right to sue
5 under the Fair Labor Standards Act, that does not preclude
6 the Secretary of Labor from bringing their own independent
7 action.

8 QUESTION: Of course, the -- the cause of action
9 for -- that EEOC has could be vindicated by an equitable
10 remedy.

11 MR. CLEMENT: I -- I don't think that's
12 necessarily true. It's certainly not going to be true in
13 every case. And Congress specifically made all forms of
14 relief available to the EEOC in its public enforcement
15 action. The court below drew a distinction between
16 equitable relief on the one hand and victim-specific
17 relief on the other hand to avoid a perceived conflict
18 with the FAA. But with respect, I don't think there is
19 any conflict.

20 QUESTION: But in this case then you say EEOC
21 can go into court and that Baker can probably not -- not
22 intervene, but the EEOC could get whatever he could have
23 gotten and give it to him.

24 MR. CLEMENT: That is true, but I don't think
25 that is particularly anomalous or limited to this area of

1 law.

2 Take, for example -- I mean, this Court has held
3 that an individual can agree to arbitrate his or her civil
4 RICO claim. I wouldn't think, though, that that agreement
5 to arbitrate the civil RICO claim would in any way prevent
6 the Government from bringing a criminal RICO action or
7 prevent the Government from getting a restitution order
8 that agreed to give restitution directly to the victim.

9 QUESTION: Who had already recovered?

10 MR. CLEMENT: No. Let's -- let's take this --
11 let's make it parallel to this case where the
12 individual --

13 QUESTION: No. I'm assuming a RICO victim who's
14 already been -- been compensated, and you think the
15 Government can bring a RICO action in which it gets not
16 just criminal sanctions but also requires the -- the RICO
17 defendant to pay again what's already been paid.

18 MR. CLEMENT: Well, actually they could get the
19 order, and then there are specific provisions in the
20 Federal restitution statute that allow a set-off for
21 amounts that have already been paid or that will be paid.

22 QUESTION: Oh, well, that's quite different.

23 MR. CLEMENT: But I don't think it --

24 QUESTION: Okay. Then let's go back -- then
25 let's simply go back to the damages case. You said a

1 second ago in -- in response or you -- you agreed with the
2 suggestion of mine that in fact the Government can
3 perfectly well sue independently.

4 My question then is, why do you concede that the
5 settlement case in which the individual settles for -- for
6 money in lieu of damages is a harder case? Why don't you
7 say no? It's just as easy as this is. And -- and in
8 neither case is the agreement between the individual and
9 the defendant binding or affecting in any way what the
10 Government can do.

11 MR. CLEMENT: Again, we don't think the
12 agreement is binding, but let me give you three reasons --

13 QUESTION: But why -- but --

14 MR. CLEMENT: Let me give you three reasons why
15 I think it's a harder case.

16 QUESTION: -- you did say earlier that you
17 thought the settlement case more difficult. So, I guess I
18 want you to explain why you think it is.

19 MR. CLEMENT: Okay. Let me give you three
20 reasons why I think the settlement case is more difficult.

21 First, there's already been some expenditure of
22 resources in that case, either -- likely, either judicial
23 or arbitral.

24 Second, Title VII seems to place particular
25 importance on the EEOC's ability to be able to initiate

1 the action and consider the early stages of litigation.
2 If, for whatever reason, we've gotten to the point where
3 somebody has filed a claim and it's settled, that role has
4 already been filled.

5 The third reason is another particularly
6 important function of the EEOC under Title VII is to act
7 as a safety valve, so if for some reason the individual is
8 not willing or able to sue, maybe out of a fear of
9 retaliation or something, in a particular case that
10 vindicates the public interest, the EEOC has the ability
11 to step in and fill that gap. If there's already been a
12 settlement --

13 QUESTION: Well, but in each of the -- in each
14 of the cases that you posit, even the third one, the --
15 the essence of the objection to your position is that an
16 agreement has been made between the individual and the
17 defendant. And in the case of the arbitration agreement,
18 an agreement has been made between the individual and the
19 defendant. And I don't see why the one class -- the one
20 kind of agreement should be treated any differently from
21 the other kind of agreement in determining whether the
22 Government really is in an autonomous position.

23 MR. CLEMENT: Well, I actually think there is a
24 reason to treat that one agreement different, which is the
25 agreement to settle a case extinguishes any claim to

1 relief. An arbitration agreement does not. It's simply a
2 forum selection provision. And the anomaly of the Fourth
3 Circuit's ruling is they take an agreement that limits
4 Baker's access to a judicial forum, but does not limit his
5 remedies and somehow transmogrify it into a rule that
6 limits the EEOC's available remedies but not their access
7 to a judicial forum.

8 QUESTION: Then your objection is the
9 transmogrification, not to the -- not to the recognition
10 of the agreement as such.

11 MR. CLEMENT: Again, we have no -- absolutely no
12 objection to having the agreement bind the parties to the
13 agreement.

14 QUESTION: But you do say that the employee
15 could not proceed even in the arbitral forum once the EEOC
16 starts. It's clear in the statute that that's true as to
17 a court action, but you I thought agreed with me that the
18 employee, once the EEOC starts, can't go into the arbitral
19 forum either.

20 MR. CLEMENT: Actually the EEOC is of the
21 opinion that the -- that the individual could bring an
22 arbitration action at that point. That is a consequence,
23 though, of the view that they cannot intervene in the
24 EEOC's enforcement action. I think -- I think they --

25 QUESTION: So, then the EEOC --

1 MR. CLEMENT: -- they have to have one action or
2 the other.

3 QUESTION: -- says we can have this -- we can
4 have this -- you've just told us that the substantive law
5 is the same. And I think you're quite right about that,
6 and -- and it's just a question of which forum. But now
7 you're saying it can be both forums simultaneously. The
8 individual can go forward in the arbitration; the EEOC can
9 go forward in the court with all the problems that
10 duplicative litigation can have of potentially conflicting
11 results.

12 MR. CLEMENT: That's equally, of course -- I
13 mean, I -- I agree that there is that problem. That is
14 equally a problem with the Fourth Circuit's rule, of
15 course, because they said that the EEOC could be in court
16 seeking general injunctive relief while the individual is
17 arbitrating his claim for victim-specific relief.

18 QUESTION: Well --

19 MR. CLEMENT: But -- but I think --

20 QUESTION: -- that doesn't strike me as so
21 terrible. I mean, that -- that's entirely understandable.
22 You have two different types of relief being sought in two
23 different forums.

24 MR. CLEMENT: And -- and --

25 QUESTION: What Justice Ginsburg points out is

1 -- is the anomaly of -- of the same relief being sought in
2 two different forums.

3 MR. CLEMENT: Well, and -- and I think that -- I
4 mean, that may be a product of -- that happens when you
5 have an arbitration agreement that limits some parties but
6 not others. That seems to be the case in -- in Moses
7 Cone.

8 QUESTION: Only if we adopt your view of the
9 thing, that the two -- that the two are independent. If
10 -- if the two are dependent, as the statute makes very
11 clear they are when -- when the Government brings --
12 brings the suit first, barring -- barring the individual
13 from bringing a separate suit, if the two are -- are
14 dependent, then you don't face any of these problems.

15 MR. CLEMENT: Well, fair enough. But in this
16 case, the Government did bring suit first. Baker has
17 never arbitrated. So, that position would lead you to the
18 conclusion that the Fourth Circuit was wrong, that the
19 EEOC can pursue this case, seek victim-specific relief and
20 general injunctive relief, and that it's up to you to
21 determine whether or not Baker gets to intervene in that
22 action. But that is -- that is certainly a result that
23 the Government is quite happy with.

24 It seems to me what's really sort of
25 indefensible about the Fourth Circuit's reasoning is they

1 take this forum selection provision and turn it into a
2 restriction on remedies. The -- the ADA and Title VII
3 have concurrent jurisdiction.

4 Suppose that an employer and an employee agreed
5 to litigate their case in State court, not Federal court.
6 It wouldn't seem to me that that forum selection clause
7 would bar the EEOC and bind the EEOC and limit them from
8 bringing their public enforcement action in Federal court.
9 It certainly wouldn't seem to me that that agreement to
10 litigate in State court would somehow prevent the EEOC
11 from getting victim-specific damages in Federal court if
12 in fact there was no State court action. But -- but in
13 principle, there's no difference between the arbitration
14 agreement and that forum selection clause agreement that
15 picks the State court.

16 QUESTION: Except there's a Federal Arbitration
17 Act, and we've said it's designed to encourage arbitration
18 of disputes.

19 MR. CLEMENT: Well, in fairness, I don't think
20 that the FAA embodies a self-executing preference for
21 arbitration. The --

22 QUESTION: No, but -- a -- a favoring where the
23 -- where an arbitration agreement has been entered into,
24 as it was here.

25 MR. CLEMENT: Well, that's true. But I think

1 the purpose of the FAA, as I understand it, was to put
2 arbitration contracts on an equal footing with other
3 contracts, not to give them some special private place.
4 And we think that that forum selection clause that picked
5 the State forum would be enforceable between the parties,
6 but we just don't think it makes any sense to say that
7 that agreement between the parties somehow leaps out and
8 bars the EEOC from bringing a Federal enforcement action,
9 or even more puzzlingly I think, restricting the remedies
10 available to the EEOC in that public enforcement action.

11 It seems to me that at -- at bottom Title VII
12 gives the EEOC a right to bring a public enforcement
13 action.

14 QUESTION: The trouble is it's not a public
15 enforcement action to the extent that it is seeking
16 damages for this individual. To that extent, it -- it's
17 an action that seeks to compensate this individual for the
18 damage he has suffered. Now, that -- that has some public
19 benefit I -- I assume, just as his own suit, should he
20 recover, would have such -- some public benefit. But to
21 call it a public enforcement action seems to me quite
22 unrealistic.

23 MR. CLEMENT: With fairness, I think that's a
24 position that Congress rejected in Title VII itself. If
25 Congress wanted to say that the only time that the EEOC

1 vindicates the public interest is when it seeks general
2 injunctive relief, it would have been quite easy for
3 Congress to limit the EEOC to general injunctive relief or
4 limit it to bringing pattern and practice cases. Instead,
5 it gave it the right --

6 QUESTION: Why? That would have been very
7 foolish. Why -- why require two separate suits: one --
8 one by the private individual, the other by the -- by the
9 agency? If the agency is going to be in there, it may as
10 well go for the whole ball.

11 MR. CLEMENT: Well --

12 QUESTION: But -- but to say that the portion of
13 it that compensates the individual is essentially, you
14 know, a vindication of the public doesn't seem to me --
15 doesn't seem to me reasonable. And -- and that is
16 demonstrated by the fact that if the agency brings the
17 suit, the individual can't because he's going to be
18 getting his individual relief.

19 MR. CLEMENT: Again, with all respect, I
20 disagree. I think restitution statutes reflect and
21 vindicate the public interest, even though the restitution
22 goes to the victim, and not the Government. It's the fact
23 that the --

24 QUESTION: If the model -- if the model is the
25 Fair Labor Standards Act, which antedated these

1 discrimination acts by many years, where the Secretary can
2 sue for the money to go into the pocket of the employee, I
3 thought that those were characterized as public interest
4 actions.

5 MR. CLEMENT: That's absolutely right. I mean,
6 every time a wrongdoer pays money, the payment of that
7 money serves a public interest that's independent of the
8 destination of the payment, whether it goes to the
9 individual who was wronged or some sort of public
10 enforcement action.

11 And again, I suggest the example of a
12 retaliation action. In a retaliation action, when an
13 employer has retaliated against an employee for filing a
14 charge with the EEOC, the EEOC clearly vindicates the
15 public interest when it files suit to take the employer to
16 task for the retaliation. And that's true even if the
17 retaliation and the most effective remedies are victim-
18 specific. In a case like that, you really need the
19 victim-specific remedies because, after all, it is clear
20 as day from Title VII itself that an employer can't
21 retaliate against an employee for filing a charge. So, to
22 simply get an injunction that says that is of somewhat
23 limited utility. On the other hand, to get back pay,
24 compensatory and capped punitive damages I think does
25 vindicate the public interest.

1 QUESTION: Well, what are your best authorities
2 for the proposition that when litigation has been
3 concluded, another party can recommence the litigation
4 alleging its own injury?

5 MR. CLEMENT: I guess I would point --

6 QUESTION: -- some other areas. You cited the
7 Firefighters case?

8 MR. CLEMENT: Yes. I would -- I would direct
9 you to Local No. 93 v. City of Cleveland. There's a
10 statement in that case that I think was just meant to
11 reflect a general principle that parties to a litigation
12 can't, through a settlement, bind a non-party to the
13 litigation.

14 QUESTION: Well, but that was because the other
15 parties had their own injury of a pecuniary nature, as I
16 recall the case. I -- I don't see the case cited.

17 QUESTION: As a practical matter, how often does
18 the EEOC seek victim-specific relief in the form of
19 monetary damages after there's been a settlement between
20 the victim and the other side?

21 MR. CLEMENT: I'm actually aware of no case
22 where that's happened.

23 QUESTION: This is all a hypothetical.

24 MR. CLEMENT: This is all hypothetical. And
25 what we're concerned about is a case like this one where

1 there is an arbitration agreement, but the individual has
2 never even sought to arbitrate. I think that's a much
3 easier case.

4 I'd like to reserve the remainder of my time for
5 rebuttal.

6 QUESTION: Very well, Mr. Clement.

7 Mr. Gordon, we'll hear from you.

8 ORAL ARGUMENT OF DAVID L. GORDON

9 ON BEHALF OF THE RESPONDENT

10 MR. GORDON: Mr. Chief Justice, and may it
11 please the Court:

12 The answer to the question presented today is
13 found in the broad terms and policies of the Federal
14 Arbitration Act. The question, of course, is what effect
15 does Mr. Baker's arbitration agreement have on the EEOC's
16 litigation remedies.

17 The Fourth Circuit correctly held that the EEOC
18 could bring in court a claim for broad-based injunctive
19 relief and declaratory relief. However, because Mr. Baker
20 had agreed to arbitrate his claims, he could not seek
21 relief in court specifically for Mr. Baker.

22 Now, I -- I listened carefully to Mr. Clement's
23 argument about the issue of settlement of a claim, and I
24 must respectfully disagree with the authority and line of
25 cases that he's citing. As a matter of fact, the

1 position, as I understand it from Mr. Clement, is that an
2 individual can settle a claim and then the EEOC can later
3 sue on behalf of that individual and recover relief for
4 that individual. And that particular principle, if that
5 is what the EEOC is espousing today, contradicts their own
6 policy guidance --

7 QUESTION: Mr. Gordon, if I understood him
8 correctly, he did take that position, but he said you
9 don't have to take that position to prevail in this case.
10 Is that right?

11 MR. GORDON: Well, perhaps I perceived it
12 differently, Your Honor.

13 But I -- I do think that from our position it's
14 very important for the Court to understand that the cases
15 are almost uniform for the proposition that if an
16 individual settles a case --

17 QUESTION: Mr. Gordon, but that's so highly
18 hypothetical because the likelihood that the employee
19 would have proceeded -- if the EEOC in the beginning is
20 the only one who can bring an action in court, EEOC brings
21 an action. Now, even if it's limited only to injunctive
22 relief, isn't it clear that the basic finding of fact, was
23 there discrimination, has to be made for any kind of
24 relief. And are you going to permit a viable set of
25 proceedings to determine that question?

1 Once the EEOC brings in -- the case in court,
2 mustn't its suit be given primacy to determine the basic
3 question, was there discrimination in violation of the
4 act?

5 MR. GORDON: Your Honor, we do not believe it
6 should be given primacy when an individual has signed an
7 arbitration agreement in which he says I agree that all
8 claims arising out of my employment shall be resolved in
9 arbitration. We don't see any reason why that case needs
10 to wait for the EEOC to --

11 QUESTION: Well, because one of them has power
12 to bind the other. Does it not? I mean, suppose the EEOC
13 proceeds and there is a finding that discrimination,
14 unlawful under the statute, occurred. That would be
15 binding on the employer in any other forum, wouldn't it
16 be?

17 MR. GORDON: Well, Your Honor, it should be, but
18 the EEOC doesn't take that position, as I understand it.
19 As I understand their position, whatever happens in their
20 court proceeding is an independent action and that Mr.
21 Baker really doesn't have any control over. And they're
22 doing their own thing in court.

23 QUESTION: But we're not talking about Mr.
24 Baker. We're talking about the employer who has been
25 found to have been a discriminator. That would have issue

1 preclusive effect against the employer in any other forum.
2 We're not talking about the individual now, but we're
3 talking about the employer who has been found to be a
4 discriminator in a Federal district court.

5 MR. GORDON: It would, Your Honor, if there were
6 findings of fact that were common to the other proceeding.

7 QUESTION: But the other way around, if the
8 arbitrator, say, finds no discrimination in that
9 arbitration forum, couldn't bind the EEOC because the EEOC
10 wasn't party to that litigation. Am I right about that?

11 MR. GORDON: Well, I would have to disagree with
12 you on that because I believe that in the arbitration, if
13 there were -- an adjudication was made as to Mr. Baker and
14 in -- as in this particular case -- if I may use this case
15 as the example, in this particular case, Mr. Baker is the
16 only game in town here. The EEOC is seeking relief solely
17 on behalf of Mr. Baker. All damages will go to Mr. Baker.

18 QUESTION: Let's -- let's cut out the relief
19 aspect of it and again concentrate on the issue, was there
20 discrimination or not, as to which there might be
21 injunctive remedies. If Mr. -- Mr. Baker loses on that,
22 that can't preclude the EEOC from getting the
23 determination, was there discrimination.

24 So, the only point I'm making is when you've got
25 one show that will be binding and the other that can't

1 preclude the EEOC from litigating that basic question,
2 whatever remedies would attach to it, doesn't it follow
3 that the EEOC's suit must be allowed to go forward and
4 have the question of discrimination determined in that
5 forum?

6 MR. GORDON: Your Honor, I -- I still believe
7 that there's no reason to wait in this case, that the
8 arbitration can go forward to resolve Mr. Baker's
9 individual claims, that the EEOC, under the Fourth Circuit
10 rule, can go forward and have the claims for broad-based
11 injunctive relief heard there.

12 And I -- I must say that there may be separate
13 issues being litigated in that EEOC court proceeding
14 because --

15 QUESTION: But isn't it true that for any
16 relief, there must be a finding that the employer has
17 violated the act?

18 MR. GORDON: There must be, but in the court
19 proceeding, there's going to be a broader finding, that
20 there is some pattern or practice of discrimination going
21 on that may or -- may or may not apply to Mr. Baker. If
22 it does apply to Mr. Baker, I would agree with you. Then
23 that particular ruling would have some collateral estoppel
24 effect in the arbitration.

25 QUESTION: Well, what -- what is your position

1 -- maybe you've answered this. What is your position if
2 the employer and the employee arbitrate and there's a
3 finding of no liability, no wrong on -- no wrong committed
4 by the employer? The EEOC then sues. Is the EEOC not
5 bound by the liability finding?

6 MR. GORDON: Your Honor, in that particular
7 case, if the arbitrator makes a ruling that there was some
8 practice --

9 QUESTION: No. My hypothetical is the
10 arbitrator rules for the employer. No discrimination.
11 There was no firing in violation of the ADA. The employer
12 was taking -- the employee was taking money or something.
13 That -- that was the reason. Can the EEOC then re-
14 litigate the issue of liability?

15 MR. GORDON: Not that particular very issue of
16 liability, but what I'm -- what I'm anticipating --

17 QUESTION: And why -- and why is that?

18 MR. GORDON: What I -- what I'm anticipating --

19 QUESTION: Why is it that the employer cannot --
20 that the EEOC cannot re-litigate the raw finding of
21 liability?

22 MR. GORDON: I am anticipating from your
23 hypothetical that a specific finding is being made about
24 Mr. Baker being discriminated against based on the facts
25 and circumstances of his case. What I am anticipating

1 going in the court proceeding is some claim for broad-
2 based injunctive relief that may -- may involve Mr. Baker
3 and may not.

4 QUESTION: I just want to make it clear what
5 your position is. Is it your position that when the EEOC
6 sues in -- in the Federal court and there has been a
7 previous finding of -- of non-liability on the part of the
8 employer, that the employer did not discriminate against
9 this person, is the EEOC bound in court by that finding?

10 MR. GORDON: Your Honor, the EEOC, to the extent
11 that it's bringing a public enforcement action, something
12 involving a pattern or practice of discrimination,
13 something --

14 QUESTION: Suppose it's not. Suppose it's just
15 interested in this --

16 MR. GORDON: Just --

17 QUESTION: -- employee and it's going to base
18 the injunction on the wrong that the employer allegedly
19 committed against this employee, but the arbitrator has
20 found that there is no such violation.

21 MR. GORDON: If it -- if the injunction is
22 solely based on relief specific to Mr. Baker and the facts
23 of his case, yes, it would be binding.

24 QUESTION: And what's your authority for that
25 proposition?

1 MR. GORDON: Well, Your Honor, the -- the
2 authority would be that based on general principles of
3 collateral estoppel where there's been -- these issues
4 have been litigated and --

5 QUESTION: Against a particular person. I
6 thought the basic principle of preclusion was that someone
7 who has not litigated cannot be bound. You would have to
8 establish that there was some kind of privity between the
9 employee and the EEOC, but I think that would be certainly
10 unprecedented. The main rule is you have a right to a day
11 in court, not two days in court, and if the EEOC has not
12 been a party in the arbitral forum, I don't see how it can
13 be bound, unless you're making up some new preclusion
14 rule.

15 MR. GORDON: No, Your Honor, I'm not making --

16 QUESTION: Or unless you say the statutory
17 scheme necessarily finds that there is privity because the
18 EEOC's interests in this case, where there's no broad
19 pattern or practice, are allied solely with those of the
20 -- of the employee. But it's -- it's a little odd to say
21 that a party in privity is -- is bound if that party
22 cannot intervene in those proceedings when it's a public
23 agency. But it seems to me that that has to be your --
24 your proposition.

25 MR. GORDON: Well, it is and it runs throughout

1 our brief, Your Honor, and it runs throughout what I'm --
2 what I'm going to say to the Court is that basically what
3 -- what is happening here, in the -- in the terms of
4 seeking individual relief, is that the EEOC is acting on
5 behalf of Mr. Baker.

6 QUESTION: Why -- why --

7 QUESTION: The EEOC is -- is effectively a party
8 to the earlier proceeding since its right in the later
9 proceeding is purely derivative of the right of -- of the
10 individual employee. That's essentially what you're
11 urging.

12 MR. GORDON: It is, Your Honor, and -- and
13 essentially the EEOC is standing in the shoes of Mr. Baker
14 when you look at this case because it is -- if you look at
15 the joint appendix, page 51 and 52, the interrogatory
16 responses from the EEOC, you see that they acknowledge
17 they are seeking -- when asked what -- what damages are
18 you seeking in this case, we are seeking relief on behalf
19 of Mr. Baker.

20 QUESTION: That -- that happens to be in this
21 case. They might have said that.

22 Doesn't the EEOC also pursue a public interest?
23 I mean, can't the EEOC -- imagine individuals who don't
24 want to bring suits. They don't care. They're cowed or
25 they just don't care. And the EEOC says, I don't care

1 whether you want to bring a suit or not; we're bringing
2 it. Now, isn't that part of the EEOC's job to see that
3 employers don't discriminate? And isn't there a public
4 interest in that, as well as the private interest?

5 MR. GORDON: There is, Your Honor. There's a
6 public interest in a case such as that, and there's also a
7 public interest in any claim that an individual brings to
8 vindicate the anti-discrimination --

9 QUESTION: But isn't there a public interest?
10 Didn't Congress set this statute up so that it is more is
11 involved than a simple tort action or a simple contract
12 action? There's a public policy in the United States
13 against this kind of discrimination embodied in many laws,
14 and this is one of those laws.

15 MR. GORDON: True, Your Honor, but that public
16 interest can be vindicated just as effectively in
17 arbitration.

18 QUESTION: That's the question. If a person
19 then in your view says to the EEOC, my employer
20 discriminated against me because I'm black or because of
21 gender or whatever, no doubt, but I like peace; I don't
22 want to bother him; I'm a little worried about it; okay,
23 drop it, if the EEOC says, I don't want to drop it, do
24 they not have that right?

25 MR. GORDON: They can continue to pursue that

1 claim for broad-based injunctive relief involved. But --
2 but here's the rub.

3 QUESTION: I'm talking about can they not get
4 appropriate relief. That's what the statute says.

5 MR. GORDON: It does say that, and the relief
6 would not be appropriate where an individual has signed an
7 agreement to arbitrate.

8 QUESTION: I'm not -- I'm asking you my
9 question, not your question. I, at the moment, have an
10 individual who doesn't care, doesn't really want the suit
11 brought, says to the EEOC drop it, forget it. The EEOC
12 says, we don't want to forget it. There's -- I'm just
13 repeating myself. So, what's the answer to my case?

14 (Laughter.)

15 MR. GORDON: Well -- well, the answer to your
16 case I think is found in the Federal Arbitration Act
17 because this individual agreed to arbitrate --

18 QUESTION: I'm not -- there is no arbitration
19 agreement in my case. It's a person. You're quite right.
20 As soon as you answer my question, I'm then going to ask
21 you why does it matter that there's an arbitration
22 agreement.

23 (Laughter.)

24 QUESTION: But I'd like you to start with my
25 case.

1 MR. GORDON: All right. Your Honor, if -- may I
2 ask you to again assert your proposition?

3 QUESTION: The person is lazy, frightened, or
4 whatever and says to the EEOC, I don't want you to bring
5 this action to get me reinstated. Forget it. Drop it.
6 I'm indifferent. Does the EEOC have the legal power to
7 say we don't care? We have a public interest here. We
8 want to bring this suit anyway because we don't think it's
9 right for the employer to discriminate against you. We
10 want to make an example of him. Okay?

11 MR. GORDON: Yes.

12 QUESTION: They can do that.

13 MR. GORDON: They can do that.

14 QUESTION: Fine. Now, my question is, when they
15 can do that, why does it matter if there's an arbitration
16 agreement since once you -- all right. Go ahead. Why
17 does it matter?

18 MR. GORDON: Well, there is, of course, the --
19 the strong Federal policy favoring arbitration, the text
20 of the Federal Arbitration Act that says, we're going to
21 enforce agreements.

22 QUESTION: And, of course, my example is
23 designed to show that all those interests have to do with
24 the private interest of the individual perhaps.

25 QUESTION: Mr. Gordon --

1 QUESTION: Not the other. That's why I asked --

2 QUESTION: -- I think -- I think it is your

3 position, is it not, that the -- that the agency would not
4 be able to bring such a suit if the individual had already
5 sued and had been compensated, or indeed, if the -- if the
6 individual had already settled?

7 MR. GORDON: True.

8 QUESTION: Isn't that your position?

9 MR. GORDON: True.

10 QUESTION: And -- and your further position is
11 that the -- that the conclusion of an arbitration
12 agreement is similar to a settlement, that the agency's
13 ability to bring the later suit depends on what the
14 individual, on whose behalf it sues, has given away.

15 MR. GORDON: That is correct.

16 QUESTION: Good. That's perfect. That's just
17 my question. Why is this arbitration agreement more like
18 the settlement than it is like the instance we both
19 agreed, the indifferent employee?

20 MR. GORDON: Your Honor, the EEOC in these cases
21 -- and I hope I can be responsive to your question. The
22 EEOC in these cases takes its employee as it finds it, and
23 in this particular case, the employee has an arbitration
24 agreement. And individual conduct can limit the ability
25 of the EEOC to seek remedies in a case. It happens in a

1 number of different contexts.

2 QUESTION: But the remedy -- I think we've
3 agreed that what we're not talking about here is the
4 substantive law -- the substantive right and the remedy.
5 It is simply a choice of forum clause. And if you have
6 two parties that have a substantive right, who can assert
7 the substantive right, one of them is bound by a choice of
8 forum clause. That's where that party must go. And the
9 other one is not so bound. Then how do you stop the EEOC
10 from choosing its forum?

11 The same question with respect to suppose it had
12 been a State human rights commission that is going into
13 the State court, and the employer says, no, State human
14 rights commission, you can't do that because this employee
15 has signed an agreement to arbitrate.

16 MR. GORDON: Your Honor, the -- the notion of
17 the importance of the Federal Arbitration Act is that
18 these agreements have to be put on the same footing as
19 other contracts, and we must give force to an arbitration
20 agreement such as this. And to allow parties to come up
21 with ways to get around these agreements completely
22 undercuts the Federal Arbitration Act.

23 And I -- I would disagree with your premise, if
24 I -- if I may, respectfully, that arbitration is a forum
25 selection clause. It's a lot more than that. It is a --

1 it is a method of resolving employment disputes.

2 QUESTION: But do you -- procedural mode, but do
3 you -- you don't contest, do you, that Title VII or the
4 disability act or the -- whatever Federal law is the law
5 that the arbitrator is to apply so that the substantive
6 law to be applied, whether you're in court or in
7 arbitration, is the same? It would be Title VII. It
8 would be the Disabilities Act. You're not suggesting that
9 the arbitrator can apply some other brand of Federal law
10 than the Federal court would apply, are you?

11 MR. GORDON: No, I'm not. But --

12 QUESTION: So, we're talking about the forum and
13 forums have rules of procedure, which can be different,
14 but the substantive law is the same. It is Title VII or
15 the Disabilities Act.

16 MR. GORDON: That's true, Your Honor, but -- but
17 still if we -- if we go forward with the rule that's
18 proposed by the EEOC, in -- in my view we will be flying
19 in the face of the Court's decisions in Gilmer, the
20 Court's decision in Circuit City, the plain text of the
21 Federal Arbitration Act. We will be discouraging rather
22 than encouraging arbitration, and --

23 QUESTION: Mr. -- Mr. Gordon, I assume that
24 giving up the whole cause of action is the greater and
25 giving up the forum is the lesser. Isn't your response

1 that if -- if the EEOC is bound by a settlement agreement,
2 a fortiori it should be bound by an agreement only to
3 bring the suit in a particular forum, if indeed its action
4 is derivative of the individual's action. The greater
5 includes the lesser, and surely giving up the whole cause
6 of action, if that binds the EEOC, is greater than giving
7 up simply the forum in which the cause of action can be
8 brought.

9 MR. GORDON: True, and if you take a step back
10 -- and let's -- let's take the more general -- general
11 example where there -- there hasn't been a claim filed and
12 where an individual is having a dispute with his employer.
13 And the employer says, I will give you \$300 in exchange
14 for a -- a settlement agreement, a release of all claims.
15 It doesn't involve where an EEOC charge has been filed or
16 where there's a court case going on. The EEOC and the
17 courts take the position that that particular scenario
18 would preclude it from later seeking relief on behalf of
19 that individual in court.

20 QUESTION: Why is this greater? You agreed that
21 this is a -- this is the greater, the arbitration.

22 The way I'm seeing it, which you can correct, is
23 that the word in the statute is appropriate relief, and
24 that there's a spectrum. On the one hand, we have the
25 indifferent employee. Next is the one with an arbitration

1 agreement who doesn't enforce it. Next is the one who is
2 in the middle of arbitration. Next is the one who has
3 been through arbitration and gotten some money, and
4 finally, at the far end we have a settlement. And whether
5 each of those is appropriate, circumstances for the EEOC
6 to proceed might differ one from the other. But certainly
7 the arbitration case is in the middle. It's not way over
8 at the extreme. So, what -- what is your response?

9 MR. GORDON: I can't accept the spectrum
10 analysis, if -- if I may. I have to revert to the fact
11 that -- that the individual signed the agreement to
12 arbitrate. Once signing that agreement to arbitrate, then
13 he must pursue his individual claims in that forum and he
14 cannot hand off the ball to the EEOC and have the EEOC do
15 for him what he cannot do for himself, which is get
16 individual relief in court. That was the bargain that
17 Waffle House made with this employee.

18 QUESTION: Would that carry over to, say, wage
19 and hour claims? Equal pay -- I guess the Equal Pay Act
20 is the closest.

21 MR. GORDON: Your Honor --

22 QUESTION: Could the Secretary of Labor also be
23 in privity with the individual employee who hasn't -- who
24 has been denied equal pay?

25 MR. GORDON: Under the -- under the wage/hour

1 laws --

2 QUESTION: Yes.

3 MR. GORDON: -- there -- there are different
4 interests there. For example, the -- the Department of
5 Labor has to approve a settlement of a wage/hour claim
6 because of the public policy involved in making sure that
7 the lowest wage earners in our society get a particular
8 wage.

9 It's different on an ADA claim, for example.
10 The EEOC does not have to approve the settlement of a
11 claim.

12 QUESTION: How about an Equal Pay Act claim?

13 MR. GORDON: Equal Pay Act claim, Your Honor, I
14 believe would be covered under the Department of Labor
15 scenario.

16 QUESTION: Mr. Gordon, may I just ask you a
17 question sort of about the other end of this case? Let's
18 assume that -- well, let's assume that there are parallel
19 proceedings going on and that the EEOC suit comes to
20 resolution first.

21 Now, you -- you are -- you at least agree that
22 the -- that the EEOC can get what I think you have
23 described as sort of generalized equitable remedies on --
24 on -- in -- in the public interest. Would those remedies
25 -- let's -- let's assume a case in which the EEOC sues on

1 behalf of the individual who is subject to the particular
2 arbitration agreement, say, in this case, but also brings
3 in a -- in effect, a -- a class-wide claim and said, you
4 know, there are -- we'll prove that there are hundreds of
5 other individuals who have suffered the same -- what is it
6 -- Title I violation that this individual suffered. Can
7 the -- and let's assume that in -- in the -- the EEOC
8 suit, that they prove that. Can the EEOC get generally
9 class-wide remedy as -- as part of its general equitable
10 relief?

11 MR. GORDON: Yes.

12 QUESTION: Would that include back pay?

13 MR. GORDON: No, it would not where there's
14 been --

15 QUESTION: Why not?

16 MR. GORDON: When there's been an arbitration
17 agreement.

18 QUESTION: Well, not back pay for this
19 individual. Back pay for everybody in the class except
20 this individual. This is just -- I just want to know what
21 your position is.

22 MR. GORDON: Our position would be, Your Honor,
23 that for those individuals who have signed arbitration
24 agreements, then any relief specific to them must be
25 awarded in arbitration. For those individuals who have

1 not signed arbitration agreements, then that EEOC class-
2 wide relief action could encompass their claim for relief
3 in court. But to give force to the arbitration agreements
4 that have been signed by the individuals, the -- the
5 general --

6 QUESTION: Okay, but then -- then I -- is it
7 also your position that the -- that the general equitable
8 relief could not include an injunction to rehire all of
9 those who were improperly fired?

10 MR. GORDON: The -- the equitable relief
11 specific to the individual -- specific to the
12 individual --

13 QUESTION: Well, the injunction is just a
14 general injunction. It says, rehire the people in this
15 class whom you unlawfully fired in -- in violation of this
16 title. Can -- can they get that relief on your theory?
17 Can the EEOC get that relief on your theory?

18 MR. GORDON: It could if the relief was broad-
19 based and not --

20 QUESTION: Well, in my example, it's broad-
21 based in the sense that it applies to everyone in the
22 class, but in order to enforce it, it will have to be
23 enforced against specific individuals. Somebody quite
24 apart from this proceeding will come forward and say, I'm
25 one of them. You've got to rehire me. Can the injunction

1 be -- be enforced in that case?

2 MR. GORDON: Yes, it could, but --

3 QUESTION: Then why can't back pay be enforced
4 in that case?

5 MR. GORDON: But -- but -- well, it would be
6 enforced in arbitration. The relief specific to the
7 individual would be enforced in arbitration.

8 QUESTION: No. You -- if I -- if I understood
9 what you just said -- maybe I didn't -- the -- the
10 injunction to rehire those who were improperly fired could
11 be enforced in -- in court. In other words, there's an
12 injunction and a court that issued the injunction can
13 enforce it. Is that correct?

14 MR. GORDON: The determination would be in
15 court.

16 QUESTION: All right. Then why -- why would not
17 a similar determination and a similar power effect a back
18 pay -- generalized back pay order? Give back pay to all
19 of those -- not this guy, but to all of those in the class
20 generally who were improperly fired.

21 MR. GORDON: Well, it could, Your Honor. In
22 court a determination such as that could be made that
23 these individuals have been discriminated against and
24 therefore remedies are available to them. But the actual
25 determination of the remedies must be made in arbitration

1 for those individuals who signed arbitration --

2 QUESTION: I can understand why you say that,
3 but I don't understand why you say that a -- a general
4 equitable order to rehire could be enforced in court and
5 would not have to be remitted to an arbitral forum.

6 MR. GORDON: The determination could be made in
7 court, but the determination of what specific equitable
8 relief, whether this person should be reinstated or -- or
9 this person should not, that should be made in
10 arbitration.

11 QUESTION: So, in -- the only thing that on your
12 theory then that is totally within the control of the
13 court would be totally prospective relief, e.g., an order,
14 don't do this again for anybody. That would be
15 enforceable in court.

16 MR. GORDON: Yes.

17 QUESTION: And purely in court.

18 MR. GORDON: That would be.

19 QUESTION: And let's say -- let's say a claim is
20 made then later on that that order has been violated, that
21 the title has been violated again, and the injunction
22 against violating the title has been -- has been violated.
23 And let's assume that the employee who claims that -- that
24 he is the subject of that violation has also signed an
25 arbitration agreement. Does it have to go to arbitration?

1 MR. GORDON: Well, in that particular case, Your
2 Honor, I believe there would be contempt --

3 QUESTION: Right.

4 MR. GORDON: -- of the injunction. The contempt
5 would be enforced in court.

6 QUESTION: But why isn't your -- why isn't your
7 claim to the vindication of the arbitration agreement the
8 same in the future case as it was in the past case?

9 MR. GORDON: Because the relief that is awarded
10 to a particular individual is awarded in arbitration.
11 Assuming that relief was awarded, then that would probably
12 end the participation of the arbitrator at that point.

13 QUESTION: The contempt action wouldn't be
14 brought by either the EEOC or -- or the individual, I
15 assume. It would be brought by the United States attorney
16 or, as we have said, some attorney appointed by the court.

17 MR. GORDON: Your Honor, the Court -- the Court
18 should not allow -- and I think this is the central --
19 central theme of -- of our argument here. The Court
20 should not allow the EEOC and its charging party who comes
21 to it with an arbitration agreement to frustrate the
22 purposes of the Federal Arbitration Act by making this end
23 run around the agreement. Mr. Baker entered into a
24 private agreement with Waffle House to resolve any
25 disputes he has arising out of his employment. The

1 Court --

2 QUESTION: Mr. Gordon, in -- in the history of
3 the anti-discrimination acts, there was legislative
4 history that said the EEOC should be the main player; that
5 is, they should be the main enforcer of these anti-
6 discrimination laws. Now, that model, which would have
7 taken a lot more money than Congress has appropriated to
8 carry out -- but that model simply could not be realized
9 under your view of things because the Federal Arbitration
10 Act would always take primacy, I think you -- you put it.

11 But the notion that the EEOC ought to be running
12 these discrimination actions -- they are the main show,
13 and then the individual actions can supplement that. But
14 -- but you couldn't have that model effected under your
15 view of it because the arbitration agreement could always
16 come in and interfere with it.

17 MR. GORDON: Well, I think we should -- should
18 take account of what the EEO still is able to do under the
19 Fourth Circuit's rule. The EEOC is still able to
20 effectuate the public interest by seeking broad-based
21 injunctive relief. The EEOC is still able to get an
22 injunction telling an employer that you are to certain
23 things with the way you run your business. The EEOC still
24 has the opportunity to tell an employer that you must
25 report back to us on a regular basis to tell us how you're

1 complying with the employment discrimination laws.

2 Injunctive relief is not a toothless remedy.

3 But I will -- I will say one other thing.

4 QUESTION: Excuse me. Does it have to wait for
5 the -- for the arbitration to be completed before it
6 brings such a suit?

7 MR. GORDON: Before the EEOC brings a public --

8 QUESTION: Before it brings such a suit based
9 upon the violation against an employee who has signed an
10 arbitration agreement.

11 MR. GORDON: No, Your Honor. It could -- it
12 could file its own action for broad-based injunctive
13 relief if it wished.

14 QUESTION: And -- and injunctive relief based
15 upon the violation that is the same subject as the
16 arbitration proceeding.

17 MR. GORDON: It could if there is a pattern and
18 practice involved in that scenario.

19 QUESTION: I don't know what you mean.

20 MR. GORDON: Well, if there is a policy, for
21 example, that is the root cause of --

22 QUESTION: Well, that's fine. It says that
23 policy is reflected in this one instance, and -- and it's
24 the same instance that's -- that's before arbitration.
25 What happens?

1 MR. GORDON: Well, in that case, Your Honor, if
2 the only -- if I'm -- if the only game in town is that Mr.
3 Baker was discriminated against, and that's it, and there
4 are no general -- general -- there's no general relief
5 being sought, we're just mad about the employment decision
6 directed toward him, then if the EEOC was in court just on
7 that theory and was unable to show any broader
8 application, then that -- the court should dismiss that
9 case.

10 QUESTION: Thank you, Mr. Gordon.

11 Mr. Clement, you have 4 minutes remaining.

12 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

13 ON BEHALF OF THE PETITIONER

14 MR. CLEMENT: Thank you, Mr. Chief Justice.

15 I want to first pick up on Justice Souter's
16 hypothetical about the contempt proceeding. It seems to
17 me that if that were enforced by civil compensatory
18 contempt, rather than a criminal contempt action brought
19 by the U.S. attorney, that he'd -- he'd have the same
20 problem at the end of the day.

21 Respondents invoke the proposition that the EEOC
22 has to take the victim as we find him. The problem with
23 that is that principle applies with respect to damages
24 problems, like a failure to mitigate, that apply to the
25 individual employee whether or not he arbitrates or

1 litigates and applies equally to an EEOC enforcement
2 action and to the individual claim.

3 What's so unique about this is that respondent
4 is attempting to take an agreement that does not restrict
5 Baker's ability to get any remedy in the arbitration
6 proceeding and turn it into a restriction on the remedies
7 available to the EEOC in its action.

8 The problem is, this is not, at bottom, a
9 restriction on damages or a problem with remedies. It is
10 a forum selection clause. And you have a statutory
11 structure that allows two people to initiate an action.
12 When one of those parties has signed a forum selection
13 clause and hasn't even initiated the action, it seems that
14 even in the general case there would be no reason to
15 restrict the other party's access to forums or their
16 remedies. That would seem to be a fortiori true for a
17 statute like Title VII that gives the EEOC a right of
18 first refusal over the initiation of the action.

19 Another point I'd like to emphasize is that, as
20 Justice Stevens made clear, there are currently no suits
21 pending against employers in a situation where there has
22 been a previous settlement. In fact, there are only 450
23 suits currently in the entirety of the EEOC's docket, and
24 I think that puts this case in perspective. In the
25 literally 99 cases out of 100, an employer's arbitration

1 agreement will govern and the only Title VII claim that
2 will be brought is the employee's claim in arbitration.
3 In the 1 case out of 100, in the extreme case where
4 there's some important public principle at stake or
5 there's particularly egregious conduct, the EEOC's public
6 enforcement action serves as a valuable safety valve that
7 allows it to preserve the possibility of precedent-setting
8 in public judicial proceedings.

9 The third and final point I'd like to make is
10 that whatever the answer is in the settlement context,
11 there's absolutely no reason to take a restriction that
12 only restricts the available forum and not the remedies
13 and turn it into a restriction on remedies but not the
14 forum. Here respondent seeks not only to bind the EEOC to
15 the results of an arbitration, but to prevent the EEOC
16 from seeking all remedies even when there hasn't been any
17 arbitration proceeding initiated at all.

18 For those reasons, we ask you to reverse.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
20 Clement.

21 The case is submitted.

22 (Whereupon, at 11:01 a.m., the case in the
23 above-entitled matter was submitted.)
24
25