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Courts Scale Back on Arbitrability of Employment Claims

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In this article, the authors review the changes to the Federal Arbitration Act effectuated by the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) and several recent court decisions that interpret the scope of the EFAA's carveout from mandatory arbitration. The authors also highlight some likely responses to those decisions by employees, and provide some practice pointers for employers to consider as they navigate this evolving body of law.

Several recent federal court decisions interpreting the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the EFAA) have swept non-sexual harassment claims from the arbitration basket into the litigation forum. These decisions have surprised many employers with respect to the potentially broad scope of the EFAA and create some doubt as to the applicability of mandatory pre-dispute arbitration agreements designed to cover all employment-related claims. Although case law interpreting the breadth of the EFAA is still in its nascent stages, these decisions should put employers on alert that employment claims accompanying or tied to claims of sexual harassment may be exempt from arbitration.

The migration of U.S. employers towards mandatory pre-dispute arbitration agreements for their employees has been a byproduct of consistent Supreme Court jurisprudence for more than a decade affirming the strong presumption of arbitrability of employment-related claims under the Federal Arbitration Act (the FAA).[1] One of the bedrock principles in this presumption is that when an employee brings multiple claims – some of which are arbitrable and some of which are not – the

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FAA requires plaintiffs to proceed in a piecemeal fashion, whereby the arbitrable claims are resolved through arbitration and the non-arbitrable claims are resolved in court.[2]

However, several recent federal court decisions interpreting the EFAA have found loopholes in those presumptions, holding that if an employee couches any of his or her claims as a form of sexual harassment, then the entire case – including all non-sexual harassment claims – must proceed in court, regardless of the employee's arbitration obligations.

This article reviews the changes to the FAA effectuated by the EFAA and the recent decisions in *Johnson v. Everyrealm, Inc.*, *Yost v. Everyrealm, Inc.*, and *Olivieri v. Stifel, Nicolaus & Co.*, which, inter alia, interpret the scope of the EFAA's carveout from mandatory arbitration. This article also highlights some likely responses to those decisions by employees, and provides some practice pointers for employers to consider as they navigate this evolving body of law.

THE EFAA'S CARVEOUT FROM MANDATORY ARBITRATION

In the wake of the #MeToo movement, some commentators criticized arbitration for its confidentiality and purported bias in favor of employers, arguing that such private, non-judicial forums perpetuate systemic issues surrounding sexual harassment in the workplace.[3] Last year, President Biden signed the EFAA, which amends the FAA by carving out from mandatory arbitration "a case which is filed under Federal, Tribal, or State law and relates to . . . [a] sexual harassment dispute."[4] A "sexual harassment dispute"[5] is a "dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."[6] However, the EFAA's carveout from mandatory arbitration applies only to sexual harassment disputes that "arise or accrue on or after" March 3, 2022.[7]

On February 24, 2023, Judge Engelmayer of the U.S. District Court for the Southern District of New York issued a ruling in a case of first impression concerning the scope of the EFAA's carveout from mandatory arbitration. In *Johnson v. Everyrealm, Inc.*, the male plaintiff initially brought a host of claims against his former employer and its female chief executive officer, alleging, inter alia, race discrimination and harassment, pay discrimination, and retaliation.[8] Notably, he did not include a claim of sexual harassment in his initial federal complaint.[9] His former employer moved to compel arbitration, and in response to the motion, the plaintiff filed an amended complaint in which he asserted – for the first time – claims of sexual harassment.[10] Based on the amended pleading, the plaintiff argued that the EFAA precluded arbitration of his entire case because he had included a sexual harassment claim.[11]

The former employer argued, among other things, that plaintiff's sexual harassment claims "were fabricated as a ploy to bring this case within

the EFAA and avoid arbitration," and "contradict the initial Complaint," which identified the gravamen of the action as related to race discrimination and harassment, pay discrimination, and retaliation.[12] But Judge Engelmayer rejected these arguments, holding that the court must accept a well-pleaded complaint as true so long as it does not contradict an earlier pleading, and that in this case, because plaintiff did not remove any allegations from the original complaint but rather supplemented it with additional allegations, the amended complaint was not an impermissible contradiction of the original complaint or a transformation of the case.[13]

The court then engaged in a close statutory reading of the EFAA, and specifically, the provision which states that "a *case* which is filed under Federal, Tribal, or State law and relates to . . . [a] sexual harassment dispute" shall be immune from arbitration.[14] Judge Engelmayer relied upon definitions in Merriam Webster's Dictionary, Black's Law Dictionary, as well as case law, to conclude that a "case" encompasses an entire legal proceeding, which includes one or more "claims."[15] The court also highlighted that the EFAA references "claims" in other areas of the statutory text, further indicating that use of the word "case" in this operative provision denotes a difference in meaning from the word "claim" in the other parts of the statute.[16]

Judge Engelmayer also placed great weight on the fact that Congress[17] directly amended the FAA through the EFAA, observing that:

> Congress's choice to amend the FAA directly with text broadly blocking enforcement of an arbitration clause with respect to an entire "case" "relating to" a sexual harassment dispute reflects its rejection – in this context – of the FAA norm of allowing individual claims in a lawsuit to be parceled out to arbitrators or courts depending on each claim's arbitrability. Accordingly, the Court holds that, where a claim in a case alleges 'conduct constituting a sexual harassment dispute' as defined, the EFAA, at the election of the party making such an allegation, makes pre-dispute arbitration agreements unenforceable with respect to the entire case relating to that dispute.[18]

While Judge Engelmayer stated that he would not delve deeply into the EFAA's legislative history, he did emphasize the statement in the House Judiciary Committee's Report on the statute's purpose, which is to prohibit "forced arbitration" in "cases involving sexual assault or harassment" because "the arbitration system lacks transparency and precedential guidance of the justice system," is "shielded from public scrutiny," and "there is no guarantee that the relevant law will be applied to these disputes or that fundamental notions of fairness and equity will be upheld in the process."[19]

Notwithstanding its holding, the court also recognized that it did "not have occasion here to consider the circumstances under which claim(s) far afield might be found to have been improperly joined with a claim within the EFAA so as to enable them to elude a binding arbitration

agreement."[20] However, and of particular significance to employers, Judge Engelmayer observed that the plaintiff's claims "all arise from his employment," and as a result, "are clearly properly joined in a common lawsuit."[21]

Judge Engelmayer's decision in *Johnson* is significant for several reasons. The court gave no weight to the fact that the original complaint was bereft of any claim of sexual harassment. Indeed, that claim was only added by way of a pleading amendment after the employer had moved to compel arbitration. Thus, employers should brace themselves for amended pleadings alleging claims within the scope of the EFAA where the original pleadings provide no basis for proceeding in court rather than in arbitration. In addition, the court's "case" versus "claim" distinction under the EFFA results in the casting of a wide net over employment claims that do not fall within the EFAA but may still be adjudicated solely in court rather than in arbitration. The court's observation in a footnote that, notwithstanding the fact that the majority of the claims had nothing to do with sexual harassment (including tort claims), the claims "all arise from his employment," may be an indication that any claims tied to a sexual harassment claim may not be arbitrated, despite a clear and unequivocal arbitration agreement, generating questions concerning the proper forum for resolving such seemingly unrelated claims as those sounding in contract, tort, or statutory discrimination and harassment unrelated to sex.

Another case decided by Judge Engelmayer on the same day as *Johnson* addressed a different series of issues of first impression relating to application of the EFAA's carveout from mandatory arbitration. In *Yost v. Everyrealm, Inc*., the plaintiff brought claims against the same employer as in *Johnson* for, inter alia, gender and disability discrimination, gender pay discrimination, and retaliation under federal, New York State, and New York City law.[22] There were no claims of sexual harassment pleaded in the original complaint. Plaintiff's employer filed a motion to dismiss and compel arbitration and the plaintiff countered that her case was not subject to arbitration pursuant to the EFAA because she had included allegations of sexual harassment in the pleading, even though there were no such formal claims.[23] Judge Engelmayer afforded the plaintiff multiple opportunities to amend her pleading to include claims and factual allegations of sexual harassment.[24]

The court first addressed whether the EFAA's definition of a "sexual harassment dispute," which is a "dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law," encompassed sexual harassment claims under the New York City Human Rights Law (NYCHRL).[25] Judge Engelmayer held that "[a]lthough the term 'State law' is undefined, the court reads that term to encompass local (for example, municipal) laws barring sexual harassment such as the NYCHRL."[26] The court reasoned that "[t]he EFAA does not contain any indication that Congress, by this formulation, intended

to exclude such laws," and that "where Congress has defined 'state' elsewhere, it has done so broadly as including states' subdivisions."[27]

Furthermore, the court explained that "[r]eading the EFAA to encompass local laws is also consistent with the statute's broad stated purpose."[28] As a result, in evaluating whether the EFAA precluded the arbitration of the plaintiff's case based on her claims of sexual harassment, the court evaluated those claims under the most lenient standard set forth in the NYCHRL, as opposed to the more stringent standards required under federal law.[29]

The second big issue was whether – for purposes of evaluating EFAA applicability – Plaintiff's sexual harassment claims should be evaluated based on a "sanctionably frivolous" standard, as plaintiff argued, or by the well-established federal "plausibility" *Iqbal/Twombly* standard.[30] The court concluded that the more rigorous "plausibility" standard was the correct benchmark because: (i) Congress was well aware of the plausibility standard when "enacting a statute that expressly referred to allegations of violations of law"; (ii) "requiring a sexual harassment claim to be capable of surviving dismissal at the threshold of a litigation fully vindicates the purposes of the EFAA"; (iii) requiring non-sexual harassment "claims to be resolved in court after the dismissal of the sexual harassment claims, barring a clear statutory command to do so, would affront Congress's intent in enacting the FAA"; and (iv) "courts in other contexts have construed the statutory term 'allege'" to incorporate the plausibility standard.[31] This distinction, at least in federal court actions, is impactful for employers, as it requires plaintiffs to plead sufficient factual allegations, rather than mere conclusory assertions, to support their claims of sexual harassment that would bring them within the ambit of the EFAA, and thus carve them and potentially all other employment claims out from arbitration.

Applying the foregoing standards, the *Yost* court concluded that, despite multiple pleading attempts, plaintiff had failed to state a claim even under the more lenient New York City standards, dismissing the sexual harassment claims and sending the rest of the case back to arbitration.[32]

It is noteworthy that the plausibility standard was also applied in another case in the U.S. District Court for the Eastern District of New York a few weeks later in *Olivieri v. Stifel, Nicolaus & Co, Inc*.[33] In that case, the court also issued a ruling that will be relevant for employers that are subject to claims of sexual harassment over the relative near term. Based on the plain language of the EFAA, courts have held that its carveout from mandatory arbitration does not apply to claims that accrue before the enactment of the EFAA.[34]

However, a major caveat to the non-retroactivity of the EFAA involves circumstances in which a plaintiff alleges a continuing violation of the sexual harassment, where the first instance may have occurred prior to the FAA but continued after its enactment. In that regard, the *Olivieri* court stated that, for sexual harassment claims, accrual occurs on the last

day of the last act that is in violation of the law.[35] Thus, because the continuing violations doctrine permitted plaintiff's claim to survive a motion to dismiss, all the other non-sexual harassment claims in the same proceeding were required to be litigated in court rather than in arbitration.[36] In the near term, employers must be cognizant that allegations of sexual harassment that both pre-date and post-date the enactment of the EFAA will nevertheless be subject to the carveout from mandatory arbitration.

KEY TAKEAWAYS AND PRACTICE POINTERS

These federal district court decisions should be illuminating to employers, which may have presumed that employment claims – the gravamen of which did not involve sexual harassment – would be subject to mandatory arbitration, rather than a court proceeding. Interestingly, none of these decisions attempted to assess what the crux of the complaint entailed, nor did they seem concerned about the fact that the sexual harassment claim may have been just a small part of the plaintiff's action against their employer. It was sufficient that at least one of the claims fell within the EFAA to pull the rest of the case out of arbitration and into court. It remains to be seen where the circuit courts will land on this important issue.

It is quite common for plaintiffs pleading distinct claims of sex discrimination and/or Equal Pay Act violations to allege facts in their pleadings that involve comments or conduct that could give rise to an independent claim of sexual harassment. After the EFAA, there are now incentives for plaintiffs to plead separate sexual harassment claims that they believe will survive a motion to dismiss even where the crux of the action is wholly unrelated to such claims.

This becomes particularly significant in jurisdictions, such as New York, that have more lenient definitions of what constitutes sexual harassment than under Title VII. Thus, a plaintiff bringing a claim under New York State or City law may need to allege only that they were treated "less well" on account of gender to bring their claim within the EFAA, and therefore the entire case, before a court rather than an arbitrator.

This risk is somewhat mitigated if such cases are brought in federal court, where the heightened federal plausibility pleading standard must be met. However, the EFAA would also apply to claims brought in state courts, many of which continue to adhere to liberal notice pleading standards and, like New York and California, have not adopted the *Iqbal/Twombly* plausibility standard.

Many employers are reluctant to file pleadings motions, in part, because it is not economical to invest in such motion practice if the employer can only eliminate a portion of the claims. However, given some of the early jurisprudence concerning the EFAA, employers may want to consider filing motions to dismiss sexual harassment claims (especially in

federal court) or motions to strike sexual harassment allegations, as such motions may be the ultimate difference between arbitrating and litigating the entire case. In addition, employers should consider filing post-discovery dispositive motions, such as for summary judgment, in relation to claims of sexual harassment.

Although plaintiffs may argue that, even if these motions are successful, judicial efficiency would require the case to continue in court, the removal of sexual harassment claims from the case may provide employers with a basis to argue that the entire proceeding must now be redirected towards the agreed-upon arbitral forum.

NOTES

1. See e.g., Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17 (2012).

2. See e.g., KPMG LLP v. Cocchi, 565 U.S. 18, 19 (2011) (holding that "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation" because "[a] court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration" (citation omitted)).

3. See Douglas Wigdor, Senate Committee Takes Aim At Forced Arbitration Of Sexual Harassment Disputes, Forbes (Nov. 15, 2021), https://www.forbes.com/sites/douglaswigdor/2021/11/15/senate-committee-takes-aim-at-forced-arbitration-of-sexual-harassment-disputes/?sh=4ed9a8bd17c5; Samuel D. Lack, Forced into Employment Arbitration? Sexual Harassment Victims are Saying #MeToo and Beginning to Fight Back – But They Need Congressional Help, Harv. Negot. L. Rev. (2020), https://www.hnlr.org/2020/08/forced-into-employment-arbitration-sexual-harassment-victims-are-saying-metoo-and-beginning-to-fight-back-but-they-need-congressional-help/.

4. 9 U.S.C. § 402(a).

5. 9 U.S.C. § 401(4).

6. The language in the EFAA tracks the language in the Speak Out Act – another piece of sexual harassment-related legislation signed by President Biden last year. The operative provision of this Act states that "[w]ith respect to a . . . sexual harassment dispute, no nondisclosure clause or nondisparagement clause agreed to before the dispute arises shall be judicially enforceable in instances in which conduct is alleged to have violated Federal, Tribal, or State law." The statute defines "sexual harassment dispute" in the same manner as the EFAA, i.e., a dispute that "constitutes sexual harassment under Federal, Tribal, or State law."

7. 9 U.S.C. § 401.

8. 2023 WL 2216173 (S.D.N.Y. Feb. 24, 2023) at *7.

9. Id.

10. Id. at *8.

11. Id. at *16.

12. Id. at *2 n.2.

13. Id.

14. Id. at *17 (emphasis added).

15. Id.

16. Id. at *18.

17. A number of states have enacted legislation to preclude the arbitration of sexual harassment claims, but federal courts have frequently struck down such legislative efforts as not amending, and thus preempted by, the FAA. See, e.g., Latif v. Morgan Stanley & Co. LLC, 2019 WL 2610985 (S.D.N.Y. June 26, 2019) (invaliding N.Y. C.P.L.R. § 7515 (2018)); Chamber of Com. of the U.S. v. Bonta, 62 F.4th 473 (9th Cir. 2023) (invalidating Assemb. B. 51, 2019-2020 Leg., Reg. Sess. (Cal. 2019)).

18. 2023 WL 2216173 (S.D.N.Y. Feb. 24, 2023) at *19.

19. Id. at *19, n.22 (citing H.R. Rep. No. 117-234, at 3 (2022)).

20. Id. at *20, n.23.

21. Id.

22. 2023 WL 2224450, at *1-3 (S.D.N.Y. Feb. 24, 2023).

23. Id.

24. Id.

25. Id. at *10.

26. Id. at *12, n.14.

27. Id (citations omitted).

28. Id.

29. Id. at *11-14.

30. Id. at *11; *15-16.

31. Id. at *15-18.

32. Id. at *18.

33. 2023 WL 2740846 (E.D.N.Y Mar. 31, 2023).

34. See, e.g., Marshall v. Hum. Servs. of Se. Tex., Inc., 2023 WL 1818214, at *3 (E.D. Tex. Feb. 7, 2023); Woodruff v. Dollar Gen. Corp., 2022 WL 17752359, at *3-4 (D. Del. Dec. 19, 2022); Steinberg v. Capgemini Am., Inc., 2022 WL 3371323, at *2 (E.D. Pa. Aug. 16, 2022).

35. 2023 WL 2740846, at *5-7.

36. Id. Plaintiff also alleged claims of gender discrimination and retaliation under Title VII and the New York State Human Rights Law, as well as aiding and abetting discrimination and retaliation under the New York State Human Rights Law.