COMMENTARY

Some Courts Refusing to Compel Arbitration Since Enacting the EFAA

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It has been a little more than a year since President Joe Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) on March 3, 2022, which amended the Federal Arbitration Act (FAA) to prohibit the enforcement of otherwise enforceable arbitration agreements for claims arising from sexual harassment. See 9 U.S.C. Section 402(a). In that span of time, several cases have challenged the enforceability of cram down arbitration agreements in the employment world. The results have been a bit of a mixed bag.

In some instances, courts have been quick to uphold the EFAA and reject arbitration of sexual harassment claims, even when the harassment claims are presented with other unrelated discrimination claims. See, e.g., *Johnson v. Everyrealm*, No. 22 CIV. 6669 (PAE), 2023 WL 2216173 (S.D.N.Y. Feb. 24, 2023) (finding that when a plaintiff alleges sexual harassment alongside other discrimination claims, the entire case is exempt from arbitration so long as the act is properly invoked); *Delo v. Paul Taylor Dance Foundation,* 2023 WL 4883337 (S.D.N.Y. Aug. 1, 2023) (same).

In other instances, courts have compelled arbitration where the claims accrued before the enactment of the EFAA. See, e.g., *Marshall v. Human Services of Southeast Texas,* 2023 WL 1818214, at *3 (E.D. Tex. Feb. 7, 2023); *Walters v. Starbucks*, No. 22-cv-1907 (DLC), 2022 WL 3684901, at *3 (S.D.N.Y. Aug. 25, 2022); *Newcombe-Dierl v. Amgen*, 2022 WL 3012211, at *5 (C.D. Cal. May 26, 2022); and *Hodgin v. Intensive Care Consortium,* No. 22-81733-CV, 2023 WL 2751443 (S.D. Fla. March 31, 2023). The foregoing decisions are instructive as to how courts may assess when employment discrimination claims and disputes "accrue" or "arise" within the meaning of the EFAA. At least one court has compelled arbitration where the nonsexual harassment claims are so inherently unrelated that forced arbitration is appropriate. See, e.g., *Mera v. SA Hospitality Group,* 2023 WL 96912 (S.D.N.Y. Jun. 3, 2023) (severing wage-and-hour claims and compelling arbitration because such claims "did not relate in any way to the sexual harassment dispute").

Tesla, 'We Have a Problem'

It is no secret that employee-side attorneys have long loathed forced arbitration. Taking the enforcement of civil rights away from a jury seems so antithetical to the Seventh Amendment's "right to jury trial in civil affairs." Nevertheless, the cards were dealt and there have been very few exceptions to forced arbitration outside of unconscionability. With the passing of the EFAA, however, employees have renewed faith that some claims may escape arbitrability. A recent case against Tesla highlights the argument that even claims that do not relate directly to any alleged sexual assault or harassment may be so "intertwined" that all of the employee's claims are exempt from arbitration. Bring out the jury.

Long known for vigorously defending their cram down arbitration agreements, noted discriminator, Tesla, lost a bid to compel arbitration under the FAA. See *Turner v. Tesla*,, Docket No. 3:23-cv-02451 (N.D. Cal. Aug. 11, 2023). According to the complaint filed in California, Tesla hired 18-year-old Tyonna Turner in November 2020 as a production associate in its Fremont manufacturing facility. At the time of her hire, Turner executed an arbitration agreement where she agreed to arbitrate "all disputes, claims or causes of action … arising from or relating to her employment, or the termination of [her] employment" with the company.

Turner claimed that she was persistently sexually harassed by her co-workers "approximately 100 times" and that Tesla failed to take remedial action following complaints to supervisors regarding the harassment in March 2021 and January 2022. Turner specifically alleged that, following the claimed harassment, one of her male co-workers made comments about her weight and clothing, as well as his own masculinity, and requested that Turner "come over to his apartment." She accused the co-worker of following her around, stalking her and staring at her for several months. This was purportedly discussed with her supervisor in September 2022.

In addition to her sexual harassment allegations, Turner also alleged that she suffered three workplace injuries for which she faced adverse actions by Tesla. Turner asserted that Tesla terminated her employment in retaliation for her reporting sexual harassment and her on-the-

job injuries. Turner also pleaded that Tesla failed to pay her wages at termination as required by the California Labor Code.

Tesla moved to compel arbitration and argued that all of Turner's arbitrable claims should be severed from the sexual harassment claims and compelled to arbitration while the balance of her claims should be stayed in the civil action pending resolution of the arbitrable claims. The court rejected these arguments.

Tesla's motion presented three questions. First, does Turner's complaint allege "conduct constituting a sexual harassment dispute" for the purposes of the EFAA? Second, does the EFAA make the arbitration agreement unenforceable for the entirety of Turner's claims, or only for the claims of sexual harassment? Third, if a subset of Turner's claims are compelled to arbitration, should the other claims be stayed pending the arbitration?

The court first addressed Tesla's argument that any claims of sexual harassment predating the effective date of the EFAA (March 3, 2022) were outside the act's nonretroactive coverage. The court found that five of Turner's claims arose out of or following her termination on Sept. 14, 2022, thus it "would be illogical to bar Turner from discussing any pre-March 3, 2022, conduct in connection with a claim" that was before the court.

Next, the court declined to sever what it deemed the "nonsexual harassment claims" and refused Tesla's request to compel them to arbitration. The core of Turner's case alleged 'conduct constituting a sexual harassment dispute,' as defined by the EFAA, the court wrote. The other claims relating to her workplace injuries and unpaid/late wage payments were so "intertwined" with her sexual harassment claims such that the EFAA renders the parties' arbitration agreement unenforceable in Turner's entire case because it involves a plausibly pleaded sexual harassment dispute.

Ending Forced Arbitration for Age and Race Discrimination Claims

Sens. Lindsey Graham (R-S.C.) and Kirsten Gillibrand (D-N.Y.) announced a bipartisan effort to enact the Protecting Older Americans Act of 2023. The proposed bill would prevent employers from forcing older workers into arbitration for age discrimination claims. The senators were joined by Sen. Dick Durbin (D-Ill.) and Rep. Nancy Mace (R-S.C.).

Similarly, in May 2023, Sen. Cory Booker (D-N.J.), Rep. Colin Allred (D-TX) introduced the bicameral Ending Forced Arbitration of Race Discrimination Act of 2023, legislation that would end the practice of forcing individuals who have experienced racial discrimination at work into arbitration. The act would: define 'race discrimination dispute' as a dispute relating to conduct that is alleged to constitute discrimination (including harassment), or retaliation, on the basis of race, color, or national origin under applicable federal, state, tribal, or local law; establish that if a person alleges racial discrimination in the workplace under federal, state, tribal, or local law, any preceding pre-dispute arbitration agreement or pre-dispute joint-action waiver is invalid and cannot be enforced; and give a court the power to determine whether an agreement requiring arbitration for racial discrimination claims is enforceable and whether the act applies.

As we move closer to the hopeful elimination of the use of forced arbitration in discrimination claims, one can expect more arguments like those made in the *Turner* case, that some or even all other claims asserted in a discrimination lawsuit are sufficiently intertwined with the sexual harassment/assault claims such that no part of the case goes to arbitration and the entire case is submitted to a jury.

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