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The EFAA Can Be a Powerful Tool to Avoid Arbitration

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The Federal Arbitration Act (the FAA) was enacted to reverse the course of judicial hostility toward arbitration agreements, and it reflects a strong federal policy favoring arbitration. For some claims, however, Congress has explicitly overridden the FAA's general mandate to enforce arbitration agreements. A recent example of this—the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the EFAA)—was enacted in March 2022. The EFAA amends the FAA so that, at the election of a person alleging "conduct constituting a sexual harassment dispute," an otherwise valid arbitration agreement become unenforceable "with respect to a case which is filed under federal, tribal or state law and relates to … the sexual harassment dispute." 9 U.S.C. Section 402(a).

Since the EFAA's enactment, plaintiffs have sought to use the statute to avoid arbitration of their claims, leading to litigation over the types of claims and cases to which the EFAA applies. In two recent such cases, *Yost v. Everyrealm,* 2023 WL 2224450 (S.D.N.Y. Feb. 24, 2023) and *Johnson v. Everyrealm,* 2023 WL 2216173 (S.D.N.Y. Feb. 24, 2023), Judge Paul A. Engelmayer addressed two issues of first impression regarding the applicability of the EFAA: (i) whether a plaintiff can use the EFAA to defeat an otherwise valid arbitration agreement by pleading a sexual harassment claim that ultimately fails to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and (ii) if a plaintiff pleads a cognizable claim for sexual harassment together with other claims that do not involve allegations of sexual harassment, does the EFAA prohibit arbitration of the entire case or only the sexual harassment claim?

Following motions to compel arbitration, Judge Engelmayer held in *Yost* that the EFAA does not invalidate an arbitration agreement unless the plaintiff pleads a cognizable sexual harassment claim that is sufficient to survive a Rule 12(b)(6) motion to dismiss. Judge Engelmayer further held in *Johnson* that that if a plaintiff pleads a cognizable sexual harassment claim, the EFAA precludes arbitration of all claims in the case, not just the sexual harassment claim.

'Johnson' and 'Yost'

The plaintiffs in *Johnson* and *Yost* alleged claims of sexual harassment by officers of Everyrealm, as well as other employment-related claims for race discrimination, pay discrimination, whistleblower

retaliation, and intentional infliction of emotional distress. As relevant to the EFAA, both plaintiffs brought their sexual harassment claims under the New York State Human Rights Law (NYSHRL), N.Y. Exec. Law Sections 290 et seq., and the New York City Human Rights Law (NYCHRL), N.Y.C. Admin. Code Section 8-502 et seq.

Because the plaintiffs in *Yost* and *Johnson* had signed arbitration agreements at the start of their employment, Everyrealm and the individual defendants moved to compel arbitration. The defendants did not contest that the EFAA applies to bar the arbitration of cognizable sexual harassment claims. Rather, the defendants argued that the plaintiffs could not invoke the EFAA to invalidate their otherwise valid arbitration agreements because the plaintiffs' sexual harassment claims failed to satisfy the plausibility standard of Rule 12(b)(6). Separately, the defendants also argued that, even if the plaintiffs had pleaded plausible sexual harassment claims, the motion to compel still should be granted as to the plaintiffs' non-sexual harassment claims, because the EFAA should not be interpreted to invalidate arbitration agreements as to non-sexual harassment claims.

Judge Engelmayer began by addressing the threshold question of whether the plaintiffs had stated a claim for sexual harassment under the most permissive of the applicable sexual harassment statutes, the NYCHRL. *Yost,* 2023 WL 2224450 at *11; *Johnson,* 2023 WL 2216173 at *12. Judge Engelmayer observed that "[t]o state a sexual harassment claim under the NYCHRL, a plaintiff need only simply allege facts showing that she 'was subject to 'unwanted gender-based conduct.'" *Johnson*, 2023 WL 2216173 at *13 (citations omitted).

In *Johnson*, Judge Engelmayer found that the plaintiff had adequately pleaded a sexual harassment claim based on the plaintiff's allegation that Everyrealm's CEO "repeatedly encouraged Johnson to engage in sexual conduct with work colleagues, but also seemingly propositioned him herself." *Johnson*, 2023 WL 2216173, at *13–15. By contrast, in *Yost*, Judge Engelmayer found that the plaintiff had failed adequately to plead a sexual harassment claim, because the plaintiff had pleaded only a "handful of crude remarks … that … are disconnected from any protected characteristic of the plaintiff." *Yost*, 2023 WL 2224450 at *14. Judge Engelmayer found that "sustaining [the plaintiff's] sexual harassment claim [under such circumstances] would [impermissibly] treat the NYCHRL as a general civility code, contrary to uniform case law."

The EFFA Does Not Apply to Inadequately Pleaded Sexual Harassment Claims

The dismissal of the sexual harassment claims in *Yost* presented Judge Engelmayer with a novel question of statutory construction: "where … a plaintiff's only basis for claiming that a complaint triggers the EFAA are implausibly pleaded claims of sexual harassment, does the EFAA still operate to invalidate a binding arbitration agreement?" *Yost,* 2023 WL 2224450 at *14.

To answer that question, Judge Engelmayer engaged in a textual analysis of the EFAA, focusing on the statutory requirement that the conduct at issue have been "alleged to constitute sexual harassment under applicable federal, tribal or state law." Judge Engelmayer emphasized that "Congress's decision to add those qualifying words"—i.e., the italicized text in the prior sentence—"is significant." Judge Engelmayer concluded that "this plain language makes the EFAA inapplicable where there has not been an allegation that such conduct violated a law prohibiting sexual harassment." From that conclusion, Judge Engelmayer reasoned that the statutory text "implicitly incorporates [Rule 12(b)(6)'s] plausibility standard."

Judge Engelmayer went on to provide four independent justifications for his textual interpretation. First, "in enacting a statute that expressly referred to allegations of violations of law, it is reasonable to infer that Congress in 2022 was aware that only viably pleaded (that is, plausible) allegations of sexual harassment law had the capacity to proceed past the pleading stage in federal court." Second, because the stated purpose of the EFAA is "to empower sexual

harassment claimants to pursue their claims in a judicial, rather than arbitral, forum," requiring a sexual harassment claim to be capable of surviving dismissal at the threshold of a litigation vindicates the purposes of the EFAA. (citing H.R. Rep. No. 117-234, at 3–4 (2022)). Third, "requiring … extraneous claims to be resolved in court after the dismissal of the sexual harassment claims … would affront Congress's intent in enacting the FAA—of which, critically, the EFAA is a part." Indeed, Judge Engelmayer observed that a contrary conclusion could destabilize the FAA's statutory scheme and "enable a plaintiff to evade a binding arbitration agreement—as to wholly distinct claims, and for the life of a litigation—by the expedient of adding facially unsustainable and quickly dismissed claims of sexual harassment." Id. Finally, though not dispositive, courts in other contexts have construed the statutory term "allege" in a similar manner: i.e., to require the allegation of a viable claim.

Because the plaintiff in *Yost* failed to plead a plausible sexual harassment claim sufficient to survive a Rule 12(b)(6) motion to dismiss, she was unable to avail herself of the EFAA. Following additional briefing on the enforceability of the operative arbitration agreement for reasons separate and apart from the EFAA, Judge Engelmayer found the arbitration agreement enforceable and issued an order compelling arbitration as to the plaintiff's remaining clams (except as to certain defendants who did not invoke their right to arbitration). *Yost v. Everyrealm,* 2023 WL 2859160, at *2 (S.D.N.Y. April 10, 2023).

The EFAA Precludes the Arbitration of All Claims

In *Johnson*, after finding that the plaintiff had pleaded a viable sexual harassment claim, Judge Engelmayer had to confront another novel question of statutory construction under the EFAA: "whether, after a court … has determined that the EFAA applies to a sexual harassment claim, the arbitration agreement is enforceable as to the other claims in the case."

To resolve the issue, Judge Engelmayer again began with the statutory text, observing that, "in its operative language, the EFAA makes a pre-dispute arbitration agreement invalid and unenforceable 'with respect to a case.'" Judge Engelmayer concluded that Congress's use of the word "case" was "clear, unambiguous, and decisive as to the issue." He reasoned that the plain text of the statute "keys the scope of the invalidation of the arbitration clause to the entire 'case' relating to the sexual harassment dispute. It thus does not limit the invalidation to the [sexual harassment] claim or claims in which that dispute plays a part."

Judge Engelmayer therefore construed the EFAA "to render an arbitration clause unenforceable as to the entire case involving a viably pleaded sexual harassment dispute, as opposed to merely the claims in the case that pertain to the alleged sexual harassment." Accordingly, he denied defendants' motion to compel arbitration with respect to all of Johnson's claims—the "entire case."

Conclusion

The takeaways from *Yost* and *Johnson* are twofold: a plaintiff will not be able to use the EFAA to invalidate an arbitration provision merely by alleging a sexual harassment claim that lacks allegations sufficient to survive a motion to dismiss under Rule 12(b)(6). Once a plaintiff alleges a viable sexual harassment claim, however, the plaintiff can use the EFAA to avoid arbitration of any additional claim that the plaintiff may include in the complaint.

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