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What To Know About Worker-Friendly 9th Circ. EFAA Ruling

By **Vin Gurrieri**

Law360 (August 21, 2026, 8:55 PM EDT) -- The Ninth Circuit's recent decision that a 2022 law barring mandatory arbitration of sexual harassment allegations shielded a former executive's lawsuit may help workers keep a broader range of claims in court, but questions linger about the appellate ruling's rationale.

Here are three things to know about the divided opinion.

Cases Can Bounce From Arbitration to Court

In the 2-1 decision from Aug. 19, a panel concluded that Dr. Ding Ding, a former chief financial officer at Structure Therapeutics USA Inc., could pursue a federal lawsuit alleging she faced discrimination and harassment based on her national origin and her status as a survivor of domestic violence.

Her ability to remain in court hinged on the applicability of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, a statute signed by former President Joe Biden that invalidates predispute arbitration agreements for allegations of sexual harassment and sexual assault.

The panel majority concluded that the law, commonly abbreviated as the EFAA, applied even though Ding first pursued her claims in arbitration, and only later uncovered evidence during discovery that she was subjected to sex-based harassment.

Writing for the Ninth Circuit majority, U.S. Circuit Judge Gabriel P. Sanchez said workers' ability to invoke the EFAA "is not categorically foreclosed by the earlier filing of an arbitration demand with non-sexual harassment claims," and the federal law "does not limit when a plaintiff may allege a sexual harassment claim" or exercise their EFAA rights.

However, U.S. Circuit Judge Johnnie B. Rawlinson said in dissent that the EFAA does not signify that a worker is allowed more than one "election" to choose the forum where their dispute will be adjudicated.

Christina Cheung, a partner at Allred Maroko & Goldberg who represents employees in sexual harassment, sexual assault and discrimination cases, said the ruling provides a significant clarification of the EFAA. The decision established that a person who didn't know they had a basis to assert a sexual harassment claim when they commenced their legal action isn't precluded from asserting the federal law when they find they have that type of claim, she said.

"I think the decision is one that makes a lot of sense given the cases that have already come out involving the EFAA and the application of what cases can't be compelled in arbitration," Cheung said.

However, management-side attorneys told Law360 that the ruling could further a trend they are seeing of plaintiffs relying on sexual harassment claims to avoid arbitration in cases with broad sets of allegations.

"Ding may provide a road map to plaintiffs whose cases are already in arbitration but wish to proceed in court — add a sexual harassment claim to the case," said Michael Kun, co-chair of Thompson Coburn LLP's labor and employment practice.

Hostile Work Environment Claims Fall Under EFAA

The bulk of the Ninth Circuit's decision focused on whether Ding waived her right under the EFAA to pursue her claims in open court. However, attorneys told Law360 that the aspect of the ruling with potentially broader implications is appellate court's holding that the EFAA can be invoked to push sex-based hostile work environment claims under California's Fair Employment and Housing Act out of arbitration.

The panel majority said that a sex-based hostile work environment claim amounts to sexual harassment under state law even when the harassing conduct is not sexual in nature, and Ding pled a viable sex-based hostile work environment claim under the FEHA that triggers the EFAA.

In a footnote, the Ninth Circuit majority also noted that the FEHA requires "a 'subjectively offensive' hostile work environment ... and a 'nexus between the alleged harassment' and plaintiff's gender, but it doesn't mandate that the plaintiff have a 'contemporaneous subjective awareness' that the hostility was sex-based.

Cheung said that the EFAA contains broad language and the Ninth Circuit's ruling is consistent with other decisions defining the scope of the law.

For example, a California federal court last year declined a hotel chain's bid to compel arbitration in a worker's suit alleging she was pushed out because of her pregnancy, with the court holding that the EFAA could be invoked to allow the matter to proceed in court.

"It's very broad, so a sex-based hostile work environment claim is a sexual harassment claim under the FEHA," Cheung said. "So I think that is entirely consistent with the plain language of the statute of the EFAA and how other cases have looked at it."

Management-side attorneys who spoke to Law360 assailed that aspect of the Ninth Circuit's ruling as one that goes beyond the initial intent of the EFAA and that threatens to undermine arbitrations.

"There absolutely is a [distinction] between sexual harassment and adverse treatment based on gender, and what the courts are doing, including now notoriously this most recent case, are completely conflating the two and obliterating any difference between [a] gender-based discrimination claim and a sexual harassment claim," said Anthony Oncidi, head of the West Coast labor and employment group at management-side firm Proskauer Rose LLP.

According to Oncidi, the Ninth Circuit's opinion didn't take into consideration recent cases that distinguish between harassment and gender discrimination claims. He pointed to a 3-week-old California federal court ruling in a case called *Ai v. Tencent America LLC et al.*, which rejected a worker's contention that her FEHA claims against a tech company belonged in court.

Attys Watching for More Rulings on EFAA's Scope

Abe Melamed, a mediator, arbitrator and special master with Signature Resolution, also cited the Ninth Circuit's stance on what claims trigger the EFAA as potentially having broad ramifications.

"This decision, from the way I read it, is basically saying that as long as the harassment claim that's being alleged ... is gender-based, then it's subject to the EFAA," Melamed said.

That interpretation would mean that claims alleging, for example, that a male worker was subjected to gender-based comments from a female colleague, or that a female employee was belittled by a male co-worker, can assert the EFAA and push those cases into court.

But Melamed questioned whether the Ninth Circuit's ruling could be extended beyond the context of sex harassment to encompass sex discrimination or retaliation claims that aren't based on conduct that is sexual in nature, saying that's an issue that will likely see further litigation.

"It's going to be interesting to see if the California state courts follow a similar analysis as the Ninth Circuit applying California state law on the issue," he said.

Oncidi said the issue of what constitutes a sexual harassment claim that falls under the EFAA's purview is one that may eventually require the U.S. Supreme Court to weigh in. However, the justices may be leery of the nettlesome analysis that assessing the law's boundaries could require. The EFAA defines a sexual harassment dispute to include "conduct constituting sexual harassment" under applicable federal, tribal or state law.

"It's not necessarily just [the] Title VII version of what sexual harassment is," Oncidi said. "So I guess it's possible that the Supreme Court might be reluctant to get involved because there isn't going to be a uniform standard that they're going to be looking at."

Kun said some high court guidance on what the EFAA covers is probable, but won't be coming any time soon.

"Eventually, the U.S. Supreme Court will likely step in and clear up some issues regarding the scope and application of the EFAA," Kun said. "But that could be years away."

--Additional reporting by Grace Elletson. Editing by Abbie Sarfo.