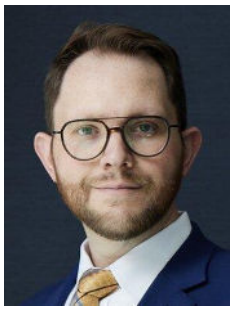
LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

What High Court Ruling Means For Sexual Harassment Claims

By **Abe Melamed** (June 10, 2024, 4:24 PM EDT)


Abe Melamed

When the U.S. Supreme Court issued its decision in Smith v. Spizzirri on May 16, it resolved a circuit split by holding that when a district court compels a case to arbitration and any party requests a stay, it is obligated to stay the case rather than dismissing it.[1]

The court found that when Congress enacted the Federal Arbitration Act, it intended to prevent parties from appealing orders compelling arbitration;[2] thus, a dismissal of the case — which would allow an immediate appeal as of right — was contrary to Congress' intention.

But for the parties in sexual harassment cases, this requirement may result in legal questions that would otherwise be ripe for appellate review never being heard by appellate courts, and as a result many claims that may belong in court will ultimately stay in arbitration.

The Smith decision could leave these parties waiting years for resolution of a fundamental question: Should their cases have been compelled to arbitration in the first place? And it may mean that some of those questions never receive meaningful review by appellate courts or the U.S. Supreme Court, leading to various conflicting trial court outcomes.

EFAA Exemption: Unresolved Questions

Pursuant to the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, or the EFAA, a plaintiff alleging workplace sexual harassment or assault may bypass arbitration and proceed to court and a jury.[3] However, both the inclusion of other causes of action outside of sexual harassment, as well as the timing of the alleged conduct, could potentially remove such claims from the EFAA's exception.

Two fundamental questions thus remain unresolved: First, what happens when a court compels non-sexual harassment claims to arbitration but retains the sexual harassment claims covered by the EFAA? Second, does the law allow plaintiffs with sexual harassment claims to avoid arbitration when the conduct giving rise to their claims occurred before the EFAA took effect? Because the EFAA is relatively new and its language is still open to interpretation, there is no definitive answer yet to these questions.

Even if a plaintiff wanted to raise either of these issues before a district court, Smith says that once a court compels the case to arbitration, the entire matter is subject to a stay. The parties would be

required to expend significant time, money and resources to litigate the arbitration to a final award before moving to confirm or vacate the award in court. Then, and only then, would the trial court be able to dismiss the action, creating a right for a party to appeal the original question of whether the case should have been compelled to arbitration to begin with.

Realistically, this is exactly the type of issue that becomes capable of repetition yet evades review. If a plaintiff prevails in the arbitration, he or she will not seek to invalidate that result by pursuing an appeal of whether the case should have been compelled to arbitration. If the case ultimately settles, neither party will have any reason to appeal the matter.

Only in the rare case where a plaintiff loses after a final hearing would there be any incentive to appeal the original decision compelling arbitration. Such an appeal, however, could take years, and such a plaintiff would likely be discouraged by the prospect of having to litigate his or her case all over again in court.

The result is that few, if any, plaintiffs whose cases are compelled to arbitration will end up challenging the original decision to compel arbitration. These issues may thus never be resolved by appellate courts.

Sexual Harassment Claims Comingled With Other Claims

What could this mean for a plaintiff who has alleged a number of claims against his or her employer, one of which is sexual harassment? Under the EFAA, that plaintiff would not be bound by the mandatory arbitration agreement signed with the employer, at least with respect to the sexual harassment claim.

But a trial court might determine that other discrimination claims that are comingled with the sexual harassment claims predominate. Because those other claims must be compelled to arbitration, the court may compel the sexual harassment claims to arbitration as well.

Or, the court may stay the sexual harassment claims pending completion of arbitration on the other claims. But is that the right result under the EFAA? This question has not been resolved by appellate courts or the Supreme Court.

Comingled cases decided thus far have been divided. In the case of Johnson v. Everyrealm, U.S. District Judge Paul Engelmayer in the U.S. District Court for the Southern District of New York ruled in February 2023 that when a valid sexual harassment claim is on the laundry list of employment claims asserted by a plaintiff, the entire case falls within the scope of the EFAA's arbitration carveout, and all the claims stay out of arbitration.[4]

Similarly, in August 2023, the U.S. District Court for the Northern District of California **ruled** in Turner v. Tesla that the employer's arbitration agreement was unenforceable with respect to the plaintiff's entire case "because the core of her case alleges 'conduct constituting a sexual harassment dispute' as defined by the EFAA."[5]

However, in another Southern District of New York decision from June 2023, Mera v. SA Hospitality Group LLC, U.S. Magistrate Judge Stewart Aaron compelled arbitration for the non-sexual harassment claims but allowed the sexual harassment claims to proceed in court, finding that "under the EFAA, an arbitration agreement executed by an individual alleging conduct constituting a sexual harassment

dispute is unenforceable only to the extent that the case filed by such individual 'relates to' the sexual harassment dispute."[6]

EFAA Retroactively Effective?

Another unresolved question is whether the EFAA applies to claims involving conduct that occurred before the law was enacted in March 2022. Courts have been divided on the question of when a dispute or claim "arises" or "accrues" under the statute, with some reading the act's language narrowly and some more broadly.

An example of the narrow reading is Castillo v. Altice USA Inc.[7] In that case, the Southern District of New York ruled in October 2023 that the plaintiff's claim arose and accrued when the alleged discriminatory conduct occurred, and unless such conduct took place after March 3, 2022, the EFAA did not apply.

Broader interpretations have found that the date when the parties first took opposing positions controls, even if the underlying conduct occurred long before the EFAA was enacted. If the first time the parties opposed each other — by lodging a formal complaint with the company or filing an administrative charge or a lawsuit — was after March 2, 2022, the plaintiff could thus disregard arbitration and proceed to court.

Under such a reading, claims filed in states with a three-year statute of limitations for sexual harassment[8] might be subject to the EFAA exemption even when the conduct occurred as far back as March 2019.

In the Jan. 29 decision in Kader v. Southern California Medical Center Inc.,[9] the California Court of Appeal, Second Appellate District, **ruled** that "[f]or a dispute to arise, a party must first assert a right, claim, or demand." The court therefore found that the controversy did not arise until after the EFAA's effective date, even though the alleged conduct predated the law's enactment.

Meanwhile, in its August 2023 decision in Famuyide v. Chipotle Mexican Grill Inc., the U.S. District Court for the District of Minnesota took a similar view of the EFAA's scope, ruling that the actual dispute between Famuyide and Chipotle — when the parties took opposing positions — was after the enactment of the EFAA, on the date when Famuyide actually filed her complaint in state court, even though the underlying conduct predated the EFAA.[10]

The case is currently under review by the U.S. Court of Appeals for the Eighth Circuit. Even if that court overturns the lower court's ruling, its precedent will be limited to that circuit. Under Smith, a similar challenge in another jurisdiction would not be possible for many years, as the court would be forced to issue a stay that barred any right of appeal.

There will be no clarity on cases involving conduct that occurred before the EFAA's effective date unless and until the Supreme Court decides the look-back issue. But, thanks to the Smith decision, such challenges are unlikely to make their way to circuit courts or to the Supreme Court.

When a court compels arbitration, it must now issue a stay pending the arbitration, leaving the parties with no appealable issue. Any potential challenge will not happen for years, an untenable wait for most parties. Ultimately, there will be no review.

Conclusion

Issues involving sexual harassment claims may thus never be decided on their merits. The parties will end up settling their matters, or the prevailing party in arbitration will have no reason to appeal.

In those rare cases that go to final hearing with plaintiffs who lose in arbitration, few will choose to go the distance to pursue a lengthy, costly, potentially unsuccessful appeal because the best case scenario for them will be trying their cases all over again. In such an unlikely event, the original sexual harassment claim could take more than a decade to resolve.

Because of Smith, such issues are the quintessential example of matters capable of repetition yet evading review. In the aftermath of the decision, sexual harassment claims will be quietly resolved without any meaningful review of the original orders compelling arbitration.

Unless parties go the distance to resolve these complex issues, it will be up to Congress to provide a mechanism for reviewing them by amending the Federal Arbitration Act to authorize dismissal, providing the right to immediate appeal. Parties in sexual harassment cases involving these issues must now take Smith into consideration in their settlement analyses.

Correction: A previous version of this article misstated the procedural posture of the Mera case. The error has been corrected.

Abe Melamed is a mediator, arbitrator and special master at Signature Resolution.

[1] Smith v. Spizzirri, No. 22 — 1218, May 16, 2024; https://www.supremecourt.gov/opinions/23pdf/22-1218_5357.pdf.

[2] U.S. Code: Title 9, https://www.law.cornell.edu/uscode/text/9.

[3] Pub. L. 11/1-/20, Mar. 3, 2022; https://www.congress.gov/117/plaws/publ90/PLAW117publ90.pdf.

[4] Johnson v Everyrealm, Inc. et al, No. 1:2022cv06669 (S.D.N.Y. 2023); https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2022cv06669/584300/70/.

[5] Turner v. Tesla, Inc., 686 F.Supp.3d 917 (2023).

[6] Mera v. SA Hospitality Group, LLC, 1:23-cv-03492 (PGG) (SDA), June 3, 2023.

[7] Castillo v. Altice USA Inc., No. 1:23-CV-05040 (JLR), 2023 WL 6690674 (S.D.N.Y. Oct. 12, 2023).

[8] See https://legiscan.com/CA/text/AB9/id/2056851; https://calcivilrights.ca.gov/wpcontent/uploads/site

s/32/2023/01/CRD-Intake-Form_Right-to-Sue_ENG.pdf.; https://dhr.ny.gov/new-workplace-discrimination-and-harassmentprotections; https://www.nysenate.gov/legislation/bills/2023/S3255.

[9] Kader v. Southern California Medical Center, Inc., Calif. Ct. App., No. B326830 (Jan. 29, 2024).

[10] Famuyide v. Chipotle Mexican Grill Inc., No. CV 23-1127 (DWF/ECW), 2023 WL 5651915 (D. Minn. Aug. 31, 2023).