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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

8th Circ. Offers 'Blueprint' To Interpret Arbitration-Curbing Law

By **Vin Gurrieri**

Law360 (August 8, 2024, 6:31 PM EDT) -- The Eighth Circuit recently ruled that a 2-year-old law aimed at sparing sex misconduct claims from mandatory arbitration allows a former Chipotle worker to sue even though her alleged sexual assault happened before the law was enacted, a worker-friendly decision that experts say gives other courts a road map for interpreting the statute.

A three-judge panel on Aug. 5 unanimously upheld a ruling by U.S. District Judge Donovan W. Frank that the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act allows former Chipotle employee Eniola Famuyide to bypass arbitration in her suit claiming she was raped at work in late 2021.

As is often the case when laws are enacted, unforeseen questions emerge about how the statute should apply in particular circumstances that courts must ultimately answer. One such issue was at the heart of Famuyide's case — whether the law, enacted March 3, 2022, allows a plaintiff who sues after that date to keep claims in court if the alleged misconduct occurred before the statute took effect.

Under the EFAA, employers' predispute arbitration agreements can't be enforced in cases alleging sexual harassment or sexual assault. The law applies to any "dispute or claim that arises or accrues" on or after its enactment on March 3, 2022.

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In Famuyide's case, the Eighth Circuit said there was no conflict or controversy between company and employee as of November 2021 and that no "dispute" existed between the parties that could have been submitted to arbitration at that time.

Amy Epstein Gluck, chair of Pierson Ferdinand LLP's employment, labor and benefits department, said the appeals court's decision is one that other courts may look toward when similar cases arise.

"This opinion warns employers and may provide other circuit courts with a blueprint, so to speak, as to interpreting the statute," Epstein Gluck said.

Here, experts break down the Eighth Circuit's recent decision.

Wide-Ranging Implications

The suit that led to the Eighth Circuit's decision was lodged by Famuyide in state court in July 2022, about four months after President Joe Biden signed the EFAA into law.

She alleged that a co-worker at a Rochester, Minnesota, restaurant sexually harassed her for months without Chipotle addressing it, and that the co-worker raped her in a Chipotle bathroom in November 2021. Chipotle neither conducted a formal investigation nor provided her with resources after she reported what happened, Famuyide said.

The perpetrator of the alleged assault was also charged criminally, according to her complaint, and she sent two demand letters to the company through her lawyer in February 2022. The federal lawsuit that led to the Eighth Circuit ruling was filed in April 2023.

In ruling that Famuyide could avoid arbitration, Judge Frank hinged his conclusion to the date her state court suit was filed, saying it was the exact point when an "actual dispute" between Famuyide and Chipotle arose.

Judge Frank said a dispute "comes into being when a person asserts a right, claim, or demand and is met with disagreement on the other side" and the parties "have taken opposing positions." The trial court judge also said language lawmakers included in the EFAA "make[s] clear that a dispute requires more than an injury."

Chipotle argued on appeal that the trial court should've sent the suit to arbitration since Famuyide had signed an arbitration agreement when she was hired and the dispute between her and the company arose before the EFAA was enacted.

In particular, Chipotle argued that the dispute originated at the time of the alleged assault, which was the underlying conduct that led to the lawsuit, or alternatively when her attorneys sent the demand letters before the EFAA's passage.

But the Eighth Circuit didn't buy those arguments. It said Famuyide in November 2021 had not asserted "any right, claim, or demand" against the company and that Chipotle "had not registered disagreement with any position" she took. It also said the two demand letters Famuyide sent the company weren't enough to establish a dispute that left her claims outside the EFAA's reach.

"Sometimes a dispute ensues after this type of correspondence. But sometimes it does not, either because the client decides not to proceed further after investigation or because the communications result in an amicable resolution between the correspondents," the panel said.

Gretchen Carlson and Julie Roginsky, whose advocacy group Lift Our Voices pushed for the passage of the EFAA, praised the Eighth Circuit's ruling as one that aligns with the law's intent in a statement to Law360.

"All survivors of workplace sexual assault deserve their day in court — no matter when these horrific incidents take place," they said. "The law we fought so tirelessly to pass is clear that survivors of sexual misconduct are free to speak about their experiences, and we are thrilled that the 8th Circuit agrees."

Open Questions Remain for Courts to Tackle

While it bears watching whether Chipotle will seek a panel rehearing or an en banc review by the full Eighth Circuit, "other district and maybe even circuit courts on the federal level may end up citing to this as support for their position" in other cases, said Abe Melamed, an employment mediator, arbitrator and special master with Signature Resolution.

Melamed said the decision is clear that no "dispute" exists until parties adopt opposing positions, and neither internal complaints nor letters from plaintiffs' counsel clear that bar unless they show an intent to pursue claims.

"So in cases with similar examples of internal complaints or even attorney letters, they will be able to rely on the decision," Melamed said.

For courts that disagree with the Eighth Circuit's conclusion, they'll likely attempt to distinguish their case from Famuyide, he noted. And while not binding on state courts in the Eighth Circuit, the decision will be cited as persuasive authority in those cases.

"The decision will have an impact on all cases within the [Eighth Circuit] ... because it will be binding precedent, and it may have an impact on state court cases who find the decision persuasive," Melamed said. "I would also expect other district courts outside the [Eighth Circuit] who agree with the decision to start citing it as persuasive."

However, Melamed noted that there remain open questions for courts to address about whether other presuit actions or statements that weren't part of the factual record in Famuyide's case would meet the Eighth Circuit's standard for establishing a dispute under the EFAA.

One example, he said, is that the ruling doesn't address whether a charge a person filed with the U.S. Equal Employment Opportunity Commission would be a "dispute."

"If an employee said something like 'I will pursue legal action' or if an attorney letter said something similar, it is possible that would be the point in time when a dispute arises," Melamed said. "So the decision still leaves room for other cases to do an individualized analysis of whether there is a dispute."

Subtleties Between Laws are Important for Employers to Grasp

While other circuits may get their chance to weigh in on what constitutes a dispute under the EFAA as misconduct cases that happened before the law's passage wind through the judicial process, employers should be on notice that incidents predating the law can bypass arbitration, attorneys say.

Epstein Gluck said the Eighth Circuit notably relied on the definition of "dispute" in Black's Law Dictionary rather than on when a hostile work environment claim accrues under Title VII of the Civil Rights Act, an interpretation she said "makes sense" since the EFAA is an amendment to the Federal Arbitration Act.

That nuance could be an important one for employers to understand.

"The EFAA is not an anti-discrimination statute — it amends the FAA, not Title VII," Epstein Gluck said.

"Courts often rely on Black's Law Dictionary when it comes to new laws, and I would not be surprised if other circuit courts did the same."

She said employers must be aware of this because "they are likely more familiar with Title VII's standards — where a hostile work environment claim may be deemed timely if the most recent act of harassment falls within the time frame of the statute."

Jason Schwartz, co-leader of Gibson Dunn & Crutcher LLP's labor and employment practice, said he believes the Eighth Circuit was incorrect to look only at when a formal legal dispute arose and that other courts faced with similar cases may take a different approach.

"It should instead have focused on when the claim accrued — when the underlying allegations took place," Schwartz said. "I expect other courts of appeal will come out differently."

But while it's a notable decision for cases that are pending or arise in the near future, the impact of the Eighth Circuit's decision will fade over time.

"In the short term, this is an important issue in the application of the EFAA, even though over the longer term it will become irrelevant as older claims become barred by the statute of limitations," Schwartz said.

The case is Famuyide v. Chipotle Mexican Grill Inc., case number 23-3201, in the U.S. Court of Appeals for the Eighth Circuit.

--Additional reporting by Grace Elletson and Amanda Ottaway. Editing by Amy Rowe and Emma Brauer.
