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5 Rulings That Brought The EFAA Into Sharper Focus In 2024

By **Amanda Ottaway**

Law360 (December 13, 2024, 1:40 PM EST) -- Nearly two years after its enactment, the courts' interpretations of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act are taking shape, though plenty of questions remain.

Under the EFAA, which amended the Federal Arbitration Act, 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, and questions quickly arose about what claims would fall under its ambit.

The EFAA will bring a lot more sexual harassment cases out of arbitration and into the court system, judging by some of the cases decided this year. (iStock.com/pic_studio)

An Eighth Circuit decision in August that allowed a worker alleging a workplace rape to avoid arbitration, even though the alleged incident occurred in 2021, is probably the most definitive EFAA opinion from 2024, experts said.

"The first time a circuit court has assessed any issue about EFAA that I'm aware of is that case," said Abe Melamed, a mediator and arbitrator at Signature Resolution. "You can't say that it is definitive, but it could be that we'll start to see other circuit courts facing the issue adopt the decision. And you know, that might be the closest thing to resolution. Everything else is a total crapshoot."

Here's a look back at five court rulings from 2024 that shed light on the EFAA.

8th Circ. Takes Broad View of When a "Dispute" Can Arise

The Eighth Circuit said Aug. 5 that a former Chipotle employee could pursue claims in court even though the sexual assault she alleged had occurred before the law went into effect, a ruling that experts said is one of the most conclusive decisions so far.

"The most definitive resolution is No. 1, anyone in the Eighth Circuit, anyone that falls under the

umbrella of the Eighth Circuit, is bound by the Eighth Circuit's decision about retroactivity," Melamed said.

Former Chipotle employee Eniola Famuyide claimed she was raped by a co-worker in the restaurant bathroom at work in 2021, months before the EFAA went into effect, and arguments in her case have focused on whether a "dispute or claim" had "arisen or accrued" on or after the March 3, 2022, effective date of the law.

The Eighth Circuit said they had, upholding a lower court's decision and finding Famuyide's "actual dispute" arose when her state court suit was filed in July 2022.

Chipotle had argued that several incidents preceding March 3, 2022 — including the date of the alleged sexual assault, letters from Famuyide's lawyer to Chipotle in February 2022, and a letter Chipotle sent March 1 — should have been what triggered the EFAA. But the appellate panel disagreed.

"Not even the lawyer letter was sufficient," Melamed said. "Even though the lawyer letter said 'We have claims.'"

Melamed said it will be interesting to see whether other courts start to cite and adopt the Eighth Circuit's reasoning.

If that happens, the issue of the EFAA's retroactivity "might be something that doesn't ever go to the Supreme Court, and you can kind of just say yes, it's still an open question in any circuit, but it's likely that most circuits are going to adopt that meaning."

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

Appeals Court Says Charge Filing Can Kick Off "Dispute"

In a Jan. 29, 2024, decision, the Second Appellate District in California found something slightly different: that the dispute arose not when the alleged sexual misconduct occurred but when the plaintiff filed charges with the state's Department of Fair Employment and Housing.

A unanimous three-judge panel rejected Southern California Medical Center Inc.'s effort to overturn a state trial court's order denying arbitration for Omar Kader's sexual misconduct claims. Because Kader's dispute began after March 3, 2022, when he filed charges with a California agency in May 2022, and did not arise before he signed the arbitration contract in 2019, the panel said the agreement can't stand.

The panel noted that a dispute doesn't always begin when an instance of sexual misconduct first occurs. Disputes arise when a party asserts a legal right or demand and an opposing party disagrees and prepares to defend itself, the panel said.

"We conclude the date that a dispute has arisen for purposes of the act depends on the unique facts of each case, but a dispute does not arise merely from the fact of injury," the court said. "For a dispute to arise, a party must first assert a right, claim, or demand."

There's a "developing split in the courts" on this, said Barrick Bollman, an associate at management-

side McDermott Will & Emery. "That's one big issue, the effective date is March 3, 2022, but what does that mean?"

The case is Kader v. Southern California Medical Center Inc. et al., case number B326830, in the Court of Appeal of the State of California, Second Appellate District.

2nd Circ. Weighs In on Continuing Violations

Also in August, a Second Circuit panel found that because financial services worker Patricia Olivieri said she continued to experience harassment after the EFAA's effective date, her case can't be kicked out of court even though the alleged harassment began before March 2022.

The case provides good insight into how broadly courts may interpret the EFAA, particularly when it comes to so-called continuing violations, said Amy Epstein Gluck, who represents employers as a partner at Pierson Ferdinand and is chair of its employment, labor and benefits department.

"While her claims initially … accrued before the act went into effect, they continued after the act was enacted," Epstein Gluck said. "So that's an interesting little nuance that just piggybacks on the general principle that if you have a case of sexual harassment as well as retaliation, a wage and hour claim, it's going to all go to court if you have an arbitration provision."

Another open question on which courts have so far come down in different places is whether an entire case can avoid mandatory arbitration as long as at least one of the claims meets the "sexual harassment or assault" bar laid out in the EFAA.

"The other big issue that we're seeing is if there is a claim for sexual harassment, sexual assault, but there are other claims," Bollman said. "What do we do about that?"

Bollman explained that under the Federal Arbitration Act — which the EFAA amended — parties can generally split their claims, for example "arbitrate the claims that are subject to arbitration and litigate the claims that are not."

But the EFAA is being interpreted differently, experts said. Melamed said he could see this issue going all the way to the U.S. Supreme Court.

The case is Olivieri v. Stifel Nicolaus & Co. Inc., case number 23-658, in the U.S. Court of Appeals for the Second Circuit.

Calif. Court Says Wage Claims Can Ride EFAA Coattails

In October, California's Second Appellate District ruled in favor of letting a whole employment case, including the plaintiff's wage claims, avoid arbitration.

Human resources employee Yongtong Liu — a lesbian who dressed in a "unisex" style according to the ruling, which cited her complaint — accused the CEO of Miniso Depot CA Inc. of commenting inappropriately on her appearance and making derogatory comments about gay people.

Liu also alleged she was misclassified, denied overtime pay and paid less than the minimum wage.

"No predispute arbitration agreement … shall be valid or enforceable with respect to a case … which is filed under … state law and relates to … the sexual harassment dispute," wrote the court in that case. Epstein Gluck pointed to that language and the use of the word "case."

"The crux of these cases really comes down to [that] quote," Epstein Gluck said. "When you look at the plain language of the statute, it says that 'an arbitration agreement or provision within an agreement is not going to be enforceable with respect to a case which is filed under state law and relates to the dispute.' It doesn't say 'claim,' it says a 'case,' right?"

The court even titled a subheading in its ruling "The EFAA makes the parties' arbitration agreement unenforceable as to Liu's entire case."

But in making its Liu ruling, the California appellate court went against the much-discussed June 2023 decision Mera v. SA Hospitality Group LLC et al.

In that opinion, a federal magistrate judge said an Italian restaurant chain couldn't force ex-busboy Danilo Mera to arbitrate his sexual orientation harassment claims because of the EFAA, but that his wage and overtime allegations should be booted to arbitration because they "do not relate in any way to the sexual harassment dispute."

On the one hand, experts acknowledged, plenty of claims could be related to a sexual assault or harassment claim — a Black woman experiencing intersectional sexual harassment who brings a race discrimination claim; a worker whose pay is lowered after they complain about being sexually harassed.

On the other hand, experts said there's a need to figure out where the line is.

"It seems to be more and more in disfavor to sever them, but it still is an open issue," Signature Resolution's Melamed said. He also said the EFAA has changed the way plaintiffs plead.

"If you've got a list of five potential claims, and the weakest one is like a tiny, minor sexual harassment claim … you throw it in now," he said. "Whereas before, you might have left it out entirely, maybe even to gain some credibility. Now you throw it in."

Some courts have found that a plaintiff must plead a "plausible" sex harassment claim in order to invoke the protection of the EFAA.

"I expect that this plausibility requirement is going to continue, because it's really nothing more than what is required with any other cause of action," McDermott's Bollman said. "Courts must, if a motion to dismiss is brought, scrutinize the allegations and make sure that there's sufficient matter pled to move forward."

The case is Yongtong Liu v. Miniso Depot CA Inc. et al., case number B338090, in the Court of Appeal of the State of California, Second Appellate District.

Claims Must Be "Plausible" to Trigger EFAA, Court Says

A Florida federal judge ruled in September that the EFAA didn't apply to a former executive's sexual harassment claims because her harassment claims lacked "plausibility."

Joena Bartolini Mitchell had argued that the EFAA doesn't explicitly require claims to be plausibly pled — that she needed only to file a suit claiming sexual harassment — but the court disagreed.

In an August report and recommendation that the district court adopted, a magistrate judge wrote that while it appeared no appellate court had yet addressed this issue, district courts had unanimously accepted that the law implied that sex harassment claims must be plausible to gain EFAA protection.

Mitchell's claims didn't rise to the level of harassment, the court found. She alleged that from 2007 to 2015, male colleagues and clients implicitly propositioned her for sex, that she overheard male colleagues discussing "stripper poles" and their genitals and that a male executive suggested she wouldn't return to work following her maternity leave, among other things.

"We see conclusory allegations all the time that aren't backed up with facts," Pierson Ferdinand's Epstein Gluck said. "You've got to be able to allege facts to show sexual harassment based on federal or state law, whichever is more protective of employees. So harassment allegations that lack plausibility — I'm not surprised that the judge said, 'OK, the EFAA doesn't apply.'"

The adoption of the plausible-pleading requirement is good news for the defense bar, because it means that even if claims get commingled, plaintiffs can't just file "kitchen sink" complaints, experts said.

"I'm encouraged by the court's insistence that the sexual harassment or sexual assault claims be plausibly alleged … because I do think that creates a bar," Bollman said. "There can't be a wage and hour class action that just kind of throws in a random sexual harassment claim, that doesn't have any substance to it, to avoid arbitration."

That plausibility bar is still fairly low, Melamed said. But if the sex harassment allegations are substantial enough to clear that bar, Epstein Gluck noted, there's a pretty good chance the case won't be shunted to arbitration.

"If there is a bona fide sexual harassment claim, and the allegations, if taken as true, create a claim for sexual harassment … then I think that the whole case is going to go to court," she said.

The case is Mitchell v. Raymond James and Associates Inc., case number 8:23-cv-02341, in the U.S. District Court for the Middle District of Florida.

--Editing by Neil Cohen and Roy LeBlanc.
