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**Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act - A Powerful Tool for Plaintiffs**
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Federal courts are vigorously enforcing a law that limits arbitration of sexual harassment and assault claims — giving plaintiffs a potential advantage not only in prosecuting sexual harassment and assault claims, but also claims related to them.

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (9 U.S.C. §402) (EFAA) amended the Federal Arbitration Act (FAA) to prohibit the enforcement of otherwise enforceable arbitration agreements for claims arising from sexual harassment or sexual assault.

Specifically, the EFAA provides that "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under federal, tribal, or state law and relates to the sexual assault dispute or the sexual harassment dispute." §402(a).

The EFAA also makes clear that courts and not arbitrators must determine whether the EFAA applies to a particular dispute, even where the "agreement purports to delegate such determinations to an arbitrator." §402(b).

A recent decision in the Southern District of New York highlights the benefits of pleading sexual harassment and/or assault related claims, among other meritorious causes of action, to plaintiffs who wish to avoid contractually mandated arbitration

In *Puris v. TikTok Inc.*, No. 24 Civ. 944, 2025 WL 343905 (S.D.N.Y. Jan. 30, 2025), the plaintiff brought claims of employment discrimination, unlawful retaliation, and interference with FMLA rights. Notably, she did not plead a traditional harassment claim. Rather, she alleged that she was terminated in retaliation for complaining about sexual harassment.

TikTok argued that the EFAA did not apply because the plaintiff did not plausibly allege the harassment related retaliation claim, and that her other claims must be severed and arbitrated. The court disagreed. Determining that the EFAA overrode the FAA, Judge Denise Cote of the

SDNY denied TikTok's motion to compel arbitration. First, the court determined that the retaliation claim was one "relating to conduct that is alleged to constitute sexual harassment."

Next, looking to the text of the EFAA, Judge Cote held "the EFAA excludes the entire case — not only certain claims — from mandatory arbitration, so long as it 'r*elates to*' the sexual harassment claim,…" *Puris*, at *6 (internal citations omitted). Ultimately, the retaliation, hostile work environment, and FMLA interference claims were all permitted to proceed in court.

*Puris v. TikTok* is not the first case in the district to hold that the EFAA may enjoin arbitration of an entire case. In *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 561 (S.D.N.Y. 2023), the court concluded the EFAA's use of the word "case" instead of "claim" in §402 (a) was indicative of an intent to invalidate the arbitration clause with respect to "the entire case" relating to the sexual harassment dispute.

As such, the court held that the EFAA applied to the plaintiff's entire case, including the NYLL pay discrimination claim, gender, race, and ethnicity-based discrimination claim, and the NYLL whistleblower retaliation claim, and declined to compel arbitration.

While the issue has not yet reached the Second Circuit, an expansive reading of the EFAA as enjoining arbitration of the entire case where harassment claims are cognizably pled is the predominant view in the Southern District of New York. *See Baldwin v. TMPL Lexington LLC*, No. 23 Civ. 9899, 2024 WL 3862150, at *7 (S.D.N.Y. Aug. 19, 2024) (observing that the view "has been widely followed by courts in this District") (citation omitted).

Meanwhile, the Second Circuit has interpreted the EFAA's definition of "sexual harassment dispute" as extending to "retaliation resulting from a report of sexual harassment." *Olivieri v. Stifel, Nicolaus & Co., Inc.*, 112 F.4th 74, 92 (2d Cir. 2024).

It is also the majority view across other federal jurisdictions. *See e.g., Williams v. Mastronardi Produce, Ltd.*, No. 23 Civ. 13302, 2024 WL 3908718, at *1 (E.D. Mich. Aug. 22, 2024) ("This court shall follow the current majority view, that is based upon the statute's express language, and rules that the EFAA precludes arbitration of this whole case."); Turner v. Tesla, Inc., 686 F. Supp. 3d 917, 925-926 (N.D. Cal. 2023) (finding arbitration agreement unenforceable with respect to plaintiff's entire case because her "non-sexual harassment claims were intertwined with her sexual harassment claims").

What is less clear is whether courts will extend the EFAA to enjoin arbitration of the entire case where a plaintiff pleads claims that are not intertwined with or in some way factually related to the sexual harassment or assault claims alleged. At least one SDNY decision, *Mera v. SA Hosp. Grp.*, LLC, 675 F. Supp. 3d 442, 448 (S.D.N.Y. 2023), limited the EFAA to the plaintiff's sexual harassment claims and granted the defendants' motion to compel arbitration of the plaintiff's wage and hour claims under the FLSA and the NYLL.

The court's basis for arriving at this conclusion was the lack of any relationship between the plaintiff's sexual harassment claims and wage and hour claims.

More recent decisions in the district have expressly disagreed, finding Mera's interpretation impractical and "antithetical to the language of the EFAA and its protective intent" and would require the court to make decisions about the relatedness of claims "early in a case and in a definitive manner a question that often is not easily answered on the pleadings." *Diaz-Roa v. Hermes L., P.C.*, No. 24 Civ. 2105, 2024 WL 4866450, at *13 N. 9 (S.D.N.Y. Nov. 21, 2024) (internal citation and quotation omitted) (noting "[i]t is not self-evident for example, that evidence that the plaintiff was the victim of persistent sexual assault or harassment would be irrelevant to the claim that such person had also been deprived of her rights to a minimum wage and overtime pay.")

These decisions reinforce a broader trend: federal courts are strictly enforcing the EFAA, which has major implications. Notably, sexual harassment and assault claims may receive more favorable treatment in court than in arbitration, particularly in plaintiff-friendly jurisdictions like New York.

Perhaps more importantly, cases filed in court have more immediate public relations consequences than arbitrations, making the threat of immediate litigation a more potent threat.

The EFAA is a powerful tool for plaintiffs who prefer to bring their claims in court. Plaintiffs' counsel are encouraged to conduct thorough due diligence of the facts underlying their clients' employment claims to determine whether plausible harassment or harassment related retaliation claims exist.

For litigants living or working in New York City, the NYCHRL has the "most lenient applicable liability standard," and to allege "a hostile work environment theory of sexual harassment," a plaintiff need only show "she has been treated less well than other employees because of her gender" or subjected to "unwanted gender-based conduct." *Delo v. Paul Taylor Dance Foundation, Inc.*, 685 F. Supp. 3d 173, 182 (S.D.N.Y. 2023).

This means the EFAA qualifying harassment claim may not necessarily require allegations of sexual misconduct, such as unwanted touching or comments. See id.; but see *Singh v. Meetup LLC,* 750 F. Supp. 3d 250, 259 (S.D.N.Y. 2024), reconsideration denied, No. 23 Civ. 9502, 2024 WL 4635482 (S.D.N.Y. Oct. 31, 2024)(plaintiff failed to allege harassing conduct or inappropriate comments that constitute sexual harassment and "[h]olding otherwise would collapse the difference between "gender discrimination" and "sexual harassment, a step too far").

Given the pervasive nature of harassment in the workplace, clients seeking counsel for employment claims may not recognize or even be aware that they are a victim, or may be embarrassed or ashamed to describe such conduct.

Additionally, a “sex” plus based theory of harassment (e.g., sex and race or sex and age) would likely qualify under the SDNY’s broad interpretation of the EFAA and local anti-harassment statutes.

Plaintiffs’ counsel should thoroughly investigate a client’s entire work history, including their day-to-day interactions with co-workers and management. It is also best practice to review documents and communications before filing the complaint, and not for the first time when presented with discovery requests.

Counsel should, of course, make every effort to assess the veracity of a client's claims fully before filing a complaint. This is good practice whether you ultimately uncover a harassment claim or not: it is always preferred to truly get to know your client, the good, the bad, and the ugly, before you file.

If there is a good faith belief that your client has a meritorious harassment claim that can survive F.R.C.P. 12(b)(6), the EFAA will allow you to litigate your client’s entire case in court, notwithstanding the existence of a mandatory arbitration clause.

And, if the facts presented truthfully do not constitute harassment, you will thank yourself later for having done the proper due diligence early.

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