When One Door Closes

New Law Ends Arbitration of Sexual Harassment Claims

By Mark C. Travis

Driven in large part by the #MeToo Movement, private arbitration agreements — particularly in the area of sexual harassment — have come under severe criticism over the past several years. On Feb. 10, after years of legislative negotiations and on a bipartisan basis, the U.S. Congress passed the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021." On March 3, President Biden signed the Act into law. The Act amends the Federal Arbitration Act[1] (FAA) by adding a Chapter 4, and while it appears straightforward at first blush, it raises numerous questions in theory and practice.

The Provisions of the Act

As a threshold matter, it should be noted that the substantive provisions in the FAA regarding the enforceability of arbitration agreements apply in state court under the Commerce Clause.[2] Along that same line, the Supreme Court has held the FAA provides no independent basis for the jurisdiction of federal courts.[3]

Section 402(a) of the Act provides that notwithstanding any other provision of the FAA, "at the election of a person alleging conduct constituting a sexual harassment or sexual assault dispute … no predispute arbitration agreement … 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." This section also makes class or collective action waivers for such disputes invalid and unenforceable in judicial, administrative or arbitration forums.[4]

The Act specifies what law applies and who is to determine whether an agreement falls under the Act — the court or an arbitrator. Section 402(b) of the Act provides that any issue over whether the prohibition applies to a particular dispute shall be determined under federal law. This provision also states the applicability of the Act to a predispute arbitration agreement "shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator." Students of arbitration will recognize the intent behind this provision. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[5] the Supreme Court established a "separability doctrine," which held an attack on the arbitration agreement (as opposed to the contract as a whole), is for the court to determine, while an attack on the contract as whole is for the arbitrator. Subsequently, in *Rent-A-Center v. West Inc. v. Jackson*,[6] the Supreme Court held the enforceability of the arbitration clause may be also decided by the arbitrator where there is specific delegation of that authority in the agreement. Thus, this provision of the Act limits those holdings in sexual harassment cases, thereby limiting the authority of the arbitrator to determine arbitrability.

The definitional provisions are found in Section 401. A "sexual assault dispute" is defined as "a dispute involving a nonconsensual sexual act or sexual contact" under the federal criminal code or similar applicable tribal or state law. A "sexual harassment dispute" is defined as "a dispute relating to conduct that is alleged to constitute sexual harassment" under applicable federal, tribal or state law. The Act does not expressly invalidate existing predispute arbitration agreements, but does apply to any claim that arises or accrues on or after its effective date, March 3, 2022.

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Issues Regarding Scope of the Act

Related Claims. The first issue likely to arise in the application of the new law is when a tort claim (*e.g.*, intentional infliction of emotional distress) is included in a complaint for sexual harassment — either under Title VII of the Civil Rights Act of 1964, or the Tennessee Human Rights Act. Put another way, under the statutory definition of sexual harassment dispute, does the tort claim "relate to" conduct that is alleged to constitute sexual harassment, or vice versa? Although arguments could be made that the claims should be severed, the legislative history suggests "all the claims" relating to the conduct should be heard in court, in one proceeding.[7]

A more challenging question can arise if a separate cause of action is pled in a complaint for sexual harassment. For example, assume an additional claim is asserted for another form of discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, or the Americans with Disabilities Act. What happens if those claims are raised in the same pleading as the sexual harassment complaint? Do those fall within the statutory definition of "sexual harassment dispute"? If not, what is the practical effect? Here, the discussion in the legislative history indicates the Act should be narrowly construed and should not be used as a device to move "unrelated" claims out of arbitration, and the unrelated claims should be remanded to arbitration.[8] Perhaps this could result in some inefficiencies. Yet when a case involves both arbitrable and nonarbitrable claims, the FAA requires courts to compel arbitration of the former, even if the result would be inefficient maintenance of separate proceedings in different forums.[9] Under this scenario, if the court were to compel arbitration of the arbitrable claim, it would not be an appealable order under section 16 of the FAA; but if the court were to deny a motion to compel the arbitrable claim, the decision would be appealable.

Continuing down the course of this analysis, what happens if the arbitration proceeds on the "unrelated" claim, and that disposition occurs before the conclusion of the sexual harassment case? Obviously, *res judicata* would not apply, but what about collateral estoppel relative to issues common to both claims (*e.g.*, whether the plaintiff was constructively

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discharged, or the amount of the plaintiff's damages)? In that event, an arbitrator's finding may be used as the basis for collateral estoppel if the elements are otherwise satisfied.[10]

Preemption and Relationship to Tennessee Uniform Arbitration Act. Another issue relates to the scope of the FAA's preemption of state law. Specifically, it is clear the FAA preempts state law which *conflicts with* or attempts to *limit* the FAA.[11] By the same token, the FAA is designed to ensure that private arbitration agreements are enforced according to their terms, and the Supreme Court has recognized that parties may potentially contract-out of FAA's coverage by reference to state law in the arbitration agreement.[12]

Most cases that have arisen in this context involve state statutes that limit the scope of the FAA. The Tennessee Uniform Arbitration Act[13] would not, by its terms, prohibit arbitration of sexual harassment cases, and is therefore *broader* than the FAA under the Act. However, the lower federal courts that have addressed this issue have generally not found the agreements to be sufficiently specific to indicate an unequivocal reference that state arbitration law should control.[14] It could also be argued that state law is preempted to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[15]

Relationship to Labor Arbitration. In *Alexander v. Gardner-Denver Co.*[16] the Supreme Court held that a labor arbitration award arising under a non-discrimination clause in a collective bargaining agreement would not preclude a civil action for violation of Title VII of the Civil Rights Act of 1964. The new Act would not seem to disturb this holding as the plaintiff-grievant's right to proceed in court for sexual harassment is now statutorily protected. A larger issue arises under the Supreme Court's 2009 decision in *14 Penn Plaza, LLC v. Pyett*.[17] There, the Supreme Court held that where the collective bargaining agreement contains a clear and unmistakable requirement that employment discrimination claims be decided through the arbitration process (in that case the Age Discrimination in Employment Act, or the ADEA), the employee has waived the right to proceed in court.[18]

The new provisions of the FAA — which did not address collective bargaining agreements — and existing Supreme Court precedent present some tension. The obvious question is whether a collective bargaining agreement that prohibits sexual harassment under federal or state law is a "predispute arbitration agreement" under the FAA. Traditionally, most labor agreements are considered to arise under Section 301 of the Labor Management Relations Act (LMRA),[19] although the Supreme Court often refers to the FAA for guidance in cases involving labor arbitration. In *Pyett* itself, the case arose by virtue of a motion to compel under the FAA, although the Court relied heavily on the National Labor Relations Act (NLRA) and the ADEA in its analysis. Specifically, the court held the collective bargaining agreement provision "must be honored unless the ADEA itself removes this particular class of grievances from the NLRA's broad sweep."[20] The resolution of this issue will definitely involve a more searching inquiry, as with many of the other issues raised in this article.

Notes

1. 9 U.S.C., § 1 et seq.
2. *Southland Corp. v. Keating*, 104 S. Ct. 852, 858 (1984); see also, *Frizzell Const. Co. v. Gatlinburg LLC*, 9 S.W.3d 79, 83-84 (Tenn. 1999).
3. *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1271-72 (2009).
4. Effectively limiting the application of *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).
5. 87 S. Ct. 1801, 1806 (1967). This doctrine was held applicable to actions in state court under *Buckeye Check Cashing Inc. v. Cardenga*, 126 S. Ct. 1204 (2005).
6. 130 S. Ct. 2772, 2779 (2010). See also, *Dean v. Draughons Junior College Inc.*, 917 FSupp.2d 751, 763 (M.D. Tenn. 2013); *Mid-South Maintenance Inc. v. Paychex Inc.*, 2015 WL 4880855 at *18 (Tenn.Ct.App., Aug. 14, 2015).
7. See, *Congressional Record – Senate*, Feb. 10, 2022, at 2625; www.congress.gov/congressional-record/2022/02/10/senate-section/article/S619-10.
8. *Id.*
9. *KPMG LLC v. Cocchi*, 132 S. Ct. 23, 24 (2011); *Dean Witter Reynolds Inc. v. Byrd*, 105 S. Ct. 1238, 1240 (1985); *Moses H. Cone Memorial Hospital v. Mercury Constr. Co.*, 103 S. Ct. 927, 939 (1983).
10. *Turpin v. Love*, 1973 WL 16997 at *3 (Tenn.Ct.App., Aug. 14, 1973); see also, *W. J. O'Neill Co. v. Shepley, Bulfinch, Richardson & Abbott Inc.*, 700 Fed. Appx. 484, 490 (6th Cir. 2017)(applying Michigan state law on elements of collateral estoppel, held arbitrator's finding on damages precluded plaintiff's claims for additional damages in tort).
11. *Southland Corp.*, 104 S. Ct. at 858 (1984).
12. *Volt Information Sciences Inc. v. Board of Trustees of the Leland Stanford University*, 109 S. Ct. 1248 (1989); *Mastrobuono v. Shearson Lehman Hutton Inc.*, 115 S. Ct. 1212 (1995); *Preston v. Ferrer*, 128 S. Ct. 978 (2008).
13. *Tenn. Code Ann.*, § 29-5-301 et seq.
14. *Ferro Corp. v. Garrison Industries Inc.*, 142 F.3d 926, 937 (6th Cir. 1998)(choice-of-law provision in arbitration agreement "conspicuously broad" and not unequivocal inclusion of Ohio law which is opposite of FAA); but see, *Palcko v. Airborne Express Inc.* 372 F.3d 588, 595 (3d Cir. 2004)(where agreement provided Washington state law pertaining to arbitration agreements would apply, enforcement of the agreement did not contradict any of the language of the FAA, but furthered the general policy goals of the FAA favoring arbitration).
15. *Volt Information Sciences Inc.*, 109 S. Ct. at 1255.
16. 94 S. Ct. 1011 (1974).
17. 129 S. Ct. 1456 (2009).
18. *Nealy v. Shelly & Sands Inc.*, 852 Fed.Appx. 879 (6th Cir. 2021).
19. 29 U.S.C. § 185(a).
20. 129 S. Ct. at 1465.