So Where Are We Now? Developments Under the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act"

Introduction

Last year Congress amended the Federal Arbitration Act (FAA) by incorporating the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act" ("the Act"). 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."[1]

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 did not expressly invalidate existing predispute arbitration agreements, but it does apply to any claim that arises or accrues on or after its effective date — March 3, 2022.

Analysis

A. Legislative History

The Act does not, however, address how to deal with cases in which a sexual harassment cause of action is included within the same complaint as other employment-related claims — whether statutory or sounding in tort. The Act simply prohibits arbitration of a case which "relates to" a sexual harassment dispute.

The legislative history of the bipartisan Act provides little additional guidance. [2] Sen. Joni Ernst, R-Iowa, stated the bill "should not be the catalyst for destroying predispute arbitration agreements in all employment matters…." and that harassment claims "should not be joined to an employment claim without a key nexus." Similarly, Sen. Lindsay Graham, R-South Carolina, stated: "What we are not going to do is take unrelated claims out of the arbitration contract." On the other side of the aisle, Sen. Dick Durbin, D-Illinois, stated: "There is nothing in the bill directing courts to dismiss related claims and compel them to forced arbitration if a victim ultimately does not prevail on her sexual assault or harassment claim…." Sen. Gillibrand, D-New York, stressed that parties "must follow the rules and plead a case correctly, and … must affirm to the court that they have good-faith basis for doing do."

Without more guidance, it is not surprising the courts have struggled with determining whether claims are "related" under the Act. The following section discusses the reasoning and results from several courts on this issue.

B. Recent Cases under the Act

In *Turner v. Tesla, Inc.*,[3] Turner was hired as a production associate in a Tesla manufacturing facility on Nov. 30, 2020, at which time she signed an arbitration agreement. Her complaint, which she filed in state court, alleged she had been subjected to sexual harassment prior to her termination from employment on Sept. 14, 2022, and that her termination was in retaliation for her sexual harassment complaints as well as in retaliation for reporting workplace injuries. The complaint also alleged wage discrimination.

Tesla removed the case to federal court and then moved to compel arbitration, or in the alternative, to sever the non-sexual harassment claims and send those to arbitration. First, as to any issue regarding the effective date of the Act, the court found that the adverse action of Turner's termination occurred after the effective date and that, thus, the action within the Act's temporal scope.

As to the issue of severance, the court addressed each of Turner's claims and found the arbitration agreement unenforceable as to all because the core of her case alleged "conduct constituting a sexual harassment dispute" under the Act. Even with respect to the claim concerning wage discrimination and workplace injuries, the court held that they should not be severed because they were otherwise "inherently intertwined with the other causes of action such that it makes sense to have this claim proceed along the other causes of action."[4]

In *Johnson v Everyrealm, Inc.*,[5] Johnson's initial complaint alleged a number of causes of action arising out of his employment with the defendant, none of which asserted sexual harassment. After Everyrealm filed a motion to compel arbitration, Johnson was allowed to file an amended complaint, which included a number of allegations related to sexual harassment.

The court held that the amended complaint sufficiently pled facts giving rise to a cause of action for sexual harassment under Rule 12(b)(6). The court then addressed whether the arbitration agreement was unenforceable as to the sexual harassment claim only or if it was unenforceable as to the entire case. The court found the latter. The court acknowledged that under the FAA, "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation."[6] However, the court observed that the Act made pre-dispute arbitration agreements unenforceable "with respect to a *case* which is filed under federal, tribal or state law and relates to the … sexual harassment dispute."[7] The court held the traditional definition of "case" referred to the overall legal proceeding, not merely the discrete claims alleging sexual harassment. Thus, the court denied the motion to compel arbitration as to the entire case.

In *Yost v. Everyrealm, Inc.*, 2023 WL 2224550 (S.D.N.Y. Feb. 24, 2023), decided by the same judge and on the same day as the *Johnson* case above, the court reached a different conclusion on different facts. After Yost filed an initial complaint and amended complaint, Everyrealm filed a motion to compel arbitration. Yost then filed a second amended complaint, adding claims for hostile work environment sexual harassment, to which Everyrealm filed a Rule 12(b)(6) motion to dismiss. Here, however, the court held that Yost's allegations did not rise to the level of actionable sexual harassment.

Not surprisingly, the court then held that, since the Act pertains to conduct "alleged to constitute sexual harassment under applicable federal, tribal or state law," it was inapplicable in this case, where the conduct failed to meet that standard. To find otherwise, the court stated, "would enable a plaintiff to evade a binding arbitration agreement — as to wholly distinct claims, and for the life of a litigation — by the expedient of adding facially unsustainable and quickly dismissed claims of sexual harassment."[8]

In *Mera v. SA Hospitality Group*,[9] Mera signed an arbitration agreement upon commencement of his employment, and subsequently filed a complaint for sexual harassment based on his sexual orientation, as well as violations of the Fair Labor Standards Act and New York wage law on behalf of all non-exempt employees. In response to the defendant's motion to compel arbitration, the court found the claim for sexual harassment clearly fell within the coverage of the Act, and the arbitration agreement was unenforceable as to that claim. However, the court held the wage claims were distinct and compelled arbitration as to those claims.

In *Delo v. Paul Taylor Dance Foundation*,[10] Delo signed an arbitration agreement at the commencement of her employment. After her termination, she filed suit alleging gender, caregiving and familial discrimination which related to the nursing and caring for her newborn while at work. In response to the defendant's motion to compel arbitration, Delo asserted the agreement was unenforceable under the Act. The defendant argued that Delo did not style any of her claims as "sexual harassment" and that the conduct alleged did not otherwise amount to sexual harassment.

The court did not agree. The court found that Delo alleged a "hostile environment," which is a recognized form of sexual harassment. As to the merits of the allegations, the court noted that under New York law, allegations of sexual harassment only need to show that the plaintiff has been treated less well than other employees because of her gender, based on unwanted "gender-based conduct." Moreover, although

the alleged wrongful conduct traversed the period before and after the effective date of the Act, the court found the post-March 3, 2022 actions sufficiently related to the earlier acts, and thus, the complaint fell within the purview of the Act.

More recently, and closer to home, in *Jane Doe v. TriStar Concepts Inc. et al*,[11] the Chancery Court for Davidson County applied the Act to enjoin a pending arbitration proceeding. There, the plaintiff was a party to an employment arbitration agreement with her employer, TriStar, which included confidentiality and non-disparagement provisions. After her termination, the plaintiff posted claims of sexual harassment by the principal of TriStar on social media. Tri-Star then commenced the arbitration proceeding for violation of the plaintiff's contractual obligations. After the arbitrator denied the plaintiff's motion to dismiss the arbitration (on grounds unrelated to the Act), the plaintiff filed this action for sexual harassment under the Tennessee Human Rights Act.[12] The court concluded that TriStar's contractual claims "relate[d] to" the plaintiff's alleged claims of sexual harassment, rendering the arbitration agreement invalid and unenforceable. The court further found the plaintiff had not waived her argument against arbitration by failing to raise it in the arbitration itself.[13]

Conclusion

The majority of courts have taken a broad view of what claims are "related" so as to invoke the Act. It is too early to see what course other cases will take, and if there will be appeals of these decisions[14] — but these examples provide a good basis for research by practitioners dealing with sexual harassment and "related" claims.

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[1] 9 U.S.C. §401 et seq.

[2] See, Congressional Record – Senate, Feb. 10, 2022, at 2625; https://www.congress.gov/congressional-record/2022/02/10/senate-section/article/S619-10.

[3] No. 3:23-cv-02451 (N.D. Cal. May 19, 2023).

[4] *Id.* at 11.

[5] 2023 WL 2216173 (S.D.N.Y. Feb. 24, 2023).

[6] *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011).

[7] 9 U.S.C. §402(a)(emphasis in case).

[8] *Id.* at *17.

[9] 2023 WL 3791712 (S.D.N.Y. June 3, 2023).

[10] 2023 WL 4883337 (S.D.N.Y. Aug. 1, 2023).

[11] Chancery Court for Davidson County, Tennessee, No. 23-1094-I (Sept. 12, 2023).

[12] Note, the substantive provisions of the FAA apply in state court under the Commerce Clause. *See, 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).

[13] The court also found the other elements for injunctive relief to be satisfied, particularly the strong public policy favoring a judicial forum for sexual harassment claims under the Act. *Jane Doe*, at p. 8

[14] Note, that under 9 U.S.C. §16 (a), an appeal may be taken from an order denying a motion to compel arbitration; and under 9 U.S.C. §16(b), an appeal may not be taken from an order granting a motion to compel arbitration.