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The latest in the war on arbitration: implausible sexual harassment claims

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In 2022, then President Joe Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA), 9 U.S.C. §§ 401 *et seq*. Under this statute, plaintiffs who signed arbitration agreements can elect to void them in "a case which ... relates to ... [a] sexual assault dispute or ... [a] sexual harassment dispute." *Id.* at § 402(a). Supported by sexual assault and domestic violence victims' rights organizations and the plaintiffs' bar, the EFAA was intended to "restore access to justice for ... victims of sexual assault or harassment ... locked out of the court system and ... [allegedly] forced to settle their disputes against companies in a private system of arbitration that [supposedly] often favor[ed] the company over the individual." H.R. Rep. No. 117234, at 4 (2021).

Unfortunately, since its enactment, the EFAA has been deployed by plaintiffs as yet another tool to evade otherwise enforceable arbitration agreements in circumstances far different from what the EFAA's proponents intended. Soon after the EFAA became effective, plaintiffs' lawyers began adding errant sexual assault or harassment claims to lawsuits as a shield against arbitration -- even when those claims were not the gravamen of or even remotely related to the employees' principal claims. In turn, employers began to question what standard (if any) should be used to assess the applicability of the EFAA to these pasted on, sometimes flimsy, sexual harassment claims.

Perhaps the earliest significant decision, *Yost v. Everyrealm*, Inc., determined that the plaintiff's sexual harassment claim was not "plausible" -- and, therefore, not subject to the EFAA -- where there were no comments related to the plaintiff's sex or gender and only two alleged comments made to or in the plaintiff's presence about other employees' sexual orientations. 657 F. Supp. 3d 563, 582 (S.D.N.Y. 2023) (emphasis added). Yost's measured approach -- requiring some degree of plausibility to support the alleged sexual harassment allegations -- has been endorsed by courts outside New York. E.g., *Gonzales v. Carnival Corp.*, 757 F. Supp. 3d 1314, 1321 22 (S.D. Fla. 2024). However, this has not been a consistent trend.

Notably, another federal district court in New York recently rejected Yost and, instead, held that "the view that is more faithful to Congress' language and intent is that a plaintiff need only plead nonfrivolous claims relating to sexual assault or ... sexual harassment." *Diaz Roa v. Hermes L., P.C.*, 757 F. Supp. 3d 498, 533 (emphasis added) (S.D.N.Y. 2024). Perhaps not surprisingly, Diaz Roa's more lenient standard has been readily embraced by courts in California. E.g., *Anderson v. Louis Vuitton N. Am., Inc.*, No. CV 25 2878 JFW(MBKX), 2025 WL 1591800, at 5 (C.D. Cal. June 5, 2025); **Gill v. US Data Mgmt., LLC*, No. 2:24 CV 05255 MCS MAR, 2024 WL 5402494, at *3 (C.D. Cal. Dec. 2, 2024); *but see Liu v. Miniso Depot CA, Inc.*, 105 Cal. App. 5th 791, 799 n.2 (2024) (acknowledging Yost's use of the plausible pleading standard, but leaving unresolved its applicability in California).

A related issue that has emerged occurs when sexual harassment

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allegations are joined with different, unrelated causes of action. Although some courts have parsed claims, exempting from arbitration only the sexual harassment or assault claims (e.g., *Mera v. SA Hosp. Grp.*, 675 F. Supp. 3d 442, 44748 (S.D.N.Y. 2023)), most have found the inclusion of any sexual harassment or assault claim sufficient to render the entire lawsuit arbitration proof.

California courts have been particularly receptive to the argument that the EFAA exempts from arbitration an entire case (not merely those individual sexual assault or harassment claims alleged therein). For example, in *Doe v. Second Street Corp.*, the California Court of Appeal affirmed a trial court order deeming a panoply of wage and hour claims exempt from arbitration under the EFAA, because they were included in the same "case" as the plaintiff's unrelated sexual harassment allegations. 105 Cal. App. 5th 552, 560 561 (2024). A few months later, another California appellate court followed suit in another hybrid wage and hour case. *See Liu, supra*, 105 Cal. App. 5th at 796.

There may be some light at the end of the tunnel for California employers. At least some courts have pushed back on sex discrimination claims masquerading as "sexual harassment," which are designed to thwart arbitration. For example, in *Johannessen v. JUUL Labs, Inc.*, a district court held that the EFAA did not apply to a plaintiff's claims, even though she had labeled one "harassment," because the plaintiff's allegations involved discriminatory "[p]ersonnel actions" (such as changes to job duties and exclusion from meetings). No. 3:23 cv 03681 JD, 2024 WL 3173286, at *3 4 (N.D. Cal. June 24, 2024).

As the Johannessen court explained, "[t]he critical point for ... purposes [of the EFAA] is that sexual harassment and sexual discrimination are not the same." *Id.* at *4. Similarly, in *Van De Hey v. EPAM Systems, Inc.*, the court found that allegations that the plaintiff's supervisors were mostly male and that she "was consistently denied equal pay" failed to constitute sex harassment for purposes of the EFAA, even if the allegations "may indeed describe sex discrimination." No. 24 cv 08800 RFL, 2025 WL 829604, at *4 5 (N.D. Cal. Feb. 28, 2025).

Absent repeal or a clarifying amendment to the EFAA, it seems that the Supreme Court will have to determine whether some degree of plausibility is required to exempt an entire case from arbitration and, failing that, whether claims unrelated to purported sexual assault or harassment can be severed from other arbitrable claims. In the interim, however, California employers are likely to face hurdles in compelling arbitration in cases in which plaintiffs strategically toss in allegations of "sexual harassment" as a poison pill to evade arbitration.