EXPERT OPINION

Southern District Confirms Broad Scope of the 'Ending Forced Arbitration Act'

A discussion of how Southern District Judge Ronnie Abrams confirmed the broad scope of the 'Ending Forced Arbitration Act.' In denying a motion to compel arbitration, the court made clear that 'sexual harassment' can include any "unwanted gender-based conduct."

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Columns

By Lawrence M. Pearson and John S. Crain | September 26, 2023 at 10:00 AM

On Aug. 1, 2023, Judge Ronnie Abrams of the Southern District of New York stood on the side of women by confirming that the Ending Forced Arbitration Act (EFAA)—the new law that exempts from secret arbitration any claim of "sexual harassment" or "sexual assault"—goes beyond protecting employees only in cases of rape, assault, or blatant sexual advances.

In denying a motion to compel arbitration of the claims of Barbara Delo, a former costume supervisor for Paul Taylor Dance Company, the court made clear—if any doubt remained—that "sexual harassment" under the EFAA does not mean only sexual assaults, sexual advances or requests for sexual favors, but can include any "unwanted gender-based conduct."

In Delo's case, the alleged conduct included the behavior of her boss John Tomlinson, who, among other harassing acts, hovered over her (purportedly to use a phone) while she pumped breast milk in order to intimidate her; berated her for bringing her child to work (when Delo's husband, who also worked there, did the same thing without any reproach); and later retaliated and interfered with her ability to do her job by refusing to talk with her at work for over six months.

According to the court, these hostile, harassing acts constituted "sexual harassment" as they were directed at Delo on the basis of her female gender, and sufficient to bar the entire case from arbitration.

When she filed her case, Delo knew that she had been "sexually harassed," and her complaint was drafted accordingly. She was also aware, however, that it could be argued that there is a gray zone in the new statute as to exactly what Congress meant by "sexual harassment."

By way of background, under federal law, an employer may require employees to sign binding arbitration agreements, and the federal courts will give effect to those agreements, forcing into asecretarbitration any claims an employee may have against their employer,including fordiscrimination, harassment orretaliation.

An employee therefore will be forced to arbitrate, usually using an arbitrator whose fees are being paid by the employer. Arbitration is commonly understood to be a more employer-friendly forum than court-based litigation and jury trials, with arbitration generally entitling parties to much less document and information exchange and often yielding lower awards even when liability is found.

Congress passed the "Ending Forced Arbitration for Sexual Harassment and Sexual Assault Act," a.k.a. the "Ending Forced Arbitration Act" or "EFAA" in 2019 to address this power imbalance. The EFAA states that any claim of "sexual harassment" or "sexual assault," or any claim "relate[d] to" sexual harassment or sexual assault, would, going forward, be exempt from secret arbitration and heard before a judge and jury.

The change, it was hoped, would keep legal claims of workplace sexual harassment public in order to combat the stigma surrounding such claims and provide a record of such allegations that is not hidden behind confidentiality.

A key issue for any case (including Ms. Delo's) under the EFAA is whether what happened to the plaintiff was "sexual harassment" as covered by that law. Much of the public rhetoric around the EFAA's passage (in the wake of the height of the Me Too movement) focused onwell-knowncases of sexual coercionor assault.TheCongressional Committeethat reported the Bill to theHousefeatured theexperiences of Gretchen Carlson, the Fox News anchorwho was fired afterrefusing the sexual advances of network CEO andChairmanRogerAiles.

The report also highlighted the experience of employees at Sterling Jewelers who, according to the Committee Report, "were victims of groping and sexual coercion and sexual degradation and rape." Such examples of what many may think of as prototypical "sexual harassment" could create the impression that only cases of sexual coercion or rape would be exempt from arbitration under that law, even though the law does not contain any such restrictive definition.

Of course, allegations of quid pro quo sexual harassment and nonconsensual sex acts capture the public's attention due to their terrible and shocking nature, and therefore will also often serve as the most powerful examples for politicians to use when advocating for passage of a bill.

In addition, the first Supreme Court case to recognize sexual harassment as actionable gender discrimination under Title VII, *M eritor Sav. Bank, FSB v. Vinson* , 477 U.S. 57 (1986), involved the allegations of a subordinate who had been sexually coerced and raped by her supervisor multiple times.

However, as we argued on behalf of Barbara Delo, the legal concept of "sexual harassment" has been clarified and expanded since *Meritor*. While sexual coercion and sexual assault are the most heinous forms of sexual harassment, legal prohibitions of "sexual harassment" are now understood to go far beyond such assaultive and coercive acts.

Decades of case law at every level now concur that "sexual harassment" includes mistreatment constituting "discrimination based on sex." *Butler v. Ysleta Indep. Sch. Dist.* , 161 F.3d 263, 268 (5th Cir. 1998). Therefore, "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

As the U.S. Court of Appeals for the Second Circuit has explained, "[a]lthough sexual harassment is usually thought of in terms of sexual demands, it can include employer action based on [sex] but having nothing to do with sexuality." *Raniola v. Bratton* , 243 F.3d 610, 617 (2d Cir. 2001) (quoting Lex K. Larson, Employment Discrimination §46.01[3] (2d ed.2000)). As we successfully argued in Delo's case, Congress is presumed to be aware of such widespread definitions, and it intended to incorporate them when it used the well-known term "sexual harassment" in the EFAA.

If "sexual harassment" was limited to only acts of sexual coercion or assault, the EFAA and antidiscrimination laws would offer no recourse for a broad swathe of employer behaviors that plainly make working conditions substantially worse for people on the basis of sex and gender.

Employers would be free to undermine and sabotage an employee's work because of their gender or gender expressions, such as by bullying them, giving them worse or less-desirable assignments, or making them physically uncomfortable—say, by turning off the heat in winter— in a manner that alters the workplace for, and targets employees on the basis of, sex or gender.

While this type of gender-based harassment is perhaps more subtle, it is no less real, as recognized in case law for decades.

Likewise, if Paul Taylor Dance Company or other employers were free to harass Delo and make it harder to do her job because of her motherhood, or to interfere with her pumping of breast milk, the law prohibiting sexual harassment would have failed to meaningfully protect her. As

Judge Abrams held, however, this is not the law. Abrams agreed that conduct such as what Tomlinson is alleged to have done is "sexual harassment," i.e., harassing conduct targeting Delo based on her sex, and that the long-established scope of such conduct under the law applies to Congress's use of that term in the EFAA.

Many state and city laws against discrimination and harassment laws, including those of New York State and City, go even further, for example not requiring that a sexually hostile work environment rise to the level of being "severe or pervasive" (the standard under federal law).These laws instead include any "unwanted gender-based conduct."

Congress expressly provided in the EFAA that any "State" (which has been construed to include local/municipal law) or "Tribal" definition of "sexual harassment" could be used to exempt a claim from arbitration and keep it in federal court. 9 U.S.C. §402(a).

This provision of the EFAA makes it even more clear that the statute contemplates prohibiting compelled arbitration of *any* claims constituting legally actionable "sexual harassment," including the relatively expansive definitions of New York law that cover "unwanted gender-based conduct."

Sexual harassment claims under New York law can include, and have been held to include, a handful of instances of gender-based insult or comments. E.g., *Sanders on v. Leg Appar el LLC,* 19 Civ. 8423 (GHW) 2020 WL 7342742, at *8 (S.D.N.Y. Dec. 14, 2020) (three gender-hostile comments stated New York City Human Rights Law (NYCHRL) claim); *Gaughan v. Rubenstein*, 261 F. Supp. 3d 390, 416 (S.D.N.Y. 2017) (being asked to serve process in a dangerous neighborhood stated NYCHRL claim for gender based harassment).

Judge Abrams held that it was the intention of Congress to incorporate definitions like those under New York law, no matter how broad, and that a complaint alleging "unwanted gender-based conduct" under New York State or City law would fall within the EFAA and could keep a case out of arbitration.

Defendants responded by arguing that, "to construe [Delo's] gender…discrimination claims as equivalent to a sexual harassment claim" would "in essence re-write the [EFAA] to cover all conduct constituting sexual harassment." And yet, that is indeed what the EFAA does and was intended to do in its plaintext—prohibit agreements from compelling employees to arbitrate legal claims relating to"sexual harassment."

The EFAA's purpose specifically is to "cover all conduct constituting sexual harassment." The U.S. District Court correctly observed that, "Delo is suing defendants in New York City, where, as discussed, the law defining and governing sexual harassment is notably—and intentionally—broad." Put another way, sexual harassment is harassment on the basis of sex, however that is defined under applicable law.

In addition, Abrams joined the majority of judges who, in recent months, have held that *all* of the claims in a complaint are exempted from arbitration if *any* of the claims state a claim for sexual harassment, properly giving broad effect and application to the EFAA's provision that claims "relate[d] to…[a] sexual assault dispute" will be barred from mandatory arbitration.

E.g., *Olivieri v. Stifel, Nicolaus & Co., Inc.* , No. 21 Civ. 0046 (JMA) (ARL), 2023 WL 2740846, at *4 (E.D.N.Y. March 31, 2023) (holding that ongoing retaliation for a complaint of sexual harassment fell during period after EFAA enactment, warranting reconsideration and vacatur of prior order compelling arbitration).

Judge Abrams's decision fulfills the EFAA full purpose—combatting harassment on the basis of sex in all its forms—without setting an artificial boundary based on what some may see as the stereotypical types of sexual harassment.

The EFAA was not meant only to apply to and bar the most egregious cases from secret arbitration, but to exempt a class of claims from such compulsory agreements (particularly as employees may still voluntarily submit cases through arbitration).

Abrams's decision helps to ensure that plaintiffs being targeted for harassment based on their gender will be protected from forced arbitration even if they were not groped or propositioned.

The case is *Delo v. Paul Taylor Dan ce Found., Inc* . , No. 22 Civ. 9416 (RA), 2023 WL 4883337 (S.D.N.Y. Aug. 1, 2023).

Lawrence M. Pearson *is a partner at Wigdor.* John S. Crain *is a senior associate at the firm.*