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A new era in arbitrating workplace sexual harassment

EVEN IF AN EMPLOYEE SIGNED AN ARBITRATION AGREEMENT, ALL HOPE IS NOT LOST

Sexual-harassment cases in the workplace have become a focal point in discussions around corporate culture and employee rights, especially in the wake of movements like #MeToo. With the trend in recent years to expand the statute of limitations for victims of sexual harassment and sexual assault, more and more people are bringing these issues to the courts. However, many employees face the risk of their claims being forced into arbitration because of an arbitration agreement entered into with their employer.

It is important for practitioners handling sexual-harassment cases to be able to anticipate whether an employment case involving these claims must be arbitrated, whether under the Fair Employment and Housing Act (FEHA) or otherwise. While Congress has enacted the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" (the "Act"), even this Act is not a clear end to forced arbitrations. For those attorneys representing employees with sexual assault and sexual harassment claims, it is essential to understand the complexities of this Act and the impact of resolving harassment claims through arbitration rather than the Courts.

Employment arbitration generally

As a preliminary matter, attorneys should understand the fundamentals of employment arbitration because employers still increasingly enforce arbitration. By 2024, 82% of all American workers will be bound by forced arbitration, mandating that they resolve their workplace claims secretly through a process that disproportionately benefits predators at the expense of survivors. (See Lift Our Voices, *Statistics* (2024) <https://liftourvoices.org/statistics> [as of Sept. 30, 2024]; Alexander J.S. Colvin, Economic Policy Inst., *The Growing Use of Mandatory Arbitration* (Sept. 27, 2017), <https://files.epi.org/pdf/135056.pdf>) While arbitration on its face appears to be a form of neutral alternative-dispute resolution, those practicing in employment law know well that arbitration is seldom as neutral as advertised.

For those who have been victims of workplace harassment and discrimination, particularly those who encountered sexual harassment and assault, arbitration can feel like a silencing mechanism rather than a path to justice. Arbitration is typically private, and the results often confidential with no way for the public to learn of the egregious acts of harassment or workplace toxicity, to allow other victims to come forward. Simply put, arbitration of sexual harassment and assault can disrupt the potential for real change in the workplace and accountability that comes with a public trial.

Even if an employee signed an arbitration agreement, all hope is not lost. The landmark case of *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, still provides protections to help ensure a level playing field in arbitration. *Armendariz* prescribes

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the standard for employment arbitration agreements, with its five essential requirements still frequently cited: (1) ensuring that the employee does not bear any costs above that which he or she would have to pay in court; (2) providing for adequate discovery; (3) providing for all types of relief that would otherwise be available in a non-arbitration forum; (4) requiring a written arbitration award and adequate judicial review; and (5) providing for a neutral arbitrator. (*Armendariz*, 24 Cal.4th. at 103-113.)

Despite these minimum protections, arbitration is still not a perfect system for the victims of sexual harassment and assault in the workplace. Particularly, sexual assault and harassment victims are at a disadvantage when proceeding in arbitration because one valuable tool available in court proceedings is the ability to seek punitive damages for repeated and egregious employer misconduct, along with significant remedial actions, which are far more difficult to obtain in arbitration.

Even more, in arbitration, the outcomes of other #MeToo cases can be concealed. These limitations mean less of a chance for plaintiffs to prove malice, oppression, or fraud needed to drive meaningful change and prevent further workplace harassment.

It is especially important to consider whether any defenses to the arbitration agreement can be successfully presented, including unconscionability, fraud, or waiver so that the entirety of the employee's claims can be excluded from forced arbitration. Unfortunately, these defenses are very fact-intensive and generally have a low bar for the employer to rebut, but if any defenses do exist, be sure to raise them early to avoid a forfeiture of any defense.

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

Since the Federal Arbitration Act's ("FAA") enactment in 1925, both state and federal courts have been sending cases to arbitration based on typically a pre-dispute arbitration agreement. The FAA generally declares every agreement to arbitrate "valid, irrevocable, and enforceable" as the intention of the parties and promotes arbitration to the maximum extent possible. (9 U.S.C. § 2.) Because of its preemption powers, even state laws aimed at keeping claims out of arbitration could not truly overcome the powerful presumption that arbitration is the desired dispute resolution method chosen by the parties. (See *AT&T Mobility LLC v. Concepcion* (2011), 563 U.S. 333, 352 [FAA preempts state laws that stand as an obstacle to the FAA's purposes or objectives].)

With the rise of the #MeToo social movement, primarily on social-media platforms in late 2017, there was an immediate understanding that knowledge is power and knowing that you are not alone as a victim of sexual harassment and sexual assault became empowering. Victims across many industries and walks of life came forward to say #MeToo in a collective way that gained momentum in the months and years that followed. California reacted rather quickly with the enactment of the Stand Together Against Non-Disclosure Act (STAND) on January 1, 2019, codified as Code of Civil Procedure section 1001, broadly prohibiting non-disclosure agreements in a variety of cases, including, particularly, sexual harassment and sexual assault.

Momentum built from the #MeToo movement finally led to the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act as the federal amendment to the FAA on March 3, 2022. Codified at 9 U.S.C. § 402(a), the Act prohibits forced arbitration on a claim for sexual harassment or assault under state or federal law based on a pre-dispute arbitration agreement arising after March 3, 2022. While relatively short, this statute has several components to understand and analyze.

A closer look at language

First, the power lies with the plaintiff. The person alleging the sexual harassment or sexual assault has the power to oppose any enforcement of the pre-dispute arbitration agreement. Of course, if the plaintiff wishes to proceed with arbitration rather than the court process, that can still happen notwithstanding the Act. But for those plaintiffs who do not want to arbitrate, they have the ability to render an otherwise enforceable arbitration agreement invalid. It is important that practitioners understand this power and use it as the tool it was meant to be.

Second, the Act specifically applies to those plaintiffs with individual cases or the named representative of a class or collective against that alleges sexual harassment or sexual assault. This means that even in a situation where the named plaintiff has an otherwise valid arbitration agreement, the Act empowers that plaintiff to keep the entire case out of arbitration. Where many arbitration agreements only permit individual claims and do not allow class or collective actions, the Act prohibits even an effective class or collective-action waiver from being enforced in these cases. No longer is the class representative forced to arbitrate their own claims while the class or collective claims are stayed in court pending the completion of arbitration.

Third, subdivision (b) specifically overcomes the increasingly popular delegation clause in arbitration agreements that normally would have sent the case to arbitration for the arbitrator to decide the threshold questions (i.e., whether the parties agreed to arbitrate, whether the arbitration applies to the claims at issue, whether the agreement is unconscionable and whether any defenses to the agreement are meritorious.) (See *Oracle America, Inc. v. Myriad Group A.G.* (9th Cir. 2013) 724 F.3d 1069, 1072 ["[w]hether the court or the arbitrator decides arbitrability is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise"].)

Without subdivision (b), the delegation clause typically found in arbitration agreements would require that even where a plaintiff resists arbitration, the court must send the case to an arbitrator to decide on the merits of any

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defenses to arbitration simply because the parties "agreed" to this delegation. The Act instead intentionally leaves the question of arbitrability with the court, rather than an arbitrator. In practice, this means that plaintiffs must raise the Act as justification for opposing any enforcement of the arbitration agreement so that the court can decide on whether the Act applies. This renders any delegation clause ineffective insofar as sexual harassment or sexual-assault claims are concerned.

Fourth, the Act applies to cases "filed" under the state and federal laws. Narrowly interpreted, this means that the Act only applies to cases filed in court and until the filing, the Act would not prevent arbitration. Depending on when the arbitration agreement is discovered or presented to the plaintiff, it is important to remember that the Act's protections might only be available once the court filing is made.

When does a dispute "arise"?

The Act, which became effective on March 3, 2022, invalidates any agreement to arbitrate a dispute that had not yet "arisen" at the time of the making of the agreement. (9 U.S.C. § 401.) The ambiguity of this language begs the question: When does a dispute "arise" for purposes of determining whether the Act applies or not? What if there are multiple acts that give rise to the dispute? There is a statutory note that was added, indicating: "This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act." (Pub.L. No. 117-90, § 3, reprinted in notes following 9 U.S.C. § 401.)

No demarcation line was drawn with any specificity in the language of the Act, which at one point references the dispute arising and then, at other points, references the filing of the claim in court. It is from this uncertainty that many attorneys will need to carefully consider all of the facts of the alleged conduct and determine whether there are any acts that "arose" or "accrued" after March 3, 2022 when the Act was effective.

Kader v. Southern California Medical Center, Inc.

Naturally, where ambiguity exists in the law, it falls to the courts to figure out how they will be resolved. That opportunity occurred in *Kader v. Southern California Medical Center, Inc*. (2024) 99 Cal.App.5th 214. *Kader* posed at least two questions: "What constitutes a dispute" and "when does it arise?" As simple as these questions seem, the court's analysis of these questions required much consideration.

By way of background, Omar Kader was a former employee of Southern California Medical Center, Inc. which is a community medical clinic. Beginning in 2018, Kader was subjected to egregious and continuous sexual harassment and sexual assault by the chief medical officer of the clinic.

Kader was repeatedly told by his perpetrator that he would be fired if he complained of the sexual harassment and assault to anyone. Initially, Kader did not complain to anyone, fearing he would lose his job and suffering from extreme shame as the victim of these actions.

In June 2019, Kader signed an arbitration agreement (the second of his employment but the only one at issue in the case) that required him to arbitrate all employment disputes in accordance with the Federal Arbitration Act. Between September 2019 and February 2022, Kader suffered from even more incidents of sexual harassment and sexual assault, including further retaliation from the chief executive officer making false statements about Kader in an effort to run him out of the workplace.

On May 27, 2022, Kader filed a complaint with the Department of Fair Employment and Housing (now the California Civil Rights Department ["CRD"]) and obtained an immediate right-to-sue notice. That same day, he filed his complaint in state court against the clinic., the individual harassers, and additional entities and board members relating to his employment. His lawsuit included causes of action for sexual harassment, discrimination on the basis of race, national origin and/or sex, failure to prevent discrimination and harassment, retaliation, intentional infliction of emotional distress, negligence, sexual battery, and defamation.

Upon appearing in the case, the collective defendants filed a motion to compel arbitration. Like many employers, the clinic required employees to sign mandatory arbitration agreements as part of their employment contracts. After the motion was denied, the clinic appealed the order denying arbitration.

At issue on appeal were the two primary questions: (1) whether the Act, that was passed on March 3, 2022, applied to prohibit arbitration of Kader's claims and (2) when the dispute between Kader and the collective defendants arose. The *Kader* court found that "a dispute does not arise solely from the alleged sexual conduct. A dispute arises when one party asserts a right, claim, or demand, and the other side expresses disagreement or takes an adversarial posture. In other words, '[a] dispute cannot arise until both sides have expressed their disagreement, either through words or actions.' Until there is a conflict or disagreement, there is nothing to resolve in litigation." (*Id*. at 222-223 [citations omitted].)

The court took a very detailed approach to decide what is a dispute and when it arises and maintaining that Congress intended every word in the Act and that no term was merely surplusage or meaningless. There was no evidence that Kader made any claim or complaint before filing with the DFEH in May 2022, and he conceded that he never complained to anyone connected with the defendants before filing his DFEH complaint. Thus, there was nothing for the defendants to disagree with until the DFEH complaint was filed, which was clearly after the effective date of the Act.

Despite the fact that a series of events led to the filing of the DFEH complaint,

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events that certainly pre-dated the Act, the court found that the arbitration agreement was unenforceable in light of the dispute arising at the time of the filing of the DFEH complaint, which put Kader and the defendants in an adversarial position.

Jane Doe v. Second Street Corp.

More recently, in *Jane Doe v. Second Street Corp*. (Sept. 30, 2024, B330281) (2024) __ Cal.App.5th __, the plaintiff opposing arbitration achieved another victory.

In *Second Street*, the plaintiff filed a lawsuit against the hotel where she was employed as a server, and against two supervisors, alleging 11 causes of action, including sexual-harassment claims under FEHA, wage and hour claims under the Labor Code, slander and libel. Once again, the court faced at least two questions: (1) whether the sexual-harassment claims alleged by the plaintiff were continuing violations that occurred before and after the Act, and (2) whether the other causes of action not related to sexual harassment would proceed in court or be sent to arbitration.

The plaintiff in *Second Street* alleged she had been attacked and sexually assaulted by a coworker outside of work hours in October 2019. She reported the assault to her supervisor and asked not to be scheduled to work with the perpetrator but was nonetheless scheduled to work shifts that overlapped with him. By October 2021, the hotel had brought on a new director who was informed by Plaintiff's supervisor of the prior assault and that Plaintiff should not be scheduled to work with the perpetrator unless absolutely necessary. The new director demanded that Plaintiff provide him details of the assault, refused to honor the prior scheduling request, and told Plaintiff the assault was her fault.

Plaintiff was thereafter forced to work nearly every shift with her perpetrator which led her to experiencing severe emotional distress, including suicidal ideations in April and May 2022. As a result of the emotional distress, Plaintiff was placed on an involuntary psychiatric hold and never returned to work thereafter.

Plaintiff's lawsuit was filed in February 2023 and defendants filed a motion to compel arbitration of the entire case by March 2023. Defendants appealed the decision of the trial court to deny the motion to compel arbitration and argued that the case should have been sent to arbitration even despite the Act's application because the "crux" of the alleged wrongful conduct happened before the Act's effective date. Further, defendants argued that the plaintiff could have initiated a legal action before 2022 and therefore should not benefit from the Act's protection.

The court thoroughly reviewed the legislative intent of the Act and the treatment by other courts across the country with respect to the interpretation of when a dispute "arises" or "accrues." The court found that, consistent with the framework of hostile-work-environment and sexual- harassment claims that can have ongoing violations that involve repeated conduct over a period of time, Congress must have used the word "accrue" in the language of the Act to import the meaning that "a continuing violation 'accrues' on the date of the last act constituting such violation, even if the conduct could have been actionable sooner." (*Id*. at pp. 21-22.) With this understanding, the Court determined that the Act applied to the plaintiff's claims even where most of the offensive conduct happened well before the Act's effective date.

The Act prohibits arbitration of the *entire case*

The Act applies to prohibit arbitration of an entire case where some of the claims involve sexual harassment or sexual assault, even if there are other claims not directly related to sexual harassment or sexual assault. Several courts have discussed whether the Act prohibits arbitration as to the entire case or only as to those claims alleging sexual harassment or sexual assault.

The U.S. District Court for the Southern District of New York analyzed the language of the Act – "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" (9 U.S.C. § 402(a) (emphasis added)) – in determining that arbitration could not be compelled for even unrelated claims alleged in the same case as sexual harassment or sexual assault claims. (*Johnson v. Everyrealm, Inc.*, No. 22 CIV. 6669 (PAE), 657 F.Supp.3d 535 (S.D.N.Y. Feb. 24, 2023).)

The *Johnson* court instructively found, "With the ordinary meaning of 'case' in mind, the text of § 402(a) makes clear that its invalidation of an arbitration agreement extends to the entirety of the case relating to the sexual harassment dispute, not merely the discrete claims in that case that themselves either allege such harassment or relate to a sexual harassment dispute…" (*Ibid*.)

The U.S. District Court for the Northern District of California discussed this issue in *Turner v. Tesla, Inc.* (N.D. Cal. 2023) 686 F.Supp.3d 917. In *Turner*, the court was faced with a motion to compel arbitration of an employee's seven causes of action in her complaint, including discrimination, wrongful termination, violation of Labor Code section 6310, and failure to pay wages at termination. The court had to determined whether these causes of action fell within the Act and if not, then whether they should be severed and stayed pending completion of the arbitrable claims.

Relying on the persuasive authority of cases from other jurisdictions, the court found that the arbitration agreement was unenforceable as to the entire case because the core of the plaintiff's claim alleged "conduct constituting a sexual harassment dispute" as defined by the Act and found that her other claims "arose out of the same facts and circumstances underlying [her] sexual harassment causes of action and is substantially related to her sexual harassment claim." (*Id*. at 925, 928, citing *Johnson v.*

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Everyrealm, Inc. and *Mera v. SA Hospitality Group, LLC*, No. 123CV03492PGGSDA, 675 F.Supp.3d 442, 447 (S.D.N.Y. June 3, 2023).)

The *Second Street* court adopted the *Johnson* analysis that [b]y its plain language, then, the statute applies to the entire *case*, not merely to the sexual assault or sexual harassment claims alleged as a part of the case. It is significant, moreover, that the statute does not require that the pendant claims *arise out of* the sexual assault or sexual harassment dispute; it is enough that the case *relates to* the sexual assault or sexual harassment claims." (*Jane Doe v. Second Street Corp.*, *supra*, at pp. 30-31 (citing *Turner*, *supra*, 686 F.Supp.3d at 925-926, italics in original).)

Outcomes and implications

For plaintiffs filing claims for the first time after the Act's effective date of March 3, 2022, *Kader* and *Second Street* are important points of reference to defeat any attempt to force arbitration. But there is at least one essential point that must be discussed – whether the filing of the claim with the CRD or in court is the first time that plaintiff and defendant were in an adversarial position concerning the claims at issue. The *Kader* court was careful to indicate that the "term dispute is broader than simply filing an action in court and includes many forums." (*Kader, supra*, 99 Cal.App.5th at 223.)

For instance, if Kader had made complaints to human resources before he filed his complaint with the DFEH, the court's decision would likely have been very different. The *Kader* court did not limit the dispute to court filings. If Kader had complained to human resources, circulated information about his claims on social media or to fellow coworkers, or even brought a claim for psychological injury in a workers' compensation claim, those actions may have been found to be enough to warrant "a dispute" in which the plaintiff and the defendants were in an adversarial position. Even with *Kader's* seemingly clear decision, there is more to be learned about when a dispute arises or accrues under the Act.

The implications of the Act are significant because Congress is now considering similar counterparts for other types of claims. The Protecting Older Americans Act was presented in 2023 as the mirror image of the Act but for age claims, including age discrimination, harassment, and retaliation under state and federal laws. The language of this potential new law is nearly identical to the Act and would have far-reaching effects because there are some who would carry on the success of the Act and other relevant legislation to bring out a complete end to forced arbitration. (See Benjamin S. Weiss, Courthouse News Service (April 9, 2024) *Experts to Congress: Block forced arbitration in workplace discrimination, consumer cases*, <https://www.courthousenews.com/experts-tell-congress-block-forced-arbitration-in-workplace-discrimination-consumer-cases/>.)

Further questions to consider

As plaintiffs' attorneys, being compelled to arbitrate claims can significantly influence the potential landscape of a case, including impacting early decisions about whether to accept a case and which claims to pursue. With these developments in sexual-harassment cases, and the potential for similar developments in age claims in the future, there are certain questions to still consider.

Primarily, the question of whether to elect to arbitrate or not must be carefully discussed with the plaintiff. Just because the Act gives the power to the plaintiff doesn't mean that the court system is the better option. While it has its challenges to overcome, arbitration can result in the more streamlined approach to resolving the claims with little impact to the plaintiff.

For those plaintiffs who don't want to be in the public eye or those who actually prefer the confidential nature of arbitration, the ability to elect to still arbitrate can be the more appropriate decision. While not a guarantee of a good outcome, the decision to cooperate in arbitrating a claim rather than staying in court can result in more creative options for the plaintiff to resolve the case. It's a decision that should not be taken lightly and would arguably require the plaintiff's informed consent under Rule 1.4 of the California State Bar Rules of Professional Conduct.

For the employers considering the breadth of the Act, it seems prudent to focus attention on internal policies for sexual-harassment education and prevention in the workplace because arbitration is not going to keep these claims private in most situations. By removing the shield of arbitration, companies may face greater pressure to address issues of harassment more proactively. While California already has pretty strict training requirements for sexual harassment, certainly prudent employers would benefit from strengthening those policies and procedures.

Conclusion

Sexual-harassment arbitration is inherently complex, and it is crucial for any competent attorney to grasp the nuances of these recent developments before taking on a case. While it may provide a quicker resolution for some cases, arbitration often lacks the public accountability that may be necessary for meaningful cultural change within organizations. For victims, it can feel like justice is being delivered behind closed doors, without the opportunity to have their experiences fully acknowledged in a public forum. Some clients just want their day in court and some highly value their privacy.

Whether through legal reform or shifts in corporate policy, the balance between efficiency and transparency in resolving workplace-harassment claims will continue to be a point of contention in the quest for justice and fairness.

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