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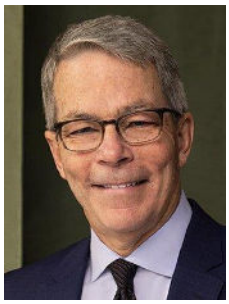
Everyrealm Case Spurs Big Workplace Arbitration Questions

By **Rex Berry** (March 15, 2023, 1:43 PM EDT)



Rex Berry

Words matter, and they have weight. But which weighs more: a single word in a statute, or decades of pro-arbitration public policy established by Congress in the Federal Arbitration Act?[1]

According to a recent decision from a federal judge in the U.S. District Court for the Southern District of New York, the use of the single word wins.

The judge's opinion denying an employer's motion to compel arbitration finds that Congress' use of the word "case" in the text of the recently enacted Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021[2] severely limits the application of the FAA to the arbitration of employment disputes.

The decision has caught the attention of many arbitration law watchers, who now are waiting to see if it will be appealed and upheld.

Specifically, U.S. District Judge Paul Engelmayer pointed to the use of the word "case" in the EFAA to support a finding that, because one of the plaintiff's claims involving sexual harassment could not be compelled into arbitration, all claims brought in the plaintiff's "case" against the employer were exempt from arbitration.

The case at issue is Johnson v. Everyrealm Inc.[3] Plaintiff Teyo Johnson, a former employee of the digital real estate company and onetime NFL player, alleged that he was subjected to "unrelenting harassment that was unsolicited, unwanted, and sexual in nature throughout his Everyrealm tenure."

After reviewing Johnson's first amended complaint — in which he for the first time included allegations of sexual harassment — the judge considered and rejected the employer's contention that the sexual harassment claim was merely a pretext to invoke the EFAA.

Applying a Rule 12(b)(6) motion to dismiss standard, the judge found the sex harassment claim to be plausible when taken at face value. The judge reasoned that the fact the claim was not part of the initial pleading did not invalidate it because it was consistent with the other claims asserted in the original filing.

But this was not the end of the judge's analysis. The employer's motion to compel arbitration, he noted, actually presented two issues:

> The first is whether the [first amended complaint] 'alleges conduct constituting a sexual harassment dispute,' so as to come within the EFAA. The second is whether, if so, the EFAA makes the arbitration agreement unenforceable as to the entirety of the [first amended complaint]'s claims, or only as to its claims of sexual harassment.

After deciding the first issue, the judge dropped a legal bombshell:

> [T]he Court construes the EFAA to render an arbitration clause unenforceable as to the entire case involving a viably pled sexual harassment dispute, as opposed to merely the claims in the case that pertain to the alleged sexual harassment. The Court accordingly denies, in its entirety, Everyrealm's motion to enforce the arbitration clause. Johnson's claims will now proceed in this Court.

While startling to many, the judge's ruling is not without support. The EFAA, signed into law on March 3, 2022, defines a "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."[4] The law's application "shall be determined by a court, rather than an arbitrator," under federal law.

At the election of the person alleging "conduct constituting a sexual harassment dispute," predispute arbitration agreements are unenforceable "with respect to a case which is filed under Federal, Tribal, or State law and relates to ... the sexual harassment dispute."[5]

That Johnson had signed a valid arbitration agreement as part of his Everyrealm employment contract was an undisputed fact.

But, according to the judge, his agreement was immaterial to the broader analysis: "The enforceability of the arbitration agreements turns instead on conclusions of law: how the EFAA applies to a case which, as the Court finds here, includes a plausibly stated claim of sexual harassment."

How this ruling denying arbitration of an entire lawsuit squares with the pro-arbitration public policy of the FAA remains to be seen. The FAA was enacted in 1925 to provide an alternative vehicle for resolving business disputes.

Over the past two decades the FAA has become enshrined as a fundamental tenet of U.S. business and commerce. The U.S. Supreme Court has repeatedly upheld the right of businesses to invoke arbitration in contractual dealings, citing Section 2 of the FAA as compelling judicial enforcement of arbitration agreements "in any ... contract evidencing a transaction involving commerce."[6]

In nearly unanimous fashion, courts have defined the FAA's use of the term "transaction" to encompass employment contracts, exempting only those few that do not involve interstate commerce.[7]

Any attempt to limit or discriminate against the right to require arbitration as a condition of doing business or being hired — including state laws barring mandatory arbitration in employment contracts[8] — repeatedly has been held to be preempted by the FAA.

Many employers will see Judge Engelmayer's decision as an attempted end-run around current Supreme Court guidance. They may argue that the addition of a sexual harassment claim can now block the enforcement of a mandatory arbitration agreement for the entire lawsuit.

The plaintiffs bar will likely counter that obligations of good faith and candor to the tribunal provide

adequate assurance that only viable claims of harassment will be pled. When such claims are pled, however, courts must enforce the EFAA as written.

The Everyrealm decision seems to recognize this tension, acknowledging the pro-arbitration FAA public policy that "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."[9] The judge, however, found that this policy "may be 'overridden by a contrary congressional command.'"[10]

In the judge's view, Congress' use of the word "case" in the EFAA was just such a command — "clear, unambiguous, and decisive as to the issue here." Invalidation of the arbitration clause therefore extended to the entire case relating to the sexual harassment dispute, not just "the claim or claims in which that dispute plays a part."

Although he found that all of Johnson's claims were related — and thus not arbitrable — the judge suggested in a footnote that claims "far afield might be found to have been improperly joined with a claim within the EFAA so as to enable them to elude a binding arbitration agreement."

Relying primarily on the Merriam-Webster and Black's Law dictionaries, the judge found that the common definition of the word "case" "captures the legal proceeding as an undivided whole. It does not differentiate among causes of action within it. The term 'case' stands in contrast to the terms 'claim' and 'cause of action.'"

Then, after reviewing the procedural history of the EFAA, Judge Engelmayer concluded that "Congress, in enacting the EFAA, thus can be presumed to have been sensitive to the distinct meanings of the terms 'case' and 'claim.'"

So is this the final word on the matter? Far from it.

The FAA authorizes interlocutory appeals from orders denying arbitration. Appellate jurisdiction extends to all orders "refusing a stay of any action under section 3" of the law, as well as orders "denying a petition under section 4 … to order arbitration to proceed."[11]

Section 16 of the law promotes appeals from orders denying arbitration, but it limits the appeal of decisions compelling arbitration. Employers will argue that this expedited process for the appeal of decisions hostile to arbitration is in keeping with Congress' intent that arbitrable disputes should proceed quickly to arbitration.[12]

The court's docket currently does not reflect an appeal of Judge Engelmayer's decision by Everyrealm, but such an appeal would come as no surprise.

Even if the decision is upheld on appeal, it will not be the end of the issue. In the very likely case that one or more other circuits rule differently, the question of the EFAA's scope is likely to find its way to the U.S. Supreme Court.

If that happens, the stage will be set for an interesting conundrum. For decades the Supreme Court has recognized the pro-arbitration public policy of the FAA and struck down numerous attempts to limit arbitration in any manner. The more conservative members of the court might be expected to act accordingly.

But the Supreme Court also is home to several strict textualists. How will they read and interpret the word "case" in the EFAA? Judge Engelmayer's opinion seems to have been written with these justices in mind. It will be interesting to see how — or if — they write their way around his logic.

For several decades, when a case on mandatory arbitration went to the Supreme Court, employers generally could expect a business-friendly outcome. Now, the tide may have turned. If the Supreme Court reads the text of the EFAA in the same strict manner as Judge Engelmayer, the result could significantly impair the enforcement of such agreements.

If the court instead continues to side with the strong pro-arbitration public policy of the FAA, it will be the scope of the EFAA that is limited. Stay tuned.

Rex Darrell Berry is a mediator and arbitrator at Signature Resolution.

[1] Pub. L. 68-401.

[2] Pub. L. No. 117-90, 135 Stat. 26, codified at 9 U.S.C. §§ 401-02.

[3] Johnson v. Everyrealm, Inc. et al (S.D.N.Y. 2023) 22 Civ. 6669 (PAE), https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2022cv06669/584300/70/0.pdf?ts=1677336696.

[4] 9 U.S.C. § 404(4).

[5] 9 U.S.C. § 402(a).

[6] Allied-Bruce Terminix Cos v. Dobson, 513 U. S. 265 (1995).

[7] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[8] See Chamber of Commerce v. Bonta (No. 20-15291 D.C. No. 2:19-cv-02456- KJM-DB).

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

[10] CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012).

[11] 9 U.S.C. § 16(a)(1)(A)-(B).

[12] Bushley v. Credit Suisse First Bos., 360 F.3d 1149, 1153 (9th Cir. 2004).