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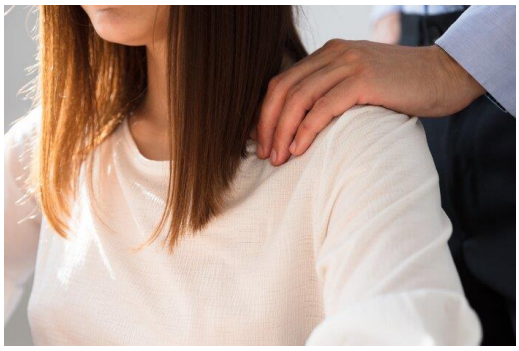
8th Circ. To Mull Scope Of 2022 Law Curbing Arbitration

By **Amanda Ottaway**

Law360 (May 7, 2024, 8:07 PM EDT) -- An Eighth Circuit panel on Wednesday will be the first federal appellate court to grapple with the question of when actions must have occurred to be covered under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, an issue experts say urgently needs more clarity.

The panel is set to hear arguments over the reach of a 2022 federal law that bars mandatory arbitration of sexual harassment and assault claims. Restaurant chain Chipotle will urge it to overturn a lower court's finding that the EFAA applies to an ex-employee's suit, allowing her to avoid mandatory arbitration of her case, even though the law was enacted months after she was allegedly raped at work.



An Eighth Circuit panel will hear arguments Wednesday in a case over the reach of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act that could have major implications for both employers and workers across the country, two experts said. (iStock.com/AndreyPopov)

If the Eighth Circuit decides to uphold that decision — which found that because Eniola Famuyide's lawsuit was filed after the law went into effect in March 2022, her claims could avoid arbitration — it could have big implications for both employers and workers across the country, the experts said.

So far, lower courts have interpreted the statute's effective-date provision in a variety of ways, including by saying that the law is triggered when the actual injury occurs, or that there's a possibility of attaching a case to the most recent injury if there were continuing violations.

No federal court of appeals has yet tackled the question of whether a lawsuit filed after the EFAA's March 3, 2022, effective date can get a plaintiff out of arbitration if the alleged conduct occurred before that date, according to Famuyide's opening brief in the Eighth Circuit.

The groundbreaking law modified the Federal Arbitration Act to nullify mandatory arbitration pacts for workers who claim they were subjected to sexual harassment or sexual assault on the job, allowing those employees to pursue their allegations in open court. In this case, Chipotle contends Famuyide must arbitrate her claims because she signed an arbitration agreement when she was hired.

Experts maintain the language of the EFAA is confusing as to when the law is triggered, pointing to the

statute's text that limits coverage to "any dispute or claim that arises or accrues on or after the date of enactment of this act."

"The language is vague, without a greater definition of what 'arise' and 'accrue' mean," said Christine Dunn, a partner at worker-side firm Sanford Heisler Sharp and co-chair of its sexual violence, Title IX and victims' rights practice group. A claim accrues when a plaintiff becomes aware of their injury, said Dunn — in this case, when Famuyide understood that she had been sexually assaulted at work.

"But a dispute can't accrue," Dunn continued. "So I think you have to give meaning to the word 'dispute' and the word 'arise.' And that means something different than 'when a claim accrues.'"

Famuyide alleged that she was raped in November 2021 and fired in February 2022. The perpetrator of the alleged assault, a co-worker whom Famuyide said raped her in a Chipotle bathroom, was also charged criminally. She sent two demand letters to the company through her lawyer the month the alleged rape happened, then sued Chipotle in state court in July 2022. She lodged the federal lawsuit that's currently before the Eighth Circuit in April 2023.

Employment mediator Abe Melamed of Signature Resolution said that one might think lawmakers didn't intend to make the EFAA retroactive, in other words to apply to harassment or assault that occurred before March 3, 2022.

"But by using this language, it seems to have done that to some degree. And when you get into just a strictly statutory interpretation analysis, it does track what this court held, I think," he said, referring to the lower court decision in Famuyide's case, by U.S. District Judge Donovan W. Frank.

"It'll be really interesting to see what happens," said Melamed.

Judge Frank leaned on the July 2022 state court lawsuit date when finding that Famuyide didn't have to arbitrate her case if she didn't want to.

"In this case, while the conduct in dispute occurred earlier, the actual dispute between Famuyide and Chipotle — the moment when they took opposing positions — arose when Famuyide filed her complaint in state court. This occurred on July 26, 2022, after the enactment of the EFAA," the district court judge wrote.

Melamed said that view is "using a pretty strong statutory interpretation." Through this lens, "every word in every statute is intentional," and there are no redundancies, he said.

Dunn agreed, saying that Congress would have used different words if it meant to only refer to the date of the injury as the effective date for a claim to avoid mandatory arbitration.

"That's the thing. If they meant for it to be just when the injury happens, then you would say 'when your claim accrues,' period. … It's sort of a basic tenet of statutory interpretation. You have to give all the words meaning," she said.

Famuyide says the appellate panel should uphold the district court's interpretation of a "dispute" as the moment when two parties disagree.

"The court noted that, in ordinary English, the word 'dispute' refers not to an injury but to a concrete

assertion of liability by the plaintiff and a concrete denial by the defendant," she said in her opening brief.

But a dispute could also be interpreted as arising when the worker notifies their employer of the claim, said Dunn, which could date the dispute to Famuyide's February 2022 demand letters.

Both Famuyide and Chipotle cited the Black's Law definition of "dispute" in their briefs — a "conflict or controversy, esp. one that has given rise to a particular lawsuit."

Chipotle, meanwhile, says that means the dispute is actually the alleged assault — the injury in the case that led to the lawsuit, which occurred before the EFAA went into effect. Therefore, she's not covered by the law, the restaurant chain said.

Melamed said the district court is interpreting the EFAA in a way that could have "broad effects around the country" if it's upheld by the Eighth Circuit.

Because different states have different statutes of limitations, a plaintiff in a place like New York or California, which both have three-year statutes of limitations, could dodge arbitration for alleged acts that occurred well before the EFAA went into effect, as long as their lawsuit came afterward.

"So there are a lot of claims that are coming down the pike that this might apply to," Melamed said.

Ultimately, it seems likely that either Congress or the U.S. Supreme Court will have to weigh in to clarify, experts said.

"I think the intent was to allow survivors to have a voice," said Dunn. "It's pretty common knowledge that survivors don't tend to fare as well in arbitrations. And so I think the intent was to allow them to have their day in court and to have a voice. But the statue as written is ambiguous, and it's causing a lot of confusion."

The case is Eniola Famuyide v. Chipotle Mexican Grill Inc. et al., case number 23-3201, in the U.S. Court of Appeals for the Eighth Circuit.

--Additional reporting by Anne Cullen. Editing by Bruce Goldman.
