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Diverging Standards to Invoke the EFAA in the Southern District

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Enacted in 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "EFAA"), amended the Federal Arbitration Act (the "FAA") so that in cases "alleging conduct constituting a sexual harassment dispute or sexual assault dispute," a claimant is not bound by an otherwise valid arbitration agreement. 9 U.S.C. §402(a). The EFAA is expansive in scope; it captures virtually every such case that could be filed in a court in the United States.

If properly invoked, the EFAA can be used to invalidate an otherwise valid arbitration agreement with respect to the entire case, not just the sexual harassment or sexual assault claims. The EFAA assigns to the court rather than an arbitrator the responsibility for determining the sufficiency of the allegations to invoke the EFAA. 9 U.S.C. §402(b). This threshold determination has led to diverging interpretations among Southern District judges.

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In *Yost v. Everyrealm*, 657 F.Supp.3d 563 (S.D.N.Y. 2023), Southern District Judge Paul A. Engelmayer, based on a textual analysis of the EFAA, concluded that a plaintiff must plead a claim for sexual harassment sufficient to survive a Rule 12(b)(6) motion to dismiss in order to invalidate an otherwise enforceable arbitration provision. *See* E. Spiro & C. Harwood, *The EFAA Can Be a Powerful Tool to Avoid Arbitration*, N.Y.L.J. (Apr. 17, 2023). *Yost* has been followed in other Southern District cases. *See, e.g.*, *Singh v. Meetup LLC*, 2024 WL 3904799, at *2 (S.D.N.Y. Aug. 22, 2024), *reconsideration denied* 2024 WL 4635482 (S.D.N.Y. Oct. 31, 2024); *Mitura v. Finco Services, Inc.*,

712 F.Supp.3d 442, 451-52 (S.D.N.Y. 2024); *Delo v. Paul Taylor Dance Foundation, Inc.*, 685 F.Supp.3d 173, 180-81 (S.D.N.Y. 2023).

In *Diaz-Roa v. Hermes Law*, 2024 WL 4866450, at *17 (S.D.N.Y. Nov. 21, 2024), Southern District Judge Lewis J. Liman diverged from Judge Engelmayer's interpretation in *Yost,* concluding that the *Twombly/Iqbal* standard for a Rule 12(b)(6) motion is "ill-suited" to the court's task under the EFAA. Instead, Judge Liman ruled that for the EFAA to apply a plaintiff need only plead nonfrivolous claims relating to conduct alleged to constitute sexual harassment. After finding that the plaintiff alleged conduct that, if established, constitutes sexual harassment under applicable law, and that her claims were not frivolous, Judge Liman denied defendants' motion to compel and found the underlying arbitration agreement unenforceable.

Diaz-Roa v. Hermes Law, P.C.

In *Diaz-Roa*, plaintiff Silvia Diaz-Roa brought claims against her former employer for sexual harassment under the New York State and City Human Rights Laws, in addition to employment, contract, and conversion claims. Diaz-Roa was employed by a law firm, Hermes Law, P.C., and a computerized litigation management system, ClaimDeck, in various roles until her termination.

Diaz-Roa alleged that during her employment, Dwayne Hermes, who controlled both Hermes Law and ClaimDeck, and Andrea Hermes "regularly encouraged [Plaintiff] to flirt to attract potential clients or use her appearance to attract business," and become romantically involved with certain individuals. *Id.* at *2 (quoting Am. Compl. ¶¶ 69, 71). She also alleged that Mr. Hermes repeatedly commented on her appearance and not on the appearance of male employees. In addition to these claims, Diaz-Roa alleged that she was terminated following her attempts to exercise vested stock options worth over $1 million that Defendants had awarded her during her employment.

Following her termination, Diaz-Roa filed claims in federal court against Hermes Law, ClaimDeck, Mr. Hermes and Mrs. Hermes ("Defendants"). Defendants moved to compel arbitration based on a mutual arbitration agreement that she signed which was attached as an addendum to the Hermes Law employee handbook. Diaz-Roa opposed the motion by invoking the EFAA. Defendants argued that Diaz-Roa had not alleged sufficient claims for the EFAA to apply.

Standard to Invoke the EFAA

The EFAA provides that the "threshold requirement" to permit a litigant to avoid an arbitration agreement is that the litigant allege "conduct constituting a sexual harassment dispute or sexual assault dispute." 9 U.S.C. §402(a). Judge Liman concluded 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 to conduct alleged to constitute sexual harassment," with the sufficiency of plaintiff's allegations "to be reserved for proper merits adjudication," such as a motion to dismiss or motion for summary judgment. *Diaz-Roa*, 2024 WL 4866450, at *14.

Judge Liman relied on "(1) the text of the statute; (2) the statutory scheme; (3) Congress' intent in enacting the EFAA; and (4) the availability of routine safeguards against abusive litigation tactics provided by federal statute and by the Federal Rules of Civil Procedure." *Id*.

First, Judge Liman reviewed the text of the EFAA. Judge Liman found textual indicia of Congress' intent in the choice of the word "disputes"

rather than "claims." Further, unlike in *Yost,* Judge Liman concluded that the absence of a specific requirement that a litigant state a claim for relief "suggests that Congress did not intend for the courts on their own authority to impose such a requirement" to invoke the statute. *Id.* at *15. Instead, according to Judge Liman, the text indicates that the correct standard is only that a claimant alleges conduct that constitutes sexual harassment pursuant to applicable Federal, Tribal, or State law, rather than requiring conduct that forms a plausible basis for relief.

Second, Judge Liman observed that his standard is consistent with the overall statutory scheme. Unlike a Rule 12(b)(6) motion which tests the sufficiency of the plaintiff's allegations for relief, a motion to compel is designed to address adjudicative capacity. Indeed, if the court lacks adjudicative capacity, Judge Liman explained, "the court should not be making substantive decisions." *Id.* at *17.

Further, he noted that if a defendant's Rule 12(b)(6) motion is granted, a plaintiff is entitled to an immediate appeal, 28 U.S.C. §1292, but if a motion to compel arbitration is granted, the claimant cannot protest the determination until after the arbitration concludes, "suffering the precise injury that the EFAA was intended to avoid." *Diaz-Roa*, 2024 WL 4866450, at *18. Therefore, Judge Liman concluded that the Rule 12(b)(6) standard used for a motion to compel arbitration "not only prematurely terminates the plaintiff's claim, but also threatens to stunt the development of the law" by preventing discovery and debate over what constitutes sexual harassment. *Id.*

Third, Judge Liman relied on the legislative history of the EFAA. He noted that although there is little history that touches on this threshold question, Senator Durbin, Chair of the Senate Judiciary Committee, clarified during a debate on the Senate floor that the bill does not impose "new dismissal mechanisms" for claims or "require that victims [ ] [ ] prove a sexual assault or harassment claim before the rest of their case can proceed in court." *Id.* (quoting 168 Cong. Rec. S626 (daily ed. Feb. 10, 2022) (statement of Sen. Richard Durbin)). This statement, Judge Liman reasoned, aligns with a less demanding standard than that established in *Yost*.

Lastly, Judge Liman explained that many tools already exist under federal law to allay Defendants' concern that a plausibility standard is necessary to prevent a slew of false claims of sexual harassment or sexual assault by claimants seeking to avoid arbitration agreements. For example, Judge Liman raised Rule 11 of the Federal Rules of Civil Procedure which prohibits litigants from filing false or frivolous claims.

Further, Judge Liman cited the Supreme Court's decision in *Bell v. Hood*, 327 U.S. 678 (1946), which held that a court can dismiss claims that are "wholly insubstantial and frivolous" or "appear[] to be immaterial and made solely for the purpose of obtaining jurisdiction." *Diaz-Roa*, 2024 WL 4866450, at *20 (quoting *Bell*, 327 U.S. at 683). Judge Liman emphasized that the *Bell v. Hood* standard, rather than the *Twombly/Iqbal* standard, is the appropriate one for weeding out frivolous claims and determining arbitrability.

Application of EFAA Standard to *Diaz-Roa*

Having determined that the proper standard to invoke the EFAA is to assess whether a plaintiff alleged "(1) a dispute; (2) conduct and that such conduct, if established, constitutes sexual

harassment pursuant to an applicable Federal, Tribal, or State law; and (3) that the dispute relates to such conduct," Judge Liman went on to apply the standard to Diaz-Roa's claims. *Id.* at *16.

Judge Liman began by analyzing how "sexual harassment" is defined under New York State and New York City law. He found New York law "applicable" since Diaz-Roa's complaint alleged that she was in New York at the time of the alleged conduct and felt the effects of the conduct there. Under the New York State Human Rights Law ("NYSHRL"), Judge Liman explained, courts analyze whether claims of sexual harassment are brought as quid pro quo claims or hostile work environment claims, either of which will suffice.

Under the New York City Human Rights Law ("NYCHRL"), Judge Liman remarked that the law is less clear, but based on courts' interpretation, the NYCHRL provides that quid pro quo and hostile work environment claims involve "sexual harassment." Judge Liman concluded that "[w]herever the bar is placed" Diaz-Roa alleged enough facts to support the inference that Defendants' conduct constitutes sexual harassment under the NYSHRL and NYCHRL, especially since Diaz-Roa alleged that Defendants made it a term and condition of her employment that she become romantically involved with potential clients. *Id.* at *22.

Next, Judge Liman addressed whether Diaz-Roa's case "relates" to the sexual harassment dispute. Judge Liman concluded that Diaz-Roa's allegations of harassment were not "immaterial" to her claims in the lawsuit or frivolous just to avoid arbitration, but rather a "part of the employment relationship from which all of her claims stem." *Id.* at *23. Accordingly, Judge Liman found the EFAA applied, and he denied Defendants' motion to compel arbitration.

Conclusion

Pending further guidance from the Supreme Court or the Second Circuit Court of Appeals, courts in the Southern District will continue to apply diverging standards in determining the applicability of the EFAA. Those judges who choose to follow Judge Liman's *Diaz-Roa* decision will apply a more lenient standard requiring only the pleading of nonfrivolous claims relating to conduct alleged to constitute sexual harassment, while judges following Judge Engelmayer's *Yost* decision will require that the complaint include allegations sufficient to survive a motion to dismiss under Rule 12(b)(6).

On Dec. 9, 2024, Defendants in *Diaz-Roa* filed a notice of appeal seeking interlocutory review of the denial of their motion to compel arbitration, so it may not be long before the Second Circuit resolves the dispute over the proper standard to apply under the EFAA.