

*Ending Forced Arbitration of Sexual  
Assault and Sexual Harassment Act:*  
What Attorneys Should Know About this  
New Law to Support Survivors



Legal Network for Gender Equity Webinar  
December 7, 2023, 3:00-4:30 pm ET



# Today's Agenda

- I. Introductions
- II. Forced arbitration advocacy background
- III. EFASASHA in the courts
- IV. Next steps in the forced arbitration fight
- V. Q&A and concluding remarks



**Julia Duncan** (she/her) is the Senior Director of Government Affairs for the American Association for Justice (AAJ) located in Washington D.C. and has spent the last 17 years advocating for the protection of consumer, survivor, investor, and employment rights. She specializes in the areas of toxic torts, forced arbitration, consumer financial issues, banking and investor protection issues, class actions, and employment discrimination. Prior to joining AAJ in 2004, Ms. Duncan worked for the Santa Cruz County District Attorney's Office and as an advocate for women's health policy issues in front of the California legislature. She is a member of the California and D.C. Bar Associations.



**Shelby Leighton** (she/her) is a senior staff attorney in Public Justice's Access to Justice Project. She litigates high-impact cases, particularly appeals, with the goal of making the civil court system a fair, equitable, and effective tool for those with less power to win just outcomes and hold those with more power accountable, including cases involving workers' rights, civil rights, access to courts, and consumer protection. One emphasis of Shelby's work is fighting employers' use of forced arbitration to keep workers from having their day in court, including advocating for a broad interpretation of the Ending Forced Arbitration in Sexual Assault and Sexual Harassment Act and litigating appeals involving cutting edge issues around the formation and enforceability of arbitration agreements.

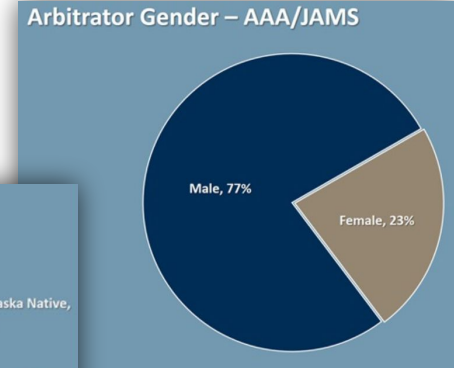
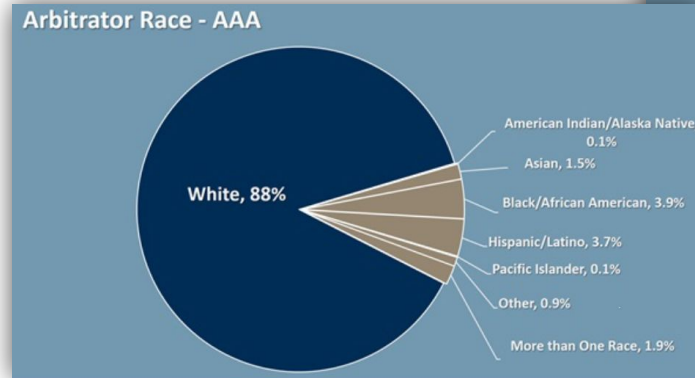


**Shane Seppinni** (he/him) is the founder of Seppinni Law, an employee rights trial law firm in New York City. Since founding Seppinni Law, Shane Seppinni has recovered millions of dollars for working people and established new legal precedent that broadens access to America's judicial system for victims of sexual harassment and assault. A graduate of Stanford Law School and Cornell University's ILR School, Shane worked as a Civil Rights Public Defender at the Bronx Defenders and an Associate Trial Lawyer at Quinn Emanuel Urquhart & Sullivan LLP before founding Seppinni Law. Shane Seppinni spends his time outside of work with his wife, son, and their dog in Brooklyn, NY. **Seppinni Law is hiring an attorney, email [contact@seppinnilaw.com](mailto:contact@seppinnilaw.com)**

# **Forced Arbitration - Past, Present, Future**

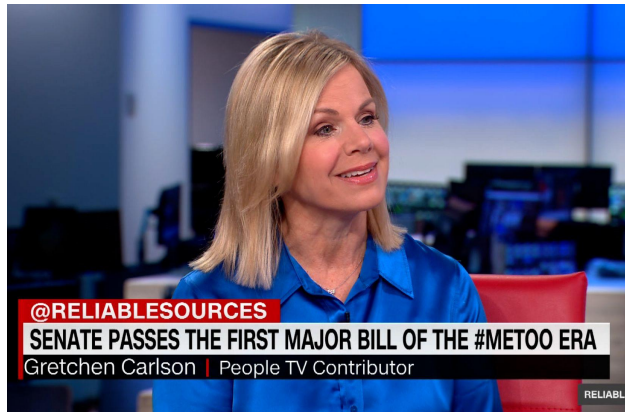
## Forced Arbitration = Corporate Immunity

- Legal landscape *favors* forced arbitration
- Biased providers
- Biased process
- Zero transparency
- Forced arbitration 2.0,  
no process at all



## Let's Take "Forced" out of "Forced Arbitration"

- Umbrella approach, fight for everything *and also*
- Piecemeal approach, one bite at a time
- Foundation laid, wait for public momentum





# Ending Forced Arbitration of Sexual Assault and Sexual Harassment (EFASASHA)

In this chapter:

**(1) PREDISPUTE ARBITRATION AGREEMENT.—**

The term “[predispute arbitration agreement](#)” means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

**(2) PREDISPUTE JOINT-ACTION WAIVER.—**

The term “[predispute joint-action waiver](#)” means an agreement, whether or not part of a [predispute arbitration agreement](#), that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

**(3) SEXUAL ASSAULT DISPUTE.—**

The term “[sexual assault dispute](#)” means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in [section 2246 of title 18](#) or similar applicable Tribal or State law, including when the victim lacks capacity to consent.

**(4) SEXUAL HARASSMENT DISPUTE.—**

The term “[sexual harassment dispute](#)” means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.

(Added [Pub. L. 117-90, §2\(a\)](#), Mar. 3, 2022, [136 Stat. 26.](#))

**(a) In GENERAL.—**

Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a [sexual harassment dispute](#) or [sexual assault dispute](#), or the named representative of a class or in a collective action alleging such conduct, 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](#).

**(b) DETERMINATION OF APPLICABILITY.—**

An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.

(Added [Pub. L. 117-90, §2\(a\)](#), Mar. 3, 2022, [136 Stat. 27.](#))

# Challenges and Lessons Learned

- Messaging is critical
- Restoring rights and freedoms
- Word choice



## 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."

September 26, 2023 at 10:00 AM

**New York Law Journal**

## A Chance to Speak

Katie Anderson's story shows the difficulty of finding some measure of accountability after being sexually assaulted.

BY DAVID DAYEN NOVEMBER 30, 2023

**THE AMERICAN PROSPECT**

Aug. 2, 2023, 4:42 PM EDT

## Paul Taylor Dance Worker Beats Arbitration Bid in Sex Bias Suit



Patrick Dorrian  
Reporter

**Bloomberg  
Law**



The New York Times

## Citi Is Sued Over Sex Abuse. Before 2022, It Would Have Been a Secret.

The 45-page suit exists in open court thanks to the 2022 federal law that prevents companies from forcing such cases into arbitration. The law was passed after Gretchen Carlson, the former Fox News anchor, and several other women sued the former Fox News chairman Roger Ailes for trying to force them into leaving sex with him.

# **EFASASHA in the Courts**

# Which Claims are Exempted from Arbitration?

## Applies to entire case that relates to a “sexual harassment dispute”

- *Johnson v. Everyrealm, Inc.*, 2023 WL 2216173 (S.D.N.Y. Feb. 24, 2023)
  - EFASASHA “keys the scope of the invalidation of the arbitration clause to the entire ‘case’ relating to the sexual harassment dispute. It thus does not limit the invalidation to the claim or claims in which that dispute plays a part.”
  - Because case involved plausible sexual harassment claims, all claims—including race discrimination and whistleblower retaliation—were not subject to arbitration under EFASASHA.
- *Turner v. Tesla, Inc.*, 2023 WL 6150805 (N.D. Cal. Aug. 11, 2023)
  - “the arbitration agreement is unenforceable with respect to Turner’s entire case because the core of her case alleges ‘conduct constituting a sexual harassment dispute’ as defined by the EFAA.”
  - Retaliation and wage claims also could proceed in court because related to sexual harassment claims
- **But:** *Mera v. S.A. Hospitality*, 2023 WL 3791712 (S.D.N.Y. June 3, 2023) (Opinion of Magistrate Judge)
  - Split claims: sexual orientation-based harassment claims could not be arbitrated under EFASASHA, but wage claims still must be arbitrated
  - Because “Plaintiff’s wage and hour claims under the FLSA and the NYLL do not relate in any way to the sexual harassment dispute, they must be arbitrated.”

## Claims Other Than Sexual Harassment

**“Sexual harassment dispute” = dispute related to conduct alleged to constitute sexual harassment under state/federal/Tribal law**

- *Johnson*, 2023 WL 2216173, at \*11 n.13:

The statutory term “sexual harassment dispute” includes not only claims of sexual harassment, but also disputes “relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.” See 9 U.S.C. § 401(4). An example would be a lawsuit bringing a claim against an employer for retaliating against a plaintiff who had reported sexual harassment.

- What other claims? Disparate treatment sex discrimination? Equal pay?

**“Sexual assault dispute” = involving a nonconsensual sexual act or sexual contact**

# What about harassment that occurred before EFASASHA was enacted?

Applies to claims that *accrue* on or after March 3, 2022

Can use continuing violation of some conduct occurred before March 2022:

- *Olivieri v. Stifel, Nicolaus & Co.*, 2023 WL 2740846 (E.D.N.Y. Mar. 31, 2023)
  - Original complaint filed before March 3, 2022 based on harassment that occurred before that date.
  - Court compelled arbitration on March 28, 2022, and plaintiff moved for leave to amend complaint to add allegations of ongoing harassment and EFASASHA defense.
  - Court granted leave to amend and held that “Plaintiff’s claims have continued to accrue after the EFAA’s March 3, 2022 enactment, by virtue of Defendants’ alleged ongoing conduct”
- *Turner*, 2023 WL 6150805:
  - Complaint alleged retaliatory/discriminatory termination in Oct. 2022 and harassment that began in January 2022 and continued “over the next several months”
  - Court held that EFASASHA still applied because most claims accrued as of date of termination, and the “complaint does not concede that the harassment . . . ceased at any point prior to Turner’s termination.”

## What do you have to plead?

*Johnson*, 2023 WL 2216173: complaint stated plausible claim for sex-based hostile work environment, so EFASASHA applied.

*Yost v. Everyrealm, Inc.*, 657 F.Supp.3d 563 (S.D.N.Y 2023): complaint did not state plausible claim for sex-based hostile work environment, so EFASASHA did not apply.

Courts should make determination on face of the complaint:

- Other jurisdictional determinations (federal question, CAFA) based on complaint, not whether allegations are plausible
- Legislative history shows intent to include cases that allege sexual harassment claims that are ultimately unsuccessful
- Can be exception for frivolous claims

## Equal Pay Cases - *Jane Doe et al. v. Niantic Inc.*

**Hot off the presses! Important for at least two reasons: Pleading Standards / Class Actions**

*“IN FEDERAL COURT A COMPLAINT MUST BE PLEADED WITH ENOUGH FACTS TO SET A CLAIM FOR RELIEF THAT IS PLAUSIBLE ON ITS FACE CITING CHIEF VERSUS REED ELSEVIER IN THE NORTHERN DISTRICT OF CALIFORNIA []. THE PLAUSIBILITY STANDARD WAS INTRODUCED IN TWOMBLY AND IQBAL CASES IN LINE WITH THE FEDERAL NOTICE PLEADING LAW[.] HOWEVER CALIFORNIA HAS ALWAYS REQUIRED THE PLEADING OF FACTS PURSUANT TO A SYSTEM OF CODE PLEADING CITING BACH VERSUS CITY OF BUTTE. A LIKELY DISCUSSION OF [TWOMBLY] AND IQBAL BY A FEDERAL JUDGE IN THE YOST CASE IS NOT RELEVANT TO THE PROCEEDINGS IN THIS COURT ON THIS CASE. THE LAW WHICH APPLIES HERE IN THE CALIFORNIA CODE OF CIVIL PROCEDURE REQUIRES THAT A COMPLAINT SHALL CONTAIN A STATEMENT OF FACTS CONSTITUTING A CAUSE OF ACTION IN ORDINARY AND CONCISE LANGUAGE.” - Draft Oral Argument Transcript*



# Niantic Continued

## Why the Order in *Niantic* Matters...

- Shows that sexual harassment under EFASASHA is about more than “sexual overtures”
  - “The ruling is a watershed moment for sexual harassment and gender bias cases, because **it clarifies that the protections of the 2021 Ending Forced Arbitration Act do indeed encompass cases in which sexual overtures are not the focus,**” said attorney Genie Harrison in a press release.
- In states with notice pleading standards, the # of federal employment cases may fall – why subject your clients’ state law claims to Twombly scrutiny and then arbitration, when you can just notice plead instead?
- Implications for pleading class actions

## Defendants Still Operate in a Pre-EFASASHA World

- **Expect sanctions threats, counter-arbitrations, bewildered defense counsel, unfair FAA appeals, etc.**
  - Corporate America isn't used to facing employees and consumers in court
  - Part of the plaintiff lawyer's role is to educate the other side on EFASASHA and not back down

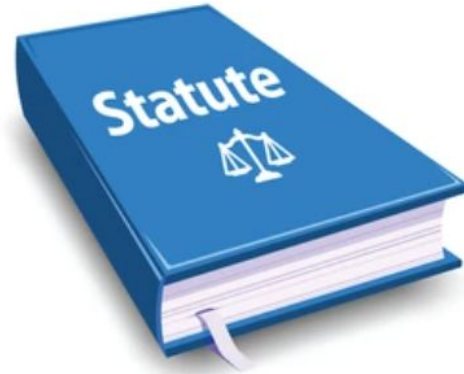
The Court after reviewing and considering all moving party and opposing party papers, and arguments of counsel, makes the following ruling:

The Motion to Compel Arbitration is DENIED, for the reasons stated on the record. The Court's ruling is more fully reflected in the notes of the Official Court Reporter incorporated herein by reference.

# Fighting Forward

*Your client isn't covered. Now what?*

- Expanding protections from forced arbitration
- Empowerment through state advocacy
- Stronger definitions of “sexual harassment”
- [julia.duncan@justice.org](mailto:julia.duncan@justice.org) for ideas and updates



# **Q&A and Concluding Remarks**

# Questions?



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# Survey & Thank you!

Webinar Survey--EFASASHA: What  
Attorneys Should Know about the  
New Law to Support Survivors



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