Escaping Arbitration and Class Action Waivers for Harassment Because of Pregnancy, Sexual Orientation or Gender Identity

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I. INTRODUCTION

In 2022, Congress amended the Federal Arbitration Act (FAA) through the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.[1] This amendment is being abbreviated to a rather clumsy acronym: EFASASHA. EFASASHA allows a person alleging sexual harassment or sexual assault to invalidate certain arbitration agreements and joint-action waivers.[2] Congress passed the Act in response to testimony in which workers alleged that serial sexual harassment and assault continued because workers' claims were forced into private arbitration and could not be publicly adjudicated.[3]

This Essay argues that the language that Congress used in EFASASHA is much broader than its title and underlying rationale suggest. EFASASHA not only applies to harassment that is sexual in nature, it also applies to sex-based harassment, as well as harassment because of pregnancy, sexual orientation, and gender identity. EFASASHA does not independently define the term "sexual harassment," but instead defines it by reference to federal and state law.[4] Federal discrimination jurisprudence uses the term "sexual harassment" to encompass these concepts and thus EFASASHA does as well.[5]

This Essay comes at an important time because no court has yet ruled on how to define sexual harassment under EFASASHA. It is vitally important that courts understand how the term sexual harassment in EFASASHA intersects with Title VII jurisprudence defining that term. Courts should interpret EFASASHA consistent with Title VII and its interpretive case law.

This Essay begins with a brief history of the Federal Arbitration Act and EFASASHA. It then demonstrates how the term "sexual harassment" in Title

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[1] *See* Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified as amended in scattered sections of 9 U.S.C.).

[2] 9 U.S.C. § 402(a).

[3] Annie Karni, *House Passes Bill to Nullify Forced Arbitration in Sex Abuse Cases*, NY TIMES (Feb. 7, 2022), https://www.nytimes.com/2022/02/07/us/politics/house-bill-forced-arbitration.html [https://perma.cc/LWT8-QSZ4]. It should be noted that not all arbitration is private and workers who allege sexual assault and sexual harassment could still seek relief through public agencies even if their claims were subject to arbitration prior to EFASASHA.

[4] 9 U.S.C. § 401(4).

[5] *See infra* Part III.

VII jurisprudence embraces sexualized harassment, sex-based harassment, pregnancy harassment, and harassment because of sexual orientation and gender identity. It argues that interpreting EFASASHA to include these types of harassment is not only consistent with the statute's text, but is also the best way to proceed practically and normatively.

II. THE FEDERAL ARBITRATION ACT AND EFASASHA

EFASASHA is the first major amendment to the Federal Arbitration Act since it was enacted in 1925.[6] Over the past several decades the Supreme Court has interpreted the FAA to make many arbitration agreements presumptively enforceable.[7] Relevant to this Essay, the Court has upheld arbitration agreements when workers or unions try to enforce federal discrimination law.[8] The Court has also held that arbitration agreements will be enforced even if they require people to waive their ability to proceed through collective action.[9]

President Joseph Biden signed EFASASHA into law in 2022.[10] It amends the FAA to allow a person alleging "conduct constituting a sexual harassment dispute or a sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct" to proceed with their claim even if it otherwise would be subject to a pre-dispute arbitration agreement.[11] Importantly, EFASASHA does not invalidate all arbitration agreements that fall within its parameters. Instead, it allows a person alleging a such a dispute (or their representative) to file suit despite the existence of a pre-dispute arbitration provision that otherwise would be enforced under the FAA.[12] If a person bound by such an agreement wishes to proceed through arbitration, EFASASHA allow this.[13]

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[6] *See* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. F. 1, 1–2 (2022).

[7] *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2837–40 (2015) (discussing Supreme Court's changed view related to arbitration over time); *see also* Horton, *supra* note 6, at 4–11.

[8] 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).

[9] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418–19 (2019); Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 237 (2013); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010). Exceptions to these parameters exist, but are beyond the scope of this Essay. *See, e.g.*, Viking River Cruises, Inc. v. Moriana, 142 S.Ct. 1906, 1922–23 (2022).

[10] *See* Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified as amended in scattered sections of 9 U.S.C.).

[11] 9 U.S.C. § 402(a).

[12] *Id.*

[13] *See id.*

The Act is not limited to overcoming arbitration agreements.[14] The Act also allows class disputes to proceed even if they otherwise would be subject to a pre-dispute joint-action waiver.[15]

The legislative history of the act refers to testimony from people who asserted they were groped, subjected to sexual advances and other sexualized treatment.[16] This legislative history and the title of the act may give the impression that the act only applies to sexualized harassment. However, the language of the statute does not support this narrow reading. EFASASHA applies to "to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute."[17] The definitions section of EFASASHA is short. It defines "sexual harassment dispute" to mean "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or state law."[18] Congressman Robert Scott of Virginia expressed concerns that sexual harassment would be construed narrowly and would exclude sex-based harassment that was not sexual in nature.[19]

Courts, not arbitrators, determine whether the Act applies, even if an arbitration agreement purports to delegate such decisions to an arbitrator.[20] There are very few written opinions interpreting EFASASHA because the statute is new and only applies to claims that accrue on or after March 3, 2022.[21] No court has interpreted the applicability of the statute to harassment based on pregnancy, gender identity or sexual orientation.

III. SEXUAL HARASSMENT

When courts apply EFASASHA in the context of federal discrimination law, they will need to reconcile that statute with Title VII. Title VII is the cornerstone federal employment discrimination statute. The text of Title VII prohibits an employer from discriminating against a worker because of race, sex, national origin, color, or religion.[22] Two quirks of Title VII result in a broad definition of the term "sexual harassment." In the Title VII context, the words "sexual harassment" encompass sexualized harassment, sex-based harassment, pregnancy harassment and harassment because of sexual orientation and gender identity.

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[14] *See id.*

[15] *Id.*

[16] 168 CONG. REC. H983–93 (daily ed. Feb. 7, 2022) (remarks by members of Congress Nadler, Bustos, Jayapal, and Jackson Lee).

[17] 9 U.S.C. § 402(a). This Essay focuses on issues related to federal discrimination law.

[18] 9 U.S.C. § 401(4).

[19] 168 CONG. REC. H991 (daily ed. Feb. 7, 2022) (remarks by Congressman Scott).

[20] 9 U.S.C. § 402(b).

[21] *See* Steinberg v. Capgemini Am., Inc., No. CV 22-489, 2022 WL 3371323, at *2–3 (E.D. Pa. Aug. 16, 2022).

[22] *See* 42 U.S.C. § 2000e-2.

The first quirk relates to the term "sexual harassment." Title VII does not contain this term.[23] Instead, the statute makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment"[24] because of a protected trait, like sex. As discussed in more detail below, the courts developed the concept of sexual harassment, and this concept embraces much more than sexualized conduct.[25] The words "sexual harassment" are an umbrella term for all sex-based harassment, whether or not it is sexual in nature.

The second quirk of Title VII relates to its broad definition of "sex." Through congressional amendment and a Supreme Court decision, the term "sex" under Title VII embraces pregnancy, sexual orientation, and gender identity.[26]

Given the title of EFASASHA and the stories leading to its enactment, it might seem that the scope of the statute is limited to sexualized conduct. However, the term sexual harassment in discrimination law is a term of art that does not mimic what that term means to a lay reader. This section demonstrates how the term sexual harassment encompasses non-sexualized, sex-based harassment, as well as harassment because of pregnancy, gender-identity, and sexual orientation.

A. Sexual Harassment Encompasses Sexualized and Sex-Based Harassment

The text of Title VII does not contain the words "sexual harassment."[27] Instead, this is a theory of discrimination. The Supreme Court explained and developed a framework for evaluating sexual harassment in three cases: *Meritor Savings Bank, FSB v. Vinson*; [28] *Harris v. Forklift Sys., Inc.*;[29] and *Oncale v. Sundowner Offshore Servs., Inc*.[30]

In *Meritor*, the Court held that Title VII recognized a theory of discrimination called harassment and specifically recognized harassment as encompassing the creation of a hostile environment because of a protected trait.[31]

In *Meritor*, the Court described how sexualized conduct violated Title VII. The Court recognized that an employer would violate Title VII if it conditioned

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[23] *See id*.
[24] *Id.* at § 2000e-2(a)(1).
[25] *See infra* Part III.B.
[26] *See id.*
[27] *See* 42 U.S.C. § 2000e-2.
[28] Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).
[29] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).
[30] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998).
[31] 477 U.S. at 65.

work benefits on the provision of sexual favors.[32] These cases are sometimes called "quid pro quo" cases.[33] In such cases, the supervisor imposes on the plaintiff the condition of sexual favors as a *quid pro quo* for the supervisor granting employment opportunities, and that condition of sexual favors is not imposed on employees of the opposite sex.[34] The denial of an employment opportunity because of the individual's refusal to have a sexual or dating relationship with a supervisor is discrimination because of sex.[35]

In *Meritor*, the Court recognized that Title VII also prohibited what it called a hostile environment because of sex.[36] It noted that the text of Title VII did not limit claims to hiring, promotion, or termination, but rather applied to all "terms, conditions, or privileges" of employment.[37] Relying on the statutory text and EEOC Guidelines, the Court held that Title VII prohibited "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[38] Such sexual misconduct constitutes prohibited sexual harassment, even if it is not directly linked to the grant or denial of an economic *quid pro quo,* where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[39] The Court also indicated that Title VII provided employees the opportunity to work in environments that are free of discriminatory ridicule, intimidation, and insults.[40]

Quoting a lower court opinion, the Supreme Court noted:

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[32] *Id.*

[33] This terminology is meant to be descriptive only and is not meant to suggest the quid pro quo is a separate claim from other kinds of harassment or that harassment is a separate claim under Title VII. For an in-depth discussion of the dangers of viewing harassment as a separate claim, see generally Sandra F. Sperino, *Harassment: A Separate Claim?*, 6 BELMONT L. REV. 121 (2019). There is a rich literature discussing how to properly conceptualize harassment. *See generally* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370 (1994); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U.L. REV. 1029 (2015); Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018) [hereinafter Schultz Open Statement].

[34] Valentín-Almeyda v. Mun. of Aguadilla, 447 F.3d 85, 94 (1st Cir. 2006) (quoting O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001)).

[35] *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982); Katz v. Dole, 709 F.2d 251, 254, 256 (4th Cir. 1983); Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 78, 80 (3d Cir. 1983); Miller v. Bank of Am., 600 F.2d 211, 212–13 (9th Cir. 1979); Bundy v. Jackson, 641 F.2d 934, 940 (D.C. Cir. 1981).

[36] *Meritor*, 477 U.S. at 65.

[37] *Id.* at 63 (quoting 42 U.S.C. § 2000e-2(a)(1)).

[38] *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)).

[39] *Id.* (quoting 29 C.F.R. § 1604.11(a)(3) (1985)).

[40] *See id.*

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[41]

The Supreme Court indicated that not all conduct would rise to the level of an actionable hostile environment.[42] Rather "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[43]

The Supreme Court returned to harassment law in *Harris*, a case in which a female employee presented evidence that her supervisor made both demeaning and sexual comments to and about female employees, including the plaintiff.[44] The Court cited to evidence that the supervisor had said "You're a woman, what do you know," "We need a man as the rental manager;" and called the plaintiff "a dumb ass woman."[45] There was also evidence that the supervisor requested female employees to get coins from his front pants pocket and suggested the plaintiff go to the Holiday Inn with him to negotiate her raise.[46]

The Supreme Court considered how serious conduct or speech needed to be to constitute an actionable hostile environment claim. The Supreme Court noted: "'The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women' in employment,' which includes requiring people to work in a discriminatorily hostile or abusive environment."[47] When articulating the standard for harassment, the Court did not separate the sexual conduct and comments from the sex-based comment, but instead considered them together.[48]

In *Harris*, the Supreme Court held that conduct that is severe or pervasive enough to create an objectively hostile or abusive work environment is cognizable.[49] In determining whether an environment is objectively hostile, the Court indicated that it must look at all of the circumstances.[50] In addition to looking at whether the environment is objectively hostile, the Supreme Court also held that the worker must subjectively perceive the environment to be hostile.[51]

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[41] *Id.* at 67 (quoting Henson v. Dundee, 682 F. 2d 897, 902 (1982)).
[42] *See Meritor*, 477 U.S. at 67.
[43] *Id.* (quoting Henson v. Dundee, 682 F. 2d 897, 904 (1982)).
[44] Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993).
[45] *Id.*
[46] *Id.*
[47] *Id.* at 21 (quoting *Meritor*, 477 U.S. at 64).
[48] *See id*.
[49] *Id*.
[50] Harris, 510 U.S. at 23.
[51] *Id.* at 21–22.

In *Oncale v. Sundowner Offshore Servs., Inc.*, the plaintiff alleged that male employees harassed him.[52] The Supreme Court held that Title VII prohibits same-sex sexual harassment.[53] In doing so, the Court emphasized that sexual harassment need not be sexual in nature. It indicated: "A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[54]

The Supreme Court recognized that Congress was not likely thinking about the problem of same-sex harassment when it enacted Title VII.[55] However, the Supreme Court held that this was not controlling. Rather, the text of Title VII prohibits discrimination because of sex and does not limit its protections to one protected sex or to opposite-sex harassment.[56]

Federal courts recognize sexual harassment as encompassing both sexualized conduct and sex-based conduct. EFASASHA incorporates this understanding of sexual harassment when it defines sexual harassment by reference to the applicable federal law.

B. Sexual Harassment Encompasses Harassment Because of Pregnancy (and Related Conditions), Sexual Orientation and Gender Identity

The term "sex" in Title VII is multi-faceted, including pregnancy (and related conditions), sexual orientation and gender identity. When Title VII jurisprudence refers to sexual harassment, it includes these concepts. When EFASASHA uses the term "sexual harassment," it also includes harassment because of pregnancy, sexual orientation and gender identity.

As discussed in the prior section, the term "sexual harassment" in Title VII is an umbrella term that includes sexualized harassment, as well as sex-based harassment. Given the text of Title VII and the case law interpreting it, the term "sex" also encompasses pregnancy, sexual orientation, and gender identity.

In *General Electric Co. v. Gilbert*, the Supreme Court interpreted the term "sex" in Title VII narrowly and held that pregnancy distinctions were not "sex" distinctions.[57] In response to *Gilbert*, Congress passed the Pregnancy Discrimination Act of 1978, which amended Title VII to include pregnancy, childbirth, or related conditions.[58] Instead of adding a new protected class under Title VII, Congress simply redefined the term "sex" to also include pregnancy, childbirth and related conditions.[59] Sexual harassment under Title VII embraces

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[52] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77 (1998).
[53] *Id.* at 82.
[54] *Id.* at 80.
[55] *Id.* at 79.
[56] *Id.* at 79–80.
[57] General Electric Co. v. Gilbert, 429 U.S. 125, 136 (1976).
[58] *See* 42 U.S.C. § 2000e(k).
[59] *See id.*

all forms of sex-based harassment. Thus, the term sexual harassment under Title VII also includes harassment because of pregnancy.[60]

Discrimination because of gender identity or sexual orientation also fall within Title VII's prohibition against sex discrimination. In *Bostock v. Clayton County, Ga.*, the Supreme Court held that Title VII prohibits discrimination because of sexual orientation and gender identity.[61] In doing so, it did not create new protected classes under Title VII. Instead, the Court held that it is impossible to discriminate against a person based on gender identity or sexual orientation without discriminating on the basis of sex.[62]

Given this history, when EFSASHA refers to a sexual harassment dispute under federal law, it includes harassment disputes based on pregnancy (and related conditions), sexual orientation, and gender identity.

IV. PRACTICALLY AND NORMATIVELY CORRECT

The text of EFASASHA defines sexual harassment by reference to federal law,[63] and federal law broadly defines that concept to include sexualized harassment and sex-based harassment, as well as harassment based on pregnancy, sexual orientation and gender identity. The text of EFASASHA and Title VII and the case law interpreting Title VII all support this outcome.

This is also the most practical result for courts. A hypothetical illustrates the problems that will occur if courts attempt to disentangle sexualized harassment from other types of harassment based on sex. Imagine that courts declare that EFASASHA only applies if a plaintiff alleges sexualized harassment and does not otherwise cover non-sexual, sex-based harassment.

Understandably, plaintiffs who would otherwise be bound by arbitration or class-waiver provisions will try to plead their evidence as involving sexualized harassment, which may distort the claims being brought. Unfortunately, courts will be drawn into all sorts of controversies about whether certain conduct or speech is sexualized or whether it is sex-based, but not sexual in nature. This kind of parsing has happened (unsuccessfully) before in the discrimination jurisprudence when courts prior to *Bostock* tried to distinguish sex-based discrimination claims from sexual orientation discrimination.[64]

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[60] *See* Donaldson v. Am. Banco Corp., 945 F. Supp. 1456, 1461 (D. Colo. 1996) (noting that "sexual harassment" includes "pregnancy-based harassment"); E.E.O.C. v. Hacienda Hotel, 881 F.2d 1504, 1515 n.8 (9th Cir. 1989), *abrogated in part on other grounds by* Faragher v. City of Boca Raton, 524 U.S. 775, 787–88 (1998) (recognizing harassment because of pregnancy is sexual harassment); *see also* Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 473–74 (1st Cir. 2002) (considering sex and pregnancy allegations together).

[61] Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1754 (2020).

[62] *Id.* at 1741.

[63] *See supra* note 4 and accompanying text.

[64] *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 350 (7th Cir. 2017) (discussing how attempts to do this required "considerable calisthenics").

Reading EFASASHA as including sexualized harassment, as well as harassment because of sex (including pregnancy, sexual orientation, and gender identity) is also the interpretation that best effectuates the underlying goals of both EFASASHA and Title VII. Sexualized harassment is not a standalone phenomenon. Instead, sexualized discrimination is intertwined with other types of sex-based harassment and discrimination.[65]

V. CONCLUSION

Sexual harassment in federal discrimination law is an umbrella term that encompasses sexualized harassment and sex-based harassment, including harassment because of pregnancy, sexual orientation, and gender identity. When EFASASHA uses the term "sexual harassment" it incorporates by reference this underlying Title VII structure.

This Essay demonstrates why this outcome is consistent with the text of EFASASHA and Title VII's text and supporting case law. It also shows how this interpretation is a practical one that avoids enmeshing federal judges and Title VII jurisprudence in unnecessary debates about what counts as sexualized harassment and what does not.

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[65] *See* Schultz Open Statement, *supra* note 33, at 19–28.