

Escaping arbitration and class action waivers for harassment because of pregnancy, sexual orientation or gender identity

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Resumen: El artículo examina el alcance y las implicaciones de la *Ley de Fin del Arbitraje Forzoso por Agresión Sexual y Acoso Sexual de 2021* (“EFAA”, por sus siglas en inglés), una reforma federal que permite a los demandantes invalidar las cláusulas de arbitraje obligatorio y las renunciaciones a demandas colectivas en disputas relacionadas con la agresión sexual y el acoso sexual. El documento analiza cómo las demandas relacionadas —tales como la discriminación por embarazo, orientación sexual o identidad de género— pueden agruparse estratégicamente para evitar el arbitraje, al tiempo que evalúa las tensiones interpretativas, los riesgos de procedimientos fragmentados y los efectos sobre el acceso efectivo a la justicia.

Abstract: The article examines the scope and implications of the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021* (“EFAA”), a federal reform that allows plaintiffs to invalidate mandatory arbitration clauses and class-action waivers in disputes related to sexual assault and sexual harassment. The piece discusses how related claims —such as discrimination based on pregnancy, sexual orientation, or gender identity— may be strategically bundled to avoid arbitration, while analyzing interpretive tensions, risks of fragmented proceedings, and the effects on effective access to justice.

Palabras Claves: Arbitraje forzoso | Acoso sexual | Agresión sexual | Renuncia a acciones colectivas | Acceso a la justicia

Keywords: Forced arbitration | Sexual harassment | Sexual assault | Class-action waivers | Access to justice

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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 (EFAA)¹. EFAA allows a person alleging sexual harassment or sexual assault to invalidate certain arbitration agreements and joint-action waivers². 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 adjudicated³.

This Essay argues that the language that Congress used in EFAA is much broader than its title and underlying rationale suggest. EFAA 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.

EFAA does not independently define the term “sexual harassment,” but instead defines it by reference to federal and state law⁴. Federal discrimination jurisprudence uses the term “sexual harassment” to encompass these concepts and thus EFAA does as well⁵.

This Essay comes at an important time because few courts have ruled on the question of how to define sexual harassment under EFAA. It is vitally important that courts understand how the term sexual harassment in EFAA intersects with Title VII jurisprudence defining that term. Courts should interpret EFAA consistent with Title VII and its interpretive case law.

This Essay begins with a brief history of the Federal Arbitration Act and EFAA. It then demonstrates how the term “sexual harassment” in Title VII jurisprudence embraces sexualized harassment, sex-based harassment, pregnancy harass-

¹ 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,” *New York Times*, February 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 EFAA.

⁴ 9 U.S.C. § 401(4).

⁵ See *infra* Part III.

ment, and harassment because of sexual orientation and gender identity. It argues that interpreting EFAA 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 EFAA

EFAA is the first major amendment to the Federal Arbitration Act since it was enacted in 1925⁶. Over the past several decades the Supreme Court has interpreted the FAA to make many arbitration agreements presumptively enforceable⁷. Relevant to this Essay, the Court has upheld arbitration agreements when workers or unions try to enforce federal discrimination law⁸. The Court has also held that arbitration agreements will be enforced even if they require people to waive their ability to proceed through collective action⁹.

President Joseph Biden signed EFAA into law in 2022¹⁰. 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 agreement¹¹. Importantly, EFAA does not invalidate all arbitration agreements that fall within its parameters. Instead, it allows a person alleging such dispute (or their representative) to file suit despite the existence of a pre-dispute arbitration provision that otherwise would be enforced under the FAA¹². If a person bound by such an agreement wishes to proceed through arbitration, EFAA allow this¹³.

The Act is not limited to overcoming arbitration agreements¹⁴. The Act also allows class disputes to proceed even if they otherwise would be subject to a pre-dispute joint-action waiver¹⁵.

⁶ David Horton, “The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,” *Yale Law Journal Forum* 132 (2022): 1–2.

⁷ Judith Resnik, “Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights,” *Yale Law Journal* 124 (2015): 2837–40 (discussing the Supreme Court’s changed view of arbitration over time); see also Horton, *supra* note 6, at 4–11.

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

⁹ *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 188–89 (2019); *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 237 (2013); *Stolt-Nielsen S.A. v. AnimalFeeds International 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*, 596 U.S. 639 (2022).

¹⁰ 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 9 U.S.C. § 402(a).

¹³ 9 U.S.C. § 402(a).

¹⁴ 9 U.S.C. § 402(a).

¹⁵ 9 U.S.C. § 402(a).

The legislative history of the act refers to testimony from people who asserted they were groped, subjected to sexual advances and other sexualized treatment¹⁶. 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. EFAA 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 EFAA 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 nature¹⁹.

Courts, not arbitrators, determine whether the Act applies, even if an arbitration agreement purports to delegate such decisions to an arbitrator²⁰. There are still relatively few written opinions interpre-

ting EFAA because the statute is new and only applies to claims that accrue on or after March 3, 2022²¹. Few courts have interpreted the applicability of the statute to harassment based on pregnancy, gender identity or sexual orientation.

III. Sexual Harassment

When courts apply EFAA 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 religion²². 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.

The first quirk relates to the term “sexual harassment.” Title VII does not contain this term²³. Instead, the statute makes it an unlawful employment practice for an

¹⁶ 168 Cong. Rec. H983–93 (daily ed. Feb. 7, 2022) (remarks by Reps. 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 Rep. Scott).

²⁰ 9 U.S.C. § 402(b).

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

²² 42 U.S.C. § 2000e-2.

²³ 42 U.S.C. § 2000e-2.

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 conduct²⁵. 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 identity²⁶.

Given the title of EFAA 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 ha-

arrassment 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 *Oncala 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 trait³¹.

In *Meritor*, the Court described how sexualized conduct violated Title VII. The Court recognized that an employer would violate Title VII if it conditioned work benefits on the provision of sexual favors³². These cases are sometimes ca-

²⁴ 42 U.S.C. § 2000e-2(a)(1).

²⁵ See *infra* Part III.B.

²⁶ See *infra* Part III.B.

²⁷ 42 U.S.C. § 2000e-2.

²⁸ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

²⁹ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

³⁰ *Oncala v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998).

³¹ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

³² *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

lled “quid pro quo” cases³³. 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 sex³⁴. 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 sex³⁵.

In *Meritor*, the Court recognized that Title VII also prohibited what it called a hostile environment because of sex³⁶. 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 employment³⁷. 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

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?,” *Belmont Law Review* 6 (2019): 121. There is a rich literature discussing how to properly conceptualize harassment. See generally Vicki Schultz, “Reconceptualizing Sexual Harassment,” *Yale Law Journal* 107 (1998): 1683; Martha Chamallas, “Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences,” *Michigan Law Review* 92 (1994): 2370; Tristin K. Green, “Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory,” *Harvard Civil Rights–Civil Liberties Law Review* 38 (2003): 91; Joanna L. Grossman, “Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law,” *Boston University Law Review* 95 (2015): 1029; Vicki Schultz, “Open Statement on Sexual Harassment from Employment Discrimination Law Scholars,” *Stanford Law Review Online* 71 (2018): 17 [hereinafter *Schultz Open Statement*].

³⁴ *Valentin-Almeyda v. Municipality 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 America*, 600 F.2d 211, 212–13 (9th Cir. 1979); *Bundy v. Jackson*, 641 F.2d 934, 940 (D.C. Cir. 1981).

³⁶ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

³⁷ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986) (quoting 42 U.S.C. § 2000e-2(a)(1)).

³⁸ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a) (1985)).

³⁹ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a)(3) (1985)).

free of discriminatory ridicule, intimidation, and insults⁴⁰.

Quoting a lower court opinion, the Supreme Court noted:

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 epithets⁴¹.

The Supreme Court indicated that not all conduct would rise to the level of an actionable hostile environment⁴². 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 plaintiff⁴⁴. 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 raise⁴⁶.

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 comments, but instead considered them together⁴⁸.

In *Harris*, the Supreme Court held that conduct that is severe or pervasive enough to create an objectively hostile or abusive work environment is cogniza-

⁴⁰ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

⁴¹ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

⁴² *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

⁴³ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

⁴⁴ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 19 (1993).

⁴⁵ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 19 (1993).

⁴⁶ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 19 (1993).

⁴⁷ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

⁴⁸ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

ble⁴⁹. In determining whether an environment is objectively hostile, the Court indicated that it must look at all of the circumstances⁵⁰. 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 hostile⁵¹.

In *Oncale v. Sundowner Offshore Servs., Inc.*, the plaintiff alleged that male employees harassed him⁵². The Supreme Court held that Title VII prohibits same-sex sexual harassment⁵³. 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 VII⁵⁵. 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 harassment⁵⁶.

Federal courts recognize sexual harassment as encompassing both sexualized conduct and sex-based conduct. EFAA 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 EFAA 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 ha-

⁴⁹ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

⁵⁰ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

⁵¹ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21–22 (1993).

⁵² *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 77 (1998).

⁵³ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998).

⁵⁴ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998).

⁵⁵ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

⁵⁶ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79–80 (1998).

rassment. 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” distinctions⁵⁷. In response to *Gilbert*, Congress passed the Pregnancy Discrimination Act of 1978, which amended Title VII to include pregnancy, childbirth, or related conditions⁵⁸. Instead of adding a new protected class under Title VII, Congress simply redefined the term “sex” to also include pregnancy, childbirth and related conditions⁵⁹. Sexual harassment under Title VII embraces all forms of sex-based harassment. Thus, the term sexual harassment under Title VII also includes harassment because of pregnancy⁶⁰.

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 identity⁶¹. 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 sex⁶².

Given this history, when EFAA 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 EFAA defines sexual harassment by reference to federal law⁶³, 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 EFAA 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

⁵⁷ *General Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976).

⁵⁸ 42 U.S.C. § 2000e(k).

⁵⁹ 42 U.S.C. § 2000e(k).

⁶⁰ *Donaldson v. American Banco Corp.*, 945 F. Supp. 1456, 1461 (D. Colo. 1996) (noting that “sexual harassment” includes “pregnancy-based harassment”); *EEOC 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 that harassment because of pregnancy is sexual harassment); see also *Gorski v. New Hampshire Department of Corrections*, 290 F.3d 466, 473–74 (1st Cir. 2002) (considering sex and pregnancy allegations together).

⁶¹ *Bostock v. Clayton County, Georgia*, 590 U.S. 644, 652 (2020).

⁶² *Bostock v. Clayton County, Georgia*, 590 U.S. 644, 652 (2020).

⁶³ See supra note 4 and accompanying text.

problems that will occur if courts attempt to disentangle sexualized harassment from other types of harassment based on sex. Imagine that courts declare that EFAA 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 discrimination⁶⁴.

Reading EFAA 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 EFAA and Title VII. Sexualized harassment is not a standalone phenomenon. Instead, sexualized discrimination is intertwined with other types of sex-based harassment and discrimination⁶⁵.

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 EFAA 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 EFAA and Title VII’s text and supporting case

⁶⁴ See, e.g., *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 350 (7th Cir. 2017) (discussing how attempts to do this required “considerable calisthenics”).

⁶⁵ *Schultz Open Statement*, supra note 33, at 19–28; *Solis v. Prime Communications Retail, LLC*, No. 5:24-CV-02389-AH-(SHKX), 2025 WL 1255143, at *3 (C.D. Cal. Apr. 7, 2025) (state law pregnancy harassment claim fell within EFAA); *Ding v. Structure Therapeutics, Inc.*, 755 F. Supp. 3d 1200, 1213 (N.D. Cal. 2024) (holding sex-based harassment falls within EFAA); *Doe v. Saber Healthcare Group*, No. 3:23CV1608, 2024 WL 2749156, at *6 (M.D. Pa. May 29, 2024) (sexual orientation and gender nonconformity harassment fall within EFAA); *Mera v. SA Hospitality Group, LLC*, 675 F. Supp. 3d 442, 444 (S.D.N.Y. 2023) (holding that sexual orientation claims fall within the ambit of the EFAA); but see *Singh v. Meetup LLC*, 750 F. Supp. 3d 250, 259 (S.D.N.Y. 2024) (holding allegations of pregnancy discrimination did not fall within EFAA); *Raupp v. Compass Group USA, Inc.*, No. 24-10565, 2024 WL 4948838, at *3 (E.D. Mich. Dec. 3, 2024) (refusing to construe plaintiff’s complaint related to sexual orientation as sexual harassment for purposes of the EFAA); *Johannessen v. JUUL Labs, Inc.*, No. 3:23-CV-03681-JD, 2024 WL 3173286, at *4 (N.D. Cal. June 24, 2024) (under state law separating harassment from discrimination); *Stephens v. DFW Linq Transport, Inc.*, No. 3:24-CV-00352-N, 2025 WL 1697537, at *4 (N.D. Tex. June 16, 2025) (separating pregnancy discrimination from harassment).

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.