“I DIDN’T AGREE TO ARBITRATE THAT!”—
HOW COURTS DETERMINE IF EMPLOYEES’
SEXUAL ASSAULT AND SEXUAL
HARASSMENT CLAIMS FALL WITHIN THE
SCOPE OF BROAD MANDATORY
ARBITRATION CLAUSES

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I. INTRODUCTION

Throughout the last few decades, mandatory arbitration clauses have become more prevalent in employment contracts.\(^1\) Mandatory arbitration clauses provide employers with a cheaper and less formal method to resolve disputes with their employees once they occur.\(^2\) Employers who want most or all of their employees’ claims subjected to mandatory arbitration will use broad language in the arbitration clauses.\(^3\) Despite the use of broad and seemingly all-encompassing language in broad mandatory arbitration clauses, some employees’ claims can escape their reach and proceed to court. This Note will look at how courts determine if employees’ sexual assault and sexual harassment claims against their employers are within the scope of broad mandatory arbitration clauses.

This Note will show that several federal and state courts around the country use different methods and have reached different outcomes when determining if sexual assault or sexual harass-

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\(^2\) Id.

\(^3\) Such clauses are known as broad mandatory arbitration clauses. A typical broad mandatory arbitration clause will require the employee to arbitrate any dispute, claim or controversy between the employer and employee or any claim relating to or arising under the plaintiff’s employment. See Barbara L. Johnson et al., Arbitrating Employment Disputes: Avoiding 10 Mistakes in Preparing and Implementing a Pre-Dispute Arbitration Program, A.L.I.-A.B.A. Continuing Legal Education-Current Developments in Employment Law (July 29-31, 2004) (stating that the most common drafting sin for employers is limiting the arbitration agreement to “claims arising out of my employment” or “arising out of this agreement”).
ment claims fall within the scope of broad mandatory arbitration clauses. The three different ways courts come out are as follows: 1) both sexual harassment and sexual assault claims are arbitrable; 2) sexual harassment claims are arbitrable and sexual assault claims are not arbitrable; and 3) neither sexual harassment nor sexual assault claims are arbitrable. To resolve this uncertainty, this Note will propose that courts should find that sexual assault claims are beyond the scope of broad arbitration clauses and that for sexual harassment claims, courts should undertake a fact-specific case-by-case analysis to see if the claim is arbitrable. This Note will also argue that Congress should have passed the Rape Victims Act of 2009, a law that would have prohibited an employer from requiring its employees to arbitrate any claim arising out of rape.

II. BACKGROUND

A. The Federal Arbitration Act and Supreme Court Jurisprudence

Over the years, both Congress and the Supreme Court have supported the use of arbitration agreements. Section 2 of the Federal Arbitration Act ("FAA") states that "a written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., the Supreme Court interpreted Section 2 of the FAA as Congress’s way of promoting a liberal federal policy favoring arbitration agreements. The Court found that because of the federal policy favoring arbitration, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Thus, when courts must determine if a claim falls within the scope of a

4 See infra notes 98, 117, 134, 149, 167.
6 Id.
9 Id. at 24.
10 Id.
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broad arbitration clause, the scale is tipped in favor of finding the claim is arbitrable.

B. The Supreme Court and Mandatory Arbitration Clauses in Employment Contracts

Although the Supreme Court generally favored arbitration as a method of resolving disputes, the Court weakened the influence of mandatory arbitration clauses in the first major case regarding mandatory arbitration in the employment context. In Alexander v. Gardner-Denver, the Court held that a plaintiff-employee could bring a race discrimination claim under Title VII of the Civil Rights Act of 1964 against his employer in court despite already submitting the grievance to binding arbitration under a collective bargaining agreement. In reaching its holding, the Court found that an employee can exercise both his contractual rights (by submitting his grievance to arbitration under a collective bargaining agreement) and his independent statutory rights under a statutory scheme (by filing a lawsuit under Title VII). After Gardner-Denver, employers could no longer use mandatory arbitration clauses in collective bargaining agreements to prevent employees from bringing statutory claims in court.

The increased prevalence of mandatory arbitration in employment contracts is a relatively new trend that has resulted from the Supreme Court’s support of arbitration as a proper method of resolving disputes post Gardner-Denver. The holding of Gardner-Denver was severely limited seventeen years later by Gilmer v. Interstate/Johnson Lane Corp. In Gilmer, the Court held that an employee’s age discrimination claim could be subjected to mandatory arbitration under an arbitration agreement in a securities registration application. The plaintiff in Gilmer made many generalized attacks against arbitration, but the Court found them all unpersuasive.

12 Id. at 49-50.
15 Id.
16 The plaintiff argued that arbitration panels would be biased. The Court dismissed this general presumption that arbitrators could not remain impartial. The court also noted the many rules and safeguards in place to protect against arbitrator bias. The plaintiff had the opportunity
The Court announced that the FAA’s purpose was to “reverse the longstanding judicial hostility to arbitration agreements... and to place arbitration agreements upon the same footing as other contracts.”17 One of the arguments raised by amici curiae in support of the employee in *Gilmer* was that Section 1 of the FAA excludes from its coverage all “contracts of employment.”18 In support of this argument, *amici curiae* cited the part of Section 1 of the FAA that states, “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”19 However, the Court failed to address whether Section 1 applied to all “contracts of employment” because the arbitration agreement at issue was contained in a securities registration application, not an employment contract.20 The *Gilmer* decision surprised many employers and employees, and it led employers to utilize mandatory arbitration in more contexts to harbor themselves from litigation against customers and employees.21 The issue of whether the FAA applied to all contracts of employment remained unresolved.

The Supreme Court addressed the issue of whether arbitration agreements were valid in all employment contracts in *Circuit City Stores, Inc. v. Adams*.22 There, the Court held that Section 1 of the

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17 *Id.* at 25.
18 *Id.* at 25, n.2.
19 *Amici curiae* argued that the inclusion of “or any other class of workers engaged in foreign or interstate commerce” included all employees. *Id.*
20 *Id.*
21 Sternlight, supra note 13, at 1637-38. Employers and employees relied on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) for the idea that employers could not force their employees to arbitrate claims against them. In *Gardner-Denver*, the court held that a mandatory arbitration clause in a collective bargaining agreement did not prevent an employee from bringing a Title VII claim in court. *Id.* at 1638, n.31. *Gardner-Denver* and *Gilmer* are distinguished on the ground that *Gardner-Denver* involved a union contract while *Gilmer* involved an individual contract. Roma, supra note 1, at 527.
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FAA only exempted employment contracts of transportation workers from its coverage.23 In Circuit City, Adams (the employee) argued that arbitration agreements in employment contracts are unenforceable because they are not contracts evidencing a transaction involving interstate commerce since the word “transaction” in Section 2 only applies to commercial contracts.24 Justice Kennedy, writing for the Court, reasoned that if all employment contracts were beyond the FAA’s scope under Section 2, then the separate exemption for “contracts of employment of seamen, railroad employees, or any other workers engaged in . . . interstate commerce” in Section 1 would be superfluous.25 After Circuit City, employers were confident that courts would uphold the arbitration agreements in their contracts with employees.26

C. The Benefits and Drawbacks of Mandatory Arbitration in the Employment Context

Mandatory arbitration clause supporters believe that there are benefits for both employers and employees. Many employers in the United States implement mandatory arbitration in their employment contracts to protect themselves from the “evils” of litigation.27 Employers prefer arbitration because it is less expensive than going through the court system.28 Arbitration also offers employers greater privacy, increased predictability (no jury in arbitration, lack of opportunity for an appeal), enhanced settlement potential, and possible insurance discounts.29 Employees prefer arbitration because it is less intimidating than the court system.30 Also, a mandatory arbitration system ensures employees have a forum to seek redress. Litigation can take years and many employ-

23 Id. at 109.
24 Id. at 113.
25 Id.
27 Charles D. Coleman, Is Mandatory Arbitration Living Up to its Expectations? A View from the Employer’s Perspective, A.B.A. J. of LAB. & EMP. L. 227, 228 (2010). See also Sternlight, supra note 13, at 1638 (listing the “evils of litigation as: publicity, jury awards, punitive damages, extensive discovery, and class actions).
28 Landry, supra note 26, at 483.
29 Coleman, supra note 27, at 228-29.
ees cannot afford to retain a lawyer for an extended period of time. 

Despite the benefits it offers to both employers and employees, mandatory arbitration does have its critics. Critics believe mandatory arbitration clauses are unfair because employment contracts are offered on a “take it or leave it” basis. Often, employees sign an arbitration agreement as a condition of their employment, and applicants who are limited in employment options are essentially required to sign such agreements. Critics of mandatory arbitration argue that requiring an employee to arbitrate employment disputes is unfair because of the employer’s greater bargaining power. Those opposed to mandatory arbitration argue that there is a lack of public accountability since written decisions are not required in arbitration proceedings. Advocates of employees also argue that the limited discovery in arbitration prevents many employees’ claims from proceeding due to the lack of evidentiary support. Another drawback of mandatory arbitration is that employers can slant the odds in their favor by selecting the arbitrator, imposing high costs, and limiting remedies.

D. Recent Legislation Regarding Mandatory Arbitration and Sexual Assault/Harassment Claims

On December 19, 2009, President Obama signed the Franken Amendment to the 2010 Defense Appropriations Bill into law. The 2010 Defense Appropriations Bill provides $636.3 billion for the troops, military equipment, and Department of Defense military programs. The Franken Amendment to the bill prohibits the use of any funds made available by the Act if a contractor or subcontractor providing services or equipment under the Act requires

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31 Landry, supra note 26, at 483-84.
32 Id. at 487.
33 Coleman, supra note 27, at 229. However, in Gilmer, the Court stated that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” Gilmer, 500 U.S. at 33.
34 Id. at 484.
35 Id.
36 Sternlight, supra note 13, at 1649-50.
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its employees to arbitrate certain claims. Such claims include those arising under Title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or sexual harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention. The Franken Amendment is the first federal legislation that prevents employers from forcing pre-dispute, binding arbitration on their employees.

Senator Al Franken, the amendment’s sponsor, was motivated by the story of Jamie Leigh Jones. Although motivated by Jones, the amendment’s coverage extends far beyond sexual assault claims; the Franken Amendment also prohibits funds to contractors who force arbitration of Title VII claims upon its employees. For example, if a company engaged in business with the Department of Defense (such as a weapons or aircraft manufacturer) requires its employees to arbitrate claims of racial or religious discrimination, it cannot receive funds under the 2010 Department of Defense Appropriations Act. For this reason, critics of the Amendment maintain that it is too broad and that arbitration “is more favorable to employees than litigation.”

Another recent but unsuccessful bill related to mandatory arbitration and sexual assault claims in the employment context is the Rape Victims Act of 2009. If enacted, The Rape Victims Act of 2009 would have made any agreement between an employer and employee to arbitrate a dispute unenforceable with respect to any claim arising out of rape. Currently, claims arising out of rape are arbitrable because under the FAA, arbitration agreements are en-

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42 See infra, note 98. The Jones case is discussed in Section III. For now, it is helpful to know that Jones was an employee who was allegedly raped by co-workers while working overseas for Halliburton/KBR. When Jones sought to bring her claims against Halliburton in court, Halliburton motioned to compel arbitration. Although Jones defeated Halliburton’s motion, Senator Franken was still motivated by the idea that a rape victim could be asked to arbitrate with her attacker and her employer who did nothing to help. See 155 CONG. REC. S10, 148-49 (daily ed. Oct. 6, 2009) (statement of Sen. Al Franken).
43 See supra note 39.
forceable in employment contracts unless Congress “has evinced an intention to preclude such agreements for the dispute at issue.”46 The purpose of the Rape Victims Act was to evince Congress’s intent that employees should not be compelled by an employer to arbitrate any claim relating to a tort arising out of rape.47 This statute, if enacted, would have been narrower than the Franken Amendment as it would only prohibit mandatory arbitration of torts arising out of rape claims. However, it would have been broader than the Franken Amendment in that it would have applied to all employers48 and not just federal contractors receiving funds under the 2010 Department of Defense Appropriations Act.

III. Analysis

A. Determining the Scope of an Arbitration Clause: The Early Steps

Although mandatory arbitration agreements in employment contracts are permitted under the law,49 there are several ways in which employees can overcome them and bring their claims in court.50 When courts decide whether to compel a party to arbitrate, they employ a two-part test.51 First, a court determines whether the party has agreed to arbitrate the dispute.52 Then, courts ask whether any “any federal statute or policy renders the claims nonarbitrable.”53 The first prong of this test can be divided into two issues: (1) whether there is a valid agreement to arbitrate the claims; and (2) whether the dispute is within the scope of the

47 Id. at § 2(b).
48 For the purposes of the statute, the term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person. Id. at § 3.
49 See supra note 22.
50 See Sternlight, supra note 13, at 1642-46.
52 Jones, 583 F.3d at 234.
53 JP Morgan Chase, 492 F.3d at 598.
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Arguing that the arbitration clause or agreement does not cover the particular claim is one of the more successful ways by which plaintiffs have combated mandatory arbitration.55

When looking at the scope of an arbitration clause, courts characterize arbitration clauses as either broad or narrow.56 The various federal circuit courts have different approaches to classifying arbitration clauses. For example, the Fifth Circuit distinguishes narrow arbitration clauses which require arbitration of disputes “arising out of” the contract from broad arbitration clauses which cover disputes that “relate to” or “are connected with” the contract.57 The Second Circuit classifies broad arbitration clauses as those which require arbitration of “any controversy, claim or dispute.”58 Arguably, parties use a broad arbitration clause so that it will cover all future disputes.59 However, courts struggle to determine the parties’ intent when broad language is used.60

Determining the parties’ intent with respect to arbitration is especially difficult in the employment context because arbitration is not the main subject of the employment contract.61 Instead, the parties (and especially the employees) are likely more concerned with the nature of the position, terms of compensation, and the grounds, if any, for termination.62 The courts’ struggle is also

54 Jones, 583 F.3d at 234. The issue of determining whether a dispute falls within the scope of an arbitration agreement is known as “substantive arbitrability.” See infra note 59, at 1138.

55 Sternlight, supra note 13, at 1644. Other successful attacks against mandatory arbitration clauses include additional contractual/common law arguments: the clause is invalid because the agreement lacks consideration, the clause is invalid due to fraud, or that the clause is unconscionable. Id.


57 Jones, 583 F.3d at 235 (citing Pennzoil).

58 Forbes, 2009 WL 424146, at *17 (citing JLM Indus., Inc v. Stolt-Nielsen SA, 387 F.3d 163, 172 (2d Cir. 2004)). See also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967) (the court found that the language of an agreement to arbitrate “[a]ny controversy or claim arising out of or relating to” the agreement was “easily broad enough to encompass” a claim that that both execution and acceleration of a consulting agreement itself were procured by fraud).


60 Id. at 1144.


62 Id.
heightened in the employment context because often, the employee is unsophisticated and is offered employment on a “take it or leave it” basis. The five sexual assault and sexual harassment cases that will be analyzed here all involve broad arbitration clauses.

B. How Courts Interpret the “arising out of” and “related to” Language

Often, when a court faces the task of determining if a sexual assault or sexual harassment claim is within the scope of a broad arbitration clause in an employment contract, it must determine if the claim “relates to” or “arises out of” the plaintiff’s employment. The only way for a court to decide if such a claim “relates to” or “arises out of” the plaintiff’s employment is to focus on the specific facts of the case (fact-specific analysis). Courts have found that the factual allegations in the complaint are more important to arbitrability than the legal causes of action asserted. However, courts struggle with interpreting the meaning of “relates to” or “arises out of” language in a mandatory arbitration provision. Thus, not all courts reach the same conclusion regarding arbitrability when looking at similar facts.

Courts employ different tests to determine if a plaintiff’s factual allegations “relates to” or “arises out of” her employment. One test that courts apply to determine if a claim “relates to” or “arises out of” the plaintiff’s employment is the “but for” test. Courts applying the “but for” test find that a claim “relates to” or “arises out of” the plaintiff’s employment if the challenged actions would not have arisen but for the employer-employee relationship. This test is extremely broad and seems to cover nearly all cases where the plaintiff was assaulted or harassed while the plaintiff was working or at a work-related function, and such acts were

\[63 \text{ See Coleman, supra note 27, at 228-29.}
\[64 \text{ See Johnson, supra note 3.}
\[65 \text{ See Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 846 (2d Cir. 1987) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 605, 622 n.9, 626 n.13 (1985)).}
\[66 \text{ One judge has offered that the proper interpretation of “arising out of” depends on the specific situation presented and thus policy considerations should determine whether “arising out of” should be given a strict or liberal interpretation. Coudert v. Paine Webber Jackson & Curtis, 705 F.2d 78, 83 (2d Cir. 1983) (Weis, J., dissenting).}
\[67 \text{ See Chase Manhattan Inv. Services, Inc. v. Miranda, 658 So.2d 181, 182 (Fla. Dist. Ct. App. 1995).} \]
committed by a supervisor or co-worker. Therefore, a court applying the “but for” test would often find that a plaintiff’s sexual assault or harassment claim is arbitrable.

Another test that courts apply is the “significant aspects” test. The Eighth Circuit implemented this test in *Morgan v. Smith Barney, Harris Upham & Co.*68 In *Morgan*, the plaintiff worked as an account executive for the brokerage firm, Smith Barney, Harris Upham & Company.69 As a part of his employment, Morgan consented to a provision whereby he agreed to arbitrate “any controversy . . . arising out of the employment or termination of employment.”70 Two years after he resigned, Morgan brought claims of *prima facie* tort and slander against Smith Barney.71 Morgan alleged that: (1) his superiors “scrounged up” complaints from his former customers and notified the NYSE and Missouri Securities Commission (“MSC”); (2) Smith Barney personnel falsely informed customers that Morgan’s Missouri broker’s license was suspended; and (3) Smith Barney personnel told Morgan’s co-workers that he stole things from their desks.72 In order to determine if these allegations arose out of Morgan’s employment, the court examined the specific allegations to see if they involved significant aspects of the employment relationship.73

The court found Morgan’s allegations that Smith Barney scrounged up complaints and misinformed his former customers were arbitrable.74 The court concluded that these allegations involved significant aspects of the employment relationship because the defendant’s statements implicated Morgan’s former customers and concerned the status of Morgan’s broker’s license and his handling of customer accounts.75 The court also found it important that Morgan alleged that the false complaints Smith Barney “scrounged up” led to investigations against him, which hurt his future employment prospects.76 The court found that this allegation directly flowed from Morgan’s employment contract with Smith Barney because Section 3 of the contract stated that Morgan

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69 *Id.* at 1164.
70 *Id.*
71 *Id.* at 1165.
72 *Id.* at 1167-68.
73 *Id.* at 1167.
74 *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d at 1167-68.
75 *Id.* at 1167.
76 *Id.* at 1167-68.
agrees to submit himself to the jurisdiction of the securities industry organizations that investigate him (the NYSE and MSC).\textsuperscript{77}

The court deemed Morgan’s allegation that Smith Barney personnel told Morgan’s co-workers that he stole things from their desks not arbitrable.\textsuperscript{78} The court distinguished this allegation from the others because the facts of this complaint did not implicate his customers or security agencies (such as the NYSE and MSC).\textsuperscript{79} Also, this allegation did not involve Morgan’s job performance as a broker.\textsuperscript{80} The Morgan case is a good illustration of how a court differentiates between the facts underlying different claims to see if they “arise out of” a plaintiff’s employment.

After reviewing the Morgan case, it seems that a court applying the “significant aspects” test would find that the sexual assault or sexual harassment of a plaintiff-employee does not “arise out of” a plaintiff’s employment. The sexual assault or sexual harassment of an employee is not related to the plaintiff’s job performance since such acts are the result of a co-worker’s independent actions. Thus, a victim of sexual assault or sexual harassment who seeks to bring their claims in court would prefer a court to apply the “significant aspects” test.

Before delving into the cases involving employees’ sexual assault and sexual harassment claims against their employer, it is helpful to first look at Victoria v. Superior Court.\textsuperscript{81} In Victoria, the plaintiff alleged that she was sexually assaulted, raped, and sodomized by a hospital employee during recovery from brain surgery at a hospital owned by Kaiser Foundation Hospitals (hereafter “Kaiser”).\textsuperscript{82} Plaintiff’s complaint against Kaiser stated two causes of action: (1) negligent infliction of emotional distress; and (2) negligent selection, employment, retention and supervision of the employee who committed the alleged assaults.\textsuperscript{83} Kaiser answered the

\begin{footnotesize}
\textsuperscript{77} Id. at 1168.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d at 1168.
\textsuperscript{81} 40 Cal.3d 734 (1985). This is a case involving a sexual assault claim brought by a patient against the hospital where the assault occurred. Although there is no employment relationship, the case serves as a good illustration of how courts interpret “arising from” language when examining a sexual assault claim.
\textsuperscript{82} Id. at 737.
\textsuperscript{83} Victoria’s complaints against Kaiser were based on the contention that Kaiser knew the employee had sexually assaulted female patients at least twice before. Victoria also brought suit against the individual employee. Id.
\end{footnotesize}
complaint and moved to compel arbitration. The Superior Court of Los Angeles granted Kaiser’s motion and plaintiff appealed.

On appeal, the plaintiff argued that her claims against Kaiser were outside the scope of the arbitration clause. Plaintiff maintained that her claims were not arbitrable because they did not arise from “the rendition or failure to render services” under the Agreement. Instead, she argued that her claims arose from an intentional sexual assault beyond the employee’s scope of employment. Kaiser argued that the claims were arbitrable because the only means by which a hospital can provide services to patients is to employ individuals to perform those services. Therefore, Kaiser argued that plaintiff’s primary claim against it for the negligent employment of the employee arose from the rendition or failure to render services under the Agreement.

The court agreed with the plaintiff and found that her claims were beyond the scope of the arbitration clause. As the court pointed out, assault, rape, and sodomy are not “medically necessary services” which are “prescribed, directed or authorized by [an] attending Physician.”

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84 Id. at 738. The arbitration clause was in an agreement between Kaiser and Southern California Edison Company. Plaintiff’s father was an employee of Southern California Edison Company and plaintiff was eligible for membership in Kaiser as a family dependent of her father. Id. The arbitration clause stated that, “[a]ny claim arising from alleged violation of a legal duty incident to this Agreement shall be submitted to binding arbitration if the claim is asserted: (1) by a Member . . . [:] (2) On account of death, mental disturbance or bodily injury arising from rendition or failure to render services under this Agreement, irrespective of the legal theory upon which the claim is asserted; (3) For monetary damages exceeding the jurisdictional limit of the Small Claims Court; and (4) Against one or more of the following . . . : (a) Health Plan, (b) Hospitals, (c) Medical Group, (d) Any Physician, or (e) Any employee of the foregoing.” (emphasis added) Id.

85 Id.

86 Id.

87 Victoria v. Superior Court, 40 Cal.3d 734 at 741. Under the Agreement, Medical Services is defined as “those medically necessary professional services of physicians and surgeons, other health professionals and paramedical personnel, including medical, diagnostic, therapeutic and preventative services which are (1) generally and customarily provided in Southern California and (2) performed, prescribed, or directed by the Attending Physician. Hospital Services is defined as “those medically necessary services for registered bed patients which are (1) generally and customarily provide by acute general hospitals in Southern California and (2) prescribed, directed or authorized by the Attending Physician.” Id.

88 Id. at 742.

89 Id.

90 Id.

91 Id.
claims arising from the rendition or failure to render services under the Agreement. By limiting the arbitration clause to claims arising from the rendition or failure to render services under the Agreement, the court found that the clause was ambiguous and construed it against the drafter (Kaiser).

In reaching its conclusion, the Victoria court focused on the nature of the plaintiff’s allegations, the language of the arbitration clause, and the parties’ intentions. The court contrasted the plaintiff’s claims of sexual assault and rape from a claim that the employee negligently failed to empty a bedpan. Unlike negligently failing to empty a bedpan, the employee’s alleged acts had nothing to do with providing, or failing to provide, services. When trying to decipher the parties’ intentions, the court found that neither party contemplated nor expected that a hospital employee would commit such violent acts against the plaintiff. Therefore, the parties could not have intended or agreed to arbitrate causes of action stemming from such an attack. As the next two sub-sections of this Note will show, courts pay special attention to the plaintiff’s factual allegations and the parties’ intentions when determining the scope of a broad mandatory arbitration clause.

C. Determining if Both Sexual Assault and Sexual Harassment Claims Are Within the Scope of a Broad Arbitration Clause in an Employment Contract: A Focus on the Plaintiff’s Factual Allegations

In Jones v. Halliburton, the Fifth Circuit engaged in a fact-specific analysis to find that the plaintiff-employee’s claims were not arbitrable. The plaintiff, Jamie Leigh Jones, began working for defendant Halliburton/KBR as a clerical assistant overseas in Baghdad in 2004. In July 2005, Jones signed a contract with Halliburton/KBR whereby she agreed to submit all claims “related to”

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92 Id.
93 Victoria v. Superior Court, 40 Cal.3d at 747.
94 Id. at 745.
95 Id.
96 Id.
97 Id. The court was guided by CIV. CODE § 1648 which stated, “[h]owever broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.” Id. at 739.
98 583 F.3d 228 (5th Cir. 2009).
99 Id. at 230.
her employment as well as any personal injury claims “arising in” the workplace to binding arbitration. Jones alleged that Halliburton/KBR housed her in predominantly male barracks where she was subjected to sexual harassment. Jones complained about her housing conditions and requested to be moved to a safer location but Halliburton/KBR took no action. The next night after requesting to change her housing, Jones alleged that several Halliburton/KBR employees drugged, beat, and gang-raped her in her bedroom following a social gathering outside her barracks. Following the rape, Jones alleged that Halliburton/KBR mishandled her rape kit and placed her in a container under armed guard. Eventually, Jones brought claims, inter alia, of assault and battery, intentional infliction of emotional distress, and negligent hiring, retention, and supervision of employees against Halliburton in a Texas district court. Halliburton/KBR motioned to compel arbitration.

Halliburton/KBR contended that Jones’ claims were arbitrable because they were “related to” her employment. The court underwent a fact-specific analysis and determined that Jones’ claims did not “relate to” her employment. The court summarized the crucial facts of the underlying allegations: “(1) Jones was sexually assaulted by several Halliburton/KBR employees in her bedroom, after-hours, (2) while she was off-duty, (3) following a social gathering outside of her barracks, (4) which was some distance from where she worked, (5) at which social gathering several co-workers had been drinking (which, notably, at the time was only allowed in “non-work” spaces).” Additionally, the court agreed with the lower court’s finding that Jones was not acting in any way related to her employment by becoming the victim of an alleged

100 Id. at 231.
101 Id.
102 Id.
103 Id.
104 Jones v. Halliburton, 583 F.3d 228, 232 (5th Cir. 2009).
105 Jones initially filed a complaint with the Equal Employment Opportunity Commission (EEOC). After the EEOC determined that Jones had been sexually assaulted and that Halliburton/KBR conducted an inadequate investigation, Jones filed a demand for arbitration against Halliburton/KBR. Jones then retained new counsel and filed an action in district court. Id. at 230.
106 Id. at 233.
107 Id. at 235.
108 Id. at 240-41.
109 Id. at 240 (emphasis in original).
580 CARDOZO J. OF CONFLICT RESOLUTION [Vol. 13:565

sexual assault. With these facts and numerous case law supporting the proposition that generally, sexual assault is independent of the employment relationship, the court concluded that the “arbitration provision’s scope certainly stops at Jones’ bedroom door.”

Halliburton/KBR further contended that Jones’ claims were arbitrable because they stemmed from a personal injury that arose “in or about the workplace.” The court found that this language did not cover Jones’ claims because it did not consider her bedroom to constitute the workplace. Although Halliburton/KBR provided Jones’ housing, her barracks were far from where she worked and Halliburton/KBR presented no evidence which showed that Jones or any other employees performed any job duties at the barracks. The court also strongly considered that employees were drinking outside the barracks and that drinking was only allowed in non-work spaces.

In Hill v. Hilliard, the court distinguished between the facts surrounding the plaintiff’s sexual assault claim and the facts surrounding her sexual harassment claim. Hill began working for Hilliard as a stockbroker in February 1991. As a condition of her employment, Hill signed a form whereby she agreed to arbitrate any dispute, claim, or controversy that may arise out of her employment. Hill alleged that in October 1998, her supervisor, Brab, raped her while they were attending a convention in New York. Hill eventually reported the incident to senior officials, but no actions were taken against the supervisor. Following the rape, Hill was required to continue working next to Brab where she was the victim of retaliatory treatment. Hill brought claims, inter alia, of assault and battery, false imprisonment, intentional

110 Id. at 237.
112 Id. at 239.
113 Id. at 241.
114 Id.
115 Id.
116 Id.
117 945 S.W.2d 948 (Ky. Ct. App. 1996).
118 Id. at 949.
119 Id. at 950.
120 Id.
121 Id.
122 Id.
infliction of emotional distress, sexual harassment, retaliation, and violation of equal pay law against Hilliard, the senior officials, and her supervisor. All of the defendants moved to dismiss and defer the case to arbitration.

Here, the court differentiated between Hill's claims of sexual harassment, retaliation, and violation of equal pay law, and Hill's other allegations against her supervisor. The court found that the claims of sexual harassment, retaliation, and violation of equal pay law arose out of her employment because they related to the action or inaction that the defendants took in response to Hill's report of the rape. However, the court found that Hill's claims against her supervisor of rape, assault and battery, and false imprisonment, did not arise out of her employment. The court agreed with the lower court that "rape does not ordinarily arise out of the employment context." The only connection the court found between Hill's claims against her supervisor and her employment were that they were committed by a co-worker and occurred while on a business trip. The court did not find these connections strong enough to compel Hill's claims against her supervisor to arbitration.

Amongst the five cases involving sexual assault/harassment claims analyzed here, the Hill v. Hilliard court's reasoning is the most sound because it distinguished between claims against the employer and claims against a co-worker. The Hill v. Hilliard court also distinguished the sexual assault claims from the sexual harassment claims. As Section IV will argue, courts should differentiate between sexual assault and sexual harassment claims because a reasonable employee does not foresee being subjected to sexual assault as a part of her employment. The court properly construed the facts of the sexual harassment claim, which dealt with the action or inaction of her employer, to find that the claim arose out of her employment. The sexual assault claim, conversely,

124 Id.
125 Id. at 951.
126 Id.
127 Id. at 950-51.
128 Id. at 952.
130 The court stated that "[t]he mere fact that these tort claims might not have arisen but for the fact that the two individuals were together as a result of an employer-sponsored trip cannot be determinative. What [the supervisor] is accused of doing is independent of the employment relationship. We will not expand the arbitration agreement merely for the sake of efficiency."
131 Id.
was not based upon the action or inaction of Hilliard but instead was based upon an independent, intentional action of the attacker.

D. Determining if Both Sexual Assault and Sexual Harassment Claims Are Within the Scope of a Broad Arbitration Clause: A Focus on the Parties’ Intentions

In order for a sexual harassment or sexual assault claim to be arbitrable, the court must find that the parties intended such claims to be covered by the mandatory arbitration provision in the parties’ contract.¹³¹ Thus, the issue of arbitrability is an issue of contract interpretation and courts must focus on the language of the mandatory arbitration provision.¹³² Normally, when parties use a broad arbitration clause, courts find that the parties meant for the clause to cover all claims touching upon the contract.¹³³

In *Forbes v. A.G Edwards & Sons*, the court focused on the language of the mandatory arbitration provisions in the parties’ contracts to determine the parties’ intentions.¹³⁴ Melissa Forbes began working for A.G. Edwards & Sons, a national securities brokerage firm, on a permanent basis as a financial associate in October 2004.¹³⁵ As a part of her employment, Forbes signed several documents that contained mandatory arbitration provisions.¹³⁶ Under the arbitration provisions, Forbes agreed to arbitrate “any dispute, claim or controversy that may arise between [her] and Edwards.”¹³⁷ On January 21, 2007, Forbes went to Miami for a week with Pearl, a manager at Edwards, for a retail conference.¹³⁸ Forbes alleged that Pearl sexually harassed her at a social gathering following conference presentations.¹³⁹ Forbes further alleged that Pearl lured her into his hotel room under false pretenses, and sexu-

¹³² Id.
¹³³ Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d at 846.
¹³⁵ Id. at *2.
¹³⁶ The documents consisted of an Employment Application, a Financial Associate Agreement, and a Supplementary Training Agreement for a Financial Associate. Id. at *2-3.
¹³⁷ The arbitration provisions explicitly listed claims of discrimination, sexual harassment, retaliation, and infliction of emotional distress as part of those claims that were covered by the provisions. Id. at *3.
¹³⁸ Id. at *4.
¹³⁹ Id. at *5.
ally assaulted her in his room. Upon returning to work following the conference, Forbes alleged that Pearl continued to harass her. Forbes felt compelled to resign as a result of Pearl’s behavior. Forbes brought claims of sexual harassment, sexual discrimination, retaliation, intentional infliction of emotional distress, battery, and assault against her employer.

The *Forbes* court focused on the broad, sweeping language of the arbitration clauses in the parties’ contracts. The court interpreted the language of the arbitration clauses to cover all claims that may arise in an employment setting. Based on the broad language of the arbitration clauses, the court did not think the parties intended for there to be any limit on the scope of arbitration. The court found that Forbes’ claims were arbitrable because the agreement’s broad arbitration clauses extend to claims that “touch matters” with her employment. The court concluded that since the incident: (1) involved Forbes’ co-worker, (2) occurred during a work conference, and (3) contributed to what Forbes alleged was a continuing course of harassing conduct at work, the claims clearly “touch matters” concerning her employment. Like *Jones*, the court here undertook a fact intensive analysis. However, the court interpreted the facts to conclude that the plaintiff’s claims were arbitrable.

In *Smith ex rel. Smith v. Captain D’s, LLC*, the court solely focused on the parties’ intentions while completely ignoring the specific facts of the case. Smith began working at Captain D’s, a seafood restaurant owned by the defendant, in 2004. Before her employment commenced, Smith filled out an application for employment. The application included an arbitration agreement whereby both parties were required to submit claims “arising out of” or “related to” Smith’s application for employment, employ-

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141 *Id.* at *5-6.
142 *Id.* at *6.
143 *Id.* at *1.
144 *Id.* at *17.
145 *Id.*
146 *Id.*
147 *Id.* at *18.
148 *Id.* at *18-19.
149 963 So.2d 1116 (Miss. 2007).
150 *Id.* at 1117-18.
151 *Id.* at 1118.
ment and/or cessation of employment to binding arbitration.\textsuperscript{152} Smith alleged that Christopher Howell, a manager of Captain D’s, assaulted and raped her in the bathroom during working hours.\textsuperscript{153} Consequently, Smith brought claims of negligent hiring, retention, and supervision of employees against Captain D’s.\textsuperscript{154} Captain D’s motioned to compel arbitration.\textsuperscript{155}

The court held that Smith’s sexual assault claim was “unquestionably” beyond the scope of the arbitration provision.\textsuperscript{156} The court found that Smith’s claim neither pertained to nor had a connection with her employment.\textsuperscript{157} In reaching its conclusion, the court relied heavily on Rogers-Dabbs Chevrolet-Hummer v. Blakeney.\textsuperscript{158} There, a car dealership’s employees used a customer’s identity to obtain forged titles to stolen vehicles, while the customer never received title to the vehicle he purchased.\textsuperscript{159} When the customer sued the dealership, it responded by filing a motion to compel arbitration under the broad arbitration clause in the parties’ contract.\textsuperscript{160} The court found that although the customer agreed to arbitrate all claims originating from the transaction, “no reasonable person would agree to submit to arbitration any claims . . . concerning a Hummer to which he would never receive a title; a scheme of using his name to forge vehicle titles . . . and the commission of civil fraud against him by misappropriating his title to the Hummer he purchased . . . ”\textsuperscript{161} Thus, it is fair to conclude that the Captain D’s court found that no reasonable person would agree to arbitrate a sexual assault claim with their employer.

According to the dissent, the majority’s analysis has several flaws.\textsuperscript{162} First, the court phrased the issue as whether Smith’s rape

\begin{itemize}
\item \textsuperscript{152} Both Smith and her grandmother signed the agreement since Smith was only seventeen at the time. \textit{Id.}.
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Id.} at 1116.
\item \textsuperscript{155} Smith ex rel. Smith v. Captain D’s, LLC, 963 So.2d 1116, 1118 (Miss. 2007).
\item \textsuperscript{156} \textit{Id.} at 1121.
\item \textsuperscript{157} The court interpreted the term “related to” to mean that the claim must stand in some relation to; pertain to; refer to; or to bring into association with or connection with (citing Black’s Law Dictionary 892 (Abridged 6th ed. 1991)). \textit{Id.} at 1121.
\item \textsuperscript{158} \textit{Id.} at 1119-21. The Rogers-Dabbs case can be found at 950 So.2d 170 (Miss. 2007).
\item \textsuperscript{159} \textit{Id.} at 1120.
\item \textsuperscript{160} \textit{Id.} (The clause required Blakeney to submit “all claims, demands, disputes or controversies of every kind or nature between [the parties] arising from, concerning or relating to” the transaction to binding arbitration.).
\item \textsuperscript{161} \textit{Id.} (quoting Rogers-Dabbs, 950 So.2d at 177).
\item \textsuperscript{162} See Smith ex rel. Smith v. Captain D’s LLC, 963 So.2d 1116, 1122-24 (Miss. 2007) (Dickinson, J. dissenting).
\end{itemize}
claim relates to or arises out of her employment. However, Smith did not bring a rape claim against Captain D’s but instead brought claims of negligent hiring, retention, and supervision. By phrasing the issue as the court did, it focused more on the manager’s actions instead of Captain D’s actions toward the manager. Also, the court failed to undertake a fact-specific analysis. The court reached its conclusion without considering several factual questions: (1) whether the restaurant was open for business; (2) whether Smith was working at the time; (3) whether the manager ordered Smith to go to the restroom for some pretextual reason; (4) whether customers or other employers were present in the restaurant or restroom; or (5) whether Smith failed to stop the assault out of fear of losing her job. Instead, the court merely referenced relevant case law (that did not involve an employee or a sexual assault/harassment claim) and concluded that a sexual assault claim was not related to Smith’s employment. As Section IV of this note will argue, for claims arising from sexual assault, such a fact-specific analysis is unnecessary.

In Barker v. Halliburton, the court interpreted the language of the parties’ mandatory arbitration agreement to cover both the plaintiff’s sexual assault and sexual harassment claims. Before Barker commenced employment with Halliburton in September 2004, she signed an employment agreement whereby she agreed to submit “any and all claims that [she] might have against [Halliburton] related to [her] employment, including [her] termination, and any and all personal injury claim[s] arising in the workplace . . . ” to binding arbitration. Barker alleged that while she was employed in Iraq, she was housed in predominantly male barracks, where she was subjected to verbal and physical abuse. Following these verbal and physical attacks, Barker reported these incidents to Halliburton, but nothing was done to remedy the situation. Instead, Barker alleges that she was locked in a room and interrogated by human resources personnel. Barker further alleged that she was sexually assaulted on two different occasions: first by a State De-

163 Id. at 1121.
164 Id. at 1116; See also id. at 1122 (Dickinson, J. dissenting).
165 Id. at 1123 (Dickinson, J. dissenting)
166 Id.
168 Id. at 883.
169 Id. at 882.
170 Id.
171 Id.
partment employee and then by her supervisor. Barker filed suit in the Eastern District of Texas in December 2006. Halliburton moved to compel Barker to arbitrate her claims in compliance with the arbitration clause in her employment agreement.

The court found that since the arbitration agreement was broad, Barker’s claims need only “touch matters” with her employment. After evaluating all of Barker’s claims related to the intentional torts, the court concluded that they not only “touched” her employment but were “entirely based on her employment.” In reaching its conclusion, the court found that all of Barker’s claims were based on Halliburton’s failure to: (1) adequately hire, train, and supervise employees; (2) provide a safe working environment; and (3) undertake adequate and sufficient safety precautions. Like the court in Hill v. Hilliard, the court placed great weight on the fact that the claims were based on the employer’s actions or inactions. However, unlike the court in Hill v. Hilliard, the court also found that the claims based entirely on the sexual assaults were also arbitrable.

IV. PROPOSAL

A. Courts Should Find that Sexual Assault Claims are Beyond the Scope of Broad Mandatory Arbitration Clauses

When determining if an arbitration clause covers a certain claim, courts focus on the parties’ intentions. As mentioned earlier, broad arbitration clauses make it difficult to determine the parties’ intentions. Although it is likely that employers who use broad arbitration clauses want all potential claims to go to arbitra-

172 Id.
174 Id. at 883.
175 Id. at 887 (citing Pennzoil, 139 F.3d at 1068).
176 Id.
177 Id.
178 Baker argued that some of her claims were based on incidents that occurred beyond the work environment (the sexual assaults that took place in her bedroom). The court dismissed this argument on the grounds that “overseas employees do not have bright lines between their working time and their leisure time.” The court concluded that even if some of the incidents occurred during leisure time, they would still be arbitrable. Barker v. Halliburton, 541 F.Supp.2d 879, 887-88 (S.D. Tex. 2008).
179 Overby, supra note 59, at 1143.
180 Id. at 1144.
tion, the cases in this Note show that it is not likely that an employee intended to arbitrate sexual assault claims. One study shows that people fail to properly evaluate the consequences of agreeing to a mandatory arbitration clause. Since people tend to be overly optimistic, they will underestimate the value of giving up the right to sue. Considering these findings, courts should adopt a reasonable person standard to determine if the employee intended to arbitrate a sexual assault claim. Using the reasonable person standard, courts should conclude that a reasonable person entering into an employment agreement does not intend to arbitrate outrageous torts such as sexual assault or rape.

The South Carolina Supreme Court applied the reasonable person standard to victims of “unforeseeable” and “outrageous” torts and held that claims arising from such behavior are not arbitrable. In Aiken v. World Financial Corp. of South Carolina, Aiken acquired loans from World Financial and the parties subsequently entered into a broad arbitration agreement. A couple years after paying off his last loan, Aiken learned that World Financial employees used his personal information to obtain fraudulent loans. Aiken brought claims, inter alia, of negligence, negligent hiring and supervision, and emotional distress. World Financial moved to compel arbitration.

In Chassereau v. Global-Sun Pools, Inc., Chassereau purchased an above-ground pool from Global-Sun. Eventually there was a problem with the pool and Global-Sun allegedly refused to fix it. This caused Chassereau to stop making payments to Global-Sun. Afterwards, a Global-Sun employee began harassing Chassereau by calling her repeatedly, revealing her personal information to others, and making defamatory statements about her. Chassereau brought claims of defamation, intentional

181 Sternlight, supra note 13, at 1649.
182 Id.
183 This suggestion also applies to claims of false imprisonment.
185 Aiken v. World Fin. Corp. of S.C., 644 S.E.2d at 707.
186 Id.
187 Id.
188 Id.
189 Id.
190 Id.
191 Id.
192 Id.
infliction of emotional distress, and a criminal offense of unlawful communication against Global-Sun. In both of these cases, the court found that the claims were not arbitrable because “the plaintiffs could not have possibly agreed to arbitrate those issues.” The court focused on whether “a reasonable consumer could have foreseen that the contract would give rise to such outrageous behavior in the ordinary course of business.” Thus, the test in South Carolina is “if a party has engaged in outrageous, tortious behavior ‘unforeseeable to the reasonable consumer,’ the court will disregard any agreement to arbitrate reached between the two parties.”

Although the claims in the South Carolina cases arose in the consumer context, the reasonable person standard can be applied just as easily in the employment context. Clearly, acts of sexual assault, rape, and false imprisonment are outrageous torts that a reasonable employee could not foresee arising out of their employment. Since employees do not foresee getting sexually assaulted or raped as a part of their employment, courts should hold as a matter of law that claims of sexual assault are not within the scope of broad arbitration clauses and thus are not arbitrable. Courts should apply the reasonable person standard when looking at broad arbitration agreements in the employment context in order to protect employees with little or no bargaining power.

B. Courts Should Undergo a Fact-Specific Case-by-Case Analysis to Determine if Sexual Harassment Claims Fall within the Broad Scope of Mandatory Arbitration Clauses

When courts are confronted with the issue of determining if a sexual harassment claim is within the scope of a broad arbitration

193 Id.
194 Id.
195 Lamb, supra note 184, at 527 (citing Chassereau, 644 S.E.2d at 720-21; Aiken, 644 S.E.2d at 709).
196 Id. at 529 (citing Chassereau, 644 S.E.2d at 709).
197 Id. at 513.
198 Instead of “reasonable consumer,” apply “reasonable employee.”
199 See Landry, supra note 26, at 487.
clause, courts should undertake a fact-specific analysis. Considering the national policy favoring arbitration and the expansive coverage of broad arbitration clauses, courts only need to determine whether the underlying facts of the claim were related to the plaintiffs’ employment. As the cases analyzed show, courts should focus on: (1) where the harassment occurred; (2) whether it occurred while the plaintiff was working; (3) who was doing the harassing; (4) whether the employer knew about the harassment; and (5) what steps the employer took or failed to take to remedy the situation. If the harassment occurred on work premises, while the plaintiff was on-duty, was initiated by a fellow employee, and if the employer was aware of the harassment and took no steps to alleviate the situation, these facts should lead a court to conclude that the harassment arose out of or was related to the plaintiff’s employment.

Unlike with claims of sexual assault, courts need not decipher if the plaintiff-employee intended to arbitrate a sexual harassment claim under a broad arbitration clause. Due to the prevalence of sexual harassment in the workplace, plaintiff employees should reasonably foresee that sexual harassment could “arise out of” or “relate to” their employment. Since sexual harassment is common in today’s workplace and often not as severe as sexual assault, it should not be considered an outrageous tort. Therefore, the South Carolina test would not apply to sexual harassment claims. Also, most employers explicitly state in the mandatory arbitration clause that it covers claims of discrimination which includes claims of sexual harassment. For example, in the Forbes case, the employer expressly listed sexual harassment as one of the claims required to be arbitrated under the agreement, while sexual assault was not expressly listed.

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200 This suggestion also applies to claims of sexual discrimination and negligent hiring, retention, and supervision. Out of the cases covered, only the court in Smith ex rel. Smith v. Captain D’s, LLC failed to undertake a fact-intensive analysis.


C. Congress Should Pass a Law Similar to the Rape Victims Act of 2009

The Rape Victims Act of 2009 was introduced on December 18, 2009. After being introduced, it was referred to the Senate Committee on Health, Education, Labor and Pensions. Since the Senate committee took no action once it was referred to them, the Rape Victims Act of 2009 never became law. Congress should have passed the Rape Victims Act and it should try to pass a law similar to it in the future. The Rape Victims Act’s subject matter was limited in scope, as it only prohibited the mandatory arbitration of torts arising out of rape. In order to protect themselves from the limited scope of the Act, employers could impart the costs of possible litigation due to an employee’s rape claim to the employee who committed the attack. Under \textit{Gilmer}, Congress has the power to prohibit certain arbitration agreements. The Rape Victims Act would have protected employees from being subjected to mandatory arbitration while only harming employers minimally. It is impossible to predict which forum a plaintiff employee will select to bring their claim, but the employee should have a choice.

V. Conclusion

As the cases analyzed in this Note show, it is difficult to predict whether a court will conclude a sexual harassment or sexual assault claim is within the scope of a broad mandatory arbitration clause. When confronted with this issue, courts must balance “the need for efficiency in dispute resolution . . . [and] the need for a process that will determine the most proper outcome.” When confronted with the arbitrability of a sexual assault claim under a broad mandatory arbitration clause, courts should focus on the victim’s intentions. Courts should apply the reasonable person standard and conclude that no employee could foresee being subjected to a sexual assault as a result of her employment. Since a reasona-

\textsuperscript{204} Rape Victims Act of 2009, S. 2915, 111th Cong. § 3 (2009).
\textsuperscript{205} \textit{Id}.
\textsuperscript{206} It is important to note that an employee, although not subjected to a mandatory arbitration clause, may still opt for arbitration instead of litigation.
\textsuperscript{207} See \textit{supra} note 46.
ble employee would not foresee being sexually assaulted as a result of her employment, there is no way an employee would intend to arbitrate a sexual assault claim. Applying this test would lead courts to find that as a matter of law, sexual assault claims are not arbitrable. Since it is unlikely that all courts will adopt this test considering the strong national policy favoring arbitration, the legislature should pass a law similar to the Rape Victims Act of 2009. A law like The Rape Victims Act of 2009 would have protected victims like Jamie Leigh Jones and Tracy Barker, who were allegedly raped by co-workers and had to struggle to get their day in court. When it comes to sexual harassment claims, there is no bright line for courts to apply. Instead, courts should undertake a fact-intensive analysis and reach outcomes on a case-by-case basis.

With the surge of employment disputes over the last several decades, mandatory arbitration clauses will continue to be commonplace in employment contracts. Although arbitration may be appropriate for many types of employees’ claims (including sexual harassment claims), requiring employees to arbitrate sexual assault and especially rape claims is not appropriate. Whether courts adopt the reasonable person standard to hold that sexual assault claims are not arbitrable, or if Congress passes a law that prohibits the arbitration of any sexual assault claims, subjecting sexual assault claims by employees to mandatory arbitration should not continue.


210 See Fitzgibbon, supra note 201 (concluding that “labor arbitration is an appropriate forum for resolution of sexual harassment claims”).