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THE "TWO DISMISSAL RULE" IS NOT A RULE OF CLAIM PRECLUSION; ALSO, THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT/HARASSMENT ACT; AND, SELF-REPRESENTED PLAINTIFFS CAN GET MANDATORY SANCTION FOR DEFENDANT'S DISCOVERY ABUSE

FRCP 41(a)(1)(B) (the "two dismissal rule") is not a rule of claim preclusion and does not apply in California state court.

Doe v. Marysville Joint Unified School District (2026) __ Cal.5th __ (Cal. Supreme.)

Before filing the instant action in California state court, the plaintiffs twice filed and then dismissed virtually identical actions in court against the defendants. One of the prior actions was filed in state court; the other in federal court. Both dismissals were designated "without prejudice." The dismissal in the federal district court was pursuant to rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure. The rule provides a plaintiff may voluntarily dismiss an action without a court order by filing a notice of dismissal. (Rule 41(a)(1)(A)(i).) "Unless the notice ... states otherwise, the dismissal is without prejudice." (Rule 41(a)(1)(B).) "But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." (*Ibid.*)

After the plaintiffs again filed nearly identical claims in state superior court, the School District demurred, arguing, among other things, that claim preclusion bars Plaintiffs' claims by operation of the so-called two-dismissal rule of rule 41(a)(1)(B). The trial court agreed that claim preclusion bars plaintiffs' claims and sustained the demurrer on this basis without leave to amend. In a split decision, the Court of Appeal affirmed. The majority reasoned that it was bound to follow rule 41(a)(1)(B) and that this rule rendered the federal dismissal claim preclusive.

The California Supreme Court reversed. It rejected the School District's argument – and the holding of the majority of the Court of Appeal – that rule 41(a)(1)(B) bars the Plaintiffs from bringing the instant action. Rather, Rule 41(a)(1)(B) is a rule of federal procedure that, when triggered, bars the plaintiff from filing the same claims *in federal court*. It is not a broader rule of claim preclusion and thus does not bar a subsequent action *in state court*.

The Court explained, federal common law governs the preclusive effect of all federal judgments. In federal-question cases, federal courts participate in developing uniform federal rules of res judicata, which the high court has ultimate authority to determine and declare. In diversity cases, federal law incorporates the rules of preclusion applied by the state in which the rendering court sits. Since state, rather than federal, substantive law is at issue there is no need for a uniform federal rule.

The United States Supreme Court has not addressed the question of what law governs the claim-preclusive effect of a judgment disposing of both federal law and supplemental state law claims. But Rule 41(a)(1)(B) is a procedural rule, not a rule of claim preclusion. A dismissal that triggers the procedural bar of rule 41(a)(1)(B) is not, by virtue of the rule itself or the ordinary rules of res judicata, a claim preclusive judgment. Such a dismissal bars a plaintiff from filing the same claims in the same federal court; it does not bar a plaintiff from filing a subsequent action in state court. Accordingly, whether we apply a federal or state claim preclusion rule, dismissal of plaintiffs' federal action does not bar the instant action.

Arbitration of sexual-harassment claims

Application of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA).

a. EFFA does not apply where plaintiff's claims accrued before the EFAA was enacted.

(*Combs v. Netflix* (9th Cir.2026) __ F.4th__)

On March 3, 2022, Congress enacted the Ending Forced Arbitration of Sexual Assault nd Sexual Harassment Act of 2021 (EFAA), which allows plaintiffs alleging sexual assault or sexual harassment to proceed in court, notwithstanding any arbitration agreement between the parties. (Pub. L. No. 117-90, § 2(a), 136 Stat. 26, 26–27 (2022); 9 U.S.C. § 402(a).) Congress specified, however, that the EFAA "shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act," i.e., March 3, 2022. (§ 3, 136 Stat. at 28; 9 U.S.C. § 401 note.)

Combs alleged in her complaint against her former employer that, between 2017 and 2021, she repeatedly complained to Netflix about instances of sexual harassment and Netflix's sexually degrading culture. Combs brought these issues to the attention of her supervisors, "only to be ignored and discarded." Elsewhere in her complaint, Combs asserts that she "complained to [Netflix] regarding the uncomfortable nature of the sexually charged atmosphere she and other female employees were subjected to," but "no action was taken to remedy the situation and the harassment continued." According to Combs, "despite her voicing concerns to management, [Netflix] did not take any reasonable steps to prevent harassment from occurring."

In August 2023, Combs filed an administrative complaint against Netflix with the California Department of Fair Employment and Housing. She received an immediate right-to-sue letter on August 3, 2023. On July 29, 2024, Combs sued Netflix in California state court, raising various state law claims of discrimination, harassment, and hostile work environment.

Netflix removed the case to federal court based on diversity of citizenship and moved to compel arbitration. The district court granted Netflix's motion, concluding that Combs's claims accrued and the dispute arose before the EFAA's March 3, 2022 effective date. Affirmed. Because the EFAA did not override the parties' arbitration agreement, and because Combs did not dispute the validity of that agreement or that her claims fell within the arbitration clause, the suit was required to go to arbitration.

b. EFAA does apply to sexual harassment claims accruing after its enactment that are based on the plaintiff's sexual orientation

(De*cloedt v. Radnet Management, Inc.* (2026) _ Cal.App.5th __ (Second Dist., Div. One).)

Decloedt sued defendants alleging 11 state-law causes of action, including a cause of action for sexual harassment under our state's Fair Employment and Housing Act. The trial court denied defendant/appellants' motion to compel Decloedt to submit these claims to arbitration. The court based its decision on the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA; 9 U.S.C. §§ 401–402), which statute creates an exemption to the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.). The EFAA applies to "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." (See 9 U.S.C. § 401(4) & § 402(a).)

Defendants/Appellants claim on appeal the trial court erred in concluding the EFAA applies to this case because: (1) Decloedt alleged Ceballos harassed him based on his sexual orientation, which is not a form of sexual harassment under FEHA; and (2) even if sexual orientation harassment were sexual harassment under FEHA, Decloedt failed to allege sufficient facts showing the harassment was severe or pervasive, which is a necessary element of a hostile work environment sexual harassment claim. Affirmed.

FEHA provides in pertinent part that the following is an "unlawful employment practice": "For an employer ... because of ... sex, gender, gender identity, gender expression, ... [or] sexual orientation[ ] ... to harass an employee ...." § 12940, subd. (j)(1); see also § 12900 [providing that part 2.8 of division 3 of title 2 of the Government Code, which includes § 12940, "may be known and referred to as the 'California Fair Employment and Housing Act'"].) Thus, an employer's harassment of an employee on the basis of the latter's sexual orientation or sex is *actionable* under FEHA. Whether harassment because of sexual orientation constitutes *sexual harassment* for the purposes of FEHA is the question before the court.

FEHA proscribes harassment "because of ... sex ...." Similarly, title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) bars an employer from "'discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex ...'" (See *Bostock v. Clayton Cnty*. (2020) 590 U.S. 644, 655, 140 S.Ct. 1731, 207 L.Ed.2d 218 (*Bostock*), quoting 42 U.S.C. § 2000e-2(a)(1).) In construing that provision in title VII, the United States Supreme Court held, "An employer who fires an individual merely for being gay or transgender defies the law." (See *Bostock*, pp. 649–652, 683, 140 S.Ct. 1731.) The high court explained that because the statute's "plain terms" "prohibit[ ] employers from taking certain actions 'because of' sex," an employer violates title VII if "the plaintiff's sex was one but-for cause of [a challenged employment] decision ...." (See *Bostock*, at pp. 656, 662, 140 S.Ct. 1731.)

The court further remarked, "When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play – both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies)." (See *id*. at p. 661, 140 S.Ct. 1731, italics omitted.) Therefore, although "homosexuality and transgender status are distinct concepts from sex," "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex" for the purposes of title VII. (See *Bostock*, at p. 669, 140 S.Ct. 1731.)

We agree with *Bostock*'s holding that discriminating against an employee because of his or her homosexuality is discrimination on the basis of sex. That logic applies with equal force when determining whether an employer who has harassed an employee because of his or her homosexuality has engaged in harassment because of the employee's sex. For that reason, we conclude sexual orientation harassment is a form of harassment because of sex under FEHA.

Self-represented plaintiffs may recover mandatory $1,000 sanction for discovery abuse, even though they lack other recoverable expenses

(*Damak v. Superior Cour*t (Khanna) (2026) _ Cal.App.5th __ (Fourth Dist., Div. Three)

After failing to receive any response from Satraj Hospitality LLC, Sangita Khanna, and Sanjeev Khanna (defendants) to a variety of propounded discovery, or any communication from their counsel concerning it, self-represented Aziz Damak filed motions to compel. In addition to other relief, each of the motions requested the trial court issue monetary sanctions of at least $1,000 pursuant to method-specific sanction provisions of the Civil Discovery Act (Code Civ. Proc., §§ 2016.010 et seq.; Discovery Act.) Although the court granted all the motions to compel and the nonmonetary relief requested, it denied the requests for monetary sanctions because Damak did not show he incurred any actual expenses as a result of defendants' failure to respond to the discovery. Reversed.

As part of a legislatively established comprehensive system of discovery procedures, the applicable statutes control the types of sanctions available and the circumstances under which they may be granted. Longstanding statutory language and relevant case law lead us to conclude it was proper for the trial court to focus, in part, on whether Damak incurred expenses due to defendants' lack of response. However, the record is devoid of any consideration afforded to a more recently enacted Discovery Act sanctions provision that is an integral component of the statutory scheme and applies notwithstanding any other law. Specifically, section 2023.050, which relates to document production requests, makes a $1,000 sanction against a party and/or attorney mandatory under certain circumstances irrespective of any resulting expenses incurred by the other side. Because the trial court failed to consider whether the requisite factual findings triggering such sanctions could properly be made, the court erred in denying outright the requests for monetary sanctions. Accordingly, Damak's petition for writ of mandate was granted, in part, and the court was directed to reconsider the monetary sanctions requests in accordance with section 2023.050 and this opinion.

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm in Claremont. He is a cum laude graduate of the Harvard Law School, an appellate specialist certified by the California Board of Legal Specialization, and an emeritus member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine, a two-time recipient of the CAALA Appellate Attorney of the Year award, and in 2019 received CAOC's Streetfighter of the Year award. Jeff received the Orange County Trial Lawyer's Association Trial Lawyer of the Year award for "Distinguished Achievement" in 2023.