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Court Limits "Get Out of Arbitration Free" Card for "Implausible" Sexual Harassment Claims

California Employment Law Update on **July 30, 2026**

Ever since the enactment of the federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA") in 2022, the plaintiffs' bar has made it Job One to insert often implausible claims of sexual harassment into all manner of disparate employment cases (having nothing whatsoever to do with sexual harassment) in an often successful effort to avoid arbitration. (The EFAA permits a person alleging a "sexual harassment dispute" to opt out of a predispute arbitration agreement that they have previously signed.)

You can't really blame plaintiffs for trying to avoid arbitration. The fact is that plaintiffs and their percentage-interest lawyers really, really don't like arbitration simply because it results in predictably fair outcomes for both sides without the prospect of a "runaway jury" verdict in the millions or even tens of millions of dollars of the kind we have chronicled here, here, and here.

Alas, there is a reason that the plaintiffs' lawyers lovingly refer to the trial courts in California as "the Bank"!

Now, a federal court in California has reinforced the conclusion that merely labeling a claim "sexual harassment" is not enough to avoid arbitration. In *Ai v. Tencent America LLC*, 2026 WL 2170875 (N.D. Cal. July 28, 2026), the district court held that a plaintiff must *plausibly* allege conduct constituting sexual harassment under the law governing the claim or they will otherwise be required to arbitrate their claims.

The plaintiff in this case, a former product manager, alleged that a male coworker had made inappropriate and gender-based comments to her, including “Let me put on my pants first” when she asked him for a document, “boss’s wife,” and “landlady who collects rent.” She also alleged the coworker belittled her in workplace communications and that, after she complained to Human Resources, Tencent removed her from meetings and projects, reassigned her responsibilities, and ultimately terminated her employment.

The plaintiff argued that her state-law sexual harassment claim as well as her various other employment claims (including violation of the California Equal Pay Act, violation of the overtime compensation law, whistleblower retaliation, and age discrimination) were exempt from arbitration under the EFAA, but the court disagreed. Following *Van De Hey v. EPAM Sys., Inc.*, 2025 WL 829604 (N.D. Cal. Feb. 28, 2025), the court applied the familiar plausibility standard from Federal Rule of Civil Procedure 12(b)(6) to determine whether the EFAA applied.

The court reasoned that the statute’s reference to conduct “alleged to constitute sexual harassment under applicable Federal, Tribal, or State law” incorporates the federal pleading requirement that the facts alleged plausibly state such a claim. A more permissive standard, the court explained, could allow a facially unsustainable harassment claim to defeat an otherwise enforceable arbitration agreement.

Applying California law, the court recognized that a claim for sexual harassment under the Fair Employment and Housing Act (“FEHA”) must *plausibly* allege conduct sufficiently severe or pervasive to alter the workplace environment. The three identified comments attributed to the coworker, without more detail about their frequency or context, did not satisfy that standard. Nor could the alleged personnel actions—such as project assignments, meeting attendance, and removal of budget authority—supply the missing harassment element because those actions ordinarily constitute management decisions, not harassment. The court therefore held that the EFAA did not invalidate the plaintiff’s arbitration agreement and compelled all claims to arbitration.

Ai adds to the growing court divide over the appropriate threshold for invoking the EFAA. To date, most courts are in accord with the *Ai* opinion in requiring that a plausible sexual harassment claim be pled in order to avoid arbitration, while still others have merely required that the claim be nonfrivolous. For employers following along at home, the decision provides useful support for testing the factual sufficiency of an asserted harassment claim in the context of a motion to compel arbitration before the harassment claim can be used to immunize an entire case from arbitration. We'll continue to monitor the cases in this area as they develop.

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