25-0927-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REBECCA ANNE BRAZZANO,

Plaintiff-Appellee,

v.

THOMPSON HINE LLP, RICHARD ANTHONY DE PALMA, in his individual and professional capacity, DEBORAH ZIDER READ, in her individual and professional capacity,

Defendants-Appellants,

THOMAS LAWRENCE FEHER, in his individual and professional capacity,

Defendant.

On appeal from the United States District Court
for the Southern District of New York, No. 24-CV-01420 (ALC)(KHP)

ANSWERING BRIEF FOR PLAINTIFF-APPELLEE
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INTRODUCTION

Passed with bipartisan support, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA" or "the Act"), Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified at 9 U.S.C. §§ 401-402), gives survivors of sexual assault and sexual harassment the right to pursue their cases in court instead of being forced into secretive binding arbitration. Under the Act, "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, . . . no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to [a] sexual assault dispute or [a] sexual harassment dispute." 9 U.S.C. § 402(a).

Consistent with the EFAA, Plaintiff-Appellee Rebecca Brazzano elected to bring her lawsuit in court to hold her former employer, Thompson Hine LLP, accountable for the sexual harassment, retaliation, and other discriminatory and unlawful treatment she endured as an attorney at the firm. She alleges that from 2010 to 2022, an equity partner she worked for in the Business Litigation Group, Defendant Richard De Palma, created a sex-based hostile work environment by making offensive and misogynist comments, allowing a "boys club" culture of sexual harassment to persist in their group, singling out Ms. Brazzano, but not male colleagues, for scrutiny, and excluding Ms. Brazzano from events and billable work

opportunities because she was a woman and because she opposed his harassment. Ms. Brazzano repeatedly reported Mr. De Palma's conduct to firm management, including Defendant Deborah Zider Read, but nothing was done. Ultimately, De Palma's efforts to disparage Ms. Brazzano to other equity partners at the firm were successful, and she was fired.

The EFAA was designed precisely to bring sexual harassment and retaliation cases like Ms. Brazzano's into the light by allowing them to proceed in court. To avoid this outcome, Defendants ignore reality two times over: they offer a definition of sexual harassment that has been rejected by the U.S. Supreme Court, this Court, and courts in New York, and they claim that the Act does not apply to sexual harassment under city, as opposed to federal or state, law. Based on these erroneous premises, they argue that this case does not relate to a "sexual harassment dispute" under the Act. That is wrong. Ms. Brazzano's allegations that she was sexually harassed and then fired for reporting the harassment are more than enough to bring her case within the scope of the EFAA because they constitute harassment under federal, state, *and* New York City law. They also constitute retaliation. Those allegations are plausible, so this Court need not decide whether a plaintiff's allegations must survive a motion to dismiss for the Act to apply. But if the Court does reach that question, under the Act's plain language, a plaintiff need only allege a sexual harassment dispute, not survive a motion to dismiss. That is consistent with

the Act's legislative history and statutory purpose and is the only way to avoid turning a simple threshold forum determination into litigation of the merits. Finally, the district court correctly held that the EFAA covers this dispute: Ms. Brazzano's sexual harassment and retaliation claims accrued after the Act's enactment, and, even if they did not, this dispute arose when Ms. Brazzano filed her administrative charge well after the EFAA was enacted.

This Court should reject Defendants' efforts to narrow the EFAA to exclude the very type of conduct it was designed to expose and affirm the district court's denial of Defendants' motion to compel arbitration.

STATEMENT OF THE ISSUES PRESENTED

1. Did the district court correctly conclude that the EFAA applies because Ms. Brazzano plausibly alleged sexual harassment under applicable law?

2. Alternatively, should the district court's decision be affirmed because Ms. Brazzano plausibly alleged retaliation for reporting sexual harassment under applicable law?

3. If this Court finds that Ms. Brazzano did not state plausible claims for retaliation or sexual harassment, should it nonetheless affirm because the EFAA's application does not depend on whether the allegations of sexual harassment survive a motion to dismiss?

4. Did one of Ms. Brazzano's claims accrue or did this dispute arise after the EFAA's enactment date, thus bringing this case within the EFAA's coverage?

STATEMENT OF THE CASE

I. Factual Background

In 2008, Rebecca Brazzano joined Thompson Hine as an attorney in the New York office's Business Litigation Group. A-108 ¶ 28; A-123 ¶ 134. When she joined, there were no female partners in the group, and she was the only "Of Counsel." A-125 ¶ 154. Defendant De Palma was an equity partner in the Business Litigation Group, and Ms. Brazzano soon noticed his inappropriate sex-based and misogynistic behavior around the office. This included greeting other female employees in the office by kissing them, asking Ms. Brazzano to go shopping with him to impress a female client, and inappropriately bragging about how he had married his former associate. A-127-28 ¶ 171. Overall, Mr. De Palma created a "boys club" atmosphere characterized by inappropriate jokes and "disturbing conduct." A-127 ¶ 170-71. Mr. De Palma also began to single out Ms. Brazzano by showing an "improper interest" in her whereabouts and requiring her to inform him whenever she left the office, even though he had no reason to do so and did not require the same thing from male attorneys. A-127-28 ¶ 171-72.

In 2010, Mr. De Palma was elevated to Vice Chair of Litigation in the New York office. A-127 ¶ 168-69; A-129 ¶ 175. As Vice Chair, he was "the point where

all litigation was funneled," A-126 ¶ 162, and was responsible for assigning requests for legal assistance that came into the firm to different attorneys, A-126 ¶ 163-65. Unlike his predecessor, who assigned work to Ms. Brazzano based on her expertise and client needs, A-126-27 ¶ 165-66, Mr. De Palma "implemented and perpetuated [an] old boys network," A-129 ¶¶ 176-77. He either kept work himself or directed the work to male partners in New York, not Ms. Brazzano or junior female attorneys. A-129 ¶ 179. As a result, Ms. Brazzano and other female attorneys received less billable work, making it harder for them to be eligible for bonuses or to become partner. A-129-30 ¶¶ 179-80, 182. Indeed, Mr. De Palma *never* once steered work that came into the firm to Ms. Brazzano. A-130 ¶ 181.

In addition to excluding female attorneys from billable work, Mr. De Palma continued to engage in inappropriate sex-based conduct in the office. For example, during litigation meetings, he told "off topic and off color" stories about his "weekend escapades," excluded Ms. Brazzano from office gatherings, and continued to single her out by tracking her whereabouts even though they were not working on cases together. A-129 ¶ 177; A-130-31 ¶ 186. In one particularly disturbing incident in 2012, Mr. De Palma asked Ms. Brazzano to come to his office to discuss an appellate pro bono opportunity. A-132 ¶ 190. In describing the opportunity, Mr. De Palma stated that appearing in a pro bono case was "like getting jerked off by a judge." A-132 ¶ 192. Ms. Brazzano reported this vulgar comment to partners in the

New York, Cleveland, and Atlanta offices, but no action was taken in response. A-132-33 ¶ 197.

At around the same time in 2012, Mr. De Palma told Ms. Brazzano he would not recommend her for partnership. A-132 ¶ 196. He didn't stop there—he also badmouthed Ms. Brazzano to attorneys in the New York office and beyond, and he made it no secret that he "intended to block" Ms. Brazzano's elevation to partner. A-133 ¶¶ 200-02. He went so far as refusing to call a meeting for the litigation partners to consider the issue, despite other partners supporting her elevation. A-134 ¶ 208. Given this behavior, Ms. Brazzano was told that, to make partner, she would need to "kiss[] the ring" and "ma[k]e nice" with Mr. De Palma. A-133 ¶ 203. Despite Mr. De Palma's "outspoken venomous opposition," A-133 ¶ 199, Ms. Brazzano was ultimately elevated to "income" partner in the New York Business Litigation Group in 2013, A-133 ¶ 198. Unlike "equity" partners like Defendants De Palma and Read, "income" partners do not share in the firm's profits or have any say in firm management. A-123 ¶¶ 137-41.

Ms. Brazzano's promotion only increased Mr. De Palma's animosity towards her, and "he leaned into his ongoing sexual harassment" of Ms. Brazzano. A-134 ¶ 211. In particular, he continued to exclude Ms. Brazzano from any billable work that came to him as Vice Chair of Business Litigation, A-135 ¶ 213, and continued to

"undermine and sabotage Plaintiff's career and seize every opportunity to subject her to humiliation, [and] question her legal qualifications," A-135 ¶ 215.

Throughout her employment, Ms. Brazzano also witnessed inappropriate behavior by Mr. De Palma toward other women at the firm, as well as a pattern of retaliation for speaking up. For example, on one occasion, Mr. De Palma's assistant entered a meeting Mr. De Palma was conducting with clients; one client then harassed Mr. De Palma's assistant, including by asking her to come sit on his lap. A-128 ¶ 171 n.4. Mr. De Palma did not say anything or do anything in response to the harassment that occurred in front of him. *Id.* Instead, the firm fired the woman who was harassed. *Id*. Likewise, in 2016 and 2017, Ms. Brazzano witnessed Mr. De Palma engaging in race- and sex- based harassment of another female attorney at the firm, and, when the attorney reported the harassment, Mr. De Palma disparaged her to other attorneys in the litigation group, including Ms. Brazzano, and refused to give her billable work when she returned from parental leave. A-139-40 ¶¶ 239-46. The attorney was eventually pushed out, despite Ms. Brazzano's efforts to stand up for her. A-140-41 ¶¶ 247-50. Finally, Ms. Brazzano witnessed other departments at the firm similarly direct work to male partners over female partners. A-144 ¶ 269; A-145 ¶ 277.

Ms. Brazzano alleges that Mr. De Palma's sex-based harassment, including the examples above, continued for "more than a decade." A-104 ¶ 5; A-106 ¶ 19; A-

162 ¶ 399. Ms. Brazzano was worried about speaking up about this treatment, as she feared retaliation. A-135 ¶ 217. But she repeatedly, "year after year," reported Mr. De Palma's manipulation of billable work assignments, A-138 ¶ 232; *see also* A-130 ¶ 181; A-137 ¶ 229; A-143 ¶¶ 262-65; A-166 ¶ 423; A-162 ¶¶ 400, 402, and his toxic and misogynist behavior was well-known by Defendant Read, A-136-37 ¶ 226; A-143 ¶ 262. Indeed, Ms. Brazzano alerted Ms. Read to Mr. De Palma's "lewd comments," A-143 ¶ 262, including his comment about being "jerked off by a judge," that Mr. De Palma held "Friday night invitation only networking/drinking parties" in his office, and his inappropriate comments about his divorce and "weekend escapades," A-143 ¶¶ 263-65. Ms. Brazzano also complained about Mr. De Palma's behavior on behalf of other female employees. A-138 ¶ 234.

In addition to being denied billable work by Mr. De Palma, A-130 ¶ 182, Ms. Brazzano was tapped to serve as chair of the firm's Pro Bono Committee, a role that was uncompensated and did not count toward her billable hours, A-146 ¶ 287; A-270. In March 2022, Mr. De Palma requested that Ms. Brazzano approve an expense for a pro bono matter. A-146 ¶ 287. Ms. Brazzano declined the request because it was contrary to the firm's pro bono policy. A-146 ¶¶ 288-89. Ms. Brazzano questioned whether the matter—a contract dispute regarding damaged artwork in a storage unit—should have been accepted pro bono in the first place, as it did not qualify under the firm's policy. A-147 ¶ 295. Rather than accept her authority to

decline the request, Mr. De Palma went over Ms. Brazzano's head to the male Business Litigation Group Leader, A-146 ¶ 292, something he would not have done to a male attorney, A-146 ¶ 293, and Mr. De Palma's expense was improperly approved despite his failure to comply with the policy. A-148 ¶ 300. Given her concerns about Mr. De Palma abusing the pro bono program to build out his "art law" practice, A-147 ¶ 297, Ms. Brazzano and the Pro Bono Committee embarked on an audit of open pro bono cases. As part of that audit, Ms. Brazzano sent out an email to the New York office with a request for information and a notice that she should be listed as the billing attorney on all pro bono cases originating in the New York office to ensure compliance with policies. A-148-49 ¶¶ 304-07. Members of the Pro Bono Committee from other offices sent the same email to their offices so that the Committee could monitor compliance across the firm. A-148 ¶ 305.

A week later, on April 29, 2022, Ms. Read contacted Ms. Brazzano while Ms. Brazzano was in the middle of an important filing and asked her to resign, ostensibly because Ms. Brazzano's billable hours were too low. A-149 ¶¶ 310-11. Of course, as described above, Ms. Brazzano had been enduring an environment in which Mr. De Palma did everything he could do to avoid giving Ms. Brazzano billable work. A-129 ¶ 179. In response to the request to resign, Ms. Brazzano had a further conversation with Ms. Read and again raised the sex-based harassment she had been subjected to by Mr. De Palma. A-153 ¶ 332. During that conversation, Ms. Read told

Ms. Brazzano that she would be terminated if she did not resign, and that they would be providing her with a separation agreement. A-153 ¶ 333. After notifying her of her termination, the firm then purported to conduct an "investigation" of Ms. Brazzano's reports of sexual harassment but ended the investigation when Ms. Brazzano notified the firm's lawyer that she was represented by an attorney. A-153 ¶¶ 333-38. No one ever talked with Ms. Brazzano or anyone she worked with about her allegations of harassment. A-155 ¶¶ 345, 348. Ms. Brazzano left the firm in June 2022. A-155 ¶ 349.

II. Procedural History

On July 1, 2022, Ms. Brazzano filed a charge with the New York State Commission on Human Rights and the Equal Employment Opportunity Commission (EEOC) alleging, among other claims, a gender-based hostile work environment and retaliation under Title VII, the New York State Human Rights Law (NYSHRL), and the New York City Human Rights Law (NYRCHRL). A-159 ¶¶ 376-77. Defendants filed their response to the charge on February 23, 2023. A-159 ¶ 378; A-248-71. At Ms. Brazzano's request, the agencies issued a notice of right to sue on December 27, 2023. A-272.

On February 23, 2024, Ms. Brazzano filed suit in U.S. District Court in New York against Thompson Hine, Mr. De Palma, and Ms. Read, alleging sexual harassment, discrimination, and retaliation under Title VII, the NYSHRL, and the

NYCHRL, and whistleblower retaliation under New York law. A-189-97 ¶¶ 549-595; A-207-208 ¶¶ 663-68.[1] Ms. Brazzano amended her complaint as of right on February 27, 2024, ECF No. 9, and with leave of court in June 2024, A-103-210.

Defendants filed three motions in response to the Second Amended Complaint: a motion to compel arbitration, a motion to dismiss for lack of personal jurisdiction, and a motion to dismiss for failure to state a claim. ECF Nos. 51, 54, 56. As to the motion to compel arbitration, Defendants argued that Ms. Brazzano had agreed to arbitration because she signed an annual letter agreement in 2021 acknowledging that she agreed to "be a party to the Firm's Partnership Agreement, as amended and restated to date," and thus was bound by an arbitration provision contained in the Partnership Agreement. ECF No. 52 at 6-7. Ms. Brazzano opposed Defendants' motion, invoking the EFAA to invalidate the arbitration provision. ECF No. 59 at 7-15. Alternatively, she argued that, even if the EFAA did not apply, no agreement existed because, by its terms, the 2021 letter agreement expired on December 31, 2021, or, at the latest, when she was terminated. *Id.* at 16-17. She also argued that the arbitration agreement was unenforceable because it was unconscionable and against public policy as an "infinite arbitration clause." *Id.* at

[1] Ms. Brazzano also brought tort claims against Thomas Feher, a Thompson Hine attorney who authored Thompson Hine's statement to the EEOC, A-200-04 ¶¶ 612-39, but the district court dismissed the claims against Mr. Feher, SPA-23-24, and he is not a party to this appeal (though he is counsel for Defendants).

17-20. After briefing on the motion was complete, the district court ordered supplemental letter briefing regarding the decision in *Diaz-Roa v. Hermes Law, P.C.*, 757 F.Supp.3d 498 (S.D.N.Y. 2024). ECF Nos. 73–74.

The district court concluded that the EFAA applied and denied Defendants' motion to compel arbitration. SPA-10-17. The court noted the split among district courts in the Southern District of New York regarding the use of the Rule 12(b)(6) plausibility standard to determine whether a dispute falls within the EFAA, but it ultimately decided that it did not need to reach the issue because Ms. Brazzano's sexual harassment claims were plausible. SPA-12-17. The court then rejected Defendants' argument that Ms. Brazzano's claims accrued before the EFAA's enactment date in March 2022, concluding that her termination was part of the alleged hostile work environment, so, under the continuing violation doctrine, her claims accrued when she was terminated after the EFAA was enacted. SPA-16-17. Because Ms. Brazzano had alleged at least one plausible claim within the coverage of the EFAA, the court concluded that "any applicable arbitration agreement is unenforceable" and denied the motion to compel arbitration as to the entire case. SPA-17. After denying the motion to compel, the court analyzed the merits of Ms. Brazzano's claims and denied Defendants' motions to dismiss as to her claims for sexual harassment and sex discrimination and the majority of her retaliation claims. SPA-20-27. Defendants appealed.

SUMMARY OF ARGUMENT

Because the district court correctly determined that the EFAA applies to Ms. Brazzano's case, this Court should affirm the denial of Defendants' motion to compel arbitration.

First, this case relates to a "sexual harassment dispute" within the meaning of the EFAA—two times over. All the EFAA requires is a "dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." Here, Ms. Brazzano brings sexual harassment claims under federal, state, and city law. Under these laws, she plausibly alleges sexual harassment: an environment of sex-based comments and differential treatment that included being subject to crude comments, such as the comment that working on a pro bono appeal was like "getting jerked off by a judge," being singled out for excessive scrutiny, being disparaged to other attorneys at the firm, being denied billable work opportunities, and, ultimately, being terminated. Defendants dismiss all but the "jerked off by a judge" comment as insufficiently "sexual" or lewd in nature. But the applicable laws do not define sexual harassment that way. And the district court did not err by looking to the standard governing claims under New York City law even though the EFAA mentions state but not city laws, as Congress consistently uses the word "state" to encompass state subdivisions like cities.

Second, even without her sexual harassment claims, Ms. Brazzano's retaliation claims on their own constitute a "sexual harassment dispute." As this Court recently held, retaliation resulting from a report of sexual harassment is a "sexual harassment dispute" under the EFAA, and Ms. Brazzano plausibly alleged exactly that: Mr. De Palma retaliated against her for her reports of sexual harassment by engaging in a years-long campaign of retaliation that ultimately ended with him convincing Ms. Read and the firm to terminate her. That's enough on its own.

Third, this Court need not decide whether the EFAA incorporates the pleading standard for claims on the merits under Federal Rule of Civil Procedure 12(b)(6) because, as the district court found, Ms. Brazzano has met it for her sexual harassment claims. But even if she hadn't met it for either her sexual harassment or retaliation claims, the EFAA would apply because Congress intended the Act to apply based solely on the *allegations* in the complaint, and not on whether they plausibly state claims for relief. Any other rule would not only be contrary to the text and legislative history of the statute, but it would make no sense to thrust courts into a merits analysis in a case they may not have authority to hear.

Finally, the district court correctly held that the EFAA applies to this dispute because Ms. Brazzano's claims accrued when she was terminated in April 2022, after the EFAA was enacted. Not only was her termination a discrete act of retaliation, but it was also part of the sex-based hostile work environment that pervaded Ms.

Brazzano's tenure at the firm. Moreover, even if her claims did accrue before the EFAA's enactment, this dispute arose after the Act was enacted when Ms. Brazzano filed her charge of discrimination in July 2022.

ARGUMENT

I. The District Court Correctly Held That Ms. Brazzano's Sexual Harassment Claims Are a "Sexual Harassment Dispute" Under the EFAA.

Ms. Brazzano's allegations of sexual harassment are sufficient to invoke the EFAA's coverage. The EFAA defines "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." 9 U.S.C. § 401(4). Defendants argue that there is no "sexual harassment dispute" here for three reasons. First, they argue that the district court erred by looking to the definition of sexual harassment under city law in addition to federal and state law. Second, they say the district court should have applied their unfounded definition of sexual harassment, which is limited to conduct that is "lewd" or "sexual in nature." Finally, they argue that Ms. Brazzano did not state a plausible claim for sexual harassment under any statute. They are wrong on all three points.

a. The EFAA defines sexual harassment by reference to applicable law, including New York City law.

As Defendants acknowledge, the EFAA does not adopt its own definition of sexual harassment. Opening Br. at 15. Instead, the Act applies the definitions of

sexual harassment "under applicable Federal, Tribal, or State law." 9 U.S.C. § 401(4); *see also Ding v. Structure Therapeutics, Inc.*, 765 F.Supp.3d 897, 902 (N.D. Cal. 2025) (holding that "[t]he EFAA requires the Court to adopt" the definition of sexual harassment in applicable law). Here, then, because Ms. Brazzano invokes Title VII, the NYSHRL, and the NYCHRL, the Court must analyze the elements of a sexual harassment claim under those statutes to determine whether this case involves a sexual harassment dispute.

Defendants do not dispute that Title VII and the NYSHRL apply but contend that the district court erred in also looking to the definition of sexual harassment under the NYCHRL because the EFAA references only "federal" and "state" law, rather than what Defendants refer to as "City Code." Opening Br. at 52. Defendants waived this argument by failing to raise it in support of their motion to compel arbitration. *See Seidl v. Am. Century Cos., Inc.*, 427 F. App'x 35, 37 (2d Cir. 2011) ("[A]n appellate court will not consider an issue raised for the first time on appeal."). Indeed, they specifically argued that the court should find that the EFAA did not apply because Ms. Brazzano did not state a plausible claim under the NYCHRL, not because the EFAA did not apply to NYCHRL claims. ECF No. 52 at 12-13.

In any event, Defendants are wrong: The Supreme Court has squarely held that Congress's reference to a "state" law—there, for purposes of federal jurisdiction—includes a "municipal ordinance." *See City of New Orleans v. Dukes*,

427 U.S. 297, 301 (1976). Consistent with that precedent, Courts in this Circuit have uniformly held that the EFAA includes local laws like the NYCHRL in its reference to "state" law. *See, e.g.*, *Johnson v. Everyrealm, Inc.*, 657 F.Supp.3d 535, 552 n.14 (S.D.N.Y. 2023); *Yost v. Everyrealm, Inc.*, 657 F.Supp.3d 563, 578 n.10 (S.D.N.Y. 2023); *Delo v. Paul Taylor Dance Found., Inc.*, 685 F.Supp.3d 173, 182 n.2 (S.D.N.Y. 2023). As the court explained in *Johnson*, Congress frequently uses the word "state" to include "states' subdivisions" like municipalities, and there is no reason to think it did not mean to do that here. 657 F.Supp.3d at 552 n.14 (citing numerous federal statutes where "state" is defined to include municipalities).

Further, that interpretation is consistent with how the state legislative power is divided under New York's Constitution: the New York City Council, which adopted the NYCHRL, exercises legislative power "subject to contrary state legislation." *In re Council of City of N.Y. v. Bloomberg*, 6 N.Y.3d 380, 392-93 (2006). In other words, as a subdivision of the state, it has delegated authority to pass laws on behalf of the state. *See Wisc. Public Intervenor v. Mortier*, 501 U.S. 597, 608 (1991) (finding that statute expressly authorizing "State" enforcement could not be read to exclude "political subdivisions" because they "are components of the very entity the statute empowers"); *United Bldg. & Constr. Trades Council of Camden Cnty. & Vicinity v. Mayor & Council of City of Camden*, 465 U.S. 208, 215 (1984) ("[F]undamentally, a municipality is merely a political subdivision of the State from

which its authority derives."). Thus, the district court correctly looked to the definition of sexual harassment under New York City law when applying the EFAA.

b. The applicable statutes define sexual harassment broadly to cover the conduct here.

Next, Defendants seek to avoid the allegations of sexual harassment in Ms. Brazzano's complaint—and the district court's conclusion that they are plausible—by arguing (at 23-36) that the sex-based harassment here was not sufficiently "of a sexual nature" to be sexual harassment, and that it was instead "gender discrimination." That narrow view is contrary to the EFAA's plain text and decades of New York and federal case law.

Begin with the NYCHRL as the "most lenient applicable liability standard." *Owens v. PriceWaterHouseCoopers LLC*, -- F.Supp.3d --, 2025 WL 1677001, at *7 n.2 (S.D.N.Y. June 12, 2025). The NYCHRL does not distinguish between "harassment" and "discrimination" claims, *see* N.Y.C. Admin. Code § 8-107(1)(a), and instead simply "proscribes imposing different terms, conditions and privileges of employment based, inter alia, on gender." *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 75 (N.Y. App. Div. 2009). In *Williams*, the First Department addressed the meaning of "sexual harassment" under the NYCHRL because the text itself does not reference harassment. *Id.* It rejected the "severe or pervasive" test from federal law, finding that it "had sanctioned a significant spectrum of conduct demeaning to women" and "reduce[d] the incentive for employers to create

workplaces that have zero tolerance for conduct demeaning to a worker because of protected class status." *Id.* at 76. *Williams* also rejected "the distinction that current federal law makes between" hostile work environment claims and other types of discrimination cases. *Id.* at 79. Instead, "the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated *less well* than other employees because of her gender." *Id.* at 78 (emphasis added).

Since *Williams*, other New York courts and this Court have routinely applied the "less well" standard to claims of "sexual harassment" under the NYCHRL. And in doing so, the analysis has focused on whether the plaintiff was treated less well "because of her membership in a protected class" or "because of her gender," and not on whether she was treated less well in a sexualized way. *See, e.g.*, *Forrester v. Corizon Health, Inc.*, 752 F. App'x 64, 66 (2d Cir. 2018) ("Whether her claim under the NYCHRL arises from an adverse employment action or harassment, [plaintiff] bore the burden of showing that she was treated less well at least in part because of her membership in a protected class." (emphasis omitted)); *Delo*, 685 F.Supp.3d at 182 ("Under the NYCHRL, a plaintiff alleging a hostile work environment theory of sexual harassment only needs show that she has been treated less well than other employees because of her gender, or, put differently, faced unwanted gender-based conduct" (citation modified)); *Golston-Green v. City of New York*, 184 A.D.3d 24,

42 (N.Y. App. Div. 2020) (similar). Thus, the NYCHRL does not require conduct to "be sexual or lewd in nature" to constitute sexual harassment. *Owens*, 2025 WL 1677001, at *10. Instead, Ms. Brazzano need only show that she was treated "less well" than her male coworkers.

Citing *Singh v. Meetup LLC*, 750 F.Supp.3d 250 (S.D.N.Y. 2024), Defendants argue that unless the Court applies a requirement that sexual harassment claims under the NYCHRL include "lewd" conduct, it would be conflating claims for "gender discrimination" and claims for "sexual harassment." Opening Br. at 48-50. *Singh* rejected the "less well" test in the context of the EFAA and conjured up a new vague standard for sexual harassment claims under the NYCHRL in part because it thought "collaps[ing] the difference between 'gender discrimination' and 'sexual harassment,' [would be] a step too far for this Court absent contrary guidance from the state courts." 750 F.Supp.3d at 259. But there *is* "contrary guidance from the state courts": In no uncertain terms, New York courts have consistently applied the "less well" standard to both types of claims. *Williams*, 61 A.D.3d at 78. *Singh*'s failure to defer to New York courts' interpretation of local law is thus fatal to its test, and it is not surprising that other courts interpreting New York law have declined to adopt *Singh*'s rule. *See, e.g.*, *Owens*, 2025 WL 1677001, at *9 ("To the extent that *Singh* requires that a plaintiff allege romantic, sexual, or lewd conduct to allege conduct constituting sexual harassment, the Court departs from *Singh*."); *Ding*, 765

F.Supp.3d at 902 (rejecting *Singh*'s standard and concluding that "the Court will not stray from the definition of sexual harassment under the NYCHRL as stated by New York and federal courts, as well as the New York Human Rights Commission").

Defendants also rely on Title VII cases to support their argument that harassment must be "sexual in nature." Opening Br. at 23-26. But Defendants' cramped definition of "sexual harassment" doesn't hold up under Title VII, either. The Supreme Court and this Court have made clear that sexual harassment claims under Title VII are not limited to conduct that is lewd or sexual in nature. In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998), the Supreme Court held that Title VII prohibits "sexual harassment of any kind that meets the statutory requirements," even if it is "motivated by general hostility to the presence of women in the workplace" rather than "sexual desire." Since *Oncale*, this Court has repeatedly held the same. For example, in *Kaytor v. Elec. Boat Corp.*, the Court explained that "[t]he harassing conduct need not be motivated by sexual desire . . . so long as it was motivated by gender." 609 F.3d 537, 547-48 (2d Cir. 2010) (citation modified). Indeed, it found that the district court erred by disregarding comments that were not "sexual in nature," *id.*, precisely what Defendants ask the Court to do here. *See also Raniola v. Bratton*, 243 F.3d 610, 617 (2d Cir. 2001) ("Although sexual harassment is usually thought of in terms of sexual demands, it can include employer action based on sex but having nothing to do with sexuality." (citation

modified)). Likewise, this Court has affirmed that sexual harassment under Title VII can include "facially sex-neutral incidents" if there is circumstantial evidence that they are motivated by sex. *See Kaytor*, 609 F.3d at 547-48.

Despite this wall of authority, Defendants cite to the unpublished opinion of this Court in *Carrasco v. Lenox Hill Hosp.*, 4 F. App'x 29 (2d Cir. 2001), to argue that harassment must be "sexual in nature." Opening Br. at 25. But *Carrasco* relied on pre-*Oncale* cases about the sufficiency of evidence to state that "[t]he only basis for a Title VII sexual harassment action is harassment that is sexual in nature." 4 F. App'x at 30. That is plainly wrong, as the Supreme Court explained in *Oncale* and this Court repeatedly affirmed in cases like *Kaytor* and *Raniola*.

Defendants' citation to the Supreme Court's distinction between "sexual harassment" and "sex discrimination" in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020), does not help their cause either. Opening Br. at 25 n.12. In those cases, the Supreme Court used those terms not to distinguish between harassing conduct that is "sexual in nature" and other harassment, *contra* Opening Br. at 25, but to recognize that both hostile work environment harassment and standalone discriminatory adverse actions are actionable under Title VII. *See Meritor Savings Bank*, 477 U.S. at 65-67; *Bostock*, 590 U.S. at 669 (citing *Oncale*, 523 U.S. at 79-80). In other words, at most, "sexual harassment" under federal law for purposes of the EFAA requires more than one

instance of sex-based conduct over time, *i.e.*, a hostile work environment, rather than a single adverse action like denial of a job or a promotion, *i.e.*, sex discrimination. *See Oncale*, 523 U.S. at 79. It does not require lewd conduct. *Id.* at 80.

Nor does the NYSHRL adopt Defendants' standard. Defendants incorrectly state that Ms. Brazzano's NYSHRL claims are governed by "the same standard" as her Title VII claims. Opening Br. at 26 n.13. But the NYSHRL was amended in 2019—after the cases cited by Defendants were decided—to adopt a more lenient standard for sexual harassment claims that removes the Title VII "severe or pervasive" standard and requires the plaintiff to show only "harassment" based on sex that resulted in "inferior terms, conditions or privileges of employment." N.Y. Exec. L. § 296(1)(h); *see Kulick v. Gordon Prop. Grp., LLC*, 2025 WL 448333, at *8 (S.D.N.Y. Feb. 7, 2025) (describing effect of amendment). New York courts have suggested but not yet definitively concluded that the new language is equivalent to the "less well" standard of the NYCHRL. *See Kulick*, 2025 WL 448333, at *8 (collecting cases); *see also Arazi v. Cohen Bros. Realty Corp.*, 2022 WL 912940, at *16 (S.D.N.Y. Mar. 28, 2022) ("After that amendment, the standard for NYSHRL aligns with the NYCHRL standard for claims that accrued on or after October 11, 2019."). Either way, like the NYCHRL and Title VII, there is no requirement that harassment be lewd or sexual in nature. *See Ding*, 765 F.Supp.3d at 902.

In short, all the applicable laws define "sexual harassment" to include all types of sex-based harassment, not just, as Defendants say, lewd harassment.

c. The district court correctly held that Ms. Brazzano alleged a plausible sexual harassment claim.

Though the EFAA does not require that allegations of sexual harassment meet a plausibility standard, *see* section III, *infra*, the district court correctly held that Ms. Brazzano "has sufficiently alleged a hostile work environment claim that avails her of the EFAA," A-478; *see Patane v. Clark*, 508 F.3d 106, 113 (2d Cir. 2007) (cautioning "against setting the bar too high" in the context of a motion to dismiss hostile work environment claims under Title VII).

Ms. Brazzano alleged that she was subject to more than a decade of harassment by Mr. De Palma that culminated in her termination from the firm. The harassment included overtly sexual behavior like the comment about "being jerked off by a judge," kissing female lawyers, bragging about his "weekend escapades" and about having married a former associate, making "off color jokes," and failing to take action when his assistant was sexually harassed by a client. *See* A-127 ¶ 171; A-129 ¶ 177; A-132 ¶ 192. And it also included sexist conduct that was not overtly sexual, like denying Ms. Brazzano and other female attorneys billable work, singling Ms. Brazzano out for scrutiny about her whereabouts, badmouthing her and vehemently opposing her elevation to partner, excluding her from firm gatherings,

belittling her in front of colleagues, and, ultimately, getting her fired. A-127-28 ¶¶ 171-72; A-129 ¶¶ 179-80, 182; A-130 ¶ 186; A-133 ¶¶ 200-02; A-135 ¶ 213.

This conduct is more than sufficient to establish that Ms. Brazzano was treated "less well" than her male colleagues such that she has plausibly alleged sexual harassment under the NYCHRL. For one, the comment about being "jerked off by a judge" is enough on its own to meet that standard. *See Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.,* 715 F.3d 102, 111 (2d Cir. 2013) (explaining that even "a single comment" may be actionable under the NYCHRL if "made in circumstances where that comment would, for example, signal views about the role of women in the workplace" (quoting *Williams*, 61 A.D.3d at 80 n.30)). But especially when that comment is combined with more than a decade of being treated worse than her male counterparts and denied equal opportunities for work, Ms. Brazzano's allegations are more than enough to meet the "less well" standard. Courts have found similar treatment of women in the workplace—such as differential assignments and work opportunities or unjustified scrutiny—to meet the "less well" standard, even at summary judgment. *See Bacchus v. N.Y. City Dep't of Educ.*, 137 F.Supp.3d 214, 246 (E.D.N.Y. 2015) (plaintiff was given "a disproportionate workload" and disciplined for conduct that other workers were not disciplined for); *Encarnacion v. Isabella Geriatric Ctr., Inc.*, 2014 WL 7008946, at *11 (S.D.N.Y. Dec. 12, 2014) (conduct including "frequent and unjustified verbal reprimands," singling out

plaintiff "by checking over every detail of her work," and "refusing to meet with" plaintiff constituted harassment); *see also Syeed v. Bloomberg L.P.*, 568 F.Supp.3d 314, 321 (S.D.N.Y. 2021) (finding plaintiff had plausibly alleged harassment under NYCHRL where she alleged she was paid less for similar work, "denied resources" that were provided to male colleagues, and not consulted regarding work assignments), *vacated and remanded on other grounds by* 2024 WL 2813563, at *1 (2d Cir. June 3, 2024). Moreover, Ms. Brazzano also alleged that she witnessed other women at the firm being sexually harassed, A-128 ¶ 171 n.4; A-139-42 ¶¶ 239-56; A-144 ¶¶ 268-69; A-145 ¶ 277, and this Court has made clear that sex-based conduct witnessed by, but not directed at, the plaintiff can also form part of a hostile work environment. *See Banks v. Gen. Motors, LLC*, 81 F.4th 242, 261 (2d Cir. 2023) (explaining that "plaintiff need not be the victim of all discriminatory harassment relevant to her hostile environment claim"). At the motion to dismiss stage, then, the district court correctly found that Ms. "Brazzano has sufficiently alleged a hostile work environment claim that avails her of the EFAA." SPA-17.

Defendants dismiss the vast majority of the conduct Ms. Brazzano alleges as "unwanted gender-based conduct," which they contend does not count for purposes of the EFAA because it is not "sexual harassment" under their narrow definition. Opening Br. at 48; *id.* at 49 (acknowledging only "a single allegedly 'lewd' comment in 2012"). To start, even under Defendants' unduly narrow definition, Ms. Brazzano

has alleged sexual harassment based on Mr. De Palma's overtly sexual conduct. *See Mihalik*, 715 F.3d at 111. But in any event, as described above, Defendants are wrong because New York courts define "sexual harassment" under the NYCHRL as a plaintiff being treated "less well" because of her gender. *Williams*, 61 A.D.3d at 75, 78. Defendants' reliance (at 48-49) on cases where there was lewd behavior does not prove that lewd behavior is *required* to state a claim under the NYCHRL, especially given the cases described above that imposed no such requirement.

Defendants also cite two cases where claims under the NYCHRL did not survive a motion to dismiss, but those are not to the contrary. In *Simon v. City of New York*, 2019 WL 916767, at *10 (S.D.N.Y. Feb. 14, 2019), the court concluded that the plaintiff had not plausibly alleged that challenged conduct was based on the plaintiff's gender where the *only* allegations were that a coworker "invaded [her] personal space]," said that "she liked him," and asked when she was leaving work. And in *Anderson v. Davis Polk & Wardwell LLP*, 850 F.Supp.2d 392, 404 (S.D.N.Y. 2012), the plaintiff alleged only that his supervisor "stood too close to" him. Here, Ms. Brazzano not only alleges overtly sexual conduct by Mr. De Palma, like the "getting jerked off by a judge" comment, A-132 ¶ 192, "off color" jokes, A-120, ¶ 177, and inappropriate discussions of his "weekend escapades," *id.*, she also alleges that Mr. De Palma treated her worse than similarly situated male co-workers, *see, e.g.*, A-129, ¶ 179, an allegation that was absent in *Simon* and *Anderson* and that

gives rise to an inference that his behavior toward her was based on her sex, *see King v. Aramark Servs. Inc.*, 96 F.4th 546, 563 (2d. Cir. 2024) (concluding that a jury could infer that conduct was based on sex "in light of [the defendant's] differential treatment of [the plaintiff] compared to her similarly situated male peers").

Finally, Defendants raise for the first time on appeal a fallback argument that Ms. Brazzano cannot state a plausible claim under the NYCHRL because she is not a New York City resident. Opening Br. at 50-52.[2] This argument is waived because Defendants did not raise it in their motion to compel below, *see generally* ECF No. 52, and the district court did not consider it. In any event, the NYCHRL is not limited to New York City residents; a non-resident plaintiff simply must "plead and prove that the alleged discriminatory conduct had an impact in New York." *Hoffman v. Parade Publs.*, 15 N.Y.3d 285, 291 (2010). That standard is met here, where Ms. Brazzano alleges harassment for more than a decade while Ms. Brazzano was working in Thompson Hine's office in New York City and where the vast majority of the conduct alleged in the complaint occurred in New York City. *See id.* (explaining that NYCHRL applies to "non-residents who work in the city").

The fact that Ms. Brazzano worked remotely in 2020 when the firm's offices were closed during the pandemic and thus was not physically in New York City for

[2] Defendants explicitly make this argument only as to the NYCHRL, and not the NYSHRL. *Id.*

less than two out of the 14 years of harassment and discrimination does not render the NYCHRL inapplicable when, aside from her termination, all the harassment alleged in Ms. Brazzano's complaint occurred in New York City. *See Johnson*, 657 F.Supp.3d at 557 (holding that there was a sufficient nexus with New York City under the NYCHRL where some harassment occurred in "the company's New York City office," and some occurred outside of the city); *Desiderio v. Hudson Techs., Inc.*, 2023 WL 185497, at *5 (S.D.N.Y. Jan. 13, 2023) (rejecting argument that plaintiff could not bring claims under the NYCHRL because, at the time of her termination, she was living and working remotely in Florida, where some discriminatory conduct was alleged to have occurred at a meeting in New York City).

The cases cited by Defendants considered plaintiffs with far fewer contacts with New York City than Ms. Brazzano. For example, in *Vangas v. Montefiore Med. Ctr.*, 823 F.3d 174, 183 (2d Cir. 2016), the plaintiff did "not allege that she ever went to NYC for work." Likewise, in *Shiber v. Centerview Partners LLC*, 2022 WL 1173433, at *4 (S.D.N.Y. Apr. 20, 2022), the plaintiff worked remotely the entire time she was employed and had never worked in New York City. Defendants have pointed to no case finding that a plaintiff who is sexually harassed in New York City does not have the requisite connection to the city to bring claims under the

NYCHRL.[3] In short, because "most of the acts that comprise [Ms. Brazzano's] sex-based hostile work environment claim were directed at her and her work in" New York, her claims under the NYCHRL can proceed. *King*, 96 F.4th at 558.

But even if the NYCHRL does not apply to Ms. Brazzano, she has still stated claims under the NYSHRL and Title VII. To begin with, as described above, the NYSHRL adopts a standard that is the same or similar to the NYCHRL. *Kulick*, 2025 WL 448333, at *8; *Arazi*, 2022 WL 912940, at *16. Like the NYCHRL, it does not impose a "severe or pervasive" requirement and instead requires only that the harassment resulted in "inferior terms, conditions or privileges of employment." N.Y. Exec. L. § 296(1)(h). Ms. Brazzano meets that standard here for the same reason she meets the "less well" standard: she was routinely subjected to "inferior" employment conditions compared to her male colleagues, whether by being routinely denied billable work opportunities, *see* A-129-30 ¶¶ 180-81; A-135 ¶ 213, being exposed to offensive and misogynist comments, *see* A-132 ¶¶ 192, 195, or being disparaged and having her promotion to partner opposed, *see* A-130 ¶ 186; A-132 ¶ 196; A-133 ¶¶ 199-202; A-134 ¶¶ 207-08; A-135 ¶ 215. And, of course, it all

[3] Defendants argue (again for the first time on appeal) that the court can only look at conduct within the statute of limitations period as part of this analysis. Opening Br. at 51. But, as described below, the termination was part of a continuing hostile work environment and thus the harassment that occurred outside the statute of limitations is properly considered a part of Ms. Brazzano's claims. *See* section IV, *supra*.

culminated in her termination, A-153 ¶ 333, which was certainly a change to her terms of employment.

Likewise, Ms. Brazzano states a plausible claim under the higher Title VII standard, as courts have found similar campaigns of sex-based comments and differential treatment over a period of years to meet the "severe or pervasive" standard. *See, e.g.*, *Rasmy*, 952 F.3d at 389 (finding that "numerous incidents of discriminatory harassment over the course of at least three years" combined with management failure to "respond appropriately" was sufficient to establish hostile work environment at summary judgment); *Pucino v. Verizon Wireless Commc'ns, Inc.*, 618 F.3d 112, 119-20 (2d Cir. 2010) (evidence that supervisors "treated similarly-situated male and female workers differently" when assigning work or engaging in sex-neutral actions like denying overtime opportunities was sufficient, when combined with "verbal abuse," to establish hostile work environment at summary judgment); *Grewal v. Cuneo*, 2015 WL 4103660, at *2, *16 (S.D.N.Y. July 7, 2015) (finding that plaintiff had plausibly alleged severe or pervasive harassment under pre-2019 NYSHRL because she alleged that, in addition to subjecting her to harassing comments, defendant law firm had denied her work opportunities and credit for originating clients).

Thus, the EFAA applies to invalidate the arbitration agreement as to this case because Ms. Brazzano has alleged a plausible claim for sexual harassment under all three of the applicable laws.

II. The District Court Correctly Held that Ms. Brazzano Alleged a Plausible Retaliation Claim, Which Is Also a "Sexual Harassment Dispute" Under the EFAA.

Even if Ms. Brazzano's sexual harassment claims do not meet the definition of a "sexual harassment dispute" under the EFAA (and they plainly do), her retaliation claims are on their own a "sexual harassment dispute."

a. This Court has held that a retaliation claim based on reporting sexual harassment is a "sexual harassment dispute" under the EFAA.

Ms. Brazzano's retaliation claims allege that she was fired at least in part for her complaints about sexually harassing conduct that, as described above, she alleges violated applicable law. And this Court has held that "retaliation resulting from a report of sexual harassment is 'relat[ed] to conduct that is alleged to constitute sexual harassment,'" and therefore is itself a "sexual harassment dispute" under the EFAA. *Olivieri v. Stifel, Nicolaus & Co.*, 112 F.4th 74, 92 (2d Cir. 2024) (quoting 9 U.S.C. § 401(4)). Defendants do not challenge that holding, Opening Br. at 36, which is all that is necessary to decide this case.

Defendants do not argue that the allegations of underlying conduct must state a sexual harassment claim for a retaliation claim based on reporting that conduct to be a sexual harassment dispute under the EFAA. Nor could they. Applying *Olivieri*'s

reasoning, district courts in this Circuit have held that retaliation claims are covered by the EFAA without requiring a corresponding plausible sexual harassment claim (or any sexual harassment claim at all). *See, e.g.*, *Diaz-Roa v. Hermes Law, P.C.*, 757 F.Supp.3d 498, 536 (S.D.N.Y. 2024) (A "plaintiff need not state a claim for sexual harassment to be considered to have made allegations relating to conduct that is alleged to constitute sexual harassment." (citation modified)); *Newton v. LVMH Moet Hennessy Louis Vuitton Inc.*, 746 F.Supp.3d 135, 151 (S.D.N.Y. 2024) (holding that a standalone complaint for retaliation, unaccompanied by a sexual harassment claim, fell within the EFAA because it was based on "reporting and speaking out" about earlier sexual harassment), *vacated in part on other grounds by Newton v. LVMH Moet Hennessy Louis Vuitton Inc*, 2025 WL 1826583 (S.D.N.Y July 2, 2025); *Clay v. FGO Logs., Inc.*, 751 F.Supp.3d 3, 17-18 (D. Conn. 2024) (concluding that retaliation claim was covered by EFAA even though sexual harassment claims were outside EFAA's temporal scope).

Moreover, it is well-established that, to prove retaliation, "a plaintiff need not prove the merit of his underlying discrimination complaint, but only that he was acting under a good faith, reasonable belief that a violation existed." *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990). Consistent with that rule, in *Olivieri* itself, neither the district court nor this Court analyzed whether the plaintiff had stated a plausible claim against the employer for the underlying harassment by the

plaintiff's supervisor before holding that the retaliation claim against the employer was a "sexual harassment dispute" to which the EFAA applied. *Olivieri*, 112 F.4th at 77, 79-81, 92. Thus, even if the Court finds that Ms. Brazzano did not allege a plausible sexual harassment claim, it can affirm on the ground that her retaliation claim is a "sexual harassment dispute" under the EFAA.

b. The district court correctly found that Ms. Brazzano alleged a plausible retaliation claim.

Defendants baldly assert that there are "*no* factual allegations" to support Ms. Brazzano's claims that she was terminated in retaliation for her complaints of sexual harassment. Opening Br. at 36 (emphasis added); *id.* at 37. That's just not true. As the district court correctly found, Ms. Brazzano plausibly alleges that she was subjected to a decade-long discriminatory and retaliatory campaign of harassment which ultimately came to a head with Ms. Brazzano's termination. *See* SPA-24-25.

Under this Court's precedent, a plaintiff alleging retaliation bears a "minimal burden at the pleading stage of the case." *Duplan v. City of New York*, 888 F.3d 612, 625 (2d Cir. 2018). "[F]or a retaliation claim [under Title VII] to survive . . . a motion to dismiss, the plaintiff must plausibly allege that: (1) defendants discriminated—or took an adverse employment action—against her, (2) because she has opposed any unlawful employment practice." *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 90 (2d Cir. 2015). The standard for retaliation claims under the NYCHRL and NYSHRL "are identical" to those under Title VII, "except that the plaintiff need not

prove any 'adverse' employment action; instead, she must prove that something happened that would be reasonably likely to deter a person from engaging in protected activity." *Leon v. Columbia Univ. Med. Ctr.*, 2013 WL 6669415 (S.D.N.Y. Dec. 17, 2013).

Ms. Brazzano alleges that Mr. De Palma waged a sexist and retaliatory campaign of harassment against her—ultimately culminating in her termination—because she was one of the few female litigators who would not put up with his misogyny. Ms. Brazzano alleges that as soon as Mr. De Palma assumed control over the Business Litigation Group, he made clear that he was running a boys club, making lewd comments about judges, holding invite-only "networking" and "drinking parties" in his office on Friday evenings, and sharing inappropriate details about his "weekend escapades." A-143 ¶ 265. Ms. Brazzano alleges that she made equally clear that she would not tolerate such sexist behavior and repeatedly reported her concern to equity partners including Defendant Read. A-143 ¶¶ 263-65; *see also* A-104 ¶ 6 (alleging that she "explicitly highlighted" Mr. De Palma's "sexual harassment, discriminatory treatment" and "open contempt" for female lawyers "to equity partners"); A-105 ¶ 13 (alleging that she complained about Mr. De Palma's harassment "for more than a decade").

Ms. Brazzano alleges that in response, Mr. De Palma's animus toward her only intensified. For example, she alleges that he singled her out for scrutiny of her

whereabouts and used his authority over the Business Litigation Group to steer billable work away from Ms. Brazzano and other female litigators. A-129-30 ¶¶ 179-81; A-135 ¶ 213; A-136 ¶ 224. And he waged a smear campaign to oppose her elevation to income partner. A-133 ¶¶ 200-02; A-134 ¶ 208. She also alleges that, "year after year," she raised concerns to equity partners about Mr. De Palma's discriminatory efforts to freeze her and other female litigators out of billable matters and stall their careers. A-138 ¶ 232; *see also* A-105 ¶ 13; A-130 ¶ 181; A-137 ¶ 229; A-143 ¶¶ 263-65; A-162 ¶¶ 400, 402; A-166 ¶ 423. Mr. De Palma found the excuse he needed to escalate his retaliation in spring 2022, when Ms. Brazzano rejected his request to approve a vendor request in his purported pro bono matter and then began auditing the firm's pro bono practices. *See* A-146-49 ¶¶ 285-308. Ms. Brazzano alleges that in response to her scrutiny, Mr. De Palma pressured other equity partners—who were well-aware of Ms. Brazzano's longstanding complaints against Mr. De Palma—to ask for her resignation. A-106 ¶ 16; A-146 ¶ 285. Ms. Brazzano refused to resign, reiterating in a follow-up conversation that Mr. De Palma had waged a decade-long campaign of harassment, discrimination, and retaliation against her. A-153 ¶ 332; A-156 ¶ 355 At the end of that conversation, she was told to expect a termination agreement. A-153 ¶ 333.

Defendants do not dispute that Ms. Brazzano's consistent and repeated complaints about Mr. De Palma were protected activity. Instead, they say she has

failed to allege a causal link between those complaints and the decision to demand her resignation. Opening Br. at 36-37. They're wrong for two reasons. First, Ms. Brazzano alleges that her termination was the ultimate act in Mr. De Palma's decade-long campaign of harassment and retaliation for her unwillingness to put up with his boys-club behavior. While being terminated certainly would "be reasonably likely to deter a person from engaging in [protected activity]," *Qorrolli v. Metro. Dental Assocs.*, 124 F.4th 115, 122-23 (2d Cir. 2024), as is required under the NYCHRL and NYSHRL, so, too, would being subjected to a decade of suppressed work opportunities, excess scrutiny, and disparaging comments.

Second, even focusing solely on her termination as an adverse action, Ms. Brazzano has adequately pled causation. To plead the requisite causal connection under Title VII, a plaintiff must plausibly allege that retaliation was a "but-for" cause of the adverse action, *Edelman v. NYU Langone Health Sys.*, 141 F.4th 28, 51 (2d Cir. 2025), which means "only that the adverse action would not have occurred in the absence of the retaliatory motive" and not "that retaliation was the *only* cause of the employer's action." *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013). And "to show causation under the NYSHRL and NYCHRL," the standard is even more permissive: "a plaintiff need only show that retaliatory animus was a motivating factor, that is, that it played any role at all in the challenged conduct." *Edelman*, 141 F.4th at 49 (citation modified). Defendants largely focus on Ms.

Brazzano's initial reports of harassment in 2012, arguing they are too far removed from her termination to infer causation. Opening Br. at 37. But "[t]emporal proximity is just one method of demonstrating causation." *Chan v. NYU Downtown Hosp.*, 2004 WL 213024, at *3 (S.D.N.Y. Feb. 3, 2004). Causation may also be inferred from a "pattern of antagonism" following protected conduct, *id.*, or from the circumstances "looked at as a whole" because the "element of causation . . . necessarily involves an inquiry into [] motives" and "is highly context-specific." *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 177-78 (3d Cir. 1997). For example, in *Duplan*, the plaintiff alleged that after he complained of discriminatory treatment, he worked against a "backdrop of continuing antagonism and frustration of his professional ambitions," which included supervisors "ostracizing him, giving him insufficient work, and making clear to him that his career would not advance further." 888 F.3d at 626. Taken "as a whole," that backdrop "establish[ed] a drumbeat of retaliatory animus" that gave rise to an "inference of causation" under Title VII. *Id.*

Here, too, Ms. Brazzano's allegations give rise to a "drumbeat of retaliatory animus" that supports an inference of causation. *Id.* Contrary to the picture Defendants paint, Ms. Brazzano did not just complain in 2012 or "in response to being informed by management of [the] termination." Opening Br. at 37 (quoting *Lewis v. City of Norwalk*, 562 F. App'x 25, 29 (2d Cir. 2014) (emphasis omitted)).

Instead, she alleges that she consistently complained about Mr. De Palma's harassing and retaliatory conduct *throughout* her time at the firm. And, as in *Duplan*, Mr. De Palma responded to that protected activity with persistent efforts to frustrate Ms. Brazzano's professional ambitions, including by singling her out for scrutiny, badmouthing her to other partners, denying her billable work opportunities that would help advance her career, making clear that he would not support her elevation to partnership, and ultimately, getting her fired.

Moreover, although Defendants suggest that, at most, Ms. Brazzano alleges she was terminated because of "her disagreement with De Palma regarding his alleged improper pro bono engagements," Opening Br. at 44, she actually identifies multiple "factors," A-150 ¶ 317: that investigation "*along with* his decade long harassment and gender discrimination" and her complaints in response. A-150 ¶ 317 (emphasis added); A-157 ¶ 365. In other words, her scrutiny of his pro bono matters was just one of many ways Ms. Brazzano pushed back on Mr. De Palma's inappropriate behavior, and she alleges that it was *all* her protected activity, including her repeated reports of sexual harassment, that cased Mr. De Palma, and ultimately Ms. Read and Thompson Hine, to fire her. Under all three statutes, that was enough to show that retaliation was the "motivating factor" or "but-for cause," even if it was not "the only cause." *Edelman*, 141 F.4th at 49; *Zann Kwan*, 737 F.3d at 846.

III. Even if Ms. Brazzano did not Meet the Rule 12(b)(6) Plausibility Standard, her Case is Still Covered by the EFAA.

Because the district court found that Ms. Brazzano alleged sexual harassment claims that were sufficiently plausible to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), it did not decide whether the EFAA imposes such a standard. SPA-14. This Court need not either because, as described above, Ms. Brazzano has alleged plausible claims for both sexual harassment and retaliation. *See* sections I(c) & II(b), *supra*. But if the Court concludes that Ms. Brazzano has not alleged plausible claims for either one, the EFAA still applies because, on the face of the complaint, her case involves "conduct alleged to constitute sexual harassment." 9 U.S.C. § 401(4). Both the plain language and the legislative history of the EFAA demonstrate that nothing more is required: Congress intended the EFAA's application to depend solely on the allegations in the complaint, not whether those allegations, if tested, can survive a motion to dismiss.

a. Under the plain text of the EFAA, a plaintiff need only allege, not state a plausible claim for, sexual harassment.

Begin with the text. First, it refers to "conduct that *is alleged to constitute* sexual harassment." 9 U.S.C. § 401(4) (emphasis added); *see also* 9 U.S.C. § 402(a). The use of the word "alleged" means the focus is what the complaint says, not whether it ultimately states a claim that can survive a motion to dismiss under Rule 12(b)(6). *See Allege*, *Black's Law Dictionary* (12th ed. 2024) (defining "allege" to

mean "[t]o assert as true, esp. that someone has done something wrong, though no occasion for definitive proof has yet occurred"). On the other hand, if the statute had used the phrase "is" sexual harassment, it would mean "an actual fact must be established" under the applicable standard, here, a motion to dismiss under Rule 12(b)(6). *See Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010, 1015 (9th Cir. 2011) (contrasting use of words "alleged" and "is"). This Court must read the statute to "give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Thus, the emphasis on allegations must mean something other than establishing a sexual harassment claim. *See Coleman*, 631 F.3d at 1015.

Indeed, Congress's choice of the word "alleged" suggests it did *not* mean to invoke the Rule 12(b)(6) plausibility standard. In *Iqbal*, the Supreme Court explained that, when a complaint doesn't meet the plausibility standard, it "has alleged—but it has not shown—that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citation modified). That's consistent with the phrasing of the plausibility requirement itself: When a complaint is challenged under Rule 12(b)(6), the Supreme Court requires a "plausible claim for relief," not plausible "allegations." *Id.*; *see also Bayerische Landesbank, N.Y. Branch v. Aladdin Cap. Mgmt. LLC*, 692 F.3d 42, 64 (2d Cir. 2012) ("facts alleged" must "give rise to a plausible claim for relief"). Thus, the EFAA's plain language shows it was intended to apply to sexual harassment that is "alleged" on the face of the complaint,

without regard to whether those allegations are ultimately "show[n]." *Iqbal*, 556 U.S. at 679; *see Diaz-Roa*, 757 F.Supp.3d at 535 ("[T]he EFAA speaks to 'allegations,' *i.e.* the content of a pleading, and not to the conclusion that those allegations plausibly state a claim for relief if the pleading is challenged under Rule 12(b)(6).").

At least one court interpreting a similar phrase in another statute has concluded that it does not impose a requirement that the allegations be able to survive a motion to dismiss. In *Coleman*, the Ninth Circuit interpreted the nearly identical phrase "alleged conduct" in the Class Action Fairness Act, 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb), as a directive to look at "what is alleged in the complaint," rather than what would meet the motion to dismiss standard, which there was a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. *Coleman*, 631 F.3d at 1015. In declining to apply the Rule 12(b)(1) standard, *Coleman* concluded that "nothing" "indicates a congressional intention to turn a jurisdictional determination concerning the . . . 'alleged conduct' into a mini-trial on the merits of the plaintiff's claims." *Id.* at 1017.

Second, that the statute applies when there is a "sexual harassment *dispute*," 9 U.S.C. § 402(a) (emphasis added), also underscores that a plaintiff doesn't have to state a plausible *claim* for the EFAA to apply. The plain meaning of "dispute" is broader than a claim for relief. *See Dispute*, *Black's Law Dictionary* (12th ed. 2024)

(defining "dispute" as "[a] conflict or controversy, esp[ecially] one that has given rise to a particular lawsuit"). And when Congress used the word "dispute" in the EFAA, it did not mean "claim." *See, e.g.*, *Memmer v. United Wholesale Mortg. LLC*, 135 F.4th 398, 408 (6th Cir. 2025). As the Sixth Circuit explained in *Memmer*, the word "dispute" in the EFAA "denote[s] a controversy between the parties regarding certain kinds of conduct, conduct which *may* support claims under state and federal law." *Id.* (emphasis added).

"'Disputes,' unlike claims, are not subject to motions to dismiss." *Diaz-Roa*, 757 F.Supp.3d at 534. So, in using "dispute," "Congress elected to refer to the nature of the disagreement between the parties rather than to its legal substance in a form that is readily measured by a motion to dismiss." *Id.* Thus, "the statutory language does not require the person seeking to avoid the effect of an otherwise applicable arbitration clause to plead a claim for sexual assault or sexual harassment much less require the courts to determine that such person pleaded a claim upon which relief can be granted." *Id*.

b. Looking to the face of the complaint for allegations of sexual harassment is consistent with the legislative history and statutory context.

To the extent the EFAA's language is ambiguous (and it's not), the legislative history also shows that Congress did not intend to make plaintiffs litigate the plausibility of their sexual harassment claims on the merits before it is determined whether their case must be arbitrated. As Senator Durbin, Chair of the Judiciary

Committee, explained on the Senate floor, "the bill text does not require . . . that victims have to prove a sexual assault or harassment claim before the rest of their related case can proceed in court." 168 Cong. Rec. S626 (daily ed. Feb. 10, 2022). If that statement wasn't clear enough, Congress declined to move forward with a bill introduced in the House that would have accomplished what Defendants seek. Specifically, that bill provided that, if a plaintiff's sexual assault claim were dismissed, all other claims would also be dismissed and sent to arbitration. *See* Carrie's Law, H.R. 2906, 117th Cong. § 402(b)(2)(A) (2021). The EFAA that was enacted, by contrast, does not contain a dismissal mechanism, demonstrating that Congress did not intend to require a plaintiff's sexual harassment claim to survive a Rule 12(b)(6) motion to dismiss for the case to proceed in court.

Congress's decision not to adopt the Rule 12(b)(6) standard is also consistent with the well-established principle that, to determine federal question jurisdiction, courts look to the "face" of the complaint, not whether the allegations in the complaint state a claim. *See, e.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Whether the EFAA applies, and thus whether a plaintiff's claims can proceed in court, is more like a determination whether claims should proceed in state or federal court than it is to a determination whether a complaint states a claim on the merits. As *Diaz-Roa* explained, "a motion to compel arbitration is designed to test who—a judge and jury or an arbitrator—is to decide the case on the merits," not to

test whether the plaintiff has stated a claim. 757 F.Supp.3d at 537. Indeed, courts are "not to rule on the potential merits of the underlying claims" when deciding whether to compel arbitration. *AT & T Techs. Inc. v. Commc'ns. Workers of America*, 475 U.S. 643, 649 (1986). That's because a court lacks "adjudicative capacity" when the case is to be decided by an arbitrator, and so "should not be making substantive decisions." *Diaz-Roa*, 757 F.Supp.3d at 538. It would thus be consistent with background legal principles for Congress to decide that the application of the EFAA depends on the allegations "on the face of the plaintiff's properly pleaded complaint," *Caterpillar Inc*., 482 U.S. at 392, *not* whether she has stated a plausible claim on the merits.

Not applying a plausibility standard makes sense as a practical matter, too. A motion to dismiss tests the sufficiency of a complaint, but it is "often not the last word on the merits of a claim." 757 F.Supp.3d at 538. If a plaintiff's claim is dismissed for failure to state a claim, they may amend their complaint, Fed. R. Civ. P. 15(a), or appeal the dismissal, 28 U.S.C. § 1291. On the other hand, a defendant ordinarily cannot appeal the denial of a motion to dismiss, preventing "piecemeal appeals" on the merits. *Koehler v. Bank of Bermuda Ltd.,* 101 F.3d 863, 865 (2d Cir. 1996). Deciding plausibility in the course of deciding a motion to compel arbitration flips that on its head. If the court grants a motion to compel because a plaintiff's claims are not plausible, the plaintiff cannot appeal the court's plausibility finding.

9 U.S.C. § 16(b). But that finding will likely prevent the plaintiff from having the plausibility of her claims adjudicated in the first instance by the arbitrator, who is likely to defer to the court's finding if not find it preclusive. *See State Farm Mut. Auto. Ins. Co. v. Tri-Borough N.Y. Med. Prac.*, 120 F.4th 59, 81 (2d Cir. 2024). Moreover, as this case illustrates, when a motion to compel arbitration is denied based on the plaintiff having stated a plausible claim, the defendant has an automatic right to appeal, thus allowing for an appeal on the merits and creating an end-run around "the final judgment rule that generally prohibits piecemeal appeals." *Koehler*, 101 F.3d at 865. Interpreting the EFAA to require only *allegations* of sexual harassment preserves the respective roles of the court and the arbitrator and avoids inundating federal courts of appeals with interlocutory disputes about whether a plaintiff has stated a claim.

Finally, interpreting the broad language of the statute to mean what it says—that anyone with a dispute relating to conduct alleged to constitute sexual harassment can choose to have their day in court—is the only way to achieve the EFAA's purpose. In passing the EFAA, Congress was specifically aiming to "restore access to justice" for survivors of sexual assault and harassment. H.R. Rep. No. 117-234, at 4 (2022). Congress recognized that "forced arbitration . . . lacks many of the fundamental due process and transparency safeguards present in the courts." *Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual*

Harassment in the Shadows: Hearing Before the H. Comm. on the Judiciary, 117th Cong. 4 (2021) (statement of Rep. Jerrold L. Nadler). Therefore, by allowing survivors to pursue justice in court rather than private arbitration, Congress sought to "fix a broken system that protects perpetrators and corporations and end the days of silencing survivors. 168 Cong. Rec. S627 (daily ed. Feb. 10, 2022) (statement of Sen. Kirsten Gillibrand). Not all survivors will succeed in proving their claims, but the EFAA gives them access to court to try to do so. "The fact that the victim of sexual harassment who fails to state a legally sufficient claim for sexual harassment is nonetheless relieved of forced arbitration in a case that relates to the sexual harassment is not an affront to Congress' intent but rather is a feature of the congressional design." *Diaz-Roa*, 757 F.Supp.3d at 541.

IV. The EFAA Applies to Ms. Brazzano's Case Even Though Some of the Conduct at Issue Occurred Before the Act's Enactment Date.

The EFAA applies here because this case does not, as Defendants argue, "predate" the Act's enactment. Opening Br. at 38. The EFAA states in a statutory note that it "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. Pub. L. No. 117-90, § 3, 136 Stat. 26, 28 (emphases added). Thus, Congress's use of "or" created two separate methods to determine whether the EFAA applies: it "applies to *claims that accrue* and *disputes that arise* on or after March 3, 2022." *Memmer*, 135 F.4th at 407; *see Cornelius v. CVS Pharmacy Inc.*, 133 F.4th 240, 246 (3d Cir. 2025)

(adopting "two separate inquires"); *Famuyide v. Chipotle Mexican Grill, Inc.*, 2023 WL 5651915, at *3 (D. Minn. Aug. 31, 2023) ("The EFAA only applies if Famuyide's claims accrued or a dispute arose on or after March 3, 2022."), *aff'd*, 111 F.4th 895 (8th Cir. 2024); *Kader v. S. Cal. Med. Ctr., Inc.*, 99 Cal. App. 5th 214, 222 (Cal. Ct. App. 2024) (discussing difference between dispute arising and claim accruing under the EFAA); *see also Olivieri,* 112 F.4th at 90 n.8 (approvingly citing Eighth Circuit's interpretation of the separate "dispute" analysis in case deciding when claim "accrued"). Here, Ms. Brazzano's sexual harassment and retaliation claims accrued *and* this dispute arose after the EFAA's effective date.

a. Ms. Brazzano's claims for sexual harassment and retaliation accrued when she was terminated in June 2022.

As this Court has explained, "the time a claim 'accrues' means the point at which the statute of limitations clock starts ticking." *Olivieri*, 112 F.4th at 87. Starting with Ms. Brazzano's sexual harassment claims, "hostile work environment claims . . . are subject to the continuing violation doctrine of accrual, meaning they accrue at the last act in furtherance of the hostile work environment." *Id.* at 91. As a result, if any of Defendants' post-March 2022 actions, including terminating Ms. Brazzano, were "part of the same course of conduct underlying her hostile work environment claims, those claims have accrued after the EFAA's effective date." *Id.* at 92. That standard is met here.

"A discrete discriminatory act, such as termination" may "render a hostile work environment claim timely if it is shown to be part of the course of discriminatory conduct that underlies the hostile work environment claim." *King*, 96 F.4th at 561. In *King*, this Court held that the plaintiff's "termination was part of an ongoing discriminatory pattern or practice of sex-based harassment" where the plaintiff alleged that her supervisor ultimately fired her after several years of treating her worse than her male colleagues by excluding her from meetings, giving her unrealistic deadlines and expectations, denying her appropriate office space, speaking to her "in a rude, condescending, dismissive, and hostile manner" in front of colleagues, and setting her up to fail so that he could find performance reasons to fire her. *Id.* at 553-56, 562. Similarly, here, Ms. Brazzano alleges that her termination was the culmination of a campaign of ongoing sex-based harassment and retaliation against her by Mr. De Palma, including consistently making inappropriate comments, creating a "boys club" at the firm, denying her work opportunities that he instead gave to male employees, opposing her promotions, and disparaging and undermining her to other people at the firm. *See* sections I(c) & II(b), *supra*. Defendants themselves linked her termination to these harassing actions by Mr. De Palma by stating that she was terminated for not billing enough hours, *see* A-149 ¶ 310, which, if true, would be a continuation of Mr. De Palma's ongoing efforts to sideline her by steering billable work away from her and toward male partners.

Moreover, like *King*, she alleges that Mr. De Palma played a "decisive role" in her termination, including by continuing to disparage her to others at the firm, and that the termination "contributed to his long-running enterprise of subjecting [Ms. Brazzano] to a pervasive, hostile work environment." *Id.* at 562. Thus, the conduct that occurred after March 2022 is "similar in kind" to the sex-based harassment and retaliatory hostile work environment she experienced from Mr. De Palma before that date, *see Olivieri*, 112 F.4th at 92, such that Ms. Brazzano's sexual harassment claims and retaliation claims accrued after the EFAA's enactment.

Moreover, at the very least, Ms. Brazzano's retaliation claim accrued when Defendants took an adverse action against her by terminating her. Defendants acknowledge that the EFAA applies to "discrete retaliatory acts that occurred on or after March 3, 2022," and that "termination" is a "discrete retaliatory act[]." Opening Br. at 39-40 (citing *Newton*, 746 F.Supp.3d at 152). In *Newton*, for example, the court held that the retaliation claims accrued after the enactment of the EFAA because the adverse actions the plaintiff alleged, "termination, denial of a reasonable accommodation, and denial of a promotion," each occurred after the EFAA was enacted. *See* 746 F.Supp.3d at 152-53. The same is true here, and the EFAA applies to Ms. Brazzano's retaliation claim, even if her termination was not part of the continuing sex-based hostile work environment. *See id.*; *Clay*, 751 F.Supp.3d at 18 (holding that EFAA applied because retaliation claim accrued after its enactment

date, even though sexual harassment claims did not); *Molchanoff v. SOLV Energy, LLC*, 2024 WL 899384, at *4 (S.D. Cal. Mar 1, 2024) (same).[4]

b. Alternatively, this dispute arose when Ms. Brazzano filed a charge of discrimination in July 2022.

Even if this Court concludes that Ms. Brazzano's claims accrued before the EFAA's enactment, it can still affirm because this dispute arose after the Act's enactment. *See Carroll v. Trump*, 124 F.4th 140, 161 n.13 (2d Cir. 2024) (explaining that this Court is "free to affirm on any ground that finds support in the record, even if it was not the ground upon which the trial court relied").[5] There is a growing consensus among courts of appeal that a dispute arises "when the parties become

[4] Defendants also argue that Ms. Brazzano's retaliation claim is insufficiently related to the underlying sexual harassment to provide a basis for the EFAA's application. Opening Br. at 39-44. But that is just a rehash of the merits of the retaliation claim. As described above, Ms. Brazzano has shown that her termination was causally connected to her complaints of sexual harassment. *See* section II, *infra*.

[5] Additionally, because the "EFAA is directly codified as a limitation upon the court's power to compel arbitration under the FAA, 9 U.S.C. § 2," it is "doubtful that a party opposing arbitration can forfeit proper application of the statute." *Memmer*, 135 F.4th at 406 n.3 (addressing application of EFAA even though plaintiff did no more than mention the statute in opposing the defendants' motion to compel arbitration); *see also, e.g., Grajales El v. Amazon Prime*, No. 232984, 2024 WL 3983335, at *1 (3d Cir. Aug. 29, 2024) (per curiam) (holding that district court erred by compelling arbitration without first considering potentially applicable exception to the FAA, even though no party raised it). Moreover, courts have an independent obligation to apply the correct legal standards, regardless of the legal arguments the parties make. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

adverse to one another," such as "when an injured party sends the defendant a demand letter, files an administrative charge, requests arbitration, commences a lawsuit, or some other event occurs." *Memmer*, 135 F.4th at 409; *see Cornelius*, 133 F.4th at 247 (explaining that "a 'dispute . . . arises' when an employee registers disagreement—through either an internal complaint, external complaint, or otherwise—with his employer, and the employer expressly or constructively opposes that position"); *Famuyide*, 111 F.4th at 898 (defining "dispute" as "a conflict or controversy" and affirming district court's holding that dispute arose when plaintiff filed complaint in state court); *Kader*, 99 Cal. App. 5th at 222 ("A dispute arises when one party asserts a right, claim, or demand, and the other side expresses disagreement or takes an adversarial posture.").

Here, the parties first "bec[a]me adverse to each other" when Ms. Brazzano filed her charge of discrimination in July 2022. *Memmer*, 135 F.4th at 409. In similar circumstances, courts have consistently held that a dispute arose with the filing of an administrative charge, not when sexual harassment occurred. *See, e.g.*, *Hodgin v. Intensive Care Consortium, Inc.*, 666 F.Supp.3d 1326, 1330 (S.D. Fla. 2023) (holding dispute arose at time of EEOC filing "because the Plaintiff was now in an adversarial posture with her employer in a forum with the potential to resolve the claim"); *Silverman v. DiscGenics, Inc.*, 2023 WL 2480054, at *2 (D. Utah Mar. 13, 2023) (holding dispute arose when a charge of discrimination was filed); *Rosser v.*

Crothall Healthcare, Inc., 744 F.Supp.3d 394, 401 (E.D. Pa. Aug. 13, 2024) (same); *Zinsky v. Russin*, 2022 WL 2906371, at *3 (W.D. Pa. July 22, 2022) (same); *Kader*, 99 Cal. App. 5th at 224 (same). Thus, even if Ms. Brazzano's claims accrued earlier, the EFAA applies because this dispute arose with the filing of her charge of discrimination.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order denying Defendants' motion to compel arbitration.[6]

Respectfully submitted,

September 26, 2025

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[6] Below, Ms. Brazzano also argued that no arbitration agreement exists that covers these claims because she lacked notice of the arbitration clause and because the 2021 partnership agreement Defendants seek to enforce expired on December 31, 2021. ECF No. 59 at 6. She also argued that it would be unconscionable to enforce the arbitration agreement against her under those circumstances, and that doing so would amount to creating an "infinite" arbitration clause. *Id.* at 19. The district court did not consider these arguments because it held that the EFAA applied. If this Court holds that the EFAA does not apply, it should remand for the district court to address Ms. Brazzano's formation and enforceability arguments in the first instance.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Local Rule 32.1(a)(4)(A) because this brief contains 13,466 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as calculated by Microsoft Office 365.

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

September 26, 2025

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CERTIFICATE OF SERVICE

I certify that on September 26, 2025, I electronically filed this brief with the Clerk of the U.S. Court of Appeals for the Second Circuit via ACMS. I further certify that all participants in the case are registered ACMS users and that service will be accomplished by ACMS.

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