No. 23-2961

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MICHELE A. CORNELIUS,
Plaintiff-Appellant,

v.

CVS PHARMACY INC., et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey

# BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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## STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. In this Title VII case, the district court held that the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFASASHA"), 9 U.S.C. §§ 401-402, did not apply because the plaintiff had not alleged sexual harassment under Title VII. In doing so, the district court emphasized that the plaintiff had not pled sexual advances or behavior motivated by sexual desire, which the court viewed as required for a Title VII sexual harassment claim. Title VII, however, does not require a plaintiff bringing a claim for sexual harassment to allege or prove sexual advances or behavior motivated by sexual desire.

The EEOC has a substantial interest in the proper interpretation of Title VII, and this appeal directly implicates the standard for sexual harassment under that statute. We therefore file this brief under Federal Rule of Appellate Procedure 29(a)(2).

## STATEMENT OF THE ISSUES[1]

1. Does a plaintiff seeking to resolve her sexual harassment dispute in court rather than arbitration need to allege sexual advances or actions motivated by sexual desire for the EFASASHA to apply in a Title VII lawsuit?
2. Did the plaintiff in this case sufficiently plead a Title VII sexual harassment claim for the EFASASHA to apply?

## STATEMENT OF THE CASE

### A. Statement of the Facts

Michele Cornelius, who is female, began working for CVS as a cashier in 1982, before earning a promotion to store manager in 1994. Appx.6 ¶¶ 9-10. She had a sterling reputation, including her approach to "operational discipline, work ethic, and service culture." *Id.* ¶ 10. CVS chose Cornelius to "transform" a struggling store in 2017, and CVS commended her the next year for her success at the store. *Id.* ¶¶ 12-13.

Shardul Patel, who is male, worked for CVS as a District Leader and began supervising Cornelius in 2018. Appx.5 ¶ 7. According to Cornelius,

[1] The EEOC takes no position on any other issues.

Patel subjected her to "severe and pervasive negative treatment, intentionally because [Cornelius] is a woman." Appx.6 ¶ 15.

Cornelius's complaint detailed the alleged harassment. Patel responded disrespectfully when Cornelius raised questions or concerns, sent "rude and unnecessary text messages," denied her a promotion and a raise "based on an alleged 'performance deficiency' while promoting a male employee [with] the same 'performance deficiency,'" and "demean[ed] her and treated her like a child." Appx.6-7 ¶ 15(a), (d)-(e), (j). Patel also "pressure[ed Cornelius] to shovel snow during a blizzard," told her he didn't need "excuses" when Cornelius explained she left after a ten-hour shift to take care of her husband who had cancer, and refused to give raises to employees that Cornelius had approved. Appx.7 ¶¶ 15(g)-(i). He also transferred employees to other stores although he knew Cornelius needed them, "resulting in intentionally overworking" her, forcing her to sometimes work "over 80 hours a week." *Id.* ¶ 15(f).

Patel's "treatment of women clearly contrast[ed] with his treatment of men." Appx.8 ¶ 21 (alleging Patel "permitted a male employee … to engage in conduct and receive benefits he denied" Cornelius). Patel's

ongoing mistreatment of Cornelius was "psychologically unbearable" and left her "on the verge of a nervous breakdown." *Id.* ¶¶ 22-23.

Cornelius repeatedly reported Patel's actions to CVS. Appx.9-10 ¶¶ 31-40. She and another employee told CVS's regional manager that Patel "was discriminating against them because they are women." Appx.9 ¶ 33. And Cornelius complained again later that she felt she was "in a hostile work environment" and that Patel was "biased against women." Appx.10 ¶ 40(a). She persisted in reporting the mistreatment, but CVS did not address her concerns. Appx.10-13 ¶¶ 39-40, 42-44, 51-52.

Cornelius submitted her resignation notice in 2021 because of Patel's harassment. Appx.9, 13 ¶¶ 28, 52. Patel ignored her notice for a week, forcing Cornelius to submit a second resignation notice. Appx.9 ¶ 25. Without acknowledging either notice, Patel then replaced her with a man while Cornelius still worked for him. *Id.* ¶ 28.

In addition to detailing the harassment she experienced, Cornelius's complaint alleged that CVS permitted other managers to harass female employees. Appx.12-13 ¶¶ 45-50. She cited a Wall Street Journal article entitled "CVS . . . Vows To Overhaul How It Handles Sexual-Harassment Complaints" and alleged that Patel "bragged about not facing

consequences despite the number of complaints against him brought by women working for CVS." Appx.10, 12 ¶¶ 38, 46.

Cornelius filed a charge of discrimination in August 2022, after the EFASASHA's enactment on March 3, 2022. Appx.5 ¶ 2; Pub. L. No. 117-90, 2136 Stat 26 (2022). She received a notice of her right to sue and then filed this lawsuit. Appx.5 ¶ 2. Cornelius titled the first claim in her complaint "CVS's Hostile Work Environment in Violation of Title VII," Appx.13, and, in it, she alleged that CVS subjected her to "severe and pervasive intentional discrimination 'because of . . . sex.'"[2] *Id.* ¶ 54.

CVS responded to Cornelius's complaint by moving to dismiss and compel arbitration. R. 9-1. In its motion, CVS alleged that Cornelius's claims were subject to a predispute arbitration agreement. *Id.* at 13.

**B. District Court's Decision**

The court granted CVS's motion to dismiss the complaint and compel arbitration. Appx.81-91. It acknowledged that "[t]he [EFASASHA] is a significant act," but said Title VII distinguishes sex discrimination from

[2] Cornelius also alleged violations of New Jersey law, Appx.13, but the court did not separately analyze whether she alleged "sexual harassment" under state law, and we do not address that issue.

sexual harassment. Appx.85-86. "Sex discrimination is discriminating against someone because of his or her sex, while sexual harassment is unwelcome sexual advances or other verbal or physical contact of a sexual nature." Appx.86 (quoting *Friel v. Mnuchin*, 474 F. Supp. 3d 673, 692 (E.D. Pa. 2020)).

The court also rejected Cornelius's reliance on *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001), for the principle that harassment does not require sexual attraction. According to the district court, *Bibby* used "sex harassment" interchangeably with "gender discrimination." Appx.86-87. *Bibby*, the district court held, "did not suggest that [Cornelius's] gender or 'sex-based' discrimination claims were automatically converted to sexual harassment claims." Appx.87.

In the court's view, Cornelius had not alleged "sexual harassment claims" or "facts to suggest that Patel's actions were sexually motivated." *Id.* The court emphasized the absence of "any facts to suggest that Defendants engaged in unwelcomed sexual advances or behavior motivated by a sexual desire." *Id.* As a result, the court held that Cornelius had not pled sexual harassment under Title VII and the EFASASHA thus

did not apply.[3] *Id.* The court then held that there was an enforceable arbitration agreement, compelled arbitration, and dismissed the case without prejudice. Appx.87-91.

## ARGUMENT

### I. The EFASASHA does not require a plaintiff pleading sexual harassment under Title VII to allege sexual advances or conduct motivated by sexual desire.

The EFASASHA allows a plaintiff "alleging conduct constituting a sexual harassment dispute or sexual assault dispute" to bring her claims in court even if there is a "predispute arbitration agreement" that would otherwise require arbitration of her claims. 9 U.S.C. § 402(a). The district court held that Cornelius had not pled a sexual harassment dispute and so the EFASASHA did not apply. Appx.87. In doing so, the district court applied a sexual harassment standard that required "sexual advances or behavior motivated by a sexual desire." *Id.*

[3] The court acknowledged the parties' arguments about whether Cornelius's claims involved "any dispute or claim that arises or accrues on or after" the EFASASHA's enactment on March 3, 2022, Pub. L. No. 117-90, 2136 Stat 26 (2022), but held that it did not need to decide the issue. *See* Appx.87 n.1. We do not address that issue.

That is the wrong standard for assessing the EFASASHA's applicability in a Title VII lawsuit like this one. Because the EFASASHA defines "sexual harassment dispute" in terms of the law under which suit is filed—here, Title VII—satisfying the EFASASHA's definition of "sexual harassment dispute" turns on what constitutes "sexual harassment" under Title VII. And Title VII does not require a plaintiff to allege sexual advances or conduct motivated by sexual desire to plead a sexual harassment claim.

### A. The Title VII sexual harassment standard governs whether a plaintiff alleged a "sexual harassment dispute" under the EFASASHA in a Title VII lawsuit.

The EFASASHA does not adopt a specific standard for alleging a "sexual harassment dispute." Instead, it casts a wide net as to what disputes cannot be forced into arbitration, including any "dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." 9 U.S.C. § 401(4).

What constitutes a sexual harassment dispute thus depends on the plaintiff's claims, i.e., whether the conduct the plaintiff challenges amounts to "sexual harassment" under the law allegedly violated. *See, e.g.*, *Delo v. Paul Taylor Dance Found., Inc.*, -- F. Supp.3d --, No. 22-CV-9416 (RA), 2023 WL 4883337, at *5–6 (S.D.N.Y. Aug. 1, 2023) (considering Title VII and New

York law); *see also Hodgin v. Intensive Care Consortium, Inc.*, -- F. Supp.3d --, No. 22-81733-CV, 2023 WL 2751443, at *2 (S.D. Fla. Mar. 31, 2023) (applying Title VII to interpret whether a claim was timely under the EFASASHA).

Here, Cornelius alleged that CVS violated Title VII. Appx.13. Whether Cornelius's complaint presents a "sexual harassment dispute" under the EFASASHA therefore depends on whether it relates to conduct alleged to constitute sexual harassment under Title VII. *See* 9 U.S.C. § 401(4).

### B. Title VII does not require a plaintiff to allege sexual advances or sexual desire to plead a sexual harassment claim.

Title VII does not define sexual harassment, nor does it use that term. Instead, it prohibits discrimination because of sex in the terms and conditions of employment. 42 U.S.C. § 2000e-2(a). And beginning with *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986), the Supreme Court has repeatedly held that sexual harassment is a form of prohibited sex discrimination. *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Although the facts in *Meritor* concerned sexual advances, the Court noted "a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work

in an environment free from discriminatory intimidation, ridicule, and insult." 477 U.S. at 65. As this Court has observed, the *Meritor* Court "in no way limited this concept to intimidation or ridicule of an explicitly sexual nature." *Andrews v. City of Phila.*, 895 F.2d 1469, 1485 (3d Cir. 1990); *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) ("The appalling conduct alleged in *Meritor* . . . merely present[s] some especially egregious examples of harassment. [It does] not mark the boundary of what is actionable.").

This Court, like the Supreme Court, thus uses a broad standard for sexual harassment. "A plaintiff may . . . establish that an employer violated Title VII by proving that sexual harassment created a hostile work environment."[4] *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 104 (3d Cir. 2009); *see also Meritor*, 477 U.S. at 66-67. And this Court examines five elements to assess whether "sexual harassment" created a hostile work environment: "1) the employee suffered intentional discrimination because of his/her sex, 2) the discrimination was severe or

[4] Historically, courts considered whether sexual harassment was "quid pro quo" or a "hostile work environment," but "[t]he principal significance of th[at] distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998).

pervasive, 3) the discrimination detrimentally affected the plaintiff, 4) the discrimination would detrimentally affect a reasonable person in like circumstances, and 5) the existence of *respondeat superior* liability." *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013). When it applies these elements, this Court refers to "[t]his type of sexual harassment claim . . . as a hostile work environment claim." *Kokinchak v. Postmaster Gen.*, 677 F. App'x 764, 766 (3d Cir. 2017) (citing *Harris*, 510 U.S. at 18-19).

Those elements do not require proof of sexual advances, overtly sexual words or actions, or any other evidence that sexual desire motivated the harasser. As the Supreme Court has observed, "harassing conduct need not be motivated by sexual desire." *Oncale*, 523 U.S. at 80. Courts have thus regularly held that "Title VII . . . does not require evidence of overtly sexual conduct for a sexual harassment claim."[5] *Tang v. Citizens Bank, N.A.*,

[5] Some courts have read the EEOC's guidelines on sexual harassment as requiring overtly sexual advances or conduct. *See Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982). This is an incorrect reading. The guidelines state that "[h]arassment on the basis of sex is a violation" of Title VII and then describe the circumstances under which "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment." 29 C.F.R. § 1604.11(a). The guidelines do not limit sexual harassment to only those actions, as this Court recognizes. *Andrews*, 895 F.2d at 1485 n.6.

821 F.3d 206, 216 (1st Cir. 2016); *see also Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 788-89 (7th Cir. 2007) (rejecting argument that proving "sexual harassment" created a hostile work environment requires "sexual advances" or other "conduct of a sexual nature" in a case involving primarily sexist comments) (internal quotation marks omitted).

This Court has likewise stated that "an employee can demonstrate that there is a sexually hostile work environment without proving blatant sexual misconduct." *Spain v. Gallegos*, 26 F.3d 439, 447 (3d Cir. 1994); *see also id.* at 447-48 (considering shunning, poor performance evaluation, and denied promotion as part of "sexually hostile work environment"). And it has held that a district court errs when it "too narrowly construed what type of conduct can constitute sexual harassment" by emphasizing "the lack of sexual advances, innuendo, or contact." *Andrews*, 895 F.2d at 1485; *see also id.* at 1486 (instructing district court on remand to consider, among other evidence, "the recurrent disappearance of plaintiffs' case files and work product, anonymous phone calls, and destruction of other property"); *see also Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291-93 (3d Cir. 2009) (vacating summary judgment on "sexual harassment" claim based on abuse directed at the plaintiff because of gender stereotypes).

Other courts have also found triable issues on sexual harassment claims without any sexual advances or other conduct motivated by sexual desire. In *Kopp v. Samaritan Health Sys., Inc.*,5 13 F.3d 264, 269 (8th Cir. 1993), the Eighth Circuit held that "[t]he predicate acts which support a hostile-environment sexual-harassment claim need not be explicitly sexual in nature." And it concluded summary judgment for the employer on a "sexual-harassment claim" was inappropriate because of evidence the harasser "yelled at, swore at, threatened, and physically endangered" employees who were "primarily women." *Id*. The Second Circuit similarly denied summary judgment on a sexual harassment claim involving verbal abuse, insubordination, and conduct that created safety hazards for the plaintiff. *Howley v. Town of Stratford*, 217 F.3d 141, 148-49, 153-55 (2d Cir. 2000).

Employing that same broad standard, courts of appeals instruct lower courts to look beyond sexual advances and conduct motivated by sexual desire in assessing sexual harassment claims. *See O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001) ("Courts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment,

then discounting the latter category of conduct."). In *Williams v. General Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999), for example, the Sixth Circuit reversed summary judgment on a sexual harassment claim, holding that "conduct underlying a sexual harassment claim need not be overtly sexual in nature." The Sixth Circuit instructed that, on remand, the district court therefore must also consider "[t]he myriad instances in which [the plaintiff] was ostracized, when others were not," because "[*a*]*ny* unequal treatment of an employee *that would not occur but for the employee's gender* may, if sufficiently severe or pervasive," establish a hostile work environment. *Id.* at 565-66. And the Eighth Circuit held that a district court correctly considered as part of a sexual harassment claim urinating in the plaintiff's car's gas tank and other acts affecting her working conditions as part of a sexual harassment claim because "intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances." *Hall v. Gus Const. Co.*, 842 F.2d 1010, 1013-14 (8th Cir. 1988).

The district court thus misinterpreted the Title VII sexual harassment standard, and nothing in the EFASASHA supports the unduly narrow standard the court applied. Indeed, Congress set aside a similarly narrow

standard before passing the EFASASHA. Congress considered defining a "sexual harassment dispute" as:

> [A] dispute relating to the any of the following conduct directed at an individual or a group of individuals:
>
> > (A) Unwelcome sexual advances.
> >
> > (B) Unwanted physical contact that is sexual in nature, including assault.
> >
> > (C) Unwanted sexual attention, including unwanted sexual comments and propositions for sexual activity.
> >
> > (D) Conditioning professional, educational, consumer, health care or long-term care benefits on sexual activity.
> >
> > (E) Retaliation for rejecting unwanted sexual attention.

H.R. 4445, 117th Cong. § 401(4) (July 16, 2021). But Congress did not adopt that language. It instead broadened the definition, allowing EFASASHA to match the scope of Title VII and other laws prohibiting sexual harassment. *See* 9 U.S.C. § 401(4); 168 Cong. Rec. H991 (daily ed. Feb. 7, 2022) (statement of Rep. David Scott) (stating that the relevant amendment "encompasses a broader array of harassing conduct" because it "embrac[es] sexual harassment jurisprudence.").

Cornelius thus need only have alleged sexual harassment under Title VII to invoke the EFASASHA, but the district court required more. Relying

on *Friel v. Mnuchin*, 474 F. Supp. 3d 673 (E.D. Pa. 2020), *aff'd*, No. 20-2714, 2021 WL 6124314, at *1 (3d Cir. Dec. 28, 2021), the court contrasted sex discrimination with sexual harassment: "Sex discrimination is discriminating against someone because of his or her sex, while sexual harassment is unwelcome sexual advances or other verbal or physical contact of a sexual nature." Appx.86. But sexual harassment under Title VII encompasses more than such overtly sexual behavior. *Spain*, 26 F.3d at 447, 451; *Boumehdi*, 489 F.3d at 788-89. And *Friel* cites no authority for its more restrictive standard, nor does it engage with the long line of cases applying a broader sexual harassment standard under Title VII. *See* 474 F. Supp. 3d at 692.

The district court's mistaken reliance on *Friel* to require sexual advances or explicitly sexual conduct also led it to misunderstand this Court's decision in *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001), *abrogated on other grounds by Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). The district court reasoned that *Bibby* "does not contradict" *Friel*'s sexual harassment standard because *Bibby* "addressed

the specific issue of same-sex gender discrimination."[6] Appx.86. But that mischaracterizes *Bibby*. Like the Supreme Court's decision in *Oncale*, *Bibby* addressed "same-sex *sexual harassment*." *Bibby*, 260 F.3d at 261 (emphasis added); *Oncale*, 523 U.S. at 82 ("[W]e conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII . . . .").

*Bibby*, meanwhile, forthrightly acknowledged that sexual harassment does not require sexual motivation. This Court held that "there are at least three ways by which a plaintiff alleging same-sex sexual harassment might demonstrate that the harassment amounted to discrimination because of sex." *Bibby*, 260 F.3d at 264. Only one of those ways involved proof that "the harasser was motivated by sexual desire." *Id.* A plaintiff may also prove sexual harassment without any evidence of "sexual attraction" by showing that the harasser's motive was "hostility to the presence of one sex in the workplace" or an intent "to punish the victim's noncompliance with

[6] Although it is not entirely clear, the district court appeared to distinguish between "sex" and "gender." *See* Appx.86-87. To the extent that it did so, the court erred, as this Court has "not considered 'sex' and 'gender' to be distinct concepts for Title VII purposes." *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 148 (3d Cir. 1999).

gender stereotypes." *Id.* at 262, 264. To that end, in discussing same-sex "sexual harassment," this Court stated that "if a man is aggressively rude to a woman, disparaging her or sabotaging her work, it is possible to infer that he is acting out of a general hostility to the presence of women in the workplace." *Id*. at 262. In recognizing this longstanding aspect of the Title VII sexual harassment standard, *Bibby* in no way suggested that abuse without sexual advances or sexual desire would constitute discrimination but not sexual harassment.

## II. Cornelius pled a Title VII claim for sexual harassment.

The district court's erroneous belief that Cornelius had to plead sexual advances or other conduct motivated by sexual desire meant it never considered whether Cornelius's complaint, considered under the proper Title VII standard, sets out sufficient facts to plead sexual harassment and invoke the EFASASHA.

Although the court held that Cornelius's "complaint does not include a sexual harassment claim," Appx.87, Cornelius unambiguously named her first claim for relief "CVS's Hostile Work Environment in Violation of Title VII." Appx.13. As this Court regularly recognizes, "a hostile work

environment claim" is a "type of sexual harassment claim."[7] *Kokinchak*, 677 F. App'x at 766; *see also Minarsky v. Susquehanna Cnty.*, 895 F.3d 303, 310 (3d Cir. 2018) (referring to the plaintiff's sexual harassment claim as "a Title VII hostile work environment claim").

The court also failed to set out the elements for Title VII sexual harassment or apply those elements to assess whether the facts that Cornelius alleged constituted sexual harassment. Here, Cornelius's complaint pled a Title VII sexual harassment claim, even as measured against the standard for a Rule 12(b)(6) motion to dismiss that some courts have applied under EFASASHA. *See Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 551 (S.D.N.Y. 2023) (applying Rule 12(b)(6) standard as "the most demanding showing that could be—or that has been—advocated" for in the case). Under that standard, Cornelius's Title VII sexual harassment claim need only be "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). And "the facts alleged must be

[7] The district court cited *Minarsky v. Susquehanna Cnty.*, 895 F.3d 303, 310 (3d Cir. 2018), as it stated that Cornelius was arguing "the elements of gender discrimination," Appx.85 n.1, but *Minarsky* "focus[ed its] analysis on the claim of sexual harassment based on a hostile work environment." 895 F.3d at 310.

taken as true and a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008).

Cornelius alleged sufficient facts for a Title VII sexual harassment claim under that plausibility standard, even assuming, *arguendo*, it applies.[8] S*ee Mandel*, 706 F.3d at 167 ("Title VII prohibits sexual harassment that is sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment." (internal quotation marks omitted)). Courts analyzing sexual harassment claims must consider the effect of multiple acts of harassment. *Harris*, U.S. 510 U.S. at 23; That includes "'[l]ess severe isolated incidents which would not themselves rise to the level of [discrimination].'" *Starnes v. Butler Cnty. Ct. of Common Pleas, 50th Jud. Dist.*, 971 F.3d 416, 428 (3d Cir. 2020) (quoting

[8] The EFASASHA requires only that a plaintiff "*alleg*[*e*] conduct constituting a sexual harassment dispute." 9 U.S.C. § 402(a) (emphasis added). We take no position on what standard applies to determine whether a plaintiff has alleged a "sexual harassment dispute." Because Cornelius's complaint satisfies even the plausibility standard of Rule 12(b)(6), it is unnecessary for this Court to decide whether that standard, or a lesser standard, applies under the EFASASHA.

*Komis v. Sec'y of U.S. Dep't of Labor*, 918 F.3d 289, 293-94 (3d Cir. 2019)); *see also EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 843, 844, 847 (9th Cir. 2005) (reversing summary judgment on hostile work environment claim where male harasser frequently shouted "in a loud and hostile manner," often profanely and in public, and physically intimidated female employees but did not make sexual advances or lewd comments; holding that a reasonable jury could find the "pattern of verbal and physical intimidation . . . sufficiently severe to satisfy the statute"). As this Court has observed, the "analysis must concentrate not on individual incidents, but on the overall scenario." *Andrews*, 895 F.2d at 1484.

Cornelius alleged an overall scenario that constituted sexual harassment. According to her complaint, Cornelius's supervisor targeted her and subjected her to ongoing abuse because of her sex, including sending her rude and disrespectful text messages, treating her like a child, "permitting a male employee to engage in conduct and receive benefits Patel repeatedly denied [Cornelius]," dismissing as "excuses" her explanation that she had left after a ten-hour shift to take care of her husband who had cancer, responding to her disrespectfully, undermining her work, denying her a raise and promotion "based on an alleged

'performance deficiency' while promoting a male employee [with] the same 'performance deficiency,'" and forcing her to work up to 80 hours per week. Appx.6-9 ¶¶ 15-28. Patel's mistreatment of Cornelius "clearly contrast[ed] with his treatment of men," Appx.8 ¶ 21, and Patel even bragged that other female employees had complained about him but that CVS had not subjected him to any consequences. Appx. 10 ¶ 38.

Cornelius described this abuse using the language of a sexual harassment claim, alleging it amounted to "severe and pervasive intentional discrimination 'because of . . . sex.'" Appx.13 ¶ 54; Appx.6 ¶ 15 (alleging Patel "began to target [Cornelius] with severe and pervasive negative treatment, intentionally because she is a woman"); *see also Mandel*, 706 F.3d at 167. The complaint's other allegations—including that Cornelius repeatedly complained to CVS of the mistreatment to no avail—sufficed to plead the remaining elements of a hostile work environment claim. *See generally* Appx.6-13; *Mandel*, 706 F.3d at 167 (setting forth elements). That was enough for Cornelius to assert her rights under the EFASASHA and to avoid arbitration. *See* 9 U.S.C. §§ 401-402.

## CONCLUSION

For these reasons, the judgment of the district court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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January 29, 2024

## CERTIFICATE OF COMPLIANCE

Pursuant to 3d Cir. L.A.R. 28.3(d) & 46.1(e), I certify that, as an attorney representing an agency of the United States, I am not required to be admitted to the bar of this Court. *See* 3d Cir. L.A.R. 28.3, comm. cmt. I also certify that all other attorneys whose names appear on this brief likewise represent an agency of the United States and are also not required to be admitted to the bar of this Court. *See id.*

I certify that this brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a) and 32(a)(7)(B) because it contains 4,459 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Book Antiqua 14 point.

Pursuant to 3d Cir. L.A.R. 31.1(c), I certify that the text of the electronically filed version of this brief is identical to the text of the hard copies of the brief that will be filed with the Court. I further certify pursuant to 3d Cir. L.A.R. 31.1(c) that, before electronic filing with this

Court, I performed a virus check on the electronic version of this brief using Microsoft Defender Antivirus, and that no virus was detected

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## CERTIFICATE OF SERVICE

I certify that on this 29th day of January, 2024, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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