No. 25-2173

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALOMA HOLSTEN,
Plaintiff-Appellee,

v.

BARCLAYS SERVICES LLC,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia at Richmond

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLEE AND IN FAVOR OF AFFIRMANCE

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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 plaintiff argues that the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified at 9 U.S.C. §§ 401-402) ("EFAA"), applies because she has alleged conduct that constitutes—or is related to—sexual harassment under Title VII.

The EEOC has a substantial interest in the proper interpretation of Title VII, including for sexual harassment claims. In addition, as an enforcement agency that litigates sexual harassment claims, the EEOC has a substantial interest in the correct application of the 12(b)(6) plausibility standard to sexual harassment claims. Finally, the EEOC has a substantial interest in a proper interpretation of the EFAA and whether it extends to the plaintiff's *related* sex-discrimination and retaliation claims. Effective enforcement of Title VII depends, in part, on lawsuits brought by individuals such as the plaintiff in this action who believe they have been injured by illegal discrimination. *See EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) (noting that although the Commission is

empowered to bring enforcement actions, Congress also provided for a private right of action and "considered the charging party a 'private attorney general'"). For these reasons, EEOC files this brief. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF THE ISSUES[1]

1. Does the EFAA apply to Title VII sexual harassment claims where the alleged harassing conduct is not sexual in nature?

2. Did the plaintiff in this case plausibly plead a Title VII sexual harassment claim?

3. Do the allegations in the plaintiff's remaining Title VII sex-discrimination and retaliation claims "relat[e] to conduct that is alleged to constitute sexual harassment" within the meaning of the EFAA?

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Plaintiff Aloma Holsten began working for Defendant Barclays Services LLC (Barclays), a financial institution, in 2021 as Director Head of

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[1] The EEOC takes no position on any other issues, including whether Aloma Holsten will ultimately prevail on her harassment claim.

[2] Like the district court, JA106 n.12, we evaluate Holsten's claim under the 12(b)(6) pleading standard, recounting the well-pleaded facts in the light

Collections Strategic Operations. JA6,¶14. She "met or exceeded expectations in this position," earning a promotion in September 2022 to Director Head of Collections and Recovery Operations. JA7,¶15. In this new position, Holsten led a team of approximately one thousand employees in Barclays's national collection and recovery efforts. JA7,¶15.

Chief Operating Officer Christopher Trill became Holsten's supervisor upon her promotion. JA7,¶17. Under Trill's supervision, Holsten's work environment shifted from "positive and supporting" to "hostile" due to Trill's regular "acts of aggression, belittlement, dismissal, and marginalization." JA7,¶¶20-21. Holsten initially attributed the hostility to "poor leadership or management skills." JA7,¶22. But due to a series of events, she started to believe the hostility was because of her sex. JA7,¶22. For instance, in January 2023, Holsten met with Trill to review her prior year's performance evaluation (covering time she was not supervised by Trill), which had an "exceeding expectations" rating. JA7-8,¶23. When Holsten shared ideas for improving business, Trill responded with

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most favorable to Holsten. *See Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (citation omitted).

dismissive comments, including a sarcastic, "what does your husband say about that?" JA7-8,¶23.

Trill's hostile behavior continued throughout 2023. JA8,¶24 According to Holsten, he ignored Holsten's requests for assistance, dismissed her contributions, left her out of business matters, cancelled her regular one-one-one collaboration and training meetings, and insulted her decision-making. JA8-9,¶26. Some of Trill's acts occurred in front of her colleagues. For instance, Trill scolded Holsten in front of male colleagues, told her male colleagues that she does "not push enough," and responded to a group email with a statement implying that Holsten was stupid ("I don't know how much clearer I can be"). JA8-9,¶¶25-26. Holsten states that she never observed Trill treating her male colleagues in a similarly demeaning and aggressive manner. JA8-9,¶¶25-27. Despite feeling distressed due to these actions, Holsten nevertheless continued to meet Barclays's performance expectations. JA7,¶16; JA9,¶28.

In late May, Holsten complained to Barclays's human resources department (HR) of Trill's discriminatory conduct. JA9,¶29. According to Holsten, two other female employees with whom Holsten had worked had

also complained to HR about Trill. JA9,¶30. HR first interviewed Holsten in August—three months after Holsten's initial complaint. JA10,¶36.

When Trill learned of Holsten's complaint, he engaged in a retaliatory "campaign." JA10,¶¶37-39. For instance, he excluded her from important business affairs and meetings and ignored her requests for assistance and collaboration. JA10,¶39. Another high-ranking female colleague informed Holsten that Trill had said he was "going to tear Aloma's world apart" and that he was introducing Holsten to colleagues as "the person who gets my coffee." JA10,¶40.

In November 2023, Trill reduced the number of people who reported directly to Holsten, a move that put her at risk for termination. JA11,¶41. He continued to weaken Holsten's role by transferring her duties to other employees, excluding her from meetings, and criticizing her in correspondence with colleagues and HR. JA11,¶41. Trill also discussed changes to Holsten's team to her peers, but not to Holsten, telling them that "Aloma doesn't know." JA11,¶41. And he refused to promote employees of Holsten's team, in order to "cause friction" within the team. JA11,¶41.

In December 2023, Holsten again complained to HR—even though in the intervening seven months, HR had yet to address her prior complaint.

JA11,¶¶42-43. After another month with no change in Trill's behavior and no update from HR, Holsten filed an administrative charge with the EEOC and a complaint with the Virginia Attorney General's Office of Civil Rights. JA11-12,¶45-46. The next day, Barclays told Holsten that her initial internal complaint was unsubstantiated and closed out. JA12,¶47.

Later that month and now with knowledge of all of Holsten's complaints, Trill assigned Holsten a low performance evaluation and criticized her performance, resulting in her receiving no raise and a reduced bonus. JA10,¶37; JA12,¶48. Trill's only support for his poor evaluation was an act that he erroneously attributed to Holsten and was instead committed by Holsten's male colleague. JA12,¶48.

In March 2024, Barclays told Holsten that it was also closing out her second internal complaint as unsubstantiated. JA12,¶50. Prior to her complaints, Holsten had been on a list of employees eligible for a promotion, which came with a raise. JA12,¶52. In July, Trill informed Holsten that she had been removed from that list. JA12,¶52. The culmination of Trill's behavior and Barclays's lack of response caused Holsten continuous anxiety and emotional distress. JA12,¶49. Barclays

eventually fired Trill—but only after Holsten had worked under his supervision for more than a year. JA12,¶53.

B. District Court's Decision

Holsten filed suit, and the district court denied Barclays's motion to compel arbitration. JA94. The court first addressed the question of what constitutes a "sexual harassment dispute" under the EFAA. It held that Title VII's definition of "sexual harassment" applied, reasoning that this approach finds support in the EFAA's text and that courts have coalesced around this standard. JA102-105. Relying on precedent analyzing Title VII sexual harassment claims, the court then rejected Barclays's argument "that a sexual harassment dispute under the EFAA necessarily requires conduct that is sexually motivated or has a sexual connotation." JA104-106.

The court next determined that Holsten had plausibly alleged a Title VII hostile-work-environment claim. It rejected Barclays's argument that the conduct was not "based on sex" because it was not of a sexual nature. JA109-110. It concluded that Holsten satisfied this element because she alleged "multiple examples of Trill's comments implying negative stereotypes regarding women," that Trill treated her differently than her male colleagues, and that two other female employees complained of Trill's

conduct. JA110. The court also concluded that Holsten had pleaded that the harassment was severe or pervasive. It focused on Trill's supervisor status, as well as the conduct's frequency, humiliating nature, and impact on Holsten's ability to perform her role. JA112-119.

The court held that the EFAA also precluded arbitration for Holsten's sex-discrimination and retaliation claims. JA120-121. It turned to the EFAA's text making arbitration agreements voidable "with respect to a case… [that] relates to the sexual harassment dispute." JA121 (quoting 9 U.S.C. § 402(a)). The court held that the decision to use the word "case" instead of "claim" reflected "the legislature's intent to apply the arbitration exception to all counts of a case, rather than just the sexual harassment dispute …." JA121 (citing *Bray v. Rhythm Mgmt. Grp., LLC*, No. 23-3142, 2024 WL 4278989 (D. Md. Sept. 24, 2024)). Barclays appealed.

ARGUMENT

The EFAA amended the Federal Arbitration Act and states in relevant part that "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 the sexual assault dispute or the sexual harassment dispute." 9 U.S.C. § 402(a). The Title VII standard, which governs whether Holsten plausibly pleaded a sexual harassment dispute, does not require allegations of conduct of a sexual nature. Further, Holsten plausibly pleaded a Title VII sexual harassment claim. Finally, the EFAA applies to Holsten's remaining claims because they are "relat[ed] to" her sexual harassment claim. *Id.*

I. A plaintiff pleading sexual harassment under Title VII need not allege conduct of a sexual nature in order for the EFAA to apply.

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

The Title VII standard governs in this case. The EFAA defines a "sexual harassment dispute" in terms of the law under which suit is filed, 9 U.S.C. § 401(4)—here, Title VII and the Virginia Human Rights Act ("VHRA"). Consequently, satisfying the EFAA's definition of a sexual harassment dispute turns on what constitutes sexual harassment under these statutes. Although the district court was correct in using the Title VII standard in its analysis, it seems to suggest that the Title VII standard *always* governs, regardless of the claims brought by the plaintiffs. JA102-103.

The EFAA, however, does not adopt a specific standard for alleging a sexual harassment dispute. It instead 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. §§ 402(a), 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.*, 685 F. Supp. 3d 173, 182 (S.D.N.Y. 2023) (considering Title VII and New York law). Here, Title VII supplies the standard for Holsten's federal claims and the VHRA for her state claims. But "[b]ecause Title VII and the VHRA use substantially identical language," courts analyze Title VII and VHRA discrimination claims together, and the Title VII standard is thus appropriate for this case. *Washington v. Offender Aid & Restoration of Charlottesville-Albemarle, Inc.*, 677 F. Supp. 3d 383, 394 n.4 (W.D. Va. 2023).

Barclays agrees that "this matter hinges upon the definition of sexual harassment under applicable federal law—Title VII." Barclays's Opening Br. at 19. But in arguing that sexual harassment under Title VII requires "conduct of a sexual nature," it turns not to Title VII but to other federal

statutes. *Id.* at 20-21. The definitions of "sexual harassment" under other statutes are irrelevant where the EFAA makes clear that the analysis is tied to the definition "under applicable Federal … law," 9 U.S.C. § 401(4)—here, Title VII.

B. Title VII does not require a plaintiff to allege conduct of a sexual nature 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). Beginning with *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986), the Supreme Court has held repeatedly that sexual harassment that creates a hostile work environment is a form of prohibited sex discrimination. *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998); *Penn. State Police v. Suders*, 542 U.S. 129, 133 (2004).

Barclays is thus correct that "all sexual harassment is discrimination on the basis of sex, but not all discrimination on the basis of sex is sexual harassment." Opening Br. at 23-26. Sexual harassment claims are indeed a type of Title VII sex-discrimination claim and distinct, for instance, from a

plaintiff's stand-alone sex-discrimination claim that she was transferred to a lesser position because she is a woman. *See Muldrow v. City of St. Louis*, 601 U.S. 346, 354 (2024).

But Barclays is wrong to argue that the distinction rests on whether the conduct was sexual in nature. Rather, the distinction is that a sexual harassment claim arises when the plaintiff experiences harassment on the basis of sex that is "sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment." *Meritor Sav. Bank*, 477 U.S. at 67 (citation modified).[3] In recognizing a sexual harassment hostile-work-environment claim as a type of sex-discrimination claim, the *Meritor* 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

[3] Barclays invokes a line from *Bostock v. Clayton Cnty,* 590 U.S. 644, 669 (2020), stating that "'[s]exual harassment' is conceptually distinct from sex discrimination." Opening Br. at 25. *Bostock*, of course, was not a harassment case. And, in any event, Barclays takes the Court's reference out of context. As explained above and below, in cases involving harassment, the Court made clear that sex-based hostile-work-environment claims—irrespective of whether they involved sexualized conduct—are *one* type of sex-discrimination claim. *See supra* pp.11-12; *infra* pp. 13-14.

intimidation, ridicule, and insult." 477 U.S. at 65. As made clear below at pages 13 to 16, although the facts in *Meritor* concerned sexual advances, the 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*, 510 U.S. at 22 ("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.").

Consistent with Supreme Court precedent, this Court has long recognized that "[a] cause of action … may exist under Title VII if *sexual harassment* creates a hostile work environment or abusive atmosphere." *Smith v. First Union Nat. Bank*, 202 F.3d 234, 241 (4th Cir. 2000) (emphasis added). To establish such a claim, a plaintiff must prove: "(1) that she was harassed 'because of' her 'sex'; (2) that the harassment was unwelcome; (3) that the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) that some basis exists for imputing liability to the employer." *Id.*; *Webster v. Chesterfield Cnty. Sch. Bd.*, 38 F.4th 404, 410 (4th Cir. 2022) (same).

None of these elements require proof of conduct of a sexual nature, sexual advances, or any other evidence that sexual desire motivated the

harasser. As the Supreme Court observed, "harassing conduct need not be motivated by sexual desire." *Oncale*, 523 U.S. at 80. "[S]exual harassment" may occur, for instance, "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." *Id.*

This Court has held similarly. In *Smith*, 202 F.3d at 242, it reversed the district court for "fail[ing] to recognize that a woman's work environment can be hostile even if she is not subjected to sexual advances or propositions." The court held that "[a] work environment consumed by remarks that intimidate, ridicule, and maliciously demean the status of women can create an environment that is as hostile as an environment that contains unwanted sexual advances." *Id. See also Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 192 & n.16 (4th Cir. 2000) (plaintiff need "not establish conduct of a 'sexual nature'" for a "sexual harassment claim due to a hostile or abusive working environment").[4]

[4] *See also Webster*, 38 F.4th at 410 (harasser's conduct need not be "motivated by sexual desire" or "sexual intent" to support a "hostile work environment sexual harassment" claim) (citation modified); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 331 (4th Cir. 2003) (en banc) (similar);

From a litany of demeaning sex-based conduct endured by the plaintiff in *Smith*, Barclays cherry-picks the few that are sexually charged to argue that *Smith* is a "prime example" of the notion that pre-EFAA courts simply did not confront the difference between a "sex-based hostile work environment … claim and those that fell within the narrower category of sexual harassment" because there was no reason to do so. Opening Br. at 23-24. But that difference is of Barclays's own creation. Barclays ignores that *Smith* explicitly used the words "sexual harassment" in naming plaintiff's claim, described the elements of a "sexual harassment claim" (different in no way from a "sex-based hostile work environment claim" as Barclays argues), held that sexual conduct is not required, and then emphasized non-sexually motivated conduct in concluding that Smith had put forth sufficient evidence. *Smith*, 202 F.3d at 241-43, 246-47.[5]

Sowash v. Marshalls of MA, Inc., No. 21-1656, 2022 WL 2256312, at *3 n.4 (4th Cir. June 23, 2022) (similar); *Mentch v. E. Sav. Bank, FSB*, 949 F. Supp. 1236, 1246 (D. Md. 1997) ("To be sure, the phrase 'sexual harassment' can be a misnomer … the touchstone of an actionable Title VII sexual harassment claim is not whether the offensive conduct includes "sexual advances or … other incidents with clearly sexual overtones.") (collecting cases).

[5] Barclays also attempts to distinguish *Smith* by arguing that "sexual advances," which *Smith* held were unnecessary for a hostile-work-environment claim, are distinct from "sexually charged remarks," which

That sexual harassment claims do not require conduct of a sexual nature is commonly understood; indeed, every circuit is in lockstep on this issue. *See, e.g., Xiaoyan Tang v. Citizens Bank, N.A.*, 821 F.3d 206, 216 (1st Cir. 2016) ("Title VII … does not require evidence of overtly sexual conduct for a sexual harassment claim."); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565-66 (6th Cir. 1999) (holding that "conduct underlying a sexual harassment claim need not be overtly sexual in nature" and instructing that the district court 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); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 788 (7th Cir. 2007) (rejecting argument that proving "sexual harassment" requires "conduct of a sexual nature" and recognizing that "[a]lthough sexual harassment is usually thought of in terms of sexual demands, it can include employer action

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were present in *Smith*. Opening Br. at 24 n.4. That is another distinction without a difference. As this Court has noted, the sex-based remarks supported a sexual harassment claim because they "belittled her *because she was a woman*," *Smith*, 202 F.3d at 243 & n.6 (emphasis added)—not solely because of their sexual nature.

based on [sex] but having nothing to do with sexuality.") (citation modified) (collecting cases).[6]

Barclays also misunderstands the EEOC's interpretation of Title VII as requiring overtly sexual advances or conduct. Opening Br. at 20 (quoting EEOC Guidelines on Discrimination Because of Sex). The guidelines, the relevant portion of which was published in 1980, 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). Contrary to Barclays's argument, and as courts have recognized, the guidelines do not limit sexual harassment to only those actions. *See, e.g.*, *Andrews*, 895 F.2d at 1485 n.6; *McKinney*, 765 F.2d at 1138 n.20.

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[6] *See also McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985), *abrogated on other grounds by Stevens v. Dep't of Treasury*, 500 U.S. 1 (1991); *Raniola v. Bratton*, 243 F.3d 610, 617 (2d Cir. 2001); *Andrews*, 895 F.2d at 1482, 1485-86; *Abbt v. City of Hou.*, 28 F.4th 601, 608 (5th Cir. 2022); *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993); *EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.3d 840, 845 (9th Cir. 2005); *Penry v. Fed. Home Loan Bank of Topeka*, 155 F.3d 1257, 1261 (10th Cir. 1998); *Furcron v. Mail Ctrs Plus,* LLC, 843 F.3d 1295, 1305 (11th Cir. 2016).

Barclays also argues that the EFAA's legislative history shows Congress meant "sexual harassment dispute" to be read narrowly. Opening Br. at 14-18. Whatever the merits of relying on such legislative history, Congress intentionally *rejected* a narrow standard like the one that Barclays offers before passing the EFAA. Drafting history shows that Congress considered defining a "sexual harassment dispute" as:

> [A] dispute relating to 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, crafting the EFAA to match the scope of Title VII and other laws prohibiting sexual harassment. *See* 9 U.S.C. § 401(4). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation

omitted). Thus, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983).

Moreover, the "cardinal canon" of statutory interpretation is that Congress says what it means and means what it says, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), such that courts must "apply the statute as it is written," *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 231 (2014) (citation omitted). The words in the EFAA are unambiguous, and thus this court should read "sexual harassment dispute" precisely as "a dispute relating to conduct that is alleged to constitute sexual harassment under … [Title VII]," 9 U.S.C. § 401(4); *Germain*, 503 U.S. at 253-54—it need not look elsewhere for a definition.

Barclays also highlights select post-EFAA district court cases for support. Opening Br. at 27-29. It argues that such cases are relevant because, pre-EFAA, courts were not confronted with distinguishing sexual harassment cases from other sex-discrimination cases. *Id.* at 23. But Barclays's reasoning, and the cases that it relies on—to the extent they even squarely confront the issue at hand—are rebutted by decades of precedent

detailing the specific contours of Title VII sexual harassment cases. *See supra* pp. 12-17.

And more to the point, the relevant analysis is how courts have interpreted "sexual harassment" under Title VII regardless of whether they did so in the context of applying the EFAA. That is because, as argued above at pages 10 to 11, Congress worded the EFAA intentionally to recognize and preserve existing federal, tribal, and state definitions of sexual harassment. *See* 9 U.S.C. § 401(4); *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot*., 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."). In other words, the EFAA's text makes clear that the statute covers sexual harassment disputes as defined by existing law and does not alter that body of law. Thus, the law that controls in this case is the decades-old precedent defining "sexual harassment" under Title VII, not out-of-circuit unpublished district court cases issued since.

II. Holsten plausibly pleaded a Title VII claim for sexual harassment.[7]

To establish a sexual harassment hostile-work-environment claim, as outlined above, a plaintiff must show that (1) the harassment was because of her sex; (2) the harassment was unwelcome; (3) the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) some basis exists for establishing employer liability. *Smith*, 202 F.3d at 241. At the motion-to-dismiss stage, Holsten's claim need only be "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This pleading standard does not require "detailed factual allegations," *id.* at 555, and "the tenet that a court must accept as true all of the allegations contained in a complaint" remains, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Barclays contests only two elements of Holsten's claim: that the harassment was based on sex, and that it was severe or pervasive conduct that a reasonable person would consider objectively hostile or abusive. Opening Br. at 36. Barclays's argument fails because Holsten's complaint "offer[s]

[7] Because, as we explain below at pages 21 to 28, Holsten's complaint satisfies the Rule 12(b)(6) plausibility standard, we do not take a position on whether a more relaxed standard applies in determining whether a plaintiff "*alleg*[*ed*] conduct constituting a sexual harassment dispute." 9 U.S.C. § 402(a) (emphasis added).

facts that plausibly support inferences" establishing both elements. *Laurent-Workman v. Wormuth*, 54 F.4th 201, 210 (4th Cir. 2022) (discussing requirements for pleading a hostile work environment).

"In determining whether offensive conduct" occurred because of sex, "courts must view the behavior in light of the social context surrounding the actions." *Strothers v. City of Laurel*, 895 F.3d 317, 329 (4th Cir. 2018). As explained above at pages 11 to 20, Holsten need not allege that Trill's conduct was sexual in nature. She has instead pleaded examples of Trill routinely treating her differently than men and selectively demeaning her in front of her male colleagues. JA8-9,¶¶25-27. *See Oncale*, 523 U.S. at 80-81 (comparative evidence about how harasser treats members of both sexes would support claim that discrimination occurred because of sex); *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297, 303 (4th Cir. 2019) (assessing differential treatment of female subordinate and male superior in determining whether harassment was based on sex).

Holsten has also alleged that two other female employees filed complaints about Trill. JA9,¶30. *See Strothers*, 895 F.3d at 330 (finding similar accounts by other employees relevant to analysis). And she has alleged instances of Trill making comments, JA8,¶23; JA10,¶40, which

"invoke[] by inference … sex stereotype[s]," *Parker*, 915 F.3d at 303, thus making it further plausible that Trill was "motivated by general hostility to the presence of women in the workplace," *Ocheltree*, 335 F.3d at 332 (quoting *Oncale*, 523 U.S. at 80). In short, taking Holsten's allegations as true and drawing inferences in her favor, *Philips*, 572 F.3d at 180, "the connection between animus and conduct may be inferred from the totality of the circumstances," *Strothers*, 895 F.3d at 330-31.

"Whether the environment is objectively hostile or abusive is 'judged from the perspective of a reasonable person in the plaintiff's position.'" *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (en banc) (quoting *Oncale*, 523 U.S. at 81). "[A]ll the circumstances" are relevant to that determination, including the "severity" and "frequency" "of the discriminatory conduct," "whether it is physically threatening or humiliating[,] … and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. Considering all the circumstances detailed in the complaint, Holsten has "offer[ed] facts that plausibly support inferences that" the conduct she endured was "severe or pervasive enough to make her work environment hostile or abusive." *Laurent-Workman*, 54 F.4th at 210 (citation omitted).

Holsten has alleged that Trill's harassing conduct was frequent. Although a complaint need not cite each specific instance of harassment at the pleading stage, *Miller v. Wash. Workplace, Inc.*, 298 F. Supp. 2d 364, 375 (E.D. Va. 2004), Holsten has nevertheless listed examples of Trill's conduct toward her, as well as alleging that Trill's conduct occurred "on a regular basis," was "a regular occurrence," and "continued through 2023." JA7-9,¶¶21-26. *See Smith*, 202 F.3d at 243 (noting that where the harasser "made many of the remarks at least once a month," he "directed his insults at [plaintiff] on a regular basis"); *Laurent-Workman*, 54 F.4th at 211 (focusing on the "consistency of the harassment" rather than on whether harassment was "daily"). Indeed, the long list of harassing conduct was concentrated in approximately one year—further supporting its frequency. *See Revak v. Miller*, No. 7:18-CV-206-FL, 2020 WL 3036548, at *8 (E.D.N.C. June 5, 2020) (allegations of "approximately eight incidents within a seven-month period" were sufficiently "pervasive").

Moreover, Trill's status as Holsten's supervisor increased the severity of his persistent discriminatory conduct. *Boyer-Liberto*, 786 F.3d at 278. "[A] supervisor's use of [a discriminatory slur] impacts the work environment far more severely than use by co-equals," *id.* (citation omitted), and "a

supervisor's power and authority invests his or her harassing conduct with a particular threatening character," *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 763 (1998); *see also EEOC v. Fairbrook Med. Clinic, P.A.*, 609 F.3d 320, 329 (4th Cir. 2010) (focusing on the "disparity in power between the harasser and the victim" (citation omitted)). Indeed, Trill used his status not only to convey a "threatening character" but also to inflict detrimental changes to Holsten's employment. JA8-12,¶¶26,39-40,48,52.

Holsten also alleged that Trill's harassment was demeaning and humiliating. Two of Trill's comments ("what does your husband say about that" and "[Holsten is] the person who gets my coffee") were, in context, not only based on sex stereotypes but also "designed to demean and humiliate" Holsten. *Fairbrook Med. Clinic*, 609 F.3d at 328. Moreover, Trill regularly leveled criticism, allegedly undeserved, at Holsten in front of her colleagues, adding to the humiliation. *See Franovich v. Hanson*, 687 F. Supp. 3d 670, 686 (D. Md. 2023) (allegations of "fabricated or exaggerated criticisms in group settings" could be "humiliating").

Holsten alleged that Trill's harassment also unreasonably interfered with her work performance. She alleged that Trill's harassment was geared to strip her of her high-ranking role and duties. JA7-10,¶¶21,26,39. *See*

Parker, 915 F.3d at 305 ("harassment interfered with [plaintiff's] work" where plaintiff, among other things, was "excluded from an all-staff meeting," "humiliated in front of coworkers," and "adversely affected in her ability to carry out management responsibility over her subordinates"). Although Holsten was a Director leading a thousand-member team, Trill reduced her in introduction to colleagues as "the person who gets my coffee." JA7,¶15; JA10,¶40. Indeed, Trill declared he was "going to tear Aloma's world apart," JA10,¶40—and he did so. He dismissed her work-related concerns, ignored her requests for collaboration and assistance, diminished her accomplishments, cancelled her meetings, unfairly criticized her in front of colleagues and HR, excluded her from work-related conversations, and refused to promote members of her team to cause friction. JA7-11,¶¶21-27,39-41. He also reduced her direct reports, subjecting her to possible termination; submitted an erroneous evaluation causing her a reduced bonus and no raise; and told her she was no longer eligible for promotion. JA11-12,¶¶41,48,52. Thus, like the plaintiff in *Parker*, Barclays's "entire relationship with [Holsten], as well as [her] employment status, was changed substantially for the worse." 915 F.3d at 305; *see also Strothers*, 895 F.3d at 332 ("[H]eightened scrutiny" and "unfair evaluations"

"were likely to affect the advancement of [plaintiff's] career" and "interfere[] with [her] ability to do her job."); *Lindsay-Felton v. FQSR, LLC*, 352 F. Supp. 3d 597, 605 (E.D. Va. 2018) (fact that harasser "humiliated and undercut [plaintiff] in front of her own store employees that she was responsible for managing on a daily basis," also "impact[ed] her ability to perform her job.").

Finally, Barclays is wrong to argue that Holsten cannot "'bootstrap' the alleged acts of retaliation and disparate treatment to support her hostile work environment claim." Opening Br. at 46 n.16. "[A] discrete discriminatory act may have 'occurred' on one day and thus be actionable, but it also may be part of a separate harm that 'occurs over a series of days or perhaps years.'" *McNeal v. City of Blue Ash*, 117 F.4th 887, 901 (6th Cir. 2024) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002)). In other words, the act "may contribute to different types of harms," simultaneously "caus[ing] a change in the terms or conditions of employment" and, when "deployed strategically as harassment[,] can also add to a climate of hostility that represents a different change in the terms or conditions of the job." *Id.* at 901, 902 n.14. Indeed, this Court has historically recognized such "discrete acts" in its harassment analysis. *See,*

e.g., *Conner*, 227 F.3d at 196 (considering, alongside sexist comments, denial of training and difference in pay and work assignments between female plaintiff and male workers); *Strothers*, 895 F.3d at 332 (considering negative evaluation that put plaintiff at risk of termination). Holsten alleged that Trill imposed acts such as canceling her meetings and removing her promotion potential "as a vehicle to target and belittle" her. *McNeal*, 117 F.4th at 903. They may thus be considered as part of her sexual harassment claim.

III. The EFAA applies to Holsten's sex-discrimination and retaliation claims because they relate to her sexual harassment claim.

The district court denied Barclays's motion to compel arbitration as to Holsten's remaining claims based on the "legislature's choice to use 'case' rather than 'claim.'" JA121; 9 U.S.C. § 402(a) (invalidating arbitration agreements, "with respect to a case … [that] relates to … the sexual harassment dispute."). This Court can affirm the district court using alternative textual grounds.

The EFAA defines a "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) (emphasis

added). The Supreme Court has made clear that the "ordinary meaning" of "relating to" is a "broad one" and "express[es] a broad … purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

In this case, Holsten's sex-discrimination and retaliation claims are premised on much of the same conduct undergirding her sexual harassment claim, and thus clearly "relat[e]" to the "conduct that is alleged to constitute sexual harassment" under Title VII. Because this Court must construe undefined terms in the statute according to their "plain and ordinary meaning," *Matson v. Alarcon*, 651 F.3d 404, 408 (4th Cir. 2011), it should conclude that Holsten's sex-discrimination and retaliation claims are covered under the EFAA.

The Second Circuit has reached the same conclusion. *See Olivieri v. Stifel, Nicolaus & Co.,* 112 F.4th 74 (2d Cir. 2024). It held that "retaliation resulting from a report of sexual harassment is 'relat[ed] to conduct that is alleged to constitute sexual harassment'" and thus the text makes clear that the EFAA applied to the retaliation claim. *Id.* at 92 (quoting 9 U.S.C. § 401(4)). It further reasoned that such a standard aligns with the standard for determining when a plaintiff has satisfied her charge-filing requirement. *Id.* Under that standard, a plaintiff who satisfies the

requirement as to a discrimination claim with the EEOC may also pursue a claim for retaliation where the 'retaliation for reporting discrimination 'is reasonably related to the underlying discrimination.'" *Id.* (quoting *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001)); *see also Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996) (articulating the same standard).

Other district courts have held similarly. *See, e.g.*, *Mulugu v. Duke Univ. Sch. of Med.,* No. 1:23CV957, 2024 WL 3695220, at *27 (M.D.N.C. Aug. 7, 2024) (plaintiff's retaliation claims are "plainly encompassed" in the EFAA's definition of a "sexual harassment dispute") (citation omitted); *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 551 n.13 (S.D.N.Y. 2023) (the EFAA's definition of "sexual harassment dispute" would include "a claim against an employer for retaliating against a plaintiff who had reported sexual harassment."); *Molchanoff v. SOLV Energy, LLC*, No. 23CV653, 2024 WL 899384, at *3 (S.D. Cal. Mar. 1, 2024) (similar).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,149 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I certify that on January 20, 2026, 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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