No. 23-2961

In the United States Court of Appeals

FOR THE THIRD CIRCUIT

MICHELE A. CORNELIUS,

Appellant

v.

CVS PHARMACY INC.; NEW JERSEY CVS PHARMACY, L.L.C.; SHARDUL PATEL

On Appeal from the United States District Court for the District of New Jersey, No. 23-cv-1858 (Hon. Susan D. Wigenton)

BRIEF OF THE RETAIL LITIGATION CENTER AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The Retail Litigation Center and the Chamber of Commerce of the United States of America are not publicly traded corporations. They have no parent corporation, and no publicly held company has 10% or greater ownership of their stock.

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES

TABLE OF CITATIONS
(continued)

Page(s)

STATUTES

TABLE OF CITATIONS
(continued)

Page(s)

RULES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

The Retail Litigation Center, Inc. ("RLC") is the only trade organization solely dedicated to representing the United States retail industry in the courts. The Retail Litigation Center provides courts with the perspective of the retail industry on important legal issues affecting its members, and on potential industry-wide consequences of significant court cases. Since its founding in 2010, the Retail Litigation Center has filed more than 200 amicus briefs on issues of importance to retailers. Its amicus briefs have been favorably cited by multiple courts, including the United States Supreme Court. *See, e.g., South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020); *Chewy, Inc. v. U.S. Dep't of Lab.*, 69 F.4th 773, 777 (11th Cir. 2023). Its member retailers employ millions of workers throughout the United States, provide goods and services to hundreds of millions of consumers, and account for more than a trillion dollars in annual sales.

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[1] All parties have consented to the filing of this brief. *See* FED. R. APP. P. 29(a)(2). No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than amici, their members, or their counsel made a monetary contribution to fund the preparation or submission of this brief.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

* * *

Many of amici's members include agreements to arbitrate in their contractual relationships. In many contexts, arbitration allows parties to resolve disputes promptly and efficiently while avoiding the costs associated with litigation. Amici's members have a strong interest in ensuring that the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 remains the limited carveout to the Federal Arbitration Act ("FAA") that Congress authored and ultimately passed by overwhelming, bipartisan majorities. Extending this new legislation as

Plaintiff and her amici propose would jeopardize the enforceability of arbitration agreements in many circumstances beyond those Congress intended.

SUMMARY OF ARGUMENT

The FAA generally embodies a strong policy in favor of enforcing arbitration agreements according to their terms. In 2021, however, Congress carved out a limited exception to that pro-arbitration policy for disputes involving sexual assault or sexual harassment. 9 U.S.C. § 402 ("Section 402"). This legislation had strong bipartisan support. But key to that support was a recognition that the statute would apply narrowly. It would ensure that claimants alleging sexual assault or sexual harassment could pursue justice in a public forum. But it would not create a massive loophole for the FAA and vitiate arbitration agreements for a wide range of employment disputes.

The district court below correctly recognized that Plaintiff is attempting to avoid arbitration for what is, at best, a thinly pleaded claim of sex discrimination. Even accepted as true, Plaintiff's allegations bear no resemblance to the conduct of sexual assault or sexual harassment addressed in Section 402. This Court should reject attempts to evade

arbitration agreements by artfully pleading sex discrimination claims as "sexual harassment" to try to bring them into the limited FAA exception.

Plaintiff and her amici quote snippets from prior cases to suggest erroneously that the district court characterized sexual harassment too narrowly. In fact, the standards applied throughout the sexual-harassment case law show that the district court's disposition of this case was sound and that the pleadings state at most a garden-variety sex discrimination claim, not a sexual harassment claim. Plaintiff did not allege any episodes of sexually charged actions or of sexual comments sufficiently severe or pervasive to state a claim arguably triggering Section 402.

Allowing conclusory claims like Plaintiff's to avoid arbitration would improperly expand the FAA's sexual harassment exception. Indeed, doing so would threaten the enforceability of arbitration agreements in every cleverly pleaded sex discrimination lawsuit. Congress plainly did not intend Section 402 to have that effect. Amici respectfully ask the Court to confine this new legislation to its intended domain and affirm the district court's judgment.

ARGUMENT

I. Section 402's exception to the FAA was intended to apply to claims arising out of sexual misconduct and does not include sex discrimination claims outside that context.

The FAA generally makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Congress's "preeminent concern" in passing this legislation "was to enforce private agreements into which parties had entered." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Congress desired "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Id.* at 219-20. So, ordinarily, the FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (citation omitted).

In 2021, Congress carved out an exception to that general rule by adding chapter 4 to the FAA. *See* 9 U.S.C. § 2 (providing that the ordinary requirement to enforce arbitration agreements does not apply "as otherwise provided in chapter 4"). This new legislation makes predispute arbitration agreements unenforceable (at the election of the plaintiff) in

relation to alleged "conduct constituting a sexual harassment dispute or sexual assault dispute." *Id.* § 402.

The statute defines "sexual assault dispute" as "a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in [18 U.S.C. § 2246[2]] or similar applicable Tribal or State law, including when the victim lacks capacity to consent." 9 U.S.C. § 401(3). This definition clearly contemplates conduct of a sexual nature.

The term "sexual harassment dispute" is defined differently. It "means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." *Id.* § 401(4). This statutory text represents a deliberate decision by Congress not to broadly exempt all sex *discrimination* claims from the FAA's ordinary rule. Instead, the statute exempts a narrower range of disputes involving alleged sexual assault or sexual harassment. There is no need to speculate about that. The law's main sponsors, Representative Cheri Bustos and Senator Kristen Gillibrand, had proposed legislation in 2017 explicitly including sex discrimination, and it went nowhere. Their proposed

[2] The definitions provision of the "Sexual Abuse" chapter of 18 U.S.C. Part I (Crimes).

Ending Forced Arbitration of Sexual Harassment Act of 2017 would have made predispute arbitration agreements invalid and unenforceable if they "require[d] arbitration of a sex discrimination dispute." S. 2203, 115th Cong. § 2 (2017); H.R. 4570, 115th Cong. § 2 (2017). This never-enacted legislation defined "sex discrimination dispute" using the standards of Title VII. *Id.* Representative Bustos reintroduced legislation using the same definitions in the following Congress—which also failed. H.R. 1443, 116th Cong. § 2 (2019).[3]

Congress took a more targeted approach when it enacted the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, because it was specifically addressing claims over alleged conduct

[3] Moreover, Congress previously enacted legislation curtailing the use of mandatory arbitration agreements across a broader range of disputes—demonstrating its ability to do so when it intended. In the Department of Defense Appropriations Act, 2010, Congress restricted the federal government from awarding contracts to government contractors who seek to require arbitration of "any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention." Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454-55 (2009). *See generally Talhouk v. RMR Grp. LLC*, No. 22-cv-3122, 2023 WL 6192774, at *4-5 (N.D. Ga. Mar. 23, 2023) (discussing case law applying this provision), *report and recommendation adopted*, 2023 WL 6192719 (N.D. Ga. Aug. 15, 2023).

of a sexual nature. The years leading up to this legislation had seen the start of the #MeToo movement and Time's Up campaign, as well as some high-profile examples in which those accused of workplace sexual misconduct had allegedly tried to avoid public scrutiny by invoking nondisclosure agreements and arbitration clauses. *See* Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2655-56 (2019).

The legislative history confirms that the concerns leading to enactment of Section 402 were based on misconduct of a sexual nature—not discrimination on the basis of sex more broadly. Legislators worried that "victims of sexual violence and harassment are often unable to seek justice in a court of law, enforce their rights under state and federal legal protections, or even simply share their experiences." H.R. REP. NO. 117-234, at 3 (2022). The exception was narrowly drafted to govern situations arising in that context.

Congress did not design this legislation to "be the catalyst for destroying predispute arbitration agreements in all employment matters." 168 CONG. REC. S624-01, S625 (daily ed. Feb. 10, 2022) (statement of Sen.

Ernst). Rather, legislators recognized that sexual "[h]arassment and assault allegations are very serious and should stand on their own." *Id.* To give effect to this policy choice, the statute's language "should be narrowly interpreted" and should not be misused "as a mechanism to move employment claims that are unrelated to these important issues out of the current system." *Id.*[4]

II. Pre-enactment changes to the definition of "sexual harassment dispute" were made to *clarify* the scope of the definition, not broaden it.

As the EEOC notes in its amicus brief in this case, the statute's definition of "sexual harassment disputes" marked a change from the definition in the original House version of the 2021 bill, which would have defined "sexual harassment dispute" through five categories—all

[4] The Senate co-sponsors of the legislation agreed that the bill was not intended to widely address allegations unrelated to sexual misconduct. *See* 168 CONG. REC. at S625 (statement of Sen. Graham) ("We do not intend to take unrelated claims out of the contract. What we are preventing here is sexual assault and sexual harassment claims being forced into arbitration, which perpetuates the problem."); *id.* at S627 (statement of Sen. Gillibrand) ("The bill plainly reads, which is very relevant to Senator Ernst's concerns, that only disputes that relate to sexual assault or harassment conduct can escape the forced arbitration clauses.").

explicitly sexual in nature.[5] EEOC Br. 15. The EEOC and Public Justice claim that Congress rejected the original proposal to "broaden[] the definition." *Id.*; Public Justice Br. 5. But that characterization is inaccurate. Their only evidence is a floor statement by Representative Scott, who primarily voiced concern that the proposed legislation, even under the proposed amendment, did not go far enough. 168 CONG. REC. H983, H991 (daily ed. Feb. 7, 2022) (statement of Rep. Scott).[6] The actual sponsor of the amendment described it very differently:

> Madam Speaker, this amendment is really very simple. It changes a somewhat convoluted definition of sexual harassment to the following: "The term 'sexual harassment dispute' means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."

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[5] The earlier definition was as follows: "[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) (as reported by H. Comm. on the Judiciary, Jan. 28, 2022).

[6] Both the EEOC and Public Justice attribute this statement to Representative David Scott of Georgia, but it appears to have been made by Representative Bobby Scott of Virginia.

> Simple, straightforward, understandable. **The issue arose here because there was a question of whether the definition that was contained in this law would supersede Federal, State, or Tribal law; it doesn't. However, this clarifies that, and I would ask my colleagues to support this.**

Id. at H992 (statement of Rep. Buck) (emphasis added). This change thus was an effort to avoid confusion, not to broaden the exception to the FAA.

If anything, the amended definition was an attempt to *narrow* the statute's scope. Legislators described the amendment as an example of "the majority party taking into account the views of the minority party" to build bipartisan consensus. *Id.* (statement of Rep. Griffith); *see also id.* (statement of Rep. Bustos). The legislators pushing for the amendment actually had the opposite concern of Representative Scott. They were worried that the original definition went too far because it "possibly made unenforceable arbitration agreements *going well beyond sexual harassment disputes*." *See id.* (statement of Rep. Bishop) (emphasis added).

The full statutory history shows that Congress's definition of "sexual harassment dispute" did not seek to push the boundaries of sexual harassment law. Just the opposite, Congress wanted to track the

existing boundaries and clarify the limited nature of the Section 402 exception to the FAA's policy favoring arbitration.

III. Labeling a cause of action as "sexual harassment," without pleading facts that state a plausible quid pro quo or hostile work environment claim under Title VII, cannot trigger Section 402's exception to the FAA.

A. The district court properly applied Rule 12(b)(6)'s pleading standard to determine whether Plaintiff brought a hostile work environment claim.

Congress defined "sexual harassment dispute" in terms of whether the "alleged" conduct would "constitute sexual harassment under applicable Federal, Tribal, or State law." 9 U.S.C. § 401(4). The lower courts have reasonably construed this language as restricting the statute to circumstances where the plaintiff has "allege[d] conduct that, taken as true, states a plausible sexual harassment claim." *Yost v. Everyrealm, Inc.*, 657 F. Supp. 3d 563, 584 (S.D.N.Y. 2023); *see also, e.g., Holliday v. Wells Fargo Bank, N.A.*, No. 23-cv-418, 2024 WL 194199, at *5 (S.D. Iowa Jan. 10, 2024) ("To trigger the EFAA, Holliday would have to raise a plausible claim for sexual harassment."); *K.T. v. A Place for Rover*, No. 23-cv-2858, 2023 WL 7167580, at *5 (E.D. Pa. Oct. 31, 2023) ("Plaintiffs do not allege a claim for 'sexual harassment' as the term is defined in the EFAA.").

Plaintiff and her amici do not dispute that it is the responsibility of courts to assess the substantive allegations in a complaint and verify that those allegations plead conduct that would constitute sexual harassment under substantive law. *See* Pl. Br. 20-25; EEOC Br. 8-22 & n.8; Public Justice Br. 6-9. This responsibility helps to prevent Section 402 from undermining the FAA's general pro-arbitration purposes. *Yost*, 657 F. Supp. 3d at 586.

The district court decision's here was a straightforward application of this principle—analyzing whether a sexual harassment claim was stated and, finding it was not, compelling arbitration.

B. Title VII's only possible "sexual harassment dispute" causes of action are "quid pro quo sexual harassment" and "hostile environment sexual harassment."

As the EEOC rightly observes, Title VII does not use the term "sexual harassment." EEOC Br. 9. Indeed, the text of the statute does not provide for a "sexual harassment" cause of action or any "harassment" cause of action at all. *See* 42 U.S.C. § 2000e-2.[7] Rather, courts have

[7] Title VII's cause of action is governed by 42 U.S.C. § 2000e-2, stating: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

identified a sexual harassment claim as a species of sex discrimination that occurs when "sexual misconduct" discriminatorily affects the terms and conditions of employment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

Courts have long held that Title VII's prohibition on sex discrimination includes, among other things, two discrete categories of sexual harassment: "quid pro quo" sexual harassment and "hostile environment" sexual harassment. *See id.* In the former category, the sexual harasser carries out "threats to retaliate against [an employee] if she denied some sexual liberties" through identifiable adverse employment actions. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751 (1998). In the latter category, on the other hand, is sexually demeaning behavior that is sufficiently "severe or pervasive" to implicitly alter the terms and conditions of employment. *Id.* at 752.[8]

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individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[8] The development of the sexual harassment hostile work environment doctrine in Title VII was typically in the context of conduct of a sexual nature. *See Burlington Indus.*, 524 U.S. at 753-54 (a case where

The two categories of "quid pro quo" and "hostile environment" harassment claims are the only two Title VII causes of action generally recognized as "sexual harassment" claims. Thus, these are the only two Title VII actions potentially constituting a "sexual harassment dispute" as defined for purposes of Section 402's exception to the FAA.

C. Plaintiff's Complaint labels the cause of action as "hostile work environment" but fails to plead facts supporting a claim that can survive Rule 12's pleading standards.

Plaintiff does not allege quid pro quo sexual harassment. Rather, her Complaint uses the "hostile work environment" and "severe and pervasive" labels. App. 6, 10-11, 13-14. But once these conclusory labels are removed, as they must be under Rule 12(b)(6), little remains to state any plausible claim for hostile work environment.

As the district court recounted, Plaintiff's factual allegations accuse Defendants of denying a promotion, pay-increase, and certain benefits; disrespectful or rude communications; long hours; and unreasonable

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plaintiff alleged a supervisor made remarks about her breasts, told her wearing shorter skirts would make her job easier when denying permission for something, and made other sexual comments); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (discussing a "sexually objectionable" environment in a case where plaintiff alleged "uninvited and offensive touching" and "lewd remarks").

professional demands—supposedly because Plaintiff is female. App. 82. But even taking these allegations as true for present purposes, the district court properly recognized that they are not sufficient to state a claim for sexual harassment in the form of a hostile work environment, even if they might amount to a different variety of sex discrimination.[9] App. 85-87.

Plaintiff and her amici take issue with some of the district court's description of the difference between sex discrimination and sexual harassment. But they do not and cannot dispute the district court's core point: sex discrimination and sexual harassment under Title VII are not coextensive, and Plaintiff has not come close to pleading the latter. *See, e.g.*, *Friel v. Mnuchin*, 474 F. Supp. 3d 673, 692 (E.D. Pa. 2020) ("Sex discrimination differs from sexual harassment."), *aff'd*, No. 20-2714, 2021 WL 6124314 (3d Cir. Dec. 28, 2021). As the Seventh Circuit has observed, "[s]exual harassment is the form of sex discrimination in the terms or conditions of employment that consists of efforts either by coworkers or supervisors to make the workplace intolerable or at least

[9] Whether the Complaint stated a claim under another Title VII theory is a question for the arbitrator given that Section 402's exception to the FAA does not apply.

severely and discriminatorily uncongenial to women ('hostile work environment' harassment), and also efforts (normally by supervisors) to extract sexual favors by threats or promises ('quid pro quo' harassment)." *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000). "It is a form of, rather than a synonym for, sex discrimination," and it is "remote . . . from a simple refusal to hire women, [or] from holding them to higher standards than their male coworkers." *Id.*

Both Plaintiff and the EEOC try to portray the district court as having adopted an overly restrictive conception of sexual harassment because it identified "unwelcome sexual advances or other verbal or physical contact of a sexual nature" as paradigmatic examples of sexual harassment. App. 86. The district court's phrasing, however, was a reasonable first-cut description of sexual harassment, as the EEOC's own website confirms with its first examples being overtly sexual, stating: "Harassment can include 'sexual harassment' or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature." U.S. Equal Emp't Opportunity Comm'n, *Sexual Harassment*, https://www.eeoc.gov/sexual-harassment (last visited Apr. 3, 2024).

The cases that the EEOC cites on this score do nothing to undermine the district court's bottom line that the Complaint does not plead sexual harassment. Indeed, the differences between the allegations in the EEOC's cited cases and this one merely underscore how far this case is from a sexual harassment dispute. *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1472, 1479 (3d Cir. 1990) (supervisors allegedly tolerated male colleagues' "outrageous" use of obscenity-ridden "name calling" toward the female employees and also tolerated their open, on-the-job display of "lewd . . . pornographic displays" of women; and one of the victims testified that her supervisor had been "'coming on' to her" while she was at work); *Spain v. Gallegos*, 26 F.3d 439, 447 (3d Cir. 1994) (plaintiff was the subject of false rumors that she was having a sexual relationship with [her supervisor] and had gained influence over him as a result of their relationship); *Tang v. Citizens Bank, N.A.*, 821 F.3d 206, 211-12 (1st Cir. 2016) (plaintiff's supervisor allegedly made sexual advances toward her and confronted her with sexually explicit writings and gestures).

Moreover, the EEOC places far more weight on *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 259-60 (3d Cir. 2001), than it

can bear. The EEOC quotes the case to suggest that a man's being "aggressively rude to a woman" might constitute sexual harassment. EEOC Br. 18 (quoting *Bibby*, 260 F.3d at 262). But in that passage, the Court was merely discussing when it is possible to infer that conduct is "because of sex"; it was not attempting to identify when conduct is severe or pervasive enough to alter the terms and conditions of employment. The Supreme Court has explained that "[d]iscourtesy or rudeness should not be confused with . . . harassment." *Faragher*, 524 U.S. at 787 (citation omitted); *see also* U.S. Equal Emp't Opportunity Comm'n, *supra* ("[T]he law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious[.]").

The Complaint does not allege that Plaintiff suffered any sexual epithets, obscenities, advances, or innuendos at all. And even setting aside the lack of any such allegations, the incidents she does describe in the Complaint—even collectively—do not plausibly amount to a severe or pervasive pattern under the case law. The EEOC contends otherwise because the Complaint "us[ed] the language of a sexual harassment claim," including the label "severe and pervasive." EEOC Br. 22. But such "labels and conclusions" cannot carry the day, even at the pleading

stage. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). The EEOC also exaggerates Plaintiff's allegations as establishing "ongoing abuse because of her sex." EEOC Br. 21. The allegations that the EEOC highlights—such as allegedly rude and disrespectful text messages that are not described further, or allowing a male employee to "order[] new shopping carts for the Store," "receiv[e] reimbursement for a vacuum," and "put[] up a display at the Store," *see* App. 8—do not plausibly describe "abuse." At the very most, the Complaint alleges that Plaintiff's supervisor took adverse employment action against her because of alleged animus against women and was occasionally disrespectful. *See* App. 6-7.

Perhaps such allegations suffice to state a claim for sex discrimination. But they do not suffice to state a claim for sexual harassment for purposes of Section 402. *See, e.g.*, *Holliday*, 2024 WL 194199, at *5 ("At the hearing, Holliday suggested she was subjected to sex discrimination in the form of unequal pay. . . . If proven, this might constitute sex discrimination, but it would not constitute sexual harassment.").

CONCLUSION

Mere labels on a cause of action are not enough to trigger Section 402's exception to the FAA. The district court correctly analyzed the Complaint, determined it does not state a claim under Title VII's hostile work environment framework, and properly compelled the case to arbitration, as the FAA requires. The Court should affirm the judgment of the district court.

Dated: April 3, 2024

Respectfully submitted,

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COMBINED CERTIFICATES OF COMPLIANCE

In accordance with Local Appellate Rules 28.3(d) and 46.1(e), I certify that all attorneys whose names appear on this brief are members in good standing of the bar of this Court or have filed an application for admission.

In accordance with Local Appellate Rule 31.1(c), I certify that the texts of the electronic brief and paper copies are identical and that Microsoft Defender Offline scanned the file and did not detect a virus.

In accordance with Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g)(1), I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,182 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the word count of Microsoft Word 365. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in Century Schoolbook 14-point font, a proportionally spaced typeface.

Dated: April 3, 2024

s/ Michael E. Kenneally
MICHAEL E. KENNEALLY

CERTIFICATE OF SERVICE

I certify that, on April 3, 2024, a copy of the foregoing was filed electronically through the appellate CM/ECF system with the Clerk of the Court. All counsel of record in this case are registered CM/ECF users. Pursuant to Local Appellate Rule 31.1, as amended by the April 29, 2013 order, seven copies of this brief were sent to the Clerk of the Court for delivery.

Dated: April 3, 2024

s/ Michael E. Kenneally
MICHAEL E. KENNEALLY