No. 24-2106

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JANE DOE,
Plaintiff-Appellee,

v.

SABER HEALTHCARE GROUP, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Pennsylvania

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 (EEOC) 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, 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) ("EFASASHA"), applies to her case because she has alleged conduct that itself constitutes—or is related to conduct that constitutes—sexual harassment under Title VII. Because EEOC has a substantial interest in the proper interpretation of Title VII, including the standard for sexual harassment under that statute, EEOC files this brief. *See* Fed. R. App. P. 29(a)(2).

STATEMENT OF ISSUES[1]

1. Did the district court correctly conclude that Plaintiff's Title VII sex-based hostile-work-environment claim alleged conduct that constitutes

[1] EEOC takes no position on any other issue in this appeal.

sexual harassment under federal law and thus amounts to a "sexual harassment dispute" under the EFASASHA?

2. Do the allegations pled in Plaintiff's Title VII retaliation claim—namely, that her employer terminated her due to her complaints of sexual harassment—"relat[e] to conduct that is alleged to constitute sexual harassment" within the meaning of the EFASASHA?

STATEMENT OF THE CASE

A. Statement of the Facts[2]

Jane Doe is a person of color, a lesbian woman, and gender non-conforming. App.11-12, ¶¶ 20, 26. She began working as a nursing assistant at Tremont Health & Rehabilitation Center, a nursing home that is affiliated with Saber Healthcare Group, around September 2022.[3] App.11, ¶ 19. Prior to beginning her employment, Doe signed an arbitration agreement with Saber that covered "claims for unlawful retaliation,

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[2] Because the district court applied the motion-to-dismiss standard under Federal Rule of Civil Procedure 12(b)(6), we draw the facts from Doe's complaint. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009) (factual allegations in complaint assumed to be true in evaluating motion to dismiss).

[3] Doe sued several corporate entities, each of which she alleges was her employer. App.6-7, ¶¶ 2-5. We refer to the defendants-appellants collectively as "Saber" throughout this brief.

discrimination and/or harassment," including those brought under Title VII. App.39.

About one month into her employment, Doe's supervisor Ranell (last name unknown) overheard Doe using female gender pronouns when referring to her fiancée. App.11-12, ¶¶ 22-23. Ranell interjected to say, "I don't believe in gay marriage." App.11, ¶ 22. Doe alleges that, after Ranell made this statement, Saber began to "treat[] [her] differently than other similarly situated heterosexual employees" by "cancel[ing] [her] for full-time shifts on multiple occasions without providing an explanation," causing her to lose pay. App.12, ¶ 24.

On December 11, 2022, a nursing home resident hit Doe. App.12, ¶ 26. Doe reported the assault that same day to Ranell, who laughed at her. App.13, ¶ 27. Doe also filed a report with the nursing home administrator, Jackie Robinson, but Robinson "took no action" in response. App.13, ¶ 28. One of Doe's co-workers later told her, "I heard the resident whooped your ass" and "[e]verybody was talking about it." App.13, ¶ 29. A few days after the assault, Saber required Doe to serve the resident a meal tray and, when she did so, the resident commented, "[a] brownie for a brownie." App.13, ¶ 31.

On December 13, 2022, Doe attended a meeting with Robinson during which Doe "brought up her mistreatment at the facility." App.13, ¶ 32. Robinson responded by telling Doe, "[y]ou're going to resign." App.14, ¶ 33. Doe thereafter requested to be scheduled for shifts multiple times in December but "was informed that she was not permitted to pick up shifts." App.14, ¶ 35. It appears from the complaint's allegations that Saber never scheduled Doe for another shift. App.14, ¶¶ 35-36.

Doe filed this lawsuit. She titled the first claim in her complaint "Harassment/Hostile Work Environment in Violation of Title VII," App.10, and alleged in it that she "was subjected to a hostile work environment" based on her "race, sex, sexual orientation, and gender non-conformity." App.11, ¶ 21. She also brought a Title VII retaliation claim, alleging that Saber terminated her in retaliation for her complaints of harassment. App.19-23. She specifically alleged that the EFASASHA applied to her complaint, rendering her arbitration agreement unenforceable. App.8-10. She also brought a Title VII disparate-treatment claim, among others not at issue in this appeal. App.16-19, 24-33.

B. District Court's Decision

Saber moved to dismiss the complaint and compel arbitration. The district court denied the motion, holding that Doe alleged a "sexual harassment dispute" that brought her case within the scope of the EFASASHA. App.70-77.

The court explained that the EFASASHA 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." App.72 (quoting 9 U.S.C. § 401(4)). Here, the court noted, Doe brought claims under Title VII, which prohibits discrimination "because of . . . sex," among other protected characteristics. App.72 (citing 42 U.S.C. § 2000e-2(a)(1)). This prohibition, the court said, protects against "discrimination based on . . . sexual orientation and gender identity" and "requiring people to work in a discriminatorily hostile or abusive environment." App.72-73 (citations omitted). Thus, the court reasoned, a Title VII hostile-work-environment claim alleging harassment based on

sexual orientation or gender identity could qualify as a "sexual harassment dispute" under the EFASASHA.[4] App.72-73.

To so qualify, the court said, Doe's claim "must be sufficiently pled to survive a motion to dismiss under Rule 12(b)(6)." App.64. The court found that Doe met this standard, rejecting Saber's arguments that Doe failed to sufficiently plead (1) intentional discrimination based on sex or (2) severe or pervasive conduct. App.74-77. As to intentional discrimination, the court emphasized that "[t]he incidents alleged by [Doe] all follow her heterosexual supervisor finding out that [Doe] was engaged to a person of the same sex." App.76. Subsequently, Doe "sustained physical abuse from a resident," which "was followed by laughter about the incident by the supervisor, cutting remarks by a co-worker, and indifference from the administrator." App.76. "If '[e]verybody was talking about' the abuse from the resident, as plaintiff's co-worker told her, and laughing about it, as plaintiff observed her supervisor doing, and doing nothing about it, as plaintiff alleges was the administrator's response, then it is plausible," the

[4] The court also concluded, App.70-71, that the resident's assault did not qualify as a "sexual assault dispute" under the EFASASHA because it did not involve a "sexual act" or "sexual contact." *See* 9 U.S.C. § 401(3); 18 U.S.C. § 2246. EEOC takes no position on this issue.

court said, "that plaintiff's sexual orientation and gender identity were the reasons for those reactions." App.76.

As to severity or pervasiveness, the court noted that this inquiry required examining "the totality of the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" App.75 (quoting *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 168 (3d Cir. 2013)). Here, the court said, Doe had "sufficiently pled that the harassment was severe or pervasive to survive a motion to dismiss" by alleging she sustained physical abuse and later a racist remark from a resident and was subjected to laughter, indifference, and intimidation from supervisors after she complained. App.76-77.

ARGUMENT

I. Doe's Title VII sex-based hostile-work-environment claim contains allegations that amount to a "sexual harassment dispute" under the EFASASHA.

A. Allegations of harassment based on sexual orientation or gender identity can constitute an EFASASHA "sexual harassment dispute."

The district court held, and Saber appears to agree, that a Title VII hostile-work-environment claim alleging harassment based on sexual orientation or gender identity can invoke the EFASASHA. App.72-74; Saber Br. 24-25 (acknowledging that sex-based hostile-work-environment claim could invoke the EFASASHA but arguing that Doe's claim rested on conclusory allegations). That holding was correct.

The EFASASHA allows a plaintiff alleging a "sexual assault dispute" or a "sexual harassment dispute" to decline arbitration.[5] 9 U.S.C. § 402(a). The statute defines a "sexual harassment dispute" as "a dispute relating to

[5] If the EFASASHA applies, it renders an arbitration agreement invalid with respect to the entire case relating to the sexual harassment dispute. *See* 9 U.S.C. § 402(a) ("[N]o 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 harassment dispute." (emphasis added)); *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 558 (S.D.N.Y. 2023) (explaining that "[t]his text is clear, unambiguous, and decisive" in "key[ing] the scope of the invalidation of the arbitration clause to the entire 'case' relating to the sexual harassment dispute").

conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." *Id.* § 401(4). Whether Doe's first cause of action for harassment constitutes a "sexual harassment dispute" under the EFASASHA thus depends on whether the conduct described in those allegations amounts to "sexual harassment" under federal law.

Here, Doe alleged that Saber violated Title VII by fostering a hostile work environment based on her sex. A hostile work environment is a recognized theory of sexual harassment under Title VII. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986) (a plaintiff seeking relief against an employer for sexual harassment can proceed under a hostile-work-environment theory); *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." (alteration in original) (internal quotation marks omitted)).

Sex-based harassment includes harassment based on sexual orientation or gender identity. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 683 (2020) (discharging an employee because of sexual orientation or gender identity is unlawful sex discrimination that violates Title VII); *Doe v. City of Detroit*, 3 F.4th 294, 300 n.1 (6th Cir. 2021) (relying on *Bostock* to conclude

that "[h]arassment on the basis of transgender identity is sex discrimination under Title VII"); *Michael v. Bravo Brio Rests. LLC*, No. 23-cv-3691, 2024 WL 2923591, at *6 (D.N.J. June 10, 2024) (hostile-work-environment claim alleging harassment based on transgender identity qualified as a "sexual harassment dispute" under the EFASASHA); EEOC Enforcement Guidance on Harassment in the Workplace, No. 915.064, § II.A.5.c n.37 (Apr. 29, 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace ("EEOC Harassment Guidance") (while "*Bostock* itself concerned allegations of discriminatory discharge, . . . the Supreme Court's reasoning . . . about the nature of discrimination based on sex logically extends to claims of harassment").[6]

Thus, as the district court recognized, App.72-73, allegations of harassment based on sexual orientation and gender identity can amount to a "sexual harassment dispute" under the EFASASHA.

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[6] A plaintiff need not allege sexual advances, overtly sexual words or actions, or any other evidence that sexual desire motivated the harasser to establish a sex-based hostile-work-environment claim. *See Andrews v. City of Phila.*, 895 F.2d 1469, 1485 (3d Cir. 1990) (district court "too narrowly construed what type of conduct can constitute sexual harassment" when it emphasized "the lack of sexual advances, innuendo, or contact"), *superseded in part on other grounds by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072.

B. Doe plausibly alleged a sex-based hostile-work-environment claim.

The contested question in this case is whether Doe plausibly alleged conduct that amounts to sexual harassment under Title VII. The district court correctly held that she did. App.72-77.

The EFASASHA requires that a plaintiff "alleg[e] conduct constituting a sexual harassment dispute." 9 U.S.C. § 402(a). This Court has not decided whether a plaintiff must plausibly allege a sexual harassment dispute under Rule 12(b)(6) principles, or whether a different, more permissive pleading standard governs invocation of the EFASASHA. *See generally Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 551 (S.D.N.Y. 2023) (noting dispute regarding whether Rule 12(b)(6) applies or whether allegations must merely be "not sanctionably frivolous" to invoke the EFASASHA). Assuming, as the parties do, that the EFASASHA and Rule 12(b)(6)'s pleading requirements are coextensive, Doe plausibly alleged a sex-based hostile work environment and therefore necessarily satisfied § 402(a).[7] *Id.* at 551 (applying Rule 12(b)(6) standards as "the most

[7] Because Doe's complaint satisfies even the plausibility standard of Rule 12(b)(6), it is unnecessary for this Court to decide whether the Rule 12(b)(6) standard, or a lesser standard, applies in determining whether a plaintiff

demanding showing that could be—or that has been—advocated [for]" in the case).

To succeed on a sex-based hostile-work-environment claim, a plaintiff must establish: "1) the employee suffered intentional discrimination because of his/her sex, 2) the discrimination was severe or 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*, 706 F.3d at 167. Under Rule 12(b)(6), Doe's Title VII hostile-work-environment 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).

Here, Saber argues that Doe failed to plausibly plead (1) intentional discrimination based on sex; (2) severe or pervasive conduct; and (3) a basis for employer liability. Saber is incorrect as to all three points.

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has "alleg[ed]" conduct constituting a sexual harassment dispute. 9 U.S.C. § 402(a). EEOC therefore takes no position on the issue.

1. Doe plausibly pled intentional discrimination based on sex.

Doe sufficiently pled intentional discrimination based on her sex (here, her sexual orientation and/or gender non-conformity). As the district court pointed out, Doe's complaint recounted a series of incidents that "all follow[ed] her heterosexual supervisor finding out that [Doe] was engaged to a person of the same sex" and expressing disapproval of same-sex marriage. App.76. Doe subsequently "sustained physical abuse from a resident" who "then also directed a racial slur at [her] two days later." App.76. She experienced "laughter about the incident" from the same supervisor who disparaged same-sex marriage, as well as "cutting remarks by a co-worker, and indifference from the [nursing home] administrator." App.76. As the district court explained, "[i]f 'everybody was talking about' the abuse from the resident, as plaintiff's co-worker told her, and laughing about it, as plaintiff observed her supervisor doing, and doing nothing about it, as plaintiff alleges was the administrator's response, then it is plausible that plaintiff's sexual orientation and gender identity were the reasons for those reactions and created the allegedly hostile environment." App.76.

Saber attacks this conclusion by segmenting Doe's allegations into isolated incidents and dismissing those that are not facially discriminatory. Specifically, Saber asserts that Doe's allegations related to shift-scheduling and the assault by the resident do not "on their face" relate to her sexual orientation or gender non-conformity and that she cannot "bootstrap [these] facially neutral allegations . . . into her harassment claim." Saber Br. 29, 33, 36. But this Court has "deemed it improper to isolate incidents of facially neutral harassment and conclude, one by one, that each lacks the required discriminatory animus." *Jensen v. Potter*, 435 F.3d 444, 450 (3d Cir. 2006) (Alito, J.), *overruled in part on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Instead, "the advent of more sophisticated and subtle forms of discrimination requires that [courts] analyze the aggregate effect of all evidence and reasonable inferences therefrom, including those concerning incidents of facially neutral mistreatment." *Cardenas v. Massey*, 269 F.3d 251, 261 (3d Cir. 2001), *overruled in part on other grounds by Burlington N.*, 548 U.S. 53; EEOC Harassment Guidance, § II.B.5 (cautioning that "[f]acially neutral conduct . . . should not be separated from facially discriminatory conduct and then discounted as non-discriminatory").

Indeed, Saber's argument illustrates the pitfalls of this acontextual approach. For example, while Doe's allegations about shift-scheduling may be facially neutral when viewed in isolation, the full context of Doe's allegations paints a different picture. Doe alleges that Saber began scheduling her less frequently than heterosexual employees shortly after her supervisor learned of her sexual orientation. App.12, ¶¶ 24-25. Saber then stopped scheduling her for all shifts entirely—effectively terminating her—after she reported her mistreatment at the facility to the nursing home administrator. App.14, ¶ 35. These are hardly the sort of isolated "scheduling concerns," Saber Br. 37, that have no plausible connection to Doe's sexual orientation or gender identity.

Saber also argues that the assault by the resident has "no connection" to Doe's sexual orientation or gender identity. Saber Br. 36. But this argument misunderstands the nature of Doe's allegations. As the district court pointed out, the thrust of Doe's harassment claim rests not on the assault itself but instead on "[t]he *responses* by [Saber's] employees," namely, the "laughter," "cutting remarks," "indifference," and "intimidation" from her co-worker and supervisors, all of which followed the initial incident where Doe's supervisor explicitly and publicly

disapproved of same-sex marriage. App.76. Saber's argument also ignores that the supervisor who laughed at Doe and ignored her complaint regarding the assault was the same supervisor who made the facially discriminatory comment about her sexual orientation in the first place. App.11, 13, ¶¶ 22, 27; *see Rasmy v. Marriott Int'l, Inc.*, 952 F.3d 379, 388 (2d Cir. 2020) ("[W]hen the same individuals engage in some harassment that is explicitly discriminatory and some that is not, the entire course of conduct is relevant to a hostile work environment claim."). Saber's myopic focus on the purportedly facially neutral nature of the assault itself thus misses the larger context of Doe's allegations.

2. Doe sufficiently pled severe or pervasive harassment.

Doe plausibly alleged a course of intentional discrimination that was threatening, humiliating, and interfered with her ability to do her job. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). This course of conduct, which all took place within roughly a two-month period, included her supervisor's disparaging comment about same-sex marriage; laughter, mockery, indifference, and intimidation after she reported the assault by the resident; and ultimately being forced out of her job entirely when Saber

"informed [her] that she was not permitted to pick up shifts." App. 11, 13-14, ¶¶ 22, 27-29, 33, 35.

Saber resists this conclusion by again disaggregating Doe's allegations into "separate, discrete, and limited" incidents and characterizing each as insufficiently severe or pervasive when viewed in isolation. Saber Br. 40. But this Court has cautioned that the "analysis must concentrate not on individual incidents, but on the overall scenario." *Andrews v. City of Phila.*, 895 F.2d 1469, 1484 (3d Cir. 1990), *superseded in part on other grounds by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072; *see also Starnes v. Butler Cnty. Ct. of Common Pleas*, 971 F.3d 416, 428 (3d Cir. 2020) (courts must consider "[l]ess severe isolated incidents which would not themselves rise to the level of [discrimination]" (second alteration in original) (citation omitted)); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 149 (3d Cir. 1999) (rejecting employer's "attempt[] to disaggregate the various allegedly discriminatory acts" and "to cast doubt on each one"). Here, Doe plausibly alleged an overall scenario that constituted sexual harassment.

To the extent Saber argues that this Court must disregard independently actionable "factual allegations supporting Doe's [disparate-

treatment] discrimination claim" when evaluating severity or pervasiveness—such as Doe's allegations that Saber effectively terminated her by refusing to schedule her for shifts—that is incorrect. Saber Br. 31-32. Discriminatory conduct that might be independently actionable as part of a disparate-treatment claim can also support a hostile-work-environment claim. The Supreme Court has suggested as much. *See Green v. Brennan*, 578 U.S. 547, 557 (2016) (hostile-work-environment claim "includes every act composing that claim, *whether those acts are independently actionable or not*" (emphasis added) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115-21 (2002))). This Court has also held (albeit in an unpublished opinion) that independently actionable discriminatory acts can comprise part of a hostile-work-environment claim. *See Stucke v. City of Phila.*, 685 F. App'x 150, 153 (3d Cir. 2017) (district court erred by "view[ing] [plaintiff's] shift work denials and discipline as discrete acts of disparate treatment that could not be considered for the purposes of a hostile work environment claim").[8]

[8] This Court in *O'Connor v. City of Newark*, 440 F.3d 125 (3d Cir. 2006) (section 1983 case), noted a "bright-line distinction between discrete acts, which are individually actionable, and acts which are not individually actionable but may be aggregated to make out a hostile work environment

Multiple other circuits are in accord. *E.g.*, *McNeal v. City of Blue Ash*, --F.4th--, 2024 WL 4262532, at *10-11 (6th Cir. Sept. 23, 2024); *King v. Aramark Servs. Inc.*, 96 F.4th 546, 560-61 (2d Cir. 2024); *Hambrick v. Kijakazi*, 79 F.4th 835, 842 (7th Cir. 2023); *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 222-23 (4th Cir. 2016); *Baird v. Gotbaum*, 662 F.3d 1246, 1252 (D.C. Cir. 2011); *Chambless v. La.-Pac. Corp.*, 481 F.3d 1345, 1350 (11th Cir. 2007). And "[t]hat conclusion makes good sense. Whether a given act contributes to a hostile work environment does not turn on whether that act might support a separate claim." *McNeal*, 2024 WL 4262532, at *11. Saber's contrary district-court cases predate (or rely on cases that predate) *Green* and *Stucke* and are thus unpersuasive. Saber Br. 31-33 (citing, *inter alia*, *Parker v. State of Del., Dep't of Pub. Safety*, 11 F. Supp. 2d 467 (D. Del. 1998); *Helvy v. Allegheny Cnty.*, No. 2:14-cv-1686, 2015 WL 672262 (W.D. Pa. Feb. 17, 2015); *Lampkins v. Mitra QSR KNE, LLC*, 383 F. Supp. 3d 315 (D. Del. 2019) (relying on *Parker*)). Thus, there is no basis when evaluating severity or pervasiveness

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claim," *id.* at 127. But this distinction, as *Stucke* explained, "exists primarily for statute of limitations purposes" and is "inapposite" where, as here, "the question is not the timeliness of the plaintiff's complaint but whether those acts complained of can, as a matter of law, rise to the level of creating a hostile work environment." 685 F. App'x at 153-54.

to exclude discriminatory conduct that could potentially be independently actionable. When properly "looking at all the circumstances," *Harris*, 510 U.S. at 23, Doe plausibly alleged a course of harassing conduct that was severe or pervasive.

3. Doe plausibly pled a basis for employer liability.

Saber argues that Doe failed to allege facts to support employer liability. Saber Br. 44-47. Saber, however, never presented this argument to the district court, and it is therefore forfeited. *See In re Niaspan Antitrust Litig.*, 67 F.4th 118, 135 (3d Cir. 2023).

In any event, this argument is meritless. Saber incorrectly suggests that Doe seeks to hold the company liable only for "conduct by . . . coworkers and the resident." Saber Br. 44. But Doe complains primarily about *supervisor* conduct. She alleges that her supervisor Ranell made a disparaging comment about same-sex marriage and then laughed at Doe when she reported the assault by the resident. App.11, 13, ¶¶ 22, 27. And she alleges that the nursing home administrator responded to Doe's complaints of mistreatment by pressuring Doe to resign, after which Saber refused to schedule Doe for further shifts. App.14, ¶¶ 33, 35. Saber fails to explain why it would not be vicariously liable for this supervisor conduct

under established employer-liability principles. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

To the extent Doe's harassment claim also rests on discriminatory conduct by non-supervisors, she has still plausibly pled facts supporting employer liability. An employer is liable for non-supervisor conduct if the employer was negligent in that it failed to act reasonably to prevent harassment or to take reasonable corrective action in response to harassment of which it was or should have been aware.[9] *See Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 104-05 (3d Cir. 2009). Here, Doe plausibly pled this basis for employer liability by alleging that she made Saber aware of her mistreatment at the facility and that it took no corrective action. App.13-14, ¶¶ 27-33. After Doe complained, Saber subjected her to further harassment by pressuring her to resign and refusing to schedule her for further shifts. App.14, ¶¶ 33, 35; *see* Saber Br.

[9] Any suggestion by Saber that employers cannot be liable for third-party harassment is incorrect. Saber Br. 45-46; *see EEOC v. Vill. at Hamilton Pointe LLC*, 102 F.4th 387, 403 (7th Cir. 2024) ("An employer may be liable for a hostile work environment originating from the harassing conduct of third parties, including the conduct of nursing home residents." (citation omitted)); *Johnson v. Bally's Atl. City*, 147 F. App'x 284, 286 (3d Cir. 2005) (per curiam) (applying negligence standard to third-party harassment).

45 (asserting, incorrectly, that Doe experienced no "further . . . harassment" after reporting mistreatment). And, even if Doe had not experienced further harassment after complaining, "an employer who takes no action in response to a complaint of harassment may not be shielded from liability by the fact that the harassment 'fortuitously stops.'" EEOC Harassment Guidance, § IV.C.3.b.ii(b) & n.356 (quoting *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999)). In sum, Saber's arguments about employer liability are both forfeited and unpersuasive.

II. The conduct described in Doe's retaliation claim falls within the scope of the EFASASHA.

Doe's retaliation claim is also independently sufficient to invoke the EFASASHA and avoid arbitration of the claims in her complaint. As noted, the EFASASHA 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). Although this Court has not addressed the issue, the Second Circuit has held that "retaliation resulting from a report of sexual harassment is 'relat[ed] to conduct that is alleged to constitute sexual harassment'" within the meaning of the EFASASHA. *Olivieri v. Stifel,*

Nicolaus & Co., 112 F.4th 74, 92 (2d Cir. 2024) (alteration in original) (quoting 9 U.S.C. § 401(4)); *see also Johnson*, 657 F. Supp. 3d at 551 n.13 (listing "a lawsuit bringing a claim against an employer for retaliating against a plaintiff who had reported sexual harassment" as an example of a dispute "relating to conduct that is alleged to constitute sexual harassment" under the EFASASHA); *Molchanoff v. SOLV Energy, LLC*, No. 23-cv-653, 2024 WL 899384, at *3 (S.D. Cal. Mar. 1, 2024) (retaliation claim fell under the EFASASHA where plaintiff alleged that company "denied her application for employment in retaliation for lodging a complaint of sexual assault and harassment"); 168 Cong. Rec. H983-09, H992 (daily ed. Feb. 7, 2022) (statement of Rep. Jerrold Nadler) (definition of "sexual harassment dispute" would "include retaliation or any other misconduct that gives rise to the underlying claim alleging a violation of these laws"). Here, Doe alleged that Saber retaliated against her for complaining of sexual harassment, App.19-23, bringing her retaliation claim within the scope of the EFASASHA.[10]

[10] Even if the conduct described in Doe's retaliation claim did not itself qualify as a "sexual harassment dispute," the arbitration agreement would still be invalid with respect to the retaliation claim because that claim is

While Doe's complaints regarding harassment must be based on a reasonable, good-faith belief that the conduct she opposed violates Title VII in order to qualify as protected activity, *see Moore v. City of Phila.*, 461 F.3d 331, 341 (3d Cir. 2006), she satisfies this standard by plausibly pleading that the conduct she opposed constituted an actionable hostile work environment. Moreover, even if the opposed conduct fell short of an actionable hostile work environment, the opposition would still be protected activity because Doe reasonably perceived the conduct to violate Title VII. *See, e.g.*, *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 866 (3d Cir. 1990) (sustaining analogous state-law retaliation claim because, although there was "not enough evidence that defendants' behavior constituted sexual harassment," plaintiff "reasonably believed that she had a sexual harassment claim"); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 282 (4th Cir. 2015) (en banc) (holding that "an employee is protected from retaliation when she opposes a hostile work environment that, although not fully formed, is in progress"); *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 469-70 (6th Cir. 2012) (complaints of sexual harassment

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part of the "case" relating to the sexual harassment dispute. 9 U.S.C. § 402(a). *See supra* p.8 n.5.

were protected opposition even though there was insufficient evidence to prove the alleged harassment was based on sex because plaintiff "could have reasonably believed he was sexually harassed"). Thus, the conduct described in Doe's retaliation claim falls under the EFASASHA.

CONCLUSION

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

Respectfully submitted,

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October 15, 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)(5) and 32(a)(7)(B)(i) because it contains 4,810 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 3d Cir. L.A.R. 29.1(b). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word for Office 365 ProPlus in Book Antiqua 14-point font, a proportionally spaced typeface.

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, prior to 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

On October 15, 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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