

GERALDINE RIVERA-SANTANA, Plaintiff/Appellant, vs. CJF SHIPPING, L.L.C., JULIE BATISTA, AND MARIA SANCHEZ, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities); and JOHN DOES 1-5 (fictitious names describing presently unidentified individuals), Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001568-24 TEAM 04 On Appeal From: Superior Court of New Jersey Law Division – Essex County Docket No. ESX-L-5834-24 Sat Below: Honorable Aldo J. Russo, J.S.C
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**BRIEF OF PLAINTIFF/APPELLANT
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The Honorable Aldo J. Russo, J.S.C.’s December 17, 2024, Order Granting Defendants’ Motion to Dismiss and Compel to Arbitration as to Counts I-III of Plaintiff’s ComplaintPa000487

The Honorable Aldo J. Russo, J.S.C.’s December 17, 2024, Statement of Reasons on the Record Granting Defendants’ Motion to Dismiss and Compel to Arbitration as to Counts I-III of Plaintiff’s Complaint.....2T3-1-2T8-23

I. PRELIMINARY STATEMENT

The central issue on appeal is whether the Trial Court erred in compelling Plaintiff Geraldine Rivera-Santana's pregnancy discrimination claims to arbitration while allowing her sexual harassment claim to remain in Essex County Superior Court. Plaintiff contends the Trial Court's decision was fundamentally flawed, as it solely relied on outdated provisions of the Federal Arbitration Act ("FAA") while disregarding the clear mandate of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA"), which was enacted on March 3, 2022. By failing to properly apply the EFAA to this case, the Trial Court misinterpreted both the evolving legal landscape and the Plaintiff's statutory rights, leading to an unjust outcome. This oversight undermines the intended protections of the EFAA and the Plaintiff's right to seek justice outside the confines of forced arbitration.

The EFAA prohibits the enforcement of pre-dispute arbitration agreements in cases involving sexual harassment or sexual assault under federal, tribal, or state law. Specifically, it renders such agreements invalid for cases that "relate to" sexual harassment disputes. This language — "relating to" — is extraordinarily broad under New Jersey and Federal law. It is also the exact same language routinely used in the arbitration context to sweep up all claims related to a person's employment in an arbitration agreement. Because Plaintiff's

claims for sexual harassment, pregnancy discrimination, and gender discrimination "relate to" one another, the EFAA applies to her entire case. Therefore, Plaintiff contends all of her claims should remain in the Essex County Superior Court, rather than dividing them up between arbitration and State Court.

On December 17, 2024, the Trial Court dismissed the pregnancy discrimination, hostile work environment, retaliation, and wrongful termination claims, compelling them to arbitration, while leaving the sexual harassment and gender discrimination claims in the Essex County Superior Court. This ruling was in error because it failed to properly consider the EFAA's clear language, which prohibits such separation. By distinguishing between sexual harassment and the other claims—despite the clear overlap—the Trial Court disregarded the legislative intent behind the EFAA, which was designed to ensure that cases involving sexual harassment could not be subjected to arbitration, even if related claims were present.

Federal case law supports Plaintiff's position that her entire case should remain in the New Jersey Superior Court. Since the enactment of the EFAA, courts have consistently held that arbitration cannot be compelled when sexual harassment is part of a broader claim. Several cases have reinforced that arbitration is not appropriate when the claim for sexual harassment is

inseparable from related claims. Given this, Plaintiff respectfully requests that the Appellate Division reverse the Trial Court's December 17, 2024, decision. All of Plaintiff's claims, including her pregnancy discrimination, hostile work environment, retaliation, and wrongful termination claims under the NJLAD should be reinstated and remain in the Essex County Superior Court, as they are closely connected and cannot be arbitrated separately under the EFAA.

II. PROCEDURAL HISTORY (Pa000001-Pa000234; Pa000485-Pa000486)¹

This is an appeal from an Order of the Trial Court below dated December 17, 2024, granting in part Defendants CJF Shipping, LLC, Julie Batista, and Maria Sanchez's Motion to Dismiss Plaintiff's First Amended Complaint ("FAC") and Compel Arbitration. (Pa000485-Pa000486). The Trial Court dismissed and compelled to arbitration Plaintiff's NJLAD-based claims of pregnancy discrimination, retaliation, and failure to accommodate and engage in the interactive process. (Pa000485-Pa000486). Plaintiff's claims of sexual harassment remain pending in Essex County Superior Court under Docket No. ESX-L-5834-24.

In her Complaint, Plaintiff alleges violations of the NJLAD, specifically: (1) discrimination, hostile work environment, and wrongful termination of the

¹ Pursuant to R. 2:6-8, citations to Plaintiff's Appendix will be referred to as "Pa."

basis of pregnancy; (2) retaliation/improper reprisal; and (3) pregnancy discrimination: failure to accommodate and failure to engage in the interactive process. (Pa000001-Pa000066). Upon learning additional information surrounding Plaintiff's claims—and before Defendants filed a responsive pleading—on September 16, 2024, Plaintiff filed her FAC with additional factual allegations involving sexual harassment, gender discrimination, and hostile work environment under the NJLAD. (Pa000067-Pa000091). The FAC articulated: Count I as Discrimination, Hostile Work Environment, and Wrongful Termination on the Basis of Pregnancy; Count II as Retaliation/Improper Reprisal; Count III as Pregnancy Discrimination: Failure to Accommodate and Failure to Engage in the Interactive Process; and Count IV as Sexual Harassment, Gender Discrimination, and Hostile Work Environment. (Pa000067-Pa000091).

In September of 2024, Plaintiff's counsel informed Defendants' counsel of their intention to file the FAC alleging claims of sexual harassment. On October 21, 2024, Defendants filed a Motion to Dismiss Count IV of Plaintiff's FAC and compel the remaining pregnancy-related counts to arbitration.

(Pa000096-Pa000234).² On November 15, 2024, counsel for Plaintiff and Defendants appeared before the Trial Court for oral argument.³ On December 17, 2024, the Trial Court dismissed without prejudice and compelled to arbitration Counts I through III of Plaintiff's Complaint and denied Defendants' Motion to Dismiss Count IV of Plaintiff's Complaint alleging sexual harassment and gender discrimination. (Pa000485-Pa000486).⁴ Accordingly, Plaintiff's claims for sexual harassment remain in Essex County, while all her other claims are proceeding in arbitration.

III. STATEMENT OF FACTS (Pa000071-Pa000078)

A. Plaintiff Was Subject to Sexual Harassment in Defendants' Workplace. (Pa000071-Pa000072).

The FAC alleges Plaintiff commenced her employment with Defendants as a Driver on December 9, 2021. (Pa000071). From the outset of Plaintiff's employment with Defendants, she was subjected to sexual harassment by her

² Pursuant to R. 2:6-1(a)(2), the briefing submitted to the Trial Court in connection with Defendants' Motion to Dismiss is included in Plaintiff's Appendix as the contents of the briefing is referred to in the December 17, 2024, decision of the Trial Court and the question of whether an issue was raised in the Trial Court is germane to the appeal.

³ The transcript of the November 15, 2024, oral argument is hereinafter referred to as "1T."

⁴ The transcript of the December 17, 2024, Trial Court Decision is hereinafter referred to as "2T."

coworkers. (Pa000071). As a Driver, Plaintiff, along with the other Drivers employed by Defendants, were directed by Defendants to gather each morning to receive the routes they would be driving that day. (Pa000071). Each morning, while gathered with her coworkers, Plaintiff was forced to endure the perverse commentary of her male coworkers. (Pa000071). More specifically, Plaintiff's male coworkers made statements such as: "She has a big ass with nice thighs;" "I want to hit that;" and "Nice titties, they are perky." (Pa000071).

It is important to emphasize these comments were made to Plaintiff, about Plaintiff, and about other female employees in Defendants' workplace. (Pa000071). Further, it is abundantly clear these comments were made to and around Plaintiff because she was a female. This commentary was unsolicited, unwanted, and fundamentally changed the terms and conditions of Plaintiff's employment. Needless to say, the shameless and relentless commentary made Plaintiff extremely uncomfortable. (Pa000072). As a result, Plaintiff was compelled by the relentless sexual harassment and gender discrimination to begin removing herself from the group meetings. (Pa000072).

B. Plaintiff Was Forced to Endure Discrimination, a Hostile Work Environment, and Retaliation by Defendants. (Pa000072-Pa000075).

As a Driver, Plaintiff was responsible for driving to multiple locations daily and offloading an average of about three hundred (300) packages per day

between 11:00 AM and 9:00 PM, five (5) days per week. (Pa000072). As a result of her job responsibilities, Plaintiff engaged in strenuous physical activity throughout the day. (Pa000072).

On or about May 12, 2023, Plaintiff learned she was pregnant and disclosed her pregnancy to Defendants Sanchez and Batista. (Pa000072). Due to her pregnancy, Plaintiff requested a reasonable accommodation in the form of modified work tasks or a role that did not require her to lift heavy items. (Pa000072). Plaintiff provided Defendants Sanchez and Batista with a physician's note stating Plaintiff was pregnant and should not lift heavy items. (Pa000073). Defendant Batista requested Plaintiff provide a more formal physician's note describing her condition, and her need for accommodation, and, on May 23, 2023, Plaintiff obtained a physician's note and provided the same to Defendant Batista. (Pa000073). The note specified Plaintiff was not to be on her feet for "more than [eight] hours in a day," was to "sit for at least [five] minutes every [one to two hours]," and was not to "push, pull, or lift anything more than 10 pounds." (Pa000073).

In response, Plaintiff's role was changed from Driver to Dispatcher by Defendants, but her hours were reduced from fifty (50) hours per week to twenty-five (25) hours per week. (Pa000073). Plaintiff was suspicious of the reduction of hours, as she was aware of a common practice whereby Defendants

reduced Drivers' hours to force them to resign—a practice even discussed by Defendants Batista and Sanchez in a WhatsApp group chat with at least four (4) Dispatchers. (Pa000073-Pa000074).

Shortly after Plaintiff requested and received her accommodation, in or about mid-June 2023, Defendant Sanchez began criticizing Plaintiff's performance as a Dispatcher and singling out Plaintiff for minor errors such as being only two (2) minutes late to the job site. (Pa000074). Furthermore, Defendant Sanchez began pressuring Plaintiff to resume her role as a Driver—a role in which Plaintiff was continuously subjected to sexual harassment—and insisted Dispatchers typically fill in for absent drivers during high-volume periods. (Pa000074). Defendant Sanchez was so insistent on Plaintiff returning to her role as a Driver that she suggested she could remove the heavier shipping items so Plaintiff would not have to handle heavier items when driving. (Pa000074). However, this arrangement would flout Plaintiff's accommodation as she would certainly be required to push, pull, and lift items weighing more than ten (10) pounds. (Pa000074).

Around mid-July 2023, Defendant Batista informed Plaintiff she must resume her role as a Driver, and, around the same time, Plaintiff found a note left on her car's windshield while it was parked at the office stating, "You better stop doing what you're doing or you're going to pay for it." (Pa000074-

Pa000075). Additionally, while Plaintiff's vehicle was parked at her personal residence, her car window was broken, and her tires were slashed. (Pa000075). Former coworker Calvo Last Name Unknown ("Calvo LNU") informed Plaintiff he overheard that Defendant Sanchez was involved in the plan to damage Plaintiff's car. (Pa000075).

In response to the Defendants' repeated threats, fearful of returning to a role rife with sexual harassment, and noticing her accommodation was being ignored, Plaintiff requested an additional note from her physician. *Id.* at ¶ 38. Plaintiff obtained a note from her physician dated July 31, 2023, stating "It is my medical [opinion] that [Plaintiff] cannot discharge the duties of the driver with the potential of heavy lifting of greater than 25lbs" and provided it to Defendant Batista. (Pa000075).

C. Plaintiff Was Wrongfully Terminated by Defendants. (Pa000076-Pa000078).

On or about August 8, 2023, three (3) Drivers called out of work. (Pa000076). Plaintiff successfully managed to get two (2) other employees to cover for the Drivers, leaving only one (1) route uncovered for the day. (Pa000076). As a result, Defendant Sanchez asked Plaintiff if she could handle the route— a task that would require Plaintiff to go against her physician's orders that Defendants were aware of and once again be forced to endure the sexual harassment affiliated with the role. (Pa000076).

Because Plaintiff was uncomfortable going against her physician's recommendations, risking her health and the health of her baby, and returning to a role where she had endured consistent sexual harassment, Plaintiff told Defendant Sanchez, "If you want me to cover it, I will. But you have to say I am covering it." (Pa000076). Rather than reiterate her request for Plaintiff to defy her physician's orders, Defendant Sanchez told Plaintiff she was making things difficult and ended the phone call. (Pa000076).

Later that day, Defendant Batista called Plaintiff and continued Defendant Sanchez's disparaging narrative in asking Plaintiff why she was making things difficult. (Pa000076). Plaintiff attempted to reiterate her restrictions, but Defendant Batista refused to listen, deemed Plaintiff difficult to work with, and terminated Plaintiff. (Pa000076). In other words, despite knowing Plaintiff's physician recommended Plaintiff work as a Dispatcher, and not as a Driver, Defendants attempted to pressure Plaintiff to risk both her health and the health of her baby to drive and deliver packages. When Plaintiff refused to immediately comply with her employers' directive, she was abruptly terminated.

On August 8, 2023, Defendant Batista dispatched a termination letter to Plaintiff via email. (Pa000077). The letter states, in pertinent part, that Plaintiff's position was "being terminated due to a lack of available work" and "the company [was] facing a significant demand reduction which has resulted in

a reduced need for staff.” (Pa000077). Curiously, Defendants hired many employees, roughly ten (10) drivers, just one (1) week after Plaintiff’s termination, as well as four (4) dispatchers shortly thereafter—exposing Defendants’ rationale as mere pretext. (Pa000078). Indeed, Plaintiff’s termination was a direct act of retaliation against Plaintiff for refusing to endure continuous sexual harassment and risk the health of both herself and her unborn child by returning to the role of Driver.

IV. ARGUMENT

A. The Standard of Review on This Appeal Is De Novo.

The interpretation of an arbitration clause is a matter of contractual construction that the appellate court should address *de novo*. NAACP of Camden County v. Foulke Management Corp., 421 N.J. Super, 404, 430 (App. Div. 2011) (quoting Coast Auto. Grp., Ltd. v. Withum Smith & Brown, 413 N.J. Super. 363, 369, 995 A.2d 300 (App.Div.2010)); see also EPIX Holdings Corp. v. Marsh & McLennan Cos., 410 N.J. Super. 453, 472, 982 A.2d 1194 (App.Div.2009) (noting that “[o]ur standard of review of the applicability and scope of an arbitration agreement is plenary”). *De novo* review is especially appropriate in evaluating a trial court's ruling on summary judgment. NAACP of Camden County, *supra*, 421 N.J. Super, at 431; Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), *certif. denied*, 154 N.J.

608, 713 A.2d 499 (1998). This standard of review should apply equally to the review of a trial court's ruling on a R. 4:6-2(e) Motion to Dismiss.

B. The EFAA Applies To Plaintiff's Claims, Nullifying Any Applicable Arbitration Clause. (Pa000071-Pa000078, Pa000485).

The EFAA was signed into law on March 3, 2022. Under the Act, "no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to [a] sexual assault dispute or . . . sexual harassment dispute." 9 U.S.C. § 402(a) (emphasis added). The plain text of the EFAA, as well as its legislative history, show that the purpose of this definition was to apply relevant state-law definitions of "sexual harassment," in addition to any applicable federal definitions. See H.R. Rep. 117-241, 8⁵ ("for the purposes of the bill, sexual harassment dispute is defined as a dispute relating to conduct that allegedly constitutes sexual harassment under applicable Federal, Tribal, or State sexual harassment laws.").

Two elements of the EFAA are essential to weighing the Trial Court's decision. First, the broad and sweeping definition of the phrase "relates to," as set forth in applicable case law, would encompass all aspects of Plaintiff's claims. This includes Plaintiff's claims of NJLAD sexual harassment,

⁵ See <https://www.congress.gov/congressional-report/117th-congress/house-report/241/1> (last visited March 11, 2025).

gender/sex discrimination, and retaliation thereafter in the form of reduction in hours, increased scrutiny, failure to accommodate, and wrongful termination. (Pa000071-Pa000078). Such claims, with supported factual allegations, are well within EFAA's scope of "sexual harassment dispute[s]" as all aspects of Plaintiff's claims are "related to" the sexual harassment she endured. Specifically, Defendants, ignoring Plaintiff's accommodation, attempted to force her back into a role rife with sexual harassment and terminated her when she refused to comply.

Second, the EFAA expressly uses the term "sexual harassment," which has a broad definition under almost four decades of decisional law, encompassing any gender-based workplace harassment. The EFAA also applies "state law" regarding what constitutes "sexual harassment" claims that cannot be compelled to arbitration. Therefore, because Plaintiff has sufficiently pled claims of sexual harassment under the NJLAD—confirmed by the Trial Court's denial of Defendants' Motion to Dismiss Plaintiff's sexual harassment claim—and all aspects of this case "relate to" "sexual harassment," the EFAA prevents Defendants from forcing Plaintiff to arbitrate her claims, regardless of the validity of the arbitration agreement at issue. (Pa485).

C. The Phrase "Relates to" In The EFAA Is Sweeping and Encompassing Of All Legal Claims. (Pa000222).

As a preliminary matter, the Trial Court's analysis appears to have

mischaracterized the central issue at hand. Rather than focusing on whether each individual claim pertains to sexual harassment, the proper inquiry should have been whether the case as a whole “relates to” sexual harassment. The distinction is critical, as the overarching issue involves the cumulative impact of the conduct in question, which, when considered in its entirety, undeniably pertains to sexual harassment. By concentrating on individual claims instead of considering the bigger picture, the Trial Court may have overlooked the main issue, which resulted in the wrong decision.

First, it is important to emphasize the EFAA specifically covers not only claims of sexual harassment but also claims "relating to" sexual harassment. Therefore, a claim need not be solely predicated on sexual harassment to be prohibited from forced arbitration; it only needs to "relate to" such claims. Courts have on many occasions opined on the wide breadth of the phrase "related to," and have found that the "ordinary meaning of these words is a broad one—to stand in some relation; to have a bearing or concern; to pertain; refer; to bring into association with or connection with." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992) (emphasis added); see also, Coregis Ins. Co. v. Am. Health Found., Inc., 241 F.3d 123, 128 (2d Cir. 2001) (J. Sotomayor) ("Here, the ordinary meaning of the term ‘related to’ . . . is broader than the term ‘arising out of,’ and . . . is typically defined more broadly and is not necessarily tied to

the concept of a causal connection."); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 88 (1983) (confirming same interpretation); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) (confirming same interpretation); Owens-Illinois v. BTR, PLC, 482 F. App'x. 631, 633 (2d Cir. 2012) (noting that "the phrase 'relates to' is undoubtedly broad.").

New Jersey courts interpreting arbitration agreements have read "arising out of" as broad language, and "relating to" as broader still. See KPH Healthcare Servs. v. Janssen Biotech, Inc., 20 Civ 05901, 2021 U.S. Dist. LEXIS 196095 at *10 (D.N.J. 2021) (citing Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc., 240 N.J. Super. 370, 375, 573 A.2d 484 (App. Div. 1990) ("An arbitration provision covering claims 'relating to' a contract is broader than one which covers claims merely arising out of a contract.")); Angrisani v. Fin. Tech. Ventures, L.P., 402 N.J. Super. 138, 149, 952 A.2d 1140 (App. Div. 2008) (describing such language as "extremely broad"); John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp., 119 F.3d 1070, 1074 (3d Cir. 1997) (stating that "in relation to" requires only some "logical or causal connection" between the dispute and the agreement); see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 US 614, 617, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). "Such broad clauses have been construed to require arbitration of any dispute between the contracting parties that is connected in any way with their contract." Curtis v.

Cellco P'ship, 413 N.J. Super. 26, 38, 992 A.2d 795 (App. Div. 2010).

Other jurisdictions are in accord. Of note, the Second Circuit, when analyzing the breadth of arbitration agreements has held that "relating to" language creates the broadest possible scope. See Collins & Aikman Prod. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 20 (2d Cir. 1995) ("The clause in this case, submitting to arbitration '[a]ny claim or controversy arising out of or relating to th[e] agreement,' is the paradigm of a broad clause."); Johnston v. Electrum Partners LLC, No. 17 Civ. 7823, 2018 WL 3094918, at *10 (S.D.N.Y. 2018) ("The arbitration provision at issue here, which encompasses 'any and all controversies or claims arising out of or relating to [the] Agreement' (ICA 7), is 'classically broad.'") (citing Mehler v. Terminix Int'l Co. L.P., 205 F.3d 44, 49 (2d Cir. 2000)).

Courts in the Third Circuit have routinely held that retaliation claims are so intertwined with the underlying discrimination and/or harassment that they are in fact "related to" each other. Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208 (3rd Cir. 2984) (Plaintiff's retaliation claim is reasonably related to his Title VII claims of discrimination); Prewitt v. Walgreens Co., 2012 U.S. Dist. LEXIS 137027 (September 25, 2012) (Plaintiff's retaliation claim is reasonably related to his claims of age discrimination). Our neighboring second circuit holds the same. See Goodman v. Heublein, Inc., 645 F.2d 127, 131 (2d

Cir.1981) (plaintiff's retaliation claim was related to his EEOC charge alleging discrimination); Ausfeldt v. Runyon, 950 F.Supp. 478, 486 (N.D.N.Y. 1997) (plaintiff's retaliation claim was related to sexual harassment allegations in her EEOC charge); see also Blesedell v. Mobil Oil Co., 708 F.Supp. 1408, 1420 (S.D.N.Y.1989) (plaintiff's constructive discharge claim was related to sexual harassment charges contained in an EEOC charge).

Also, the "related to" clause is routinely used in the arbitration context to sweep up all claims related to a person's employment, rather than being construed as limiting arbitrable claims to only those disputes concerning, say, the arbitration agreement itself. See Martindale v. Sandvik, Inc., 173 N.J. 76, 96 (2002) ("In the circumstances of this case, the language in the arbitration agreement not only was clear and unambiguous, it was also sufficiently broad to encompass reasonably plaintiff's statutory causes of action. The arbitration agreement provides that plaintiff agreed to waive her right to a jury trial "in any action or proceeding relating to my employment with Sandvik" and that "all disputes relating to my employment with Sandvik or termination thereof" shall be subject to arbitration.). The use of the phrase "arise out of or relate to" indicates the parties' intent that the arbitration clause would have a broad scope. See., e.g., Zeller-Landau v. Sterne Agee CRT, LLC, 2018 U.S. Dist. LEXIS 3532, 2018 WL 334970, at * 4 (E.D. Pa. Jan. 9, 2018) (collecting cases); see

also Battaglia v. McKendry, 233 F.3d 720, 727 (3d Cir. 2000) ("when phrases such as 'arising under' and 'arising out of' appear in arbitration provisions, they are normally given broad construction"); Powers v. Fox Television Stations, Inc., 923 F. Supp. 21, 24 (S.D.N.Y. 1996) ("Powers' employment relationship with Fox existed solely by virtue of the employment agreement. Accordingly, his claim that this employment relationship was unlawfully terminated clearly `aris[es] out of or in connection with' this agreement."); Lewis v. ANSYS, Inc., No. 19 Civ. 10427 (AJN), 2021 WL 1199072, at *8 (S.D.N.Y. Mar. 30, 2021) ("Plaintiff's claims against Defendant for discrimination, retaliation, and defamation, all of which are related to Plaintiff's purportedly unlawful termination, are readily covered by the terms `arising out of or in any way related to ... the Participant's employment with the Company.'").

Here, the Arbitration Agreement (the "Agreement") at issue provides, in pertinent part:

Except as explained in the section "Claims Not Covered" below, this Mutual Agreement to Individually Arbitrate Disputes (this "Agreement") covers all past, current, and future grievances, disputes, claims, issues, or causes of action (collectively, "claims") under applicable federal, state or local laws, *arising out of or relating to* (a) Employee's application, hiring, hours worked, services provided, and/or employment with the Company or the termination thereof...or that the Company may have against Employee.

(Pa222).

The Trial Court erroneously held that Counts I through III (Count I as Discrimination, Hostile Work Environment, and Wrongful Termination on the Basis of Pregnancy; Count II as Retaliation/Improper Reprisal; and Count III as Pregnancy Discrimination: Failure to Accommodate and Failure to Engage in the Interactive Process) of Plaintiff's FAC were not related to her sexual harassment claims and, as such, must be bifurcated for arbitration. (2T8:19-22).

Defendants' argument that Counts I through III of Plaintiff's Complaint are unrelated to her sexual harassment claims is meritless. (1T14:7-10). Plaintiff endured an ongoing campaign of sexual harassment, discrimination based on her sex and pregnancy, retaliation, and wrongful termination—all because she was a woman. (1T14:18-25). Plaintiff's claims are closely intertwined and directly relate to her sexual harassment claim. (1T14:18-25; 25:21-26:21). In fact, Defendants retaliated against Plaintiff by terminating her for refusing to continue enduring sexual harassment and for not putting her health and the health of her unborn child at risk by returning to the role of Driver. This wrongful termination is part of a continuous and cumulative pattern of tortious conduct aimed at Plaintiff because of her gender. (1T20:5-12).

There is a clear hypocrisy and intellectual dishonesty in Defendants' position. They seek to enforce an arbitration agreement that broadly prohibits Plaintiff from bringing any claims relating to her employment in State Court,

yet, in the same breath, they argue Plaintiff's pregnancy discrimination claims are unrelated to her sexual harassment claims. Both things cannot be true. This contradictory stance underscores the unfairness and inconsistency in Defendants' attempt to limit Plaintiff's access to the courts and avoid accountability for their discriminatory conduct. Further, the Trial Court failed to appreciate how Plaintiff's claims of pregnancy discrimination related to her claims of sexual harassment which is evidenced by their December 17, 2024, decision stating, in reference to Counts I-III of Plaintiff's Complaint, that "There is a valid, enforceable, unambiguous arbitration agreement that requires the remaining causes of actions to arise out of a set of different facts than the sexual harassment claims to be arbitrated." (2T8:19-22).

D. Courts Have Held That As Long As A Claim of Sexual Harassment Pends In A Case, The EFAA Blocks Arbitration Of The Entire Case. (Pa00071-Pa00078; Pa000418-Pa000419).

Courts have already held that "as long as a claim of sexual harassment pends in a case, the EFAA, by its terms, blocks arbitration of the entire "case" containing that claim." Johnson v. Everyrealm, Inc., 657 F. Supp. 3d 535, 586 (S.D.N.Y. 2023). The United States District Court recently addressed this exact issue in Johnson v. Everyrealm, Inc., a case from the Southern District of New York, which provides compelling guidance for this matter. In Johnson, the plaintiff filed a multi-count complaint, which included claims for race

discrimination, pay discrimination, sexual harassment, hostile work environment, gender-based discrimination, whistleblower retaliation, and intentional infliction of emotional distress. As in the present case, the defendants in Johnson sought to compel arbitration of the plaintiff's claims, arguing that the sexual harassment claim should be dismissed and the remaining claims should be sent to arbitration.

In its analysis, the court examined the EFAA and determined that once a plaintiff elects to pursue litigation for a sexual harassment claim, the EFAA blocks the enforcement of arbitration for the entire case. Id. at 558. The court interpreted the EFAA to render the arbitration clause unenforceable in its entirety when a sexual harassment dispute is sufficiently pled, rather than limiting the unenforceability to only the claims of sexual harassment. Id. Were it not for the EFAA, the court noted, all of the plaintiff's claims would have been subject to arbitration. In reaching its conclusion, the court considered two key questions: (1) whether the plaintiff's First Amended Complaint adequately alleged a sexual harassment dispute; and (2) whether that claim rendered the arbitration agreement unenforceable as to the entire complaint or only as to the sexual harassment claims. Id. at 550-551. The court ruled that because the complaint adequately pled sexual harassment, the EFAA applied, invalidating the arbitration agreement for all claims in the case. Id. at 558. This reasoning

strongly supports Plaintiff's position here.

The court went on to analyze the applicability of the EFAA to all of the plaintiff's claims. Id. Under the FAA, "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation." Id. (citing KPMG LLP v. Cocchi, 565 U.S. 18,19 (2011)). But, the FAA's mandates in support of its "liberal federal policy favoring arbitration agreements" may be "overridden by a contrary congressional command." Id. (citing) CompuCredit Corp. v. Greenwood, 565 U.S. 95,98 (2012) (citation omitted). Therefore, the question presented was whether the EFAA, which applies "[n]otwithstanding any other provision of [the FAA's] title," 9 U.S.C. § 402(a), does, such that the presence of a well-pled sexual harassment claim makes an arbitration clause unenforceable as to the other claims in the case. Id.

The court noted that Congress chose to block arbitration of any "case", and did not limit its prohibition only to any "claim." Id. at 561. The court concluded that Congress's choice to amend the FAA directly with text broadly blocking enforcement of an arbitration clause with respect to an entire "case" "relating to" a sexual harassment dispute reflects its rejection of the FAA norm of allowing individual claims in a lawsuit to be parceled out to arbitrators or courts depending on each claim's arbitrability. Id. Accordingly, the court held

that where a claim in a case alleges "conduct constituting a sexual harassment dispute" as defined, the EFAA, at the election of the party making such an allegation, makes pre-dispute arbitration agreements unenforceable with respect to the entire case relating to that dispute. Id. at 561.

The court in Johnson, like the Trial Court in the instant matter, found the complaint stated a claim for sexual harassment and therefore was deemed a "sexual harassment dispute." Id. at 562. Therefore, the court construed the EFAA to block the enforcement of an arbitration provision with respect to the entirety of a "case filed under Federal, Tribal, or State law that relates to ... the sexual harassment dispute." Id. (quoting 9 U.S.C. § 402(a)). As a result, the defendants' Motion to Compel arbitration was denied with respect to all claims in the complaint—the entire case. Id. Clearly, the issue present in Johnson mirrors the instant matter and, as such, in accordance with congressional command, the presence of Plaintiff's sexual harassment claim makes the Agreement unenforceable as to the totality of Plaintiff's claims.

Likewise, in Delo v. Paul Taylor Dance Found., Inc., 685 F. Supp. 3d 173, the plaintiff filed a complaint alleging gender and familial status discrimination. Delo v. Paul Taylor Dance Found., Inc., 685 F. Supp. 3d 173, 179 (2023). On March 24, 2023, the plaintiff filed a complaint adding discrimination and retaliation claims prompting the defendants to move to compel arbitration of the

plaintiff's claims. Id. The court concluded that where a dispute presents multiple claims—some related to sexual harassment, others not, the EFAA blocks arbitration of the entire case, not just the sexual harassment claims. Id. at 180 (citing (citing Johnson v. Everyrealm, Inc., 657 F. Supp. 3d 535, 586 (S.D.N.Y. 2023))).

In addressing the defendants' arguments that: (1) the plaintiff did not style any of her claims as "sexual harassment" claims, instead titling them retaliation, gender discrimination, and familial status discrimination claims; and (2) the plaintiff's factual allegations did not amount to "sexual harassment" under applicable state law, the court held that the defendants' suggestion that the plaintiff could not invoke the EFAA because none of her claims are styled as "sexual harassment" claims was unpersuasive. Id. at 181. The court stated it is a well-established principle that, when evaluating the viability of a complaint, courts focus on the substance of the factual allegations and not how the causes of action are labeled. Id.; See Ashcroft v. Iqbal, 556 U.S. 662 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'; 'labels and conclusions . . . will not do'); See also In re Am. Express Anti-Steering Rules Antitr. Litig., 343 F. Supp. 3d 94, 100 (E.D.N.Y. 2018) ("In order to

define the 'claims' in a complaint . . . the court must look beyond any formal distinctions among 'counts,' 'causes of action,' and 'claims,' and examine the facts alleged and the legal relief sought.").

As such, the court held there was nothing in the text of the EFAA that suggests its applicability hinges on how a claim is labeled. Id. The court noted that, to the contrary, the EFAA appears to define "sexual harassment dispute" broadly, requiring only that the claim "relates to" conduct that, as alleged, "constitutes" sexual harassment under applicable law. Id.; See 9 U.S.C. § 401(4); See also Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

Because the plaintiff had, at the very least, plausibly pled sexual harassment violations, the court held that the EFAA applies to block arbitration of all her claims. Id. Further, contrary to the Trial Court's December 17, 2024, decision in this matter, the court in Delo concluded plaintiff's allegations were "sufficiently related" as all of the allegations occurred in the same environment, within the same time frame, and were primarily perpetrated by the same person—as is the case in the instant matter. Id. at 187. That is, of course, the same in the present matter.

The court stated allegations of a similar nature, if they uniformly relate to the defendant's purported mistreatment of and disdain for female employees,

particularly those who are pregnant or have childcare responsibilities, can be considered acts that "contribute" to the hostile work environment and relate to the plaintiff's sexual harassment allegations. Id. In the instant matter, as Plaintiff has alleged a sexual harassment sex discrimination claim, along with several other causes of action within her case that stem from the gender discrimination she endured, the EFAA, by its terms, blocks arbitrating this matter. As such, Counts I through III of Plaintiff's Complaint must be reinstated and proceed in State Court.

As discussed at length above: 1) Plaintiff was forced to endure sexual harassment as a Driver starting in December 2021 and continuing until May 2023 when Plaintiff became a Dispatcher due to her pregnancy; 2) Defendants continued to pressure Plaintiff to return to her role as a Driver despite the role being rife with sexual harassment; 3) Defendants further pressured Plaintiff to return to her role as a Driver—which involved extensive lifting— despite her physician's orders not to lift and her approved accommodation; 4) Defendants retaliated against Plaintiff for not returning to a role rife with sexual harassment that could also harm both her health and her child's health; and 6) Defendants terminated Plaintiff as a result. (Pa000071-000078; Pa000419). Clearly, Plaintiff's claims all specifically relate to her sexual harassment claim.

Similarly to the instant matter, in Turner v. Tesla, Inc., 686 F. Supp. 3d 917 (2023), the plaintiff alleged claims of: (1) hostile work environment; (2) discrimination; (3) retaliation; (4) failure to prevent sexual harassment; (5) violation labor code relating to workplace safety; (6) wrongful termination; and (7) failure to provide wages at termination and defendants sought to compel arbitration of the plaintiff's claims. Turner v. Tesla, Inc., 686 F. Supp. 3d 917 (2023). The court analyzed three questions: (1) does the plaintiff's complaint allege "conduct constituting a sexual harassment dispute" for the purposes of the EFAA; (2) does the EFAA make the arbitration agreement unenforceable for the entirety of the plaintiff's claims, or only for the claims of sexual harassment; and (3) if a subset of plaintiff's claims are compelled to arbitration, should the other claims be stayed pending the arbitration? Id. at 923-924.

Further, and comparable to the present case, the defendants argued that because the plaintiff included both sexual and non-sexual harassment claims in the same complaint, the Federal Arbitration Act (FAA) required the court to sever the non-sexual harassment claims and compel arbitration for those, even if some claims remained before the court. Id. However, the court rejected this argument, emphasizing that the EFAA reflects Congress's clear preference that plaintiffs alleging sexual harassment have their day in court, not be forced into arbitration. Id. In a decisive ruling, the court held that the EFAA renders the

arbitration agreement unenforceable with respect to the entire case because the core of the plaintiff's claims was rooted in conduct that clearly qualifies as a sexual harassment dispute under the EFAA. Id. This decision underscores the broader intent of the EFAA to ensure that sexual harassment claims are heard by a court, not arbitrated. Id.

In Turner the defendants cited Mera v. SA Hosp. Grp., LLC 675 F. Supp. 3d 442 (2023) in support of their argument that the plaintiff's non-sexual harassment-based claims should be compelled to arbitration. Id. at 925-926. Mera is easily distinguished from the present matter because the plaintiff —in addition to her sexual harassment claims under the New York State Human Rights Law ("NYSHRL") — brought Fair Labor Standard Act ("FLSA") wage-and-hour claims on behalf of a collective and putative class, consisting of "all non-exempt employees, including servers, bartenders, barbacks, waiters, bussers, and food runners . . . employed by Defendants." Id. at 448. Magistrate Judge Aaron denied the motion to compel arbitration of the NYSHRL harassment claims, but compelled arbitration of the FLSA wage and hour claims, finding the EFAA not to apply to these because such group claims were not

“distinct to Plaintiff.” That distinction is not present in this matter, because clearly Plaintiff’s claims are all brought on her behalf only.⁶

In this matter, the Trial Court ruled Counts I through III of Plaintiff’s Complaint are dismissed without prejudice and compelled to arbitration as they “arise out of a set of different facts than the sexual harassment claims and must be arbitrated.” (2T:8:17-22). Contrary to the Trial Court’s ruling, the court in Turner found that although some of the plaintiff’s causes of action did not directly allege sexual harassment, a claim for gender discrimination is substantially related to the underlying claim of sexual harassment. Turner, 686 F. Supp. at 926. Further, the court found it apparent that the plaintiff’s allegations of sexual harassment arose out of her gendered experience in the workplace as the plaintiff alleged she was discriminated against on the basis of her gender—as is the case here. Id. The court further stated that the resolution

⁶ Irrespective of the clear distinction, Mera has been heavily criticized. See Doe v. Second Street Corp., 105 Cal. App. 5th 552, 557 (Cal. Ct. App. 2024) (rejecting Mera in favor of Johnson as Johnson states “the statute applies to the entire *case*, not merely to the sexual assault or sexual harassment claims alleged as a part of the case. It is significant, moreover, that the statute does not require that the pendant claims *arise out of* the sexual assault or sexual harassment dispute; it is enough that the case *relates to* the sexual assault or sexual harassment claims.”); see also Liu v. Miniso Depot CA, Inc., 105 Cal. App. 5th 791, 803 (Cal. Ct. App. 2024) (stating “to the extent Mera held that, under the EFAA, only those claims in a plaintiff’s case that related to the plaintiff’s “sexual harassment dispute” were exempt from arbitration, we find the decision unpersuasive based on the plain language of section 402(a).”).

of the plaintiff's claims were intertwined with her sexual harassment claims— involving many of the same witnesses— and therefore it makes sense to have the claim proceed alongside the other causes of actions. Id. at 927-928.

Plaintiff faces circumstances indistinguishable from those in Turner, as discussed at length above. Plaintiff's allegations and claims clearly establish that the entire Complaint "relates to" "sexual harassment" as these two phrases are used by the EFAA and have been construed by applicable case law.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Appellate Division vacate the Trial Court's judgment dismissing and compelling to arbitration Counts I through III of Plaintiff's Complaint and reinstate Counts I through III of Plaintiff's Complaint.

Respectfully submitted,

/s/ Peter D. Valenzano

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Dated: April 4, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-001568-24

GERALDINE RIVERA-SANTANA,	:	CIVIL ACTION
	:	
	:	ON APPEAL FROM THE FINAL
<i>Plaintiff-Appellant,</i>	:	ORDER OF THE
	:	SUPERIOR COURT OF
vs.	:	NEW JERSEY,
	:	LAW DIVISION,
	:	ESSEX COUNTY
CJF SHIPPING, L.L.C., JULIE BATISTA, MARIA SANCHEZ, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities) and JOHN DOES 1-5 (fictitious names describing presently unidentified individuals),	:	Docket No. ESX-L-5834-24
	:	Sat Below:
	:	HON. ALDO J. RUSSO, J.S.C.
<i>Defendants-Respondents.</i>	:	
	:	
	:	
	:	

BRIEF OF DEFENDANTS-RESPONDENTS CJF SHIPPING, L.L.C., JULIE BATISTA AND MARIA SANCHEZ

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PRELIMINARY STATEMENT

Defendants/Respondents CJF Shipping, LLC (“CJF”), Maria Sanchez and Julie Batista (collectively, “Respondents”), hereby submit this memorandum of law in opposition to Plaintiff/Appellant Geraldine Rivera-Santana’s (“Appellant”) appeal.

Appellant’s only challenge to the Trial Court’s decision is its determination that Appellant’s failure-to-accommodate pregnancy discrimination claims in Counts I through III of the Complaint are arbitrable under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (“EFAA”). Importantly, Appellant does not challenge the Trial Court’s determination that the parties’ arbitration agreement is valid, enforceable and unambiguous. However, the Trial Court correctly concluded that Appellant’s failure-to-accommodate pregnancy claims must be arbitrated because they are unrelated to her sexual harassment claims. Put simply, they arise out of a completely different set of facts, involving different actors (female supervisors vs. male coworkers), different time-period, different legal theories, and importantly, no allegations of sexual harassment. There is nothing in the Complaint that ties the two together. The Trial Court’s decision strikes the proper balance between the longstanding requirement of bifurcation under the

Federal Arbitration Act (“FAA”) and the EFAA’s express purpose of precluding “forced” arbitration of sexual harassment claims.

Since Appellant appeals the Trial Court’s entire decision, Respondents contend that the Trial Court erred in denying Respondents’ motion for dismissal of the cause of action for sexual harassment under the New Jersey Law Against Discrimination (“NJLAD”) asserted in Count IV of the Complaint on the grounds that it was untimely under the NJLAD’s two-year statute of limitations and failed to state a cognizable claim. Specifically, Appellant fails to plead a sufficient and timely sexual harassment claim based on the continuing violation theory and therefore such claim should be dismissed. Moreover, the failure to plead a sufficient cause of action for sexual harassment bars the application of the EFAA.

PROCEDURAL HISTORY

A. The Original and First Amended Complaint

On August 23, 2024, Appellant filed her initial Complaint, alleging three counts related to her pregnancy in 2023: Count I: Discrimination, Hostile Work Environment, and Wrongful Termination under the NJLAD; Count II: Retaliation/Improper Reprisal under the NJLAD; and Count III: Pregnancy Discrimination, Failure to Accommodate and Failure to Engage in Interactive Process under the NJLAD. (Pa000001-20).

By electronic mail dated September 9, 2024, Respondents' counsel advised Appellant's counsel that Appellant entered into an agreement with Respondent CJF to arbitrate the claims filed in this action. (Pa000098 ¶ 2). Respondents' counsel provided Appellant's counsel with a copy of the Arbitration Agreement and inquired whether Appellant would voluntarily submit her claims to arbitration. (*Id.*). The very next day, on September 10, 2024, Appellant's counsel advised that Appellant intended to add a count for sexual harassment, which counsel claimed would bar CJF from compelling arbitration. (Pa000099 ¶ 3).

On September 16, 2024, Appellant filed her First Amended Complaint ("Complaint") adding a count (Count IV) for Sexual Harassment, Gender Discrimination and Hostile Work Environment under the NJLAD. (Pa000067-91). The factual allegations attributable to Appellant's sexual harassment claim in Count IV comprise six paragraphs, compared to the thirty paragraphs of allegations associated with Appellant's pregnancy related claims in Counts I-III. No revisions were made to the pregnancy related claims of the Original Complaint.

B. The Trial Court's Order/Decision

On October 21, 2024, Respondents filed a motion to dismiss the Complaint and compel arbitration pursuant to the parties' Arbitration

Agreement. (Pa000096-234). In their motion, Respondents contended that Appellant's sexual harassment claim as pleaded in Count IV of the Complaint was untimely under the LAD's two-year statute of limitations and otherwise deficient in failing to set forth a valid cause of action for sexual harassment. Respondents further contended that the remaining causes of action were, therefore, subject to arbitration under the Arbitration Agreement, and that the EFAA did not apply because no sexual harassment claim remained.

On November 15, 2024, the Hon. Aldo J. Russo heard oral argument on Respondent's motion for dismissal and/or to compel arbitration. (1T1-1T28-9) On December 17, 2024, the Trial Court denied without prejudice Respondents' motion to dismiss Appellant's sexual harassment claim in Count IV but granted Respondents' motion to dismiss and compel arbitration of Appellant's pregnancy claims in Counts I – III of the Complaint. (Pa000485). The Trial Court ruled that the Arbitration Agreement, which the Trial Court characterized as valid, enforceable and unambiguous, required the pregnancy related claims in Counts I-III to be arbitrated because they “arise out of a set of different facts” than the sexual harassment claim. (2T8:17-22).

On January 30, 2025, Appellant filed her Notice of Appeal of the Trial Court's entire Order of December 17, 2024. (Pa000487).

STATEMENT OF FACTS¹

A. Employment Background

Respondent CJF hired Appellant as a delivery driver on or about December 9, 2021. (Pa000071 ¶ 13). Appellant contends that she was subjected to sexual harassment by her **male coworkers** “[f]rom the outset of [her] employment with [] CJF.” (*Id.* ¶ 15). Appellant alleges that each morning, while gathered with her counterparts to receive the routes they would be driving that day, she was “forced to endure the perverse commentary of her male counterparts.” (*Id.* ¶ 16). Appellant asserts that her male counterparts made comments such as: “She has a big ass with nice thighs;” “I want to hit that;” and “Nice titties, they are perky.” (*Id.* ¶ 17).

On or about May 12, 2023, Appellant learned she was pregnant. (Pa000072 ¶ 23). Appellant alleges that fearing the heavy lifting and physically taxing nature of her job could jeopardize the viability of her pregnancy, she requested an accommodation in the form of modified work tasks or a different role which did not require her to lift heavy items. (*Id.* ¶ 24). Appellant claims that in response to her request, Respondents switched her to a Dispatcher role where she was no longer required to drive or lift heavy objects. (Pa000073 ¶

¹ Respondents object to Appellant’s Statement of Facts, which is replete with disputed allegations – as opposed to “facts” – gleaned directly from her Complaint.

28). Appellant alleges that shortly after she requested and received her accommodation in or about June 2023, Respondent Maria Sanchez, CJP's Fleet Manager, began criticizing her performance as a Dispatcher, "singling her out for minor errors." (Pa000074 ¶ 31). Appellant asserts that Ms. Sanchez did not subject her to such scrutiny prior to her request for an accommodation. (*Id.*). Appellant further claims that Ms. Sanchez began pressuring her around this time to resume her driving responsibilities.² (*Id.* ¶ 32).

Appellant alleges that around mid-July 2023, Respondent Julie Batista, CJP's Human Resources Coordinator, told Appellant that her working as a Dispatcher was "becoming a problem" and pressured Appellant by saying she must resume her driving responsibilities at some point. (Pa000074 ¶ 35). Appellant alleges she requested an additional note from her physician "[i]n response to the CJP Defendants' repeated threats and the undue pressure" they placed on her to return to her role as a Driver. (Pa000075 ¶ 38).

Appellant alleges that on or about August 8, 2023, Respondent Sanchez asked her to cover a route that would require her to go against her physician's orders. (Pa000076 ¶¶ 40-42). Appellant claims she told Respondent Sanchez "If you want me to cover it, I will. But you have to say I am covering it." (*Id.*

² Appellant also suggests that Respondent Sanchez was involved in a plan to damage Appellant's car. (Pa000075 ¶ 37).

¶ 43). Appellant alleges Respondent Sanchez then told her she was “making things difficult.” (*Id.* ¶ 44). Appellant alleges that Respondent Batista called her later that day and continued Respondent Sanchez’s disparaging narrative, asking her why she was making things difficult. (*Id.* ¶ 45). Appellant alleges Respondent Batista then terminated her employment. (*Id.*).

B. Arbitration Agreement

On December 4, 2021, in connection with her application for employment with CJP, Appellant electronically agreed to and accepted the terms of the Arbitration Agreement. (Pa000228 ¶¶ 6-7). The Agreement provides, in pertinent part:

MANDATORY ARBITRATION. THE EMPLOYEE AND COMPANY AGREE THAT ANY COVERED CLAIM (DEFINED BELOW), WHETHER BASED IN CONTRACT, TORT, STATUTE, FRAUD, MISREPRESENTATION OR ANY OTHER LEGAL OR EQUITABLE THEORY, SHALL BE SUBMITTED TO INDIVIDUAL BINDING ARBITRATION.

Covered Claims. Except as explained in the section “Claims Not Covered” below, this Mutual Agreement to Individually Arbitrate Disputes (this “Agreement”) covers all past, current, and future grievances, disputes, claims, issues, or causes of action (collectively, “claims”) under applicable federal, state or local laws, arising out of or relating to (a) Employee’s application, hiring, hours worked, services provided, and/or employment with the Company or the termination thereof...or that the Company may have against Employee.

(Pa000230) (emphasis in original). The Agreement further specifies that “Covered Claims” include:

The claims covered by this Agreement include, but are not limited to claims asserted under or relating to: (i) Title VII of the Civil Rights Act of 1964 and **similar state statutes**; . . . (xv) any common law, or **statutory law issues relating to discrimination by sex . . . disability, medical condition, . . .** or other characteristic protected by applicable law; (xvi) **wrongful retaliation of any type....**

(Id.) (emphasis added).

Appellant did not contest the validity or enforceability of this Agreement before the Trial Court, (2T7-21-23), and does not do so on appeal. See (Pb1-30).

STANDARD OF REVIEW

This Court construes arbitration provisions of a contract under a de novo standard of review in which no deference is owed. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 445-46, 99 A.3d 306, 315 (2014). Likewise, this Court applies a de novo standard of review when “construing the meaning of a statute.” Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584, 46 A.3 1262, 1264 (2012).³

³ Determining the applicable statute of limitations is also an issue of law that is subject to plenary review. Town of Kearny v. Brandt, 214 N.J. 76, 91, 67 A.3d 601, 610 (2013)

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY HELD THAT COUNTS I THROUGH III OF THE FIRST AMENDED COMPLAINT ARE SUBJECT TO ARBITRATION UNDER THE FAA/EFAA.

The Trial Court’s decision requiring bifurcation of Appellant’s sexual harassment and non-sexual harassment claims should not be disturbed as it strikes the proper balance between the text and legislative histories of the FAA and the EFAA. As the Trial Court recognized, both the Federal Arbitration Act (“FAA”) and the New Jersey Arbitration Act express a policy favoring arbitration as a means of settling disputes that otherwise would be litigated in court. (2T4:22-5:2). The FAA, which the Trial Court found applicable here, declares that a written arbitration provision encompassed by the FAA “shall be valid, irrevocable, and enforceable save upon such grounds as exist in law or equity for revocation of any contract.” (2T5:4-8) (citations omitted). The Trial Court found no grounds to revoke the Arbitration Agreement under New Jersey law, concluding it contained a clear and unambiguous waiver of rights to seek relief in court. (2T5:23-25).⁴

⁴ Appellant did not contest the validity or enforceability of the Arbitration Agreement before the Trial Court, see (2T7:21-23), nor do they do so on appeal. In fact, during oral argument on November 15, 2024, Appellant admitted that if the Complaint was not amended to include a sexual harassment claim the

Effective March 3, 2022, the EFAA amended the FAA to provide that “no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case which is filed under Federal [] or State law and relates to the sexual assault dispute or the sexual harassment dispute.” 9 U.S.C. § 402(a) (emphasis added). Although courts from other jurisdictions have reached different conclusions on whether the EFAA bars the arbitration of only sexual harassment-related claims (as its title suggests) or the entire lawsuit (as Appellant argues), including claims wholly unrelated to sexual harassment, the two trial courts in New Jersey that have addressed this issue have concluded that the EFAA only precludes sexual-harassment related claims from arbitration. In one of those cases, McDermott v. Guaranteed Rate Inc., Morris County Superior Court Judge Noah Franzlau found that the EFAA does not bar arbitration of non-sexual harassment claims, noting “it is clear that the EFAA does not intend to exclude from arbitration claims that are *unrelated* to a claim of sexual harassment and are otherwise arbitrable.” McDermott v. Guaranteed Rate Inc. et al, No. L-000360-24, (Morris County Div., Sept. 23, 2024) (emphasis added) (Pa000471). Bergen County Superior Court Judge John D. O’Dwyer subsequently reached a similar conclusion, ruling that while claims relating to

arbitration agreement would apply to Counts I, II, and III of the Complaint. See (1T5:4-6:23).

sexual harassment had to be litigated, other claims, including a failure-to-accommodate pregnancy claim, similar to the instant matter, were required to be arbitrated given that such claims fell under the purview of the arbitration agreement that included claims related to employment. See Paton v. Davis, Saperstein & Salomon, P.C., No. BER-L-4319-24 (Bergen Cnty. Sup. Ct., Oct. 8, 2024) (Da3-10). Moreover, other courts that have addressed this issue have reached the same conclusion. See Mera v. SA Hosp. Grp., LLC, 675 F. Supp. 3d 442, 448 (S.D.N.Y. 2023) and other supporting decisions cited below.

The courts' interpretations above stem from the EFAA's jurisdictional provision, which provides that an arbitration agreement is unenforceable "with respect to a *case* which is filed under Federal, Tribal, or State law and relates to . . . the sexual harassment dispute." 9 U.S.C. § 402(a) (emphasis added). When viewed against the backdrop of both its intent and a common sense reading of its text, the EFAA was clearly intended to do only *what it says*, which is end forced arbitration of sexual harassment claims, not bar arbitration of unrelated claims.

Although Appellant argues that her pregnancy related claims are "well within EFAA's scope of 'sexual harassment dispute[s]' as all aspects of [these] claims are 'related to' the sexual harassment," (Pb12-13), no such nexus exists. There is simply no connection between the conduct that is alleged to constitute

sexual harassment and that which underpins Appellant's failure to accommodate pregnancy discrimination claims. Appellant's pregnancy claims involve different actors (female supervisors versus male coworkers), are completely devoid of sexual harassment allegations, involve a completely different set of facts, involve a different time-period, and allege retaliatory conduct having no connection to the alleged sexual harassment. In fact, Appellant does not plead any allegations that she engaged in any protected activity, a necessary prerequisite for a retaliation claim, with respect to the alleged sexual harassment.

A. The EFAA was not Intended to Bar Arbitration of non-sexual harassment claims.

Appellant erroneously argues that the EFAA's use of the term "sexual harassment" was meant to encompass "any gender-based workplace harassment." Pb13. However, the legislative history of the EFAA and applicable caselaw show otherwise.

The EFAA, which was enacted in response to the "Me-Too" movement, amended the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, to exempt from arbitration two very narrow types of disputes - disputes involving sexual assault and sexual harassment claims under applicable law. 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] 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. This is clear from a review of the legislative history surrounding its enactment, which confirms that the intent of the EFAA is “not to be the catalyst for destroying predispute arbitration agreements in all employment matters.” 168 Cong. Rec. S619, S625 (daily ed. Feb. 10, 2022) (statement of Sen. Joni Ernst) (emphasis added). Indeed, Congress did not “intend to take unrelated claims out of” an arbitration contract but instead intended to prevent “sexual assault and sexual harassment claims from being forced into arbitration.” *Id.* at S625 (statement of Sen. Lindsey Graham). Specifically, Senator Gillibrand stated that, “[t]he bill plainly reads... that only disputes that relate to sexual assault or harassment conduct can escape the forced arbitration clauses. ‘That

relate to’ is in the text.” 168 Cong. Rec. S627 (statement of Sen. Kirsten Gillibrand).⁵

Sexual harassment is one form of the broader category of sex discrimination that violates Title VII and the NJLAD. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-67 (1986); Lehmann v. Toys ‘R’ Us, Inc., 626 A.2d 445, 452 (1993) (citing Meritor Sav. Bank, 477 U.S. 57). Despite Appellant’s efforts to broaden its application, the EFAA does not provide an election to avoid arbitration to plaintiffs alleging claims of sex discrimination that fall outside the subset of sexual harassment and sexual assault disputes. See 9 U.S.C. § 402(a); see, e.g., Singh v. Meetup LLC, 2024 WL 4635482, at * (S.D.N.Y. Oct. 31, 2024) (finding gender discrimination devoid of sexual, romantic, or lewd behavior does not qualify as sexual harassment under the EFAA); Dixon v. Dollar Tree Stores, Inc., No. 22-CV-131S, 2023 WL 2388504, at *7 (W.D.N.Y. Mar. 7, 2023) (finding allegations of disparate treatment

⁵The law’s main sponsors had proposed legislation in 2017 explicitly including sex discrimination, but it did not advance. Their proposed 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.* The legislation was reintroduced using the same definitions in the following Congress, but it too failed. H.R. 1443, 116th Cong. § 2 (2019).

because of gender were not precluded from arbitration by EFAA); Cornelius v. CVS Pharmacy Inc., No. 23-cv-01858, 2023 WL 6876925, at *4 (D.N.J. Oct. 18, 2023) (finding Plaintiff alleged gender discrimination claims and facts to support discrimination based on sex, but not sexual harassment, and therefore could not rely on the EFAA to avoid arbitration).

B. The EFAA’s “Relate[s] To” Language Must be Interpreted Narrowly to Effectuate The Intent of Both the FAA and EFAA

Appellant argues that the phrase “relate[s] to” in the EFAA must be interpreted broadly to exclude her pregnancy related claims from arbitration. (Pb) In support of this argument, Appellant cites to a plethora of cases adopting a broad definition of “relate” or “relating to” language; however, all of these cases pre-date the EFAA and therefore are not proper comparators. For instance, while many of the cases cited support a broad interpretation of “arising out of” and “relating to” language in arbitration agreements, that is because arbitration agreements must be interpreted broadly to *require* arbitration wherever possible, and such cases do not provide any support for the same adoption to the EFAA .⁶ Adopting such a broad definition for interpreting the

⁶As the Supreme Court has explained, agreements must be interpreted to require arbitration wherever possible: “The arbitration act establishes that, as a matter of law, *any doubts concerning the scope of the arbitrable issue should be resolved in favor of arbitration*, whether the problem at hand is a construction of the contract language itself or an allegation of waiver, delay or a like defense

“relate to” language in the EFAA would have the opposite effect of stifling arbitration. It would also undermine federal and state policy favoring arbitration and otherwise contravene the clear mandate of the FAA to bifurcate arbitrable claims from non-arbitrable claims in order to effectuate the legislative intent of enforcing arbitration agreements.

Based on the EFAA’s legislative history, it is clear that the phrase “relate[s] to” must be construed narrowly. As noted above, the EFAA was never intended to preclude from arbitration sex discrimination claims that fall outside of the subset of sexual harassment and sexual assault disputes. The EFAA’s policy is to prevent sexual harassment claims from being forced into arbitration, rather than “to be a catalyst for destroying predispute arbitration agreements in all employment matters.” 168 Cong. Rec. S625 (statement of Sen. Joni Ernst) (emphasis added)). Congress did not intend to take unrelated claims out of an arbitration contract but instead intended to prevent sexual assault and sexual harassment claims from being forced into arbitration. Senator Gillibrand, one of the Act’s main sponsors, made this clear when she acknowledged “[t]he bill plainly reads... that only disputes that relate to sexual assault or harassment conduct can escape the forced arbitration clauses. ‘That relate to’ is in the text.”

to arbitrability.” *Moses H. Cone Memorial Hospital*, 460 U.S. 1, 24-25 (1983) (emphasis added).

168 Cong. Rec. S627 (statement of Sen. Kirsten Gillibrand). McDermott, at 19-20.

C. The EFAA Does Not Preclude Bifurcation Required Under The FAA

Cherry-picking a few lower court decisions from other jurisdictions, Appellant suggests that this Court need not engage in any relatedness analysis because the EFAA blocks arbitration of the entire ‘case’ as long as a claim for sexual harassment pends in the case.⁷ (Pb20-21). Such interpretation, however, produces the awkward result of describing a *case* as “relating to” a particular legal theory. Normal parlance, however, would refer to a “case” in this manner (i.e., a lawsuit or action) as *containing* and/or *asserting* a claim “relating to” sexual harassment. Stated differently, lawsuits/actions are comprised of *claims*, which in turn “relate to” statutory or common law violations. As such, the interpretation proposed by Appellant is contrary to the plain and common sense understanding and use of these terms.⁸ Congress clearly intended use of the term “case” to mean a *claim*, as opposed to an action or lawsuit.

⁷ This argument stems from the EFAA’s jurisdictional provision, which provides that an arbitration agreement is unenforceable “with respect to a *case* which is filed under Federal, Tribal, or State law and relates to . . . the sexual harassment dispute.” 9 U.S.C. § 402(a) (emphasis added)

⁸ The canons of statutory construction do not require a court to forego the use of common sense in construing ambiguous statutory language. See, e.g., State in Interest of K.O., 217 N.J. 83, 94 (2014) (holding that “[s]tatutory language is . . . to be given a common-sense construction”)

Moreover, a reading of Section 402(a) *in its entirety* further supports that Congress intended the term “case” to mean a *claim*. Specifically, the terms “case” and “relates to” are intended to modify the “predispute agreement,” which is the object of that sentence. As such, these *conjunctive* terms must both be satisfied in the context of the predispute agreement’s enforceability (as opposed to one another). That is, an arbitration agreement is only invalidated *to the extent*: (i) a “case” is filed under law *and* (ii) it “relates to the sexual assault or the sexual harassment dispute.” Under Appellant’s interpretation, however, the reference to a “case” being filed becomes wholly superfluous in that *any* sexual harassment claim would render an arbitration agreement unenforceable, *e.g.*, “*at the election of the person alleging conduct constituting a sexual harassment dispute . . . no predispute arbitration agreement . . . shall be valid or enforceable with respect to . . . the sexual harassment dispute.*” Such interpretation is at odds with the conjunctive language utilized in Section 402(a). See United States v. Williams, 917 F.3d 195, 202 (3d Cir. 2019) (observing that “[a] cardinal rule of statutory interpretation is that courts should avoid interpreting a statute in ways that would render certain language superfluous”).

A federal court was recently aligned with this interpretation:

The EFAA states that no arbitration agreement shall be enforceable “with respect to a case which is filed under Federal, Tribal, or State law and relates to the [] sexual harassment dispute.” 9 U.S.C. § 402(a) (emphasis added). Some courts have assigned significance to

the use of the word “case” and suggest the use of that term means all claims are precluded from arbitration in any case that includes even one claim that relates to a sexual harassment dispute. See, e.g., Johnson v. Everyrealm, Inc., 657 F.Supp.3d 535, 558-561 (S.D.N.Y. 2023); but see id. at 562 n.23 (noting that court did not have the opportunity “to consider the circumstances under which claim(s) far afield might be found to have been improperly joined with a claim within the EFAA”). . . . Indeed, at least one court has implicitly rejected that reading of “case.” See Mera v. SA Hosp. Grp., LLC, 675 F. Supp. 3d 442, 447-48 (S.D.N.Y. 2023). There, the court compelled to arbitration state-law and FLSA claims about wage and hour law violations, but declined to compel to arbitration of hostile work environment claims that arose from sexual orientation discrimination. Mera, 675 F. Supp. 3d at 443. The court reasoned the wage and hour claims did “not relate in any way to the sexual harassment dispute.” Mera, 675 F. Supp. 3d at 448. ***This is plain language interpretation of “relate to.”*** It also effectuates the statute’s purpose of discouraging the concealment of behavior involving sexual harassment and misconduct, not necessarily prohibiting non-public resolution of all legal violations by employers.

Lee v. Taskus, No. SA-23-CV-01456-OLG, 2024 U.S. Dist. LEXIS 116623, *8-9 (W.D. Tex. July 2, 2024).

Respondents submit the only way to harmonize the underlying purpose of the FAA with the EFAA is to follow Mera, as Lee and the McDermott New Jersey court did. In other words, courts must engage in a relatedness analysis to determine whether the claims in the case relate to the sexual harassment dispute. If they do not, then they must be arbitrated under the FAA.

As the McDermott court recognized, “[c]learly, the FAA mandates bifurcation of arbitrable claims from non-arbitrable claims in order to effectuate

the legislative intent of enforcing arbitration agreements.” McDermott, at 19 (Pa470). On the other hand, the court observed, it is “self-evident” that the purpose of the EFAA is to help eradicate sexual harassment in the workplace. Id. The court noted a review of the EFAA’s legislative history confirms, however, “that the intent of the EFAA is ‘not to be the catalyst for destroying predispute arbitration agreements in all employment matters.’” Id. (citations omitted). “Indeed, Congress did not ‘intend to take unrelated claims out of’ an arbitration contract but instead intended to prevent ‘sexual assault and sexual harassment claims from being forced into arbitration.’” Id. (citations omitted).⁹

Based upon the foregoing and viewing the statutory schemes of the FAA and EFAA in harmony, the McDermott court concluded “it is clear that the EFAA does not intend to exclude from arbitration claims that are unrelated to a claim of sexual harassment and are otherwise arbitrable.”¹⁰ McDermott, at 20

⁹ Legislators recognized that sexual “[h]arassment and assault allegations must stand on their own.” 168 Cong. Rec. S624-01, S625 (daily ed. Feb. 10, 2022) (statement of Sen. Ernst). 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.

¹⁰ As one court observed, while “the FAA does make plain that arbitration shall not reach ‘a sexual harassment dispute or sexual assault dispute,’ . . . nothing in the FAA would impede . . . claims – which do not involve sexual harassment – from proceeding to arbitration.” Potts v. Excalibur Assocs., Inc., No. 8:22-cv-02565-PX, 2023 U.S. Dist. LEXIS 78110, *8 (D. Md. May 3, 2023).

(Pa470). In this regard, the court accepted the holding of Mera as the correct answer to this puzzle when stating that:

The Court holds that, under the EFAA, an arbitration agreement executed by an individual alleging conduct constituting a sexual harassment dispute is unenforceable only to the extent that the case filed by such individual ‘relates to’ the sexual harassment dispute, see 9 U.S.C. § 402(a); in other words, only with respect to the claims in the case that relate to the sexual harassment dispute. **To hold otherwise would permit a plaintiff to elude a binding arbitration agreement with respect to wholly unrelated claims affecting a broad group of individuals having nothing to do with the particular sexual harassment affecting the plaintiff alone.**

Id. (citation omitted)(emphasis added).

Numerous other courts have reached the same conclusion in ordering the bifurcation of sexual harassment claims from those claims unrelated to sexual harassment that remain arbitrable pursuant to the EFAA. See, e.g., Dixon v. Dollar Tree Stores, Inc., No. 22-CV-131S, 2023 U.S. Dist. LEXIS 37974, *16-17 (W.D.N.Y. Mar. 7, 2023) (approving of bifurcation under the EFAA because it “only applies prospectively to sexual assault and sexual harassment claims arising on and after the Act’s effective date”); Guzman v. BFS Grp. of Cal., LLC, 2024 Cal. Super. LEXIS 30912, *11 (Sup. Ct. April 16, 2024) (approving of bifurcation because “the EFAA does not apply to claims that are wholly

unrelated to sexual harassment”); Williams v. Apro, LLC, 2023 Cal. Super. LEXIS 108098, *6 (Sup. Ct. July 18, 2023) (holding that “[n]othing in the statute suggests a plaintiff may merge allegations subject to [EFAA] with others that are not, and thereby avoid arbitration of the non-[EFAA] claims”); Bustos v. Stations Serv., 2023 Cal. Super. LEXIS 41466, *3 Sup. Ct. June 23, 2023) (requiring bifurcation of wage and hour claims under the EFAA).

Although Appellant cites the Johnson decision out of the Southern District Court of New York in support of her argument that bifurcation should not be permitted for any of her other claims, Johnson noted it “[did] not have occasion here to consider the circumstances under which claim(s) far afield might be found to have been improperly joined with a claim within the EFAA so as to enable them to elude a binding arbitration agreement.” Johnson v. Everyrealm, Inc., 657 F. Supp. 3d 535, 562, fn. 23 (S.D.N.Y. 2023). Other cases following Johnson, including the Turner decision cited by Appellant, have deemed it necessary to nonetheless engage in a relatedness analysis thus signaling significant doubt or even rejection of the “case” interpretation advanced by Appellant. See, e.g., Turner v. Tesla, Inc., 686 F. Supp. 3d 917, 924-25 (N.D. Cal. 2023) (examining each of the plaintiff’s claims to determine whether they were either “inherently intertwined” with or “substantially related to” her sexual harassment claim); Newton v. LVMH Moet Hennessy Louis Vuitton Inc., No.

23-CV-10753, 2024 U.S. Dist. LEXIS 151749, *22-23 (S.D.N.Y. Aug. 23, 2024) (examining factual relatedness pursuant to Section 402(a) based on subject matter); Baldwin v. TMPL Lexington LLC, 2024 U.S. Dist. LEXIS 148291, *1-2 (S.D.N.Y. Aug. 19, 2024) (examining relatedness of wage-related claims to sexual harassment under Section 402(a)); Ding Ding v. Structure Therapeutics, Inc., 2024 U.S. Dist LEXIS 196549 (N.D. Cal., Oct. 29, 2024) (holding that the plaintiff's "non-sexual-harassment claims are based upon the same underlying facts as her sexual harassment claim" for purposes of establishing relatedness under Section 402(a)); These courts would not have engaged in the analysis of determining whether other claims related to the underlying sexual harassment claim if Section 402(a) required the entire case to be arbitrated simply because a sexual harassment claim was alleged.

Moreover, Appellant's reliance on Delo is misguided and readily distinguishable from the instant matter. Delo concerned whether the plaintiff in that case could invoke the EFAA, even though none of her claims were styled as "sexual harassment." See Delo v. Paul Taylor Dance Foundation, Inc., 685 F.Supp. 3d 173 (S.D.N.Y. 2023). That is not the case here, as Appellant's sexual harassment claim is clearly styled as such. Moreover, the gender claims in Delo are not the same as the pregnancy-related claims here, which are neither styled as sexual harassment claims, nor involve allegations of sexual misconduct;

rather, they are solely based on an alleged failure to accommodate Appellant's pregnancy restrictions in a position different from the position she allegedly experienced sexual harassment in years prior.¹¹

D. The Trial Court Correctly Determined That Counts I Through III Of The First Amended Complaint Do Not “Relate To” Sexual Harassment Under The EFAA.

Appellant does not offer any rational basis for disturbing the Trial Court's determination that Appellant's pregnancy-related claims in Counts I through III of the Complaint are unrelated to Appellant's sexual harassment claims. The Court need only review the Complaint itself to see there is no relationship between her failure-to-accommodate pregnancy discrimination and retaliation claims and her sexual harassment claims.

Upon amending the Complaint to include a cause of action for sexual harassment after learning of the existence of the Arbitration Agreement, Appellant only added the following six scant allegations relating to sexual harassment:

- From the outset of Plaintiff's employment with Defendant CJF, she was subjected to sexual harassment by her coworkers. . . .

¹¹ In arguing that her gender discrimination claims should be considered “sexual harassment” under the EFAA, the plaintiff in Delo alleged that her boss, among other things, reached across her body while she was pumping breast milk at her desk and proceeded to make a phone call in that position.

- Each morning, while gathered with her male counterparts, Plaintiff was forced to endure the perverse commentary of her male counterparts.
- More specifically, Plaintiff's male counterparts made statements such as: "She has a big ass with nice thighs;" "I want to hit that;" and "Nice titties, they are perky." It is important to emphasize these comments were made to Plaintiff, about Plaintiff, and about other female employees in the Defendant CJF workplace.
- It is abundantly clear these comments were made to and around Plaintiff because of the fact she was a female.
- It was equally clear these comments were unsolicited, unwanted, and fundamentally changed the terms and conditions of Plaintiff's employment.
- Needless to say, the shameless and relentless commentary made Plaintiff extremely uncomfortable, however, she attempted to brush the comments aside. Despite Plaintiff's best efforts, she was compelled by the relentless sexual harassment and gender discrimination to begin removing herself from the group meetings.

(Pa000071 ¶¶ 15-20).

By contrast, Appellant's pregnancy related allegations span 30 paragraphs and focus almost exclusively on Respondents' alleged mistreatment of her *because of her pregnancy* and refusal to provide a reasonable accommodation *for her pregnancy*. For example, Appellant alleges Respondents began "criticizing" and "pressuring" her to resume her driving responsibilities after she requested and received an accommodation for her pregnancy in the form of a new role as a Dispatcher. See (Pa000074 ¶¶ 31, 32, 35). Appellant claims to have requested additional restrictions because of the purported "repeated threats and undue pressure [Respondents] placed on her to return to her role" as a

Driver. (Pa000075 ¶ 38). Appellant also alleges she was terminated after she “attempted to reiterate her restrictions.” (Id. ¶ 39).

As is clear from Appellant’s actual allegations, Appellant’s pregnancy related claims in Counts I-IV are completely unrelated to her sexual harassment claims. They involve different actors (female supervisors versus male coworkers), are completely devoid of sexual harassment allegations, arise out of a different set of facts, and allege retaliation only in connection with Appellant’s accommodation requests.

Although Appellant disingenuously tries to suggest Appellant sought to fortify her pregnancy accommodation because she was “fearful of returning to a role rife with sexual harassment,” (Pb9), it is clear that no such allegations were made in either the original complaint or the First Amended Complaint. Moreover, Count II of the Complaint alleging retaliation specifically provides “Defendants took retaliatory action against Plaintiff by terminating Plaintiff after she announced she was pregnant and was required a reasonable accommodation by her doctor for her pregnancy.” Importantly, there is no reference remotely related to sexual harassment and the focus of such allegations is solely on her failure to accommodate claim.

The causes of action pleaded in Counts I through III of the Complaint have no evidentiary bearing whatsoever on Appellant’s sexual harassment narrative.

They are essentially two different cases, with no overlapping facts. In fact, Counts I through III and the facts related to these Counts existed on their own until Appellants learned of the Arbitration Agreement and amended the complaint to include six allegations regarding sexual harassment.

That Appellant's pregnancy discrimination claim in Count I and her sexual harassment claim in Count IV both allege hostile work environment is meaningless as they relate to two separate and distinct events—one concerning the sexual harassment Appellant allegedly experienced from her co-workers at the outset of her employment—and the other involving the discrimination Appellant allegedly experienced due to Respondents' failure to accommodate her pregnancy over a year later. There is no overlap between the claims.

E. There Is A Strong Policy-Based Justification For Bifurcation Under The EFAA.

The Trial Court's ruling should also be affirmed on policy-based grounds. In particular, as the McDermott court noted, precluding bifurcation under the EFAA would permit virtually any sexual harassment claim to invalidate an otherwise enforceable arbitration agreement *regardless of its merit or lack thereof*. The court observed:

In the context of the foregoing, this court cannot help but think about a scenario in which an employee agrees to arbitrate all employment disputes. Thereafter, that employee files a fourteen-count complaint, which

contains one count alleging sexual harassment. If the court were to refuse to bifurcate the thirteen unrelated claims, and the court subsequently was to dismiss the sexual harassment claim before trial, the court arguably would have to retain jurisdiction over 13 counts *that should have been arbitrated*. This extreme example reflects an absurd outcome that this court believes should be avoided.

McDermott, at 21. First, the above scenario is by no means “extreme” in that this scenario would indeed become commonplace if this Court were to adopt Plaintiff’s interpretation of Section 402(a). Sexual harassment claims are inherently fact-based and only rarely incapable of meeting the liberal pleading standard imposed by R. 4:6-2(e). The scenario painted by the McDermott court would make a mockery of the purposes behind both the EFAA and the FAA.

Second, it creates the potential for either permitting individuals in multiple party cases to be unfairly benefited or restricted by one party’s sexual harassment claim despite having absolutely no connection that particular claim or even litigant. It is not all unusual for employment claims to consist of either multiple plaintiffs or defendants. Under the “case” theory urged by Appellant, one party asserting a sexual harassment claim would permit other plaintiffs bound by such claim to unfairly avoid their contractual obligation to arbitrate. Indeed, the Mera Court contemplated this very scenario:

The Court holds that, under the EFAA, an arbitration agreement executed by an individual alleging conduct constituting a sexual harassment dispute is

unenforceable only to the extent that the case filed by such individual "relates to" the sexual harassment dispute, see 9 U.S.C. § 402(a); in other words, only with respect to the claims in the case that relate to the sexual harassment dispute. ***To hold otherwise would permit a plaintiff to elude a binding arbitration agreement with respect to wholly unrelated claims affecting a broad group of individuals having nothing to do with the particular sexual harassment affecting the plaintiff alone.***

Mera, 675 F. Supp. 3d at 448. Conversely, multiple defendants like Respondents Sanchez and Batista here with no bearing whatsoever to the sexual harassment claims, would likewise be unfairly denied the benefit of their prior bargain to arbitrate. Permitting bifurcation to continue under the EFAA avoids these thorny scenarios.

Lastly, the interpretation advanced by Appellant poses its greater danger by providing an individual a means by which to *intentionally* invalidate an arbitration agreement through fabricated sexual harassment allegations. In Lee, the district court keenly recognized that Appellant's "reading of the term 'case' could lead to ***strategic pleading*** by plaintiffs to avoid arbitration of claims that have nothing to do with sexual harassment or related conduct." Lee, 2024 U.S. Dist. LEXIS 116623 at *8-9 (emphasis added). No guardrails exist that are capable of preventing this sort of "strategic pleading" from becoming the norm. In the event the fraudulent sexual harassment claim is dismissed following discovery, arbitration proceedings are simply no longer practical. See, e.g., Dean

Witter Reynolds, 470 U.S. at 221 (observing that “encouragement of efficient and speedy dispute resolution” are goals of arbitration). Even the Johnson case relied upon by Appellant deemed it necessary to acknowledge this conundrum. See, Johnson v. Everyrealm, Inc., 657 F. Supp. 3d 535, 562, fn. 23 (S.D.N.Y. 2023) (holding that the court “does not have occasion here to consider the circumstances under which claim(s) far afield might be found to have been improperly joined with a claim within the EFAA so as to enable them to elude a binding arbitration agreement”). These policy-based concerns support the Trial Court’s decision to bifurcate the claims in this case, especially since it certainly appears the only reason Appellant added her sexual harassment claims was to avoid arbitration.

Accordingly, the Trial Court’s decision to bifurcate Counts I through III of the Complaint should be affirmed as it strikes the proper balance between the FAA’s intent of facilitating arbitration with the EFAA’s purpose of ending involuntary arbitration of *sexual harassment* claims.

POINT II

THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT’S SEXUAL HARASSMENT CLAIM WAS NOT

BARRED BY THE LAD'S TWO-YEAR STATUTE OF LIMITATIONS THEREBY TRIGGERING THE EFAA.

In the alternative,¹² Respondents respectfully submit that the Trial Court erred in refusing to dismiss Appellant's sexual harassment claims in Count IV as untimely under the LAD's two-year statute of limitations. Appellant's sexual harassment allegations that occurred at or around the beginning of her employment in 2021 constituted discrete acts which must be deemed untimely by application of the CVR under the LAD's two-year statute of limitations. The Trial Court further erred by alternatively construing the allegations in the Complaint to support a viable sexual harassment claim in Count IV.

In the absence of said errors, the EFAA would not have been applicable to this action at all. See Yost v. Everyrealm, Inc., 657 F. Supp. 3d 563, 577 (S.D.N.Y. 2023) (observing that to qualify as a "sexual harassment dispute" under EFAA, the claim must be capable of surviving a motion to dismiss on other grounds).

A. The Conduct Alleged To Have Occurred At The Outset Of Appellant's Employment Is Not Rendered Timely By The CVR.

Sexual harassment claims under the NJLAD are subject to a two-year statute of limitations. *Montells v. Haynes*, 133 N.J. 282, 287 (1993). It is also

¹² Respondents submit Appellant opened the door to a review of the Trial Court's refusal to dismiss Count IV by appealing the *entire* Order. See (Pa000487).

well-settled that a cause of action that is time-barred is ripe for dismissal pursuant to R. 4:6-2(e). *See, e.g., Joseph R. McFadden v. Pentagon Fed. Credit Union*, No. A-3538-20, 2023 N.J. Super. Unpub. LEXIS 1298, *9-14 (App. Div. July 27, 2023) (affirming dismissal under R. 4:6-2(e) on statute-of-limitations grounds); *Carlson v. Aristacare at Cherry Hill, LLC*, No. A-1753-22, 2023 N.J. Super. Unpub. LEXIS 2227, *3 (App. Div. Dec. 6, 2023) (same). “[A] dismissal with prejudice is ‘mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.’” *Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co.*, 473 N.J. Super. 1, 17 (App. Div. 2022). A dismissal with prejudice under R. 4:6-2(e) is further warranted when “discovery will not give rise to such a claim.” Id. As is the case here, an “impediment such as a statute of limitations” compels that the dismissal be with prejudice. *Nostrame v. Santiago*, 213 N.J. 109, 127 (2013).

Here, Appellant’s NJLAD sexual harassment claim, which was originally filed on September 16, 2024, is time-barred because she relies on ***discrete, independent forms*** of sexual harassment that purportedly occurred at the outset of her employment in 2021, at which time the LAD’s two-year statute-of-limitations clock began ticking. See Roa v. Roa, 200 N.J. 555, 556-70 (2010) (distinguishing between discrete and non-discrete actions for purposes of

triggering the LAD's two-year statute-of-limitations under the CVR). The CVR does not permit these allegations to potentially be timely in perpetuity.

In Roa, the New Jersey Supreme Court distinguished between “discrete discriminatory acts” and non-discrete acts for the purpose of establishing the availability of the CVR – a narrow “equitable exception to the statute of limitations.” Id. at 566. Applying United States Supreme Court precedent, Roa held that individually actionable allegations (*i.e.*, discrete acts) cannot be aggregated for purposes of the CVR but, rather, are *independently actionable* for purposes of the statute-of-limitations. Id. at 567 (emphasis added). The Court explained:

Defendants counter that the continuing violation theory cannot be applied to sweep in an otherwise time-barred discrete act. We agree. As we have said, the continuing violation theory was developed to allow for the aggregation of acts, each of which, in itself, might not have alerted the employee of the existence of a claim, but which together show a pattern of discrimination. In those circumstances, the last act is said to sweep in otherwise untimely prior non-discrete acts.

What the doctrine does not permit is the aggregation of discrete discriminatory acts for the purpose of reviving an untimely act of discrimination that the victim knew or should have known was actionable. Each such “discrete discriminatory act starts a new clock for filing charges alleging that act.”

Id. at 569-70 (emphasis added) (citations omitted).

“[I]n direct contrast to discrete acts, a single [non-discrete act] may not be actionable on its own.” National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002). Rather, it is the cumulative effect of a series of non-discrete acts from which a hostile work environment claim arises, which provides the rationale for application of the CVR. Id. As such, the CVR is an equitable doctrine in that its application is limited to situations where a particular act in isolation is *reasonably* incapable of providing notice of actionable harassment claim as a matter of law. Roa, 200 N.J. at 569-70. Importantly, however, the CVR is not intended to restart “a new clock” for each and every act of harassment sustained by an employee. See Morgan, 536 U.S. at 113 (holding that “[e]ach discrete discriminatory act starts a new clock for filing charges alleging that act” and that any related claim “must be filed within the [statutorily prescribed] time period after the discrete discriminatory act occurred”). Thus, the distinction between discrete and indiscrete acts are critical to the application of the CVR. See, e.g., Dyer v. N.J. Tpk. Auth., No. A-4313-17T3, 2020 N.J. Super. Unpub. LEXIS 1491, *29-30 (App. Div. July 24, 2020) (affirming the trial court’s decision “that plaintiff alleged discrete acts occurring earlier than March 5, 2012 and that her claims arising from such conduct are time-barred”); Castro v. Cty. of Bergen, No. A-1903-14T1, 2016 N.J. Super. Unpub. LEXIS 616, *19 (App. Div. Mar. 22, 2016) (same).

Similarly, the Third Circuit has applied this CVR standard to harassment allegations with similar emphasis on the discrete/indiscrete nature of the allegations:

Morgan established 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 claim. ***The former must be raised within the applicable limitations period or they will not support a lawsuit.*** Id. at 113 (“Discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discriminatory act starts a new clock for filing charges alleging that act.”).

O’Connor v. City of Newark, 440 F.3d 125, 127 (3d Cir. 2006) (emphasis added) (observing that “denial of training” and “wrong accusation” constitute discrete harassment for purposes of the CVR); see also Nicolas v. Trenton Bd. of Educ., No. A-4039-21, 2024 N.J. Super. Unpub. LEXIS 75, *20 (App. Div. Jan. 17, 2024) (observing that “‘individually actionable allegations cannot be aggregated’ for purposes of the continuing violation doctrine and must be asserted within their individual limitations periods”) (quoting O’Connor, 440 F.3d at 127). The Third Circuit further observed that “there is not a single vote on the [Morgan] Court for the proposition that *individually actionable discrete acts* may support suit outside the limitations period if they are aggregated and labeled as a hostile environment claim.” Id. at 129 fn.6. In sum, a discrete

violation of the LAD is independently actionable and, thus, triggers its own statutory clock for purposes of the statute of limitations.

Here, the Complaint establishes that the earliest alleged statements supporting Appellant's hostile work environment claim were made at the beginning of her employment in December 2021, close to three years prior to Appellant filing this action. Appellant contends that her male counterparts made comments such as: "She has a big ass with nice thighs;" "I want to hit that;" and "Nice titties, they are perky." (Pa000071 ¶ 17). Clearly, these allegations are the gravamen of Appellant's sexual harassment claim and were readily identifiable as harassment at the time they were made. Indeed, Appellant amended her complaint solely to insert this language to emphasize the vulgarity of this alleged conduct as constituting actionable harassment.

Moreover, there are no further assertions setting forth specific allegations and/or their dates to support a timely hostile work environment claim in the Complaint. Instead, Appellant merely adds that the commentary was "relentless," without providing any more specifics. (*Id.* ¶ 20.) This sort of innocuous and conclusory assertion falls far short of establishing a continuing violation of a hostile work environment.

Importantly, the Complaint itself makes clear that the allegations in paragraph 17 consist of *discrete, independently actionable* acts of sexual

harassment under the Morgan/Roa framework. There is no ambiguity to the severity and/or hostility of this alleged conduct nor is any intended. As noted, Appellant specifically amended her Complaint to reference the alleged comments and described them as “perverse”, “shameless” and that they “fundamentally changed the terms and conditions” of her employment.” (Id. ¶ 20.) It is also no coincidence that Appellant further describes this alleged harassing conduct by reciting the prima facie elements of a hostile work environment claim by using descriptors such as “unsolicited” and “unwanted.”

The New Jersey Supreme Court has repeatedly observed that even a single utterance is capable of constituting a discrete act of harassment. See, e.g., Taylor v. Metzger, 152 N.J. 490, 501 (1998) (observing that “a single utterance” is capable of creating a hostile work environment); Cutler v. Dorn, 196 N.J. 419, 440 (2008) (same); see also Lehmann v. Toys-R-Us, 132 N.J. 587, 606-07 (1993) (observing that “it is certainly possible” that a single incident can be sufficiently severe so that it makes the work environment hostile to a reasonable woman); Leonard v. Metro. Life Ins. Co., 318 N.J. Super. 337, 345 (App. Div. 1999) (observing that “[e]ven a single derogatory remark may be sufficiently severe to produce a hostile work environment”).

In sum, the Trial Court committed reversible error in applying the CVR to the above alleged conduct thereby permitting it to constitute a timely sexual

harassment claim. See, e.g., Bolinger v. Bell Atl., 330 N.J. Super. 300, 307-09 (App. Div. 2000) (rejecting a claim that discriminatory treatment constituted a continuing violation over a seven-year period because this “did not arise as the result of continuously inflicted, albeit discrete and individual injuries that, taken together, comprised a single tortious act”) Case in point, her own Complaint demonstrates that Appellant clearly “knew or should have known [this alleged conduct by her co-workers] was actionable,” which is the sine qua non of the CVR. Roa, 200 N.J. at 569; see also Brennan v. State, No. A-3119-07T3, 2009 N.J. Super. Unpub. LEXIS 1920, *17 (App. Div. July 24, 2009) (holding that “to the extent that plaintiff believed [a reduction of his job duties] was a discriminatory act within the larger hostile work environment at DHS, he was obligated to commence his suit within two years of the events” by the CVR).

Accordingly, Appellant should not be permitted to rely on the alleged conduct to support her sexual harassment claim in Count IV of the Complaint.

B. The Complaint Does Not Support A Viable Sexual Harassment Claim Under The EFAA Without The Untimely Allegations.

In the absence of the untimely allegations above, Appellant’s remaining harassment-related allegations fall short of supporting an actionable claim for sexual harassment under the EFAA. As noted above, despite Appellant’s efforts to broaden its application, the EFAA does not provide an election to avoid arbitration to plaintiffs alleging claims of sex discrimination that fall outside the

subset of sexual harassment and sexual assault disputes. See 9 U.S.C. § 402(a); see, e.g., Singh v. Meetup LLC, 2024 WL 4635482, at * (S.D.N.Y. Oct. 31, 2024) (finding gender discrimination devoid of sexual, romantic, or lewd behavior does not qualify as sexual harassment under the EFAA); Dixon v. Dollar Tree Stores, Inc., No. 22-CV-131S, 2023 WL 2388504, at *7 (W.D.N.Y. March 7, 2023) (finding allegations of disparate treatment because of gender were not precluded from arbitration by EFAA); Cornelius v. CVS Pharmacy Inc., 2023 WL 6876925, at *4 (E.D.N.J. Oct. 18, 2023) (finding Plaintiff alleged gender discrimination claims and facts to support discrimination based on sex, but not sexual harassment, and therefore could not rely on the EFAA to avoid arbitration).

In conclusion, the sexual harassment allegations involving the “perverse” commentary made at the beginning of Appellant’s employment are untimely, and without them, Appellant fails to set forth a viable sexual harassment claim in Count IV under the EFAA. The Trial Court’s denial of Respondents’ Motion to Dismiss Count IV should therefore be reversed.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Court deny Appellant’s appeal in its entirety and reverse the Trial Court’s denial

of Respondents' Motion to Dismiss and Compel Arbitration of Count IV of the Complaint.

Respectfully submitted,

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Dated: May 12, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-001568-24T4

GERALDINE RIVERA-SANTANA,

Plaintiff-Appellant

v.

CJF SHIPPING, LLC, *et al.*,

Defendants-Respondents.

CIVIL ACTION

On Appeal From:
Superior Court of New Jersey
Law Division – Essex County
Docket No. ESX-L-5834-24

SAT BELOW:
Hon. Aldo J. Russo, J.S.C.

**BRIEF ON BEHALF OF *AMICUS CURIAE* NATIONAL
EMPLOYMENT LAWYERS ASSOCIATION OF NEW JERSEY**

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PRELIMINARY STATEMENT

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (“EFAA”) is an amendment to the Federal Arbitration Act (“FAA”) that prohibits courts from compelling a person alleging sexual harassment to arbitrate a case that relates to the sexual harassment dispute. To our knowledge, every published opinion and the vast majority of unpublished opinions that have addressed the issue have concluded that all of the claims an individual plaintiff brings against her employer in a case that includes a sexual harassment claim are subject to the EFAA’s prohibition against forced arbitration.

As detailed below, the National Employment Lawyers’ Association of New Jersey (“NELA-NJ”) urges this Court to follow that long line of cases, and in particular the Southern District of New York’s well-reasoned seminal opinion in *Johnson v. Everyrealm, Inc.*, and reverse the trial court’s Order compelling Plaintiff-Appellant Geraldine Rivera-Santana to pursue her pregnancy discrimination, failure to accommodate pregnancy and retaliation claims in arbitration since those claims are part of the same lawsuit in which she is asserting a sexual harassment claim against the same defendants. Pursuant to the EFAA, since Ms. Rivera-Santana’s case relates to a sexual harassment dispute, she has the right to pursue her entire case in Court.

PROCEDURAL AND FACTUAL BACKGROUND

In this case, Ms. Rivera-Santana alleges that her former employer, Defendant-Respondent CJF Shipping, LLC, and two of its employees, Defendants-Respondents Julie Batista and Marisa Sanchez, engaged in sexual harassment, pregnancy discrimination, failure to accommodate pregnancy and retaliation against her in violation of the New Jersey Law Against Discrimination, N.J.S.A. § 10:5-1, *et seq.* (“LAD”). For purposes of this brief, we rely on the procedural history and factual background set forth in Ms. Rivera-Santana’s appellate brief.

ARGUMENT

I. The EFAA Expressly Prohibits Compelling Arbitration of a Case that Relates to a Sexual Harassment Dispute

The EFAA is an amendment to the FAA that prohibits compelling arbitration in any case involving a sexual harassment or sexual assault claim. The key provision of the EFAA, as it pertains to this appeal, says:

Notwithstanding any other provision of [the FAA], at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, ... no predispute arbitration agreement or predispute joint-action waiver 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 plain language of that provision establishes two requirements for the prohibition against forcing arbitration to apply: (1) the case must have been filed under Federal, Tribal, or State law; and (2) the case must relate to a sexual

assault dispute or a sexual harassment dispute under that Federal, Tribal or State law. Both of those requirements apply here.

While we recognize there is no binding precedent with respect to how to interpret that statutory provision, it is respectfully submitted that the Southern District of New York interpreted it correctly in *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535, 558 (S.D.N.Y. 2023). Since it was decided, *Johnson* has been “widely followed.” *See, e.g., Doe v. Second St. Corp.*, 105 Cal. App. 5th 552, 575, 326 Cal. Rptr. 3d 42 (Ct. App. 2024) (collecting cases).

Johnson clearly and correctly addresses the issue at the center of this appeal, namely whether an arbitration clause that is unenforceable pursuant to the EFAA because the case includes a sexual harassment claim precludes forced arbitration only of the sexual harassment and any claims that arise directly from it, or precludes arbitration of the entire case.

Johnson first recognizes that, ordinarily under the FAA, if some but not all claims are arbitrable then the non-arbitrable claims “must be sent to arbitration even if this will lead to piecemeal litigation.” *Johnson*, 657 F. Supp. 3d at 558 (citing *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011)). However, “the FAA’s mandates in support of its ‘liberal federal policy favoring arbitration agreements’ may be ‘overridden by a contrary congressional command.’” *Id.* (quoting *CompuCredit*

Corp. v. Greenwood, 565 U.S. 95, 98 (2012)). That is precisely what Congress did when it passed the EFAA. *Id.*

Specifically, the key language of the EFAA quoted above “makes a pre-dispute arbitration agreement invalid and unenforceable ‘with respect to a case which is filed under Federal, Tribal, or State law and relates to the . . . sexual harassment dispute.’” *Id.* (emphasis in original) (quoting 9 U.S.C. § 402(a)). As *Johnson* explains, that “text is clear, unambiguous, and decisive as to the issue here” in that “the scope of the invalidation of the arbitration clause to the entire ‘case’ relating to the sexual harassment dispute.” *Id.* at 559. In doing so, *Johnson* establishes the obvious, namely that a “case” is the entire lawsuit rather than the individual causes of action comprising it. *Id.* at 558-59.

Johnson then explains that the plain language of “§ 402(a) makes clear that its invalidation of an arbitration agreement extends to the entirety of the case” if the case relates to a sexual harassment dispute, and “not merely the discrete claims in that case that themselves either allege such harassment or relate to a sexual harassment dispute” such as “a claim of unlawful retaliation for a report of sexual harassment.” *Id.* at 559. Accordingly, it “holds that, where a claim in a case alleges ‘conduct constituting a sexual harassment dispute’ as defined, the EFAA, at the election of the party making such an allegation, makes pre-dispute arbitration agreements unenforceable with respect to the entire case relating to that dispute.” *Id.*

(emphasis added). In other words, it prohibits courts from forcing a plaintiff to arbitrate any of the claims in a case that includes a sexual harassment or sexual assault claim.

Even though *Johnson* was decided only a little more than two years ago, at least 31 cases, including at least seven published opinions, have adopted and followed it and its progeny on this issue. *See, Doe*, 326 Cal. Rptr. 3d at 575-76 (adopting *Johnson*'s "well-reasoned analysis" and ruling that "although not all of plaintiff's causes of action arise out of her sexual harassment allegations, the 'case' unquestionably 'relates to' the sexual harassment dispute because all of the causes of action are asserted by the same plaintiff, against the same defendants, and arise out of plaintiff's employment by the hotel") (citing *Olivieri v. Stifel, Nicolaus & Co., Inc.*, 112 F.4th 74, 92 (2d Cir. 2024); *Turner v. Tesla, Inc.*, 686 F.Supp.3d 917, 925 (N.D. Cal. 2023) ("*Johnson v. Everyrealm* is persuasive concerning its statutory interpretation of the EFAA and its result"); *Newton v. LVMH Moet Hennessy Louis Vuitton Inc.*, 2024 WL 3925757, *7 (S.D.N.Y., Aug. 23, 2024) ("[T]he EFAA's provision that a litigant may elect to invalidate an arbitration agreement for any 'case' requires courts to render such agreements unenforceable for an entire case"); *Scoggins v. Menard, Inc.*, 2024 U.S. Dist. LEXIS 147638, *21 (S.D. Ohio, Aug. 19, 2024) ("[T]he arbitration agreement is unenforceable against the entirety of Plaintiff's case, not just her claims of sexual harassment"); *Arouh v. GAN Limited*,

2024 WL 3469032, *6 (C.D. Cal., Mar. 22, 2024) (“When a plaintiff brings several claims, some of which are sexual harassment claims and some of which are not, the EFAA precludes arbitration as to all claims”); *Watson v. Blaze Media LLC*, 2023 U.S. Dist. LEXIS 135694, *2 (N.D. Tex. Aug. 3, 2023) (“If a plaintiff alleges a sexual harassment dispute, a predispute arbitration agreement is unenforceable as to ‘the entirety of the case relating to the sexual harassment dispute, not merely the discrete claims in that case that themselves either allege such harassment or relate to a sexual harassment dispute’”); *Baldwin v. TMPL Lexington LLC*, 2024 U.S. Dist. LEXIS 148291, at *24 (S.D.N.Y. Aug. 19, 2024) (applying *Johnson*, finding the plaintiff’s other claims are “a far cry from the types of far-afield claims unrelated to sexual harassment (*e.g.*, of antitrust or securities law violations) that *Johnson* had in mind in leaving open the possibility that the EFAA would not apply to improperly joined claims”)); *accord, Bruce v. Adams*, 2025 U.S. Dist. LEXIS 33532, at *35-36 (M.D. Tenn. Feb. 25, 2025) (“This court, following the clear majority of opinions on this issue, finds, based on the unambiguous statutory language, that, because the plaintiff states a colorable sexual harassment claim, the Arbitration Agreement is unenforceable as to the entire case”); *Bray v. Rhythm Mgmt. Grp., LLC*, 2024 U.S. Dist. LEXIS 173020, at *22 (D. Md. Sep. 24, 2024) (“[T]he language of the EFAA establishes that Congress intended to bar enforcement of an arbitration clause over all claims within a civil action when the case in some way ‘relates to’ a sexual

harassment dispute”); *Diaz-Roa v. Hermes Law, P.C.*, 2024 U.S. Dist. LEXIS 212472, *37 (S.D.N.Y. Nov. 21, 2024) (Recognizing that, “if the EFAA is properly invoked and applies, the pre-arbitration agreement is invalid and unenforceable with respect to the entire case”); *Casey v. Superior Court*, 108 Cal. App. 5th 575, 588 (2025) (“The EFAA provides that it applies to ‘a case’—as opposed to a claim—that a plaintiff brings alleging sexual harassment, meaning that the EFAA applies to an entire case”) (internal citation omitted); *Liu v. Miniso Depot CA, Inc.*, 326 Cal. Rptr. 3d 286 (Ct. App. 2024) (“We agree that... the plain language of the EFAA exempts a plaintiff’s entire case from arbitration where the plaintiff asserts at least one sexual harassment claim subject to the act”); *Martinez v. San-I-Pak Pac., Inc.*, 2024 Cal. Super. LEXIS 12986, *16 (Superior Court, San Joaquin Cty., Mar. 5, 2024) (“The EFAA was intended to apply to the entire case as long as it has some nexus to the sexual harassment dispute”); *Puris v. TikTok Inc.*, 2025 U.S. Dist. LEXIS 16998, *15-16 (S.D.N.Y. Jan. 30, 2025) (“[T]he EFAA excludes the entire case -- not only certain claims -- from mandatory arbitration, so long as it ‘relates to’ the sexual harassment claim, as this case does”); *Williams v. Mastronardi Produce, Ltd.*, 2024 U.S. Dist. LEXIS 150550 (E.D. Mich. Aug. 22, 2024) (“This Court shall follow the majority of the district courts that have addressed this issue, and rules that the EFAA precludes arbitration of this whole case”); *Clay v. FGO Logistics, Inc.*, 2024 WL 4335791 at *12 (D. Conn. Sept. 27, 2024) (Holding, for claims arising after the

EFFA’s effective date, “any arbitration agreement that would otherwise govern that dispute or claim may be invalidated with respect to all claims in the case by the person alleging the covered dispute or claim”); *Molchanoff v. SOLV Energy, LLC*, 2024 WL 899384, at *5 (S.D. Cal. Mar. 1, 2024) (Ruling that, since the plaintiff asserted a retaliation claim relating to sexual harassment “the EFAA bars enforcement of the arbitration agreement. . . as to all claims in this case”); *Gill v. US Data Mgmt.*, 2024 U.S. Dist. LEXIS 239683, at *5 (C.D. Cal. Dec. 2, 2024) (“[T]he EFAA broadly allows claimants to elect not to arbitrate any ‘case which . . . relates to . . . the sexual harassment dispute.’ Had Congress intended sexual harassment claims to be severed and litigated in court separately from the otherwise arbitrable cases in which they arise, it would not have used the word ‘case’”) (internal citation omitted); *Aleman v. DHS We Care, Inc.*, 2024 Cal. Super. LEXIS 43814, *5 (Superior Ct., Riverside Cty, Oct. 31, 2024) (“The Court finds that the EFAA applies to bar arbitration here where Plaintiff has alleged at least two claims for hostile work environment sexual harassment, as Defendant concedes. Based on these claims, the EFAA bars arbitration of any claims in Plaintiff’s complaint”) (internal citation omitted); *Ramos v. Prime Wheel Corp.*, 2023 Cal. Super. LEXIS 53651, *7 (Superior Court, Los Angeles Cty, Aug. 10, 2023) (“U]nder the EFAA, Plaintiff’s entire case -- not two discrete sexual harassment claims -- cannot be ordered to arbitration”); *Paulsen v. Pixel Labs, LLC*, 2024 Cal. Super. LEXIS 51614, *14 (Superior Court,

Los Angeles Cty, April 24, 2024) (Concluding the plaintiff’s “non-sexual harassment claims cannot be compelled to arbitration”); *Parra v. Cheesecake Factory Inc.*, 2024 Cal. Super. LEXIS 51695, *8 (Superior Court, Los Angeles Cty, Mar. 28, 2024) (“[A]ll of Plaintiff’s claims are subject to the EFAA and are non-arbitrable”); *Bryant v. Verses, Inc.*, 2025 Cal. Super. LEXIS 894, *6 (Los Angeles Cty, April 1, 2025) (“Under the EFAA, when any claim in a case contain allegations of a sexual harassment dispute, a Plaintiff may elect to invalidate the arbitration agreement for all claims in the action”); *Cruz v. Tustin Hills Healthcare Inc.*, 2024 Cal. Super. LEXIS 31245, *9 (Superior Ct. Orange Cty, June 24, 2024); *Ruiz v. Butts Foods, L.P.*, 2025 Tenn. App. LEXIS 125, at *40 (Ct. App. Apr. 14, 2025); *Cardenas v. F.D. Thomas, Inc.*, 2025 U.S. Dist. LEXIS 21854, at *15 (E.D. Cal. Feb. 5, 2025); *Flores v. Rubio’s Rests. Inc.*, 2024 Cal. Super. LEXIS 23147, *7 (Superior Court, Orange Cty, May 2, 2024); *Ybarra v. Adame*, 2024 Cal. Super. LEXIS 10856, *13-14 (Superior Court, San Diego Cty, Mar. 1, 2024); *Michael v. Bravo Brio Rests. LLC*, 2024 U.S. Dist. LEXIS 102504, at *18 n.6 (D.N.J. June 10, 2024); *Delo v. Paul Taylor Dance Found., Inc.*, 685 F. Supp. 3d 173, 180 (S.D.N.Y. 2023).

The only published opinion we are aware of that concludes a sexual harassment claim can proceed in court pursuant to the EFAA, while other claims brought in the same lawsuit must proceed in arbitration, does not contradict *Johnson*

but rather expressly distinguishes it based on its own unique set of facts. That case, *Mera v. SA Hospitality Group, LLC*, involves a sexual harassment claim asserted by an individual plaintiff in the same lawsuit in which he also asserted class action wage and hour claims. *Mera* distinguishes *Johnson* as follows:

Here, unlike the plaintiff in *Johnson*, who alleged that he was singled out for disparate treatment in the form of sexual harassment, race discrimination (including pay discrimination) and retaliation, Plaintiff in the present case alleges, with respect to his FLSA and NYLL claims, that “all non-exempt employees, including servers, bartenders, barbacks, waiters, bussers, and food runners among others, employed by Defendants” were “subjected to Defendants’ decisions, policies, plans, programs, practices, procedures, protocols, routines, and rules, all culminating in a willful failure and refusal to pay them their proper wages.” The only claims that are distinct to Plaintiff in this case are his NYSHRL and NYCHRL claims, which are based on the allegations that Defendants failed “to address the constant harassment and abuse made against Plaintiff on the basis of his sexual orientation.”

Since Plaintiff’s wage and hour claims under the FLSA and the NYLL do not relate in any way to the sexual harassment dispute, they must be arbitrated, as the Arbitration Agreement requires.

Mera v. SA Hosp. Grp., LLC, 675 F. Supp. 3d 442, 448 (S.D.N.Y. 2023) (internal citations omitted).

Mera is unique in that, whether or not there was a motion to compel arbitration, it was logical for the court to sever the class action wage and hour claims from the individual sexual harassment claim because the sexual harassment claim had nothing to do with the wage and hour class action claims other than the

commonality of the defendant and one of numerous putative plaintiffs. Thus, as another court explained, *Mera* is

distinguishable from *Johnson* because the plaintiff [in *Johnson*] alleged claims only on his own behalf, while *Mera* alleged both harassment claims that were unique to him and wage-and-hour claims on behalf of all nonexempt employees. The court thus concluded that the wage-and-hour claims were subject to arbitration because they “do not relate in any way to the sexual harassment dispute.”

Doe, 105 Cal. App. 5th at 576 (internal citations omitted); accord, *Diaz-Roa*, 757 F. Supp. 3d at n. 9.

Mera likewise is distinguishable from the case at bar since Ms. Rivera-Santana’s lawsuit does not include a class action or other representative claim, but rather alleges sexual harassment, pregnancy discrimination, failure to accommodate pregnancy and retaliation, all of which relate to the same individual employee, Ms. Rivera-Santana; the same employer, Defendant CJF Shipping; the same statute, the LAD; and the same employment relationship.

Aside from *Mera*, Defendants rely exclusively on a handful of unpublished opinions. One of those cases is similar to *Mera* in that it concludes the plaintiff’s wage and hour claims were not sufficiently related to her sexual harassment claim to be covered by the EFAA. *Bustos v. Stations Serv.*, 2023 Cal. Super. LEXIS 41466, *3 (Sup. Ct. June 23, 2023). *Bustos* is readily distinguishable from *Johnson*, the case at bar, and the other cases we cite in which the sexual harassment claim and the other claims all involve the same employee, the same employer, and alleged violations of

the same employment discrimination statute (or multiple state and federal employment discrimination statutes).

Defendants also rely on the Law Division's opinion in *McDermott v. Guaranteed Rate Inc.*¹ However, *McDermott*'s conclusion is based on the trial court's erroneous belief that the EFAA and the FAA are two separate and conflicting statutes:

Recognizing the existence of a conflict as between the FAA and EFAA with respect to bifurcation of claims for the purpose of sending certain claims to arbitration when the litigation involves a claim of sexual harassment falling under the EFAA, this court accepts that it may not throw up its hands and simply choose to follow the directive that it prefers. *Morton v. Manari*, 417 U.S. 535, 551 (1974). Rather, the imperative is to harmonize the FAA and EFAA in order "to give effect to both." *Ibid.*

McDermott v. Guaranteed Rate Inc., MRS-L-000360-24 (Law. Div., Sept. 23, 2024) (Pa467-68). *McDermott* goes on to discuss how to resolve that supposed conflict of law question, including that "it is widely recognized that judicial resolution of conflicting laws must be guided by legislative intent" before it attempts to reconcile the intentions of the FAA with the EFAA as if they were two separate statutes. *Id.* (Pa468).

¹ As per the trial court record available on eCourts, the Plaintiff in *McDermott* has appealed that ruling.

The problem with that analysis, of course, is that the EFAA is an amendment to the FAA rather than a separate conflicting statute. As a result, *McDermott*'s conflict of law analysis is misplaced. Rather, as the Court explained in *Johnson*:

In construing § 402(a), it is significant, too, that the EFAA amended the FAA directly... That reinforces Congress's intent to override—in the sexual harassment context—the FAA's background principle that, in cases involving both arbitrable and non-arbitrable claims, “the former must be sent to arbitration even if this will lead to piecemeal litigation.”

Johnson, 657 F. Supp. 3d at 560 (citations omitted).

Ultimately, *McDermott* adopts *Mera*, and in particular its conclusion that a plaintiff cannot “elude a binding arbitration agreement with respect to *wholly unrelated claims* affecting a broad group of individuals having nothing to do with the particular sexual harassment affecting the plaintiff alone.” *Id.* (Pa471) (*quoting Mera*, 675 F. Supp. 3d at 447) (emphasis added). But, in doing so, *McDermott* overlooks the fact that *Mera* does not reject *Johnson*, but rather distinguishes it, and thus implicitly recognizes that multiple employment discrimination claims asserted by the same plaintiff against the same employer are not “wholly unrelated” to each other. *McDermott* misapplies *Mera*, which distinguishes *Johnson* on the basis that *Mera* involves class action wage and hour claims that are wholly unrelated to the class representative's individual sexual harassment claim, whereas *Johnson* involves sexual harassment, race discrimination and retaliation claims by a single plaintiff

against the same employer. *Mera*, 675 F. Supp. 3d at 448. In other words, *McDermott* erroneously applies *Mera*.

Another case Respondents cites, *Paton v. Davis Saperstein & Salomon, P.C.*, BER-L-4319-24 (Law Div., Bergen Cty., Oct. 8 2024), is an unpublished trial court opinion that does not provide any analysis of the EFAA or offer any explanation why it denied the defendants' motion to compel arbitration with respect to the plaintiff's claims of gender discrimination, harassment due to pregnancy and sexual harassment, but not with respect to her claims for failure to accommodate pregnancy, failure to pay wages in violation of the New Jersey Wage and Hour Law ("WHL") and the New Jersey Wage Payment Law and retaliation in violation of the WHL.

Although Defendants cite *Dixon v. Dollar Tree Stores, Inc.* for the proposition that other courts have dismissed other claims while allowing sexual harassment claims to proceed in court pursuant to the EFAA (Db. 21), *Dixon* actually concludes that the EFAA did not apply because the plaintiff's sexual harassment claim arose prior to the effective date of the EFAA, and her post-effective date claims did not involve sexual harassment. *Dixon v. Dollar Tree Stores, Inc.*, 2023 U.S. Dist. LEXIS 37974, *16 (W.D.N.Y. Mar. 7, 2023). Similarly, *Potts v. Excalibur Assocs., Inc.* is inapposite because it does address the EFAA at all, but rather a provision in a Maryland employment law that prohibits arbitrating sexual harassment claims that the District Court concluded is preempted by the FAA; and in any event the

plaintiff's claims in that case did "not involve sexual harassment" but rather wage and hour claims and a common law abusive discharge claim. *Potts v. Excalibur Assocs., Inc.*, 2023 U.S. Dist. LEXIS 78110, *4, *8 (D. Md. May 3, 2023).

Several other cases Defendants cite actually conclude that the entire case before the Court could not be compelled to arbitration because the case included a sexual harassment claim. See, *Lee v. Taskus*, 2024 U.S. Dist. LEXIS 116623, *10 (W.D. Tex. July 2, 2024) ("[B]ecause of the statute's broad 'relates to' language, and because all three claims are related to the underlying sexual harassment dispute—Ms. Lee's termination for complaining about alleged sexual harassment based on a coworker's conduct—the undersigned finds that the EFAA renders unenforceable the parties' arbitration agreement as to the three claims in this case"); *Guzman v. BFS Grp. of Cal., LLC*, 2024 Cal. Super. LEXIS 30912, *13 (Riverside Cty., April 16, 2024) ("Because all of Plaintiff's claims involve FEHA violations arising out of the alleged sexual harassment, all causes of action are related to the sexual harassment claims"). To the extent those cases go beyond their facts and suggest that courts can compel arbitration of other discrimination and harassment claims that an employee brings against her employer in a case that includes a sexual harassment claim, that *dicta* contradicts the plain language of the EFAA.

Yet another case Defendants cite on this issue, *Williams v. Apro, LLC*, offers no substantive analysis or explanation for its conclusion other than the fact that the

plaintiff apparently failed to present any persuasive authority that the EFAA applies to the entire case. *Williams v. Apro, LLC*, 2023 Cal. Super. LEXIS 108098, *6 (Sup. Ct. July 18, 2023).

Thus, we respectfully submit that this Court should adopt the rationale of *Johnson v. Everyrealm*.

II. The EFAA Expressly Adopts State Law Definitions of Sexual Harassment, Including the LAD's Definition Which Includes Gender-Based Harassment Whether or Not it is Sexual

The EFAA applies to a “person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, ... 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). That unquestionably encompasses anyone who files a case that includes a claim of sexual harassment under our state anti-discrimination law, the LAD.

Under the LAD, sexual harassment is harassment that occurs because of the victim's sex. *Lehmann v. Toys 'R' Us*, 132 N.J. 587, 603 (1993). To violate the LAD, sexual harassment “need not be sexual in nature; rather, its defining characteristic is that the harassment occurs because of the victim's sex.” *Id.* at 602 (citing *Muench v. Township of Haddon*, 255 N.J. Super. 288 (App. Div. 1992) (holding employer liable for sexual harassment where employees harassed her because she was female even though the harassment was not sexual in nature)). For example, it can include

harassment that is sexist but not sexual. *Id.* at 605. Accordingly, since the EFAA applies to sexual harassment within the meaning of the LAD, it includes allegations of sexual harassment in violation of the LAD irrespective of whether the harassment was sexual in nature.

That is consistent with the reasoning of the court in *Bryant v. Verses, Inc.*, which applied the EFAA to a case in which the alleged sexual harassment that was not sexual in nature under California’s anti-discrimination law, as follows:

Contrary to what Defendants appear to suggest, sexual harassment claims are not limited to claims that are based upon sexual conduct or the exchange of sexual favors. A viable sexual harassment claim can be stated where a plaintiff alleges an alleged hostile work environment based upon gender or sex (female). Sexually harassing conduct need not be motivated by sexual desire, as Defendants argue....

Under the EFAA, when any claim in a case contain allegations of a sexual harassment dispute, a Plaintiff may elect to invalidate the arbitration agreement for all claims in the action.

Bryant, 2025 Cal. Super. LEXIS 894 at *4, *6. Other courts have reached the same conclusion. *See, e.g., Michael*, 2024 U.S. Dist. Lexis 102504 (finding EFAA applies to alleged sexual harassment under LAD and Title VII that occurred because the plaintiff is a transgender female even though the Complaint did not use the words “sexual assault” or “sexual harassment,” or allege any conduct that was sexual in nature); *Kennedy v. Meta Platforms, Inc.*, 2023 Cal. Super. LEXIS 110303, *1 (San Francisco Cty., April 28, 2023) (applying EFAA to sexual harassment claim that was not sexual in nature because, under California law, “‘harassment’ because of

sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions”); *Ding Ding v. Structure Therapeutics, Inc.*, 2025 U.S. Dist. LEXIS 21088, at *9 (N.D. Cal. Feb. 5, 2025) (concluding EFAA applies to claim alleging gender-based harassment that is not sexual in nature under New York City Human Rights law because, under it, “sexual harassment is conduct involving treating the plaintiff less well than other employees based on her gender. The EFAA requires the Court adopt that definition”); *McCullough v. Hykso, Inc.*, 2024 Cal. Super. LEXIS 32803, *3 (Orange County, July 3, 2024) (applying EFAA based on allegations of “the creation of a work environment that is hostile or abusive on the basis of sex” but not sexual in nature). Thus, the EFAA applies to a case alleging sexual harassment in violation of the LAD, irrespective of whether the harassment was sexual in nature.

CONCLUSION

For the foregoing reasons, amicus curiae NELA-NJ asks this Court to adopt the well-reasoned analysis of *Johnson v. Everyrealm* and its progeny and, pursuant thereto, to reverse the judgment of the Appellate Division, reinstate the Complaint in its entirety and remand this matter to the Law Division for further proceedings.

Date: May 23, 2025

Respectfully submitted,

s/ Jonathan I. Nirenberg
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Attorney for *Amicus Curiae*
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GERALDINE RIVERA-SANTANA, Plaintiff/Appellant, vs. CJF SHIPPING, L.L.C., JULIE BATISTA, AND MARIA SANCHEZ, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities); and JOHN DOES 1-5 (fictitious names describing presently unidentified individuals), Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001568-24 TEAM 04 On Appeal From: Superior Court of New Jersey Law Division – Essex County Docket No. ESX-L-5834-24 Sat Below: Honorable Aldo J. Russo, J.S.C
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**BRIEF OF PLAINTIFF/APPELLANT
GERALDINE RIVERA-SANTANA IN REPLY TO
DEFENDANTS/RESPONDENTS' BRIEF IN OPPOSITION**

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The Honorable Aldo J. Russo, J.S.C.’s December 17, 2024, Statement of Reasons on the Record Granting Defendants’ Motion to Dismiss and Compel to Arbitration as to Counts I-III of Plaintiff’s Complaint.....2T3-1-2T8-23

I. PRELIMINARY STATEMENT

Defendants/Respondents CJF Shipping, LLC, Julie Batista, and Maria Sanchez (“Defendants”) mischaracterize Plaintiff/Appellant Geraldine Rivera-Santana’s (“Plaintiff”) claims by attempting to separate her pregnancy and gender discrimination allegations from her sexual harassment claim. The central legal inquiry under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (“EFAA”) is whether the case as a whole “relates to” sexual harassment, not whether each individual claim stands alone. Plaintiff’s detailed pleadings show a continuous pattern of sexual harassment, retaliation, and discrimination beginning in December 2021, culminating in termination after Plaintiff disclosed her pregnancy and requested accommodation. These claims are interwoven and arise from the same hostile work environment and retaliatory animus.

The phrase “relates to” in the EFAA is broad and encompasses any claim logically or causally connected to sexual harassment. Defendants’ narrow interpretation contradicts well-established precedent recognizing that “relates to” covers disputes with any relation or connection to the underlying matter. Courts have consistently held that when a sexual harassment dispute is present, arbitration is barred for the entire case at the election of the party alleging

harassment. Defendants rely on inapplicable and distinguishable authorities that address either isolated or unrelated claims, which do not apply here.

Finally, Defendants seek relief beyond the scope of the Trial Court's Order by arguing Plaintiff's sexual harassment claim is time-barred. This argument is procedurally barred as Defendants did not file a timely cross-appeal. In any event, the continuing violations doctrine applies, as the harassment and retaliation were ongoing through the relevant time period, rendering Plaintiff's First Amended Complaint timely. For these reasons, all of Plaintiff's claims, including her pregnancy discrimination, hostile work environment, retaliation, and wrongful termination claims under the NJLAD, should be reinstated and remain in the Essex County Superior Court, as they are closely connected and cannot be arbitrated separately under the EFAA.

II. ARGUMENT

1. The Record Unequivocally Demonstrates Plaintiff's Gender/Pregnancy Discrimination Claims and Sexual Harassment Claim Relate.

A. Plaintiff's Claims, as a Whole, Relate to Her Sexual Harassment Claim. (Pa000071-000078; Pa000471; Da3-10)¹.

Defendants intentionally mischaracterize Plaintiff's First Amended Complaint by trying to separate her gender/pregnancy discrimination claims

¹ Pursuant to R. 2:6-8, citations to Plaintiff's Appendix will be referred to as "Pa" and citations to Defendant's Appendix will be referred to as "Da."

from her sexual harassment claim. They argue the pregnancy-related claims involve different actors, facts, time periods, and have no connection to sexual harassment or retaliation. Both the Trial Court and Defendants miss the key inquiry—whether the case as a whole “relates to” sexual harassment. This distinction is crucial because the core issue is the cumulative impact of the conduct, which clearly involves sexual harassment.

As detailed in Plaintiff’s moving papers, she was subjected to daily sexual harassment by male coworkers from the start of her employment in December 2021, particularly during morning route assignments (Pa000071). In May 2023, after disclosing her pregnancy and requesting accommodation, Defendants cut her hours by half (Pa000073). By mid-June, Defendant Sanchez began targeting her for minor errors and pressuring her to resume driving despite medical restrictions (Pa000074). In mid-July, Defendant Batista escalated the pressure, calling her Dispatcher role a “problem,” and Plaintiff soon found a threatening note on her car: “You better stop doing what you’re doing or you’re going to pay for it.” (Pa000075). On August 8, 2023, Defendants Batista and Sanchez berated Plaintiff for following her doctor’s orders and terminated her. (Pa000076).

Plaintiff endured ongoing sexual harassment as a Driver from December 2021 until May 2023, when she became a Dispatcher. Despite this, Defendants — who

supervised her in both roles—repeatedly pressured her to return to the Driver position, disregarding both the hostile environment and her physician’s orders. When she refused, Defendants retaliated. Their claim that her allegations lack sexual harassment or involve unrelated facts, actors, or time periods is contradicted by the detailed facts already pled.

i. The Phrase “Relates to” In The EFAA Is Sweeping and Encompassing Of All Legal Claims.

The EFAA, enacted March 3, 2022, bars arbitration of claims “relating to” sexual harassment, which need not be solely based on harassment. Defendants’ narrow reading of “relates to” to preserve broad arbitration contradicts decades of precedent affirming its broad scope. The phrase means “to stand in some relation or connection with” and is broader than “arising out of.” Courts—including Morales v. Trans World Airlines, 504 U.S. 374, 383 (1992), Coregis Ins. Co. v. Am. Health Found., 241 F.3d 123, 128 (2d Cir. 2001), and multiple others — have consistently held “relates to” covers disputes with any logical or causal connection to the underlying matter. New Jersey courts also confirm this broad interpretation. Thus, the EFAA’s enactment does not override longstanding, well-established law interpreting “relates to” broadly to include all claims connected to sexual harassment.

The key language of the EFAA establishes two requirements for the prohibition of arbitration: (1) the case must have been filed under Federal, Tribal, or

State law; and (2) the case must relate to a sexual assault dispute or a sexual harassment dispute under that Federal, Tribal or State law. 9 U.S.C. § 402(a). In asserting their argument, Defendants ignore Johnson v. Everyrealm, Inc., 657 F. Supp. 3d 535, 558 (S.D.N.Y. 2023), where the Court correctly and effectively interpreted whether an arbitration clause, subject to the EFAA, precludes arbitration of only the sexual harassment claim—and any claims that arise directly from it— or precludes arbitration of the entire case.

In Johnson, the court held that the EFAA invalidates pre-dispute arbitration agreements for an entire case if it "relates to" a sexual harassment dispute — not just the specific claims alleging harassment or retaliation. 595 F. Supp. 3d at 559. When a claim involves “conduct constituting a sexual harassment dispute,” arbitration is barred for the full case at the election of the alleging party. Id. Johnson has been widely followed. See Doe v. Second St. Corp., 105 Cal. App. 5th 552, 575 (2024) (collecting cases). Defendants ignore Delo v. Paul Taylor Dance Found., Inc., 685 F. Supp. 3d 173, 180 (2023), which, citing Johnson, held that when a case includes sexual harassment-related claims alongside others, the EFAA blocks arbitration of the entire matter. Here, as in Johnson, Plaintiff’s sexual harassment claim renders the Agreement unenforceable as to all claims.

ii. Plaintiff’s Retaliation Claim Is Intertwined with All of Her Claims. (Pa000071-Pa000078).

Defendants further argue Plaintiff failed to plead she engaged in any

protected activity—an essential element to any retaliation claim. The *prima facie* elements of a retaliation claim under the NJLAD “requires plaintiff to demonstrate that: (1) plaintiff was in a protected class; (2) plaintiff engaged in protected activity known to the employer; (3) plaintiff was thereafter subjected to an adverse employment consequence; and (4) that there is a causal link between the protected activity and the adverse employment consequence.” Victor v. State, 203 N.J. 383, 409 (citing Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996)). “[I]nformal protests of discrimination to management may qualify as protected activity.” DeJoy v. Comcast Cable Communs., 968 F. Supp. 963, 988 (D.N.J. 1997) (citing Barber v. CSX Distrib. Servs., 68 F.3d 694, 702 (3d Cir. 1995)); See also N.J.S.A. 10:5-12(d) (rendering it unlawful “For any person to take reprisals against any person because that person has opposed any practices or acts forbidden under [the NJLAD]”).

Further, Courts in the Third Circuit consistently hold that retaliation is inherently related to underlying discrimination or harassment. Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208 (3d Cir. 1984) (retaliation claim “reasonably related” to Title VII discrimination claim); Prewitt v. Walgreens Co., 2012 U.S. Dist. LEXIS 137027 (Sept. 25, 2012) (retaliation “reasonably related” to age discrimination). The Second Circuit agrees. Goodman v. Heublein, Inc., 645 F.2d 127, 131 (2d Cir. 1981); Ausfeldt v. Runyon, 950 F.

Supp. 478, 486 (N.D.N.Y. 1997); Blesedell v. Mobil Oil Co., 708 F. Supp. 1408, 1420 (S.D.N.Y. 1989). Defendants falsely claim Plaintiff's retaliation is unrelated, despite extensive evidence that she objected to sexual harassment and discriminatory treatment—a protected activity—and was then subjected to reduced hours, increased scrutiny, denial of accommodation, and ultimately, wrongful termination. (Pa000071–Pa000078).

iii. Defendants Rely Upon Easily Distinguishable and Meritless Case Law. (Da3; Pa000071).

Defendants rely upon McDermott v. Guaranteed Rate Inc. et al, No. L-000360-24, (Morris County Div., Sept. 23, 2024) (Pa000471), Paton v. Davis, Saperstein & Salomon, P.C., No. BER-L-4319-24 (Bergen Cnty. Sup. Ct., Oct. 8, 2024) (Da3-10), and Mera v. SA Hosp. Grp., LLC, 675 F. Supp. 3d 442, 448 (S.D.N.Y. 2023) in stating that the EFAA does not bar arbitration of nonsexual harassment claims, noting “it is clear that the EFAA does not intend to exclude from arbitration claims that are *unrelated* to a claim of sexual harassment and are otherwise arbitrable.”

First, McDermott is on appeal for the same reasons raised here and offers no persuasive value. Second, Paton is clearly distinguishable: the court dismissed the harassment claim there as redundant, based only on a single offensive remark about the plaintiff's unborn child. Here, Plaintiff's sexual harassment claim survived dismissal because it was extensively and specifically

pled. From day one, Plaintiff endured repeated sexual comments from male coworkers—such as “She has a big ass with nice thighs,” “I want to hit that,” and “Nice titties, they are perky”—while gathered each morning as directed by Defendants. (Pa000071). Unlike Paton, this is not a vague or isolated incident. Third, Mera is also inapplicable. The court in Mera compelled arbitration of FLSA wage-and-hour class claims—not sexual harassment claims—because they were not unique to the plaintiff. In contrast, Plaintiff here brings only her own claims, and all directly relate to the sexual harassment she faced, rendering the EFAA fully applicable.²

B. The EFAA Amends The FAA By Expressly Referring To The Broadly Defined Phrase “Sexual Harassment” And To State-Law Definitions of “Sexual Harassment.”

Defendants argue the EFAA exempts only a narrow range of disputes—sexual assault or sexual harassment — from arbitration, not all sex

² Irrespective of the clear distinction, Mera has been heavily criticized. See Doe v. Second Street Corp., 105 Cal. App. 5th 552, 557 (Cal. Ct. App. 2024) (rejecting Mera in favor of Johnson as Johnson states “the statute applies to the entire *case*, not merely to the sexual assault or sexual harassment claims alleged as a part of the case. It is significant, moreover, that the statute does not require that the pendant claims *arise out of* the sexual assault or sexual harassment dispute; it is enough that the case *relates to* the sexual assault or sexual harassment claims.”); see also Liu v. Miniso Depot CA, Inc., 105 Cal. App. 5th 791, 803 (Cal. Ct. App. 2024) (stating “to the extent Mera held that, under the EFAA, only those claims in a plaintiff’s case that related to the plaintiff’s “sexual harassment dispute” were exempt from arbitration, we find the decision unpersuasive based on the plain language of section 402(a).”).

discrimination claims. We agree that the EFAA precludes the arbitration of Plaintiff's sexual harassment claim. The statute's plain language covers "sexual harassment," which decades of precedent define broadly to include workplace gender-related harassment beyond just "quid pro quo" or explicit sexual conduct, as affirmed by the Supreme Court in 1998.

Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, 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.

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

Our New Jersey Supreme Court is in accord, stating in Lehmann v. Toys 'R' Us, 132 N.J. 587, 604 (1993):

In the majority of hostile work environment cases, the harassing conduct takes the form of unwelcome sexual touchings and comments. **However, the harassing conduct need not be sexual in nature; rather, its defining characteristic is that the harassment occurs because of the victim's sex.** See Muench v. Township of Haddon, 255 N.J. Super. 288, 605 A.2d 242 (App.Div.1992) (holding defendant employer liable for hostile work environment sexual harassment where employees harassed dispatcher because she was female although harassment was not sexual in nature).

This is the consensus of the federal judiciary and has been for several decades. See Nichols v. Azteca Rest. Enterprises, Inc., 256 F.3d 864, 873 (9th Cir. 2001) ("campaign of taunts, directed at [the plaintiff] and designed to humiliate and anger him "constituted "sexual harassment"); McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985) ("We have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs because of the sex of the employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones."); accord Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987) (applying McKinney, holding that verbal threats and intimidation should have been considered as part of sexual harassment claim); Hall v. Gus Const. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (citing Hicks and McKinney, holding "[i]ntimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances."); Williams v. Gen. Motors Corp., 187 F.3d 553, 565 (6th Cir. 1999) (citing Hicks and McKinney, holding that "we now take this opportunity to join our sister circuits and make clear that the conduct underlying a sexual harassment claim need not be overtly sexual in nature.")

In other words, for several decades, federal courts at all levels have recognized that "sexual harassment" encompasses all manner of workplace

conduct expressing hostility or animus towards a given sex or gender. Since "Congress is presumed to be aware of the judicial background against which it legislates," there can be no doubt that Congress was fully aware of this well-established definition of "sexual harassment" and intended it to be used in construing and applying the Act. Siebert v. Conservative Party of New York State, 724 F.2d 334, 337 (2d Cir. 1983).

The EFAA also expressly refers to state law formulations of "sexual harassment," and exempts from the FAA, and prohibits forced arbitration of any case related to "sexual harassment," as that term is defined under state law.

As recognized by the New Jersey Supreme Court:

[s]exual harassment jurisprudence generally divides sexual harassment cases into two categories. *Quid pro quo* sexual harassment occurs when an employer attempts to make an employee's submission to sexual demands a condition of his or her employment. It involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotions, or suffer other adverse employment consequences. Hostile work environment sexual harassment, by contrast, occurs when an employer or fellow employees harass an employee because of his or her sex to the point at which the working environment becomes hostile.

Lehmann v. Toys 'R' Us, 132 N.J. 587, 604 (1993).

Defendants' attempt to reframe Plaintiff's well-pled sexual harassment claims as mere "sex discrimination" is unfounded. Plaintiff alleges sexual

harassment consistent with State and Federal law. Counts I–IV of her First Amended Complaint detail discrimination, retaliation, and a hostile work environment based on gender and pregnancy, with the majority of alleged conduct—including her termination—clearly “relating to” sexual harassment. Defendants’ broader treatment of women further demonstrates that such harassment was embedded in the workplace. Accordingly, under federal law, the EFAA applies to all of Plaintiff’s claims, as they stem from Defendants’ animus toward her as a woman.

C. Bifurcation of Plaintiff’s Claims is Not Applicable Under the EFAA.

Defendants tirelessly reiterate their argument that Plaintiff’s claims do not “relate” in stating that the EFAA does not preclude bifurcation of claims. It should be noted that the Trial Court did not bifurcate Plaintiff’s claims—it dismissed Counts I-III of Plaintiff’s First Amended Complaint. Defendants again reply upon McDermott, which is currently on appeal with the Appellate Division for the same reasons as the instant matter, and therefore not applicable or persuasive, and Mera, which is again easily distinguishable. McDermott adopts Mera, holding that a plaintiff cannot “elude a binding arbitration agreement with respect to *wholly unrelated claims* affecting a broad group of individuals having nothing to do with the particular sexual harassment affecting the plaintiff alone.” Mera, 675 F. Supp. 3d at 447. But, McDermott, and Defendants, overlook that Mera

does not reject Johnson, but rather distinguishes it, on the basis that Mera involves class action wage and hour claims that are wholly unrelated to the individual sexual harassment claim and Johnson involves sexual harassment, race discrimination, and retaliation claims by a single plaintiff against the same employer. Mera, 675 F. Supp. 3d at 448. Accordingly, McDermott misapplies Mera.

Defendants rely on cases rejecting the arbitration of entire cases due to sexual harassment claims. See Lee v. Taskus, 2024 U.S. Dist. LEXIS 116623, *10 (W.D. Tex. July 2, 2024) (EFAA bars arbitration of all claims “related to” sexual harassment, including retaliation for complaining); Guzman v. BFS Grp. of Cal., LLC, 2024 Cal. Super. LEXIS 30912, *13 (Riverside Cty. April 16, 2024) (all FEHA claims arising from sexual harassment are related). Here, Plaintiff alleges continuous sexual harassment, sex and pregnancy discrimination, retaliation, and wrongful termination, all stemming from the same unlawful employment practice and directly related to the sexual harassment she endured.

2. Defendants Improperly Seek Relief Beyond Affirmance of the Trial Court’s Order. (Pa000071-74; Pa000487).

Defendants improperly seek affirmative relief—specifically, a ruling that Plaintiff’s sexual harassment claim (Count IV) is time-barred under the NJLAD—even though the Trial Court’s Order did not address Count IV. As the U.S. Supreme Court has held, when a defendant seeks to expand the relief granted by the trial court rather than merely support the judgment on existing grounds, a

cross-appeal is required. See State v. Eldakrouy, 439 N.J. Super. 304, 307 n.2 (App. Div. 2015) (citing Jennings v. Stephens, 574 U.S. 271 (2015)). Here, the Trial Court Order compelled arbitration only for Counts I–III. Defendants argue Plaintiff’s appeal of the Trial Court’s entire Order permits them to challenge Count IV’s timeliness, but this is incorrect. As stated in our appeal, “the central issue on appeal” is whether the Court erred in compelling the arbitration of Plaintiff’s pregnancy discrimination claims while leaving her sexual harassment claim in court, not the timeliness of Count IV. Permitting Defendants to seek dismissal of Count IV now would improperly expand the relief granted below. Affirmative relief requires a timely cross-appeal. See State v. Lefante, 14 N.J. 584, 590 (1954). Defendants failed to file one, and the 15-day deadline under N.J. Ct. R. 2:4-1(c) has passed, so this argument is now procedurally barred.

A. Plaintiff’s NJLAD Sexual Harassment Claim is Not Time-Barred.

Plaintiff’s sexual harassment claim is timely under the continuing violations doctrine, which tolls NJLAD’s two-year statute of limitations until the last act in a related series of discriminatory or harassing conduct. See Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999); AMTRAK v. Morgan, 536 U.S. 101 (2002). Plaintiff faced ongoing sexual harassment from December 2021 through May 2023 as a Driver, with Defendants continuing retaliatory actions—including pressuring her to return to that hostile environment and ultimately terminating her on August 8,

2023. Since Plaintiff filed her First Amended Complaint on September 16, 2024, within two years of the last unlawful act, her claim falls within the limitations period as part of a continuing pattern of unlawful employment practices

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Appellate Division vacate the Trial Court's Order dismissing and compelling to arbitration Counts I through III of Plaintiff's First Amended Complaint and reinstate Counts I through III of Plaintiff's First Amended Complaint.

Respectfully submitted,

/s/ Peter D. Valenzano

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Dated: May 27, 2025