FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DING DING, Ph.D., *Plaintiff - Appellee*, v. STRUCTURE THERAPEUTICS, INC., NASDAQ; GPCR formerly known as Shouti, Inc.; STRUCTURE THERAPEUTICS USA, INC.; RAYMOND STEVENS, Ph.D., *Defendants - Appellants*.	No. 25-1532 D.C. No. 3:24-cv-01368-JSC OPINION

Appeal from the United States District Court
for the Northern District of California
Jacqueline Scott Corley, District Judge, Presiding

Argued and Submitted December 2, 2025
San Francisco, California

Filed August 19, 2026

Before: Johnnie B. Rawlinson, Eric D. Miller, and Gabriel P. Sanchez, Circuit Judges.

Opinion by Judge Sanchez;
Dissent by Judge Rawlinson

SUMMARY*

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

The panel affirmed the district court's order denying Structure Therapeutics USA, Inc.'s motion to compel arbitration in an action brought by a former Structure employee, Dr. Ding Ding, under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA"), which empowers victims of workplace sexual harassment and sexual assault to invalidate predispute arbitration agreements and elect to pursue their claims in federal court.

After Dr. Ding was terminated from her position as Chief Financial Officer with Structure, she filed a demand for arbitration, asserting claims of discrimination and harassment based on national origin and her status as a domestic violence victim. During discovery, Dr. Ding uncovered evidence that her workplace mistreatment was motivated because of her sex. She then withdrew from arbitration and elected to pursue claims in civil court under the EFAA.

The panel held that Dr. Ding could assert her rights under the EFAA. Both the text of the statute and its underlying purpose make clear that Congress intended to afford victims of workplace sexual assault and sexual harassment a genuine choice whether to pursue their claims in a court of law, notwithstanding a preexisting agreement to arbitrate. Where

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

a plaintiff discovers a basis to pursue claims covered by the EFAA during arbitration, she may elect to end arbitration and proceed in court. As the district court found, Dr. Ding did not become aware that her workplace mistreatment was motivated because of her sex until she obtained discovery once arbitration proceedings had commenced. Consequently, she could not have triggered an "election" under the EFAA by filing an arbitration demand with non-sexual harassment claims. Dr. Ding made an election only one time—when she chose to pursue the newly discovered sexual harassment claim by filing her claims in federal court,

The panel rejected Defendants' argument that Dr. Ding waived her right to proceed in court by filing an arbitration demand even though she was aware of the facts underlying her sexual harassment claim. This argument was foreclosed by the district court's finding that there was no record evidence that Dr. Ding knew she had a plausible sexual harassment claim but intentionally chose not to bring the claim when she initiated arbitration.

The panel further held that Dr. Ding plausibly pled a sex-based hostile work environment claim under California's Fair Employment and Housing Act and therefore under the EFAA, which defines "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." 9 U.S.C. § 401(4).

Judge Rawlinson dissented from the majority's holding that an employee may proceed with an action under EFAA after first electing to proceed with arbitration and engaging in significant litigation in the arbitration forum. She wrote that the majority's reading of the statute conflicted with the

plain language of the statute, the legislative history, the commonly accepted legal definition of the term "election," and the court's precedent addressing waiver in the arbitration context.

COUNSEL

Melissa K. Zonne (argued), Boies Schiller Flexner LLP, Los Angeles, California; Mariah J. Noah (argued), Boies Schiller Flexner LLP, San Francisco, California; Benjamin Kim, Kelysium Law APC, Los Angeles, California; for Plaintiff-Appellee.

Kathleen R. Hartnett (argued), Matthew D. Caplan, Audrey J. Mott-Smith, Emma Harrington, and Gregory J. Merchant, Cooley LLP, San Francisco, California; Rachel Thorn, Cooley LLP, New York, New York; Annie Lau, Fisher & Phillips LLP, San Francisco, California; for Defendants-Appellants.

Russell L. Kornblith, Susannah R. Cohen, Miranda Katz, and Kate MacMullin, Sanford Heisler Sharp McKnight LLP, New York, New York, for Amici Curiae National Employment Lawyers Association/New York and California Employment Lawyers Association.

OPINION

SANCHEZ, Circuit Judge:

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA") empowers victims of workplace sexual harassment and sexual assault to invalidate predispute arbitration agreements and elect to pursue their claims in federal court. 9 U.S.C. §§ 401–02. Plaintiff Dr. Ding Ding brought this action against Structure Therapeutics USA, Inc. ("Structure") after she was terminated from her position as Chief Financial Officer with the company. Dr. Ding initially filed a demand for arbitration, asserting claims of discrimination and harassment based on national origin and her status as a domestic violence victim. During discovery, Dr. Ding uncovered evidence that her workplace mistreatment was motivated because of her sex. She withdrew from arbitration and elected to pursue claims in civil court under the EFAA. Structure now appeals the district court's order denying its motion to compel arbitration.

We hold that Dr. Ding can assert her rights under the EFAA despite having initiated and participated in arbitration for a period of time with Structure. Both the text of the federal statute and its underlying purpose make clear that Congress intended to afford victims of workplace sexual assault and sexual harassment a genuine choice whether to pursue their claims in a court of law, notwithstanding a preexisting agreement to arbitrate. Where, as here, a plaintiff discovers a basis to pursue claims covered by the EFAA during arbitration, she may elect to end arbitration and proceed in court. We further hold that Dr. Ding has plausibly alleged a sexual harassment claim under California

law and therefore under the EFAA. *See id.* § 401(4) (defining a "[s]exual harassment dispute" in accordance with "applicable Federal, Tribal, or State law"). We affirm.

I.

A.

Structure is a clinical drug development company. In 2021, Structure conducted a search for a Chief Financial Officer ("CFO") to take it through an initial public offering ("IPO"). Dr. Raymond Stevens, Structure's Chief Executive Officer, circulated an email on August 5, 2021 that outlined his "ideal phenotype"—that is, observable characteristics—for the CFO position and offered, as "example phenotype[s]," two men with investment banking backgrounds. Structure's Board of Directors, however, wanted to emphasize gender diversity in its recruitment efforts to appeal to third-party investors. Structure recruited Dr. Ding, a Wharton graduate and pharmacology Ph.D. with over twenty years of experience in biopharmaceutical equity research and investment banking at multiple leading global investment banks in Asia and the United States. At the time Dr. Ding was being recruited, she was employed by Credit Suisse as the head of its Asia-Pacific healthcare investment banking and capital markets divisions. Dr. Ding's offer of employment required the resolution of all employment disputes "by final, binding and confidential arbitration" with JAMS.

Dr. Ding started as CFO at Structure on December 15, 2021. According to her complaint, "Dr. Stevens almost immediately began to sideline Dr. Ding," directing her to "read and listen for her first year with the company" instead of "perform[ing] the primary functions of her position, including managing and interfacing with lead investment

banks who were serving [Structure] as part of the IPO." Dr. Stevens assigned her responsibilities "already being performed by others" such that there would appear to be "no need for her," "pigeonholed [her] job duties" to limited business development in Asia, and "repeatedly dismissed her contributions and suggestions for improvement." This continued as Structure pushed for an "aggressive" IPO closing date in May 2022.

In January 2022, Dr. Stevens discussed with Dr. Ding complaints from Wall Street bankers servicing Structure's IPO that "Dr. Ding was 'too aggressive' and 'lectured' them." Dr. Ding was "puzzled and offended" by the comments, given that "Wall Street investment bankers are known for their aggressiveness" and "she was always polite and never raised her voice on any communications with these bankers."

On March 7, 2022, Dr. Ding was the victim of a domestic violence incident, suffering "visible injuries to her face and eye." Dr. Ding informed Dr. Stevens about the incident on March 8, 2022 and suggested that, because of her physical injuries and required meetings with police officers, she might need to skip an internal Zoom meeting scheduled that afternoon. In a later Zoom call, Dr. Stevens commented on her injuries, stating, "I can hardly see anything. You may be more sensitive to it than others." These comments surprised and offended Dr. Ding. The injuries were significant enough that other employees noticed her injuries and expressed their sympathy.

After requesting limited accommodations, Dr. Ding indicated she was otherwise ready to resume work as normal. However, "Dr. Stevens was adamant that Dr. Ding not travel to San Francisco the following week to attend the planned

monthly week-long executive meetings." When Dr. Ding traveled for that meeting, Dr. Stevens repeatedly asked her "if she wanted to reconsider her role as CFO given her transition in life." "Deeply troubled and offended" by these comments, Dr. Ding confirmed her willingness and ability to continue as CFO.

On March 17, 2022, ten days after the domestic violence incident, Dr. Stevens recommended Dr. Ding's termination to the Board of Directors. On March 22, 2022, Dr. Stevens informed Dr. Ding that she was terminated. He "provided no performance-related reason for her termination, but specifically called out [her] domestic situation as a factor in his decision." In his deposition, Dr. Stevens testified that he had taken into account complaints by several male Wall Street bankers that Dr. Ding was "difficult to work with" and "lecture[d] them." Dr. Ding alleges that the CFO position was then filled by a man who had "no business, accounting or finance degree" and "had been laid off at almost every employment" since graduating college.

B.

Dr. Ding filed an arbitration demand with JAMS on October 6, 2022, asserting claims against Structure for discrimination, retaliation, and harassment based on her national origin and status as a victim of domestic violence. Over the course of a year, the parties attended preliminary hearings, began discovery, stipulated to a protective order, and litigated discovery disputes. The arbitrator denied Structure's motion to apply California law and to dismiss Dr. Ding's New York law claims. On October 25, 2023, Dr. Ding notified JAMS that she was withdrawing from arbitration pursuant to Section 1281.98 of the California Code of Civil Procedure due to Structure's late payment of

arbitration fees. JAMS closed its file on November 20, 2023. In discovery that took place during and after arbitration, Dr. Ding obtained new information, including Dr. Stevens's "phenotype" email listing two men, the Board's gender diversity goal in CFO hiring, and Dr. Stevens's reliance on male bankers' complaints in terminating Dr. Ding.

On March 4, 2024, Dr. Ding filed a complaint against Structure, a related entity, and Dr. Stevens in the Superior Court of California, asserting a sex discrimination claim and a sex-based hostile work environment claim in violation of California's Fair Employment and Housing Act ("FEHA"), and a discrimination claim based on her status as a domestic violence victim. Defendants removed the action to federal court and filed a motion to compel arbitration, arguing that California Code of Civil Procedure Section 1281.98 was preempted by the Federal Arbitration Act ("FAA") and the New York Convention. In opposition to the motion, Dr. Ding argued that the arbitration agreement was invalid and unenforceable under the EFAA.

The district court preliminarily ruled that California's procedural rule for non-payment of arbitration fees was preempted by the FAA and the New York Convention, but that Dr. Ding had properly elected to proceed in court under the EFAA based upon a plausible allegation of sexual harassment under the FEHA. The district court deferred a final ruling on the motion to compel arbitration to allow Dr. Ding an opportunity to amend her complaint and assert additional claims under New York law. Dr. Ding filed an amended complaint which added two claims for "sex discrimination and harassment" under the New York City Human Rights Law and the New York State Human Rights Law. After additional briefing, the district court denied

Defendants' motion to compel arbitration, holding that Dr. Ding properly elected to exercise her rights under the EFAA based upon plausible allegations of sexual harassment under New York law. Defendants timely appealed both orders.

II.

"We review de novo a district court's decision to grant or deny a motion to compel arbitration." *Holley-Gallegly v. TA Operating, LLC*, 74 F.4th 997, 1000 (9th Cir. 2023). We review the district court's underlying factual findings for clear error. *Id.*

A.

The EFAA creates an express exception to the FAA's requirement that an arbitration agreement "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. Enacted in 2022, the EFAA provides:

> Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, 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.

Id. § 402(a). The EFAA thus permits a plaintiff who is "alleging conduct constituting a sexual harassment dispute or sexual assault dispute" to "elect[]" to render a predispute

arbitration agreement "[in]valid [and] [un]enforceable." *Id.* The effect of the election is that a plaintiff may pursue her claims in court.

Defendants do not dispute that general understanding of the EFAA but argue that the statute does not permit Dr. Ding to proceed in court under the circumstances here. First, Defendants argue that a plaintiff is categorically barred from making an EFAA election if, like Dr. Ding, she first files other claims in arbitration. Second, Defendants argue that even if a later-discovered sexual harassment claim would allow a plaintiff to proceed in court, Dr. Ding was aware of the relevant facts underlying her sexual harassment claim when she filed in arbitration and thus waived her rights under the EFAA.

Defendants' first argument raises a question of statutory interpretation. "[F]or all questions of statutory interpretation," we begin "by turning to the text." *United States v. Herrera*, 974 F.3d 1040, 1047 (9th Cir. 2020). "For further understanding we may also consider the provision's history, purpose, and the reasons for any relevant amendments." *Id.*

A plaintiff's right under the EFAA to pursue her claims in court is not categorically foreclosed by the earlier filing of an arbitration demand with non-sexual harassment claims. The plain text of the EFAA does not limit when a plaintiff may allege a sexual harassment claim or exercise her rights under the EFAA. To the extent the EFAA references timing, it suggests only that a plaintiff may not make her "election" until the time she is "alleging conduct constituting a sexual harassment dispute or sexual assault dispute." 9 U.S.C. § 402(a). Nothing in the text indicates that the earlier filing of other claims extinguishes her rights under the statute.

For this reason, we are unpersuaded by our dissenting colleague's view that Dr. Ding is entitled to only one election under the EFAA and that she "made [her] election to proceed to arbitration rather than litigating in court." *See Diss. Op.*, pp. 23-24. When Dr. Ding initially filed in arbitration, she was not a "person alleging conduct constituting a sexual harassment dispute." 9 U.S.C. § 402(a). Rather, her arbitration demand was predicated on discrimination and harassment claims based solely on national origin and domestic violence victimhood. As the district court found, Dr. Ding did not become aware that "the harassment she experienced at work was based on her sex and sexism" until she obtained discovery from Defendants once arbitration proceedings had commenced. Consequently, she could not have triggered an "election" under the EFAA by filing an arbitration demand with non-sexual harassment claims. Under the facts of this case, Dr. Ding made an election only one time—when she chose to pursue the newly discovered sexual harassment claim by filing her claims in federal court.[1]

[1] This understanding is reinforced by the "ordinary, contemporary, common meaning" of the word "election." *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 958 (9th Cir. 2013) (quotation marks omitted). Dictionary definitions all support that an "election" involves a choice among different options. *See, e.g.*, The American Heritage Dictionary (5th ed. 2016) ("[a]n act of choosing; a selection"); The Wolters Kluwer Bouvier Law Dictionary (2012) ("a choice between several mutually exclusive options"); Black's Law Dictionary (12th ed. 2024) ("[t]he exercise of a choice; esp., the act of choosing from several possible rights or remedies in a way that precludes the use of other rights or remedies"). Dr. Ding did not have more than one option available to her when she initiated arbitration: she faced a binding arbitration agreement and had no claim that would entitle her to proceed in court.

Defendants' proposed reading of the statute would undermine its purpose. Congress enacted the EFAA to "restore access to justice for millions of victims of sexual assault or harassment who are currently locked out of the court system and are forced to settle their disputes against companies in a private system of arbitration . . . ." H.R. Rep. No. 177-234, at 4 (2022). The legislative history of the EFAA emphasized giving victims of sexual harassment "a real choice" to bring their claims in court. *See, e.g.*, 168 Cong. Rec. H985 (Feb. 7, 2022) (statement of Rep. Jerrold Nadler) ("[The EFAA] removes these barriers to justice for survivors of sexual assault or sexual harassment by giving them a *real choice* of whether to go to court or to arbitrate their claim." (emphasis added)); 168 Cong. Rec. H989 (Feb. 7, 2022) (statement of Rep. Sylvia Garcia) ("By ending forced arbitration in lawsuits involving sexual assault or sexual harassment claims, we ensure survivors are given a *real choice* of whether to go to court or to arbitrate their claim." (emphasis added)). Under Defendants' reading, a plaintiff could lose her ability to have her sexual harassment claim heard in court before she knows she has such a claim. Such an interpretation would deprive individuals who uncover a sexual harassment claim during discovery of the choice the EFAA was enacted to provide.[2]

[2] Defendants' contention that "the very nature of a sexual harassment claim means it is not something a victim 'discovers' after the fact" but is rather "experienced in real time" lacks merit. No statutory language or case law supports this narrow view of sexual harassment. A victim may experience inappropriate conduct or remarks but only later come to understand that they contained sexual innuendo. And States may define sexual harassment to encompass conduct that is more subtle in nature. *See infra* Section II.B.

Defendants further argue that the EFAA does not expressly authorize withdrawals from arbitration and point to a "federal policy favoring arbitration" that requires courts to "rigorously enforce agreements to arbitrate," citing *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). But the Supreme Court has since clarified that the federal policy behind the FAA "is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). The EFAA is a discrete amendment to the FAA that exempts sexual harassment and sexual assault cases from predispute arbitration agreements. Enforcement of the EFAA is consistent with federal policy.

Our conclusion does not mean that a plaintiff may start in arbitration, bring a sexual harassment claim at any time, under any circumstances, and then pursue her claims in court. A plaintiff may waive her EFAA rights under ordinary waiver principles. *See Bobka v. Toyota Motor Credit Corp.*, 968 F.3d 946, 954 (9th Cir. 2020) ("Absent some affirmative indication of Congress' intent to preclude waiver, statutory provisions are subject to waiver by voluntary agreement of the parties." (cleaned up)). "The Supreme Court has defined waiver as the 'intentional relinquishment or abandonment of a *known* right.'" *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1278–79 (9th Cir. 2006) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)) (emphasis added). Thus, a court may find waiver where a plaintiff is aware of the facts giving rise to a sexual harassment claim and either unduly delays in bringing such a claim through intentional acts or decides to pursue that claim in arbitration rather than court. *Cf. Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994) (finding waiver of objection to the arbitrator's authority where

plaintiff "initiated the arbitration, attended the hearings with representation, presented evidence, and submitted a closing brief of fifty pages").

Defendants' second argument is that Dr. Ding waived her right to proceed in court by filing in arbitration even though she was aware of the facts underlying her sexual harassment claim. The argument is foreclosed by the district court's findings. The district court found no evidence in the record that Plaintiff knew she had a plausible sexual harassment claim but intentionally chose not to bring the claim when she initiated arbitration. This finding is not clearly erroneous. Dr. Ding explained that she initially did not know that "the harassment she experienced at work was based on her sex and sexism." She could have experienced Dr. Stevens's comments about her aggressiveness and her sensitivity to domestic violence as offensive in real time, but only come to understand the sex-based nature of those comments upon learning in discovery that Dr. Stevens drew his ideal "phenotype" for a CFO from men, hired Dr. Ding in part to accommodate the Board's desire for gender diversity, and terminated Dr. Ding in part based on male bankers' complaints that she "lecture[d] too much." Because Dr. Ding was unaware she had a plausible sexual harassment claim when she filed in arbitration, she did not waive her right to pursue her claims in court.

B.

Defendants also argue that Dr. Ding failed to state a sexual harassment claim within the meaning of the EFAA. The EFAA defines "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." 9 U.S.C. § 401(4). Because the parties agree that the EFAA

requires a plaintiff to "plausibly plead" a sexual harassment claim, we assume without deciding that the EFAA imposes that requirement. In evaluating whether a claim is plausibly pled, we "accept all factual allegations in the complaint as true" and "draw[] all reasonable inferences in favor of the plaintiff." *Ass'n for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011) (quotation marks omitted).

As relevant here, the FEHA makes it unlawful "[f]or an employer . . . because of . . . sex . . . to harass an employee . . . ." Cal. Gov't Code § 12940(j)(1). It further states that "'harassment' because of sex includes sexual harassment" and "[s]exually harassing conduct need not be motivated by sexual desire." *Id.* § 12940(j)(4)(C). The California Supreme Court has interpreted the FEHA's prohibited conduct "[w]ith respect to sexual harassment in the workplace" to range broadly "from expressly or impliedly conditioning employment benefits on submission to, or tolerance of, unwelcome sexual advances to the creation of a work environment that is 'hostile or abusive to employees because of their sex.'" *Hughes v. Pair*, 209 P.3d 963, 970 (Cal. 2009). In short, the FEHA mirrors Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, in recognizing two theories of sexual harassment: "quid pro quo harassment" and "hostile work environment." *Hughes*, 209 P.3d at 970–71.

Because "it is the disparate treatment of an employee on the basis of sex . . . that is the essence of a sexual harassment claim," *Lyle v. Warner Bros. Television Prods.*, 132 P.3d 211, 221 (Cal. 2006), a sex-based hostile work environment claim amounts to sexual harassment under California law even when the harassing conduct is not sexual in nature. The California Supreme Court has noted that "a hostile

environment may be created even if the plaintiff never is subjected to sexual advances," citing with approval a California Court of Appeal decision that sustained a sexual harassment claim where a female employee "had been subjected to long-standing ridicule, insult, threats, and especially exacting work requirements by male coworkers." *Miller v. Dep't of Corr.*, 115 P.3d 77, 87 (Cal. 2005) (citing *Accardi v. Superior Ct.*, 21 Cal. Rptr. 2d 292, 293 (Ct. App. 1993) ("Sexual harassment does not necessarily involve sexual conduct. It need not have anything to do with lewd acts, double entendres or sexual advances. Sexual harassment may involve conduct, whether blatant or subtle, that discriminates against a person solely because of that person's sex.")).[3]

Under the FEHA, "harassment creates a hostile, offensive, oppressive, or intimidating work environment . . . when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being." Cal. Gov't Code § 12923(a).[4] To be actionable, the harassment must have been "*pervasive* or *severe*," *Hughes*, 209 P.3d at 971 (emphasis in original), created an environment that was "both objectively and

[3] The Ninth Circuit "follow[s] decisions of the California Court of Appeal unless there is convincing evidence that the California Supreme Court would hold otherwise." *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 889 (9th Cir. 2010).

[4] Section 12939, which went into effect on January 1, 2019, "did not change the substantive law of sexual harassment, but addressed how the trial courts were to apply that law." *Beltran v. Hard Rock Hotel Licensing, Inc.*, 315 Cal. Rptr. 3d 842, 854 (Ct. App. 2023).

subjectively offensive," *Lyle*, 132 P.3d at 223 (quotation marks omitted), and been undertaken "on the basis of sex," *id.* at 221. Under the FEHA, "[a] single incident of harassing conduct" may be sufficient to establish a hostile work environment claim, and "[h]arassment cases are rarely appropriate for disposition on summary judgment" because "hostile working environment cases involve issues 'not determinable on paper.'" Cal. Gov't Code § 12923(b), (e) (quoting *Nazir v. United Airlines, Inc.*, 100 Cal. Rptr. 3d 296, 331 (Ct. App. 2009)). Although "'[s]imple teasing, offhand comments, and isolated incidents (unless extremely serious)' are not sufficient to create an actionable claim," "[i]t is enough 'if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay in her position.'" *Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 687 (9th Cir. 2017) (first quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998); and then quoting *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994)).[5]

With all reasonable inferences drawn in her favor, Dr. Ding has plausibly pled a sex-based hostile work environment claim under the FEHA. First, she has alleged severe or pervasive harassment. She alleges that Dr. Stevens wanted to hire a man for the CFO position, hired her due to the Board's emphasis on gender diversity, and immediately began sidelining her and diminishing her job responsibilities. He allegedly adopted sexist, unsupported criticisms made by Wall Street bankers servicing the

[5] *Reynaga* describes the standard for a Title VII hostile work environment claim. "California courts have adopted the same standard for hostile work environment sexual harassment claims under the FEHA." *Lyle*, 132 P.3d at 220.

company that Dr. Ding was "too aggressive," despite the fact that "Wall Street investment bankers are known for their aggressiveness." *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."). He allegedly made light of the facial injuries that Dr. Ding suffered from a domestic violence incident and told Dr. Ding that she "may be more sensitive to it than others," while repeatedly questioning Dr. Ding's ability to continue her CFO job after that incident and preventing her from attending executive meetings. Within two weeks, Defendants terminated Dr. Ding, raising no performance-related issues but "call[ing] out [her] domestic situation as a factor" for the termination. The continuous sidelining, gendered criticisms and mistrust, and ultimate termination of Dr. Ding was a far cry from "[s]imple teasing, offhand comments, and isolated incidents." *Reynaga*, 847 F.3d at 687.

Second, the alleged conduct created a work environment that was objectively and subjectively offensive. Dr. Ding was "deeply troubled and offended" by Dr. Stevens's gendered comments. In *Roby v. McKesson Corp.*, the California Supreme Court upheld a jury's FEHA sexual-harassment verdict based on a supervisor's "hostile social interactions in the workplace" that included "demeaning comments to Roby about her body odor and arm sores," "demeaning facial expressions and gestures toward Roby," and "official employment actions" such as "shunning [] Roby during staff meetings," "belittling [] Roby's job," and "reprimand[ing] Roby in front of Roby's coworkers" prior

to her termination. 219 P.3d 749, 763 (Cal. 2009). Dr. Ding has alleged conduct of a similar nature such that a reasonable person in her position would consider the work environment to be hostile. These allegations support the inference that Dr. Stevens's conduct "affect[ed] [her] ability to perform the job as usual," Cal. Gov't Code § 12923(a), or "ma[de] it more difficult for [Dr. Ding] to do her job, to take pride in her work, and to desire to stay in her position," *Reynaga*, 847 F.3d at 687.

Finally, Dr. Stevens's alleged preference for a male CFO, reiteration of sexist remarks, belittling of Dr. Ding's domestic violence experience, and comment about Dr. Ding's inability to continue her job all support an inference that his conduct towards Dr. Ding was plausibly based on her sex. Thus, Dr. Ding has adequately stated a sex-based hostile work environment claim under the FEHA, which constitutes a "sexual harassment dispute" covered by the EFAA.[6]

Because the EFAA invalidates an arbitration agreement "with respect to a case"—rather than a claim—that "relates to" a sexual harassment dispute, 9 U.S.C. § 402(a), Dr. Ding

[6] There is no basis for Defendants' argument that because Dr. Ding "didn't understand at the time" that Dr. Stevens's harassing conduct "was based on sex," she cannot plead a sexual harassment claim. The FEHA requires a "subjectively offensive" hostile work environment, *Lyle*, 132 P.3d at 223 (quotation marks omitted), and a "nexus between the alleged harassment and [plaintiff's] gender," *Jones v. Dep't of Corr. & Rehab.*, 62 Cal. Rptr. 3d 200, 209 (Ct. App. 2007); it does not require a plaintiff's contemporaneous subjective awareness that the hostility was based on sex. *Accord Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 871–72 (9th Cir. 2001) (explaining that Title VII requires a plaintiff to prove that "his workplace was 'both objectively and subjectively offensive'" and that "any harassment took place 'because of sex'").

is entitled to bring her entire case in court. *See Bruce v. Adams & Reese, LLP*, 168 F.4th 367, 382 (6th Cir. 2026). In light of our conclusions, we do not reach whether Dr. Ding has also plausibly alleged a sexual harassment claim under New York City or New York State law.

III.

The EFAA expands access to courts by persons "alleging conduct constituting a sexual harassment dispute or sexual assault dispute," providing them with a choice to invalidate predispute arbitration agreements. 9 U.S.C. § 402. We hold that a sex-based hostile work environment claim under the FEHA is a "sexual harassment dispute" under the EFAA. We further hold that the EFAA allows a plaintiff to make an election to proceed in court upon discovering a sexual harassment claim, even if she had initially pursued other claims in arbitration.

AFFIRMED.

Rawlinson, Circuit Judge, dissenting:

I respectfully dissent from the majority's holding that an employee may proceed with an action under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) after first electing to proceed with arbitration and engaging in significant litigation in the arbitration forum.

I begin with the language of the statute. The EFAA is codified at 9 U.S.C. § 402 and provides:

> (a) Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, . . . no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.
>
> (b) An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. . . .

So our task is to determine under Federal law whether the EFAA applies with respect to Ding Ding's (Ding's) dispute with Structure Therapeutics. *See* 9 U.S.C. § 402(b).

As the majority acknowledges, Ding filed her arbitration demand seven months after her termination. *See Majority Opinion*, p. 8. She asserted claims for discrimination, retaliation, and harassment based on national origin and her status as a victim of domestic violence. *See id*. The majority

also acknowledges that for over a year Ding engaged in extensive litigation activities in the arbitration forum, including preliminary hearings, discovery, stipulations and discovery disputes. *See id.* Following this extensive litigation in the arbitration forum, Ding abruptly changed course and notified the arbitration forum that she was withdrawing her claims from arbitration. The basis for the withdrawal was not to invoke the provisions of the EFAA, but due to the purported failure of Structure Therapeutics to timely pay the costs of arbitration.

Considering these facts, I remain unpersuaded that Ding's belated invocation of the EFAA was in conformance with the provisions of the statute. As always, we begin with the language of the statute. *See Howard v. Republican Nat'l Comm.*, 164 F.4th 1119, 1122 (9th Cir. 2026). We assume that Congress "says in a statute what it means, and means in a statute what it says." *Hanan v.USCIS*, 174 F.4th 614, 628 (9th Cir. 2026) (citation omitted). The operative language in the statute provides for "*the* election by the person alleging conduct constituting a sexual harassment dispute." 9 U.S.C. § 402(a) (emphasis added). There is absolutely no indication that the individual is entitled to more than one election.

Consistent with the direction of the statute to engage Federal law to determine the applicability of the EFAA, *see* 9 U.S.C. § 402(b), I turn to our cases addressing the term "election." In discussing "election of remedies," we have reasoned that an election may only be made once. *See Teutscher v. Woodson*, 835 F.3d 936, 954 (9th Cir. 2016). Specifically, in *Teutscher* we addressed the respective available remedies of front pay and reinstatement after the plaintiff prevailed on a claim of retaliatory discharge. *See id.* at 939-40. We determined that "[r]einstatement and front pay are alternative remedies, which cannot be awarded for

the same period of time." *Id.* at 954 (citations omitted). We held that:

> [a] party is bound by his election of remedies if three conditions are met: (1) two or more remedies existed at the time of the election, (2) these remedies are repugnant and inconsistent with each other, and (3) the party to be bound affirmatively chose, or elected, between the available remedies. *Id.* at 956 (citation, alterations, footnote reference, and internal quotation marks omitted).

Applying this standard, we determined that Teutscher waived the remedy of reinstatement "when he *elected* to seek front pay." *Id.* at 954 (emphasis added).

Applying this analysis here, a similar outcome pertains. Once Ding elected to proceed with arbitration, she waived the inconsistent option of proceeding in federal court. *See id.*

This result is bolstered by the myriad of cases in the arbitration context holding that a party waives the right to arbitration once it has substantially litigated a case in court. *See Hill v. Xerox Bus. Servs., LLC*, 59 F.4th 457, 477-79 (9th Cir. 2023) (holding that a party waived its right to compel arbitration when it "engaged in discovery and attacked the legal merits of [the] claims with a summary judgment motion"); *see also Newirth by & through Newirth v. Aegis Senior Communities, LLC*, 931 F.3d 935, 942 (9th Cir. 2019) (determining that an arbitration waiver resulted when a party intentionally withdrew its motion to compel arbitration and "proceeded to take advantage of the federal forum by filing

a motion to dismiss Newirth's arbitrable claims, with prejudice, for failure to state a claim"); *Martin v. Yasuda*, 829 F.3d 1118, 1126 (9th Cir. 2016) (upholding arbitration waiver when a party spent seventeen months litigating a case including "a joint stipulation structuring the litigation, filing a motion to dismiss on a key merits issue, entering into a protective order, answering discovery, and preparing for and conducting a deposition") (footnote reference omitted); *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 759 (9th Cir. 1988) (concluding that a party waived his right to compel arbitration when he "chose instead to litigate actively the entire matter—including pleadings, motions, and approving a pre-trial conference order"). These cases present the other side of the coin—losing the right to arbitrate by electing to litigate in court. No principled basis exists to reason differently when an individual elects to pursue substantial procedures in an arbitration forum then attempts to forego arbitration midstream and commence litigation in court.

This outcome is further bolstered by the fact that the EFAA was not made retroactive. *See* Pub. L. No. 117-90, § 3, 136 Stat. 26, 28 (2022); *see also* 168 Cong. Rec. H986-87 (daily ed. Feb. 7, 2022) (statement of Rep. Griffith) ("[T]here has been an allegation that [the EFAA] is retroactive— and that is not accurate—as to cases currently pending"). The lack of retroactivity reflects an obvious concern that ongoing arbitration proceedings not be disrupted. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (explaining that the presumption against retroactivity "is deeply rooted in our jurisprudence" and based on "[e]lementary considerations of fairness").

The majority cites legislative history in support of its preferred interpretation of the statute. *See Majority Opinion*,

p. 13. However, the legislative history actually supports a determination that Congress contemplated only one election. The quoted statement of Representative Nadler referenced "*a* real choice." *Id.* (emphasis added). Similarly, the statement of Representative Garcia repeated the language of "*a* real choice." *Id.* (emphasis added).

Other Congressional statements echoed the intent of a single election. Representative Griffith, a co-sponsor of the EFAA, *see* H.R. 4555, 117th Congress (2021), stated during the House debate that the purpose of the EFAA was to give designated plaintiffs "*an opportunity* to go to court *or* [] *an opportunity* to go to binding arbitration, if that is what they choose, but they will have *a choice*." 168 Cong. Rec. H986-87 (daily ed. Feb. 7, 2022) (emphases added). Nothing in this statement from the co-sponsor of the legislation reflects an intent to allow a plaintiff to elect arbitration, then subsequently abandon arbitration and elect to go to court.

Similar statements were made during the Senate debates. Senator Ernst remarked that the EFAA would provide "survivors of sexual assault and sexual harassment with a choice *between* litigation and arbitration," 168 Cong. Rec. S624-25 (daily ed. Feb. 10, 2022) (emphasis added). A choice "between litigation and arbitration" necessarily forecloses the choice of both. Senator Durbin reiterated that the EFAA "will give survivors *a choice* of whether or not to bring a claim in court." *Id.* at S625-26 (emphasis added). Ding exercised her choice to initiate arbitration proceedings rather than "bring a claim in court." *Id.* No choice remained to "bring a claim in court" once she exercised the one choice provided for in the statute. *Id.*

Finally, the commonly accepted legal definition of "election" reinforces this reading of the statute. *See*

Election, Black's Law Dictionary (12th ed. 2024) (defining "election" as "[t]he exercise of *a* choice; esp., the act of choosing from several possible rights or remedies in a way that precludes the use of other rights or remedies") (emphasis added). The example provided is "the taxpayers' *election* to file jointly instead of separately." *Id.* (emphasis in the original). Here, Ding made the election to proceed to arbitration rather than litigating in court.

To summarize, the majority's reading of the statute conflicts with the plain language of the statute, the legislative history, the commonly accepted legal definition of the term "election," and our precedent addressing waiver in the arbitration context. I respectfully dissent.