UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

HUNTER DRAGON	)	3:23-CV-00188 (RNC)
	)	
PLAINTIFF	)	
	)	
V.	)	
	)	
SCA PHARMACEUTICALS, LLC	)	
	)	
DEFENDANT	)	JUNE 23, 2023

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND MOTION TO DISMISS

Defendant, SCA Pharmaceuticals, LLC, respectfully submits this Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Compel Arbitration and Motion to Dismiss Constructive Discharge Claims.

I. There is No Dispute the Parties Agreed to Arbitrate Plaintiff's Claims

In pages 1 through 7 of his Objection, plaintiff does not dispute any of the facts presented by defendant demonstrating plaintiff: (a) was hired as an Aseptic Cleaner on August 10, 2020; (b) was provided with documents concerning SCA policies and procedures, including the Business Conduct Handbook, at the inception of his employment; (c) that he had the opportunity to read and review the Handbook which included the "Arbitration Policy"; (d) that he had the opportunity to ask any questions or discuss any policies and procedures in the Handbook with a human resources representative; and (e) that he signed and dated the Handbook at the inception of his employment.

Thus, the plaintiff's argument on page 7 through 12 that there was no contract concerning his employment completely misses the point – the parties clearly agreed to

arbitrate any employment disputes even though the parties did not agree to a contract of employment for a specific term or generally to alter plaintiff's employment at will status. Plaintiff's attempt to argue the bilateral obligations to arbitrate as set forth in the Handbook are meaningless because it states it is not a contract of employment shortsightedly avoids the language in two acknowledgments undisputedly signed and dated August 10, 2020 by Mr. Dragon stating: (1) "that I have received a copy of the handbook and understand that it is my responsibility to read and comply with the policies contained in this handbook and any revisions to it." See Defendant's Exhibit B; Durand Aff. ¶ 6; (2) "I have read and understand the employee policies and procedures, my job description, and my wages and benefits. I understand the rules and information and agree to its provisions." See Exhibit C; Durand Aff. ¶ 7.

Defendant contends that the only logical and reasonable conclusion to be drawn from these undisputed facts is that the parties specifically agreed to be bound by the "Arbitration Policy" in the Handbook even though they did not agree to a general employment contract or a contractual term of employment. Put another way, the parties agreed to arbitration of disputes, even though they did not enter into a contract of employment governing all aspects of the employment relationship.

In addition to not contesting the factual foundation for defendant's Motion to Compel Arbitration, plaintiff makes no attempt in pages 7 through 12 of his Objection to address the binding and recent case law in the District of Connecticut enforcing arbitration provisions in the following cases cited by defendant: Topf v. Warnaco, Inc., 942 F. Supp. 762 (D. Conn. 1996) (holding an employee agreed to arbitrate claims against his employer when he received a handbook that contained the employer's

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arbitration agreement, and signed an acknowledgment of receipt of the handbook); Rowe v. Affordable Motors, Inc., 2018 WL 6258606, at *4 (11/30/18; D. Conn.); Paltz v. Alliance Healthcare Services, Inc., 2022 WL 633732 (3/4/22; D.Conn); and Johnson v. Raymours Furniture Company, Inc., HHD-CV-22-6158951 (1/30/23; Rosen, J.).

These cases recognize that the specific inquiry should be whether an agreement to arbitrate was reached as distinct from whether a comprehensive employment contract was formed by the parties. In rejecting the plaintiff's arguments that the dispute resolution policy in an employee handbook was not binding, the Court in Paltz focused on the plaintiff's signature acknowledging agreement to policies, the bilateral obligations of both parties to submit any disputes to arbitration and disagreed with plaintiff's contention that the document was not enforceable because it was simply an acknowledgment of workplace policies. See Paltz, 2022 WL 633732 *4-5. The Court in Paltz also recognized that courts in the District of Connecticut routinely uphold arbitration agreements contained in an employee handbook where a plaintiff admits to signing an acknowledgment form. Paltz, Id. at *5:

> " Under Connecticut law, a party who signs a written contract is conclusively presumed to know its contents and to assent to them, and he or she is therefore bound by its terms and conditions. See Phoenix Leasing, Inc. v. Kosinski, 47 Conn. App. 650, 654 (1998). In the employment context, courts in this District routinely uphold arbitration agreements in an employee handbook where the employee signs an acknowledgment form. See Santos v. GE Cap., 397 F. Supp. 2d 350, 3555-56 (D. Conn. 2005) (finding that employer and employee agreed to submit claims to arbitration where "[the employee] signed at the bottom of the acknowledgment form were made" where employee signed acknowledgment form in manual). Here, defendants have provided evidence that Ms. Paltz electronically signed the Acknowledgment to the Handbook, see Macphail Decl. ¶¶12, 17-2-, and Ms. Paltz has not marshaled any evidence to suggest that his signature is invalid or that she otherwise opted out of the agreement to arbitrate. The Court therefore finds that the parties formed a valid arbitration agreement."

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Paltz, Id. at *5 (footnotes omitted).

Plaintiff does not dispute signing the acknowledgement form or that the arbitration policy would apply to the plaintiff's claims. Defendant contends that a disclaimer in the Employee Handbook providing that it does not constitute a contract of employment should not override the clear intent that the parties specifically agreed mutually to arbitrate employment disputes. The weight of precedential authority reflected by the recent Paltz decision and cases cited therein stands for the idea that courts will uphold and enforce arbitration provisions in employee handbooks where parties have intended to arbitrate disputes. The fact that the parties did not intend to enter into a comprehensive employment contract or that language was included so as not to alter the at will employment relationship should not change the conclusion that the parties agreed to submit all claims against each other to arbitration.

II. The EFAA Should not Be Applied Retroactively as Urged by Plaintiff

Plaintiff's argument in pages 13 through 18 of his Objection essentially asks the Court to apply the End Forced Arbitration Act ("EFAA") retroactively to alleged claims and conduct occurring before the March 3, 2022 effective date of the Act.

Defendant contends this is legally incorrect and contrary to the clear intent that the EFAA is not retroactive and only applies to claims that arise or accrue after the March 3, 2022 enactment date. See 136 Stat. 28, § 3. In the present action, where the claims made by the plaintiff concerning a hostile work environment and retaliation are predominately and substantially based on allegations occurring before March 3, 2022 the Court should rely upon the reasoning in O'Sullivan v. Jacaranda Club, LLC, 2023

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WL 2949512 (N.Y. Sup. April 13, 2023) cited by defendant, rather than the flawed reasoning in Olivieri v. Stifel, 2023 U.S. Dist. LEXIS 57001 (E.D.N.Y. Mar. 31, 2023) cited by plaintiff on pages 14 and 15 of his Objection[1].

Defendant contends the reasoning in Olivieri, that if one act contributing to a claim of hostile work environment occurred after the effective date of the EFAA then arbitration is barred as to the whole case, distorts the plain meaning and intent of the statue and leads to the absurd result that the statute is applied retroactively. Essentially, the question here is whether "arise or accrue" should be interpreted to mean when claims predominately come into existence as argued by defendant or whether such claims "arise or accrue" each day they continue or reoccur as urged by plaintiff where that would mean they would accrue both before and after the statute's enactment thereby giving the Act a retroactive effect.

Under fundamental tenets of statutory interpretation, the EFAA effective date of the arbitration ban provision should be interpreted to not apply when the genesis of the plaintiff's claims arise and accrue before March 3, 2022 even if some portion of the claim is alleged to have occurred after March 3, 2022.

When interpreting a statute,

> [A] court should always turn first to one, cardinal canon before all others. [The Supreme Court] has stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.

[1] The Olivieri case was apparently stayed on May 19, 2023 pending resolution of the interlocutory appeal of the Court's March 31, 2023 ruling relied upon by Mr. Dragon. See Olivieri v. Stifel, Nicolaus & Company, Inc., 2:21CV00046 (E.D.N.Y) Doc. 72.

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Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (internal quotations and citations omitted); see also Est. of Pew v. Cardarelli, 527 F.3d 25, 30 (2d Cir. 2008) ("We first look to the statute's plain meaning; if the language is unambiguous, we will not look farther."). "Only if an attempt to discern the plain meaning fails because the statute is ambiguous, do we resort to canons of construction. If both the plain language and the canons of construction fail to resolve the ambiguity, we turn to the legislative history." Green v. City of New York, 465 F.3d 65, 78 (2d Cir. 2006) (internal citation omitted). Put differently, "[i]t is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms. Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous." Lee v. Bankers Tr. Co., 166 F.3d 540, 544 (2d Cir. 1999) (internal citations omitted).

A. The Term "Accrue" Unambiguously Refers to When a Claim First Comes Into Existence.

The guiding principle of statutory interpretation is that courts "normally interpret[] a statute in accord with the ordinary public meaning of its terms." Bostock v. Clayton Cnty., Georgia, ---U.S.---, 140 S. Ct. 1731, 1738 (2020). In other words, the "starting point in statutory interpretation is the statute's plain meaning, if it has one." United States v. Dauray, 215 F.3d 257, 260 (2d Cir. 2000) (internal citation omitted). To ascertain the statute's plain meaning, courts "look to the particular statutory language at issue, as well as the language and design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (internal citation omitted). In performing this analysis, "[a] sound method for determining the plain meaning of words is to look at their

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dictionary definitions." CBS Corp. v. Eaton Corp., No. 07 Civ.11344(LBS), 2009 WL 4756436, at *4 (S.D.N.Y. Dec. 7, 2009) (citation omitted); see also Mass Mutual Asset Fin. LLC v. ACBL River Ops. LLC, 220 F. Supp. 3d 450, 455 (S.D.N.Y. Nov. 28, 2016) ("To determine the plain and ordinary meaning of . . . terms, dictionary definitions prove useful.") (internal citations omitted). But plain meaning "'does not turn solely on dictionary definitions of [the statute's] component words'"—it "is also determined by the 'specific context in which that language is used, and the broader context of the statute as a whole.'" United States v. Rowland, 826 F.3d 100, 108 (2d Cir. 2016) (quoting Yates v. United States, 574 U.S. 528, 537 (2015) (plurality opinion)). To that end, "[t]he text's plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute." Saks v. Franklin Covey Co., 316 F.3d 337, 345 (2d Cir. 2003). Specifically, "[t]he meaning of a particular section in a statute can be understood . . . by appreciating how sections relate to one another" within the statutory scheme. Auburn Hous. Auth. v. Martinez, 277 F.3d 138, 144 (2d Cir. 2002).

There is no question that the "ordinary public meaning" of the term "accrue" supports defendants' interpretation. Bostock, 140 S. Ct. at 1738. The dictionary defines the term "accrue" to mean when a claim first becomes actionable. See, e.g., Accrue, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/accrue (last visited June 23, 2023) ("accrue" means "to come into existence as a legally enforceable claim"); Black's Law Dictionary 23 (11th ed. 2019) ("accrue" means "[t]o come into existence as an enforceable claim"). Similarly, the term "arise" means "to begin to occur or to exist." See, e.g., Arise, Merriam-Webster Dictionary,

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https://www.merriam-webster.com/dictionary/accrue (last visited June 23, 2023) And the Supreme Court has repeatedly stated that "[i]n common parlance," the term "accrue" refers to "when [a claim] comes into existence." United States v. Lindsay, 346 U.S. 568, 569 (1954); see also Gabelli v. S.E.C., 568 U.S. 442, 448–49 (2013) (a claim "accrues when the plaintiff has a right to commence it." (quoting 1 A. Burrill, A Law Dictionary and Glossary 17 (1850) (emphasis omitted)); Heimeshoff v. Hartford Life & Accident Ins. Co., 571 U.S. 99, 105 (2013) (a claim accrues when "the plaintiff can file suit and obtain relief" (internal quotations and citation omitted)); Rice v. United States, 122 U.S. 611, 7 S. Ct. 1377, 1381 (1887) ("A claim first accrues . . . when a suit may first be brought upon it . . . .").

The structure of the EFAA also confirms that this ordinary meaning is what Congress actually intended. The term "accrue" appears only in one section of the EFAA. This section, which is entitled "Applicability," is completely separate from the Act's substantive provisions—and it serves to limit those provisions by preventing them from applying to claims that "accrue[d]" before the statute's enactment. Taken in context, the obvious purpose of this "Applicability" section is to prevent the statute from "chang[ing] the legal consequences of past events," which would make the Act retroactive. Guaylupo-Moya v. Gonzales, 423 F.3d 121, 129–30 (2d Cir. 2005) (defining statutory "retroactivity"). The only way to effectuate that purpose is by reading "accrue" to mean when a claim first arises—not when the last act in furtherance of a pre-existing claim occurs, which would allow the Act to "change the legal consequences" of conduct preceding its enactment by bootstrapping them to post-enactment conduct as plaintiff urges the Court to do here. Id.

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Because dictionary and legal definitions, judicial interpretations, and the structure of the statute all favor applying the ordinary meaning of the term "accrue," the statute is unambiguous. Plaintiff's interpretation based on Olivieri would defeat the function of the EFAA's limiting section, and result in its retroactive application – a result not intended by Congress.

B. Even If the Term "Accrue" Is Ambiguous, The Canons of Construction Foreclose Amici's Interpretation.

Notwithstanding the ordinary meaning of "accrue," plaintiff in reliance on Olivieri contends that Congress actually intended to borrow an obscure "term of art" from the statute of limitations context without the EFAA stating as much. As explained above, the Court need not consider the canons of statutory construction because the statute is unambiguous on its face. Greathouse v. JHS Sec. Inc., 784 F.3d 105, 111 (2d Cir. 2015) (courts only "turn to canons of statutory construction for assistance in interpreting the statute" when the statute's plain meaning is ambiguous).

Even if the Court finds ambiguity, the canons of construction, taken together, foreclose plaintiff's interpretation—both because the suggested canon is inapplicable, and because reading the statute as plaintiff suggests would violate two other canons of construction that make the Olivieri interpretation impossible.

(i) The canon of statutory construction regarding legal terms of art does not apply here.

Plaintiff contends that the term "accrue" should be construed as a "term of art" because courts interpreting statutes of limitations have given the term a different meaning with respect to "continuing violations." But there is no question that Congress

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meant to use the ordinary meaning of the term in this Act which has nothing to do with statutes of limitations.

Generally speaking, "when Congress employs a term of art, 'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken.'" F.A.A. v. Cooper, 566 U.S. 284, 292 (2012) (internal quotations and citation omitted). But courts "do not force term-of-art definitions into contexts where they plainly do not fit." Johnson v. United States, 559 U.S. 133, 139–40 (2010) (declining to treat the term "physical force" as a legal term of art) (internal quotations and citation omitted). For this reason, the term-of-art canon applies only when a word in a statute is "obviously transplanted from another legal source." Sekhar v. United States, 570 U.S. 729, 733 (2013) (internal quotations and citation omitted) (emphasis added). Examples include the terms "punitive damages" in the Federal Tort Claims Act, Molzof v. United States, 502 U.S. 301, 306 (1992); "prospectus" in the Securities Act of 1933, Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 584 (1995); and "child support" in the Social Security Act, Sullivan v. Stroop, 496 U.S. 478, 483 (1990)—i.e., terms that possess a well-known and fixed legal meaning that logically springs to mind given the context in question.

The term "accrue," by contrast, is not amenable to this analysis. Unlike these recognized terms of art, "accrue" "takes on different meanings in different contexts." Cooper, 566 U.S. at 300 (rejecting technical meaning of the term "actual damages" found in inapposite case law). It is a "generic, imprecise term[] encompassing a broad spectrum" of subjects. United States v. Columbia Pictures Corp., 189 F. Supp. 153, 181–82 (S.D.N.Y. 1960) (rejecting technical meaning of the words "acquire" and

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"assets"). And the EFAA—which has nothing to do with statutes of limitations—is not a context that would require the interpretation of "arise or accrue" that may apply with a statute of limitations analysis, particularly where it would undercut the entire premise of this canon of statutory construction.

The Supreme Court has refused to give the term "accrue" any special meaning. In United States v. Lindsay, the petitioner argued that the term "accrued" in a newly-enacted statute of limitations should be interpreted to mean either when: (1) a claim first came into existence; or (2) when the statute of limitations was enacted (for pre-existing claims that would otherwise become barred upon its enactment). 346 U.S. 568, 570–71 (1954). The petitioner in Lindsay supported its position by citing cases from the same context (i.e., statutes of limitations). But the Court rejected the argument because, although "courts have sometimes given 'accrued' the meaning the [petitioner] here suggests, . . . we are unable to agree that the word has thereby taken on an established technical meaning which Congress must have had in mind when it used 'accrued' in this Act" absent evidence to that effect. Id. at 570 (emphasis added). The reasoning in Lindsay compellingly applies to the statutory interpretation question presented here. Plaintiff cannot override the plain meaning of the term "accrue" by pointing to cases related to statute of limitations without any evidence that Congress meant to incorporate that meaning when writing this Act.

Simply because "accrue" may operate as a term of art in reading statute of limitations does not mean it should be applied that way here to the interpretation of the effective date of a statute. See Cooper, 566 U.S. at 292 (refusing to treat phrase as legal term of art where its meaning "changes with the specific statute in which it is

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found" (quoting Cooper v. F.A.A., 622 F.3d 1016, 1029 (9th Cir. 2010))). Courts have held that the "concept of continuing violation[s]" is "ordinarily associated with statutes of limitations issues"—not claims in relation to the effective dates of statutes. Caviness v. Nucor-Yamato Steel Co., 105 F.3d 1216, 1220 n.1 (8th Cir. 1997) (explaining that the court was "not familiar with any Eighth Circuit law" where the concept of continuing violations served to "overcome a non-retroactivity rule" in a statute). Plaintiff fails to "demonstrate that the statutory context supports reading [the term] as a term of art rather than according to its plain meaning," which renders the canon inapplicable here. Yellen v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 2434, 2443–44 (2021).

Statutes of limitations define the time when litigants must bring claims in the interest of promoting "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." Gabelli, 568 U.S. at 448 (internal quotations and citation omitted). By contrast, the limiting section in the EFAA operates to restrict the EFAA's own scope so that it is not applied retroactively. Because a statute of limitations and the EFAA's retroactivity bar serve entirely different functions, there is no reason to believe Congress meant to carry context-specific meanings from one to the other. In sum, "accrue" is not a legal term of art. At most, the term holds special meaning when interpreting statutes of limitations. But there is no reason Congress would have thought to use that meaning here in this unrelated context particularly where the intent that retroactivity not applied would be defeated by such an interpretation.

Under plaintiff's reading, the statute would reach back retroactively to ban arbitration of claims, like Plaintiff's alleged sexual harassment and retaliation allegations

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pre-dating March of 2022, simply because some act may have occurred after March 3, 2022. However, courts in the Second Circuit have repeatedly refused to give statutes retroactive effect just because "continuing violations" straddled the statute's effective date. For instance, in Sank v. City Univ. of N.Y., No. 94 CIV.0253(RWS), 2002 WL 1792922 (S.D.N.Y. Aug. 2, 2002), the plaintiff argued that the Civil Rights Act of 1991 ("CRA")—which granted claimants the right to a jury and monetary damages—reached back to events that preceded the statute's enactment because the plaintiff alleged a continuing violation that started before the statute's effective date. Id. at *4. But the court, "agree[ing] with the weight of authority," rejected this argument because the CRA had already been held "not to apply retroactively" - because the plaintiff's argument (which is identical to the one plaintiff makes here) would give the statute impermissible retroactive effect. Id. at *4-5.

Likewise, in Tillman v. St. Vincent's Hosp. & Med. Ctr. of N.Y., No. 92 Civ.1890(RPP), 1993 WL 426882 (S.D.N.Y. Oct. 18, 1993), the plaintiff argued again that the CRA, which also created a cause of action for discrimination in the "terms and conditions" of employment, applied to conduct preceding the statute's enactment because her claim alleged a continuing violation. Id. at *3. Once again, the court rejected this argument because adopting it would "not be consonant" with prior holdings that "the CRA does not apply retroactively." Id. In reaching this conclusion, the court noted—as here—that the continuing-violation doctrine only "applies to questions of whether the statute of limitations period has run on alleged acts of discrimination," and that the plaintiff cited no "case in which the continuing violation theory has been applied in such manner"—namely, to make a prospective statute retroactive. Id.

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The reasoning of these cases applies squarely here. Because plaintiff's interpretation of the term "accrue" would make the statute retroactive and the Act's "plain language indicates no Congressional intent" to do so, Zinsky v. Russin, 2022 WL 2906371, at *4, the presumption against retroactivity compels rejection of Plaintiff's interpretation because ot runs counter to yet another canon of statutory construction: the avoidance of absurd results. It is "well-established that [a] statute should be interpreted in a way that avoids absurd results." S.E.C. v. Rosenthal, 650 F.3d 156, 162 (2d Cir. 2011) (quoting United States v. Venturella, 391 F.3d 120, 126 (2d Cir. 2004)). This canon applies "where the result of applying the . . . language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result and where the alleged absurdity is so clear as to be obvious to most anyone." Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 846 F.3d 492, 517 (2d Cir. 2017) (quoting Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring in the judgment)).

In short, Congress made a choice to limit the scope of this statute to prospective claims. Giving "arise or accrue" its plain meaning is the only way to honor that clear statutory intent and it should be interpreted to mean that when claims predominately come into existence before March 3, 2022 they are not subject to the EFAA.

III. Plaintiff's Constructive Discharge Claims Should be Dismissed

With respect to plaintiff's argument on pages 18 through 23 of his Objection, defendant contends that the constructive discharge claims in Counts III and VII should be dismissed based upon: (1) the lack of factual allegations which, if true, would show objectively that defendant intentionally and deliberately created intolerable working

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conditions for plaintiff; and (2) the gap between what plaintiff describes as "the most significant allegation that defendant's conduct was deliberate" (the ambiguous statement made in January 2022) and his actual resignation four months later in May of 2022.

On the first point, the parties appear to agree that the plaintiff must plead facts demonstrating an employer "intentionally creates a work atmosphere so intolerable that he is forced to quit voluntarily." Terry v. Ashcroft, 336 F.3d 128, 151-152 (2d Cir. 2003). Further, plaintiff must plead facts showing the employer's actions were "deliberate and not merely negligent or ineffective." Corfey v. Rainbow Diner of Danbury, 746 F. Supp 2d 420 (D. Conn. Oct. 15, 2010) quoting Petrosino v. Bell AH., 385 F.3d 210 (2d Cir. Sept. 29, 2004).

Plaintiff's allegations entirely label defendant's conduct as "failing" to take certain action but do not include any overt or deliberate conduct or statements by defendant intentionally creating an intolerable work environment. There are no allegations that plaintiff was repeatedly forced to work with or intentionally placed near his alleged harasser, that defendant disregarded any actual observed harassment of plaintiff, that defendant encouraged or promoted or participated in any harassment of plaintiff, did not investigate complaints or threatened plaintiff with termination for bringing complaints. In short, plaintiff's allegations do not rise to the required level of deliberate and intentional creation of intolerable work conditions sufficient to transform a claim of a hostile work environment into a case that meets the higher pleading standard for a constructive discharge claim. See Bader v. Special metals Corp., 985 F. Supp. 2d 291, 309

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(N.D.N.Y. 2013); Ocasio v. Mohawk Valley Community College, 2021 WL 447724 (1.3021 N.D.N.Y.).

Secondly, the four-month gap between the so-called "most deliberate conduct by defendant" – the vague allegation of a statement by Mr. Dufort in January 2022 about making a choice – and plaintiff's resignation on May 23, 2022 does not support an objective and reasonable conclusion that an intolerable work condition existed which required resignation. This is particularly true where the allegations during the four month period after January 2022 do not include any intentional and deliberate conduct engaged in by defendant.

Because a constructive discharge claim only arises when working conditions have deliberately been created by the employer that are "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, a constructive discharge claim fails as a matter of law if there is a sufficient gap in time between the alleged misconduct and the plaintiff quitting." Brandenburg v. Greek Orthodox Diocese of North America, 2023 WL 2185827 (2/23/23 S.D.N.Y.) (internal citations omitted) citing Rutkowski v. Sears Roebuck Corp., 210 F.3d 355, at *4 (2d Cir. 2000) (unpublished opinion) (affirming dismissal of constructive discharge claim in light of the approximately two-month gap between the alleged misconduct and plaintiff's resignation); Bellom v. Neiman Marcus Grp., 975 F. Supp. 527, 534 n. 6 (S.D.N.Y. 1997) (dismissing constructive discharge claim in light of eight month gap between defendant's conduct and plaintiff's quitting).

Accordingly, the constructive discharge claims should be dismissed.

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IV. Conclusion

In summary, the Motion to Compel Arbitration and Motion to Dismiss the Constructive Discharge Claims should be granted because: (a) there is no dispute the parties agreed to arbitrate plaintiff's claims and plaintiff does not dispute those facts; (2) the EFAA should not be interpreted in the manner suggested by plaintiff because that would incorrectly result in its retroactive application; and (3) plaintiff's allegations of constructive discharge fail to meet the required pleading standard based on the lack of allegations of deliberate and intentional conduct by defendant creating intolerable working conditions and the gap in time between the alleged deliberate conduct and plaintiff's resignation.

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CERTIFICATION

This is to certify that on this 23rd day of June, 2023, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

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