PROPOSED TENTATIVE

The court has detailed the parties, the nature of the lawsuit, and the procedural history in previous orders; they will not be recounted here. Suffice it to say for our immediate purposes that on December 18, 2024, the court granted plaintiff's request to file a first amended complaint, which was deemed filed as of that date, and continued defendant Employbridge's motion to compel arbitration. The court indicated it could not determine the merits of the latter motion until defendant's pretrial challenges to the operative pleading had been determined, in light of Congress's amendment to the Federal Arbitration Act in 2022 by virtue of the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA) (9 U.S.C. §§ 401-402). Plaintiff wished to add two new causes of action in the first amended pleading – the ninth for pregnancy harassment in violation of Fair Employment and Housing Act (FEHA), and the tenth for sexual harassment in violation of FEHA. The court, in granting leave to amend, afforded plaintiff an opportunity to submit an amended pleading. On December 19, 2024, plaintiff replaced defendant Zenia Perales for Doe 1.

In an order dated January 24, 2025, the parties' stipulated that plaintiff would be permitted to file a second amended complaint. In the stipulation, the court agreed to continue defendant Employbridge's motion to compel arbitration to April 16, 2025, and indicated that defendants would be permitted to file a demurrer to the second amended complaint, which would be heard on April 16, 2025. Plaintiff's second amended complaint was filed on January 29, 2025. Defendant Perales filed an answer to the second amended complaint on February 27, 2025. On March 25, 2025, defendant Employbridge filed a demurrer to the second amended complaint, challenging the ninth and tenth causes of action.[1] On April 2, 2025, the court signed a stipulation, continuing the hearing on the demurrer to the second amended complaint and the motion to compel arbitration to May 28, 2025.

Defendant demurs to the ninth and tenth causes of action in the second amended complaint. The ninth cause of action, as noted, alleges a claim for pregnancy harassment, while the tenth cause of action alleges a claim for sexual harassment, both in violation of FEHA (and particularly Government Code section 12940, et. seq.) Opposition was filed on May 15, 2025, which was one day late. On May 20, 2025, the parties stipulated to allowing the late opposition, and agreed that a reply could be filed by May 21, 2025. Employbridge filed a reply to the opposition on May 21, 2025. All briefing has been reviewed.

The court will detail the new allegations in the operative pleading relevant to the current demurrer, and then explore the arguments offered in support and against the demurrer. The court

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[1] Defendant's demurrer was filed by attorney Michael S. Kun, from Epstein, Becker, and Green, P.C. On April 18, 2025, defendant filed a substitution of attorney, removing attorney Michael Kun as counsel, and substituting in attorney Nicole Kamm, from Fisher Phillips, LLP.

will then detail the legal principles that are relevant to resolution, and then address the merits of the parties' arguments. The court will then discuss separately the status of defendant's motion to compel arbitration, concluding with a summary of its determinations.

1) Defendant's Demurrer to the Second Amended Complaint

A) *Allegations in the Second Amended Complaint/Arguments for and Against the Demurrer*

At issue are claims advanced in the new ninth and tenth causes of action as contained in the second amended complaint. As noted above, the ninth cause of action advances a claim based on pregnancy harassment in violation of FEHA, while the tenth cause of action is based on sexual harassment in violation of FEHA. According to the second amended complaint, plaintiff began working for defendant Primus Auditing Operations through defendant Employbridge, LLC (a staffing agency) as an administrative assistant on June 29, 2023. She was scheduled to work five days a week (Monday through Friday), from 8:00 a.m. to 5:00 p.m., and at no time has she received a negative performance review. In the body of the ninth and tenth causes of action, plaintiff contends that during her employment, defendants "created and allowed to exist a hostile work environment and retaliated and harassed [her] on the basis of her status as a pregnant person" (¶ 91) and "on the basis her sex/gender" (¶ 104). The allegations in the body of both the ninth and tenth causes of action themselves do not contain any facts offered in support; both are cloaked in conclusory statutory language, observing that the harassment is against public policy, created an oppressive, hostile, intimidating and/or offensive work environment, interfered with her emotional well-being and ability to perform her duties, "were sufficiently severe and pervasive to materially alter Plaintiff's conditions of employment, and created an abusive work environment."[2] All facts alleged to support the pregnancy and sex harassment causes of action are alleged in the chain pleading portion of the second amended complaint, and as a result, plaintiff utilizes the same facts to support both forms of alleged harassment.

Plaintiff in mid-July 2023 discovered she was pregnant, and informed her direct supervisor, Ms. Perales, of this in late July 2023 "and her need for time off to visit doctors." Ms. Perales shared "her own pregnancy experience, reassuring Plaintiff about her job security." In or around early August 2023, plaintiff informed defendant Perales "of the necessity to attend several medical appointments requiring adjustment to her work schedule." Plaintiff contends that the following allegations show evidence of a severe and pervasive harassment based on her pregnancy and her sex:

[2] Plaintiff requests punitive damages for both causes of action. As there is no motion to strike that request, and as the claims are not relevant to the demurrer, the punitive damages request will not be discussed or explored further.

- Plaintiff "on one occasion" suffered "severe cramping and some bleeding," and was in pain; she then "went into an empty office to call her doctor and report cramping and bleeding." Plaintiff was away from her desk "for no more than five (5) minutes." Upon returning to her desk, defendant Perales "scolded her for stepping away from her desk . . ." When plaintiff inform her that she was not feeling well and stepped away to call a doctor, defendant Perales "rudely responded 'It doesn't matter. You need to be here to talk to Javiar'" (i.e., Javiar Sollozo, the President of Primus. Plaintiff began to feel "uncomfortable even mentioning her pregnancy at work." (¶ 19.)
- "On another occasion," while plaintiff was discussing "her morning sickness with a coworker," defendant Perales "overheard the conversation, stared and leered at Plaintiff, and appeared visibly disgusted, further making Plaintiff uncomfortable."
- On another occasion, during "a break," plaintiff was browsing "her online baby registry"; defendant Perales' assistant "noticed and informed Ms. Perales" about this. Ms. Perales "then called Plaintiff into a meeting in the conference room. Plaintiff attended this meeting, where Ms. Perales reprimanded her for browsing 'stuff like that.'"
- "Despite her discomfort" (the court assumes this means the environmental discomfort and not physical discomfort caused by her pregnancy), plaintiff did inform defendants about her medical appointments (August 8, August 16, and August 17, and August 18 -21, 2023), both in person and via text, and "providing a printed calendar with the medical appointment dates for additional clarity. [Plaintiff] also informed Defendant Perales that she would need to arrive at work a little later on these days due to her appointments." Apparently defendants agreed to these dates.
- Nevertheless, starting on August 21, 2023, defendant Perales inquired of plaintiff via text if she would be present at work the following day, which plaintiff confirmed. Plaintiff, however, starting feeling ill later that day and on August 22, 2023, and expressed concerns about her ability to work, meaning the possibility of visiting an emergency clinic. On August 23, 2023, defendant Employbridge informed plaintiff that Primus had terminated her assignment, based on a false and pretextual reason related to the "elimination of her position and stating that she was not a good fit." Plaintiff alleges on information and belief that she was terminated based on her pregnancy and sex, and this was a form of harassment.

Defendant demurs to both causes of action. It claims the court should sustain the demurrer as to both causes of action because the second amended complaint fails to state facts sufficient to support her ninth and tenth causes of action. It claims that that there is nothing in the complaint to suggest defendants' conduct was motivated by anything other than legitimate, employment-related concerns, or that plaintiff was harassed because of her pregnancy or sex. Additionally, defendant argues that plaintiff has failed to allege sufficient facts to show any harassment was severe or pervasive. Defendant asks that the court sustain the demurrer without leave to amend. Plaintiff has filed opposition. She argues that she has pleaded sufficient facts to support both pregnancy- and sex-based harassment. Defendant has filed a reply.

B) *Legal Background*

FEHA expressly prohibits sexual harassment in the workplace. It is an unlawful employment practice '[f]or an employer ... because of ... sex ... to harass an employee....' [Citation.] The FEHA also provides that '[sexual] [h]arassment of an employee ... by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.' [Citation.] For the purposes of the relevant provisions of the FEHA, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.' [Citation.]" (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460–461).)

A harassment claim can be either quid pro quo or based on the creation of a hostile work environment. Plaintiff relies exclusively on the latter, so the court will focus on those standards. Generally, to state a claim for hostile work environment in violation of FEHA, a plaintiff must [allege and] demonstrate: (1) membership in a protected group; (2) harassment because plaintiff belonged to this group; and (3) harassment so severe that it created a hostile work environment. (*Lau v. Wal-Mart Associates, Inc.* (E.D. Cal., Apr. 17, 2025, No. 2:24-CV-01202-DAD-AC) 2025 WL 1134555, at *3; see *Doe v. Department of Corrections & Rehabilitation* (2019) 43 Cal.App.5th 721, 736.)

To constitute harassment plaintiff must show "that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that qualifies as hostile or abusive to employees because of their [pregnancy or sex].'" [Citation.] . . . Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it. [Citation.]" (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927.) Harassment based on sex and pregnancy require plaintiff to plead sufficient facts to establish an atmosphere of pervasive or severe harassment in her work environment. (*Mayfield v. Trevors Store, Inc.* (N.D. Cal., Dec. 6, 2004, No. C-04-1483 MHP) 2004 WL 2806175, at *3.) In order to state a claim for relief for harassment under either, a plaintiff is required to show a "continuous manifestation of a

[pregnancy and sex]-based animus." Nothing more is required to state a claim for relief under Government Code section 12940(j). A cause of action for "harassment because of sex" under section 12940(j) includes "harassment based on pregnancy." (*Ibid*.)

The totality of the allegations must demonstrate "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." (Gov't Code § 12923.) Factors to consider in this context include the frequency of the conduct, whether the conduct was humiliating or physically threatening, the alleged harasser's role and status in the workplace, whether the harasser shared a physical workspace with the victim, whether the harasser and victim's work was closely intertwined, and any other relevant or pertinent work environment factors that might increase or decrease the severity of the harassment. (*Bailey v. San Francisco Dist. Attorney's Office* (2024) 16 Cal.5th 611, 633; *Doe*, supra, at p. 736; *White v. Capital One, National Association* (E.D. Cal., Oct. 23, 2024, No. 1:24-CV-00633-KES-SKO) 2024 WL 4555936, at *4.) Conduct that is merely offensive is not enough to state a harassment claim. (*Bailey, supra,* 15 Cal.5th at p. 628.) Simple teasing, offhand comments, and isolated incidents (unless extremely serious) are sufficient to create an actionable claim of harassment. (Ibid; see *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279 [setting out prima facie requirements for sexual harassment claims under FEHA].)

Importantly, harassment is to be distinguished from discrimination. "Discrimination refers to bias in the exercise of official actions on behalf of the employer," while "harassment refers to bias that is expressed through interpersonal relations in the workplace." Put another way, unlike discrimination claims, "harassment often does not involve any official exercise of delegated power on behalf of the employer," but instead "focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706; see also *Bailey v. San Francisco Dist. Attorney's Office* (2024) 16 Cal.5th 611, 627.) As our high court has noted, "harassment is generally concerned with the message conveyed to an employee, and therefore with the social environment of the workplace, whereas discrimination is concerned with explicit changes in the terms or conditions of employment." (*Id.* at p. 708.) Harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness of bigotry, or for other personal reasons, while discrimination refers to bias in the exercise of official actions on behalf of the employer. (*Roby, supra,* at p. 706 [commonly necessary personnel management decisions do not come within the meaning of harassment].) Nevertheless, "official employment actions" may constitute an "evidentiary basis of the harassment cause of action, because [defendant] used those official actions as [a] means of conveying [the] offensive message." (Id. at p. 708.) In some cases the hostile message that constitutes the harassment may be conveyed through official employment actions, and therefore

evidence that would otherwise be associated with a discrimination claim can form the basis of a harassment claim. (Ibid; see also *White v. Capital One, National Association* (E.D. Cal., Oct. 23, 2024, No. 1:24-CV-00633-KES-SKO) 2024 WL 4555936, at *4 [personnel management decisions can be considered evidence of harassment when actions demonstrate a pattern of bias]; *Gholson v. Beacon Health Options, Inc.*, No. SACV 22-00445-CJC (DFMx), 2022 WL 19241012, at *2 (C.D. Cal. July 26, 2022) ("they cannot escape liability for harassment simply because they chose to express the message through managerial decisions rather than explicit comments."); *Garcia v. Nestle USA, Inc.*, No. C 23-06199 WHA, 2024 WL 923774 at *4 (N.D. Cal. Mar. 1, 2024) (finding that personnel decisions can support harassment claims following *Roby*).

C) *Merits*

As plaintiff does not distinguish between harassment based on sex and harassment based on her pregnancy, as the same acts alleged in the chain pleading are offered to support both. As the standards are the same – including the rules attendant to specific factual pleading – the rules analysis provided below applies to both causes of action equally.

The court makes two preliminary determinations. First, the court finds that that plaintiff has adequately alleged that she is part of a protected class (pregnancy and gender based on sex). This is point is uncontested by defendant.

Second, and contrary to defendant's claim, there are sufficient allegations to show defendants made comments and/or engaged in acts based on plaintiff's pregnancy and sex. In this regard the court rejects defendants claim to the effect that personnel management decisions can never provide the basis for a FEHA harassment claims (i.e., the fact plaintiff was scolded by being away from her desk, the fact she was chastised for using the computer to look at her baby registry, and the fact she was terminated), in reliance on *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 64–65) ["commonly necessary personnel management actions" such as "job or project assignments" "do not come within the meaning of harassment"].) The court notes that *Janken* predates the California Supreme Court's decision in *Roby*, which held that personnel management actions can be considered evidence of action when the actions demonstrate a pattern of bias. (*Roby, supra*; see also *White v. Capital One, National Association* (E.D. Cal., Oct. 23, 2024, No. 1:24-CV-00633-KES-SKO) 2024 WL 4555936, at *4.) The court also finds defendant's reliance on cases such as *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, is misplaced, as it is based on older versions of FEHA, not the 2019 amendments, including the definition of a hostile work environment and the clarification that a single incident of harassing conduct is sufficient to create its existence. (*Beltran v. Hard Rock Hotel Licensing, Inc.* (2023) 97 Cal.App.5th 865, 880 [*Fisher* is no longer good law when it comes to determining what conduct creates a hostile work environment]; see CACI No. 2524.) Plaintiff is not required to show a decline in productivity, only "that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so

altered working conditions as to 'make it more difficult to do the job." (*Beltran, supra*, at p. 878.)

That being said, the court sustains the demurrer, because plaintiff has failed to allege sufficient facts to show any harassment based on her pregnancy and sex was severe or pervasive, as opposed to isolated, rude, and perhaps offensive. True, whether a work environment is reasonably perceived as hostile or abusive is not a mathematically precise test, and as noted looks to the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or merely an offensive utterance, and whether it unreasonably interferes with the plaintiff's work. Further, the required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct. (*Reynaga v. Roseburg Forest Products* (9th Cir. 2017) 847 F.3d 678, 687.) Even after construing the complaint liberally, plaintiff has not alleged sufficient facts to show the conduct at issue was severe. (*Bailey, supra*, 16 Cal.5th at p. 634 ["we conclude there is a triable issue of fact whether Larkin's one-time use of the N-word was, under the totality of the circumstances, sufficiently severe so as to create a hostile work environment"].) Nor has plaintiff alternatively pleaded facts showing pervasiveness – that is, an employee cannot recover for harassment that is occasional, isolated, sporadic, or trivial. (*Lyle, supra*, 38 Cal.4th at p. 283.)

More specifically, plaintiff alleges that she was employed by defendant between June and August 2023. At no point does she claim that any single event or incident was so severe that it alone supports harassment, as was true in *Bailey*. Distilled to its bedrock essence, plaintiff supports her harassment claims based on the following allegations: 1) she was "rudely" chastised once by defendant Perales for being away from her desk for no more than 5 minutes when she entered a nearby empty office to call her doctor after cramping and bleeding as a result her pregnancy, being told that she had to be at her desk (presumably not during a break, although this is unclear from the allegations in the complaint) because she had to be available to talk to the defendant's President; 2) on another occasion, while discussing with a coworker her morning sickness resulting from her pregnancy (presumably not during break, although again we are not told), Ms. Perales "stared and leered at Plaintiff, and appeared visibly disgusted" with plaintiff; 3) during a break, while browsing her online baby registry (we are not told if it was on her phone or on the company's computer), plaintiff was "reprimanded for browsing 'for stuff like that'"; and 4) her termination after being out between August 18 to 21, following the fact she was suffering nausea and expressed concerns about her ability to work.

These allegations, either individually or collectively, are insufficient. We are told that Ms. Perales treated plaintiff "rudely" when she chastised her leaving her desk.[3] Yet there is

[3] Plaintiff in opposition emphasizes that plaintiff was admonished for stepping away from her desk to call her doctor "*when she was bleeding at her desk*." The highlighted language is emphasized by plaintiff. It is not clear to the court, however, why this fact is significant, as plaintiff did not go to the toilet, but to an empty office in order to make a phone call. While no doubt troubling, there is no explanation as to why plaintiff could not call the doctor from her desk (or why there was no time to request permission to leave the desk).

nothing in the operative pleading to suggest that if plaintiff had made the phone call to her doctor from her desk (or asked to be excused from her desk to make the phone call), that this would have been equally chastised. Notably, plaintiff fails to detail or describe in the operative pleading what rules governed her job as an "Administrative Assistance" (e.g., was she allowed to walk away from her desk when there was no break, or was she required to stay there as part of her job, and the fact she was not there was the basis for legitimate criticism?) Plaintiff fails to indicate what occurred with other employees – for example, were they allowed to be away from their desk without criticism? The unadorned allegation as pleaded, sans context, fails to show that a reasonable person would find that the harassment altered working conditions as to make it more difficult to do the job, particularly as allegations in the complaint indicate that defendants did approve of plaintiff's time off from work for medical appointments (and between August 18 to 21, 2023).

Plaintiff also claims that on one occasion, while talking to a co-worker about her pregnancy and morning sickness, Ms. Perales "stared," leered, and "appeared visibly disgusted." Further, plaintiff claims that she was chastised by Ms. Peralta for "browsing" her baby registry while on break. And finally, plaintiff claims that her termination was a form of harassment. Yet these facts alone are ineffectual; more context is required. While it is true that criticism of job performance and termination can be the basis for harassment, that is true only if the act conveys a pregnancy- or sex- biased message that the supervisor wishes to convey. (*Roby, supra*, 47 Cal.4th at p. 708 [there is no basis for excluding evidence of biased personnel management actions so long as that evidence is relevant to prove the communication of a hostile message].) The employment-related act (not being at the desk) and plaintiff's termination require more context for plaintiff to be able to claim that the intended message(s) permitted a reasonable person to find that the harassment altered working conditions as to make the job more difficult. Was plaintiff browsing her baby register on the company computer against company policy, or was it her telephone during break? We are not told. Was plaintiff talking to a coworker away from her desk when she should have been ***at*** her desk, and that was the reason for Ms. Peralta's demeanor? We are not told. More facts must be pleaded. (See, e.g., *Bailey, supra,*16 Cal. 5th at 633 [finding harassing comment's severity and effect is dependent on nature of interactions within workplace)].)

Plaintiff in opposition also argues that Ms. Peralta stared, leered, and was visibly disgusted at her, and this is sufficient alone to show harassment, relying on *Birschstein v. New United Motor Mfg., Inc.* (2001) 92 Cal.App.4th 994.[4] *Birschstein,* however, is factually distinguishable. In *Birschtein,* a co-worker asked the plaintiff on a date three of four times, told her he wanted to "eat her," and described his sexual fantasies about her in detail. (*Id.* at pp. 997-998.) When the plaintiff rejected these advances and complained to management, the co-worker began a "campaign of staring" at the plaintiff. (*Id.* at p. 998.) He drove past her workstation five

[4] Plaintiff also cites to *Robinson v. County of Los Angeles* (Cal. Ct. App., Nov. 8, 2023, No. B317521) 2023 WL 7383276, at *1 in opposition which is an unpublished California Court of Appeal decision. (See p. 4 of Opposition.) It is settled that plaintiff cannot cite to and rely upon unpublished California Court of Appeal decisions in briefing. (Cal. Rules of Court, rule 8.1115(a).)

to 10 times a day and stared directly at her for several seconds each time. (*Ibid*.) After the plaintiff complained, the co-worker reduced the staring incidents to two or three times a day; once he drove past the plaintiff's workstation and stared at her while grabbing his crotch. (*Id*. at pp. 998–999.) The *Birschtein* court concluded this evidence was sufficient to withstand summary adjudication of the plaintiff's sexual harassment claim. As the court explained, "[w]hat began as [the co-worker's] overt acts of sexual harassment (asking for dates, the 'eat you' remarks, his specifically sexual bathing fantasies) were later transmuted by plaintiff's reaction . . . into an allegedly daily series of *retaliatory* acts—the prolonged campaign of staring at plaintiff—acts that were directly related to, indeed assertedly *grew out of*, the antecedent unlawful harassment." (*Birschtein*, *supra*, 92 Cal.App.4th at p. 1002, italics in original.)

There was nothing similar here. There is no evidence that the solitary incident of "staring, leering," and Ms. Peralta's apparent disgust, was severe or pervasive, aside from the conclusory observations offered by plaintiff in the operative pleading. (See, e.g., *Haberman v. Cenage Learning, Inc.* (2009) 180 Cal.App.4th 365, 386 [while two comments were personal and inappropriate for the workplace, the comments, without more, did not constitute actional conduct, for they were not severe or pervasive as to alter conditions of employment and create a hostile work environment].) The facts do not indicate that Ms. Peralta sought out plaintiff to stare at her, as was the case in *Birchstein*, and there is no evidence as to the duration of Ms. Peralta's staring or leering. Under California law, when the harassing conduct is not severe in the extreme, more than a few isolated incidents must have occurred to prove a claim based on working conditions. (*Lyle, supra*, 38 Cal.4th at p. 283-284; *Bailey*, *supra,* 16 Cal.5th at p. 628 [teasing, offhand comments, and isolated incidents, unless extremely serious, are not sufficient to create an actional claim for harassment]; see also *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 446.) FEHA is not a civility code. (*Lyle, supra*, 38 Cal.4th at p. 295.) Even when the allegations are considered together and liberally construed in plaintiff's favor, they fail to provide a *reasonable* basis to conclude defendant's conduct interfered with plaintiff's work performance or altered her working conditions (i.e., was sufficiently severe or pervasive conduct to be harassing based on pregnancy or sex bias outside the scope of necessary job performance). More must be alleged.

The allegations offered here seem qualitatively similar to the allegations made *White v. Capital One, National Association* (E.D. Cal., Oct. 23, 2024, No. 1:24-CV-00633-KES-SKO) 2024 WL 4555936, at *5, and which the federal district court found to be insufficient to support harassment for pregnancy and sex in violation of FEHA:

> "The specific allegations within the complaint concerning White's pregnancy harassment claim include: (1) Dickins informed White she could breastfeed only before or after her scheduled breaks and denied her request for additional accommodation to breastfeed; (2) Dickins would "make comments about Plaintiff's newborn child crying and making noise"; (3) Dickins denied White the requested accommodation of working a reduced schedule to treat her postpartum depression; and (4) Dickins told White she would be

written up for missing work to attend medical appointments for her postpartum depression despite White's documented medical excuse. Compl. at ¶¶ 11–12. The complaint lacks allegations concerning the frequency of Dickins's comments; the content, circumstances, and tone of the comments; and whether White received any 'write-up' for her medical absences. Dickins is implied to be White's supervisor, which would add severity to the allegations, but the complaint fails to provide additional information concerning White and Dickins's working relationship or concerning the nature and context of Dickins's comments. Based on the limited allegations in the complaint, the allegations of harassment are not severe or pervasive. . .."

"The isolated comments alleged in the complaint – e.g., that Dickins 'made comments about' White's child crying in the background – do not meet the severity or pervasive requirements needed for White's pregnancy harassment claim . . .. Similarly, the allegations of Dickins's denials of accommodation concerning White's work schedule do not identify how Dickins delivered the denials, the reasons given for the denials, or whether other workers faced the same or different treatment in similar circumstances. Without more, the denials do not establish severe or pervasive harassing or biased conduct. [Citation.] White has failed to sufficiently allege that the denials of additional breaks were for a harassing purpose or communicated a targeted harassing message affecting the workplace environment, particularly as the complaint notes that Dickins indicated White could take additional time to breastfeed her child right before or after her scheduled breaks. Similarly, the general allegation that Dickins threatened to write-up White for absences from work does not establish harassing behavior in the absence of more specific details concerning the context of that statement and whether any adverse consequences ensued."

Similar defects are present here.

The circumstances alleged in the second amended complaint are also comparable to those identified and discussed in *Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047. In *Holmes*, the plaintiff revealed that she was pregnant a month after she was hired as an executive assistant and told her employer she planned to work up until her due date and would be out on maternity leave for six weeks. (*Id.* at p. 1052.) The plaintiff disliked when other employees asked about her maternity leave and asked them to stop, which they did. (*Id.* at p. 1053.) A month after she revealed her pregnancy, the employer emailed the plaintiff about getting another person up to speed on covering her tasks. (*Ibid.*) Plaintiff informed him that she would be taking her maternity leave earlier than previously discussed and might be out for the full four months permitted under California law. (*Ibid.*) The employer responded, "I need some honesty. How pregnant were you when you interviewed with me and what happened to six weeks? . . . That is an extreme hardship on me, my business and everybody else in the company. You have rights for sure and I am not going to do anything to violate any laws, but I feel taken advantage of and deceived for sure." (*Ibid.*)

The appellate court concluded that "[a]n evaluation of all the circumstances surrounding [plaintiff's] employment discloses an absence of evidence from which a reasonable jury could objectively find that [the employer] created a hostile work environment for a reasonable pregnant woman. During the two months [the plaintiff] worked for [the employer], there was no severe misconduct or pervasive pattern of harassment." (*Holmes, supra,* 191 Cal.App.4th at p. 1060.) The *Holmes* court observed that other employees ceased to ask questions about the plaintiff's maternity leave when asked. (*Ibid.*) With respect to the emails from her employer, the court concluded that, "[w]hen viewed in context, the e-mails . . . show nothing more than that [the employer] made some critical comments due to the stress of being a small business owner who must accommodate a pregnant woman's right to maternity leave. He recognized [the plaintiff's] legal rights, stated he would honor them, said he was not asking for her resignation, noted he had been pleased with her work, and simply expressed his feelings as a 'human in a tough business where people are constantly trying to take advantage of me.' He assured [the plaintiff] that 'it will work.'" (*Id.* at pp. 1060–1061.) The court observed that the FEHA is not "a civility code" and that "[t]he isolated incidents to which she points are objectively insufficient." (*Id.* at p. 1061.) The court acknowledged that pervasive conduct is not required where the harassment is sufficiently severe but concluded that the circumstances before it did not rise to that level. (*Ibid.*) The same observations can be made about the allegations here.

The court sustains the demurrer to the ninth and tenth causes of action with leave to amend. Plaintiff will be afforded an opportunity to cure the factual deficiencies of the ninth and tenth causes of action.

2) Defendant's Motion to Compel Arbitration

As indicated above, the court on December 18, 2024, rather than denying defendant's motion to compel arbitration, continued it to the next hearing date. The court wishes to revisit this issue, and the parties should come prepared to discuss it. The central issue for the motion to compel arbitration will be whether plaintiff has adequately alleged sexual harassment as contemplated by FEHA, precluding arbitration for *all* causes of action. As the court noted in its original tentative order, the briefing filed to date had failed to address all important aspects of this determination, and as no supplemental briefing has been submitted, that conclusion remains true today. It seems far more efficient under these circumstances to deny the motion to compel arbitration without prejudice, and once the status of the operative pleading can be determined, to permit defendant to file the motion to compel arbitration anew. That seems more efficient than simply continuing the motion to compel arbitration from hearing date to hearing date, which in the end will potentially require additional briefing in any event. Again, the parties should come prepared to discuss this proposal.

The parties directs the parties appearance either in person or by Zoom.

In Summary:

The court sustains defendant's demurrer to the ninth and tenth causes of action with leave to amend. Plaintiff has thirty days to submit a third amended pleading.

The court is considering denying defendant's motion to compel arbitration without prejudice, as was originally contemplated in the first proposed tentative; once the allegations in the operative pleading have been settled, defendant can refile the motion, and both parties can address all relevant issues accordingly. This seems more efficient than simply trailing the motion to compel arbitration from hearing to hearing, notably as additional or supplemental briefing on the arbitration question will be required in any event. The parties should come prepared to discuss.

The parties are directed to appear in person or by Zoom.