RECORD NO. 17-1037

In The
United States Court of Appeals
For The Fourth Circuit

IAN CURRAN LYONS,

Plaintiff – Appellant,

v.

THE JOHNS HOPKINS HOSPITAL,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify all parent corporations, including all generations of parent corporations:
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3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/Jay R. Fries Date: 06/07/2017

Counsel for: AppelleeThe Johns Hopkins Hospital

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/s/Jay R. Fries (signature) 06/07/2017 (date)

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STATEMENT OF THE CASE

I. Legal Background

Mr. Lyons' Statement of the Case contains a "Legal background" section cleverly inserting legal arguments that more properly should be made in the Argument. Specifically, Mr. Lyons asserts that a disabled individual who engages in drug abuse is nevertheless protected from discrimination due to his separate disability. Throughout this litigation Mr. Lyons has asserted a "the disability made me do it" defense to his acknowledged use of illegal drugs. This Court has repeatedly held that the fact that misconduct may be the result of a disability does not provide a defense to discipline or discharge based on that misconduct. *Vannoy v. Federal Reserve Bank*, 827 F.3d 296, 305 (4th Cir. 2016); *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999); *Little v. FBI*, 1 F.3d 255, 259 (4th Cir. 1993) (Rehabilitation Act case).

II. Appellee's Statement of Facts

A. Facts Surrounding Mr. Lyons' Employment

On or about July 9, 2012, Ian Lyons was employed by The Johns Hopkins Hospital ("the Hospital") as a Clinical Social Worker in the Pediatric Emergency

Department. (**JA 65-66** and **JA 237-238**).[1] His duties involved working with vulnerable children who could be in acute distress. (**JA 48**).

Mr. Lyons had a history of mood disorder which he discussed with the Hospital's Occupational Health Service ("OHS") at the time of his hiring. (**JA 62**). During a health screening after a conditional offer of employment, Mr. Lyons denied that he had ever used illegal drugs. (**JA 71-72; JA 241-242**). Those answers were not an accurate representation of his past drug use because he had previously used both marijuana and cocaine. (**JA 51; JA 76-77**).

Mr. Lyons started his employment with the Hospital as a part-time social worker but transitioned to full-time employment within two to three months after his hire date. (**JA 81**). He was supervised by Paula Heneberry and Diane Pickett. (**JA 84**). Ms. Heneberry is the Director of Pediatric and OB Social Work at the Hospital. (JA 304). Diane Pickett was Mr. Lyons' immediate supervisor during the time Mr. Lyons was employed by the Hospital. (JA 306).

During Mr. Lyons' brief period of full-time employment in the Pediatric Emergency Department, several incidents provoked emotional responses from Mr. Lyons that caused his supervisors to become concerned that he was having

[1] The Appendix citations in **bold** are to testimony in Mr. Lyons' deposition. Mr. Lyons cannot contradict this testimony in his appeal. This Court has held that "a genuine issue of material fact is not created where the only issue of fact is to determine which of two conflicting versions of the plaintiff's testimony is correct." *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984), *quoting Radobenko v. Automated Equipment Co.*, 520 F.2d 540, 544 (9th Cir. 1975).

difficulty managing workplace stress. (JA 318). In October, 2012, Mr. Lyons became very upset upon learning that he was uninsured despite having applied for medical coverage with the Hospital when he became a full-time employee. (**JA 87**). Mr. Lyons was unable to focus on his work, was very upset and agitated, and was observed as having "tremulous hands." (JA 355; **JA 245**).

In November, 2012, Mr. Lyons became angry when he was asked to sign up for strike duty in preparation for a possible strike by a union representing service employees at the Hospital. (**JA 99**). Ms. Pickett recalled that he was "heated" and "agitated," arguing his concerns about the strike duty in a loud voice, disrupting the office. (JA 358). Mr. Lyons was still very upset when he met with Ms. Heneberry about the issue 45 minutes later. (**JA 99**). Mr. Lyons was never forced to sign up for strike duty and he was never disciplined for his refusal to perform strike duty. (**JA 101-102**).

In December, 2012, Mr. Lyons was disciplined for absenteeism pursuant to the Hospital's Attendance Management Policy. He had incurred five occurrences of absenteeism during October, November and December, 2012. The last such occurrence was a two-day call-out on December 6-7, and Mr. Lyons received a written reprimand under the policy when he returned to work on December 12, 2012. (**JA 127-128; JA 139; JA 250-253**). Mr. Lyons does not deny he was absent on the days reported on the attendance form, (**JA 139**), and he admits, when

calling out because of illness, he never attributed his illness to his mood disorder. (**JA 141-142**).

At this same time, Ms. Heneberry received a complaint about Mr. Lyons from a psychiatrist at Kennedy Krieger Institute ("KKI"). KKI is a non-profit institution assisting children and young adults with pediatric developmental disabilities that regularly refers patients to the Hospital. The complaint described unprofessional behavior by Mr. Lyons directed at a social worker from KKI who, on November 30, 2012, attempted to have a 17-year old patient admitted for psychiatric evaluation. (JA 319-320; **JA 102; JA 246-247**). The KKI complaint states that Mr. Lyons told the KKI social worker (in front of the patient) that she was "wasting his time" and "wasting taxpayers' money" by attempting to get the patient admitted to the Hospital's Pediatric Emergency Department. (**JA 246**). The complaint also reports that Mr. Lyons was "extremely unprofessional in his stance" and in "volume of voice" (described as "yelling" by the KKI social worker). He was also aggressive in his behavior toward the KKI social worker and her patient. (**JA 246**).

Mr. Lyons admits to being abrupt, stern and forceful during his confrontation with the KKI social worker. (**JA 110**). He told the KKI social worker that the Hospital was "no longer going to tolerate [KKI's] . . . misuse of the Psychiatric Emergency Department." (**JA 110**). He admits to telling the KKI

social worker that she was wasting Hospital resources and the time of the clinicians in the Emergency Department. (**JA 114**). He admits to speaking "loudly" in front of the patient and the social worker, telling her that "the ER is not for medication changes." (**JA 117**). He admits he told the mother of the patient that "the school (KKI High School) should have been able to manage this" (**JA 118**), and he was critical of the social worker's judgment in bringing the patient to the ER. (**JA 125-126**). As to his aggressive behavior, Mr. Lyons admits that he pushed his chair back "forcefully" during his assessment of the patient and that the door to the treatment room slammed shut when he left the room. (**JA 119-121**).

Ms. Pickett observed Mr. Lyons' demeanor when he returned to the social work office following his confrontation with the KKI social worker. Mr. Lyons was "very upset, loud and agitated" (JA 364-365), and slammed his fist down on the desk. (*Id.*). Ms. Heneberry considered the complaint from KKI to be "very unusual" and "very worrisome." (JA 319-320).

Ms. Heneberry and Ms. Pickett met with Mr. Lyons on December 12, 2012, issuing him a Written Warning with Decision Making Leave for the Kennedy Krieger incident, a written reprimand for his absenteeism, and a referral for a fitness for duty examination regarding his emotional behavior. (**JA 126-128; JA 248-251**). Mr. Lyons denied that his behavior toward the KKI social worker was inappropriate, (**JA 70-72**), but he did not oppose the fitness for duty referral. In

fact, he believes he scheduled the appointment. (**JA 133-134**). He also requested a leave of absence which was approved by Ms. Heneberry. (**JA 128; JA 254**).

Consistent with Hospital policy, Mr. Lyons' fitness for duty evaluation at OHS included a drug screen. (JA 383). Mr. Lyons was also referred to the Hospital's Faculty and Staff Assistance Program ("FASAP") where he met with Charles Glicksman, a clinician. (**JA 144-145**). On December 17, 2012, Mr. Glicksman did an in-person assessment of Mr. Lyons' fitness for duty (JA 438; JA 469), but he had not yet received the results of Mr. Lyons' drug screen. (JA 440-441). During this initial meeting with Mr. Lyons, Mr. Glicksman had Mr. Lyons sign an authorization form which allowed Mr. Glicksman to discuss Mr. Lyons' compliance with FASAP's recommendations and fitness for duty with his managers and supervisor at the Hospital. (JA 462-463; JA 477-478; JA 595).

On December 21, 2012, Mr. Glicksman received an email from OHS, informing him that Mr. Lyons' drug screen had come back positive for cocaine. (JA 596; JA 440; JA 493). In a follow-up telephone conversation with Mr. Lyons, Mr. Lyons told Mr. Glicksman that he was presently using cocaine "2-3 times a month" and had been using cocaine "on and off for years." (JA 492; JA 596-597; **JA 153-155**). Mr. Glicksman gave Mr. Lyons a referral to two substance abuse providers, The Resource Group and The Kolmac Clinic. (JA 445-446; JA 492; JA

596-597). Mr. Lyons told Mr. Glicksman that he would follow up with a substance abuse provider. (JA 445).

Mr. Glicksman issued a letter to OHS on December 21, 2012 confirming that Mr. Lyons was not fit for duty. (JA 465; JA 479). Mr. Lyons was placed on leave of absence until February 25, 2013. (**JA 146-147; JA 254**).

At the start of his leave, Mr. Lyons sought treatment for his substance abuse at The Resource Group. (**JA 155-156**; JA 596-597). His therapist at The Resource Group was Sheri Stiltz. (**JA 156-157**; JA 596-597). At his initial session at The Resource Group on December 28, 2012, Mr. Lyons filled out a "Questionnaire On Drinking and Drug Habits." (**JA 163-164; JA 255-257**). His responses to the questionnaire included admissions that (1) he felt guilty about his drug use, (2) he had gotten in trouble at work or school because of drug use, (3) he had previously sought treatment for his drinking and drug use, (4) he had been a patient in a psychiatric hospital because of drinking or drug use, and (5) he believed he should cut down on his drug use (referring to drug use as "self-medicating behavior during November and December, 2012"). (**JA 164-166; JA 255-257**). He concluded the questionnaire by describing his drug use as "episodic." (**JA 167; JA 255-257**).

Mr. Lyons also gave The Resource Group a clinical history. (**JA 167-168; JA 258-266**). In this clinical history, Mr. Lyons stated that (1) he had used marijuana in college, (2) he had used cocaine in the last twelve months and in the

last two months, and (3) that he was worried about his use of cocaine. (**JA 169; JA 172-173; JA 258-266**). He described the frequency and amount of cocaine he was using each week as one-half to three-quarters a gram of cocaine each week during the "period of decompensation." (**JA 208; JA 258-266**). Mr. Lyons also told Ms. Stiltz he had experimented with Ecstasy. (**JA 175**).

On January 11, 2013, Ms. Stiltz spoke with Mr. Glicksman and discussed her treatment plans for Mr. Lyons. She told Mr. Glicksman that she would be referring Mr. Lyons to the Intensive Outpatient Program ("IOP") offered by The Resource Group. The IOP would require Mr. Lyons' attendance three times a week and he would be drug tested one or two times a week. (JA 597; JA 448; JA 500). Ms. Stiltz also told Mr. Glicksman that she thought Mr. Lyons was "minimizing" his drug use, and that she was not convinced that Mr. Lyons' drug use was tied solely to his mood disorder. (JA 597 and JA 500).

Mr. Lyons was aware that the IOP offered by The Resource Group would involve random drug testing. (**JA 179-180**). Mr. Lyons refused to participate in the IOP offered by The Resource Group, however. (**JA 158**). On February 7, 2013, he terminated his treatment at The Resource Group after just three therapy sessions. (**JA 158; JA 179-180**; JA 450-451; JA 502).

On February 19, 2013, Ms. Stiltz contacted Mr. Glicksman to notify him that Mr. Lyons had terminated his treatment at The Resource Group. She told him that

Mr. Lyons had met with her only three times and refused to be admitted to the IOP. She also told Mr. Glicksman that Mr. Lyons had refused to participate in a drug test when it was offered to him. (JA 597; JA 450-451; JA 502).

On February 21, 2013, Mr. Glicksman left Mr. Lyons a voicemail message asking Mr. Lyons what his plans were now that he had terminated treatment at The Resource Group. He informed Mr. Lyons that his refusal to be drug tested and go through an IOP would prevent his return to work. He told Mr. Lyons that regardless of the type of treatment he had received in the past, he must receive the same level of treatment as in the IOP recommended by The Resource Group. (JA 597; JA 448; JA 454; JA 505).

On February 25, 2013, Mr. Lyons returned Mr. Glicksman's phone call and told Mr. Glicksman that he would schedule an intake at The Kolmac Clinic to receive treatment, and Mr. Lyons' medical leave was extended. (JA 597-598; JA 452; JA 506). In early March, 2013, Mr. Glicksman contacted The Kolmac Clinic and discovered that the Clinic did not have Mr. Lyons' name in their patient database. (JA 598; JA 507; JA 408). Mr. Glicksman called Mr. Lyons and left him another voicemail, asking him to confirm whether he had started treatment at The Kolmac Clinic. (JA 598; JA 448; JA 505). Mr. Lyons never returned Mr. Glicksman's call, and never sought treatment at The Kolmac Clinic. (**JA 184**; JA 598).

Mr. Glicksman kept Mr. Lyons' manager and other administrators at the Hospital informed as to Mr. Lyons' non-compliance with the referrals for drug treatment. On March 26, 2013, Mr. Lyons emailed the Hospital, requesting that he be returned to work on April 15, 2013, and requesting accommodations. (**JA 198-200; JA 268-271**). In response, the Hospital explained the process to Mr. Lyons, telling him that he would first have to be cleared to return to work by OHS, and that OHS would "review information from his doctor, including any restrictions [he] has or accommodations needed . . . ." (**JA 200; JA 268-271**). A Hospital Benefits Specialist also emailed Mr. Lyons and assured him that his accommodation request would be reviewed by the Hospital's ADA office and his department manager, whereupon "next steps" would be given to him. (**JA 205-206; JA 268-271**). Mr. Lyons responded with an email stating that he did not want to undergo any further health evaluations until he was given assurance by the Hospital that his proposed accommodations would be "fully considered." (**JA 200-201; JA 268-271**).

On or about April 16, 2013, Mr. Lyons called OHS seeking a "return to work assessment." (**JA 191**). Mr. Lyons was told that he had to be seen by Mr. Glicksman at FASAP before he could be cleared for return to work. (**JA 191-192**). Mr. Lyons telephoned Mr. Glicksman on April 16, 2013, asking for a return to duty assessment. (JA 461-462; JA 511; JA 598). Mr. Glicksman told Mr. Lyons

that because he had not followed any of FASAP's treatment recommendations, he could not be assessed for a return to work. Mr. Glicksman reminded Mr. Lyons that, in past discussions, he had made it clear to Mr. Lyons that to get back to work, he must follow the recommendations. (JA 598; JA 462; JA 511). Mr. Glicksman reported this phone conversation with Mr. Lyons to Hospital management. (JA 598-599; JA 456-457; JA 511).

On April 18, 2013, the Hospital discharged Mr. Lyons for his continued noncompliance with the Hospital's drug treatment recommendations. The decision was made during a conference call involving in-house employment counsel for the Hospital, OHS, Human Resources, and Hospital management. (JA 601-605; JA 377-378). During the conference call, there was consensus among the participants that Mr. Lyons should be discharged because he had not completed the drug treatment program necessary for return to duty despite the fact that he had been afforded a leave of absence of almost four months. (JA 391; JA 393-394; JA 416-417).

B. Ms. Heneberry's Report to the Maryland Board of Social Work Examiners

On March 19, 2013, Paula Heneberry, who is a licensed clinical social worker, filed a report with the Maryland Board of Social Work Examiners (the "Board") stating that Mr. Lyons had tested positive for illegal drugs and had refused to participate in a drug treatment program. (JA 427-428). Ms. Heneberry

filed this report "in response to my code of ethics as a clinical social worker". (JA 329). The "code of ethics" referred to by Ms. Heneberry is actually codified in regulations issued by the Board. COMAR, § 10.42.03.04.C. The duty to report is not discretionary with the licensee, but is mandatory.

On November 8, 2013, the Board, after an independent investigation, charged Mr. Lyons with a violation of the Maryland Social Work Examiners Act. (**JA 228; JA 273-277**). On March 6, 2014, the Board placed Mr. Lyons on probation with a requirement that he be subject to random drug testing. (**JA 231-232; 278-288**). On January 20, 2015, Mr. Lyons surrendered his social worker license after he failed to report for several drug tests and again faced charges from the Board. (**JA 232-233; JA 235; JA 289-296; JA 297-300)**.

C. Mr. Lyons' Charge of Discrimination

On June 4, 2013, Mr. Lyons filed an internal discrimination complaint with the Hospital's Office of Workforce Diversity ("OWD"). (JA 608-609). The intake form used by OWD includes a box that allows employees to indicate they are making a claim of retaliation. Mr. Lyons left that box empty and, instead, checked the box indicating disability discrimination as the basis of his complaint. Although the Hospital began an investigation into Mr. Lyons' allegations, no final determination was issued because he had filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (JA 404-405).

Mr. Lyons also did not mark the box designated "retaliation" on the charge he filed with the EEOC on May 15, 2013, (**JA 221-222; 272**), and the narrative of the charge did not describe retaliation, either with respect to the report made to the Maryland Board of Social Work Examiners or the Hospital's discharge of Mr. Lyons. The concluding paragraph in the charge states: "I believe I was denied a reasonable accommodation and discharged due to disability in violation of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA)." (**JA 272**). The charge lists March 26, 2013 as the earliest date discrimination took place. (**JA 222**). The EEOC's documents related to the investigation and analysis of Mr. Lyons' charge also show no evidence of any investigation into allegations of retaliation. (JA 610-621).

SUMMARY OF THE ARGUMENTS

1. Mr. Lyons was an employee with a past history of illegal drug use who was drug tested due to a series of incidents of inappropriate and unusual behavior on the job. When he tested positive for cocaine use, he was not immediately terminated, as would have been permissible, but was instead given an opportunity to receive drug abuse treatment. His return to work was expressly conditioned on receiving such treatment. When he failed to participate in the treatment programs (and to be drug tested), his employment was terminated.

As such, Mr. Lyons was a "current user of illegal drugs" and thus not a "qualified individual" protected under the Americans with Disabilities Act ("ADA"). Furthermore, Mr. Lyons does not qualify under the "safe harbor provision" of the Act, because the uncontroverted evidence shows that he never received drug rehabilitation treatment.

2. Mr. Lyons failed to exhaust his administrative remedies both as to his unsupported allegations of requesting accommodation prior to his drug test, and his claims of retaliation. Mr. Lyons' Equal Employment Opportunity Commission ("EEOC") charge was filed on May 15, 2013, after Ms. Heneberry's report to the Maryland Board of Social Work Examiners on March 19 and after his termination by the Hospital on April 18. Both the charge and the intake form filed with the EEOC completely fail to allege retaliation, and allege only discriminatory conduct beginning at the earliest on March 26, 2013. Thus, the District Court properly granted summary judgment on these claims.

3. The Hospital articulated a legitimate business reason for its termination of Mr. Lyons, namely Mr. Lyons' failure to follow the recommendations of the Hospital's employee assistance plan (FASAP) to complete drug rehabilitation. Mr. Lyons has no competent evidence to prove that the articulated reason is a pretext either for discrimination or for retaliation. As such, the Hospital was entitled to summary judgment on Mr. Lyons' claims.

ARGUMENT

I. The Standard of Review

In reviewing the District Court's grant of summary judgment *de novo*, this Court applies the same legal standards as the District Court applied. Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party seeking summary judgment bears the initial burden of showing that there are no issues of material fact in dispute. *Cray Communications, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 393 (4th Cir.1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)). In *Celotex*, the Supreme Court stated that "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id*. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . . ." *Id.* at 323-24.

After the moving party meets this initial burden, the opposing party must set forth specific facts showing that there is a genuine issue of fact for trial. The nonmoving party "cannot create a genuine issue of material fact through mere

speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). The United States Supreme Court has stated with respect to the opposing party's burden that:

> [T]he issue of fact must be "genuine". ... When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.

Matsushita Electric Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Likewise, this Court has stated: "A mere scintilla of evidence is not enough to support a fact issue; there must be evidence on which a jury might rely." *Barwick v. Celotex Corp.*, 736 F.2d 946, 958-59 (4th Cir. 1984), *quoted in Sibley v. Lutheran Hosp. of Maryland, Inc.*, 871 F.2d 479, 483 (4th Cir. 1989).

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court explained what is meant by "genuine issue of material fact". A material fact is "genuine", if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. The Court described the inquiry upon a summary judgment motion as determining "whether, in other words, there are any genuine factual issues that properly can be resolved by a trier of facts because they may not be resolved in favor of either party." *Id.* at 250. The Court also said that "the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

A summary judgment motion should not be regarded "as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . . ." *Celotex Corp.*, 477 U.S. at 327. Rule 56 should be construed to allow parties to demonstrate prior to trial that the opposing party's claims have no factual basis. *Id.*

II. Discussion of the Issues

A. Mr. Lyons Was Not a Qualified Individual under the ADA at the Time of His Termination.

1. Mr. Lyons was terminated for noncompliance with the Hospital's drug treatment recommendations.

Contrary to the unsupported statements in Mr. Lyons' Brief, the record is clear that Mr. Lyons was terminated because of his failure to comply with the Hospitals recommendations for drug treatment. When Mr. Lyons tested positive for cocaine use, the Hospital initially placed Mr. Lyons on a medical leave of absence and referred him to a clinician, Mr. Glicksman, in FASAP.

When Mr. Glicksman received the positive results of Mr. Lyons' drug test, he referred Mr. Lyons to rehabilitation providers for treatment. In February, 2013, when Mr. Glicksman became aware that Mr. Lyons had dropped out of The Resource Group program, Mr. Glicksman told Mr. Lyons that his failure to complete an Intensive Outpatient Program ("IOP") and to be drug tested would prevent his return to work. Mr. Glicksman told Mr. Lyons that in order to return to

work, he must receive the level of treatment provided in the IOP. Mr. Lyons committed to attending such a program at The Kolmac Group, another of the programs recommended by Mr. Glicksman.

However, Mr. Lyons failed to register at The Kolmac Group. In addition, Mr. Lyons failed to respond to Mr. Glicksman's telephone inquiries regarding the status of his rehabilitation.

On March 26, 2013, Mr. Lyons emailed the Hospital, seeking to return to work on April 15. He was informed that he would have to be cleared by Occupational Health to return to work. On April 16, Mr. Lyons called Occupational Health to arrange a "return to work assessment". He was told that he had to be assessed by Mr. Glicksman before he could be cleared to return. When Mr. Lyons sought this assessment, Mr. Glicksman told Mr. Lyons that he could not be assessed for return to work until he had followed FASAP's treatment recommendations. Mr. Glicksman reported this conversation to Mr. Lyons' supervisor, to Occupational Health, and to Human Resources. On April 18, a telephone conference was held with the Hospital's in-house counsel in which the decision was made to not extend the medical leave of Mr. Lyons, but to terminate his employment. A form letter was sent out to Mr. Lyons on the same date referencing that Mr. Lyons' leave would not be extended and that he was terminated.

The Americans with Disabilities Act authorizes an employer to "adopt or administer reasonable policies" to confirm that an individual is no longer engaging in illegal drug use. 42 U.S.C. § 12114(b)(3). Requiring an individual who has tested positive for illegal drugs to complete drug rehabilitation and to undergo drug testing are common examples of such policies.

These uncontradicted facts clearly demonstrate that Mr. Lyons was terminated for his failure to seek rehabilitation in accordance with the recommendations of FASAP. A failure to complete drug treatment is not a reason that is legally distinct from "current use of illegal drugs." *Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 679 (5th Cir. 2013) (characterizing the logic of Appellant's argument as "flawed beyond cavil."). The actions of the Hospital were clearly taken "on the basis of" Mr. Lyons' drug use as that term is used in the ADA.

2. <u>At the time of his termination, Mr. Lyons was still "currently engaging" in drug use.</u>

The ADA expressly excludes from the class of "qualified individuals" any employee "who is currently engaging in the illegal use of drugs" at the time that the employer makes an employment decision "on the basis of such use." 42 U.S.C. § 12114(a). This Court has defined the term "currently engaging in the illegal use of drugs" in *Shafer v. Preston Mem'l Hosp. Corp.*, 107 F.3d 274 (4th Cir. 1997). As noted by the District Court below, the word "currently" means "a periodic or

ongoing activity in which a person engages (even if doing something else at the precise moment) that has not permanently ended." *Id*. at 278. Furthermore, the exclusion applies to employees "whose illegal use of drugs occurred recently enough to justify a reasonable belief that [their] drug use is current." *Id*. at 279.

Contrary to Mr. Lyons' contentions, length of abstinence from drug use is not dispositive of this issue. Rather the test is whether the drug use was sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem. *Id*. at 280. *See also Zenor v. El Paso Healthcare Sys., Ltd*., 176 F.3d 847, 856 (5th Cir. 1999).

Mr. Lyons repeatedly asserts that as of April 18, 2013, he had been drug free for four months. Mr. Lyons, however, admitted that he was never tested for drug use by anyone during his leave of absence. (JA 189). In discovery, he produced no evidence to show he was drug-free during this time. Thus, we are left with the bald assertion of an individual with an admitted prior history of cocaine abuse, who was not tested for drugs during the time in question, and who dropped out of a comprehensive drug treatment program in which he would have been regularly tested. "The law is well-established that uncorroborated, self-serving testimony of a plaintiff is not sufficient to create a material dispute of fact sufficient to defeat summary judgment." *DiQuollo v. Prosperity Mortg. Corp*., 984 F. Supp. 2d 563, 570 (E.D. Va. 2013), *quoted in Conrad v. CSX Transp., Inc*., 2015 U.S. Dist

LEXIS 78188 *13 (D.Md. June 15, 2015) *aff'd per curiam* 633 Fed. Appx. 134 (4th Cir. 2016).

In any case, it is the employer's reasonable belief that is at issue. In this case, the Hospital's belief that Mr. Lyons remained a current user of drugs was justified by a number of facts. Mr. Lyons had a long prior history of illegal drug use. Mr. Lyons told FASAP that he was currently using cocaine "2-3" times a month and had been doing so "on and off for years." (JA 492; JA 596-97). He told The Resource Group that he used one-half to three-quarters of a gram of cocaine per week during periods of "decompensation". (JA 208; 258-266).

It is also significant that Mr. Lyons refused to participate in the IOP which would require that he be drug tested one or two times per week. (JA 597; JA 448; JA 500). Instead, he terminated his treatment program at The Resource Group (JA 158), and failed to follow through with his expressed intent to seek treatment at The Kolmac Clinic. (JA 598; 507). He "minimized" his illegal drug use, attributing it to his mood disorder (JA 597, 500), and referring to the cocaine use as "self-medicating behavior". (JA 164-166; JA 255-257).

Mr. Lyon's Brief repeatedly states that during his leave of absence, he was being treated for drug abuse by his personal psychiatrist, Dr. Kwon. However, Dr. Kwon's deposition tells a completely different tale. Although Mr. Lyons made monthly visits to Dr. Kwan for medical management of his bipolar disorder (JA

185), Dr. Kwon clearly testified that he did not provide treatment for Mr. Lyons' cocaine use. (JA 536; 538). In fact, Dr. Kwon mistakenly believed that Mr. Lyons was being treated for drug abuse by The Resource Group. (JA 532; 537). As a result, Dr. Kwon never tested Mr. Lyons for drug use. (JA 189).

This Court has recognized that employers "are entitled to reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem." *Shafer*, 107 F.3d at 278. Neither Dr. Kwon nor Mr. Lyons ever sent documentation to the Hospital providing assurances that Mr. Lyons was not still using illegal drugs. (JA 212).

Other courts that have considered similar fact situations have held that terminating an employee for failure to complete a drug rehabilitation program does not constitute a violation of the ADA. *Shirley*, 726 F.3d at 679; *Law v. Garden State Tanning*, 159 F. Supp. 2d 787, 791-793 (E.D. Pa. 2001); *Redding v. Chicago Transit Authority*, 2000 U.S. Dist LEXIS 14557 *18 (N.D. Ill. 2000).

The U.S. Department of Transportation has promulgated regulations for workplace testing for alcohol and use of controlled substances to drivers of "safety-sensitive transportation employees". 49 C.F.R. §§ 40.1 *et seq*. Under these regulations, if a substance abuse professional ("SAP") determines that a covered employee who has tested positive for drugs has not "demonstrated compliance" with the treatment recommendations of the SAP, the employer may not return the

covered employee to his prior job. *Id.* § 40.305(a) & (b). Although these regulations did not apply to the Hospital or Mr. Lyons, they demonstrate the proper response of an employer to a user of illegal drugs who fails to comply with treatment recommendations.

Given the facts set forth above, the Hospital clearly had a reasonable belief that in April, 2013, Mr. Lyons remained a current user of drugs who had failed to complete treatment. As such, the Hospital was justified in terminating Mr. Lyons' employment.

3. Mr. Lyons does not qualify for the "safe harbor" exception.

Mr. Lyons argues that his monthly visits to his psychiatrist, Dr. Kwon, fulfilled the requirement that he be "otherwise . . . rehabilitated successfully" in order to qualify for the safe harbor provision in the ADA. *See* 42 U.S.C. § 12114(b)(1). As set forth above, Dr. Kwon disagreed with that contention, testifying that he did not treat Mr. Lyons for substance abuse. It was Dr. Kwon's expectation that Mr. Lyons would participate in the Intensive Outpatient Program ("IOP") at The Resource Group (JA 537-538) and undergo drug screening at The Resource Group during the IOP sessions. (JA 541). Dr. Kwon believed the IOP at The Resource Group would be intensive "five days a week" therapy for Mr. Lyons. (JA 537-538). In contrast, Mr. Lyons saw Dr. Kwon once a month for about 15

minutes in February through May, 2013 for adjustment of the medications he was taking for treatment of his mood disorder. (JA 534).

Clearly, Dr. Kwon was not treating Mr. Lyons for his illegal use of cocaine. Although Mr. Lyons has made the conclusory representation that Dr. Kwon provided him with a "higher level of treatment" than he would have received at The Resource Group or some other drug rehabilitation facility, it is clear that the treatment provided by Dr. Kwon could not (and did not) provide JHH with the assurance an employer is entitled to under 42 U.S.C. § 12114(b), i.e., that an employee is no longer using illegal drugs. The statute clearly confers therapeutic control upon employers for determining the conditions for return to work and the requisite treatment for employees who are current users of illegal drugs. The Hospital was not required to accept treatment modalities dictated by Mr. Lyons as a condition for his return to work. This Court must reject Mr. Lyons' attempt to turn the statute on its head and allow him to define the limits of the safe harbor exception. Mr. Lyons was not a qualified individual with a disability because he continued to be a "current user of illegal drugs" throughout the course of his leave of absence.

B. The District Court Properly Granted Summary Judgment on Mr. Lyons' Retaliation Claim Because He Failed to Allege Retaliation in his Charge of Discrimination.

1. Neither Mr. Lyons' charge of discrimination nor his intake form allege retaliation.

This Court has consistently held that exhaustion of a plaintiff's administrative remedy is "an integral part" of the enforcement scheme of the Americans with Disabilities Act ("ADA"). *Sydnor v. Fairfax County*, 681 F.3d 591, 593 (4th Cir. 2012); *Chacko v. Patuxent Inst.*, 429 F.3d 505, 510 (4th Cir. 2005). The purpose of this requirement was succinctly stated by this Court in *Chacko*:

> The filing of an administrative charge is not simply a formality to be rushed through so that an individual can quickly file his subsequent . . . lawsuit. Rather, Congress intended the exhaustion requirement to serve the primary purpose of notice and conciliation. First, an administrative charge notifies the employer of the alleged discrimination. This notice gives the employer an initial opportunity to voluntarily and independently investigate and resolve the alleged discriminatory actions. It also prevents the employer from later complaining of prejudice, since it has known of the allegations from the very beginning. Second, the exhaustion requirement initiates agency-monitored settlement, the primary way that claims of discrimination are resolved.

Id. (*citations omitted*).

When Mr. Lyons filed his charge of disability discrimination with the EEOC on May 15, 2013, he did not mark the box designated "retaliation," and the narrative of the charge did not allege or describe retaliation, either with respect to

the Hospital's discharge of Mr. Lyons or in connection with the report made to the Maryland Board of Social Work Examiners. (JA 272). Mr. Lyons alleged only disability discrimination in his charge.

This Court has been very clear that it is the narrative of the administrative charge of discrimination, and not the content of the EEOC intake form, that must be considered in determining whether a plaintiff has exhausted his administrative remedy. *Balas v. Huntington Ingalls Indust., Inc.*, 711 F.3d 401, 408 (4th Cir. 2013) ("The intake questionnaire . . . submitted to the EEOC cannot be read as part of [the] formal discrimination charge without contravening the purposes of Title VII.") Likewise, other federal courts of appeals have held that it is the contents of the Charge, and not the contents of the EEOC intake questionnaire, that matter in determining whether the employee has exhausted her administrative remedy. *Green v. JP Morgan Chase Bank*, 501 Fed. Appx. 727, 731-32 (10th Cir. 2012); *Novitsky v. American Consulting Eng'rs, L.L.C.*, 196 F.3d 699, 702 (7th Cir. 1999) ("Under the statute, however, it is the charge rather than the questionnaire that matters."); *Park v. Howard Univ.*, 71 F.3d 904, 909 (D.C. Cir. 1995) ("To treat Intake Questionnaires willy-nilly as charges would be to dispense with the requirement of notification of the prospective defendant….").

Regardless, it is clear that the EEOC's investigation of Mr. Lyons' charge did not involve allegations of retaliation. Retaliation was not alleged by Mr. Lyons

on his initial intake questionnaire or at any time thereafter during the investigation. The box indicating an intent to claim retaliation was not checked on the intake questionnaire and no facts were presented that would indicate such an intent. (JA 618-621). The written findings of the EEOC investigator did not mention or discuss retaliation; indeed, the EEOC's findings sent to Mr. Lyons clearly state; "You allege that you were denied a reasonable accommodation and were discharged due to your disability . . . ." (JA 612-613). *See Bryant v. Bell Atl. Maryland, Inc.*, 288 F.3d 124, 133 & n. 6 (4th Cir. 2002) (affirming dismissal of a retaliation claim on grounds of failure to exhaust his administrative remedy where the written findings of the administrative agency investigating the plaintiff's charge included no reference to retaliation).

This Court has repeatedly affirmed the dismissal of retaliation claims in lawsuits in which the plaintiff's administrative charge alleged only another form of discrimination. *Miles v. Dell, Inc.*, 429 F.3d 480, 491-92 (4th Cir. 2005) (charge alleged only sex and pregnancy discrimination); *Sloop v. Mem'l Mission Hosp., Inc.*, 198 F.3d 147, 149 (4th Cir. 1999) (charge alleged only age discrimination). *See also Mercer v. PHH Corp.*, 641 Fed. Appx. 233, 238-39 (4th Cir. 2016) (charge alleged retaliation but not race discrimination).

Mr. Lyons' contention in his Brief that his "inclusion of his 'unlawful termination' in his EEOC charge" is tantamount to an allegation of retaliation is

completely spurious. Mr. Lyons' charge concludes with the statement by Mr. Lyons "I believe I was . . . discharged due to disability in violation of " the ADA. (JA 272). Clearly, at the time he filed his charge, Mr. Lyons believed that he was being discharged because of his alleged disability, and not in retaliation for any protected activity. As discussed above, the findings of the EEOC investigation reference Mr. Lyons alleging that his termination was due to his disability, and not due to retaliation. Clearly, the EEOC did not construe the allegation in the charge regarding Mr. Lyons' termination as relating to retaliation.

Nor does the EEOC's regulation defining what constitutes a charge of discrimination assist Mr. Lyons. Those regulations assist the court in determining whether informal communications between a complainant and the EEOC are sufficient to constitute a "charge of discrimination" in order to meet the timeliness requirements of the administrative process. The regulations do not purport to expand the scope of an actual formal charge beyond what is alleged on the charge form itself. As this Court stated in *Balas v. Huntington Ingalls Indust., Inc.*,:

> [W]e are not at liberty to read into administrative charges allegations they do not contain. Instead, persons alleging discrimination have a different form of recourse if they determine that their initial charge does not read as they intended: they may . . . file an amended charge with the EEOC.

711 F.3d at 408. *See also Sloop*, 198 F.3d at 149 (plaintiff who took no official action to amend the charge of discrimination failed to exhaust administrative remedies).

Mr. Lyons' initial charge discrimination did not allege retaliation. His intake form likewise did not allege retaliation, and the findings of the EEOC are clear that the agency did not investigate retaliation. Finally, Mr. Lyons did not amend his charge to allege retaliation. As a result, Mr. Lyons has failed to exhaust his administrative remedy as to the allegations of retaliation, and those claims were properly dismissed by the District Court.

2. The exception to the exhaustion requirement set forth in *Nealon v. Stone* does not apply to Mr. Lyons' case.

In *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992), the Court held that a plaintiff asserting a Title VII claim of retaliation for filing a previous EEOC charge need not exhaust administrative remedy before filing suit in federal court. As noted in Mr. Lyons' Brief, the decision was based on the proposition that a charging party would be "gun shy" about inviting further retaliation by filing a second charge regarding retaliation for filing the first charge.

In his Brief, Mr. Lyons claims the benefit of this holding with regard to Ms. Heneberry's report filed with the Maryland Board of Social Work Examiners ("the Board") regarding Mr. Lyons. However, the timing of Mr. Lyons' EEOC charge,

occurring two months after Ms. Heneberry's report, proves that the *Nealon* holding is inapplicable in this case.

Ms. Heneberry filed her report with the Board on March 19, 2013. Mr. Lyons' charge of discrimination was filed on May 15, 2013, and not served on the Hospital until sometime afterward. Obviously, Ms. Heneberry's report could not have been motivated by the filing of the EEOC charge and could not have been filed in retaliation for the first charge. Mr. Lyons had ample opportunity to include allegations of retaliation, including allegations regarding Ms. Heneberry's report, in his one and only charge of discrimination with the EEOC. Furthermore, Mr. Lyons could not have been "gun shy" regarding the filing of an EEOC charge since his charge was not filed until after Ms. Heneberry's report. As such the holding in *Nealon* is completely inapplicable to this case.

In a final effort to salvage a retaliation claim, Mr. Lyons claims he did not know of the report to the Board until after he filed his Charge of Discrimination. The Board interviewed Mr. Lyons regarding Ms. Heneberry's report on May 22, 2013. (JA 280). Presumably, the Board contacted Mr. Lyons well before May 22 to schedule this interview, to give Mr. Lyons notice of the subject matter, and to allow Mr. Lyons to secure counsel. *See* COMAR 10.42.04.04A ("A respondent may be represented by counsel in any matter before the Board and at any stage of the proceeding."); COMAR 10.42.04.05A(2) ("The Board may send a copy of the

complaint . . .to the licensee that is the subject of the complaint, to obtain a response to the allegations made in the complaint.") Even if he did not know Ms. Heneberry had filed the report, he had to realize that the report was filed by someone at the Hospital who had knowledge of his positive drug test and his failure to complete rehabilitation.

In any case, Mr. Lyons was aware at the time of the interview that a report had been filed by the Hospital, but took no steps to amend his Charge of Discrimination. *See Sloop*, 198 F.3d at 149. As such he failed to exhaust his administrative remedy as to his claim of retaliation, and thus the District Court properly disposed of this claim.

C. Mr. Lyons Likewise Failed to Exhaust his Administrative Remedy as to the Alleged Failure to Accommodate in 2012.

In his Brief, Mr. Lyons claims that the "bulk of the conduct supporting Mr. Lyons' discrimination claim occurred before his December 13 drug test." (Appellee's Brief, p. 19). Mr. Lyons' attempt to insert these issues into the case at this late juncture is to no avail, since this alleged failure to accommodate was not set forth in the charge of discrimination filed by Mr. Lyons.

Initially, the record regarding these alleged requests for scheduling accommodation is very vague. Mr. Lyons testified he made two requests; one on December 12 (the day he was placed on medical leave) and the other sometime before. (JA 137). Mr. Lyons' Complaint states that the prior request was on

December 7 (five days prior to being placed on leave) (JA 9), and not in November as repeatedly stated in his Brief. Unlike his request in March, 2013, Mr. Lyons did not file a written request for accommodation with the Hospital. (JA 268-269). Mr. Lyons also testified that Ms. Heneberry responded that she would "fix" his schedule. (JA 137). Mr. Lyons' intervening medical leave obviously prevented pursuing the interactive process to determine a reasonable accommodation since he was not present at the Hospital. Had Mr. Lyons complied with the treatment recommendations of FASAP, the Hospital would have been in a position to discuss accommodation possibilities during Mr. Lyons' return to work.

Regardless, the discrimination charge filed by Mr. Lyons alleges only that he submitted a reasonable accommodation request form to the Hospital on March 29, 2013; that the Hospital failed to respond to that form; and that he was subsequently discharged on April 18, 2013. There is no allegation at all of any failure to accommodate in November or December of 2012. Indeed, the box on the charge listing the dates of discrimination states that the alleged disability discrimination took place between March 26, 2013 (at the earliest) and May 2, 2013. (JA 272). As such, the allegations Mr. Lyons seeks to raise relating to 2012 exceed the scope of his Charge filed with the EEOC, and cannot form a basis of liability in this case.

Again, the EEOC's letter to Mr. Lyons dated October 27, 2014 summarizing the results of the EEOC's investigation of Mr. Lyons' Charge is completely devoid

of any reference to an alleged failure to accommodate in November or December 2012. (JA 612-613). The focus of this letter (and of the EEOC's investigation) was the termination of Mr. Lyons in April, 2013 and the failure to respond to the accommodation he requested in March, 2013. The EEOC's investigation concluded: "[A]s of mid-April 2013 shortly before you received formal notification of your discharge, you had still not taken the necessary steps to be eligible to be released to return to work by Respondent Occupational Health and, as a result, have any consideration made for your March 29, 2013 request to be accommodated." Clearly, the EEOC did not investigate any alleged disability discrimination preceding Mr. Lyons' leave of absence in December, 2012, because his Charge failed to allege such discrimination.

This Court has noted that a plaintiff fails to exhaust administrative remedies where a charge of discrimination references "different time frames, actors, and discriminatory conduct" than the allegations found in a complaint. *Chacko*, 429 F.3d at 506. In *Chacko*, the plaintiff's administrative charges alleged three specific acts of supervisory national-origin harassment at specific times. Plaintiff's case at trial centered on derogatory remarks over a twenty-year period by co-workers. This Court concluded that: "The sharp differences between this evidence and the allegations in [the] administrative charges compel the conclusion that he failed to exhaust his administrative remedies." *Id*. at 511. *See also Abdus-Shahid v. Mayor*

and City Council of Baltimore, 2017 U.S. App. LEXIS 118 *18 (4th Cir. January 4, 2017) (charge of disparate impact religious discrimination insufficient to support claim of disparate treatment religious discrimination); *Tillbery v. Kent Island Yacht Club, Inc.*, 461 Fed. Appx. 288 (4th Cir. 2012) (charge alleging discrimination in July, 2006 insufficient to exhaust claim of discrimination from October, 2008 to April, 2009).

Mr. Lyons' claims of failure to accommodate arising in November or December of 2012 were not alleged in his Charge of Discrimination, nor were these claims investigated by the EEOC. As such, Mr. Lyons has failed to exhaust his administrative remedy as to these claims, and thus they cannot be maintained in this litigation.

D. <u>The Report to the Board of Social Work Examiners Regarding Mr. Lyons' Positive Drug Test Does Not Constitute Retaliation.</u>

The report filed by Ms. Heneberry with the Board of Social Work Examiners ("the Board") was not retaliation under the ADA. There can be no causal link between Mr. Lyons' filing of the discrimination charge and the submission of the report, since the report predated the filing of the charge. In addition to this timing issue, the uncontradicted evidence show that the report was mandated by state law and thus cannot constitute retaliation.

On March 19, 2013, Ms. Heneberry, who is a licensed clinical social worker, filed a report with the Board stating that Mr. Lyons had tested positive for illegal

drugs and had refused to participate in a drug treatment program. When asked in her deposition why she had filed the report, she testified:

> A. On March 19th, I submitted a report specifically related to knowledge that he had a substance abuse problem and zero evidence that he was in treatment for it. And that was in response to my code of ethics as a clinical social worker. (JA 329).

When Ms. Heneberry made her report to the Board regarding Mr. Lyons, she had learned from Mr. Glicksman that Mr. Lyons had elected to forego treatment at The Resource Group after only a couple of visits and that Mr. Glicksman had no other information that he might be in treatment. She knew that Mr. Lyons was licensed to do private work and might be practicing with an active substance abuse problem. (JA 329-330). Ms. Heneberry knew that Mr. Lyons had tested positive for drug use and that the Hospital had received no verification that Mr. Lyons was being treated or had completed treatment for his drug use. Accordingly, she reported Mr. Lyons' "potential impairment" to the Board. (JA 331).

Ms. Heneberry reviewed the Code of Ethics for Social Workers set forth in COMAR 10.42.03.01 before making her report to the Board. She circled the language in Section .04 C ("Responsibilities to Colleagues"). (JA 426, JA 432). Section 10.42.03.04.C states:

> Licensees having knowledge of a colleague's impairment or incompetence should take reasonable measures to assist a colleague in taking remedial action. In cases where the colleague does not address the problem, or in any case in which the welfare of clients appears to

> be in danger, the licensee **shall report** the impairment or incompetence to the Board. (Emphasis added)

Ms. Heneberry's duty to report was not discretionary, but was mandatory. Ms. Heneberry would be subject to disciplinary action by the Board for failing to make such a report. *See* COMAR 10.42.09.04A(13) ("Knowingly fails to file any report as required under law.")

Section 19-207 of the Health Occupations Article of the Maryland Code provides: "A person shall have the immunity from liability described under § 5-718 of the Courts and Judicial Proceedings Article for giving information to the Board or otherwise participating in its activities." Section 5-718(b) of the Courts and Judicial Proceedings Article of the Maryland Code provides: "A person who acts in good faith and within the scope of the jurisdiction of the [State] Board [of Social Work Examiners] is not civilly liable for giving information to the Board or otherwise participating in its activities."

Mr. Lyons cannot show that Ms. Heneberry acted in bad faith in making her report to the Board. The information Ms. Heneberry possessed at that time was that Mr. Lyons was not addressing his drug problem. In her report to the Board, she states: "There is no evidence of ongoing compliance with or completion of a treatment program after 3 months. I am reporting the concern that Mr. Lyons is practicing social work independently or at another agency who is unaware of his potential impairment." (JA 427-428).

In his deposition, Mr. Lyons provided no evidence that Ms. Heneberry's report was made in bad faith. He simply believed the report was "inappropriate" because Ms. Heneberry "had no way of knowing whether or not he was using drugs." He admitted, however, that she did know that he had tested positive for drug use. (JA 227).

Ms. Heneberry's report was reasonable under the circumstances known to her at the time the report was made. The Board's subsequent independent investigation of the report demonstrates this reasonableness in that the Board entered into a Consent Order with Mr. Lyons, finding that Mr. Lyons had violated his responsibilities under the Maryland Health Occupations Code; putting him on probation for at least two years; putting him under a Board-approved clinical supervisor; requiring Mr. Lyons' psychiatrist to provide quarterly reports to the Board; and requiring Mr. Lyons to undergo a drug testing program. (JA 278). Mr. Lyons later surrendered his license after he had failed to report for several drug tests. (JA 289). The findings and actions of the Board following Ms. Heneberry's report demonstrate the reasonableness and the propriety of her action.

Ms. Heneberry's report does not constitute retaliation, but is a report required by the Maryland Board, and privileged under Maryland law. As such, this report cannot constitute retaliation under the ADA or form the basis of liability for the Hospital.

E. The Hospital Has Proffered a Non-Discriminatory Reason for Mr. Lyons' Termination and No Competent Evidence Establishes Pretext.

The Hospital's proffered explanation for its discharge of Mr. Lyons - his positive test for cocaine, his refusal to be drug tested during his leave of absence, and his failure to complete a supervised rehabilitation program for drug abuse despite being on leave for almost four months - is a legitimate non-retaliatory reason for termination. *Shirley v. Precision Castparts Corp*., 726 F.3d at 679; *Law v. Garden State Tanning*, 159 F. Supp. 2d 787, 791 (E.D. Pa. 2001); *Redding v. Chicago Transit Authority*, 2000 U.S. Dist LEXIS 14557 *18 (N.D. Ill. 2000).

The Hospital's justification for terminating Mr. Lyons becomes even more resistant to claims of pretext when viewed in the context of its willingness to allow Mr. Lyons the chance to participate in a drug rehabilitation program, and Mr. Lyons' decision to forego any such treatment. Mr. Lyons abandoned the Hospital's recommended treatment program, refusing to take periodic drug tests or even admit that his cocaine use was a problem. *See, e.g., Brown v. Triboro Coach Corp.*, 153 F. Supp. 2d 172, 184-185 (E.D.N.Y. 2001) (employer's decision to terminate an employee only after he had stopped attending his rehabilitation program was not a pretext for discrimination).

Once an employer articulates a legitimate, non-retaliatory reason for discharge, the plaintiff must show that the articulated reason is a pretext for retaliation. To do so, the plaintiff must do more than simply show that the

articulated reason is false, he must also show that the employer retaliated against him on the basis of the proffered protected activity. *Buchhagen v. ICF Int'l, Inc.*, 650 Fed. Appx. 824, 829 (4th Cir. 2016) (age discrimination case). The plaintiff must show pretext and that the real reason for the employer's action was to retaliate against him for having taken protected action. *Foster v. Univ. of Maryland-Eastern Shore*, 787 F.3d 243, 252 (4th Cir. 2015). The plaintiff always bears the burden of persuading the trier of fact that he or she was the victim of retaliation. *Id.*

In this case, Mr. Lyons cannot show that the Hospital's articulated reason for terminating him, *i.e.*, that he failed to follow FASAP's recommendations for drug treatment, is false. He concedes he left one of the drug treatment programs recommended by Mr. Glicksman (The Resource Group) and then failed to seek treatment at the other clinic recommended by Mr. Glicksman (The Kolmac Clinic). He admits he never participated in an IOP during his leave of absence and never was drug tested during his leave of absence. Mr. Lyons also admits he was told he could not come back to work until he was cleared by FASAP. (JA 191-192).

As argued more fully above, the monthly prescription management he received from Dr. Kwon, promoted repeatedly in Mr. Lyons' Brief as a "higher level of [drug] treatment," was, in reality, no drug treatment at all. Rather, it was simply a means by which Mr. Lyons hoped to avoid actual drug counseling in an

IOP and the drug testing that would be associated with such an intensive therapy program.

The fact remains uncontested that Mr. Lyons was non-compliant with the Hospital's recommended drug treatment program and, therefore, the Hospital's reason for discharging Mr. Lyons was not and could not be a pretext for retaliation. It is uncontroverted that Mr. Lyons never provided the Hospital with any assurance that he had completed a drug rehabilitation program or that he had stopped using drugs. Accordingly, after almost four months of leave, the Hospital's decision to discharge Mr. Lyons was neither unreasonable, discriminatory, nor retaliatory. Thus, summary judgment was properly granted on Mr. Lyons' cause of action for retaliatory discharge.

CONCLUSION

For all the reasons set forth above, the Hospital submits that the District Court below was correct in granting summary judgment against Mr. Lyons in this case. The Hospital therefore requests that this Court affirm the decision of the District Court in full.

Respectfully submitted,

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ADDENDUM OF STATUTES AND REGULATIONS

Federal Statutes

42 U.S. Code § 12114 – Illegal use of drugs and alcohol

(a) Qualified Individual with a Disability
For purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of Construction Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who –

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

Federal Regulations

49 C.F.R. § 40.305 How does the return-to-duty conclude?

(a) As the employer, if you decide that you want to permit the employee to return to the performance of safety-sensitive functions, you must ensure that the employee takes a return-to-duty test. This test cannot occur until after the SAP has determined that the employee has successfully complied with prescribed education and/or treatment. The employee must have a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02 before resuming performance of safety-sensitive duties.

(b) As an employer, you must not return an employee to safety-sensitive duties until the employee meets the conditions of paragraph (a) of this section. However, you are not required to return an employee to safety-sensitive duties because the employee has met these conditions. That is a personnel decision that you have the discretion to make, subject to collective bargaining agreements or other legal requirements.

Maryland Statutes

Md. HEALTH OCCUPATIONS Code Ann. § 19-207:

> A person shall have the immunity from liability described under § 5-718 of the Courts and Judicial Proceedings Article for giving information to the Board of otherwise participating in its activities.

Md. COURTS AND JUDICIAL PROCEEDINGS Code Ann. § 5-718:

> (a) **"Board" defined. --** In this section, "Board" means the State Board of Social Work Examiners in the Department of Health and Mental Hygiene.
>
> (b) **In general. --** A person who acts in good faith and within the scope of the jurisdiction of the Board is not civilly liable for giving information to the Board or otherwise participating in its activities.

Maryland Regulations

Code of Maryland Regulations ("COMAR")

Title 10 Department of Health and Mental Hygiene
Subtitle 42 Board of Social Work Examiners
Chapter 03 Code of Ethics

.01 Scope and Purpose.

A. This chapter governs the professional conduct of social workers licensed by the Board regardless of whether the service delivery is in person, telephonically, or electronically.

B. The objective of this chapter is the protection of the public. The best interest of the public shall be the primary guide in determining the appropriate professional conduct of all individuals whose activities are regulated by the Board.

C. A social worker has a responsibility to practice ethically by considering the potential benefit versus risk of harm to clients when planning and delivering social work services, including respecting and facilitating clients' rights to make informed decisions.

.04 Responsibilities to Colleagues.

* * *

C. Licensees having knowledge of a colleague's impairment or incompetence should take reasonable measures to assist the colleague in taking remedial action. In cases where the colleague does not address the problem, or in any case in which welfare of a client appears to be in danger, the licensee shall report the impairment or incompetence to the Board.

Title 10 Department of Health and Mental Hygiene
Subtitle 42 Board of Social Work Examiners
Chapter 04 Rules of Procedure for Board Hearings

.01 Scope.

This chapter governs procedures for disciplinary matters and hearings before the State Board of Social Work Examiners.

* * *

.04 Representation by Counsel.

A. A respondent may be represented by counsel in any matter before the Board and at any stage of the proceedings.

* * *

.05 Proceedings under Health Occupations Article, § 19-311, Annotated Code of Maryland.

A. Investigation of Complaints.

(1) The Board may:

(2) The Board may send a copy of the complaint, either in its entirety or redacted, to the licensee that is the subject of the complaint, to obtain a response to the allegations made in the complaint.

Title 10 Department of Health and Mental Hygiene
Subtitle 42 Board of Social Work Examiners
Chapter 09 Disciplinary Sanctions and Monetary Penalties

.01 Scope.

This chapter establishes standards for sanctions and monetary penalties not exceeding $5,000 against any social worker in the State if, after a hearing, the Board finds that there are grounds under Health Occupations Article § 19-311.1, Annotated Code of Maryland, to impose a sanction or monetary penalty.

* * *

.03 Imposition of a Penalty after a Hearing.

If, after a hearing under Health Occupations Article, § 19-312, Annotated Code of Maryland, the Board finds that there are grounds under Health Occupations Article, § 19-311, Annotated Code of Maryland, to suspend or revoke a license, the Board may impose a penalty as set forth in this chapter:

A. Instead of, or in addition to, suspending the licensee; or

B. In addition to revoking the license.

.04 Guidelines for Disciplinary Sanctions and Imposition of Penalties.

A. Subject to the provisions of this section, the Board may impose sanctions and penalties for violations of the Maryland Social Workers Act and its regulations according to the guidelines set forth in the following chart:

VIOLATION	Minimum SANCTION/PENALTY	Maximum SANCTION/PENALTY
* * *		
(13) Knowingly fails to file or record any report as required under the law	Reprimand, or $100 fine, or both	Revocation, or $5,000 fine, or both

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Dated: June 7, 2017

/s/ Jay R. Fries
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 7th day of June, 2017, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 7th day of June, 2017, I caused the required copy of the Brief of Appellee to be hand filed with the Clerk of the Court.

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