No. 17-1037

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IAN CURRAN LYONS,

Plaintiff-Appellant,

v.

THE JOHN HOPKINS HOSPITAL,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland

REPLY BRIEF OF APPELLANT IAN LYONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

Lyons brings three claims: (1) that Hopkins discriminated against Lyons under the ADA by failing to accommodate his requests for a more regular schedule needed to manage his disability, bipolar disorder; (2) that Hopkins retaliated against Lyons by firing him rather than accommodating his disability; and (3) that Lyons' supervisor at Hopkins, Heneberry, retaliated against Lyons by filing a complaint with Lyons' licensing board in response to Lyons' attempts to pursue his rights under the ADA.

Hopkins' principal response on the merits is that Lyons' decision to seek treatment from his psychiatrist after testing positive for drug use rather than using a rehabilitation program recommended by Hopkins categorically excludes Lyons from the ADA's protections under the statute's current-drug-user exception. Hopkins also argues that Lyons' supposed failure to receive treatment provides a non-retaliatory explanation for both Hopkins' decision to fire Lyons and Heneberry's decision to submit her complaint.

Finally, Hopkins argues that Lyons has not exhausted his two retaliation claims and a portion of his discrimination claim based on Hopkins' failure to respond to Lyons' requests for accommodations in November and December 2012. As we now show, none of these arguments is correct. Lyons has exhausted his claims and established disputes of fact that entitle him to a trial. This Court should reverse.

I. Lyons is entitled to a trial on his discrimination claim.

A. The current-drug-user exception does not apply because Hopkins did not act on the basis of Lyons' drug use.

Hopkins' claim that the current-drug-user exception applies because it fired Lyons on the basis of his purported failure to receive appropriate treatment is wrong for several independent reasons. First, the statutory exception does not apply because Lyons alleges discrimination on the basis of a disability other than drug addiction. Second, Hopkins' reason for firing Lyons cannot justify its failures to engage with his requests for accommodations, which occurred *before* Hopkins learned that Lyons had used drugs. Finally, and in any event, the record shows that Hopkins did not fire Lyons on the basis of his drug use and treatment.

1. The ADA's current-drug-user exception does not apply to an employee who alleges that his employer took adverse actions against him on the basis of a disability that is not drug addiction, even if the employee has used drugs. *See* 42 U.S.C. § 12114(a). The analysis in *Shirley v. Precision Castparts Corporation* makes this point crystal clear. 726 F.3d 675, 679 (5th Cir. 2013). There, the employee's claimed disability was drug addiction. *Id.* at 679-80. The employee argued that the statutory exception did not apply because the employer didn't fire him on the basis of his drug use but on his failure to receive treatment for his drug use. *Id.* The Fifth Circuit disagreed, explaining that the statutory requirement that an employer act "on the basis of [drug] use" doesn't create a statutory distinction between drug use and drug treatment, but rather

"reflects Congress's intent to provide ADA protection for current drug users who suffer adverse employment actions because of *other* disabilities." *Id.* at 679 n.13 (citing 42 U.S.C. § 12114(a)) (emphasis in original). As the Fifth Circuit explained, "[i]f an individual who uses or is addicted to illegal drugs also has a different disability, and is subjected to discrimination because of that particular disability, that individual remains fully protected under the ADA." *Id.* (quoting 135 Cong. Rec. S10,775 (daily ed. Sept. 7, 1989)).

That describes this case. Lyons claims that Hopkins discriminated against him because it failed to accommodate his bipolar disorder by providing him with a more regular work schedule, which is underscored by the fact that Hopkins' alleged unlawful conduct occurred *before* (as well as after) the positive drug test. Prior to the drug test, there is no way that Hopkins could have acted "on the basis" of Lyons' drug use. And even after the drug test, Lyons "remain[ed] fully protected under the ADA" because his discrimination claim is based on Hopkins' failure to accommodate his bipolar disorder, not his drug use. *Id.*

2. On the merits of Lyons' discrimination claim, Hopkins offers what it says are "uncontradicted facts" showing that the hospital fired Lyons for failing to follow treatment recommended by its employee, Glicksman. Hopkins Br. 19. And so, Hopkins contends, it "clearly" acted on the basis of Lyons' drug use. *Id.* This argument suffers from two fatal flaws.

First, Hopkins may not rely on after-the-fact evidence – here, Lyons' supposed failure to receive treatment – to excuse its own *earlier* failure to accommodate Lyons' disability. *Bowers v. NCAA*, 475 F.3d 524, 537 (3d Cir. 2007). Even if Hopkins lawfully could have fired Lyons because of his treatment choice, that cannot justify Hopkins' failure to accommodate Lyons' disability based on his requests prior to his drug test and treatment, which is sufficient to establish Lyons' discrimination claim on its own.

Second, the record *does*, in fact, contradict Hopkins' claim that it terminated Lyons based on his supposed failure to receive treatment. Lyons' termination letter says he was fired for failing to extend his leave and doesn't mention treatment at all. JA 652. Similarly, emails among Hopkins' employees leading up to Lyons' termination recount his supervisor's requests to fire Lyons for failing to extend his leave, not for failing to complete treatment. JA 473-74, 657-58. Glicksman, who provided the treatment recommendations to Lyons, explained both to Lyons and Lyons' supervisors that his recommendations have "nothing to do with whether" Lyons "is hired or fired." JA 516. Hopkins just ignores these parts of the record. Instead, Hopkins offers testimony that it made its decision to fire Lyons during a phone call with counsel, Hopkins Br. 11, 18, assertedly protected by attorney-client privilege, JA 602, 378, that does not reflect any of these contemporaneous documents and discussions surrounding Lyons' termination. In full view of the record, Hopkins' argument simply underscores a genuine dispute about Hopkins' motives that should be decided at trial, not on summary judgment.

B. Lyons was not currently using drugs when Hopkins failed to accommodate his disability.

Hopkins' argument that it had a reasonable belief Lyons was currently using drugs when it fired him, Hopkins Br. 19, overlooks that Lyons' discrimination claim is based on Hopkins' failure to accommodate Lyons, not its reason for firing him. As explained, Lyons was certainly protected by the ADA when Hopkins failed to accommodate him prior to the drug test, and Lyons may bring his claim based on this unlawful conduct regardless of what occurred later. Br. 22-23. Nevertheless, for the reasons we now explain, whether Lyons was a "current" user after the drug test was a disputed question of fact that the district court should not have resolved at summary judgment.

1.a. Hopkins' claim that Lyons was a current drug user ignores important record evidence about Lyons' disability. For example, Hopkins' assertion that Lyons has a "long prior history of illegal drug use," Hopkins Br. 21, is based on instances of substance use during periods of decompensation in his bipolar disorder long ago (1997 and 2001). JA 154-55. Hopkins ignores evidence showing that Lyons successfully addressed those periods through medication treating his bipolar disorder, JA 160-61, that this approach is effective because substance use is a secondary symptom of his bipolar disorder during periods of decompensation, JA 624, 629-37, 639-44, and that Lyons had effectively managed his disability with medication to avoid

any periods of decompensation or substance use during the decade leading up to his employment with Hopkins, JA 154-55.

Hopkins also makes much of Lyons' decision to stop treatment with The Resource Group recommended by Hopkins to focus on treatment from Dr. Kwon, emphasizing that the Group's treatment would include drug tests while Kwon's treatment did not. Hopkins Br. 21-22. But Hopkins ignores evidence that Lyons stopped treatment at The Resource Group not because it included drug tests, but because the therapist there said she was not qualified to treat Lyons and the Group could not prescribe the medication Lyons needed to manage his disability. JA 180. And Hopkins skips over Dr. Kwon's explanation that he did not test Lyons because he is a psychiatrist who treats mental health disabilities through medication and methods that are different from those used at rehabilitation facilities like the Group. JA 535-38, 541.

Viewing the record as a whole, a jury could easily find that Dr. Kwon's treatment was appropriate because Lyons' one instance of drug use in December 2012 during a period of decompensation was a secondary symptom of his bipolar disorder that he had successfully managed with medication in the past. JA 159-160. In contrast, Hopkins doesn't point to anything in Dr. Kwon's testimony suggesting that Lyons needed to attend a drug rehabilitation treatment like those recommended by Glicksman, or that he should have been drug tested. The hospital itself never even asked Lyons to take another drug test after the December 2012 test. And Lyons did

take and pass three drug tests as part of his compliance with the Board's investigation. JA 233-34, 294. All told, Hopkins' characterization of Lyons' treatment is inconsistent with the record.

b. Whether Lyons was a current user of drugs is a question of fact for a jury, *Teahan v. Metro-North Commuter R.R.*, 951 F.2d 511, 520 (2d Cir. 1991), and Lyons has put forward substantial evidence to dispute the claim that he was a current user when Hopkins engaged in unlawful conduct. It was reversible error for the district court to assess the reasonableness of Hopkins' claim that Lyons was a current user on its own, rather than treating it as a factual dispute. This is especially true on the record here, which shows that Lyons had not used drugs for at least four months before Hopkins fired him. JA 624, 668. No circuit court has ever held that someone is a current user after such a long period of abstinence. Br. 25. And Hopkins does not dispute that this case is very different from this Court's decision in *Shafer*, where the employee was using drugs less than a month before her termination. *See id.* at 25-26.

2. Hopkins' authorities do not help its cause. First, purporting to follow *Shafer*, Hopkins argues that it was entitled to wait for Lyons to provide, on his own accord, some unspecified additional "documentation" that he was "not still using illegal drugs." Hopkins Br. 22. But what *Shafer* actually says is that "[e]mployers are entitled to *seek* reasonable assurances that no illegal use of drugs is occurring." *Shafer v. Preston Mem'l Hosp. Corp.*, 107 F.3d 274, 279 (4th Cir. 1997) (emphasis added). Hopkins didn't *seek* anything from Lyons that he did not provide, JA 212-13, and nothing in *Shafer*

authorizes Hopkins to make assumptions because Lyons did not provide it with something it never asked for. Moreover, if complying with the employer's request "for assurances" is the issue, the record shows that Lyons submitted in good faith every form requested and met every deadline imposed by Hopkins that would allow Lyons to return to work with accommodations – including documentation of Lyons' successful treatment with Dr. Kwon and clearance to return to work, JA 654, and re-filing of his request for accommodations on Hopkins' own form, JA 207. Hopkins, for its part, disregarded Lyons' documents and fired him.

Hopkins' cases involving employers that fired employees for failing to seek drug treatment are off point. *Shirley*, as explained, involved a plaintiff whose claimed disability was drug addiction and whose employer acted on the basis of his drug use. 726 F.3d at 679-80. *Redding v. Chicago Transit Authority* also involved a plaintiff whose claimed disability was drug addiction and whose employer acted on the basis of her drug use. 2000 WL 1468322, at *1, *4 (N.D. Ill. Sept. 29, 2000). And *Law v. Garden State Tanning* involved a plaintiff who had a disability other than drug addiction but conceded that he was fired on the basis of his drug use. 159 F. Supp. 2d 787, 793 (E.D. Pa. 2001). As explained, Lyons' disability is bipolar disorder, not drug addiction, and he faced discrimination on the basis of his disability, not his drug use, when Hopkins failed to accommodate him. That an employer may fire an employee who is currently using drugs on the basis of his or her drug use does not authorize Hopkins

to discriminate against Lyons by ignoring his requests to accommodate his bipolar disorder. *Shirley*, 726 F.3d at 679 n.13.

Finally, Hopkins' reliance on Department of Transportation regulations requiring compliance with treatment recommendations for employees in "safety-sensitive" transportation positions who have tested positive for drugs is seriously misplaced. Hopkins Br. 22. Hopkins' error is not simply that these regulations do not apply to non-transportation employees like Lyons, as Hopkins acknowledges. Hopkins Br. 23. That the ADA authorizes action only against certain transportation employees who test positive for drug use, 42 U.S.C. § 12114(e), suggests that Congress did *not* intend to authorize employers like Hopkins to take similar actions, *see, e.g.*, *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress acts intentionally when it omits language included elsewhere").

C. Lyons' treatment entitled him to protection under the safe-harbor provision.

The current-drug-user exception includes a safe harbor that protects Lyons if he was "rehabilitated successfully" and "no longer engaging" in drug use when Hopkins failed to accommodate him after the drug test. 42 U.S.C. § 12114(b). Hopkins argues that Lyons cannot qualify for this safe harbor because he never received the treatment recommended by the hospital. Hopkins Br. 23-24. But that's not what the provision requires. The record shows that Lyons received successful treatment from Dr. Kwon, JA 654, and did not use any illegal drugs between

December 13, 2012, when he tested positive for drug use, and April 18, 2013, when Hopkins fired him, JA 624, 668. Those facts qualify Lyons for the safe harbor.

Hopkins argues that the safe-harbor provision entitles it to "assurance" that Lyons "could not (and did not)" provide and that "the statute clearly confers therapeutic control upon employers" such that "the Hospital was not required to accept treatment modalities dictated by Mr. Lyons." Hopkins Br. 24. The statute does no such thing.

Section 12114(b) authorizes employers to "adopt or administrate reasonable policies or procedures, including but not limited to drug testing." As explained above (at 7-8), Lyons complied in good faith with every requirement, deadline, and form Hopkins requested of him, including timely documentation of Dr. Kwon's treatment plan and formal clearance for him to return to work. JA 212-13, 654. Hopkins never asked Lyons to take another drug test. Hopkins recommended, but never required, that Lyons attend a rehabilitation program. JA 181. Lyons followed that recommendation, but focused on treatment with Dr. Kwon when it was clear the recommended program could not treat his disability during this period of instability. JA 180. Lyons did everything Hopkins asked him to do.

In sum, Hopkins offers no meaningful response to evidence showing that Lyons qualified for the safe harbor because he had been successfully treated by Dr. Kwon and was not using drugs when Hopkins discriminated against him.

D. Lyons fully exhausted his discrimination claim.

Perhaps realizing that its failure to accommodate Lyons *prior to* the drug test is fatal to its defense on this claim, Hopkins argues that Lyons did not exhaust his "claims of failure to accommodate arising in November or December 2012" because his 2012 requests for accommodations were not described in his EEOC charge. Hopkins Br. 34. To be clear, Lyons pled one discrimination claim based on Hopkins' failure to accommodate Lyons or engage in any interactive process both before and after the drug test. *See* First Amended Complaint ¶¶ 75-80. So, as a result, Lyons can maintain his discrimination claim even without evidence of Hopkins' 2012 unlawful conduct.

Nevertheless, Hopkins is wrong that Lyons has not exhausted a portion of his discrimination claim. As a threshold matter, Hopkins forfeited this argument below, and resolution of this forfeiture issue would require this Court to resolve inconsistencies in this circuit's decisions regarding whether exhaustion is a jurisdictional requirement. However, this Court need not resolve that question here because Lyons has indisputably exhausted his discrimination claim and there is no requirement that he allege in the charge every fact that could support his claim.

1.a. Generally, this Court will only consider issues that were properly presented to and considered by the district court. *See Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 103 (4th Cir. 2013). "The ordinary rule in federal courts is that an argument raised for the first time in a reply brief or memorandum will not be considered." *Clawson v. FedEx*

Ground Package Sys., Inc., 451 F. Supp. 2d 731, 734 (D. Md. 2006) (citing *United States v. Williams*, 445 F.3d 724, 736 n.6 (4th Cir. 2006)). *See also McBurney v. Cuccinelli*, 616 F.3d 393, 409 (4th Cir. 2010) ("any argument raised for the first time in a reply brief has been abandoned"). Here, Hopkins first raised this argument in its reply brief in support of its motion for summary judgment. ECF No. 48 at 10-12. The district court did not address the argument below. JA 666-69. Hopkins has therefore forfeited this argument. *See, e.g.*, *Garcia v. Sistarenik*, 603 F. App'x 61, 63 (2d Cir. 2015).

b. Hopkins' forfeiture raises the question whether exhaustion is a jurisdictional requirement or not. A federal court must consider jurisdictional questions at any time and on its own initiative. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). However, the Supreme Court has held that "types of threshold requirements that claimants must complete, or exhaust, before filing a lawsuit" are not jurisdictional unless Congress clearly identified them as jurisdictional in the relevant statute. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010). *See also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (collecting cases). Along this line, the Supreme Court has held that prerequisites to bringing a Title VII lawsuit are not jurisdictional because they are not located in the statute's jurisdictional provision, do not mention jurisdiction, and are subject to exceptions that suggest the requirements are not essential to the court's power to adjudicate the parties' claims. *See Arbaugh*, 546 U.S. at 513-15 (Title VII's numerosity requirement); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-98 (1982) (Title VII's requirement to file a timely charge with the EEOC).

Based on these cases, the majority of circuits hold that exhaustion is not a jurisdictional requirement to bring a Title VII lawsuit. *See, e.g.*, *Francis v. City of New York*, 235 F.3d 763, 766-68 (2d Cir. 2000). This Court, however, has issued competing decisions on this issue. *Compare Pueschel v. Peters,* 340 F. App'x 858, 861 (4th Cir. 2009) (citing *Edelman v. Lynchburg Coll.*, 300 F.3d 400, 403-04 (4th Cir. 2002)) (not jurisdictional), *with Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009) (jurisdictional). If this Court were inclined to resolve the issue, it should align itself with the majority view, in keeping with the Supreme Court cases just discussed.

2. But the Court "need not" resolve "whether the exhaustion requirement is a jurisdictional one" here because Lyons has indisputedly exhausted his discrimination claim. *See Sydnor v. Fairfax Cty., Va.*, 681 F.3d 591, 597 n.2 (4th Cir. 2012). Plaintiffs generally must exhaust their *claims*, but in the course of exhausting they need not disclose every *fact* that could later be used to establish the claim in litigation. *See id.* at 594-95 (finding that the plaintiff had exhausted her claim because, although her lawsuit alleged facts not contained in the charge, the "type of prohibited action alleged—discrimination on the basis of disability by failing to provide a reasonable accommodation—remained consistent throughout"). Hopkins does not, and cannot, dispute that Lyons' charge alleges discrimination based on the hospital's failure to accommodate his disability. *See, e.g.*, Hopkins Br. 26. Lyons has therefore exhausted his claim that Hopkins failed to accommodate him and may rely on evidence regarding both his 2012 requests and 2013 request to establish that claim.

Put another way, even if Hopkins' 2012 conduct is viewed as separate from its 2013 conduct, the 2012 conduct is still reasonably related to Hopkins' failure to accommodate expressly alleged in the charge. *Sydnor*, 681 F.3d at 595 ("The touchstone for exhaustion is whether plaintiff's administrative and judicial claims are 'reasonably related,' not precisely the same") (internal citation omitted). Lyons' lawsuit does not allege separate instances of unlawful conduct, but a series of events starting with his 2012 pre-drug-test requests for accommodations and continuing through his March 2013 request as support for his single claim that Hopkins discriminated against him by failing to accommodate his disability or engage in an interactive process. First Amended Complaint ¶¶ 75-80. Hopkins' conduct in 2012 is closely related to Lyons' express allegation in his charge that Hopkins unlawfully ignored his requests for accommodations and therefore supports a suit based on that charge. JA 660.

This close relationship between the conduct alleged in Lyons' charge and lawsuit shows why Hopkins' reliance on *Chacko*, *Abdus-Shahid*, and *Tillbery* is misplaced. Hopkins Br. 33-34. Those cases involved circumstances where the allegations of the charge and lawsuit were so different that they alleged "two different cases," *Chacko v. Patuxent Inst.*, 429 F.3d 505, 512 (4th Cir. 2005), where the allegations in the charge did "not correlate" at all with the plaintiff's legal claims, *Abdus-Shahid v. Mayor & City Council of Balt.*, 674 F. App'x 267, 276 (4th Cir. 2017), or where the plaintiff just "never filed a charge with the EEOC," *Tillbery v. Kent Island Yacht Club, Inc.*, 461 F. App'x 288, 290 (4th Cir. 2012). This case is nothing like those.

Here, Lyons has consistently maintained the same allegation: that Hopkins failed to accommodate his bipolar disorder, despite his requests. Thus, this case is like *Sydnor*, where the "plaintiff's description of her disability did not shift from the administrative to judicial proceedings." 681 F.3d at 595. Under those circumstances, this Court has found that the similarities between the plaintiff's "administrative and judicial narratives make clear that the [defendant] was afforded ample notice of the allegations against it," and noted that such a case "differs markedly from *Chacko*, in which the plaintiff's EEOC charge and formal suit 'dealt with different time frames, actors, and conduct' such that they 'described two different cases.'" *Id.* Lyons' charge and his complaint tell the same story about Hopkins' unlawful conduct on the basis of Lyons' disability and therefore pose no exhaustion problem. *Id.*

II. Lyons exhausted his retaliation claims.

A. Hopkins' arguments misconstrue this Court's precedent.

1. Hopkins argues that Lyons' charge does not allege retaliation for several reasons: (a) that the narrative in the charge does not describe retaliation; (b) that the EEOC's investigation did not consider retaliation; and (c) that Lyons did not check the box for retaliation. Each point is flawed.

a. Hopkins claims that there are "no facts" in the charge narrative that describe retaliation, and that Lyons could not have alleged his first retaliation claim because his charge states that he was "discharged due to his disability" rather than due to retaliation. Hopkins Br. 27-28. This argument misconstrues both this Court's

precedent and the charge narrative. This Court reads the allegations made in a charge liberally to protect the claimant's rights and does not require either "absolute precision" in language or a "detailed essay" to exhaust a claim. *Sydnor*, 681 F.3d at 594, 597 (citing *Fed. Express v. Holowecki*, 522 U.S. 389 (2008)). As our opening brief explains, Lyons' narrative does expressly allege his first retaliation claim by describing that Hopkins fired him "instead" of responding to his requests for accommodations. Br. 32-33. Moreover, the inclusion of Lyons' termination in his narrative can only support his claim for retaliation, not discrimination. *Id.* Under this Court's precedent, these express allegations are sufficient to exhaust Lyons' first retaliation claim, even if Lyons did not use the word "retaliation."[1]

b. Hopkins' assertion that Lyons has not exhausted his retaliation claim because the EEOC's investigation did not discuss retaliation is misplaced. Hopkins Br. 26-27, 28. A plaintiff may bring any claims that "are reasonably related to her EEOC charge and can be expected to follow from a reasonable administrative investigation" of the charge. *Sydnor*, 681 F.3d at 594. Determining whether claims are "reasonably related" is a separate inquiry distinct from the EEOC's actual investigation, and so "[t]he EEOC's failure to address a claim asserted by the plaintiff in her charge has no bearing on whether the plaintiff has exhausted her administrative remedies with regard to that claim." *Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d

[1] Our opening brief also explains that Lyons has exhausted both of his retaliation claims because both claims are reasonably related to the express allegations in the charge. Br. 36-37, 37-38. As to those arguments, we rest on our opening brief.

658, 670 (4th Cir. 2015) (quoting *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002)). Indeed, "whether the EEOC in fact conducted *any* investigation at all is not material for purposes of exhaustion." *B.K.B.*, 276 F.3d at 1100-01 (emphasis in original).

In any case, the EEOC documents show that the agency considered the facts alleged in Lyons' charge that support his first retaliation claim – that Lyons had told Hopkins that his schedule was exacerbating his disability, that he requested accommodations under the ADA, and, rather than respond to his request, Hopkins fired him. JA 615. These allegations are the heart of Hopkins' first retaliation claim and, by including them, his charge alleges retaliation. Br. 32-33. So, to the extent that the EEOC's actual investigation is relevant, it supports Lyons' position that he alleged facts in his charge that establish his first retaliation claim.

c. Hopkins fixates on the fact that Lyons did not check the "retaliation" box on the charge form or questionnaire. Hopkins Br. 25. But as both the district court below and this Court have noted, an unchecked "retaliation" box will not alone prevent a claimant from pursuing a retaliation claim. Br. 32 (citing *Mercer v. PHH Corp.*, 641 F. App'x 233, 238-39 (4th Cir. 2016)).

2. Hopkins' argument that courts cannot look to the EEOC intake questionnaire, citing this Court's decision in *Balas*, misses the mark. Hopkins Br. 26. *Balas* says only that plaintiffs cannot bring claims based solely on the questionnaire, Br. 35, and the other cases Hopkins cites also each discuss circumstances where the

plaintiffs alleged a claim in the questionnaire and not the charge. *Green v. JP Morgan Chase Bank Nat'l Ass'n,* 501 F. App'x. 727, 731 (10th Cir. 2012) (the questionnaire "set forth allegations of retaliation" but the charge "does not"); *Novitsky v. Am. Consulting Eng'rs, L.L.C.*, 196 F.3d 699, 702 (7th Cir. 1999) ("Her intake questionnaire mentions the Yom Kippur episode" but "[t]he charge itself . . . does not."); *Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995) (the charge "did not express or even hint at" the claim made in the plaintiff's questionnaire).

Here, Lyons' retaliation claim is not solely based on his questionnaire. Rather, this Court has regularly looked to the questionnaire and found additional support for claims made in a charge. Br. 35-36. Lyons' answers to his questionnaire corroborate that Lyons viewed his termination as retaliation for his requests for accommodations and therefore further show that his charge alleges retaliation. *Id.*

3. Hopkins' reliance on cases where courts have found a plaintiff's retaliation claim was not sufficiently related to a charge that alleged discrimination also does not help its cause. Notably, none of them stands for the proposition that a retaliation claim cannot be reasonably related to a charge that alleges discrimination. Rather, each offers fact-bound reasons why the plaintiff's particular retaliation claim was not related to the conduct alleged in the charge and therefore had not been exhausted.

In *Miles v. Dell*, the facts alleged in the plaintiff's charge did not suggest retaliation because the plaintiff had not discussed her concerns about discrimination with her employer. 429 F.3d 480, 492 (4th Cir. 2005). In *Sloop v. Memorial Mission*

Hospital, the plaintiff's charge alleged age discrimination but she filed a lawsuit arguing that she had been fired in retaliation for comments she made to coworkers. 198 F.3d. 147, 148-49 (4th Cir. 1999). *Mercer v. PHH Corporation* did not involve retaliation – there, the plaintiff sued for race discrimination but the only discriminatory conduct mentioned in the charge were statements made by his boss to other people, unrelated to his termination. 641 F. App'x at 239 n.7. Each case involved claims that were not reasonably related to the conduct alleged in the charge. They say nothing about the relationship between retaliation and discrimination claims generally or about the facts here, where the allegations in Lyons' charge – that he requested accommodations under the ADA and that Hopkins fired him instead of responding to those requests – form the basis of his discrimination and retaliation claims.

B. Hopkins misses the point of our *Nealon* argument.

Hopkins argues that *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992), does not apply because Heneberry filed her complaint before Lyons filed his charge and Lyons never amended his charge after he learned about the complaint. Hopkins Br. 29-31. This argument misses the point. In *Nealon*, this Court held that a plaintiff was entitled to bring a claim alleging that her employer had retaliated against her for filing her initial EEOC charge without filing a new charge or amending her initial charge because requiring the plaintiff to refile would be unlikely to resolve the dispute and could invite further retaliation from her employer. *Nealon*, 958 F.2d at 590.

This Court has since applied the reasoning in *Nealon* beyond the specific facts in that case. For example, in *Jones*, this Court applied the reasoning in *Nealon* to a situation where the claim was not based on retaliation "for filing the charge," but based on "a continuation of the retaliation she alleged in the charge." *Jones v. Calvert Group Ltd.*, 551 F.3d 297, 304 (4th Cir. 2009). This Court found "no reason" why the specific type of conduct giving rise to the retaliation claim "should make any difference" so long as the "practical concerns" that motived this Court's reasoning in *Nealon* apply. *Id.* The key question, therefore, is not whether Heneberry filed her complaint as a direct result of Lyons filing his EEOC charge or whether Lyons amended his charge, but whether the record shows that Lyons reasonably could have believed that filing a new or amended charge would result in additional retaliation rather than resolve his dispute with Hopkins. It does.

Lyons testified that he knew "an unspecified complaint had been made at least by May 22, 2013," just a week after he filed his EEOC charge. JA 624. Based on that timing, Lyons reasonably could have believed the complaint was submitted as retaliation for pursuing his rights through the administrative process. As in *Nealon*, he had no reason to think that filing a new charge or amending his original charge would better resolve his dispute with Hopkins, and good reason to think that doubling-down on his allegations would invite further retaliation. Those are the practical concerns that entitle plaintiffs to bring retaliation claims in court without filing new or amended charges. *See Jones*, 551 F.3d at 304.

III. Lyons is entitled to a trial on his retaliation claims.

Hopkins does not challenge that Lyons has established a *prima facie* case for his first retaliation claim or, as to his second retaliation claim, that the record sufficiently shows that Heneberry's reasons for filing her complaint were pretext. Hopkins argues only the opposite – that Lyons has not established a *prima facie* case for his second retaliation claim and that he cannot show pretext on the first retaliation claim. Hopkins is wrong on each score.

A. Lyons has sufficiently shown that Heneberry's complaint was retaliation.

1. Hopkins argues that Lyons has not established a *prima facie* case on his claim that Heneberry's complaint was retaliatory because her complaint predated Lyons' EEOC charge and because the complaint was purportedly mandated by state law and therefore cannot constitute retaliation. Hopkins Br. 34. Both arguments are flawed.

First, Hopkins misunderstands the scope of Lyons' second retaliation claim and the evidence of temporal proximity. Lyons claims that Heneberry submitted the complaint in retaliation for his protected activity, including actions he took *prior to* filing his EEOC charge, like inquiring about his rights under the ADA and through internal processes at Hopkins. *See* First Amended Complaint ¶ 94. That Heneberry's complaint predated Lyons' EEOC charge is therefore irrelevant.

Hopkins likewise ignores the evidence of temporal proximity. Heneberry filed her complaint just six days after hospital employees confirmed to her that Lyons was protected under the ADA and the hospital would have to consider his requests for

accommodations before they could fire him. JA 274, 329, 657. Though not enough on its own to establish pretext, this evidence "certainly satisfies the less onerous burden of making a prima facie case of causality." *Yashenko v. Harrah's N.C. Casino Co.*, 446 F.3d 541, 551 (4th Cir. 2006). Lyons' claim thus easily survives summary judgment.

Second, Hopkins' argument that Heneberry's report was "mandated by state law and thus cannot constitute retaliation" is unsupported by the record. Hopkins Br. 34. Hopkins points to a Maryland law that requires a social worker with "knowledge of a colleague's impairment" to report it to the Board "where the colleague does not address the problem" and where "the welfare of clients appears to be in danger." Hopkins Br. at 35-36. Neither condition was satisfied here. First, Heneberry was aware of Lyons' treatment with Dr. Kwon. On February 25, she and several other hospital employees received notice of Lyons' treatment plan with Dr. Kwon and Lyons' clearance to return to work in April. JA 473. Heneberry was part of the conversation where Glicksman "rescind[ed]" his "non-compliance" statement after learning about Lyons' treatment with Dr. Kwon and after speaking with Lyons on the phone that same day. JA 655-56. Heneberry continued pushing for Lyons' termination through March 13, when hospital employees informed Heneberry that Lyons "is covered under the ADA" and that "he can't be term[inated] until we reach out to him to determine his intent to return," including "see[ing] if he can be accommodated before he can be term[inated]." JA 657. Only then – weeks after she learned about

Lyons' treatment plan but only days after she learned that he was covered by the ADA – did Heneberry submit her complaint.

Moreover, Hopkins doesn't point to anything in the record showing that Heneberry believed Lyons was placing the "welfare of clients" in "danger." As just discussed, by late February, Heneberry was aware that Lyons was on medical leave receiving treatment from his psychiatrist for his bipolar disorder and had expressed his intent to return to work at Hopkins as soon as he was cleared to do so. Hopkins points to nothing in the record supporting Heneberry's "concern that Mr. Lyons is practicing social work independently or at another agency who is unaware of his potential impairment." Hopkins Br. 36. Rather, the facts suggest that Heneberry submitted her complaint to retaliate against Lyons for seeking to protect his rights under the ADA. At the very least, this factual dispute over Heneberry's intent forecloses summary judgment.

2. Hopkins' other arguments fare no better. Its claim that the Board's investigation demonstrates the validity of Heneberry's complaint is contradicted by the record. Hopkins Br. 37. Lyons voluntarily surrendered his license not because he had an untreated drug problem but because he was unable to comply with the terms of his agreement with the Board—in particular, he was not able to pay for or attend some of the randomly-timed drug tests, despite having taken and passed three drugs tests at the Board's request. JA 294, 234-36. Nothing about his voluntary surrender justifies Heneberry's false report that Lyons was not receiving treatment and putting

patients in danger. Finally, Hopkins cites two provisions of Maryland law that protect social workers from civil liability in Maryland courts for filing valid complaints. Hopkins Br. 36. Even assuming Heneberry's complaint was valid, those laws would be irrelevant because this case does not seek liability against Heneberry.

B. Sufficient evidence shows that Hopkins' reason for firing Lyons was pretext.

As to pretext, Hopkins rehashes its claim that Lyons "cannot show" that its purported reason for firing Lyons – failure to follow treatment recommendations – "is false." Hopkins Br. 39. But that's not Lyons' burden. At this stage, Lyons needs only to establish a dispute about pretext, and he has done so. Hopkins does not challenge, for example, that its reasons for firing Lyons have changed over time, and that shifting reasons are themselves evidence of pretext. Br. 44-45. It offers no response to the fact that the termination letter says Hopkins fired Lyons for failing to extend his leave; no response to the emails showing Hopkins' supervisors trying to fire him for failing to extend his leave; and no response to Glicksman's own statements that his treatment recommendations have nothing to do with whether Lyons would be fired. *See* Br. 45-47. Lyons has established a dispute of fact on pretext, and this case should be remanded for trial.

CONCLUSION

This Court should reverse the district court's decision and remand for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,216 words, excluding the parts exempted by Fed. R. App. P. 32(f) as calculated using Microsoft Word 2013. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced typeface.

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I certify that on June 21, 2017, I electronically filed this Reply Brief of Appellant Ian Lyons using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users: appellee Johns Hopkins Hospital's attorney of record, Jay Robert Fries (jfries@fordharrison.com).

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