NO. 21-_____

In the Supreme Court of the United States

HECTOR M. JENKINS,

Petitioner,

v.

HOUSING COURT DEPARTMENT,
CITY OF BOSTON DIVISION, A SECTION OF THE TRIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employee's repeated complaints of unlawful and discriminatory treatment and the employee's failure to cease making such complaints when the underlying discrimination remains unaddressed by the employer can, without more, provide the basis for a legitimate, nonretaliatory reason, as a matter of law, to terminate the employee for asserted "insubordination."

2. Whether the remedial purposes of Title VII protections will be severely limited if the EEOC is deemed not to be on notice and to have had no duty to investigate an employee's discrimination claim expressly included in materials filed with the employee's charge to that agency; and

3. Whether it is an abuse of discretion under the Federal Rules of Civil Procedure's liberal pleading amendment provision to deny a litigant leave to amend to add a count for disability discrimination to a Title VII Complaint prior to the commencement of discovery and especially where the defendant was on notice of the claim.

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant Below

- Hector M. Jenkins

Respondent and Defendant-Appellee Below

- Housing Court Department, City of Boston Division, a Section of the Trial Court of the Commonwealth of Massachusetts

Respondents and Defendants Below

- Jeffrey Winik, First Justice of the Boston Housing Court
- Michael Neville, Chief Housing Specialist of the Boston Housing Court
- Paul Burke, Deputy Court Administrator of the Massachusetts Housing Courts
- Paula Carey, Chief Justice of the Massachusetts Trial Courts
- Harry Spence, Court Administrator of the Massachusetts Trial Courts
- Mark Conlon, Human Resources Director of the Massachusetts Trial Courts
- Eamonn Gill, Labor Counsel, Human Resources Department of the Massachusetts Trial Courts
- Elizabeth Day, Assistant Labor Counsel, HR Department of the Massachusetts Trial Courts

- Antoinette Rodney-Celestine, Administrative Attorney, HR Department of Trial Courts
- Timothy Sullivan, Chief Justice of the Massachusetts Housing Courts
- Maura Healey, Attorney General of Massachusetts

LIST OF PROCEEDINGS

U.S. District Court for the District Massachusetts
No. 16-11548-PBS
Jenkins v. Housing Ct. Dept., et. al.
Final Judgment: January 10, 2020

U.S. Court of Appeals for the First Circuit
No. 20-1124
Jenkins v. Housing Ct. Dept., et. al.
Final Judgment: October 18, 2021
Rehearing Denial: January 4, 2022

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hector M. Jenkins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Unites States Court of Appeals for the First Circuit (Petition Appendix ("App") at 1a-21a) is published at 16 F.4th 8 (1st Cir. 2021). The district court's memorandum opinions and orders (App.24a-66a) are unreported. As is the First Circuit's order denying rehearing and rehearing *en banc* (App. 99a-100a.)

JURISDICTION

The judgment of the court of appeals was entered on October 18, 2021. (App.1a-21a.) A timely filed petition for rehearing and rehearing *en banc* was denied on January 4, 2022. (App.99a-100a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND JUDICIAL RULES INVOLVED

STATUTORY PROVISIONS

Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) states in pertinent part:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that, an employment agency employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee

(hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action.

Section 706 of Title VII of the Civil Rights Act of 1964, § 7, 42 U.S.C. § 2000e-3(a) states in pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

JUDICIAL RULES

Fed. R. Civ. P. 15(a)(2)

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

STATEMENT OF THE CASE

A. Introduction

This action arises out of Jenkins' wrongful termination claim under Title VII of the Civil Rights Act of 1964. Jenkins, a Black Costa Rican was employed as a Housing Court specialist and mediator for over twenty-three years by the Respondent Housing Court Department, City of Boston Division, a section of the Trial Court of the Commonwealth of Massachusetts (the "Trial Court").

Throughout periods of his employment, Jenkins complained to Trial Court management about racially discriminatory treatment that he experienced and observed regarding Trial Court employees and Trial Court litigants. Jenkins contended his supervisors and the Trial Court's management consistently refused to address or investigate his complaints.

These complaints were almost exclusively made by sending emails to persons up the Trial Court chain of command and to officers and agencies of the Commonwealth and the United States.

Jenkins' supervisors and the Trial Court's managers demanded that Jenkins stop complaining.

As a result of his complaining, Jenkins' supervisors decided he was "crazy." In April 2015, Jenkins was placed on temporary leave and forced to submit to a mental health evaluation. After being medically cleared (the Trial Court's selected psychiatrist concluded Jenkins was upset by unaddressed discrimination in his workplace and not mentally ill), Jenkins returned to work and continued to raise complaints about discrimination and the Trial Court's refusal to investigate or address it.

In July 2016, the Trial Court terminated Jenkins on the alleged basis that Jenkins had been insubordinate in refusing to cease complaining (to his Trial Court supervisors and outside government agencies) about experienced and observed unlawful racial discrimination at the Trial Court.

In December 2016, Jenkins filed complaints asserting a racially hostile environment, retaliation, and disability discrimination with the EEOC (after he initiated this lawsuit in the District Court). In his original and amended complaints in the District Court, Jenkins asserted that the individual named defendants violated his civil rights and the Trial Court terminated him in violation of Title VII in retaliation for complaining about racially motivated discrimination of employees and litigants.

B. Legal Background

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, sex, religion, or other impermissible grounds. *See* 42 U.S.C. § 2000e-2(a).

Title VII is designed to protect employees who in good faith oppose workplace discrimination and harassment. The statute includes an anti-retaliation provision, which is designed to prevent employers from taking steps to terminate employees who have filed complaints for workplace discrimination and harassment. *See* § 2000e-3(a).

As Title VII jurisprudence has developed in recent years, under some circumstances where the complaining employee's actions have been violent, extraordinarily disruptive to the functioning of the workplace, and/or interfered with the employees' performance of their job duties, federal courts have recognized employers' rights to terminate employees whose opposition to alleged discriminatory conduct in those situations constitute insubordination. *See*, *e.g.*, *Windross v. Barton Protective Services Inc.*, 586 F.3d 98, 104 (1st Cir. 2009) (employee who switched shifts without permission against company rules and who repeatedly refused to meet with her supervisor could be terminated for insubordination). Even when courts have allowed the employer to use insubordination as a legitimate non-retaliatory reason for discrimination, the employer's true reasoning for termination is typically a question of fact for the jury. *See e.g. McDonough v. City of Quincy*, 452 F.3d 8 (1st Cir. 2006) (employer may raise insubordination justification to create fact question for jury); *Zatorska v. Fla. Dep't of Health*, No. 8:18-CV-114-T-35CPT, 2019 WL 13032138, at *5 (M.D. Fla. Sept. 30, 2019) (same).

The established insubordination exception to Title VII retaliation is not found in the text of Title VII. In fact, the statute's retaliation provision unequivocally provides the employee with the unfettered right to complain without retribution. *See* § 2000e-3(a).

The present case raises the seminal question when an employer seeks to justify a termination decision based on insubordination founded solely on the employee's refusal to stop making complaints of unlawful treatment: (i) whether a retaliatory pretext under Title VII exists is necessarily a fact question for the jury; or (ii) whether the employer's assertion of "insubordination" as a legitimate nondiscriminatory reason for termination can be determined, as a matter of law, by the court.

Pursuant to Title VII, an aggrieved employee first files a "charge" with the Equal Employment Opportunity Commission ("EEOC"). *See* 42 U.S.C. § 2000e-5(b). In general terms, the EEOC notifies the employer, investigates the charge, and may seek to conciliate the dispute. *See id.* After the EEOC has an opportunity to investigate, and if an attempt at conciliation fails, either the government or the charging party may file "a civil action." *Id.*; *see generally, e.g.*, *Ft. Bend Cnty. v. Davis*, 139 S.Ct. 1843, 1846-47 (2019) (describing EEOC process). Documents filed by an employee that seek to describe Title VII claims with the EEOC should be construed in a manner that protects the employee's rights to the statutory remedies. *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 406 (2008).

Title VII claims, like all federal civil claims, must be construed liberally under Rule 15 of the Federal Rules of Civil Procedure to allow litigants to amend their pleadings, especially early in the process and when there is no prejudice to the other party. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

C. Procedural History

The District Court dismissed the individual defendants (App.6a) and hostile environment claim (on the incorrect ground that claim had not been properly exhausted). (App.7a.) The retaliation claim survived dismissal (*id.*), and Jenkins and the Trial Court proceeded to litigate.

Before discovery commenced, Jenkins moved to amend his complaint to add the disability discrimination claim he had filed with the EEOC in December 2016. (*Id.*) The District Court denied his motion to amend as "untimely" and futile. (*Id.*) After discovery was exchanged, the Trial Court moved for summary judgment, asserting Jenkins could not make a prima facie claim and could not prove his employer's termination was retaliatory or that its stated reason for termination, insubordination, was pretextual. (*Id.*) Jenkins opposed, and the Trial Court replied. (Dkts. 123–125, JA 461–538.) The District Court granted summary judgment. (App.25a-26a.)

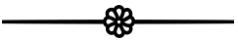
Jenkins appealed to the First Circuit, asking it to reverse the District Court's (i) granting of summary judgment on the question of retaliation, (ii) dismissing of the hostile-environment claim, and (iii) denying leave to amend to add a count for disability discrimination.

On October 18, 2021, the First Circuit affirmed the District Court. (App.1a-21a.) In affirming summary judgment, the First Circuit ruled that no reasonable juror could find that the Trial Court's stated non-retaliatory grounds for termination was a mere pretext for retaliation. (App.10a.)

On the racially-hostile environment claim, the First Circuit held that the EEOC was not on notice of Jenkins' claim despite the fact that a complaint including the hostile environment count was attached to his charge of discrimination filed with the EEOC. (App.15a-16a.)

The First Circuit affirmed the District Court's denial of leave to amend to add the disability count as untimely despite the request being made before discovery in the case had commenced. (App.18a-21a.)

Thereafter, the First Circuit denied Jenkin's motion for rehearing or rehearing *en banc* on January 4, 2022. (App.99a-100a.)



REASONS FOR GRANTING THE PETITION

Jenkins requests that this Court grant certiorari on the grounds that:

1) The public policy rationales embodied in Title VII are materially undermined if an employer is allowed to silence an employee who is attempting to bring to light serious allegations of racial discrimination, by terminating the employee for making complaints regarding that discrimination in a manner that the employer allegedly regards as "insubordinate" and when that employee, as a result of an adverse ruling on summary judgment, is prevented from having a jury decide the question of fact as to the employer's true motive;

2) The remedial purposes of Title VII protections will be severely limited if the EEOC is deemed not to

be on notice and to have had no duty to investigate an employee's discrimination claim expressly included in materials filed with the employee's charge made to the agency; and

3) It must constitute an abuse of discretion under the Federal Rules of Civil Procedure's liberal pleading amendment provisions to deny a litigant leave to amend to add a count for discrimination prior to the commencement of discovery and where the defendant was on notice of the claim.

I. TITLE VII'S REMEDIAL OBJECTIVES AND PROHIBITION AGAINST RETALIATION ARE UNDERMINED IF FEDERAL COURTS ALLOW AN EMPLOYER TO TERMINATE FOR INSUBORDINATION AN EMPLOYEE WHO COMPLAINS BY EMAIL OF DISCRIMINATORY TREATMENT.

A. The First Circuit Decision Erodes Title VII's Primary Purpose, as Articulated by This Court, to End Unlawful Workplace Discrimination.

Employees who complain about discriminatory practices in their workplaces, like other types of whistleblowers, promote the lofty goals of civil rights' laws by bringing to light discriminatory workplace practices. Nothing in Title VII's text or legislative history limits how employees may oppose unlawful employment practices. 42 U.S.C. § 2000e-3(a). Instead, the opposition clause is "expansive." *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1067 (6th Cir. 2015). "'When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's opposition

to the activity.'" *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276 (2009) (citation omitted). Exceptions to this rule "will be eccentric cases." *Id.*

Title VII's "antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. [citation omitted] The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). "[T]he very purpose of the anti-retaliation provision is to prevent Title VII claims from being deterred" by employers and supervisors. *Heuer v. Weil-McLain, a Div. of The Marley Co.*, 203 F.3d 1021, 1023 (7th Cir. 2000).

In determining whether a termination was made on pretextual grounds, courts look to whether the employee has "adduced sufficient evidence to create a genuine issue as to whether retaliation was the real motive underlying [her] dismissal." *Harrington v. Aggregate Indus. Ne. Region, Inc.*, 668 F.3d 25, 31 (1st Cir. 2012). In reversing the District Court's summary judgment grant in a recent Title VII case involving another public employer, the First Circuit observed: "We proceed with caution and restraint when considering summary judgment motions where, as here, issues of pretext, motive, and intent are in play." *Taite v. Bridgewater State Univ.*, 999 F.3d 86, 93 (1st Cir. 2021). Importantly, "to establish pretext, there are many veins of circumstantial evidence that may be mined as courts will look at evidence of dis-

crimination not in splendid isolation, but as part of an aggregate package of proof offered by the plaintiff." *Id.* at 94 (internal quotations omitted).

The First Circuit Decision authorizes discriminators to silence their employees by allowing them to be terminated if they refuse to stay quiet after being directed to do so.

At times, courts have agreed that an employee's conduct may be insubordinate, and thus outside the protection of Title VII, when there is evidence of extremely disruptive conduct. *See, e.g.*, *Matima v. Celli*, 228 F.3d 68, 79-81 (2d Cir. 2000) (Black employee's discrimination and harassment complaints were "disruptive," and termination for "gross insubordination" based on those complaints was nondiscriminatory); *Rollins v. Fla. Dep't of Law Enforcement*, 868 F.2d 397, 401 (11th Cir. 1989) (employer may deny Black employee promotion where frequent discrimination complaints earned employee reputation as "disruptive complainer who antagonized her supervisors and colleagues and impaired the morale of her unit") (emphasis added); *Pendleton v. Rumsfeld*, 628 F.2d 102, 106-08 (D.C. Cir. 1980) (participation in on-premises demonstration by aggrieved minority employees was "inconsistent with [their] duties" and therefore legitimated termination) (emphasis added); *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976) (plaintiff's pattern of disruptive, hostile gender pay equity complaints unprotected by Title VII).

This judicially created "insubordination" exception to Title VII claims has undermined Title VII's express protection of the employee's right to complain about

discrimination in the workplace without suffering retribution.

Moreover, unlike the cases discussed above, the insubordination exception has never been applied by a federal court to a case like this one, where the allegedly insubordinate conduct consisted solely of sending of written email complaints. Here, there was no evidence in the record that the employee's conduct interfered with his job performance. Likewise, there is no evidence in the record that his emails "impaired the morale" of Jenkins' department at the Trial Court or involved "gross disruptions" to the activities at the Trial Court.

Other cases where courts have applied the insubordination exception in ruling on motive as a matter of law involved factors other than complaining about discrimination in an allegedly improper manner. For instance, in *Calero-Cerezo v. U.S. Department of Justice*, the court reasoned that the "troubling history of plaintiff's insubordinate and disruptive behavior and the occasions when she failed to perform her duties in a satisfactory manner all provided legitimate justification for disciplinary action entirely untainted by retaliatory animus." 355 F.3d 6, 26 (1st Cir. 2004). *See also Pearson v. Massachusetts Bay Transp. Authority*, 723 F.3d 36, 38 (1st Cir. 2013) (the employer's asserted non-discriminatory termination basis involved a combination of "inattendance, discourtesy and insubordination"); *Windross*, 586 F.3d at 104 (in addition to insubordinate acts, the employee switched shifts without getting permission).

There is no evidence here that Jenkins did not satisfactorily perform his job duties or that suggest his sending of emails was meaningfully disruptive

to the workplace. Indeed, emails as a method of complaining by their nature are easily ignored (and can even be blocked through spam features). Here, the Trial Court's insubordination ground was exclusively founded on Jenkins' failure to ignore its arbitrary orders to stop complaining by email to certain persons and outside entities. Moreover, an employer's assertion that a complaining employee is guilty of insubordination does not alone eliminate a possible discriminatory or retaliatory motive in terminating that employee. Often, biases affect the way employers respond to complaints. In particular, race and/or gender of complainants can change employer perceptions of the reasonableness of complainants' expression of anger.[1]

As commentators and other courts have noted, establishing an insubordination exception to retaliation as a matter of law does not recognize the biases and realities faced by employees and fails to protect employees from discrimination. It also undergirds discrimination by allowing employers' biased reasoning

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[1] Cassandra A. Bailey et. al., *Racial/Ethnic and Gender Disparities in Anger Management Therapy as a Probation Condition*, 44 LAW & HUM. BEHAV. 88, 89 (2020) (African American and Hispanic men more likely to be required to complete anger management); Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2044 (2017) (Black women's response to aggressors causes shift in focus "from the aggressor's act to the appropriateness of the Black woman's response"); Jessica M. Salerno & Liana C. Peter-Hagene, *One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation*, 39 LAW & HUM. BEHAV. 581, 589 (2015) (women's anger perceived more negatively than men's).

and justifications to prevail. *See*, *e.g.*, Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 532-533 (2003) ("The neglect and judicial misapprehension of [Title VII's anti-retaliation provision] is especially deleterious to the outspoken employee—the 'race man,' the 'uppity n[—]'—who, in short, dares to talk back to the boss, to cause trouble") (quoting employer's use of N-word); *Compare Bulwer v. Mount Auburn Hosp.*, 473 Mass. 672, 687 (2016) (jury could determine employer comments criticizing Black male as disrespectful, "combined with [a supervisor's] behavior, . . . reflect a subconscious sense that the plaintiff, as a black man and a foreigner, did not 'know his place.'"). Jenkins cited evidence here alleging that his direct supervisor told him Jenkins—a black, Costa Rica immigrant—that he should complain "to his boy Obama." (Dkt. 24, JA 24.) A reasonable jury could find that this comment reflected a racist or nativist bias in the supervisor that would undermine the credibility of the employer's assertion that Jenkins was insubordinate.

In addition, the Trial Court's recitation of summary judgment facts included its assertion that its termination decision was not retaliatory because, during the termination hearing, "Jenkins sermonized biblical passages." (App.63a-64a; Dkt. 124, ¶ 55, JA 498-99.) Jenkins admitted to "loving Psalms" and used an allegory from the bible to explain his frustration with the Trial Court's hierarchy's refusal to address discrimination in his workplace. (*Id.*) Whether an employee's reference to his religious faith amounts to an act of insubordination must be a question of fact for a jury. Indeed, a reasonable juror could conclude that the

Trial Court's apparent disdain for religious expression coupled with its labeling of Jenkins as "crazy" undermines the credibility of its alleged motive for firing Jenkins for "insubordination." But in affirming the District Court, the First Circuit disturbingly holds that no reasonable juror could decide otherwise.[2]

The summary judgment record is replete with facts upon which a reasonable jury could find that the asserted insubordination grounds for termination was inextricably intertwined with the very discrimination Title VII seeks to eliminate.

If the First Circuit Decision stands, however, employers will understand they may dissuade employees from making grievances about discriminatory conduct by categorizing any complaints outside of officially sanctioned channels or procedures as an act of insubordination warranting termination. It is essential that Title VII complainants, like Jenkins, be protected and allowed to seek redress if there is any chance that the statute can meet its lofty purpose of eradicating discrimination in the workplace.

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[2] The First Circuit itself very recently recognized that Title VII retaliation claims require a jury to resolve fact questions arising out of an employee's disregarded complaints of discrimination. *Forsythe v. Wayfair Inc.,* No. 21-1095, 2022 WL 592888 (1st Cir. Feb. 28, 2022) (fact issues precluded summary judgment in Title VII retaliation claim based on employee's uncredited complaints made to employer about sexual harassment).

B. Title VII's Language and Purpose Require That the Determination of an Employer's Motive Is a Fact-Based Assessment That Can Only Be Resolved by a Jury.

As this Court has made clear: evaluating an employer's excuse that it had a legitimate, nondiscriminatory reason for termination based on employee insubordination involves disputed issues of fact that require a jury trial. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."). Federal Circuit Courts have similarly concluded this determination is for the jury. *See e.g.*, *Hazel v. U.S. Postmaster Gen.*, 7 F.3d 1, 4 (1st Cir. 1993) ("[T]he issue of retaliatory motive in an employment discrimination case presents a pure question of fact."); *See Fraternal Ord. of Police, Lodge 1 v. City of Camden*, 842 F.3d 231, 243 (3d Cir. 2016) (Retaliatory motive evidence raises a question of fact for a jury); *Gracia v. SigmaTron Int'l, Inc.*, 842 F.3d 1010, 1020–21 (7th Cir. 2016) ("When a jury concludes that the employer's stated reason for the termination is a pretext, the jury may consider that pretextual explanation as evidence of retaliatory motive." (*citing Reeves*, 530 U.S. at 147)).

Here, Jenkins has presented sufficient evidence that would enable a reasonable juror to conclude that he was ultimately terminated in retaliation for bringing his complaints to outside governmental agencies.

Jenkins also pointed to sufficient evidence to allow a reasonable jury to find that his employer's proffered "insubordination" grounds for termination was a mere pretext for retaliatory animus. Jenkins' complaints

made in the "right" way to the "right" persons had not remedied his grievances. A reasonable juror could conclude from this evidence that, once it was determined that Jenkins was not mentally ill, the Trial Court built a pretextual case for terminating him.

The report and conclusions from the psychiatrist, Dr. Russell G. Vasile, who the Trial Court selected to evaluate Jenkins for his mental fitness, undermines the Trial Court's insubordination ground for termination. Dr. Vasile summarized the results of his examination:

> There was no evidence of delusional thinking, nor evidence of marked mood instability, irritability or hostility. At no point did Mr. Jenkins even remotely suggest any physical threat to any member of the trial court. This matter was specifically and repeatedly reviewed and it is clear Mr. Jenkins had absolutely no intention of in any way verbally or physically threatening any member of the trial court . . . I find no evidence that Jenkins is suffering from a major mental illness . . . I am left, therefore, with the conclusion Jenkins is experiencing feelings of being discriminated against . . . .

Dkt. 119, JA 304.

Moreover, after Dr. Vasile issued his report, Jenkins met with his Trial Court supervisors, who told him, that he must cease making what they once called mentally unhinged, and now labeled "unprofessional" complaints. (Dkt 124. ##8–9, JA 477–478.) The Trial Court, however, has presented no evidence that Jenkins was violating established workplace pro-

cedures. In the face of Jenkins' arguments that no rules had prohibited him from sending his emails complaint until his supervisors imposed special rules aimed at stopping his airing of his grievances, the Trial Court was unable to point to the existence of a written or established workplace rule that Jenkins had violated. Further, none of the Trial Court's directives to Jenkins pointed to any specific workplace rules as their source. (Dkt. 118, #3, JA 231; Dkt. 119-20, JA 339, ll. 6-JA 340 ll. 12.) As such, the summary judgment record easily allows for a reasonable inference that no previously established workplace rule existed and that the directives were tailored solely to silence Jenkins, in retaliation for his complaint of discriminatory misconduct.

Jenkins also presented supporting evidence for his retaliation claim through the Lawyers' Committee for Civil Rights and Economic Justice 2017's study on discriminatory practices at the Trial Court. The Lawyers Committee revealed numerous issues regarding the Trial Court's systematic discrimination in the workplace regarding race, national origin and gender. (Dkt. 123-1, JA 469–473.) Like Jenkins, numerous Trial Court employees anonymously had lodged similar complaints of discrimination and racial and retaliatory animus. In light of that study, a reasonable jury could conclude that Jenkins was not "unhinged" for believing discrimination was rampant at his workplace. The record provides nearly unrebutted evidence that the Trial Court's administrators failed to adequately investigate and rectify the problems underlying Jenkins' complaints. (*Id.*)

In sum, the summary judgment record provides far more than a "scintilla" of evidence to defeat summary judgment on Jenkins' retaliation claim. On this

record, a jury could easily find that Jenkins was fired for engaging in protected activity. To determine that a reasonable juror could not conclude that the employer "disguise[d] retaliation for protected conduct by portraying it as merely discipline for the manner in which such conduct was undertaken" is not a defensible holding on this record. (App.10a.) The First Circuit impermissibly usurped the jury's role in determining the fact-based motive question.

C. In Deciding the Question of Fact on Retaliatory Motive, the First Circuit Decision Runs Afoul of This Court's Holding in *Reeves*, and Rulings in Other Circuits, Including in the First Circuit.

That the First Circuit reached this conclusion as a matter of law is wholly inconsistent with this Court's direction in *Reeves*, 530 U.S. at 150 and the other Circuit Court holdings referenced above. *Fraternal Ord. of Police, Lodge 1*, 842 F.3d at 243; *Gracia*, 842 F.3d at 1020–21.

Moreover, the First Circuit's recent holding in *Fournier v. Massachusetts*, No. 20-2134,2021 WL 4191942, at *4 (1st Cir. Sept. 15, 2021) illustrates the same usurpation of the role of the jury by the court in affirming the grant of summary judgment against Jenkins. In *Fournier*, the First Circuit appropriately recognized that evaluating an employer motive and the complex social realities underlying "disruptive" complaints requires weighing facts, which should usually preclude summary judgment in reversing the District Court's grant of summary judgment dismissing an employee's Title VII retaliation claim involving

the Trial Court (the same employer Jenkins has sued in this case).

Like here, the District Court granted the Trial Court's motion for summary judgment finding that on the summary judgment record facts that no reasonable juror could find that the employer Trial Court's proffered, non-retaliatory reason for threatening to terminate its plaintiff-employee, Maria Fournier was a pretext. *Fournier v. Massachusetts*, 498 F.Supp.3d 193, 223-24 (D. Mass. 2020).

The District Court held, as a matter of law, that Fournier had been terminated for lodging "improper complaints" about the Trial Court and its "sham" investigative processes. Moreover, unlike in Jenkins' case, the District Court in *Fournier* even pointed to undisputed evidence that Fournier had received extremely negative job performance evaluations. *Id.* at 213.

Yet, the First Circuit, on appeal, determined that "[a] juror could reasonably find that [the Trial Court's] proffered reasons for [demoting] Fournier . . .were pretextual in nature." *Fournier*, 2021 WL 4191942, Ex. A at *4. The reasoning of *Fournier* properly recognizes that, even where an employee may have failed to follow an employer's rules or guidelines for making complaints, it is the realm of the jury to decide whether an employer's stated reasons for termination were pretextual in the face of sufficient evidence supporting the substance of those complaints.

Other federal court decisions support Jenkins' position that the question of retaliatory motive requires a trial when an employee is terminated based on making complaints of discrimination. In *McDonough*,

the City asserted "insubordination" as a non-retaliatory justification for its termination of police officer McDonough. 452 F. 3d at 18. Even though a supervisor "testified that he was so concerned about the possibility of McDonough becoming violent that he wore a bullet-proof vest" in meetings with him on his employment, the First Circuit allowed a jury to reach its own conclusion as to whether the safety concerns were mere pretext masking retaliation. *Id.* at 18–19.

When a Title VII retaliation claim is rebutted by the employer solely on grounds that its employee's repeated complaints constituted insubordination, as is the case here, a jury must decide the factual question as to motive. *See Zatorska*, 2019 WL 13032138, at *5 (Where "Defendant's only asserted non-discriminatory reasons for the alleged retaliation are the Plaintiff's protestations as to her treatment, which Defendant couches as insubordination. . . . factual issues preclude granting summary judgment.") An employer's termination of an employee for failure to cease complaining of unlawful treatment when so directed by his employer (the accused discriminator) establishes evidence of a retaliatory pretext that require the case to go to the trier of fact. The core facts presented in Jenkins' case involve the quintessential question of motive that only a jury of Jenkins' peers is empowered to decide on his Title VII retaliation claim. The Petition should be granted.

II. THE FIRST CIRCUIT DECISION GUTS TITLE VII'S PROTECTIONS BY AFFIRMING THE DISMISSAL OF A HOSTILE ENVIRONMENT CLAIM FOR FAILURE TO EXHAUST EVEN WHEN THE EEOC HAD TIMELY NOTICE OF THE CLAIM.

A Title VII litigant "opens the courthouse door" through the process of filing a discrimination charge with the EEOC. 42 U.S.C. § 2000e–5(b); *Velazquez–Ortiz v. Vilsack*, 657 F.3d 64, 71 (1st Cir. 2011). The statute requires that the complaining employee provide a statement under oath to the EEOC that is known as the charge. 42 U.S.C. § 2000e–5(b). The employee making the charge may use the EEOC's charge form or provide the information (name and address of the employee and employer and the particulars of the complaint discrimination) in a self-drafted letter charge. *See Ernst v. Methodist Hosp. Sys.*, 1 F.4th 333, 337 (5th Cir. 2021) (discussing the EEOC charge form); *Giovanni v. Bayer Properties, LLC*, No. CV 20-2215, 2021 WL 1737136, at *2 (E.D. Pa. May 3, 2021) (referring to an EEOC charge letter). "The purpose of this administrative charge requirement is twofold—'giving the charged party notice of the claim' and 'narrowing the issues for prompt adjudication and decision.'" *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002).

In this case, Jenkins filed two separate charge letters in December 2016. On December 21, 2016, Jenkins filed his first charge letter, complaining of unlawful employment discrimination and retaliation. (Dkt. 38-1, JA 49.) On December 30, 2016, Jenkins filed a separate charge at the EEOC against the Trial Court for disability discrimination. (Dkt. 86-2, JA 176–178.) Jenkins included, with his December

21, 2016 charge letter to the EEOC, a copy of his First Amended Complaint ("FAC") that contained a hostile environment claim. (Dkt. 85, JA 168–170.) Jenkins' December 2016 charge letters were self-drafted one-two page sworn to complaints that he sent to the EEOC (along with the copy of the FAC he had earlier filed, in October 2016, in this lawsuit). (*Id.*)

The First Circuit Decision, in deciding that Jenkins failed to exhaust his hostile environment claim, incorrectly reasons that the EEOC is permitted to put on blinders and completely ignore any documents and information filed by the employee in addition to the one-or two-page description of the charge in the form or letter submitted. (Dkt. 38-1-Dkt. 40, JA 49-55; Dkt. 86-2, JA 176-78.)

This Court held in *Holowecki* that an employee's effort to present Title VII discrimination claims to the EEOC must be construed in a manner that protects the employee's rights to the remedies which that statute provides:

> Documents filed by an employee with the EEOC should be construed, to the extent consistent with permissible rules of interpretation, to protect the employee's rights and statutory remedies. Construing ambiguities against the drafter may be the more efficient rule to encourage precise expression in other contexts; here, however, the rule would undermine the remedial scheme Congress adopted.

552 U.S. 389, 406 (2008).

In fact, to exhaust a claim before the EEOC, courts have ruled that the details of the employee's claim need not always arise from the four corners of

the charge form or self-drafted charge letter itself**.** In some circumstances, other documents can serve as a forming part of the "charge" to which the EEOC is deemed to have notice. *See Ernst*, 1 F.4th at 337 (*citing Holowecki*, 552 U.S., at 405–07 (which found Holowecki's supplemental affidavit included the necessary information));*Williams v. CSX Transp. Co.*, 643 F.3d 502, 509–10 (6th Cir. 2011) (where document other than charge form or charge letter stated complainant was subject "a very hostile work environment" and felt she was owed money damages, "an objective observer would believe that complainant sought the EEOC to activate its remedial machinery, rather than simply obtain information.")

In this case, the District Court had not realized that the FAC was provided to the EEOC charge despite finding the FAC included a hostile environment claim, thus Jenkins filed for reconsideration. (App. 89a-93a.) On reconsideration, the Magistrate acknowledged that the FAC described a hostile environment claim writing that "Jenkins mentioned a hostile work environment in the First Amended Complaint." (App. 91a.) The Magistrate also accepts that the EEOC not only received the FAC but also reviewed the FAC stating: "The court assumes that the EEOC in fact received a copy of the First Amended Complaint and considered the allegations set forth in it." (*Id.* n. 2). Despite determining that the EEOC had a copy of the FAC and considered it and the hostile environment claim presented by Jenkins, the Magistrate illogically and inexplicably held that "it was not reasonable to expect that a hostile work environment claim would have been part of the EEOC investigation." (*Id.* at App.92a.) The District Court summarily adopted

the Magistrate's recommendation without explanation. (App.27a.)

Then, the First Circuit affirmed the District Court's dismissal of Jenkins' Title VII claim for a racially hostile workplace environment on the grounds that Jenkins somehow failed to provide proper notice when he attached a copy of his FAC—which contained a hostile workplace environment claim—to his EEOC charge. (App.15a-18a.) The reasoning behind the First Circuit's Decision is even more convoluted and unsupportable than the Magistrate's. The First Circuit absurdly holds that the EEOC would not investigate a charge it believed had already been filed in a federal district court. (*Id.* at App.17a.) There is no doubt that this was far from the first time that a litigant went first to court with a Title VII claim only to learn that 42 U.S.C. § 2000e-5(b) requires that the litigant file a charge at the EEOC.[3]

The Trial Court did not challenge Jenkins' right to amend the FAC (which he did in filing the Second Amended Complaint which pleaded exhaustion based on the December 2016 filed EEOC charges). (App. 6a.) Neither the Magistrate nor the District Court indicated any issue with the filing of the EEOC charges after the lawsuit was initiated. The First Circuit, on its own initiative and without citing to any legal authority, came up with the novel reasoning that the

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[3] For the avoidance of any confusion, there is no issue here, that even though Jenkins filed his complaints in District Court first, he did file his EEOC charges within the 300 days allowed by Title VII to initiate a charge at the EEOC. Jenkins' employment was terminated in July 2016 and the EEOC received both of his charges of discrimination in December 2016, less than six months from his termination.

EEOC can ignore complaints of discrimination filed with the agency, if the complaining employee happened to file the same complaints made to the agency in a court in the first instance.

The EEOC is not some unsophisticated consumer that is so easily confused. If the EEOC has notice, on a questionnaire, supplemental charge form, and/or from the attachment of a previously filed court complaint, the EEOC is on notice and should have the obligation to investigate. Attaching the FAC surely constitutes actual notice to the EEOC of Jenkins' charge, and, in the EEOC then issuing the right to sue letter, allows the employee to initiate suit on the exhausted hostile environment claim.

The record on exhaustion is uncomplicated: Jenkins alleges the FAC was filed with the EEOC on December 21, 2016; the FAC includes a hostile work environment claim; the EEOC was on notice of the FAC and the hostile work environment claim when it issued the right to sue letter on January 25, 2017.

Furthermore, the First Circuit's holding would effectively mean that any litigant who filed a Title VII complaint in court before exhausting his claims at the EEOC, could never rectify that procedural error by going to the EEOC even if, as here, the litigant is still within the statutory period. Such a rule needlessly elevates form over substance and undermines the protections of Title VII.

Finally, the First Circuit Decision runs afoul of the clear holding by this Court in *Holowecki* and of the several Circuit Court decisions cited to above that have addressed the issue of sufficiency of notice to the EEOC. This draconian and flawed interpretation

of notice requirements for bringing Title VII claims cannot be left in place. This Court should grant the Petition.

III. RULE 15'S EXPRESS DIRECTION THAT LEAVE TO AMEND BE "FREELY GIVEN" HAS NO MEANING IF IT IS NOT AN ABUSE OF DISCRETION TO DENY JENKINS LEAVE TO AMEND TO ADD A DISABILITY CLAIM.

The First Circuit Decision affirmed the District Court's denial of Jenkins' leave to amend to add a claim for disability discrimination as untimely without considering the lack of any prejudice to Defendant from allowing the amendment. (*See* App.20a-21a.) The harsh standard of timeliness to which Jenkins is being held by the First Circuit Decision erodes the rights of litigants to pursue Title VII claims and is inconsistent with Rule 15(a) which has long provided that the federal rules require that leave to amend be freely granted.

As this Court held nearly sixty years ago in *Foman v. Davis*, 371 U.S. 178, 182 (1962):

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. *See generally*, 3 Moore, FEDERAL PRACTICE (2d ed. 1948), §§ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure defici-

> encies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'

In particular, in determining whether the plaintiffs unduly delayed in filing their motion to amend, the focus is on whether allowing the amendment would unfairly prejudice the defendants. *See*, *e.g.*, *Hayes v. CRGE Foxborough, LLC*, 167 F.Supp. 229, 242 (D. Mass. 2016) (internal citations omitted).

Here, there was no evidence that the Trial Court or any other defendant would suffer prejudice if leave to amend had been granted. Jenkins sought to add the "perceived" disability claim in response to the Trial Court's assertion in responsive pleadings that it justifiably fired him because he was "crazy" for refusing to stop sending email complaint.

The timeline of events leading to the filing of the motion to amend makes clear that Jenkins sought leave in a timely manner. On March 12, 2018, the District Court allowed in part and denied in part the Magistrate's recommendation, dismissing the Title VII "hostile environment" claim but permitting Jenkins' retaliatory termination claim to proceed. (App.78a-88a.)

The Trial Court sought reconsideration of the District Court's ruling and objected when the Magistrate recommended denying its motion. (Dkt. 69, JA 138; Dkt. 75, JA 156–161.) On July 9, 2018, the District Court denied the Trial Court's reconsideration motion. (Dkt. 78, JA 166.)

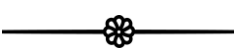
On July 27, 2018, the Trial Court, for the first time at any point in the case, filed an answer, which

was to Jenkins' Second Amended Complaint and its single remaining count for retaliatory termination. (Dkt. 79.) On August 30, 2018, a scheduling conference was held in front of the Magistrate at which only Jenkins appeared (Trial Court's counsel apparently forgot to attend). (Dkt. 84, JA 167.)

At that status, Jenkins indicated he would be filing a motion for leave to amend and the Magistrate asked him to do so within 14 days. (*Id.*) The Magistrate set a November 1, 2018 deadline for pleading amendments and a January 10, 2019 end date for the completion of discovery (which neither party had yet to start). (*Id.*)

On September 11, 2018, twelve days after the status conference, Jenkins filed a motion for leave to amend to add a claim for disability discrimination and filed a separate motion to reconsider the striking of the hostile environment claim (Dkt. 85, JA 168–170; Dkt. 86, JA 171–178.) Jenkins sought leave to amend within the time period the Magistrate had requested that he do so and well within the time period set by the Magistrate in her scheduling order. In addition, the request for leave was filed before any party had even commenced discovery.

In failing to grant leave to amend where there was no undue delay and no prejudice, the District Court abused its discretion in this case. Jenkins ought to be afforded an opportunity to test his claim on the merits. As this Court noted, the "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman*, 371 U.S. at 182.



CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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