No. 25-13156

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Hireana Johnson,

Plaintiff-Appellant,

v.

International Longshoreman Association, Local 1414,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Southern District of Georgia
Savannah Division
Case No. 4:24-cv-00143, Hon. J. Randal Hall

REPLY BRIEF FOR PLAINTIFF-APPELLANT HIREANA JOHNSON

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January 20, 2026

No. 25-13156

Hireana Johnson, Plaintiff-Appellant

v.

International Longshoreman Association, Local 1414, Defendant-Appellee

Certificate of Interested Persons

Under this Court's Rule 26.1-1, plaintiff-appellant Hireana Johnson states that the following people and entities have an interest in the outcome of this appeal:

Bignault & Carter LLC

Bignault, W. Paschal

Carter, Lori

Epps, Hon. Brian K., U.S. Magistrate Judge

Hall, Hon. J. Randal, U.S. District Court Judge

Hayes, Veronica

Herman, Charles

Hollenbeck, Jakob

International Longshoreman Association, Local 1414

Johnson, Hireana

Kelly, Jesse

Khan, Natasha

Steinberg, Becca

Wolfman, Brian

The undersigned certifies that, to his knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

January 20, 2026

Respectfully submitted,

/s/Brian Wolfman

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Introduction and Summary of Argument

I. Hostile-work-environment claim

Local 1414 does not dispute that Ms. Johnson pleaded harassment that was sufficiently severe or pervasive to alter the conditions of her employment. It attempts, nonetheless, to escape liability on two grounds. First, Local 1414 asserts that the harassment aimed at Ms. Johnson that occurred within the administrative filing period is not actionable as part of a single hostile work environment. Second, for the first time on appeal, Local 1414 contends that it cannot be held liable under Title VII because it was not Ms. Johnson's employer. Both arguments should be rejected.

A. Local 1414 first maintains that Ms. Johnson is procedurally barred from relying on the incidents that occurred during the filing period because (1) Ms. Johnson's EEOC charge did not include them; (2) she did not specifically reiterate them in her complaint's sexual-harassment count; and (3) she did not rely on these incidents below. Each point has a simple answer: (1) A district-court complaint may go beyond the incidents listed in the EEOC charge; (2) Ms. Johnson incorporated the allegations into her sexual-harassment count; and (3) Ms. Johnson *did* rely on two of the incidents below, and, besides, parties forfeit only positions or issues, not particular arguments in support of them.

Local 1414 next argues that the three incidents within the filing period are insufficiently similar to the prior harassment to render all of the harassment part of one administratively timely hostile-work-

environment claim. It says that the complaint insufficiently connects Mr. Jackson to the later harassment. But one of the incidents involves Mr. Jackson directly and circumstantial evidence plausibly ties him to the other two. Local 1414 also asserts that the incidents were unrelated to Ms. Johnson's sex. But that's flatly wrong: Each action plausibly occurred because of Ms. Johnson's sex, in particular because they involve Ms. Johnson's spurning of Mr. Jackson's sexual advances.

B. Local 1414 argues for the first time on appeal that it is not a proper Title VII defendant because it is a union and was not Ms. Johnson's employer. That argument is forfeited, and it's wrong in any event because Ms. Johnson sufficiently pleaded that Local 1414 was her employer.

II. Retaliation claim

A. Local 1414 says that Ms. Johnson did not administratively exhaust her retaliation claim regarding her suspension without pay. But, as the district court held, Ms. Johnson did not have to amend her EEOC charge to include her suspension without pay because it grew out of her earlier EEOC charge.

B. Local 1414's merits-based challenge to Ms. Johnson's retaliation claim also misfires. Local 1414 argues that Ms. Johnson did not adequately plead retaliation concerning her suspension without pay because she did not reallege the suspension under the complaint's retaliation count. But reallegation of previously pleaded facts, though

permitted by the federal rules, is not required by the rules or by this Court's precedent.

Local 1414 then asserts that Ms. Johnson has not alleged a causal connection between her protected activity and Local 1414's adverse employment actions. But it overlooks the close temporal proximity between those events, which ranges from between a few weeks to two months. In any case, Local 1414 ignores allegations of its retaliatory animus towards Ms. Johnson for reporting the harassment. At the motion-to-dismiss stage, that is more than enough to establish a causal connection.

Argument

I. Dismissal of Ms. Johnson's hostile-work-environment claim should be reversed.

A. Ms. Johnson pleaded a timely hostile-work-environment claim.

Our opening brief explained (at 10-16) that the pre-filing-period harassment is actionable because three related acts of harassment occurred during the filing period: (1) Mr. Jackson likely smashed Ms. Johnson's car windows and slashed her tires; (2) her coworkers repeatedly ridiculed her in the bathroom for allegedly lying about Mr. Jackson; and (3) Mr. Jackson violated the order to stay away from Ms. Johnson's workspace. Local 1414 first raises a host of procedural objections. It then dismisses Mr. Jackson's connection to the three

incidents as conclusory before asserting—without explanation—that the incidents were unrelated to Ms. Johnson's sex. None of these arguments withstands scrutiny.

1. Local 1414's procedural objections are meritless.

Pleading structure. Local 1414 asserts—without citation—that Ms. Johnson cannot rely on the three incidents because she incorporated by reference the entire fact section into her sexual-harassment count rather than specifically reiterating each relevant allegation in that count itself. Local 1414 Br. 7-8. But the federal rules say that "[a] statement in a pleading may be adopted by reference elsewhere in the same pleading." Fed. R. Civ. P. 10(c). And a complaint need not be a "model of efficiency or specificity" to survive a motion to dismiss. *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1325 (11th Cir. 2015). "[D]ismissal … is appropriate where 'it is *virtually impossible* to know which allegations of fact are intended to support which claim(s) for relief.'" *Id.* (quoting *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996)).

Ms. Johnson's short, two-count complaint falls nowhere near the virtual-impossibility line. After all, the three incidents could support *only* her hostile-work-environment claim. They would not be actionable under Ms. Johnson's only other count—a standard retaliation claim, *see* App. 14-16—because they were not committed by someone acting on Local

1414's behalf. *See* Opening Br. 15. So, it is likely—and certainly not "virtually impossible"—that someone reading the complaint would appreciate that these facts support her hostile-work-environment claim. *See Anderson*, 77 F.3d at 366.

And even assuming (counterfactually) that the complaint was virtually impossible to parse, that would not have justified immediate dismissal but rather would have required the court to "compel the plaintiff to redraft [her] complaint in compliance with Rule 10(b)." *Vujin v. Galbut*, 836 F. App'x 809, 818 (11th Cir. 2020).

Scope of the EEOC charge. Local 1414 says that Ms. Johnson may not rely on the incidents within the filing period because she did not include them in her EEOC charge. Local 1414 Br. 8. A Title VII complaint, however, is limited not to the charge's particular allegations but rather to "the scope of the EEOC investigation which can reasonably be expected to grow out of the charge." *Gregory v. Ga. Dep't of Hum. Res.*, 355 F.3d 1277, 1280 (11th Cir. 2004) (per curiam) (quoting *Alexander v. Fulton Cnty.*, 207 F.3d 1303, 1332 (11th Cir. 2000)). And this standard is not "strictly interpreted" because this Court is "extremely reluctant to allow procedural technicalities to bar claims brought under" Title VII. *Id.* (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970)).

Ms. Johnson's charge listed a range of harassing and retaliatory conduct committed by Mr. Jackson and Local 1414. App. 23-24. As a

result, "the EEOC presumably investigated" incidents that occurred during the same timeframe and were plausibly connected to Mr. Jackson or to Ms. Johnson's charge. *See Gregory*, 355 F.3d at 1280. The EEOC's investigation therefore "would have reasonably uncovered" the harassment from other coworkers, the destruction of her car, and Mr. Jackson's presence in her workspace. *See id.* So, Ms. Johnson is not barred from relying on these incidents.

Forfeiture. Local 1414 maintains that Ms. Johnson has forfeited reliance on the incidents within the filing period because Ms. Johnson raised them as part of a "new legal theor[y]." Local 1414 Br. 9. That's incorrect. Ms. Johnson has always pursued a "'continuing violation' theory." ECF 10 (Pl.'s Resp. to Def.'s Motion to Dismiss) at 6. And she has always supported this theory by emphasizing that "Jackson appeared in a section that Plaintiff was assigned to work" and that her car was "vandali[zed]." *Id.* at 6-7.

Although Ms. Johnson characterized the latter incident as "retaliatory" in the colloquial sense, the argument appeared in the "Allegations based on Sexual Harassment" section of her response to Local 1414's motion to dismiss. *See* ECF 10 at 6-7. That's because, as Ms. Johnson has explained, retaliatory and discriminatory motivations are not always mutually exclusive. *See* Opening Br. 15.

In any case, though litigants can forfeit "positions or issues," they cannot forfeit "authorities or arguments." *ECB USA, Inc. v. Chubb Ins.*

Co. of N.J., 113 F.4th 1312, 1320 (11th Cir. 2024), *cert. denied*, 145 S. Ct. 1431 (2025). The three incidents "merely provide additional authority to support [her original] position," so they can be relied on in this appeal. *See id.* at 1321. "Were the rule otherwise, we could never expect the quality and depth of argument to improve on appeal—an unfortunate result." *Sec'y, U.S. Dep't of Lab. v. Preston*, 873 F.3d 877, 883 n.5 (11th Cir. 2017).

2. The incidents were plausibly part of the same hostile work environment.

Under *National Railroad Passenger Corp. v. Morgan*, a single act of harassment during the filing period can anchor pre-filing-period harassment so long as the harassment in both periods is part of the "same hostile environment claim." 536 U.S. 101, 118 (2002).

True, in *Morgan*, the Court could not "say that [the acts in both periods were] not part of the same actionable hostile environment claim" because "the Court of Appeals [there] concluded that 'the pre- and post-limitations period incidents involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers.'" *Id.* at 120-21. But Local 1414 uses this language out of context to suggest that incidents *must* be related by type, perpetrator, and frequency to be part of the same hostile-work-environment claim. *See* Local 1414 Br. 15 (quoting *Morgan*, 536 U.S. at 120-21).

That's wrong. As the context makes clear, *Morgan* was simply affirming the lower court's analysis of the facts in that case—not creating hard-and-fast requirements for every continuing-violation claim. 536 U.S. at 120-121. The three factors identified in *Morgan* are, thus, sufficient to establish a continuing violation but are "not exhaustive" or necessary. *E.g.*, *Hansen v. SkyWest Airlines*, 844 F.3d 914, 923 (10th Cir. 2016).[1]

Instead, *Morgan* called for an "individualized assessment," *McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 77 (2d Cir. 2010), of whether the harassment during both periods was "sufficiently related" to be "fairly considered part of the same claim," *Chambless v. La.-Pac. Corp.*, 481 F.3d 1345, 1350 (11th Cir. 2007). Our opening brief explained (at 10-16) that the harassment in both periods here is "fairly considered part of the same claim" because all the harassment was (1) plausibly attributable to the same person, Mr. Jackson, who was (2) plausibly motivated by the same sex-based animus. As we now show, Local 1414 has failed to refute both connections.

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[1] *See also McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 77 (2d Cir. 2010) (holding that *Morgan* "does not limit the relevant criteria, or set out factors or prongs"); *Vickers v. Powell*, 493 F.3d 186, 199 (D.C. Cir. 2007) (finding continuing violation despite different perpetrator before and after the filing period); *Isaacs v. Hill's Pet Nutrition, Inc.*, 485 F.3d 383, 386 (7th Cir. 2007) (same).

Attributable to Mr. Jackson. Local 1414 does not dispute that Mr. Jackson violated the order to stay away from Ms. Johnson's workspace. As to Mr. Jackson's connection to the vandalism of Ms. Johnson's car and the harassment by her coworkers, Local 1414 misunderstands the pleading standard.

Local 1414 argues that the vandalism cannot plausibly be attributed to Mr. Jackson because Ms. Johnson's complaint did not "identif[y] Jackson as the individual who vandalized her vehicle." Local 1414 Br. 18. But at the motion-to-dismiss stage, Ms. Johnson is entitled to the benefit of all reasonable inferences. *See Sebastian v. Ortiz*, 918 F.3d 1301, 1307 (11th Cir. 2019). Recall that Ms. Johnson's car was vandalized on the same day that Mr. Jackson testified to the grievance committee about his harassment. App. 11 (¶ 38). And Mr. Jackson had a history of threatening Ms. Johnson for reporting him, including by sending her a picture of a snake he had killed, App. 10 (¶ 34), and yelling at her for "snitching," App. 10 (¶ 30). Drawing all reasonable inferences in Ms. Johnson's favor, these facts at least "nudged [her] claims" of Mr. Jackson's involvement "across the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

Mr. Jackson's involvement in the harassment Ms. Johnson endured in the bathroom is similarly plausible. These coworkers were "closely associated" with Mr. Jackson and chastised her "for allegedly lying" about him. App. 13 (¶ 48); App. 11 (¶ 39). Mr. Jackson also held

significant sway over her coworkers; on her first day, Ms. Johnson was told that Mr. Jackson "ran" the workplace, App. 6 (¶ 9), which Mr. McDuffie all but confirmed when he said he would protect Mr. Jackson no matter "right or wrong" after she reported him, App. 9 (¶ 27). And Mr. Jackson had previously involved other coworkers in harassing Ms. Johnson when he yelled at her for snitching with three coworkers in tow. App. 10 (¶ 30). In other words, Mr. Jackson had influence in the workplace, was vindictive, and had already involved coworkers in harassing Ms. Johnson. Taken together, it is more than plausible that he prompted the harassment.

Local 1414 first responds that Ms. Johnson's allegation that the coworkers were "associated with Jackson" is "conclusory." Local 1414 Br. 18-19. That the coworkers chastised Ms. Johnson for allegedly lying about the harassment, however, easily supports this inference. App. 13 (¶ 48); App. 11 (¶ 39).

Besides, their association with Mr. Jackson is a fact, not a legal conclusion, and therefore must be accepted as true. Just as a plaintiff can plead that someone is married without attaching his marriage certificate, Ms. Johnson can plead that the coworkers were associated with Mr. Jackson without providing any further support.

Tellingly, every decision that Local 1414 cites concerns allegations regarding a defendant's state of mind. Local 1414 Br. 19 n.69. Courts treat state-of-mind allegations differently from other factual allegations

because a plaintiff cannot know a defendant's state of mind without additional circumstantial evidence. *See* Howard M. Erichson, *What Is the Difference Between a Conclusion and a Fact?*, 41 Cardozo L. Rev. 899, 917 (2020). The same is not true of relationships among coworkers in a public workplace.

Local 1414 next faults Ms. Johnson for not pleading that the bathroom where she was harassed was located at the workplace. Local 1414 Br. 19. But Ms. Johnson's complaint easily supports the inference that the harassment occurred at work. The allegation refers to "*the* women's restroom," App. 11 (¶ 39) (emphasis added), not "a" women's restroom. And, besides, where else would Ms. Johnson face repeated harassment in a restroom from people associated with Mr. Jackson?

Motivated by the same sex-based animus. Ms. Johnson's opening brief described two plausible ways in which the sex-based animus that motivated Mr. Jackson's earlier explicitly sex-based conduct also motivated the facially sex-neutral harassment that occurred within the filing period.

First, it is plausible that Mr. Jackson interpreted Ms. Johnson's report to his supervisors as a rejection of his sexual advances and punished her for it. Opening Br. 13-14. As we earlier explained, "when harassment is motivated by a failed attempt to establish a sexual relationship, the victim's sex is inextricably linked to the harasser's decision to harass." *Id.* at 13 (quoting *Perez-Cordero v. Wal-Mart P.R., Inc.*, 656 F.3d 19, 28

(1st Cir. 2011)). Thus, punishing someone for refusing sexual advances—even if the reprisal is facially sex-neutral—is actionable sex-based conduct because it would not have happened but for the victim's sex. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 659 (2020).[2]

Second, it is plausible that Mr. Jackson felt motivated or emboldened to punish Ms. Johnson for reporting him because she is a woman. Opening Br. 15-16. Mr. Jackson harassed Ms. Johnson in such "sex-specific" and egregious ways as to make it plausible that he was "motivated by general hostility to the presence of women in the workplace." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). In other words, Mr. Jackson plausibly harassed Ms. Johnson to "distress or disempower rather than to seduce" her. *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 898 (9th Cir. 1994). When Ms. Johnson challenged his power over her by reporting him, it is plausible that he lashed out to "remind [her] of [her] lower status in the workplace." *Id.* Again, that means Mr. Jackson's conduct in both periods plausibly would not have occurred but for Ms. Johnson's sex.

Local 1414 ignores these arguments entirely. Instead, it suggests that only explicitly sexual conduct qualifies as sex-based. *See* Local 1414 Br. 11-12, 16. But the Supreme Court has been clear: Any conduct that would

[2] *See also Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 549 (2d Cir. 2010) (finding that facially sex-neutral harsh treatment was sex-based because it was caused by "spurned advances").

not have occurred but for an employee's sex is sex-based. *See, e.g.*, *Bostock*, 590 U.S. at 656. Thus, it is "universally accepted" that facially sex-neutral conduct can support a hostile-work-environment claim. *Livingston v. Marion Bank & Tr. Co.*, 30 F. Supp. 3d 1285, 1305 n.11 (N.D. Ala. 2014) (collecting cases).

It is therefore no answer that the later incidents were facially sex-neutral, especially because Local 1414 impermissibly divorces the incidents from the broader "social context" in which they occurred. *See Oncale*, 523 U.S. at 81. Take, for example, Local 1414's treatment of Mr. Jackson's defiance of the order to stay away from Ms. Johnson's workspace. It correctly suggests that "encountering a coworker in the workplace" would not normally be viewed as sex-based. Local 1414 Br. 12. But Ms. Johnson did not encounter just any coworker. She encountered a man who had sexually harassed her for months and had been ordered to stay away. Given Mr. Jackson's extensive pattern of sex-based intimidation, it is plausible that Ms. Johnson's sex motivated Mr. Jackson to violate the order.

Local 1414's analysis of the other two incidents suffers from the same problems. Yes, divorced from context, smashing someone's car windows or prompting others to harass someone is not sex-based. But, as our opening brief explained (at 13-16), that conduct is actionable when taken to punish someone for refusing sexual advances or for upsetting sex-based expectations.

If Local 1414 is arguing that facially sex-neutral acts cannot anchor prior explicitly sexual conduct per se, *see* Local 1414 Br. 16, that too is wrong. This Court has already held that discrete acts, such as a demotion (which are, by their nature, facially sex-neutral), can anchor prior explicitly sex-based harassment as part of one hostile work environment. *See Chambless v. La.-Pac. Corp.*, 481 F.3d 1345, 1350 (11th Cir. 2007). After all, *Morgan*'s touchstone is whether the conduct is part of the "same hostile environment claim." 536 U.S. at 118. Given that both facially sex-based and sex-neutral acts can contribute to the same claim, it would make little sense to bar facially sex-neutral acts from anchoring prior explicitly sexual conduct. The limiting principle is the relationship between the conduct in both periods—not whether the conduct was facially sex-based.

Lastly, Local 1414 argues that, even if the incidents in both periods are sufficiently related, Mr. McDuffie's meeting with Mr. Jackson was an intervening action that "sever[ed]" the "causal chain" between the harassment in the two periods. Local 1414 Br. 21. But Local 1414 cites no case where this Court applied the intervening-action doctrine when, as here, harassment continued (and arguably escalated) after the employer's intervention. *See Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003) (applying doctrine where plaintiff "did not have any problems" with supervisor after intervention); *Harris v. Pub. Health Tr. of Miami-Dade Cnty.*, 82 F.4th 1296, 1303 (11th Cir. 2023) (per curiam)

(applying doctrine where plaintiff "encountered no discrimination at the hands of her former supervisors" after intervention).

Besides, Local 1414 misunderstands Ms. Johnson's position. It was Ms. Johnson's report—not Mr. McDuffie's intervention—that prompted Mr. Jackson's behavior to change from explicitly sexual to facially sex-neutral. *See* Opening Br. 13-16. The intervening-action doctrine is therefore inapplicable because it is plausible that Mr. McDuffie was not part of the "causal chain" that led to a change in Mr. Jackson's behavior.

That Mr. Jackson flagrantly disregarded most of Mr. McDuffie's orders strengthens this inference. In addition to asking Mr. Jackson to "stop sending Plaintiff videos/photographs," Mr. McDuffie directed him to not "follow Plaintiff around; not to call or speak with Plaintiff; and to refrain from any attempts to hinder Plaintiff's work." App. 9-10 (¶ 29). Mr. Jackson disregarded all but the first order: He subsequently yelled at Ms. Johnson for "snitching," App. 10 (¶ 30), likely was involved in breaking her car windows and slashing her tires, App. 11 (¶ 38), continued to appear in her workstation, App. 12 (¶ 40), turned her coworkers against her, App. 11 (¶ 39), and texted her a picture of a snake he had killed, App. 10 (¶ 34).

Mr. Jackson's open defiance of the orders makes Mr. McDuffie's effect on the "causal chain" all the more unlikely—and makes it all the more plausible that Mr. Jackson was responding to Ms. Johnson's report rather than to any intervention from Local 1414. In any event, dismissal

is inappropriate at this early stage because the relative importance of Ms. Johnson's report compared to Mr. McDuffie's intervention can only properly be judged, first, at summary judgment and, then, by the trier of fact.

B. Local 1414 was Ms. Johnson's employer.

Local 1414 argues for the first time on appeal that it cannot be liable under Title VII because it is not Ms. Johnson's employer. This argument is forfeited, and, even if it weren't, it fails because Ms. Johnson sufficiently pleaded that Local 1414 is an employer under Title VII.

Parties "forfeit positions or issues" by not raising them in the district court. *ECB USA, Inc. v. Chubb Ins. Co. of N.J.*, 113 F.4th 1312, 1320 (11th Cir. 2024). Asserting that Local 1414 is not Ms. Johnson's employer is a "new issue"—not just a new argument—because Local 1414 has raised it as "a new legal ground [for] the reason it should win." *Id.* at 1321. And as Local 1414 itself points out, "[i]t is well established in this circuit" that forfeited issues cannot be raised on appeal "absent extraordinary circumstances." Local 1414 Br. 9 (quoting *Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009)). No extraordinary circumstances exist here. Local 1414 had every opportunity to raise this issue below but "failed to do so." *Gould v. Interface, Inc.*, 153 F.4th 1346, 1358 (11th Cir. 2025).

Besides, taking judicial notice of Local 1414's status as a union would not automatically shield it from liability because, depending on the circumstances, "[u]nder Title VII a union can be both an 'employer' and a 'labor organization.'" *Chavero v. Loc. 241, Div. of the Amalgamated Transit Union*, 787 F.2d 1154, 1155 n.1 (7th Cir. 1986). That's because whether an entity is an employer under Title VII depends not on formal titles but rather on a fact-specific "consideration of the totality of the employment relationship." *See Peppers v. Cobb Cnty.*, 835 F.3d 1289, 1297 (11th Cir. 2016); *Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 450-51 (2003).

Here, Ms. Johnson pleaded that she "commenced employment with ILA." App. 6 (¶ 7). This straightforward allegation of an employer-employee relationship is supported by many other facts demonstrating that Local 1414 was "in control of the fundamental aspects of the employment relationship that gave rise to the claim" and therefore her employer under Title VII. *Peppers*, 835 F.3d at 1297 (citation omitted). For example, Ms. Johnson pleaded that Local 1414 assigned Mr. Jackson and Ms. Johnson to different work areas, App. 12 (¶ 40), suspended her, App. 12 (¶ 41), blocked her PIT certification, App. 11 (¶ 36), and controlled the grievance process, App. 8-9 (¶¶ 24-29), App. 10 (¶¶ 32-33), App. 11 (¶¶ 37-38). These allegations embody the hallmarks of the employer-employee relationship: Local 1414 "exerted" significant "control" over Ms. Johnson and had the "power to … modify the terms

and conditions" of her employment. *Peppers*, 835 F.3d at 1297 (citation omitted). At this early stage, then, Local 1414 cannot escape liability by simply pointing to its status as a union.

II. The district court erred in dismissing Ms. Johnson's retaliation claim.

A. Ms. Johnson administratively exhausted her retaliation claim.

As our opening brief explains (at 20-23), and as the district court held, App. 35-37, Ms. Johnson administratively exhausted her retaliation claim regardless of whether she amended her EEOC charge to refer to her suspension without pay. Under the so-called *Gupta/Baker* exception, "it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge." *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981); *see Baker v. Buckeye Cellulose Corp.,* 856 F.2d 167, 168-69 (11th Cir. 1988). Because Ms. Johnson's suspension without pay was "reasonably related" to the blockage of hours alleged in her EEOC charge, she did not need to amend her charge. *See Wu v. Thomas*, 863 F.2d 1543, 1547 (11th Cir. 1989).

Relying on the nonprecedential decisions in *Ellison v. Postmaster Gen., U.S. Postal Serv.*, 2022 WL 4726121 (11th Cir. 2022), and *Duble v. FedEx Ground Package Sys., Inc.*, 572 F. App'x 889, 892-93 (11th Cir. 2014), Local 1414 asserts that the *Gupta/Baker* exception does not apply here because the retaliation against Ms. Johnson occurred before she

sued in district court. In *Ellison* and *Duble*, the plaintiffs were required to separately exhaust retaliation that occurred after they filed their initial EEOC charge but before they filed a lawsuit. But, as our opening brief explains (at 22-23), the view expressed in *Ellison* and *Duble* does not reflect a consensus. Indeed, in *Thomas v. Miami Dade Pub. Health Tr.*, 369 F. App'x 19, 23 (11th Cir. 2010), this Court found that the *Gupta/Baker* exception applied to retaliatory acts that occurred before a plaintiff filed her lawsuit.

Nor do *Ellison* and *Duble* square with this Court's pedigreed precedent in *Gupta* and *Baker*. *See* Opening Br. 20-23. The basis for the *Gupta/Baker* exception is "the scope of the EEOC investigation" and its relationship to the alleged post-charge retaliatory acts. *See Baker*, 856 F.2d at 169. The scope of the EEOC investigation has nothing to do with when a plaintiff sues.

Local 1414 argues that a pre-suit/post-suit distinction is supported by *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). But *Morgan*'s understanding that each discrete act of discrimination must be separately exhausted does not have anything to do with that distinction. *Id.* at 114. A plaintiff exhausts, as required under *Morgan*, when the alleged acts of discrimination fall within the "scope of the EEOC investigation which can reasonably be expected to grow out of the charge." *See Baker*, 856 F.2d at 169; *see also Gregory v. Ga. Dep't of Hum. Res.*, 355 F.3d 1277, 1280 (11th Cir. 2004) (per curiam). That remains

true regardless of whether an act of retaliation not expressly mentioned in the EEOC charge occurs before or after the plaintiff files suit. Put differently, if we assume (counterfactually) that *Morgan* requires complainants to file a separate EEOC charge for each new act of retaliation even when they meet the *Gupta*/*Baker* exception, why would that requirement vanish once a plaintiff has sued? Local 1414 provides no answer.

B. Ms. Johnson's complaint alleged a prima facie case of Title VII retaliation.

To plead Title VII retaliation, Ms. Johnson had to plausibly allege that (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) a causal connection exists between the protected activity and Local 1414's adverse action. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008); *see* Opening Br. 24. Ms. Johnson alleged two retaliatory acts: (1) Local 1414 blocked her PIT certificate in December 2021 after she "continuously reported" Mr. Jackson in the fall of that year, App. 11 (¶ 36), and (2) two months after Ms. Johnson filed an EEOC charge, Local 1414 suspended her without pay. App. 12 (¶ 41).

Local 1414 does not dispute that Ms. Johnson engaged in protected activities when she reported Mr. Jackson and filed an EEOC charge. Local 1414 Br. 22-23. It also does not dispute that her suspension without pay constituted an adverse action. *Id.* at 23-24. Local 1414 argues, however, that Ms. Johnson failed to adequately plead the PIT-related

adverse action. *Id*. It also says that a causal connection is lacking between Ms. Johnson's protected activities and its adverse actions. *Id.* at 25-27. Local 1414 is wrong on both counts.

1. Ms. Johnson adequately pleaded that blocking her PIT certificate was an adverse action.

Local 1414 contends that Ms. Johnson's complaint did not sufficiently plead the PIT-certificate blockage as an adverse action because she did not formally reincorporate this incident under the retaliation count of her complaint. Local 1414 Br.; *see* App. 14-16. It argues that, under the federal rules, Ms. Johnson was required to replead each fact under the count it supported. Local 1414 Br. 23-24.

But as explained above (at 4), the federal rules say only that "[a] statement in a pleading *may* be adopted by reference elsewhere in the same pleading." Fed. R. Civ. P. 10(c) (emphasis added). Plaintiffs thus may incorporate earlier statements by reference. But the rules do not say that "each count must contain all facts and elements of the claim." *See* Antonio Gidi, *Incorporation by Reference: Requiem for a Useless Tradition*, 70 Hastings L.J. 989, 1035 (2019).

Our opening brief explains (at 26-27) that it is enough that Ms. Johnson's complaint as a whole "adequately put [the defendant] on notice of the specific claims against them and the factual allegations that support those claims." *See Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1325 (11th Cir. 2015). And dismissal is appropriate only when

"it is *virtually impossible* to know which allegations of fact are intended to support which claim(s) for relief." *Id.* (citation omitted). Yes, the complaint in *Weiland* did reincorporate all the preceding facts. *Id.* But a blanket reincorporation of all the facts (as occurred in *Weiland*) is no better than not incorporating for purposes of providing a defendant with notice of which facts support a particular claim.

Here, Ms. Johnson's EEOC charge put Local 1414 on notice that she was alleging retaliation based on her allegation that management blocked her project hours. App. 23 (¶ 1). And then her complaint pleaded the PIT-certificate blockage immediately after describing that she had engaged in protected activity by "continuously reporting Mr. Jackson to management in the fall of 2021." App. 11 (¶ 36). Based on the structure of her complaint, it was far from "virtually impossible" for Local 1414 to understand that Ms. Johnson had alleged the PIT-certificate blockage as support for her retaliation claim. *See Weiland*, 792 F.3d at 1325.

2. Ms. Johnson adequately pleaded a causal connection between her protected activities and Local 1414's adverse actions.

Local 1414 argues that Ms. Johnson did not plead a causal link between her protected activity and the alleged retaliatory conduct. Local 1414 Br. 25. Ms. Johnson needed to allege facts that plausibly indicate that "the decision-maker[s] [were] aware of the protected conduct" and that "the protected activity and the adverse action were not wholly

unrelated." *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 590 (11th Cir. 2000) (*quoting Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1337 (11th Cir. 1999)). She has done so.

Suspension without pay. Local 1414 argues that Ms. Johnson failed to plead causation regarding her suspension without pay because a two-month gap between her EEOC charge and the suspension is not enough on its own to support a causation finding. Local 1414 Br. 26. This Court has observed that "close temporal proximity" alone suffices to establish the causation element of a prima facie retaliation claim. *Gupta*, 212 F.3d at 589 (citation omitted). And though this Court has not decided whether a two-month gap is proximate enough to establish causation, *see Thomas v. Cooper Lighting, Inc.*, 506 F. 3d 1361, 1364 (11th Cir. 2007), other courts have held that it is, s*ee, e.g.*, *Garcia v. Pro. Cont. Servs., Inc.*, 938 F.3d 236, 243 (5th Cir. 2019); *Planadeball v. Wyndham Vacation Resorts, Inc.*, 793 F.3d 169, 178 (1st Cir. 2015).

In any event, Ms. Johnson doesn't rely on temporal proximity alone. She also alleged facts indicating that Local 1414 exhibited retaliatory animus against her for reporting Mr. Jackson. When Ms. Johnson first reported the harassment to Union Representative McDuffie, he told her that Mr. Jackson was "his boy" and that he would "help Jackson no matter right or wrong." App. 9 (¶ 27). Ms. Johnson's confidential conversation with Vice President Mosely concerning Mr. Jackson's misconduct was leaked to the entire workplace the next day. App. 10

(¶ 33). And after continuously reporting Mr. Jackson to management in fall 2021, Ms. Johnson learned that her PIT certificate had been blocked. App. 11 (¶ 36). Ms. Johnson also alleged that Mr. Jackson "ran" the workplace. App. 6 (¶ 9). Taken together, these allegations support the reasonable inference that Local 1414 favored Mr. Jackson and retaliated against Ms. Johnson for reporting him. These facts, combined with the short two-month gap between Ms. Johnson's EEOC charge and suspension, easily satisfy the causation element at this stage.

Local 1414 says that Ms. Johnson did not adequately allege that the decisionmakers who suspended her without pay were aware of her protected conduct, relying on *Goldsmith v. City of Atmore*, 996 F.2d 1155 (11th Cir. 1993), and *Uppal v. Hosp. Corp. of Am.*, 482 F. App'x 394, 397 (11th Cir. 2012). Local 1414 Br. 27. But *Goldsmith* noted that "[t]he defendant's awareness of the protected statement, however, may be established by circumstantial evidence," 996 F.2d at 1163, which is exactly what Ms. Johnson relies on here.

And *Uppal* affirmed a dismissal where the plaintiff had not alleged that the hearing committee that terminated her was aware she had sent a letter to her company's CEO reporting alleged harassment. 482 F. App'x at 397. But here Ms. Johnson did more than just lodge an internal complaint with Local 1414's management; she filed an EEOC charge. App. 15. The "purpose of filing a charge of discrimination with the EEOC is to give the employer notice," so "we can reasonably infer" that Local

1414 knew that Ms. Johnson had filed an EEOC charge. *Norgren v. Minn. Dep't of Hum. Servs.*, 96 F.4th 1048, 1055 (8th Cir. 2024); *see* Opening Br. 30-31.

PIT certificate. Local 1414 argues that causation is lacking because of the purported delay between Ms. Johnson's reporting of Mr. Jackson to management and the blocking of her PIT certificate. Local 1414 Br. 26. It measures the time gap as running from August 9—when Ms. Johnson reported Mr. Jackson to Vice President Mosley—and the blocking of her PIT certificate in December. But that misunderstands the record.

Ms. Johnson alleges that her PIT certificate was blocked after she "*continuously report[ed]* Jackson to management in the *fall of 2021*." App. 11 (emphasis added); *see* Opening Br. 32. Drawing all reasonable inferences in Ms. Johnson's favor, as required at this stage, Ms. Johnson may have reported Mr. Jackson in November or early December. The time gap between her reports and PIT-certificate suspension may be as short as a few weeks, which is close enough on its own to establish a causal link. *Henderson v. FedEx Express*, 442 F. App'x 502, 507 (11th Cir. 2011); *see also Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs,* 810 F.3d 940, 948-49 (5th Cir. 2015). In any case, when temporal proximity is combined with the allegations of Local 1414's retaliatory animus discussed above (at 23-24), Ms. Johnson's allegations are sufficient to create a causal connection.

Local 1414 also maintains that Ms. Johnson did not allege which decisionmakers blocked her PIT certificate or that they were aware of her protected activity. But at this stage, circumstantial evidence is sufficient to demonstrate that a defendant was aware of the plaintiff's protected activity. *See Goldsmith,* 996 F.2d at 1163. That Ms. Johnson reported the harassment to Local 1414's senior management and her report was leaked to the entire workplace supports the reasonable inference that the decisionmakers who blocked Ms. Johnson's PIT certificate were aware of her protected activity. *See* Opening Br. 32-33.

Conclusion

The district court's judgment should be reversed on both of Ms. Johnson's Title VII claims and the case remanded for further proceedings.

Respectfully submitted,

/s/Brian Wolfman

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January 20, 2026 /s/Brian Wolfman

Brian Wolfman

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Brian Wolfman