E-FILED
Tuesday, 12 April, 2022 01:55:24 PM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

DERICK BROWN, ATIBA FLEMONS, and JEFFREY TAYLOR On behalf of themselves and all others similarly situated, **Plaintiffs**, **v.** THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, **Defendant.**	**2:19-cv-02020-JBM-EIL** **The Hon. Joe Billy McDade** **Magistrate Judge Eric I. Long**

DECLARATION OF CHRISTOPHER B. WILSON
IN RESPONSE TO THE COURT'S ORDER OF APRIL 8, 2022

I, Christopher B. Wilson, declare and state as follows:

1. I am counsel of record for Defendant, the Board of Trustees of the University of Illinois ("University"). I am the senior attorney on the defense team and the person ultimately responsible for the Defendant's Opposition to Plaintiffs' Motion to Certify Class filed with this Court under seal on March 31, 2022 and filed publicly on April 7, 2022 (the "Response Brief"). Dkt. 66.

2. I have investigated the circumstances of the filing of the University's Response Brief in light of the concerns raised by this Court in its Order of April 8, 2022.

3. I want to assure the Court that there was no attempt to evade the local rules in any way and in particular no attempt by anyone associated with the Response Brief to evade the requirements of Civil Local Rule ("LR") LR 7.1(B)(4)(a). I describe the circumstances of the preparation and filing of the Response Brief in more detail, as follows:

4. Prior to filing the Response Brief, one of the associates working on the brief converted the font of the brief from 12-point Times New Roman to 14-point Times New Roman as provided for in LR 5.1(B)(1).

5. He did this solely in order to make the brief easier to read and not for any other purpose.

6. When he converted the brief to the larger font, he overlooked the necessary spacing change. He should have converted the 24-point line spacing to 28-point line spacing to comply with the "double-spacing" requirement established by LR 7.1(B)(4)(a).

7. Although multiple members of the team worked on the Response Brief after this change, no one caught either this spacing error or the conversion to 14-point font generally.

8. The Court's April 8, 2022 Order expressed its concern that Defendant's counsel may have "purposefully manipulated the spacing so as to request fewer extra pages." Dkt. 67. I can assure the Court that that was not anyone's intention. In fact, the opposite was the case. By using 14-point font, rather than 12-point font, the final brief was seven pages longer than it otherwise would have been.

9. For the Court's convenience, I have attached a revised version of the publicly filed Response Brief (Dkt. 66) with 12-point Times New Roman font and 24-point line-spacing as Exhibit A. As the Court will see, this corrected version is 45 pages long compared with the version originally submitted to the Court which was 52 pages long.

10. The Response Brief filed with the Court on March 31 and April 7, 2022, however, did not comply with LR 7.1(B)(4)(A). While this was due to an innocent mistake, I take responsibility for the error, and accept any sanction the Court believes is appropriate under the circumstances.

11. I can assure the Court, though, that as an officer of the Court and an attorney licensed in the State of Illinois since 1989, this mistake was not, in any way, an effort to create the impression that the Response Brief was shorter than the rules required.

12. I apologize to the Court for my error, and I regret that the Court has had to use its time to address this issue. I respectfully request that any sanction the Court enters be imposed upon me personally. My client, the University, had no responsibility whatsoever for the errors regarding the spacing issues or the failure to comply with the Local Rules.

13. I declare under penalty of perjury under the laws of the State of Illinois and the United States that the foregoing is true and correct.

EXECUTED this 12th day of April, 2022, at Chicago, Illinois.

s/ Christopher B. Wilson
Christopher B. Wilson

Christopher B. Wilson
Jonathan R. Buck
Keith A. Klein
James A. Kilcup
Christopher Rocco Lepore
PERKINS COIE LLP
110 N. Wacker Drive
Suite 3400
Chicago, IL 60606
Tel: (312) 324-8400
Fax: (312) 324-9400
cwilson@perkinscoie.com
jbuck@perkinscoie.com
kklein@perkinscoie.com
jkilcup@perkinscoie.com
clepore@perkinscoie.com

Attorneys for Defendant:
Board Of Trustees Of The University Of Illinois

E-FILED
Tuesday, 12 April, 2022 01:55:24 PM
Clerk, U.S. District Court, ILCD

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

DERICK BROWN, ATIBA FLEMONS, and JEFFREY TAYLOR

On behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,

Defendant.

2:19-cv-02020-JBM-EIL

The Hon. Joe Billy McDade
Magistrate Judge Eric I. Long

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY CLASS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

I. INTRODUCTION

Plaintiffs' Motion for Class Certification is not supported by either the facts, the law, or Federal Rule of Civil Procedure ("Rule") 23. Plaintiffs seek to certify a massive class action composed of nearly every Black[1] person employed by the University of Illinois Urbana-Champaign ("University") since January 1, 2014 without providing any common issue of law or fact that can, as it must, "drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Plaintiffs' Claims Are Not Supported by the Facts. Plaintiffs' central claim is that the University has a policy or practice of refusing to find that employees have been subject to unlawful harassment. Yet after years of discovery, Plaintiffs have not and cannot demonstrate a hostile work environment in the individual cases they highlight, let alone on behalf of class containing hundreds of members who have never claimed that they were subject to a hostile work environment. Failing to have uncovered facts to support their claims, Plaintiffs ask this Court to *infer* the key factual finding and find that somehow the University has an unspoken policy or practice of permitting racial discrimination.

Plaintiffs' proposed class claims also rest on an inaccurate and misleading picture of the actual policies and practices of the University in responding to complaints of racial harassment. While Plaintiffs complain that the University's Office of Access and Equity ("OAE") did not find a violation of the Non-Discrimination Policy alleging racial discrimination by Black employees during the alleged class period, Plaintiffs conveniently ignore the fact that the OAE and the University did find violations of the University's Code of Conduct where such a conclusion was warranted. These findings lead, in appropriate cases, to discipline and/or supervisory changes. Plaintiffs cannot credibly contend that the University ignored workplace issues during the alleged class period.

[1] Plaintiffs propose a class that includes individuals "identifying as Black and/or African American." Throughout this brief, the University uses the word "Black" referring to both those who identify as Black and/or African-American.

In reality, the record demonstrates, far from the Plaintiffs allegations and conjecture, that the University acted precisely as public policy and the law would expect: the University adopted policies and procedures to prevent and redress any instances of race-based misconduct that took place at the University.

Plaintiffs' class is legally untenable. Beyond the factual issues with Plaintiffs' class argument, Rule 23(a)(2)'s commonality requirement cannot be squared with Plaintiffs' proposed hostile work environment class because Rule 23(a)'s commonality threshold requires of the class "the capacity … to generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350. Plaintiffs' proposed class presents no common issues that are "apt to drive the resolution" of Plaintiffs' hostile work environment claims. Although Plaintiffs propose five common issues, common litigation aimed at resolving those issues would not resolve a single element of a single class member's hostile work environment claim.

The reason for this is that Plaintiffs have proposed a massive class along with a legal claim—hostile work environment discrimination—that requires an individualized factual inquiry. Plaintiffs' proposed class includes the vast majority of Black employees who worked at the University at any time over the last eight years—a class with over 1,000 members. The *only* thing these putative class members would have in common is that they identify as Black or African American, and that they worked, at some point since January 1, 2014, somewhere on a campus that contains over 600 University-owned facilities and more than 6,000 acres.[2] Yet, these putative class members had different jobs, at different times, on different sites, in different buildings, with different supervisors, and different coworkers, and reported to different human resources departments. No court has ever certified a class for a "hostile work environment" comprised of such a sprawling differentiated group of employees.

By contrast, Seventh Circuit precedent bars certification under these conditions. In *Howard v. Cook County Sheriff's Office*, the court rejected a Title VII hostile work environment

[2] https://illinois.edu/about/facts html.

class that spanned multiple work sites and differently situated employees. 989 F.3d 587 (7th Cir. 2021). The Seventh Circuit reasoned that the plaintiffs' hostile work environment class could not meet Rule 23's commonality requirement because of "meaningful distinctions among the class members' individual experiences" and because "plaintiffs have not demonstrated that [harassment] manifests in the same way across all parts of the jail, such that it could be a common question for the class." *Id.* at 603-04.

The same is true here. Plaintiffs' motion should be dismissed.

II. FACTUAL BACKGROUND

A. An overview of the relevant facts relating to the University of Illinois Urbana-Champaign campus.

The University is Illinois' flagship public research university, enrolling a diverse body of more than 33,000 students at its UIUC campus. Plaintiffs' Memorandum of Law in Support of Their Motion for Class Certification ("Plaintiffs' Brief" or "Plaintiffs' Br.") Ex. 6 at 03636.[3] The University employs thousands of individuals at its UIUC campus, including full- and part-time faculty, administrators, and staff. Black employees make up much of the University's workforce. *Id.*

The University is comprised of various colleges and departments. The University's physical plant is supported by the Department of Facilities and Services ("F&S"). Student housing, including the campus dormitories and other undergraduate and graduate student housing, is supported by the University's Housing Department. Dining services, a subject of some of Plaintiffs' allegations, are a separate part of the Housing Department. In short, the UIUC campus that is at the center of Plaintiffs' allegations involves dozens of different supervisory units with hundreds of different supervisors, and thousands of different employees. Notably, none of the named Plaintiffs, nor any of the other incidents referenced in Plaintiffs

[3] Like Plaintiffs' Brief, citations will utilize the last five digits of Bates numbers.

sprawling Motion for Class Certification involve the same supervisors, the same worksite, or the same circumstances.

The University's Office of Access and Equity ("OAE") is the body charged with investigating claims of racial discrimination, sexual discrimination and sexual harassment.[4] Complaints submitted to OAE may assert violations of the University's Non-Discrimination Policy. OAE, however, is charged with investigating any claim asserted by a University employee of a racial or sexual nature and providing recommendations to other units of the University. OAE does not have disciplinary authority. *See* Plaintiffs' Br. Ex. 42 (Excerpts of Deposition of Jennie Marie Duran or "Duran Deposition"). OAE's Equal Employment Opportunity ("EEO") division is staffed by EEO investigators who are charged with investigating complaints that the NDP has been violated. As part of the investigation process, EEO investigators interview witnesses, review documentary materials, and draft reports. *See* Plaintiffs' Br. Ex. 40 at 50 (Excerpts of Deposition of Kaamilyah Abdullah-Span or "Span Deposition"). These investigators were supervised during the class period by then-Senior Associate Director of the EEO division, Kaamilyah Abdullah-Span. OAE also performs campus outreach about the issues of discrimination and harassment; for instance, OAE puts on campus workshops designed to increase education around preventing harassment and discrimination. *Id.* at 57.

The personnel in the EEO division of OAE have historically been diverse. Many of the investigators have been women of color and the supervisor of EEO investigations during the class period is herself a Black woman. Johnson Decl. ¶ 5.

OAE's interaction with claims of NDP violations is largely confined to investigation, findings, and recommendations. OAE does not engage in any enforcement or disciplinary actions. OAE cannot terminate UIUC employees, and it cannot mandate training, mediation, dispute resolution, or corrective action of any kind. Plaintiffs' Br. Ex. 39 at 14-16 (Excerpts of

[4] During the class period OAE changed its name from the Office of Diversity, Equity and Access ("ODEA") and some of the documents and exhibits refer to that earlier title. For ease of reference, we refer to the office as OAE throughout.

Deposition of Rule 30(b)(6) Representative of UIUC or "UIUC Deposition"). Those duties are the duties of the University's human resources departments, including University Human Resources, Staff Human Resources, and the Faculty and Staff Assistance Office. *Id*. at 15-17. Those departments are not bound by OAE recommendations, though they often incorporate recommendations made by OAE. Nor are these departments prevented from taking action should OAE not recommend taking discipline.

Participation by University employees in the OAE process is voluntary. *Id*. at 52-53. An employee who has come forward with a charge may withdraw it at any time. *Id*. Here, many of the complaints of racial discrimination asserted during the class period were withdrawn after initial consideration by the claimant. Johnson Decl. ¶ 7. Others are resolved through an informal mediation process. Only a relatively small number of those complaints proceed through the investigative process to a final report. *Id*. Plaintiffs were well aware of this during discovery. The University has produced every final written report, as well as any drafts of those reports which were in the files, as part of the discovery process. Plaintiffs' claims regarding the number of investigations and reports entirely ignore this record of which they are fully aware. As Plaintiffs know, after years of discovery, only a small number of complaints resulted in a final written report. *Id.*

B. University policies related to employee complaints of harassment.

The University is committed to both preventing and addressing unlawful discrimination as well as any other form of race-based misconduct that may not meet the legal standard of discrimination. The University has a several policies and departments that serve distinct purposes in preventing, investigating, and redressing any instances of racial discrimination or misconduct. These include the Nondiscrimination Policy that is the core of Plaintiffs' allegations but also the University's Code of Conduct that Plaintiffs ignore entirely.

The Nondiscrimination Policy. The University has incorporated the following Nondiscrimination Policy ("NDP"):

> The commitment of the University of Illinois at Urbana-Champaign (Illinois) to the most fundamental principles of academic freedom, equality, of opportunity, and human dignity, requires that decisions involving students and employees be based on merit and be free from invidious discrimination in all its forms.

Plaintiffs' Br. Ex. 1 at 27070. The NDP states the University's ban on all forms of discrimination or harassment, and provides: "It is the policy of the University not to engage in discrimination or harassment against any person because of race, color, religion, sex, pregnancy, disability, national origin, citizenship status, ancestry, age, order of protection status, genetic information, marital status, sexual orientation, gender identity, arrest record status, unfavorable discharge from the military, or status as a protected veteran[]." *Id.*

Under the NDP, discrimination means "[t]o be subject to different treatment based on membership in a protected class cation and to thereby experience an adverse employment or academic action or to be excluded from participation in or denied the benefits of a University program." *Id.*

The NDP, as adopted during the class period, was designed in part to ensure the University's compliance with federal and state law. UIUC Deposition at 131. Mirroring its obligations under Title VII, the NDP defines harassment as "[a] form of discrimination and unwelcome conduct based on an individual's status within a Protected Classification" which rises to the level of a NDP violation when the unwelcome conduct is "based on one or more of the protected classifications" and is either:

> (1) sufficiently severe or pervasive; and (2) objectively offensive; and (3) unreasonably interferes with, denies, or limits a person's ability to participate or benefit from educational or employment opportunities, assessments, or status that the University; or performed by person having power or authority over another in which submission to such conduct is made explicitly or implicitly a term or condition of educational and/or employment opportunities, participation, assessments, or status at the University.

Plaintiffs' Br. Ex. 1 at 27071. As the University explained in its 30(b)(6) deposition, the NDP prohibits conduct alleged to be harassment where that conduct is severe or pervasive enough to be prohibited by Title VII. UIUC Deposition at 131. The University implemented this policy to

govern investigations of complaints of discrimination or harassment and as part of its affirmative action plan and Title VII compliance program. *Id.* at 13. It is meant to make sure that employees "are aware that its not acceptable to discriminate or harass anyone based on a … protected class." *Id.*

Code of Conduct. While the NDP is the only University policy that incorporates the standards of discrimination codified in Title VII, it is not the only that addresses race-based misconduct at the University. The University Ethics and Compliance Office maintains a separate Code of Conduct which established guidelines for professional conduct which governs faculty and staff at the University. Declaration of Christopher B. Wilson in Support of Defendant's Opposition to Plaintiffs' Motion to Certify Class ("Wilson Decl.") Ex. 1 at 00732. That Code of Conduct requires that "[t]hose acting on behalf of the University have a general duty to conduct themselves in a manner that will maintain and strengthen the public's trust and confidence in the Integrity of the University" by, among other things "[e]venhandedness by treating others with impartiality" and "[r]espect by treating others with civility and decency." *Id.* In certain cases alleging an NDP violation, OAE finds that the conduct involves does amount to an NDP violation, but does violate the Code of Conduct. Along with those findings, OAE can and does recommend discipline. *See* Plaintiffs' Br. Ex. 16 at 00263 ("I strongly recommend and encourage the department, in conjunction with Staff Human Resources, to pursue the discipline appropriate for this type of behavior").

While the Code of Conduct applies to employee conduct across the University, disciplinary decisions made by human resources departments necessarily vary by the status of the employee and the employee's department. For instance, disciplinary codes are established, in part based on management-labor negotiations with public sector unions. Other employees are not subject to such protections and are therefore disciplined under a different set of procedures.

C. The University does not have a policy or practice of "never issuing a finding of a violation of the NDP."

1. The University's actual policies and practices.

Plaintiffs assert that "OAE has a practice of never finding a violation of the NDP, that the University has a policy or practice of carrying out "sham investigations" and that the University even "refus[es] to investigate" allegations of racial harassment. Plaintiffs' Br. at 2, 59. This assertion, the cornerstone of Plaintiffs' entire case, is factually unsupported. Despite dozens of depositions and hundreds of thousands of pages of discovery, Plaintiffs cannot identify a single document, a single employee, or a single line of testimony to support this radical theory.

Nor can Plaintiffs support this theory by inference. Plaintiffs have not—and indeed cannot— point to any official practice, published guidance, or formal policy that indicates OAE or any other UIUC entity has a practice of never finding a violation of the NDP. In reality, the University has multiple policies, practices, and tools available to address race-based mistreatment experienced by an employee. Besides the NDP, which prohibits a racially hostile work environment, defined based on Title VII hostile work environment jurisprudence, the University also has policies and practices that result in discipline for race-based misconduct that does not qualify as unlawful conduct under Title VII. Instead, when a formal complaint was made to OAE, OAE follows it procedure and conducts investigations, interviews witness, and makes a finding based on the facts as revealed during the investigation. OAE's highly trained investigators weighed witness testimony and made witness-credibility findings to determine, when witness testimony conflicted, whose testimony carried more weight. *See, e.g.*, Wilson Decl. Ex. 2 at 216 (referencing witness credibility training in relation to OAE investigation into allegations from named Plaintiff Brown).

2. Plaintiffs reliance on "The Inexorable Zero" is misplaced as a matter of fact.

Lacking a plausible motive or any documentary evidence that the University has a policy precluding finding NDP violations for Black employees, Plaintiffs try to bridge the evidentiary

gap by turning to an inapplicable legal doctrine—"the inexorable zero." Plaintiffs allege that because OAE did not issue a formal finding of a violation of the NDP involving a Black employee during the purported class period, that this fact alone should be used an inference of a "hostile work environment."

The facts do not support Plaintiffs' "inexorable zero" claim. To reach their "zero," Plaintiffs had to exclude cases in which the University took dramatic and immediate steps to remedy cases of severe harassment. For instance, a Black F&S employee, Adrian Flowers, encountered a noose which had been tied by a white co-worker. Flowers reported what he had seen to his supervisor at the end of his shift after the other workers had left. The co-worker who had tied the noose was fired the next morning. Plaintiffs' Br. Ex. 14 at 06809; Ex. 15 at 06774. Because the issue was immediately resolved with the highest available sanction—summary termination—an OAE investigative report was not prepared. According to Plaintiffs, however, this example of the University immediately responding to a Black employee's report of racial harassment, taking immediate steps to address it, and immediately terminating the employee involved, should not count to show that the University takes complaints of racial harassment seriously.

More generally, it is unfair to infer that OAE has racist *investigations* just because it has not reached the statistical proportion of NDP violations Plaintiffs expect. This inference is particularly unjustified where Plaintiffs have had access to thousands of OAE documents that would allow them to show the allegedly sham nature of OAE investigations into Black complaints of NDP violations. Yet out of a putative class boasting over a thousand members, Plaintiffs' briefing collects all of two new examples, J.D. [redacted] and C.A. [redacted]—less than 0.2% of a putative class with over a thousand members. As will be discussed below, § V.A(1)(a), the allegations and evidence in the cases of J.D. [redacted] and C.A. [redacted] highlighted by Plaintiffs—ostensibly the worst examples Plaintiffs could find—would not result in a finding of a hostile work environment in federal litigation. If those claims are not likely to make out a Title VII violation, of course, then Plaintiffs' class claims are dead on arrival.

3. The putative class representatives' claims.

a. Derick Brown.

Named Plaintiff Derick Brown works as a Machinist in the Machine department at UIUC's F&S, where he has worked since 2006. Plaintiffs' Br. at 14; Compl. ¶ 10, Dkt. 4. In July 2017, Mr. Brown brought a complaint to OAE that, sometime two years prior in 2015, his supervisor in the Machine department witnessed another coworker don a rag as a mask in a racially insensitive manner. Plaintiffs' Br. Ex. 16 at 00260-261. Mr. Brown believed that the rag was intended to replicate a KKK-style mask and hood. *Id.* Mr. Brown alleged that his supervisor, Chris McCoy, laughed at the incident, but Mr. Brown did not want his supervisor to lose his job. *Id.* Despite seeing what he calls a "KKK hood" Mr. Brown did not report the incident for approximately two years. *Id.*; Wilson Decl. Ex. 3 at 148.

Separate from this incident, Mr. Brown makes a host of generalized complaints about his work environment. Mr. Brown claims that his work was loudly criticized and that he was given generally undesirable tasks. *Id.* at 56. Mr. Brown also alleged generally that he was treated differently than his co-workers due to his race and even given poor performance reviews based on his race. Plaintiffs' Br. Ex. 16 at 00260-261. In particular, Mr. Brown alleged that he was assigned simple tasks and his co-workers made fun of him for not doing "real" mechanical work. *Id.* Mr. Brown also alleged that his supervisor, after bringing a sympathy card to another co-worker after a death in their family, instead made a rude comment to Mr. Brown after a death in Mr. Brown's family. *Id.*

Prior to making a complaint about racial discrimination in July 2017, Mr. Brown had had a series of conflicts with his manager Chris McCoy. Human resources for F&S department successfully mediated their conflicts on several occasions. On July 13, 2017, Mr. Brown claimed that he had been subjected to racist conduct by McCoy mostly centering on an incident that occurred years prior when he claimed he had seen McCoy and other coworkers donning a "KKK-style" hood and laughing about it. The following day, July 14, 2017—a Friday—senior

executives from Facilities & Services as well as human resources met to discuss the allegation. They decided that Mr. McCoy should be placed on administrative leave during an investigation of the hood incident. Mr. McCoy was placed on administrative leave the following Monday, July 17, 2017. Wilson Decl. Ex. 5 at 00423.

OAE began investigating Mr. Brown's complaint. Jennie Duran, in her capacity as OAE investigator, interviewed witnesses allegedly present for the hood incident in 2015, and reviewed text messages and other documentary evidence. Plaintiffs' Br. Ex. 16 at 00260. OAE issued a final report on October 5, 2017. The report concluded that Mr. Brown's complaint about his supervisor Mr. McCoy "does not meet the high standard needed to state a claim for racial harassment" under the NDP. *Id.* at 00263. Ms. Duran determined that "the crux" of Mr. Brown's complaints were unrelated to treatment based on his race, and instead related to crude comments directed at Mr. Brown by a person who "yelled profanities to other people … regardless of their race or protected class." Wilson Decl. Ex. 2 at 225. As to the hood incident, OAE determined that there was "insufficient evidence to demonstrate the existence of a KKK-style mask." Plaintiffs' Br. Ex. 16 at 00262. Even so, OAE did conclude that Brown's supervisor had acted inappropriately. *Id.* at 00263. OAE then found that Mr. Brown's treatment likely violated the University's Code of Conduct policy, even though it did not rise to the level of an NDP violation based on the protected class of race. *Id.* at 00263. In line with OAE's policy, OAE recommended that Staff Human Resources pursue "the discipline appropriate for this type of behavior." *Id.*

In response to the recommendation of OAE to punish Mr. McCoy, F&S entered into an agreement with Mr. McCoy that allowed him to return to work at F&S, but demoted him from his supervisor position and removed the possibility of any future promotion to a supervisory role. Wilson Decl. Ex. 5 at 00423.

b. Atiba Flemons

Named Plaintiff Atiba Flemons works as a brick mason in the F&S department at UIUC, a union position, where he has worked since 2011. Plaintiffs' Br. at 19; Compl. ¶ 11, Dkt. 4. Mr. Flemons has been involved in multiple OAE investigations related to harassment, and has made claims based on allegations of harassment dating back to 2008. Compl. ¶¶ 370, 374, 376, Dkt. 4.

In 2012, Mr. Flemons requested informal dispute resolution process mediated by OAE to resolve a dispute between Mr. Flemons and his immediate supervisor. Plaintiffs' Br. Ex. 23 07472-7473. OAE concluded that the single comment calling Mr. Flemons a "big, black guy" was not sufficiently "severe or pervasive to establish harassment." *Id.* at 07476. Indeed, OAE found that the supervisor was treating white employees with similar hostility, and therefore recommended that the supervisor receive "additional supervision, training, guidance, and mentoring in order to enhance and improve the Brick Mason shop's work environment." *Id.* at 07477.

Mr. Flemons was also disciplined in 2014 for vulgar and derogatory comments he made towards a coworker. Plaintiffs' Br. Ex. 11 at 00058. He was suspended without pay for three days. Flemons unsuccessfully appealed his decision based on the grievance procedures set out in his union contract. The grievance panel, however, affirmed the decision and held that Mr. Flemons had violated University Policy requiring that all employees treat all others with respect and courtesy. Plaintiffs' Br. Ex. 19 at 00083.

In 2017, Mr. Flemons also emailed OAE to report that he had seen a vehicle with a confederate-flag image in a UIUC parking lot. Plaintiffs' Br. Ex. 5 at 01942. In that email, Mr. Flemons wrote that "In the past few weeks, I have seen a vehicle on multiple occasions with two Confederate flag stickers in its windows, one of which reads "Kiss My Flag." *Id.* Mr. Flemons did not assert that the flag was interfering with his work or performance, and suggested that the sticker "likely" belonged to an unidentified employee based on where the car was parked. *Id.*

Mr. Flemons reported the flag in an email to Heidi Johnson on June 29, 2017, and that same day, Ms. Johnson replied, forwarded his email to a campus-wide tolerance group, and sent more information about the Bias Team on campus. *Id.*

c. Jeffrey Taylor

Named Plaintiff Jeffrey Taylor is employed as a Culinary Worker III within UIUC's Dining department, where he has been employed since 2015. Plaintiffs' Br. at 28; Compl. ¶ 12, Dkt. 4. Mr. Taylor filed a complaint with ODEA in 2017, alleging that both his supervisors and coworkers racially harassed him. Plaintiffs' Br. Ex. 28 at 04921.

After investigating Mr. Taylor's claims, including interviewing four witnesses, ODEA found that "there is not a preponderance of the evidence that [Mr. Taylor's supervisor's] conduct was based on race." Plaintiffs' Br. Ex. 28 at 04928. Following corroboration by witnesses, the ODEA found that Mr. Taylor was not subject to different treatment based on his race and did not suffer an adverse employment action. *Id.*

In its report, ODEA recognized that Mr. Taylor's supervisor had a short temper and had behaved inappropriately—both towards Taylor and other employees. Plaintiffs' Br. Ex. 28 at 04930. The report recommended that Taylor's supervisor continue to work in a separate dining hall. Mr. Taylor even acknowledged to OAE that this reassignment changed his work environment "for the better" for both him and other employees. *Id.* at 04923.

d. [redacted] C.A.

C.A. [redacted] worked in University dining, starting in 2000 as a Pastry Chef, and eventually working her way up to a supervisory role as an Executive Chef. Plaintiffs' Br., Ex. 36 at 30122. In 2016, C.A. [redacted] orally told a University Housing Director that she was being discriminated against because she was being used as a "show pony" to be a public-facing minority. *Id.* At that time, C.A. [redacted] did not make a formal complaint to OAE. *Id.* Two

years later, however, C.A. [redacted] did make a formal OAE complaint, in which she brought an allegation based on comments related to her race and sex.

OAE concluded, after its investigation, that C.A. [redacted] allegations could not sustain a finding of a violation of the NDP, but that the conduct of her supervisors had violated the "spirit and the letter of the University's Code of Conduct." *Id.* at 30143. OAE concluded that the behavior of Ms. Aubrey and Mr. Henning toward C.A. [redacted] constituted a "gross dereliction of their leadership responsibilities." *Id*. OAE then made the following recommendations:

- With respect to Ms. Aubrey, "University Housing, in consultation with Student Affairs leadership, take appropriate employment action to ensure that others are not subject to fabrication of their record and intimidation." *Id*.
- With respect to Mr. Henning, "Housing identify leadership development opportunities … that pertain to leading with integrity and managing conflict." *Id*.
- With respect to C.A. [redacted], "Housing take immediate steps to hire a permanent executive chef for Ikenberry and permit C.A. [redacted] to resume her previously held responsibilities or otherwise identify responsibilities that are similar in scope to those that she previously held and that meet Dining's departmental needs."

Id. Senior personnel in the Dining Department then undertook the steps recommended by OAE.

e. [redacted] J.D.

J.D. [redacted] works for University Parking. Plaintiffs' Br. at 31. J.D. [redacted] complained that his supervisor in the Parking Department used the n-word multiple times and "made other statements that were derogatory towards African Americans." Plaintiffs' Br. Ex. 50 at 04694. In particular, J.D. [redacted] alleged that his supervisor had used the n-word and questioned the Black Lives Matter movement while taking a smoking break. *Id.*

Plaintiffs argue that an initial draft of J.D. [redacted] report recommended a finding that the NDP had been violated. The final report did not find such a violation. Plaintiffs fail to note, however, that OAE concluded that the subject behavior violated the University's Code of Conduct. Plaintiffs' Br. Ex. 50 at 04697. Based on that violation, OAE recommended "the

termination of Mr. Wise's appointment with the University." *Id.* Less than a month after OAE's investigation and recommendation, Mr. Wise was no longer employed at the University. Johnson Decl. ¶ 10.

Ultimately, Plaintiffs' Motion only highlights the variance in the claims they have brought forth; Plaintiffs Motion highlights different employees, working under different supervisors at different locations, who brought different claims, at different times, and led to different resolutions. The table below summarizes the factual differences among Plaintiffs Derick Brown, Atiba Flemons, and Jeffrey Taylor, as well we Plaintiffs' class examples [redacted] C.A. [redacted] and [redacted] J.D.:

III. PROCEDURAL BACKGROUND

A. Plaintiffs' original class claims.

On February 19, 2019, Plaintiffs filed their Amended Complaint ("Complaint"), seeking class relief claiming the Board of Trustees for the University of Illinois ("University") is liable for creating a campus-wide hostile work environment in violation of Title VII and the Illinois Civil Rights Act. Compl. ¶¶ 488-503, Dkt. 4. Plaintiffs' Complaint centered on the claim that the University had created a pervasive hostile work environment for Black employees by adopting its Nondiscrimination Policy ("NDP"), and through the policies and actions of the Office of Access and Equity ("OAE"), which is charged with investigating allegations that the NDP has been violated. Plaintiffs' complaint alleges that the OAE, the office tasked with enforcing the NDP, is "infected with racism," *id.* ¶¶ 114-34, and that the OAE engages in a pattern or practice of deliberately failing to find that racial discrimination has occurred under the NDP, *id.* ¶¶ 135-246.

Plaintiffs' Complaint sought compensatory, injunctive, and declaratory relief for a class-wide hostile work environment.

Plaintiffs' Complaint also alleged disparate treatment claims Title VII, *id.* ¶¶ 517-523, but abandoned them when the University moved to dismiss Plaintiffs' respective Title VII claims

under Rule 12(b)(6). Responding to the University's motion to dismiss, Plaintiffs represented to the Court that they were pursuing only hostile work environment and retaliation claims. Dkt. 18, at 1. Judge Bruce relied on that representation in denying the University's motion to dismiss. *See* August 8, 2019 Text Order ("The court would also note that Plaintiffs … are pursuing only hostile work environment and retaliation claims under Title VII and the ICRA."). Plaintiffs took no steps in response to Judge Bruce's order to suggest otherwise.

Plaintiffs' retaliation claims were pled only as individual claims. *See* Compl. at ¶¶ 83-88 (identifying the retaliation claims brought under Title VII and ICRA as "On Behalf of Named Plaintiff Individually for their Non-Class Claims". So Plaintiffs' class claim were now based exclusively on hostile work environment claims. The Complaint proposed three classes to be represented by Named Plaintiffs Brown, Flemons, and Taylor:

1. an "Issue Class" under Rule 23(c)(4) composed of "all present and future black University employees, to determine whether the University maintains the policies and practices [of a standard operating procedure of racial harassment]";

2. an "Injunctive Class" under Rule 23(b)(2) composed of "all present and future black University employees, in order to obtain injunctive relief, including an order to prohibit the University from engaging in unlawful employment practices, and such affirmative action as may be appropriate under Title VII and ICRA"; and

3. a "Monetary Relief Class" under Rule 23(b)(3) composed of "all black University employees, excluding University employees and officers with authority to make policy concerning employment discrimination, from April 8, 2016 to present who have been or may be subject to the University's pattern, policy, and/or practice of creating and maintaining a hostile work environment based on race."

Id. ¶¶247-49.

Plaintiffs' Complaint proposes a two-stage bifurcated trial. Stage I of the bifurcated trial would resolve Plaintiffs' injunctive and declaratory relief, and that determination would serve as "the essential predicate for the Class Representatives' and class members' entitlement to monetary and non-monetary remedies at Stage II of a bifurcated trial." *Id.* ¶ 281.

The University answered Plaintiffs' Complaint, denying Plaintiffs' entitlement under any of their individual or class theories. *See* Answer, Dkt. 23.

B. Discovery.

The Court ordered phased discovery, with Phase 1 of fact discovery dedicated to "the merits of the claims brought by the Individually Named Plaintiff (including damages)," and "the prerequisites to class certification pursuant to Fed. R. Civ. P. 23(a)." Dkt. 16, at 1. After the close of Phase 1 of fact discovery, the Court ordered Expert discovery, to be followed by briefing on the issue of class certification under Rule 23. *Id*. at 2.

The Parties then engaged in extensive discovery over a two-year period. The University made fourteen distinct productions totaling over 4,000 documents and over 30,000 bates-stamped pages of documents. The University ran search terms requested by Plaintiffs' counsel against a database with millions of files. The University expended considerable resources in attorney review of tens of thousands of documents for privilege and responsiveness. Wilson Decl. ¶ 8.

While the close of fact discovery marked the beginning of the expert-phase of discovery, Plaintiffs declined to pursue any expert discovery related to their individual or class claims.

C. Plaintiffs' Motion for Class Certification

On January 28, 2022, Plaintiffs filed their Motion for Class Certification. Dkt. 54-55. The proposed class presented in the Motion is materially different from the classes proposed in Plaintiffs' Complaint in three important respects. *First*, Plaintiffs changed the nature and scope of their proposed class. Plaintiffs dropped their Monetary Relief class, and therefore no longer seek class certification under Rule 23(b)(3). Plaintiffs' Motion proposes only one class definition (below), but proposes that the class definition is the basis for an injunctive class, potential issue classes, and a newly-added declaratory class:

> All individuals identifying as Black and/or African American who are currently employed at UIUC, or who have been employed at UIUC at any point since

> January 1, 2014, and who have not held a supervisory position within System Human Resources, Illinois Human Resources, campus unit offices for human resources, or the Office of Access and Equity at any point since January 1, 2014.

Unlike the original proposed class, this new class omits any reference to *future* employees and includes *former* Black employees for declaratory and injunctive relief. The injunctive class proposed in Plaintiffs' Complaint, meanwhile, applied only to "all present and future black University employees." Compl. ¶ 248.

Second, Plaintiffs' motion no longer seeks phased class litigation. Plaintiffs' Complaint proposed a two-stage bifurcated class trial. *Id*. ¶ 281. Stage I would determine "injunctive and declaratory relief," *id*. ¶ 281, which would then serve as the factual and legal predicates for Stage II. Stage II would then determine the "Class Representatives' and class members' entitlement to monetary and non-monetary remedies." *Id*. ¶¶ 281-83. Plaintiffs' motion for class certification does not propose multiple phases or stages, leaving the Court to a proposed class with only one phase, addressing only claims for injunctive and declaratory relief. Plaintiffs' Br. at 64. Plaintiffs claim that such injunctive relief will supply "full and final relief as to the class claims." *Id*. at 65.

Last, Plaintiffs' briefing abandons a key allegation from their Complaint—that OAE is staffed with racist leadership. In the Complaint, Plaintiffs repeatedly claimed that OAE was infected with racism. *See* Compl. ¶¶ 114-34 (claiming that OAE's former director Ms. Johnson, "herself racially harasses her black subordinates" and that "several members of UIUC OAE leadership similarly have engaged in racial [sic] motivated mistreatment of black OAE employees"). The Complaint alleges that this racism internal to OAE explains the University's "powerful motive to find that conduct does not raise to the level of a violation of the University's NDP." Compl. ¶ 118.

IV. LEGAL STANDARD

Plaintiffs bear the burden of proving that their proposed class should be certified under Rule 23. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006). Although class

certification proceedings are not "a dress rehearsal for the trial on the merits," *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012), in deciding the certification question, the Court does not presume that all well-pleaded allegations are true, *see Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001). Rather, before it allows a case to proceed as a class action, the Court "should make whatever factual and legal inquiries are necessary under Rule 23." *Id.* at 676. "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The Court can only certify the class if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011).

Plaintiffs try to generate a more favorable legal standard by relying on bad precedent and misrepresenting legal authority. Plaintiffs cite *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974) for the proposition that "the Court must take the substantive allegations of the complaint as true." Br. 39. That aspect of *Eisen* was rejected in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (describing *Eisen*'s discussion of Rule 23 as a pleading as "the purest dictum" that is "contradicted by our other cases"). Plaintiffs also cite *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) for the proposition that "[t]he Court also should employ a presumption in favor of maintaining a class action[.]" Br. 39. The *Califano* Court says no such thing. The Supreme Court has, in fact, repeatedly stressed that courts are not to certify class actions without first performing a "rigorous analysis" into whether a plaintiff has established that the proposed class satisfies the prerequisites of Rule 23. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

V. ARGUMENT

Plaintiffs cannot meet the requirements of Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs cannot establish as a matter of law either "that there are questions of law or

fact common to the class" nor that "the claims of the representative parties are typical of the claims or defenses of the class." Instead, Plaintiffs' motion layers a legally unworkable class claim—campus-wide class adjudication of highly individualized hostile work environment claims—atop a deeply distorted portrait of the way the University's responds to claims of race-based misconduct. The record is clear—the University has no policy or practice of discriminating against Black employees as it conducts investigations into race-based misconduct. Stripped of Plaintiffs' misrepresentations and distortions, the facts in the record shows that the University is committed to diligent investigation and response to claims of racial discrimination. Indeed, the University has many offices, policies, and practices to deter race-based misconduct and to remedy any such misconduct where it occurs.

The law is also clear—hostile work environment claims cannot be commonly adjudicated among employees who did not work in a common environment. Looking only to binding precedent from this circuit, Plaintiffs' proposed class is barred.

A. Plaintiffs' proposed class cannot meet Rule 23(a)'s prerequisites for class certification.

1. Plaintiffs provide no "significant proof" that the University has a policy or practice of enforcing the NDP in a discriminatory fashion.

Plaintiffs' assertion that the University maintains a policy or practice of enforcing the NDP in a discriminatory manner must be supported by "significant proof." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353 (2011). Yet, Plaintiffs fail to provide any evidence, let alone significant proof, that the University maintains racially discriminatory policies or practices.

> Plaintiffs claim the University has the following discriminatory policies or practices:
> *One:* OAE has a practice of never issuing a finding of a violation of the NDP;
>
> *Two:* OAE refers draft investigatory findings for Legal Review only where there is a preliminary recommendation that a violation of the NDP is indicated, ensuring that UIUC's legal department will override the preliminary determination, as it has done on every such review;
>
> *Three:* OAE knowingly employs a definition of "harassment" constituting a violation of the NDP that is more demanding than the requirements of proving a

> claim under Title VII, and thus disadvantages those alleging racial harassment, including the putative class members;
>
> *Four:* OAE applies a different definition of "harassment" to complaints involving sexual harassment that entails a less demanding standard than the definition applied in complaints alleging racial harassment, and thus discriminates "because of" race; and
>
> *Five:* OAE maintains a practice of nonenforcement by purposefully disregarding provisions of the NDP aimed at preventing harassment, and by taking no measures to mete out discipline, mandate reporting of racial harassment, ormandate training on the NDP for all employees.

Plaintiffs' Br. at 2. Plaintiffs simply fail to show that four of the five policies exist. The one that does exist—No. 4—cannot be construed as a racially discriminatory policy.

a. Plaintiffs have not shown that OAE has a practice of never finding a violation of the NDP.

After two years of discovery into thousands of University records, Plaintiffs have found no documentary evidence that OAE, or the University more broadly, has adopted a policy or practice of refusing to find NDP violations. In fact, Plaintiffs came across examples where the University *did* find "illegal discriminatory or harassing activity," though Plaintiffs studiously avoid mentioning those examples in their briefing. *See, e.g.*, Final Report: Review of the Work Environment in Facilities & Services at the University of Illinois at Urbana Champaign, at 2 (February 23, 2017), available at https://fs.illinois.edu/docs/default-source/news-docs/finalreport.pdf?sfvrsn=506effea_8 (Final Report cited in Plaintiffs Br. at 38 n. 21); *see also* Eric Smith Deposition, at 129-34 (Eric Smith testifying to finding a hostile work environment violation of the NDP resulting in the termination of the respondent supervisor).

Plaintiffs' nonetheless claim that the "UIUC admitted that there was not a single instance of a final determination that the NDP was violated during the class period." The University said no such thing, and, as shown above, University employees actually testified that the opposite is true. *See* Smith Dep. at 129-34. As evidence of the University's supposed admission, Plaintiffs cite a page from Heidi Johnson's 30(b)(6) deposition. Plaintiffs' Br. at 5. Here's the transcript:

> Q: Okay. And just to clarify for—we discussed this yesterday, but for the record for this deposition, are you aware of any investigations handled by OAE that resulted in a determination that the NDP was violated?
> A: As mentioned yesterday, *I do not recall*.

Plaintiffs' Br. Ex. 39 at 100 (emphasis added). As Plaintiffs' counsel surely knows, a witness failing to recall something does not amount to "an acknowledgment that facts are true," ADMISSION, Black's Law Dictionary (11th ed. 2019). In construing Ms. Johnson's testimony as an admission, Plaintiffs misrepresent the record.

The facts show just the opposite. Far from demonstrating a basis for a "hostile work environment" for an entire class, Plaintiffs' claims fail to show that even their chosen class representatives did not encounter a policy or practice of not finding NDP violations. Plaintiffs had access to 76 OAE investigation files relating to racial harassment complaints of African American employees.[5] Plaintiffs' Br. at 48. Of those, Plaintiffs chose to highlight two investigation results—C.A. [redacted] and J.D. [redacted]. These two examples—ostensibly the most egregious cases Plaintiffs could find—do not show that OAE looks the other way when it comes to NDP violations. On the contrary, they actually illustrate that OAE applies the same hostile work environment elements in a manner consistent with federal jurisprudence. Tellingly, Plaintiffs do not really argue otherwise.

C.A. [redacted]. OAE investigated C.A. [redacted] racial hostile work environment claim, interviewed multiple witnesses in addition to the complainant and respondent, and concluded that, even crediting C.A. [redacted] interpretation of events, C.A. [redacted] conduct was not sufficiently pervasive nor severe" to constitute a hostile work environment.

OAE did not get this case wrong. As this Court has made clear, "Title VII is *not* a general civility code to be used by anyone who is upset with his coworker or boss." *Whitlow v. Bradley Univ.*, No. 1:16-cv-01223-JBM-JEH, 2017 WL 3521639, at *1 (C.D. Ill. Aug. 16, 2017) (emphasis in original). In *Whitlow*, this Court emphasized that "Title VII does not protect

[5] As noted in the Factual Background above, a "file" does not necessarily result in a "Final Report" and much more frequently results in a withdrawal or mediated resolution.

against 'standoffish, rude, or unprofessional behavior from coworkers.'" *Id*. at *6 (citation omitted). OAE properly came to the same conclusion regarding [redacted] racial harassment claim.

> Plaintiffs' sole criticism of OAE's hostile work environment analysis is as follows: In its harassment analysis, OAE accounted for a single instance of mistreatment, ignored the balance of [redacted] evidence, then concluded that the one fact it acknowledged on its own was not sufficiently sever or pervasive to support an NDP violation.

Plaintiffs' Br. at 34. Yet Plaintiffs make no argument that harassment *would have been found* if it the analysis had included the other alleged conduct, which was, taken with the "show pony" comment, neither severe nor pervasive, and only speculatively connected to race. Critically, Plaintiffs fail to even argue that OAE *was wrong* to conclude that [redacted] was not subjected to a hostile work environment.[6]

[redacted]. Plaintiffs' treatment of the [redacted] case is even less helpful to their cause. Plaintiffs make *no argument* that OAE's final report was incorrect in concluding that [redacted] was not subject to a hostile work environment. Plaintiffs instead focus on the fact that OAE's recommendation changed after University Counsel reviewed an earlier draft report. Plaintiffs' Br. 31-32, 49-50. Plaintiffs overlook the relevant question: Did the final report, incorporating University Counsel's feedback, get it right? Plaintiffs don't say. But the answer is clearly yes. The OAE final report regarding [redacted] accorded with Title VII jurisprudence.

OAE ultimately concluded that [redacted] supervisor's use of racial epithets during a smoke break "do not by themselves establish the severe or pervasive conduct needed to sustain a hostile work environment claim under the relevant law." *Id*. at 4. The investigator reasoned that while it was possible under certain circumstances for a single racial epithet to create a hostile work environment, "most courts have declined to find a hostile work environment unless the use of the racially offensive language has been repeated, continuous and prolonged." *Id*. at 3-4. In

[6] Plaintiffs focus on [redacted] retaliation claim, which the OAE report discussed in great detail. *Id*. But Plaintiffs do not bring a retaliation class action claim, so this example is not relevant.

reaching that conclusion, the OAE investigator accurately described Title VII jurisprudence. *See, e.g.*, *Smith v. Illinois Dep't of Transp.*, 936 F.3d 554, 562 (7th Cir. 2019) (affirming summary judgment for an employer where a hostile work environment claim involved, among other things, one incident of a supervisor calling the plaintiff a "stupid ass ni[]"). *see, e.g.*, *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 552 (7th Cir. 2002) (a Black employee's exposure to the N-word in the workplace does not establish a hostile-work environment claim). The Seventh Circuit stresses the frequency of racial epithets in the workplace above all else, differentiating between cases involving multiple instances of racist conduct—which may be actionable—from cases where "there was one isolated racial epithet"—which invariably are not. *See Cerros v. Steel Techs.*, *Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2002).

The OAE final report found the statements "repugnant," concluded that they have "no place within the workplace," and found them to be a gross violation of the University's Code of Conduct. *Id*. at 4. The final report recommended termination. Within the same month that OAE issued its report, the supervisor was no longer employed at the University. Yet, none of this additional detail is in Plaintiffs' lengthy brief.

The [redacted] J.D. example, far from proving a OAE policy of refusing to find an NDP violation when warranted, shows that the OAE investigator (a) came to the right conclusion regarding the NDP (b) nonetheless found Mr. Wise conduct unacceptable to the University; and (c) that the University followed OAE's recommendation to terminate Mr. Wise's employment. The fact that this is one of the two cases Plaintiffs have chosen to highlight in this case tells the Court everything it needs to know about the viability of this class action.

Inexorable zero. Lacking any documentary evidence of a discriminatory policy or practice, or even examples of OAE misapplying the NDP, Plaintiffs attempt to clear the evidentiary hurdle by use of the legal concept of the "inexorable zero." This legal concept does not apply here.

First, taking a step back, the "inexorable zero" without more does not prove anything. An individual plaintiff claiming a hostile work environment would get nowhere relying solely on

the circumstantial evidence that his employer had not sustained other claims of unlawful discrimination. Plaintiffs here are trying to maintain an entire class action on that fact, rather than show any evidence that the University actually mishandled these cases.

Second, Plaintiffs fundamentally misconstrue the cases which have applied that the "inexorable zero." The reference to "inexorable zero" comes from a footnote in *Teamsters*, 431 U.S. at 342 n. 23, where the Court was discussing a situation in which certain employment positions were, as a statistical matter, clearly unavailable to certain races. In the wake of the *Teamsters* decision, some cases have used "the inexorable zero" as a way to infer discriminatory treatment in the absence of complex statistical analysis. For example, in one case cited by Plaintiffs, the inexorable zero was used to infer sex discrimination when 0/230 foremen selected over a nine-year period were women. Plaintiffs' Br. at 46 (citing *Jenson v. Eveleth Taconite Co*, 139 F.R.D. 657, 661 n.8 (D. Minn. 1991)). That is not the situation Plaintiffs present here. Plaintiffs, in fact, repeatedly claim—incorrectly—that the University has found *no* violations of the NDP, for any race. The analog to *Jenson* would be if the plaintiffs there complained that the employer left a foreman position open for several years, thereby discriminating against female applicants. Absent additional facts, it would be very difficult to say that the employer discriminated against female employees by failing to hire anyone for the position. The same applies here. Plaintiffs have not advanced a claim that the University's application of the NDP is applied in a racist fashion against Black employees. They instead claim that the University makes finding an NDP violation too difficult for complainants generally. This is not an "inexorable zero" case. No case anywhere in the country has found that a lack of finding of a violation of a non-discrimination policy is evidence of discrimination. Plaintiffs are asking this court to create entirely new law.

Last, Plaintiffs only generate their inexorable zero number by (1) ignoring cases where the University has found illegal discrimination and harassment, *see* Smith Dep. at 129-34; and (2) ignoring the fact that, of the 76 complaints of racial discrimination by African Americans that they place in the denominator, many never resulted in a final report because they were either

resolved or the complaint was withdrawn, Johnson Decl. ¶ 7. Of the complaints that are filed with OAE, "only a relatively small number proceed[] through the investigative process to a final report." *Id*.

In sum, Plaintiffs "inexorable zero" claim here is outlandish. Plaintiffs seem to be arguing that if several incidents had resulted in a finding of a violation of the NDP – evidence that the University was regularly encountering discriminatory workplace actions of a severe and pervasive nature – that somehow Plaintiffs would find this more acceptable. This "heads I win, tails you lose" argument by Plaintiffs is nonsensical. The University has no policy or practice of making the NDP more demanding than Title VII, "effectively prohibit[ing] any finding that alleged racial harassment will be found to have violated the NDP." Plaintiffs' Br. at 46.

Plaintiffs' "inexorable zero" claim, however, is contradicted by another "inexorable zero." During the purported class period, there has never been a finding by either the EEOC or the Illinois Human Rights Commission that the University has violated Title VII or the Illinois Civil Rights Act. Given Plaintiffs theory of the case – that there have been "zero" findings of a violation of the University's NDP despite, according to Plaintiffs, multiple cases where such a finding should have been made – one would expect at least **one** case in which a government agency had sanctioned the University for this conduct. But Plaintiffs have not identified any such case, nor could they.

b. Plaintiffs have not shown that legal review of OAE decisions only occurs where an NDP violation is indicated—or that, if there were such review, it would violate Title VII.

Plaintiffs claim that "OAE refers draft investigatory findings for Legal Review *only* where there is a preliminary recommendation that a violation of the NDP is indicated, ensuring that UIUC's legal department will override the preliminary determination, as it has done on every such review." Plaintiffs' Br. at 2 (emphasis added). This is false. Plaintiffs' evidence in support of this claim is a supposed admission by the University during Heidi Johnson's 30(b)(6) deposition. Plaintiffs' Br. at 5. (stating that UIUC "admit[ted] that this Legal Review is part of

OAE's "practice") (citing UIUC Deposition at 171-177). During the deposition, however, Ms. Johnson repeatedly said the exact opposite. When asked whether the "university counsel review[ed] all OAE draft reports" or if they instead only reviewed reports where "there was a finding, or a draft finding, reflecting evidence of discrimination," Ms. Johnson answered: "They [University Counsel] have reviewed reports that were—that there was not going to be a finding in the past." UIUC Deposition at 176. To make sure the point was not lost on Plaintiffs' counsel, Ms. Johnson continued: "I just want to make it clear that there could be a time or two that they reviewed a report that did not have violation of the discrimination—the nondiscrimination policy." *Id*. 176-77.

On the other hand, The Report and Recommendations of the Committee on Faculty Sexual Misconduct, which Plaintiffs cite repeatedly cite authoritatively, describes UIUC legal policy as follows: "Legal counsel currently reviews the reports and recommendations developed by OAE before they are issued in part to identify legal risks." Plaintiffs' Br. Ex. 9 at 03938.

In sum, Plaintiffs have adduced no admissible evidence that such a policy exists either in OAE or in the University Counsel's office.

c. Plaintiffs have not shown that the NDP standard violates Title VII.

Plaintiffs claim that the NDP "force[s] complainants beyond the burdens of proof a Title VII plaintiff faces in court." Plaintiffs' Br. 6. This misrepresents the NDP, but it is also of dubious relevance legally. *First*, Plaintiffs claim that the NDP requires "a proof of 'sufficiency' with respect to the first element that is separate and in addition to the proof required for the third element[.]" *Id.* at 7. Here are the definitions provided in the NDP and in *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 900 (7th Cir. 2018), respectively:

NDP:

> This policy is violated when the unwelcome conduct is based on one or more of the protected classifications, and is either **(1) sufficiently severe or pervasive**; and (2) objectively offensive; and (3) unreasonably interferes with, denies, or limits a person's ability to participate or benefit from educational or employment

opportunities, assessments, or status at the University.

Johnson:

> [P]laintiffs must show that (1) they were subject to unwelcome harassment; (2) the harassment was based on their race; (3) the harassment was so **severe or pervasive** as to alter the conditions of employment and create a hostile or abusive working environment; and (4) there is a basis for employer liability.

(Emphases added).

The argument is pedantic. Plaintiffs provide no evidence that the University relied on the location of the words "severe and pervasive" in the first element of the NDP to avoid a conclusion that would have been required if those terms were placed in the third element.

Second, Title VII does not require that all employers adopt a non-harassment policy *at all*, let alone a policy that perfectly mirrors the language used in recent circuit precedent. As the Seventh Circuit pointed out in *Hardy v. University of Illinois at Chicago*, there is no legal authority for the "the University must "mandate" that employees utilize a specific procedure, and *Ellerth* and *Faragher* do not hold that an employers must do so." 328 F.3d 361, 365 (7th Cir. 2003); *see also Burlington Indus., Inc. v. Ellerth*,524 U.S. 742, 765 (1998) ("proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

Last, Plaintiffs acknowledge in their briefing that these specific terms were not present in the NDP prior to December 2016—meaning their complaint about this aspect of the NDP is not common across the class period. Plaintiffs' Br. at 7, n. 5. Plaintiffs try to overcome this issue by saying that "OAE investigators applied the definition of 'harassment' in the same way substantively throughout the class period." *Id*. As support for this claim, Plaintiffs again misrepresent deposition testimony. Looking to Plaintiffs' citation—Ms. Abdullah-Span's deposition, pages 115-16, there is no testimony supporting Plaintiffs' claim. *See* Span Deposition at 115-116.

Plaintiffs argue that the University's implementation of the NDP is less favorable to

complainants than Title VII because complainants in an NDP investigation lack the powers of discovery, Compl. ¶ 66, are not given access to all materials used in the investigation, *id*. ¶65, and NDP investigators need not consider the totality of the circumstances, as required under Title VII, *id*. ¶¶68-70. Plaintiffs are right that the University's OAE office does not regard itself as a federal district court, and afford a complainant and the accused all the rights afforded under the Federal Rule of Civil Procedure and the Federal Rules of Evidence. But so what? What legal authority shows that employers violate Title VII when they do not create investigatory bodies and procedures equivalent to formal federal litigation? In fact, by Plaintiffs' standard, the EEOC itself would be a chronic violator of Title VII. Its investigations do not replicate the procedural protections of federal litigation. The EEOC is not required to take testimony under oath, give complainants an opportunity to confront the respondent, or provide complainants with the power of civil discovery. *See Quality Practices for Effective Investigations and Conciliation*, U.S. Equal Employment Opportunity Commission, (September 30, 2015), *available at* https://www.eeoc.gov/quality-practices-effective-investigations-and-conciliations.

The answer: there is none, and Plaintiffs can cite none. Indeed, the notion that the University's NDP, by lacking all the procedures available in federal litigation, automatically subjects the University to Title VII liability run headlong into a wall of legal authority holding the opposite. Courts have repeatedly held that employers lacking any antidiscrimination policy at all let alone a policy mirroring Title VII, can make a successful affirmative defense against Title VII employer liability. *Hardy v. University of Illinois at Chicago*, 328 F.3d 361 (7th Cir. 2003) is instructive in this regard. There, the plaintiff alleged that she was subject to a hostile work environment on account of her sex. *Id*. at 362. The University asserted the *Ellerth/Faragher* affirmative defense against liability on the grounds (1) "that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that Hardy failed to take advantage of any preventive or corrective opportunities provided by the University to otherwise avoid harm." *Id*. at 364. As evidence of its reasonable care, the University pointed to its formal sexual harassment policy. *Id*. at 365. Hardy responded that "the

policy was not reasonable enough to prevent sexual harassment because the reporting procedures were merely 'suggestions,' and the University did not adequately respond to her complaints." *Id*. The Seventh Circuit rejected Hardy's argument, citing the fact that both *Ellerth* and *Faragher* held that an employer could make out the affirmative defense against Title VII liability *even when the employer had no antiharassment policy*. *Id*. If an employer lacking any such policy took "reasonable care to prevent and correct" harassment, then an antiharassment policy that mirrors Title VII cannot be a per se Title VII violation.

Plaintiffs argue that the University, by failing to adopt the procedures available in federal litigation, "frustrates … Title VII's primary objective geared toward preventing further harassment." Plaintiffs' Br. at 51. Plaintiffs claim that "[i]nternal employer investigations of racial harassment are required by Title VII to facilitate reporting and remediation of racial harassment *before it becomes severe and pervasive*." Br. at 51 (emphasis in original). What Plaintiffs advance here is the facially contradictory argument that employers can be—due to their investigation procedures—liable for a hostile work environment claim *before the critical elements of a hostile work environment are established*. Predictably, Plaintiffs' legal citations show as much. They quote dicta from *Alalade v. AWS Assistance Corp.*, where the district court is discussing the separate question of the Supreme Court's policy rationales behind holding employers vicariously liable for supervisor harassment in *Ellerth/Faragher* affirmative defense doctrine. 796 F. Supp. 2d 936, 945 (N.D. Ind. 2011). They also cite for support a stray quote from a Seventh Circuit opinion in a case where the court was clear "that this is not a Title VII case; it is an ERISA case." *Chalmers v. Quaker Oats Co.*, 61 F.3d 1340, 1343 (7th Cir. 1995).

Retaliation. Plaintiffs argue that the NDP maintains a deficient antiretaliation standard. Plaintiffs bring no retaliation class claim, so this argument is, *first* of all, irrelevant. *Second*, even if this argument were relevant, it is unsupported by the record.

Plaintiffs point out that the NDP only deems actions retaliatory if "they have a materially adverse effect on the working, academic, or living environment of a person or if they hinder or prevent the person from effectively carrying out their University responsibilities." Plaintiffs' Br.

at 10 (quoting NDP, Plaintiffs' Ex. 1). Plaintiffs say this is inadequate because the Supreme Court in *Burlington N. & Santa Fe Ry. Co. v. White* said that the test for retaliation is whether the acts are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." 548 U.S. 53, 57 (2006). Plaintiffs say that the NDP is in conflict with the *Burlington* because in that decision the Supreme Court "rejected the requirement that the challenged actions must be related to the terms or conditions of employment." Plaintiffs' Br. at 10.

To create the appearance of a conflict, Plaintiffs have simply stripped words right out of the NDP. Far from requiring that retaliator actions be related to the terms or conditions of employment, the NDP explicitly deems retaliatory any action that has "a materially adverse effect on the *working, academic, or living environment of a person*." Plaintiffs' Br. Ex. 1 (emphasis added). The policy then uses the conjunction "or" and also deems retaliatory acts that "hinder or prevent the person from effectively carrying out their University responsibilities.

d. Plaintiffs have not shown that the NDP violates Title VII because the University adopted a new definition of sexual misconduct in Title IX investigations.

Plaintiffs argue that the University, in its efforts to ensure compliance with Title IX regarding claims of sexual harassment, have discriminated against Black employees at the University. This argument fails out of the gate because the University adopting a stringent sexual misconduct policy is not relevant to Plaintiffs' claim—a hostile work environment claim. Plaintiffs may try to couch this as a disparate treatment claim. They cannot, for two reasons—(1) Plaintiffs waived that claim, *see above* § 4(B)(1); and (2) the policy does not, on its face, treat any Black employee differently than any non-Black employee. It is a policy that is facially neutral with respect to race. Plaintiffs' argument that the University's revisions to its sexual misconduct policy simply reflects the weakness of the theory they pled and sought to validate throughout discovery.

The reality is that the University has compliance obligations under both laws. Its efforts to strengthen its Title IX policies around investigating sexual assault claims do not racially discriminate against any employee. It would be an absurd result if University's entirely legitimate efforts to address sexual harassment under Title IX placed it in violation of Title VII.

The University's Sexual Misconduct Policy is intended to ensure, among other things, that the University "compl[ies] with Title IX." Plaintiffs' Ex. 3 at 1. In 2020 the University adopted revisions to the Sexual Misconduct Policy in an "effort to align the University's policy and procedures with new Title IX regulations and to incorporate recommendations made by the Committee on Faculty Misconduct for addressing unwelcome sexual, sex, or gender-based conduct by employees." *Id*.

Title VII and Title IX are distinct statutory provisions. The Supreme Court has repeatedly declined the opportunity to synchronize to interpret Title VII and Title IX in uniform fashion. *See, e.g.*, *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998). The penalties for Title VII and Title IX violations likewise vary. By enacting Title IX, Congress created a strong incentive for schools to adopt policies that protect federal civil rights; namely—that failure to comply with Title IX risks the loss of "the funds supplied by a myriad of federal agencies." *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862 (7th Cir. 1996), *abrogated on other grounds by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009).

In any event, the University only adopted these changes as of July 2020, meaning they are irrelevant for most of the class period, and entirely irrelevant for putative class members that departed before July 2020 or claims that arise before then.

e. Plaintiffs have not shown that OAE has a policy or practice of not enforcing the NDP.

Plaintiffs argue that the University does not help inform employees of the NDP, train employees about the NDP, or discipline employees.

With respect to discipline, the record simply does not bear that out. As covered above, the University does not hesitate to discipline employees in response to complaints of race-based misconduct. In the case of J.D. [redacted], his supervisor was terminated. In the case of Derick Brown, his supervisor was demoted. In the case of Jeffrey Taylor, his supervisor was transferred out of Taylor's worksite. In the case of Atiba Flemons, his supervisor received "additional supervision, training, guidance and mentoring to enhance the Brick Mason shop's work environment. Flemons OAE Report, UIBOT-Brown0007477.

Beyond discipline, the University requires mandatory ethics training, has a University ethics hotline, requires ethics training of new hires, and makes the NDP and applicable code of conduct readily available to all students, faculty, and staff. Wilson Decl. Ex. 1 at 00738.

Regarding training, Plaintiffs briefing admits to multiple efforts by the University to conduct investigations of racial misconduct across entire departments. As Plaintiffs say, "OAE conducted an investigation into the Dining department's treatment of its African American employees and found that there were disparities between White employees and African American employees with regard to disciplinary treatment and employment opportunities." Plaintiffs' Br. 30 n. 17. The University conducted a very similar study for Facilities and Services. And, as Plaintiffs concede, "OAE ultimately followed up with training for certain F&S employees." *Id.* at 38.

2. Plaintiffs' proposed class cannot satisfy Rule 23(a)(2) because it lacks commonality.

Plaintiffs' proposed class spans hundreds of work sites across the University and includes over 1,000 employees.[7] Plaintiffs propose only one legal claim to be commonly adjudicated across this class—a hostile work environment claim under Title VII.[8] A hostile work

[7] Plaintiffs provide no estimate of the number of class members but state that the University employed nearly 900 Black employees in 2015. Plaintiffs' Br. at 42. Given that the class includes current *and* former employees of the University over at least an eight-year period, Plaintiffs' proposed class likely numbers in the thousands.

[8] *See above* § III.A (explaining that Plaintiffs waived their disparate treatment claims). Plaintiffs' Complaint contains retaliation claims on an *individual*, rather than class, basis. *See* Compl. ¶ 504-515, Dkt. 4. And Plaintiffs' Motion does not ask the Court to certify retaliation class claims.

environment claim requires proof: "(1) that the work environment was both subjectively and objectively offensive; (2) that the harassment was based on membership in a protected class; (3) that the conduct was severe or pervasive; and (4) that there is a basis for employer liability." *Alexander v. Casino Queen, Inc.*, 739 F.3d 972, 982 (7th Cir. 2014).

Rule 23(a)(2) requires that a proposed class present "questions of law or fact common to the class." As the Seventh Circuit has explained: "One common question is enough, but not just any question will do." *Howard v. Cook Cnty Sheriff's Off.*, 989 F.3d 587, 598 (7th Cir. 2021). The kind of common question that satisfies Rule 23(a)(2) is one that will "resolve an issue that is *central to the validity of each one of the claims* in one stroke." *Wal-Mart Stores*, 564 U.S. at 350 (emphasis added). Plaintiffs' proposed class cannot satisfy Rule 23(a)(2)'s commonality requirement because no *element* of each putative class member's hostile work environment claim, let alone the University's *liability*, can be commonly determined.

The showing necessary to establishing the elements of a hostile work environment claim is fact intensive and worker specific. *Howard*, 989 F.3d at 604. Whether a hostile work environment is established turns on, *among other things*, "the frequency, severity, character, and effect of the harassment." *Harris*, 510 U.S. at 23. And even once a hostile work environment is established, the plaintiff must, in addition, prove that there is a basis for employer liability, which is also a "fact-bound inquiry." *Howard*, 989 F.3d at 608. Every element in this inquiry demands individualized facts, facts that are not fungible between putative class members have nothing in common aside from identifying as Black and having worked for the University at some point after January 1, 2014.

Howard. Binding circuit precedent instructs that Plaintiffs' class—a multi-site hostile work environment class—cannot satisfy commonality. In *Howard*, the court rejected a Title VII hostile work environment class that spanned multiple work sites and differently situated employees. The class at issue there was a hostile work environment class of over 1,000 female prison guards that claimed their employer had failed to enact policies sufficient to protect them from sexual harassment by male inmates. *Id.* at 592. The Seventh Circuit rejected the class,

reasoning that the class members' hostile work environment claims could not meet Rule 23's commonality requirement because of "meaningful distinctions among the class members' individual experiences" and because "plaintiffs have not demonstrated that [harassment] manifests in the same way across all parts of the jail, such that it could be a common question for the class." *Id*. at 604. The crux of the *Howard* court's problem with a hostile work environment class spanning so many different work environments was as follows:

> [T]he significant variation in harassment levels across different parts of the jail complex renders certain class members' work environments materially different from those of others. Some variation among class claims is inevitable, but the variation in this case is more than Rule 23 tolerates.

Id. at 598.

Howard also concluded that the plaintiffs could not generate commonality from the common question of "whether there is a basis for employer liability based on the defendants' failure to adopt reasonable policies to combat harassment." *Id*. at 607. The court pointed out that "the reasonableness of an employer's response to harassment is a fact-bound inquiry." *Id*. The plaintiffs argued, as they do here, that "the reasonableness of those preventive measures is a common question because the Sheriff's Officer has one set of policies to control sexual misconduct at the jail complex and it enforces those policies through a centralized, hierarchical management structure." *Id*. The court concluded that "employer liability is not a common question" because while the defendant's "policies may be uniform throughout the jail … the reasonableness of those policies (and any other preventive measures) *still depends on the specific circumstances of the plaintiff(s) or class member(s) challenging those policies*." *Id*. at 608-609 (emphasis added).

Likewise here. *Howard*'s holding that Rule 23's commonality requirement is not satisfied by a multi-site hostile work environment class—even with common policies and a hierarchical enforcement structure—bars Plaintiffs class claims here.

On all fronts, Plaintiffs' proposed class falls shorter of satisfying Rule 23(a)(2) than did the proposed class in *Howard*. Here, unlike the plaintiffs in *Howard*, Plaintiffs' briefing does not even suggest that there is *harassment* common to the class, focusing instead on the alleged defects in the University's policies in response to complaints of harassment. There, in a jail complex the court described as "massive," the area at issue spanned 36 buildings over eight city blocks. *Id*. at 604. Here the proposed class has a work site over 20 times that size, with over 600 buildings across over 6,000 acres.

Plaintiffs do not contend with *Howard*. In fact, Plaintiffs do not cite a single case in which a multi-site hostile work environment class such as theirs has been found to satisfy Rule 23. On the other side of the ledger, courts across the country have denied certification of a hostile-work-environment class due to the variability of the harassment experienced by the class members.[9]

Sellars. Plaintiffs' counsel cannot plead ignorance. Plaintiffs' counsel recently brought a multi-site hostile work environment class action against a long-haul trucking company in the Northern District of Iowa where the defects identified in *Howard* were put on full display. *Sellars v. CRST Expedited, Inc.*, 359 F. Supp. 3d 633 (N.D. Iowa 2019). As with *Howard*, the court there eventually confronted the fact that the plaintiffs' proposed hostile work environment class would allow the plaintiffs to aggregate evidence of sexual harassment from a variety of plaintiffs for the purpose of showing a general hostile work environment, but that a finding of a general hostile work environment would be insufficient for a finding of liability for any particular plaintiff. *Id*. at 679-81. As here, and in *Howard*, the plaintiffs in *Sellars* tried to generate commonality from focusing on "[employer] records during the relevant time period as to how [the employer] handled sexual harassment complaints." The court recognized that the

[9] *See, e.g.*, *Skipper v. Giant Food Inc.*, 68 Fed. Appx. 393, 395-96 (4th Cir. 2003) (denying class certification of a hostile work environment class because the facts "will vary widely from warehouse to warehouse in cases of a hostile work environment"); *Van v. Ford Motor Co.*, 332 F.R.D. 249, 277-78 (N.D. Ill. 2019) (denying certification when the plaintiffs' and the class members' experiences likely varied due to "the size of the Plants and the fact that named Plaintiffs have not worked in many of the Plants different departments and crews during all relevant time frames").

plaintiffs' approach "raise[d] the question of whether an employer's common response to individualized hostile conditions can form the entire basis of a hostile work environment claim." In accord with *Howard*, the concluded:

> I find that it cannot. Plaintiffs are not alleging that CRST's policies, patterns or practices themselves are the harassing conduct, but the means by which CRST tolerates, encourages and allows sexual harassment in the workplace. As CRST notes, this addresses the second part of a hostile work environment claim (the employer's response), but the first part (the unwelcome sexual harassment and the severity of such harassment), is equally important to establish liability. . . .
>
> *This is where the class structure falls apart, as there is no common evidence regarding the alleged harassment* female drivers experienced. Considering that at Phase II, the conduct will have to be evaluated again (regarding whether it is objectively and subjectively offensive), the class structure, even with regard to one issue (the employer's negligence), loses its efficiency.

Id. at 679-80 (emphasis added).

This Court faces virtually the same situation. As the district court in *Sellars* found, even if common evidence as to an employer's response exists, it is insufficient to answer the question of whether the University is liable with respect to any individual Title VII claim. *Id*.

Plaintiffs' own briefing inadvertently concedes that there is no commonality. As established above—a common question must be a question that resolves an issue central to the validity of putative class members' claims. This common question cannot be a peripheral question that is "relevant to just one small part of the analysis" and "leaves [the Court] far from resolving the litigation on a classwide basis." *McFields v. Dart*, 982 F.3d 511, 517 (7th Cir. 2020). Plaintiffs propose five common issues, none of which would resolve a single element of any class member's hostile work environment claim. Plaintiffs propose the following "common" issues:

> *One:* Whether OAE has a policy or practice of never issuing a finding of a violation of the NDP;
>
> *Two:* Whether OAE has a policy or practice of referring to UIUC's Legal Department for review and reversal only those draft preliminary investigation reports that indicate a violation of the NDP;

> *Three:* Whether the provisions of the NDP itself are more demanding than those of Title VII that they effectively prohibit any finding that alleged racial harassment will be found to have violated the NDP;
>
> *Four:* Whether OAE's definition of "harassment" as applied to complaints of racial harassment demands more proof than the definition OAE applies to complaints of sexual harassment, further evidence that UIUC is discriminating "because of" race; and
>
> *Five:* Whether OAE has a practice of nonenforcement of the NDP with respect to reporting racial harassment, training employees on what constitutes racial harassment, and meting out discipline that, in effect, OAE tolerates racial harassment.

Plaintiffs' Br. at 45-46. Notably, these alleged "common issues" are nothing more than a request for more discovery. By asserting these "issues" Plaintiffs are tacitly admitting that after three years of discovery and nearly a dozen depositions, they have not found facts to support their case. Setting these factual issues aside, though, these alleged issues reveal Plaintiffs' lack commonality because the answer to any of these questions simply will not "resolve an issue that is *central to the validity of each one of the claims* in one stroke." *Wal-Mart Stores*, 564 U.S. at 350 (emphasis added).

3. Plaintiffs also cannot satisfy the requirement of "typicality."

In addition to satisfying the "commonality" prong of Rule 23, Plaintiffs must also show their claims are typical of the claims of the class at large. *See* Fed. R. Civ. P. 23(a). "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 597 (7th Cir. 1993). "While factual distinctions between the claims of the named and represented plaintiffs do not defeat typicality, the claims of the named plaintiffs must have 'the same essential characteristics' as the claims of the proposed class." *Orr v. Elyea,* 279 F.R.D. 474, 479 (C.D. Ill. 2009) (citations omitted) (typicality defeated when state inmates with Hepatitis C had different treatment circumstances, incarceration periods, genotypes). "A class is not fairly and adequately

represented if class members have antagonistic or conflicting claims." *Ahad v. Bd. of Trustees of S. Illinois Univ.*, No. 15-CV-3308, 2018 WL 4350180, at *11 (C.D. Ill. Sept. 12, 2018) (citations omitted) (no typicality when plaintiff alleging gender-based pay discrimination failed to allege a common policy among class members); *see also Christie Clinic, P.C. v. MultiPlan*, Inc., No. 08-CV-2065, 2009 WL 175030, at *9 (C.D. Ill. Jan. 26, 2009) (typicality defeated when defendants' contract and course of dealing were unique to plaintiff).

Here, even a cursory review of the five cases submitted by Plaintiffs indicate that they cannot satisfy the "typicality" prong of the analysis. Each of the five cases submitted by Plaintiffs involve different supervisors and different fact patterns. Each involve different allegations of misconduct and different injuries arising from that conduct. There is no typical plaintiff any more than any one "work environment" alleged here could be considered "hostile" compared to any other. There is simply nothing typical about each Plaintiff—or any set of Plaintiffs —that can be translated to every other case. Thus, the "typicality" prong of the Rule 23 analysis fails as a matter of law.

B. Plaintiffs do not satisfy either the requirement of commonality or typicality by calling their proposed class a *Teamsters* pattern or practice class.

Plaintiffs go to great lengths to avoid addressing the defects identified above. Plaintiffs try sidestepping these class defects by re-branding their class as something other than what it is—a hostile work environment class. Plaintiffs' Brief only once, in passing, refers to their hostile work environment claim and Plaintiffs never refer to their class as a hostile work environment class. Plaintiffs instead characterize their proposed class as "*Teamsters* pattern-or-practice claim for racial discrimination." Plaintiffs' Br. at 39.

Plaintiffs' effort to satisfy Rule 23(a) requirements through avoiding the nature of their underlying claim fails for two related reasons: *first*, hostile work environment claims are the only class claims Plaintiffs have; and *second*, hostile work environment claims conflict with pattern-or-practice claims.

1. Plaintiffs waived any pattern-or-practice class claim.

"[P]attern-or-practice claims "represent a theory of intentional discrimination." *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 716 (7th Cir. 2012); *see also Council 31, Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO v. Ward*, 978 F.2d 373, 378 (7th Cir. 1992) (explaining that a pattern or practice suit is a "means of proving *intentional discrimination*") (emphasis added); *Wessmann v. Gittens*, 160 F.3d 790, 817 n.20 (1st Cir. 1998) ("In every instance in which the phrase has been used by the Supreme Court, a 'pattern or practice' claim under Title VII refers to a pattern or practice of *disparate treatment*, rather than disparate impact.") (emphasis added); *see also Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998) (referring to a pattern-or-practice claim as a "systemic *disparate treatment* theory") (emphasis added). Indeed, the namesake of Plaintiffs' proposed class, *Int'l Bhd. of Teamsters v. United States*, was a *disparate treatment* case. 431 U.S. 324, 335, n.15 (1977) ("The ultimate factual issues are thus simply whether there was a pattern or practice of such *disparate treatment* and, if so, whether the differences were "racially premised.") (emphasis added).

Plaintiffs have no such claim. They expressly waived their intentional discrimination over two years ago in response to the University's motion to dismiss. *See* Dkt. 18, at 1; August 8, 2019 Text Order ("The court would also note that Plaintiffs … are pursuing only hostile work environment and retaliation claims under Title VII and the ICRA."). Even when an explicit waiver has *not* occurred, plaintiffs are not allowed to plead one theory of Title VII liability and then switch to another theory at the last moment. *See DeClue v. Cent. Illinois Light Co.*, 223 F.3d 434, 437 (7th Cir. 2000) (holding that a plaintiff had waived a disparate impact claim by pursuing only a disparate treatment claim).

2. "Pattern-or-practice" claims conflict with hostile work environment claims.

Plaintiffs implicitly argue that they can mount a "pattern-or-practice" hostile work environment claim. They cannot. As courts across the country have found repeatedly, even in

the context of the EEOC suing—which does not require Rule 23 certification—hostile work environment doctrine and pattern-or-practice claims are incompatible.

Historically, the EEOC used the pattern-or-practice framework to pursue employers who intentionally discriminated by race or sex, usually in hiring or promotion practices. *Van v. Ford Motor Co.*, 332 F.R.D. 249, 274 (N.D. Ill. 2019). In those contexts, once a court accepts that company management *intended* to discriminate, pattern-or-practice theory helps establish classes of protected groups with less person-by-person evidence. For instance, a female working in a factory where management has decided not to promote females is likely a Title VII victim whether she knows of the problem or not. This, in turn, justified the *Teamsters* burden shifting, where the employer then would have to disprove discrimination.

A hostile work environment claim is different. Its elements require a plaintiff to have personally suffered "severe and pervasive" harassment sufficient to alter her working conditions. *Whittaker v. N. Ill. Univ.*, 424 F.3d 640, 645 (7th Cir. 2005) (a plaintiff must establish that the harassment she experienced was so severe or pervasive, both objectively and subjectively, that it altered the terms of the employee's employment). Using a pattern-or-practice framework does not change these elements. *Van*, 332 F.R.D. at 275 ("[A]dopting the *Teamsters* method of proof … does not obviate the need to consider the statutory elements of the specific cause of action."). Thus, unlike in hiring or promotion practices, "a finding that employer had a pattern or practice of tolerating sexual harassment in violation of Title VII does not necessarily establish that an individual claimant was exposed to harassment or that the harassment an individual suffered violates Title VII." *Sellars*, 359 F. Supp. 3d at 680-81; *see also EEOC v. Int'l Profit Assocs., Inc.*, 2007 WL 844555, at *14 (N.D. Ill Mar. 16, 2007) ("It is not clear why a finding that [an employer] had a company policy of tolerating sexual harassment … would make it any more likely that the harassment suffered by an individual claimant was severe or pervasive enough to be actionable.").

C. Plaintiffs' proposed class cannot satisfy Rule 23(b)(2) because it cannot afford final injunctive or declaratory relief for all members of the class.

Beyond meeting the prerequisites in Rule 23(a), Plaintiffs' class must qualify for certification under Rule 23(b)(2). That Rule requires that Plaintiffs show that the University "has acted or refused to act on grounds that apply generally to the class, so that *final* injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Rule 23(b)(2) (emphasis added). "The final clause is important: The injunctive or declaratory relief sought must be final to the class as a whole." *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 498–99 (7th Cir. 2012) (citation omitted and cleaned up). Rule 23(b)(2) is not satisfied "if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made." *Jamie S.*, 668 F.3d at 499. Such relief "would be class-wide in name only, and it would certainly not be final." *Id.*

So Plaintiffs must show that the class claims they have proposed are capable of final injunctive and declaratory judgments common across the class. They failed to make this showing.

1. Plaintiffs' requested declaratory relief cannot be final or common.

Plaintiffs' proposed class claims will not allow the Court to render a final declaratory judgment common across the class. Plaintiffs seek "[a] declaratory judgment that the policies, patterns and/or practices complained of violate Title VII and ICRA." Plaintiffs' Br. 64. For this declaratory judgment to be both final and common to the class, the Court would need to determine that the University was liable for a hostile work claim for each class member.

Plaintiffs wrongly think that the Court can make a final judgment about University liability for Title VII hostile work environment claims without first establishing the elements needed for any class member's hostile work environment claim. The Court simply cannot enter a final declaratory judgment that the University is liable to every class member under Title VII based on policies with which many class members have never interacted. But because of

Plaintiffs' mistaken belief, Plaintiffs make no effort to show that each class member, on an individual basis, has personally been affected by the challenged policies, or that they have made any complaint of racial harassment that would implicate the policies, or even that they have experienced unwelcome racial behavior. Without such a showing, the Court cannot render a final judgment on the University's Title VII liability as to the class.

A declaratory judgment that stopped short of that would also not work, as it would not be final "respecting the class as a whole." Rule 23(b)(2). It would instead, impermissibly, "merely initiate a process through which highly individualized determinations of liability and remedy are made." *Jamie S.*, 668 F.3d at 499.

2. Plaintiffs' requested injunctive relief is not supportable on a class-wide basis.

Plaintiffs' proposed injunctive relief suffers from the same problem. Plaintiffs seeks a variety of policy and administrative changes at the University that, they argue, would improve the University's response to complaints of racial harassment. Plaintiffs' requested injunctive relief fails, first of all, because is cannot succeed under the well-known test for a permanent injunction. "An injunction requires a showing that: (1) the plaintiffs have suffered irreparable harm; (2) monetary damages are inadequate to remedy the injury; (3) an equitable remedy is warranted based on the balance of hardships between the plaintiffs and defendant; and (4) the public interest would be well served by the injunction. *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 892 (7th Cir. 2011) (citation omitted).

As noted above, Plaintiffs fail to show that all the class members have suffered any harm, let alone an irreparable harm. Plaintiffs fail also to show that monetary damages are inadequate to remedy any class member's hostile work environment claim. Monetary damages are often sought as the remedy for Title VII violations and Plaintiffs do not explain why that would not be the case here. Plaintiffs make no effort to show that they could satisfy the balance of hardships or public interest factors.

Second, injunctive relief is not appropriate respecting the class as a whole because Plaintiffs' proposed class includes former employees who would receive no benefit from enjoining the University. *See Bolin v. Sears, Roebuck & Co.,* 231 F.3d 970, 978 (5th Cir. 2000) (class certification not permitted where class members "have nothing to gain from an injunction, and the declaratory relief they seek serves only to facilitate the award of damages").

Relatedly, Plaintiffs' decision to pursue a Rule 23(b)(2) class is complicated by the fact that some class members may believe themselves better off seeking monetary damages, rather than injunctive relief. The Seventh Circuit has held that in that case, a Rule 23(b)(2) class ought to be certified only if Plaintiffs provide class members with an opt-out opportunity. *See Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 470 (7th Cir. 2004) ("Rule 23(b)(2) may not be used, even in a pattern-or-practice suit, unless persons with significant damages claims are allowed to opt out of the class to the extent that the litigation concerns financial relief.").[10]

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, the University asks that the Court deny Plaintiffs' motion for class certification.

Dated: March 31, 2022

Respectfully Submitted,

DEFENDANT THE UNIVERSITY OF ILLINOIS

By:/s/ Christopher B. Wilson
One of Its Attorneys

[10] Plaintiffs briefly argue in the alternative that, even if Rule 23(b)(2) is not satisfied, the proposed class should be certified as an "issue class" under Rule 23(c)(4). This does not help them. A class proposed under Rule 23(c)(4) cannot be certified unless "the proposed issue class satisfy[ies] Rule 23(a)'s requirements." *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 262 (3d Cir. 2021). For the reasons stated above, Plaintiffs' proposed class fails to satisfy those prerequisites under Rule 23(a) and therefore cannot be certified under Rule 23(c)(4).

Christopher B. Wilson
Jonathan R. Buck
Keith A. Klein
James A. Kilcup
PERKINS COIE LLP
131 S. Dearborn; Suite 1700
Chicago, IL 60603
Tel: (312) 324-8400
Fax: (312) 324-9400
cwilson@perkinscoie.com
jkilcup@perkinscoie.com

CERTIFICATE OF SERVICE

I, Christopher B. Wilson, certify that on March 31, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 31st day of March.

s/ Christopher B. Wilson

Christopher B. Wilson