2022 WL 22286773 (N.D.Ill.) (Trial Motion, Memorandum and Affidavit)
United States District Court, N.D. Illinois,
Eastern Division.

Derrick EDMOND, et al., Individually and on behalf of all others Similarly-Situated, Plaintiffs,
v.
THE CITY OF CHICAGO, Defendant.

No. 1:17-cv-04858.
December 16, 2022.

Plaintiffs' Corrected Memorandum of Law in Support of their Motion for Class Certification Pursuant to Fed. R. Civ. P. 23

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INTRODUCTION

Plaintiffs' putative class claims arise from the long and undisputed history of race discrimination at the City of Chicago's Department of Water Management ("Department"). The "culture of racism" former Mayor Rahm Emanuel described as an "open secret" flourished and was reinforced by Department leadership for over a decade, creating a demeaning and life-altering work experience for hundreds of Black City employees.

As set forth below, the evidence Plaintiffs have amassed through extensive discovery - much of which comes from the City's own admissions - shows the Department's racist culture was standard practice. Racism was part of the fabric of the Department and encouraged throughout the Department by predominantly White management and supervisors.

The Chicago Office of Inspector General's ("OIG") investigation found ample evidence of a top-down hostile work environment that management fostered by freely exchanging countless graphic, racist emails among themselves and others. Plaintiffs, their experts and innumerable other current and former Department employees describe the racially discriminatory hostile environment that top, middle and lower-level management admit existed.

The Department's entrenched practice of racist behavior, combined with a grossly inadequate EEO function and management's well-known practice of punishing complainers (referred to as "rats"), led to the proliferation of the hostile environment and discouraged workers from reporting incidents of racist behavior. The predictable and even intended result? A City department where it is "open season" on Black workers, and racial affronts such as "nigger", nooses and racist imagery pervaded the workplace without repercussion.

In 2017, after the Chicago Sun-Times reported on the racist emails circulating through the Department, the City fired or forced nearly a dozen people to resign, including the Department's Commissioner, and attempted to "reset" the culture, installing new management and conducting EEO training of the entire Department for the first time. Despite its public acknowledgement of the problem at the Department, in this lawsuit the City still puts forth the Orwellian claim that the hostile environment simply did not exist, ignoring its own OIG's conclusions which were accepted and acted upon. The City also ignores the admission by the new Department Commissioner, Randy Conner (who is Black), that when he came to the Department, racism against Blacks was an "open secret" - it was "everyday business" and ingrained in the "way they think."

Unsurprisingly, the same managers and practices that subjected Blacks to workplace harassment also denied them equal opportunities with respect to overtime and access to better jobs within the Department (*i.e.*, promotions). Using City records, Plaintiff's expert witness, Dr. Bernard Siskin, demonstrated overtime and promotion disparities due to race and the Department's practice of initiating discipline against Black workers at rates far greater than White employees.

Based on the above-described climate of Department-wide racism, Plaintiffs assert claims for race discrimination under the

Equal Protection Clause and Section 1981 (through Section 1983) and the Illinois Civil Rights Act of 2003. The Supreme Court has recognized that discrimination claims can be class-based, involving class-wide wrongs that are often best remedied in a single lawsuit rather than piecemeal. *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 (1981). This case is an example. It is time for the "open secret" of racism at the Department to be addressed in one lawsuit for all class members, and as set forth below and in Plaintiffs' Trial Plan, attached as Exhibit A, that is an achievable goal.

Common questions about the Department's hostile work environment and pattern-or-practice of discrimination predominate and Plaintiffs satisfy all other requirements of Fed. R. Civ. P. 23. Accordingly, Plaintiffs move this court to certify: (1) a hybrid class under Fed. R. Civ. P. 23(b)(2) and 23(b)(3) for declaratory and injunctive relief directed at the Department's racially hostile work environment, and (2) similar hybrid sub-classes associated with the Plaintiffs' claims relating to unwarranted discipline and denial of access to overtime and promotion opportunities.

Alternatively, Plaintiffs seek certification pursuant to Fed. R. Civ. P. 23(c)(4) for the issues of: (a) whether Defendant maintained a hostile work environment for Blacks; (b) whether Defendant's methods or criteria for administering discipline, assigning overtime and/or selecting internal applicants for positions discriminated against Blacks or had the effect of discriminating against them; (c) whether discrimination was so widespread and well-established that it constituted a *de facto* policy of the Department for purposes of liability under Section 1983 (*e.g.*, *Monell*); and (d) whether Defendant engaged in a pattern-or-practice of discrimination against Blacks. Each of these questions is common to Plaintiffs and each class member and common evidence can answer them, advancing all their claims simultaneously.

I. FACTUAL BACKGROUND

A. The Organization And Operations Of The Water Department.

Chicago's Department of Water Management delivers drinking water to Chicago and suburbs and removes waste water by delivering it to Chicago's Water Reclamation District. The Department is divided into five bureaus: (1) the Bureau of Operations and Distribution ("BOD" or "Operations"), which maintains and repairs the water distribution and sewer system; (2) the Bureau of Water Supply ("BWS" or "Water Supply"), which treats, tests and pumps water from Lake Michigan at two purification plants and pumping stations; (3) the Bureau of Engineering ("BOE" or "Engineering"), which provides design and inspection services for water and sewer mains and connected buildings; (4) the Bureau of Administrative Support ("BAS" or "Administrative Support") which handles payroll and personnel-related matters; and (5) the Bureau of Meter Services ("BMS" or "Meter Services"), which handles water meters. (*See* Ex. 48, Organization Chart.)

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

(Ex. 58, March 2020 OIG Overtime Audit Report, DWM-Edmond-068406.)

The Department employs approximately 2,000 people, who all report directly or indirectly to the Commissioner and First Deputy Commissioner. (*Id.*; *see also* Ex. 48 Organization Chart, DWM-Edmond-124825; Ex. 21, J. Pope Dep. 216:7-8.) The Commissioner's office coordinates all operations at the Department. (*See* Ex. 48, Organization Chart.)

B. The Commissioner's Responsibilities At The Department.

Mayor Emanuel appointed Barrett Murphy (White), a longtime family friend, to be Commissioner of the Department in 2016. (Ex. 16, Murphy Dep. 14:16-19, 33:11-13.). Before that, Murphy was appointed by Mayor Daley as First Deputy Commissioner, a position he held from 2011 to 2016 serving under Commissioner Tom Powers (White). (*Id.* at 33:8-10, 70:10-24; Ex. 36, Answer ¶ 38.)

All Department employees are subject to applicable City policies, including its Personnel Rules (maintained since at least 2003) and its Hiring Plan (adopted in 2007 and amended in 2011). (*Id.* at ¶¶49, 50, 52.) By code and pursuant to the Personnel Rules, the Commissioner is responsible for ensuring that the Personnel Rules and the Hiring Plan are followed. (*See* Municipal Code of City of Chicago Sections 2-106-010, 2-106-020 and 2-106-040(m).) Under Personnel Rule 21, the

Commissioner has plenary responsibilities over Department management, including all personnel matters (review of disciplinary actions, equal employment opportunity, training, hiring, and promotions). (Ex. 36, Answer ¶56.)

C. A Racist Culture Pervaded the Department Under Murphy And Powers.

Discrimination cases do not usually start with *de facto* confessions — but this one is different. Here, in 2017 and early 2018, in response to the Sun-Times's reporting about an OIG investigation of the Department, Mayor Rahm Emanuel, then seven years into his tenure, conceded there was a long-standing culture of racism at the Department. As a result of the OIG's investigation, Commissioner Murphy resigned and Mayor Emanuel appointed Randy Conner (Black) to replace him beginning June 2017. (Ex. 16, Murphy Dep. 242:7-11, 246:15-19.)

Six months later, answering questions about what was being done to address the racism the OIG exposed, Mayor Emanuel explained to the media that the "culture" at the DWM needed to change and changing that "culture" would take more than six months "because ***the culture of that department has been around for decades...***" (Ex. 45-12, Emanuel Decl. ¶15 and its Exhibit 1, emphasis added). The context of his comments shows that Mayor Emanuel's "culture" reference was to the "culture of racism," and that is exactly what Department witnesses understood.[1]

Commissioner Conner, who was tasked with "changing the culture" in the summer of 2017, was explicitly told by Mayor Emanuel that the "culture" he was tasked with changing was the "culture of racism:"

Q. Well, the mayor told you there was a culture of racism at the water department, correct?

A. Yes.

(Ex. 3, Conner Dep. 85:15-17; *see also* 77:23-78:4, 85:15-86:16, 135:21-135:23, 141:5-141:16.) Commissioner Conner was also told by Mayor Emanuel that the racism at the Department was an "open secret." (*Id.* at 125:18-126:5.)

That culture of open racism was consistent with what Commissioner Connor actually observed. When he took over and "went to all the district buildings, pumping stations and the filtration plants" he consistently heard the same thing - concerns about racism in being passed over for promotions and overtime and workers being disciplined because of their race. (*Id.* at 113:5-9, 163:3-15.)

Commissioner Conner found the Mayor's mandate to change the culture of racism "challenging" because it required changing the Department's everyday racist *modus operandi*:

Q. And what did that mean to you to change the culture?

A. It meant that — change the way that the department *did its everyday business* and change *the way that they look at things*.

****

Q. Why was that the most challenging task of all?

A. Trying to get people who think a certain way or try *to change their thinking is a daunting task if that's how they think*.

(*Id.* at 140:24-141:7, 196:3-8, emphasis added.)

D. Department Leadership Was Predominantly White.

The Department's senior leadership is comprised of a fairly small group, and during the time in question that group was comprised of mostly White males (many of whom admit engaging in racist workplace behavior). The leadership group consists of the Commissioner (Barrett Murphy and before him Tom Powers), as well as the First Deputy Commissioner, two Managing Deputy Commissioners and five Deputy Commissioners. (*See* Ex. 48, Organizational Chart.)

Murphy joined the Water Department in 2004 as Assistant Commissioner. He was Deputy Commissioner from May 2006 to October 2006 and Managing Deputy Commissioner from October 2006 to July 2011. He became First Deputy Commissioner in July 2011 under then-Commissioner Powers (White) and became Commissioner in May 2016 until his resignation. (Ex. 16, Murphy Dep. 32:20-33:13, 70:10-24.)

William Bresnahan (White) was a Managing Deputy Commissioner. (Ex. 36, Answer ¶39.) Bresnahan was hired in 2006 into the position of First Deputy Commissioner from the Chicago Police Department and occupied that position until 2011. (Ex. 2, Bresnahan Dep. 27:1-24.) Bresnahan then became Managing Deputy Commissioner for the Bureau of Operations and Distribution. (*Id.*)

Alan Stark (White) was a Deputy Commissioner from September 2011 to November 2017, when he became Managing Deputy Commissioner. (Ex. 36, Answer ¶41; Ex. 25, Stark Dep. 33:4-10.) After becoming Assistant Commissioner in approximately 2004, Stark's duties took him to many different locations throughout the Department. (*Id.* at 26:10-18; *see generally* pp. 27-29.)

Luci Pope-Anderson (White) was a veteran Department employee, starting in 1994 and going from Staff Assistant to Assistant Commissioner in 2006 and then Deputy Commissioner in 2016. (Ex. 76, OIG Interview of Luci Anderson p. 9, DWM-Edmond 31162.) She reported directly to Commissioner Murphy before the OIG investigation in 2017. (*Id.*)

Below the Commissioners were managers and supervisors, including superintendents in charge of the three "districts" for the Bureau of Operations, and Chief Operating Engineers at BWS in the two water filtration plants, the majority of whom were White, just like other supervisors. (Ex. 46-2, Defendant's Supplemental Response to Interrogatory No. 19; *see also* Ex. 40, Gallagher Report, p. 13) (noting 67% of Department foremen were White, 73% of assistant supervisors, 81% of Chief Operating Engineers, and 86% of superintendents).

These superintendents included Paul Hansen (White), who supervised approximately 130 employees as Superintendent of the North District for the Bureau of Operations and Distribution between 2015 and his forced resignation in 2017. (Ex. 63, OIG Report pp. 7, 18.) John "Jack" Lee (White) and Andy Anderson (White, and Pope-Anderson's husband) were the District Superintendents for the South and Central Districts and each supervised hundreds of employees. (Ex. 68, OIG Interview Transcript of John Lee, pp. 10-11.)

E. Department Leaders Fostered The Culture of Racism.

Commissioner Murphy understood that as First Deputy Commissioner and Commissioner of the Department he had complete authority to dictate the culture for the Department and was responsible for ensuring others who reported up to him also did their job. (Ex. 16, Murphy Dep. 247:4-10, 253:22-254:4; *see also* Chicago Municipal Code 2-106-010 - 2-106-050.)

Under Commissioner Murphy's and Powers' leadership, Defendant's OIG found an "unrestricted" culture of racism at all levels of the Department:

... an OIG investigation found egregious, offensive racist and sexist emails distributed by and among employees of the Department of Water Management (DWM) that extended to senior levels of department management and that suggested **the existence of an unrestricted culture of overtly racist and sexist behavior and attitudes within the department**. OIG recommended that DWM discharge multiple employees and refer them to the ineligible for rehire list maintained by the Department of Human Resources.

(Ex. 55, OIG Quarterly Report, Second Quarter 2017, pp. 2-3, DWM-Edmond-086876; emphasis added) In 2018, the OIG reiterated:

The investigations ... revealed that **individuals at the highest level of the Department sent and received hateful emails over a period of at least five years**. [.] DWM supervisory employees did not report the offensive emails they received as required by City policy.

(Ex. 57, OIG First Quarter Report 2018, p.10-12; emphasis added.)

The "hateful emails" exchanged among the Department's top leadership referred to Blacks as "niggers" and stereotypically described them as criminals, animals, unintelligent or uneducated, poor or with bad credit, living in the "ghetto," or prone to drug use. (*See generally* Exs. 88-1 through 81-78). The Department's leadership group often employed common racist tropes about Blacks' preferences in names, food, attire, appearance or language (*e.g*., Blacks liked to eat fried chicken or watermelon, they wear alligator shoes and have larger lips, and speak in Ebonics). (*Id.*) Commissioner Conner (Black) described the emails as "horrible." (Ex. 3, Conner Dep. 91:17-20.)

A sample of the countless "hateful emails" circulated among the Department's leaders and supervisors includes:

· January 24, 2013 email exchange with Plumbing Foreman **Tom Durkin** - "Life Without Farms," where a Detroit kindergarten class is asked "what kind of sound a pig makes?" A Black child named "Tyrone" answers: "**freeze muthafucka!!!!!!!**" Durkin responded "LMAO!!! Good one!" (Ex. 81-15.)

· July 23, 2012 email exchange between **Murphy**, **Bresnahan** and **Hansen**, talking about a service request made by Latino Alderman Ariel Reyboyras, commenting "I am not understanding African-American and Puerto Rican thinking today." (Ex. 81-65.)

· September 28, 2012 email exchange between **Murphy**, **Bresnahan** and **Hansen**, talking about Deputy Commissioner for Bureau of Operations and Development Dwayne Hightower (Black), stating "He [Hightower] don't even know Ghetto slang. Where is this guy from [sic]" (Ex. 81-62.)

· February 16, 2013 email exchange between **Murphy** and **Hansen**, Hansen wrote the only thing the line [referring to a particular water line] did not service was "the center for severely challenged negro midgets" - a place Hansen described as where Department Laborers had been hired from years ago (Ex. 81-21.)

· March 12, 2013 email, shared with multiple Department employees, including Blacks, in which **Hansen** wrote "I believe he [John Ware] is going to Ireland with Diddy. [referring to Hightower] Better tell him no KFC there." (Ex. 81-19.)

· July 15, 2013 "Chicago Safari Tickets Package" email exchange sent to **Bresnahan** and **Murphy**. **Hansen** invokes racial stereotypes that likened Chicago's neighborhoods to jungles populated by Black "wild animals" living in their natural habitats of Englewood, Garfield Park, Austin, Lawndale, South Shore and Woodlawn,[2] where White safari-goers were guaranteed to "see at least one kill and five crime scenes per three-day tour" and would also enjoy meals catered by "Harold's Chicken" and hotel accommodations with at least one clean room free of "crack pipes." (Ex. 81-8.)

· August 5, 2013 email between **Hansen** and **Durkin** "Apology - Paula Deen" with a picture of a forlorn-looking Black child sitting in a bucket of water eating a watermelon with the caption "[a]s an apology - Paula Deen opens a swimming pool for youth." (Ex. 81-6.)

· August 15, 2013 email exchange where **managers** purport to recite, in Ebonics, a Black employee's question about the city policy giving employees two hours of leave time to take their children to the first day of school, stating "Ib I beez habbin firbteen wittl wons doos I be getting' twenty-six hours off to takes da little mutha fuckas to skool?" (Ex. 81-41.)

· August 19, 2013 email exchange between **Hansen, Murphy, Bresnahan** and **Daniel Misch** about why there are no Black NASCAR drivers - "engine noise drowns out the rap music ... pit crews can't work on the car and hold up their pants at the same time ... and how they keep trying to carjack Dale Earnhardt, Jr." (Ex. 81-1.)

· February 23, 2014 email exchange between **Murphy**, **Bresnahan**, **Murphy** and **Pope-Anderson** wherein Murphy and Hansen engaged in racist banter mimicking "Ebonics" - e.g., "I beez cornfuzed ... dey wabs putted ins fo dooz mubdey." (Ex. 81-29.)

· March 14, 2014 Hansen Email containing a purported joke that uses the words "nigger" and "queer." (Ex. 81-34.)

· June 14, 2014 Email containing a link to the song "Nigger Hatin' Me," which has the following lyrics, among others: "I like children and I like tea but I don't like niggers no siree" and "the NAACP would sure like to get a hold of nigger hatin' me." (Ex. 81-11.)

· February 1, 2015 email chain between *inter alia* **Powers**, **Hansen**, **Murphy**, **Lee**, and **Anderson**, "Send Dwayne [Hightower] if he goes outside and gets lost he will be easy to find [because he is Black] ... [t]hat's cruelty to animals." (Ex. 81-20.)

· June 16, 2015 email exchange between **Hansen** and **Bresnahan** referring to a Black employee's request for leave time and how, if she was confronted about her physician's notes, she would shit "corn nuggets" and "watermelon seeds!" (Ex. 81-16.)

· July 1, 2015 email exchange between **Hansen** and **Murphy** stating "No negros here!" and then, shortly thereafter, "36 hours south and ain't seen one yet, this is beautiful country." (Ex. 81-61.)

· July 2015 email exchange between **Hansen** and **Pope-Anderson**, in which Hansen comments, "I guess that puts me one up on a black man with a decent credit score and alligator slippers." (Ex. 81-14.)

· May 19, 2016 email exchange between **Hansen**, **Lee**, **Anderson** and **Pope-Anderson**, concerning an overtime report where Hansen, speaking in "Ebonics" writes "nunz ub dees peoples beez mines." (Ex. 81-75.)

(*See generally* Group Ex. 81.)[3]

Describing acts of physical harm to Blacks was another common thread, with references to Klu Klux Klan ("KKK") imagery. For example, Murphy received an email that he forwarded to another White employee containing a series of racially derogatory images, including use of the word "nigger":

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(Ex. 16, Murphy Dep. 176:1-179:9 and Murphy Dep. Ex. 25; Ex. 81-7.)

Although the emails visited many racist tropes, an especially common theme was using Ebonics to mock Black speech. (Ex. 16, Murphy Dep. pp. 158-161, 169-173, 176-177, and Murphy Dep. Exs. 18, 21 and 25; Exs. 81-19, 81-29, 81-41, 81-42, 81-63, 81-64, 81-73, 81-75.) Commissioner Tom Powers emailed in 2013 using Ebonics, and others responded in kind. (*Id.* at 156:4-22.) Pope-Anderson admitted there was a pattern of Department employees imitating Ebonics: "I will be completely honest with you; *I see the pattern* ..." (Ex. 76, OIG Interview of Pope-Anderson, 74:22-75:3, emphasis added.)

On one remarkable occasion, Commissioner Murphy, took it upon himself to research and instruct a White supervisor about the punch line of a racist joke that he thought was botched. (Ex. 16, Murphy Dep. pp. 163-167; Ex. 81-17.) Hansen had sent Murphy a racist "joke" about the old Jetsons cartoon series, the punch line of which lauded a future world - which the Jetsons inhabited - without any Blacks. Murphy looked up the joke on the internet, familiarized himself with how the joke was *supposed* to go, and took the time to explain and correct Hansen's telling of it. (*Id.*)

Beyond the racist comments and imagery, there were physical representations of racism in the workplace. During the relevant time period, there were at least three nooses present in the Department, including one referenced in an OIG investigation in 2013 of a Department employee driving a truck "with a racoon being lynched" hanging from the rear of the vehicle, which was reported by a City resident identifying the vehicle number of the truck. (Ex. 16, Murphy Dep. pp. 150-152, 224:4-17, Deposition Exhibit 16; Ex. 2, Bresnahan Dep. pp. 94-96, 176-179.) Another, in October 2017, was photographed:

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Unsurprisingly, the noose was explained away as a "joke," despite what was happening in the Department at that time. (*See, e.g.*, Ex. 45-47, Watson-Williams Decl. ¶7(e)-(h), stating Department management explained "they had gotten to the bottom of this and it was all a joke".)

In addition to exchanging racist email images with the word "nigger," Commissioner Murphy admitted *hearing* "nigger" in conversation with a co-worker. (Ex. 16, Murphy Dep. 120:11-19.) Murphy received one email with the subject line "Watermelon Protection" containing imagery of a scarecrow wearing a KKK robe:

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(Ex. 16, Murphy Dep. 179:10-180:19 and Murphy Dep Ex. 25; Ex. 81-5.)

F. The Racist Culture Set At The Top Permeated The Department.

Commissioner Murphy testified that in leading the Department, he "tried to implement aligning responsibility and authority." (Ex. 16, Murphy Dep. 72:22-73:11.) In reality, Murphy's conduct and words provided those with responsibility for supervising Black employees the authority to treat Black employees as second-class citizens. As the OIG found, mid-level leaders quickly followed their leader. For more than five years (2012 through 2017), the racist thoughts and images about Blacks flowed freely across various divisions and bureaus of the Department and between Commissioners and supervisors alike. (Ex. 68, OIG Interview of Jack Lee, pp. 3539.)

Deputy Commissioner Bresnahan admitted that his emails using the term "nigger" set a bad example and could impact employees "throughout the Department":

Q. Do you agree with me that if the racist emails go from Barrett Murphy down to you and then further down the chain to John Lee and then further down the chain to the people that worked for him, that that's problematic?

A. Yes.

Q. Why do you agree with that?

A. Because I said before, racist emails shouldn't be sent.

Q. You don't know if John Lee sends it to the people below him, that that's not spreading the racist emails?

A. I don't know that he sent them.

Q. Well, assuming he did, that's wrong, though, right?

A. It is.

Q. And that spreads bad information throughout the Department, right?

A. Yes.

(Ex. 3, Bresnahan Dep. 146:23-147:24.)

Like Stark's job, Bresnahan's wide-ranging job duties and travels brought him into contact with many Blacks throughout the Department. Bresnahan also routinely conducted hiring/promotion interviews, interacted with employees at worksites all over the city, and regularly visited the Jardine Water Purification Plant, North District, Central District, South District, Sawyer

South Water Purification Plant, and the Mayfair Pumping Station. (*Id.* at pp. 47-48.) Bresnahan's interactions with Black employees reflected the thoughts and images of Black people shared in emails.

Department employee Robin Scott, a bricklayer, testified as follows:

Q. "Let's talk about the times that you heard William Bresnahan talk about black workers in a negative or derogatory manner?

A. Oh, every time we came to him with a complaint ..."

(Ex. 24, Scott Dep. 87:14-22.). When that happened, Bresnahan also told Scott things like:

"These black fuckers, they need to know that they got a job and be happy.'

"you tell these niggers to - you know, no."

"Those black niggers need to work their eight hours and be happy"

(*Id.* at 89:11-18, 93:8-18, 95:9-14.)

The OIG concluded that District Superintendent Jack Lee, who oversaw some 200 employees in various positions:

[Text redacted in copy.]

(Ex.68, OIG Investigative Interview of Jack Lee, p. DWM-Edmond-032517; Ex. 69, OIG Report on Jack Lee, p. DWM-Edrnond-032475.) As discussed below, his and other managers' actions were consistent with their racist emails.

As for Hansen, the original tar get of the OIG's investigation, the OIG concluded that [Text redacted in copy.] (Ex. 63, March 17, 2017 OIG Report, p. 10, emphasis added.) The same could easily have been said about any of the Department's other leaders and supervisors - and particularly Murphy. Bresnahan or Stark - given testimony from Marisol Santiago that she expected racist views held by leaders in the department *would* filter down. (Ex. 37, DeCaluwe Discharge Hearing Testimony, 79:1-24, 84:1-85:15, 87:1-88:21.)

The OIG reached similar conclusions about the impact of racist ideology shared among mid-level managers, like Thomas Durkin, General Foreman of Plumbers and supervisor of over thirty employees:

[Text redacted in copy.]

(Ex. 71, OIG Report for Thomas Durkin p. 7, emphasis added; Ex. 70, OIG Interview for Thomas Durkin, pp. 9-11.) Similarly, Stanley DeCaluwe (White) who was Foreman of Water Pipe Construction (Ex. 66, OIG Interview for Decaluwe, p. 26), was described by the OIG as:

[Text redacted in copy.]

(Ex. 67, OIG Summary for DeCaluwe, p. 10, emphasis added.)

G. Department Leaders Openly Flouted City Policies.

The City had policies that top leadership was supposed to enforce against racism, discrimination and improper use of City computers and email. (*See, e.g.*, Exs. 49 through 54.) Despite these paper tigers, Department managers at all levels, including Commissioner Murphy, openly used the City's email systems to send, reply to, comment on and forward a host of discriminatory emails. This behavior demonstrates that racist ideology was part of the very fabric of the Department. Department supervisors clearly felt secure in the knowledge no one would report them or, if they did, nothing would ever happen. Each racist email was, in Commissioner Conner's words, "everyday busmess" and could include racially discriminatory conduct. (Ex. 3, Conner Dep. 140:15-24, 141:1-14, 142:1-24, 179:1-24, 180:1-24, 232:1-24, 267:1-9.)

Racially discriminatory conduct was so common, that when an employee allegedly brought a copy of Hitler's Mem Kampf to work. Deputy Commissioner Stark never asked the employee if the Nazi manifesto was on his desk and could not recall mentioning it to Assistant Commissioner John Pope when asking him to look into other allegations about the employee (despite alleged photographic evidence):

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(Ex. 25, Stark Dep. 201:5-208:20 and Stark Dep. Ex. 27, p. 26.)

What happens when supervisors fail to report open discrimination or harassment occurring in the workplace? Defendant knows: "they're essentially turning a blind eye to it," which may empower the employee to continue violating the EEO policy. (Ex. 20, Pando *Abreu* 30(b)(6) Dep. 104:2-24.)

H. Department Employees Endured A Racially Hostile Environment.

Testimony from Plaintiffs and putative class members confirms a racially hostile work environment existed at the Department. It was so bad that Black workers chose to leave - including by retiring early - rather than continue to endure it. (*See, e.g.*, Ex. 45-5, G. Clark. Decl. ¶10; Ex. 45-8, B. Crawford Decl. ¶7.g, Ex. 45-9, C. Davis Decl. ¶7.d.)

Forty-seven putative class members attested to being unable to avoid the Department's racially hostile work environment. (*See generally* Exs. 45-1 through 45-47.) Many describe being subjected to racial epithets or imagery in the workplace, hearing comments explaining Blacks were not welcome or seeing or hearing obviously race-based terrorizing comments:

Melinda Cottle, a construction laborer, heard White workers say to her "look at that Black nigger" and was told by fellow Black co-workers that use of the word "nigger" was commonplace. (Ex. 45-7, Cottle Decl.)

Derrick Holland is an Operating Engineer "C" who has worked at multiple water pumping stations. His supervisor made comments such as "get all of the Black people together and just burn them" and "somebody called off today, is it another nigger holiday?!" Holland recounts how when senior supervisors made these comments, it would filter down to subordinate White employees who would then make the same or similar racist remarks about Blacks. (Ex. 45-19, Holland Decl.)

Lois Perkins, a 60-year old staff assistant, describes how Bresnahan repeatedly referred to her as "hey, little colored girl." (Ex. 45-33, Perkins Decl.)

Willie Davis, an Engineering Tech V and 30-plus year Water Department veteran, was referred to by his supervisor as "Li'l Willie" and a "fucking black guy" who "doesn't know what he is doing." (Ex. 45-10, W. Davis Decl.)

Gerald Washington, a bricklayer, explained how work assignments were often made on the basis of race, where White bricklayers, who lived in the Mt. Greenwood neighborhood of the politically influential 19th Ward, were allowed to work assignments near their homes while Black bricklayers like Washington, who lived on the far-south side, were often sent to locations on the far-west side of the city. (Ex. 45-46, Washington Decl.)

Addie Watson-Williams was a Motor Truck Driver with the Department for 18 years. In 2017, after a Black employee reported that White employee Dave McKinney was openly displaying a noose in this Department truck, Watson-Williams took a photo. When she told McKinney to remove the noose, he refused and Superintendent Jack Lee refused to take action. (Ex. 45-47, Watson-Williams Decl.).

David Reed, a Water Chemist II, described how an employee called a coworker a "monkey faced baboon," spoke in Ebonics ("you is ugly") and referred to Black workers as "son." (Ex. 4535, Reed Decl.)

Antwon Nelson, a Pool Motor Truck Driver, heard White co-workers refer to Blacks as niggers and say how "Blacks should

never have been working for the Water Department." His complaints about racism were dismissed and he was told "quit whining and be grateful you have a job." (Ex. 45-30, Nelson Decl.)

Cheryl Roberts, a Timekeeper and Assistant II, described how she was subjected to racist comments, including "nigger." (Ex. 45-36, Roberts Decl.)

Frederick Meriweather has been a steamfitter at the Sawyer Water Purification plant since 2010. His supervisor frequently made racist comments to Meriweather's face. Once Juan Romero laughed when he observed Meriweather eating a piece of watermelon and said "typical." When Meriweather filed a complaint about Romero's racism, the investigation revealed that Romero had posted a sign saying "Fred's Durags" (referring to a cloth hair covering to create waves) in the workplace, leaving it posted for over one year. (Ex. 45-26, Merriweather Decl.)

Michael Colton, an employee since 1986, was told "that Black employees were not supposed to be in the jobs they held at the Water Department," and that White workers would not want to work with Blacks. (Ex. 45-6, Colton Decl.)

Bernard Crawford, a 68-year-old Operating Engineer, heard a White foreman and supervisors call him and Black co-workers "nigger", "spook", "boy", and "coon" multiple times. Supervisor Chris Murphy said to Mr. Crawford "You ain't nothing but a coon here taking up a white boy's job." Crawford recounts that almost on a weekly basis White foremen and supervisors called him and his Black co-workers "boy." (Ex. 45-8, Crawford Decl.)

Tracie L. Burns, a Department employee since 1998, frequently heard Bresnahan refer to Blacks as "you people." Bresnahan and Paul Hansen referred to a Black supervisor, Dwayne Hightower, as "50 cent." Bresnahan referred to Black employee Debbie Dooland, as Debbie Booland, a slang term for a baboon. (Ex. 45-4, Burns Decl.)

Marvin Jordan, a Motor Truck Driver, described that Blacks typically received older equipment in poorer shape and were assigned jobs in more dangerous neighborhoods. (Ex. 45-22, Jordan Decl.)

Clara Nettles, a station laborer and stationary fireman, heard Blacks called "nigger" on the job and heard a coworker say "they sure are letting a lot of niggers get these jobs." (Ex. 4531, Nettles Decl.)

Ivy Anderson, a Chief Operating Engineer for twenty years, was transferred to the Sawyer Water Purification Plant where a Swastika was painted on his work place floor and Anderson's equipment was sabotaged. (Ex. 45-2, I. Anderson Decl.)

LaDonna Brown, a current employee, said her White supervisor Norman Clark routinely and openly wore "traditional African clothing, such as a kufi at work in an effort to taunt or mock Black employees." Brown also witnessed the noose hanging from the City owned truck of White employee Dave McKinney. (Ex. 45-3, Brown Decl.)

Graylin Clark, a 63-year-old store room clerk and laborer of 24 years, asked Tom Durkin and Matt Quinn what would happen if he moved into their White neighborhood. Quinn responded "you better get fire insurance." (Ex. 45-5, Clark Decl.)

Normandy Rogers was a Sewer Laborer and Construction Laborer with the Department from 1994 until September 2017. Rodgers experienced blatant racism on a daily basis where White employees cursed at Black employees, calling them "nigger." Rodgers' supervisors, Timothy Kavanaugh and Luci Pope-Anderson, also often assigned Rodgers physically demanding tasks, that would never be given to White employees, and others laughed at him for having to complete them. (Ex. 45-39, Rogers Decl.)

Charles Davis, an employee for 26 years, was subject to racist verbal abuse and went to Superintendent Jack Lee about it and was told Lee's supervisor, Tony Megaro, was not going anywhere but that he [Davis] might be if he kept speaking up. "That made me fear retaliation if I complained about Megaro or other's [sic] racist behavior." Davis retired early because he "couldn't take the hostile environment." (Ex. 45-9, C. Davis Decl.)

Like these putative class members, Plaintiffs also experienced the Department's hostile work environment for Blacks.

Plaintiff Anton Glenn, a laborer at the Jardine Water Purification Plant, resigned in 2019 due to what he described at as the culture of racism. He testified about racist graffiti he saw in the 1990s and again in 2014 or 2015 (Ex. 8, Glenn Dep.

157:7-14), as well as being called a "nigger" by Deputy Commissioner John Pope in 2016 (*Id.* at 38:12-14) and hearing a Chief Operating Engineer refer to Blacks generally as "you all." (*Id.* at 58:7-15, 66:1-21, 99:15-23, 101:10-15, 204:1-9.) He also testified Deputy Commissioner Alan Stark made Black maintenance workers go into basins filled with grime and clean them, but never Whites. (*Id.* at pp. 19-34, 53:24-55:13.)

Plaintiff Kathy Ealy, a Navy veteran, resigned from her position as Chief Operating Engineer (BWS) in 2019 due to rampant racism. (Ex. 6, Ealy Dep. 18:1-19:5.) She described hearing Chief Operating Engineer Joseph Lynch call Blacks "you people" and testified he undermined her interactions with other employees, which did not happen to her White counterparts. (*Id.*, p. 265, Lines 6-14; p. 266, Lines 20-24; p. 267-271.)

Plaintiff Donald Anderson described his work environment under Bresnahan as a "plantation" and in March 2017 was falsely accused of workplace violence by Superintendent Andy Anderson for responding to being called "nigger" by supervisor Mike Szorc (White) who was not disciplined for his conduct. (Ex. 1, Anderson Dep. 131:5-135:19.) Defendant drug-tested Anderson, but Szorc was allowed to go home. (*Id.* at 135:20-138:4.)

Plaintiff Eddie Cooper, a Water Chemist II at the Jardine Plant, testified that swastikas and KKK symbols could be found in the lower galleries at Jardine, but he never reported it because White management would do nothing to stop it. (Ex. 4, Cooper Dep. 19:16-20, 120:10-16, 136:1324, 137:1-10, 203:17-24, 231:11-15.)

Plaintiff Derrick Edmond is a Group A operating engineer. (Ex. 7, Edmond Dep. 14:2415:4.) Edmond testified that Deputy Commissioner Joe Lynch referred to Blacks as "you people" and picked fights with Cooper because Cooper is Black. (*Id.* at 37:7-38:7, 47:17-48:12, 66:15-24, 127:17-22.) Edmond did not complain or report the incidents because the Water Department ignores complaints raised by Blacks. (*Id.* 120:10-121:12.)

Plaintiff Vicki Hill was an administrator in the Jardine Water Purification Plant who assisted in scheduling disciplinary hearings. (Ex. 11, Hill Dep. 23:11-24:10, 185:10-187:24, 200:15-22.) While at Jardine, Hill interacted with operating engineer Joseph Lynch, who held the position of Assistant Chief Operating Engineer, when Lynch and Hill would observe employee disciplinary hearings. (*Id.* at 23:15-25:24.) Hill saw a "black-face" doll in Lynch's office while Lynch met with Black and White employees. (*Id.* at 25:1-26:24, 28:1-29:24.) When Hill told Lynch the doll was offensive, he laughed in her face and did not move the doll. (*Id.* at 27:10-24.)

Hill concluded Deputy Commissioner Stark was a racist because he often spoke to Hill in a nasty, unprofessional tone of voice, and was overheard frequently referring to other employees using the word "nigger." (*Id.* at 37:1-24, 38:1-24, 39:1-24.) When pressed for details, Hill explained Stark said nigger while she was delivering the interview packets to him as he was preparing for interviews. (*Id.* at 40:1-24, 41:1-24, 42:1-24.) Hill said she was afraid to report Stark for his conduct because she had previously been subjected to retaliation and feared she would face more retaliation if she reported Stark. (*Id.* at 43:1-24) Hill knows that Stark's treatment of her was racially-motivated because Stark ordered Hill to come into the office from her mother's deathbed, so that Hill could process a 5-day time-off request for a White employee (Eddie Popelas). (*Id.* at 47:1-24, 48:1-24, 50-57.) Hill recounted that Bresnahan (a former Chicago Police Officer) told racially tinged anecdotes about torturing Black arrestees during interrogations and having so much fun it seemed like he was having an "orgasm." (*Id.* at 181:1-182:24.)

Plaintiff Veronica Smith, a construction laborer with the Department since 1988, walked into a workplace office and observed a racially-offensive monkey displayed on the wall of the office. (Ex. 23, Smith Dep. 26:11-15, 127:23-24, 128: 1-14.) During a severe blizzard, Smith was forced to work assigned overtime and to work outside shoveling snow while her White male counterparts were allowed to work inside. (*Id.* at 119:1-120:24.)

Plaintiff David Henry, a plumber at the Department for 21 years, described how Superintendent Jack Lee once referred to Henry as a "nigger," and how Lee told other White plumbers who lived in the Mt. Greenwood community how "that nigger David Henry ain't getting shit" [referring to overtime] and would "have problems" once a Black superintendent — John Sanders — retired. (Ex.9, Henry Dep. 65:1-24, 66:1-24, 67:1-24; 68:1-24.)

Plaintiff Robert Laws confirmed that a Jim Crow culture was being enforced on a daily basis, where Blacks were treated and expected to accept their status as "second-class" persons. (Ex. 12, Laws Dep. 67:12-24-68:1-14.) Laws related how, while performing routine daily duties, Whites had no problem calling their Black co-workers "nigger" or "Black motherfucker."

(*Id.* at 70:11-71:7.) Laws described how supervisor Tim Collins (White) referred to Laws and other Black laborers as "pickaninnies" and Whites called Blacks "nigger" or "spook." (*Id.* at 68:16-24, 72:1-24.) In addition to seeing the 2017 noose, Laws described a 2016 incident where White supervisor Norman Clark (foreman of drivers), got into an altercation with Black driver Keith Evans after Clark called Evans a "half-breed" and "nigger" and heard supervisor Roger Stribling tell a Black coworker he could "take [his] Black ass north [referring to the Central District] and told multiple Black drivers, including Joe Johnson, "do what I say ... or get your Black ass sent somewhere else." (*Id.* at 72:1-24 - 74:1-75: 10, 81:24-86: 24, 144:16-18.)

I. Defendant Denied Blacks Equal Overtime Opportunities.

Under the Department's written policies and collective bargaining agreements, overtime opportunities should have been assigned equally based on rotating lists, starting with the most senior person and working down, and then starting over again. (Ex. 16, Murphy Dep. 107:19110:6.) As with Defendant's EEO policy, DWM's leadership never ensured this process was followed. After evaluating the Department's overtime practices for the period 2015-2019, Defendant's OIG determined:

[The Department's] management could not ensure overtime was offered in accordance with CBAs and established practices because it was unaware of the full range of overtime processes in use across the Department, it did not provide robust oversight, and it did not consistently retain overtime records.

***

[The Department's] central and bureau management were unaware of the full range of overtime processes in use across the Department, and therefore could not ensure that all employees were offered overtime in a manner consistent with established practices and compliant with [collective bargaining agreements].

(Ex 58, OIG Overtime Audit, DWM-Edmond-068398, 0608403-0608404) Unsurprisingly, the OIG found many supervisors were implementing an overtime distribution process that they had not been trained on and some relied on union memos not authorized by Department management. (Ex. 58, OIG Overtime Audit, DWM-Edmond-068417-068418).

Overtime is lucrative for employees, if they can get access. As the OIG noted, there was a perception, that could not be dispelled by the absent record keeping, that overtime was unfairly distributed. (Ex. 58, OIG Overtime Audit, DWM-Edmond-0135730.)

To analyze whether there was a widespread pattern of discrimination in the Department generally, Plaintiffs' expert witness, Bernard Siskin, Ph.D. (a labor economist previously retained by Defendant), compared how similarly situated Black and White employees were treated with respect to discipline, overtime and promotions. (Ex. 42-1, Siskin Dec. Report, pp. 1-4.)[4] Dr. Siskin analyzed employment data about Department employees for 2015-2017 ("the Class Data Period") as well as the total time period for which data was provided (2011-2020) (Ex. 42-1, Siskin Dec. Report, pp. 2-4.) As discussed below, Dr. Siskin found statistically significant racebased disparities that were adverse to Black employees in all three areas.

With respect to overtime, Dr. Siskin compared Blacks and Whites in the same bureau and job title with similar seniority. (Ex. 42-1, Siskin Dec. Report, pp. 5-10, 13, 23-24.) He found that Blacks received a statistically significant smaller share of overtime during the whole time period and during the relevant time period, outside of the Bureau of Water Supply - and that the likelihood of this occurring absent race being a factor was less than 5%. (Ex. 42-1, Siskin Dec. Report, pp. 23-36, Table 11.)

Dr. Siskin concluded that the pattern of adverse treatment for Blacks "was consistent across bureaus" except Water Supply. The lack of a statistically significant disparate result in that Bureau did not imply or suggest to Dr. Siskin that the overall pattern of discrimination was not present at BWS, but rather that the data observed at BWS resulted from unusual levels of vacant positions there and resultant shift staffing requirements (particularly among Operating Engineers). (Ex. 421, Siskin Dec. Report, pp. 23, 40-41, Table 12.) In a 2020 audit of DWM's overtime practices, the OIG found that overtime practices at Water Supply were affected by short-staffing and legal requirements for minimum staffing, which forced distribution of overtime among lower-level operating engineers. (Ex. 42-3, Siskin Rebuttal Report, pp. 9-10, ¶¶25-28.)

Outside of the Bureau of Water Supply, disparities in overtime for Blacks were significant and adverse regardless of the method of analysis (*e.g*., whether done separately by year or bureau or overall and including when controlling for job, Department seniority or length of employment with the City). (Ex. 42-1, Siskin Dec. Report, pp. 23-24, 41-45). These results were consistent as between regular overtime and "weighted" overtime (*i.e*., overtime paid at higher rates), which Dr. Siskin studied to assess whether Blacks were excluded from more lucrative overtime assignments. (*Id.* at pp. 4, 23-24, 41-43, Table 13). The likelihood of these outcomes occurring absent race impacting the assignment of overtime is 1 in 65 million for the Class Data Period and less than 1 in 388 billion for the whole class period. (*Id.* at p. 24).

Dr. Siskin's findings are consistent with the experiences of Plaintiffs and affiants across the Department. Plaintiff Robert Laws, a construction laborer, testified that overtime assignments were unfairly distributed, causing overtime for construction labor crews that were mostly White. (Ex. 12, Laws Dep. 18:3-7, 24:3-7, 56:16-18.) Laws recounted instances where Whites got more over-time than Blacks and he believes that it occurred so often and was so obvious that management could not have been unaware of the situation. (*Id.* at pp. 24:3-7, 56:16-57:15, 61:716.) Laws filed a union grievance, but it did not resolve the situation. (*Id.* at 120:9-19.) Laws did not complain to Human Resources because everyone knew that it would not be seriously investigated and that remedial action would not be taken. (*Id.* at 121:6-15.)

Plaintiff Donald Anderson testified how for a decade Andy Anderson (Pope-Anderson's husband) supervised an all-White crew assigned to work mostly downtown. (Ex. 1, Anderson Dep. 53:21, 54:13, 96:1-24, 100:8-14.) Pope-Anderson would remove a Black crew already working on a site and send out her husband's all-White crew, resulting in the all-White crew making so much overtime it was called the "money train," while Blacks rarely received overtime (*Id.* at 53: 21-54:13, 96:1-104:24.)

David Henry testified he routinely was not given overtime before Superintendent Jack Lee was fired, but that his overtime pay significantly increased after Lee left the Department. (Ex. 9, Henry Dep. 64:1-24.) Henry attributed the disparity to intentional discrimination, relating how Lee once threatened Henry would not get any overtime when his Black supervisor (Sanders) retired. (*Id.* at 65:1-24-68:24.) Once Sanders retired, the Department appointed a new superintendent (Gallagher) and Henry immediately stopped receiving overtime until Lee left. (*Id.* at 68:1-24.) Henry further testified Bresnahan knew that Lee was interfering with overtime for Henry because Bresnahan met with Lee at the South District on a daily basis and was aware of what was going on because Bresnahan was everyone's boss. (*Id.* at 69:1-70: 24.)

Affiants also attested to being denied equal opportunities to work overtime. For example, Willie Davis, an Engineering Tech V, was consistently denied overtime. (Ex. 45-10, W. Davis Decl.) Tracey Burns was denied overtime which went to White workers. (Ex. 45-4, Burns Decl.) Addie Watson Williams was frequently denied assignments that went to White men with less seniority and denied overtime during prime weekends and holidays where it was paid out at a premium rate. (Ex. 45-47, Watson-Williams Decl.)

J. Defendant Disciplined Blacks More Often.

The City's Personnel Rules establish the disciplinary process for all DWM Career Service employees and establish five types of violations: (1) tardiness/absenteeism; (2) misrepresentation; (3) criminal or improper conduct; (4) conduct involving job performance; and (5) violations of City policy and rules. (Ex. 54-1, 2014 Personnel Rules, pp. 47-53). What discipline is issued varies based on severity of offense. (Ex. 54-1, 2014 Personnel Rules, DWM 008005, p. 54). In the Promotional Criteria Guidelines, discipline can prevent promotional opportunities. (Ex. 54-2, Promotional Criteria Guidelines DWM-Edmond-014694).

The discipline process is initiated by a Notice of Pre-Disciplinary Hearing ("NDPH" or "charge"). While Personnel Rules do not require this process for non-Career Service employees, DWM's disciplinary database reflects such notices were issued to them as well. (Ex. 27, Hernandez-Tomlin Dep. 210:13-211:16.) Jennifer Izban (White) coordinated disciplinary hearings for the Department and was part of the group that was terminated and forced out as a result of the OIG investigation. (Ex. 2, Bresnahan Dep. 150:13-151:5; Ex. 46-1, City of Chicago Answers to 2nd Set of Interrogatories, Answer No. 20.) Commissioner Murphy ensured discipline was consistent by having all DWM suspensions reviewed by one person. (Ex. 16, Murphy Dep. 62:14-24.)

Dr. Siskin analyzed discipline in the Department by comparing Blacks and Whites who were similarly situated with respect

to bureau, job series, and grade, during the Class Data Period (2015-2017) and for the whole time period (2011-2020). Dr. Siskin found Blacks were statistically significantly more likely to be charged with a disciplinary violation than Whites. (Ex. 42-1, Siskin Dec. Report, pp. 5-6, 11, 21-22, Table 1, Chart 1). For the Class Data Period, the likelihood of these disparate outcomes without race being a factor was approximately 1 in 10 million and for the whole time period it was essentially zero. (*Id.* at pp. 21-22). These disparities were statistically significant for each of the five categories of disciplinary violations under the Personnel Rules, meaning they were consistent regardless of the type of violation, and were "consistent over years and bureaus." (*Id.* at pp. 21-22, 27-29, 32-35 and Tables 5, 6 & 9).

This finding is undisputed - meaning Dr. Paul White, Defendant's statistical expert agreed that "there is something in the charging process adversely associated with race which results in African-Americans being more likely than Whites to be charged after considering the employee's bureau, job and seniority" (Ex. 42-3, Siskin Rebuttal Report, p, ¶¶3-4; Ex. 43, White Dep. pp. 8093.) This disparity is unexplainable other than by race, unless one assumes that Black employees are many times more likely to break the rules than White employees. (Ex. 42-3, Siskin Rebuttal Report, p. 2, ¶¶3-4.) Even Dr. White found no evidence to support that assumption. (*Id.* at p. 2, n.2, quoting White Dep. pp. 80-93.)

While it is not possible to tell whether the discipline disparity is a reflection of "too many" charges being filed against Blacks or "too few" being brought against Whites, the disparity exists. If one assumes Blacks and Whites are equally likely to engage in misconduct, Blacks are adversely affected at statistically significant higher levels. (*Id.* at p. 45, ¶12, Table R1.) As Dr. Siskin explained, analyzing the discipline outcomes fails to take into account the undisputed finding that Blacks are either overcharged for violations, Whites are not charged for violations they commit, or both. (*Id.* pp. 2-4, ¶¶5-11.)

Consistent with Dr. Siskin's analysis, numerous White employees blatantly violated the EEO policy without being subject to disciplinary action until the OIG stumbled onto the racist exchanges. Contrastingly, Blacks were subject to false discipline allegations, akin to "drivingwhile-Black" - a methodology employed to make sure they knew their place.

Plaintiff Henry testified that many of the White plumbers lived in Chicago's Mt. Greenwood neighborhood (where Bresnahan lived) and that Bresnahan gave White employees preferential treatment. Henry's testimony is consistent with Dwayne Hightower's testimony that Bresnahan ran interference against discipline of White employees while actively disciplining Black employees. (Ex. 9, Henry Dep. 39:1-54:24; Ex. 10, Hightower Dep. 29:12-22, 129:6-17.) Donald Anderson was falsely accused of discipline based on his reaction to a supervisor calling him a "nigger." (Ex. 1, Anderson Dep. 131:5-138:10.)

Plaintiffs Ealy, Glenn, Hill, Cooper, and Laws also were accused of disciplinary violations during the relevant period.[5] Numerous other putative class members attested to being disciplined for alleged infractions that were not enforced against Whites. (*See, e.g.*, Ex. 45-21, J. Jones Decl. ¶8(e); Ex. 45-40, R. Scott Decl. ¶ 8; Ex. 45-45, D. Tignor Decl. ¶7(b); Ex. 45-48, C. Williams Decl. ¶8(b).)

K. Defendant Denied Blacks Equal Opportunity To Advance Within The Department ("Promotions").

Selection of candidates for all Department positions subject to the Hiring Plan use the same process. Department personnel working with the City's Department of Human Resources ("DHR") identify criteria for the position based on the job description/hiring criteria. (Ex. 5, Doyle-Deane Dep. 110:9-23, 111:1-112:24, 146:6-14, 183:8-17, 186:1-188:24.)

Applicants apply electronically. Since 2007 Defendant has tracked applicants' progression through the City's hiring process electronically with TALEO, an Oracle database. (*Id.* at 18:119:24, 24:21-25:2.) Positions are posted by that system, applications are accepted by that system, and in the end, selected candidates are identified on it. (*Id.*) All positions created in the City's budget system go through TALEO, except those that are not covered by *Shakman* (*i.e.*, exempt) (now referred to as the Hiring Plan), such as a deputy commissioner, managing deputy, first deputy commissioner. (*Id.*)

DHR identifies which applicants are minimally qualified based on the criteria the Department provides, and refers those candidates to the Department. (*Id.* at 30:4-31:17.) Department "subject matter experts" work with DHR to determine and administer selection criteria (*e.g.*, interview questions, tests) and the Department creates the candidate "assessment form." (*Id.*, at 99:1-101:24, 105:1-106:24, 137:12-138:4; Ex. 25, Stark Dep. pp. 99-101.) Department personnel preform the

interviewing, evaluate the candidate and, after a consensus meeting, recommend hiring. Generally, Pope-Anderson and John Pope (both White) helped coordinate this for the Department. (Ex. 16, Murphy Dep. pp. 87:3-88:8, 89:21-90:12; Ex. 82-1 - 82-7, Pope-Anderson Coordinating Emails.)

To analyze promotions, Dr. Siskin compared the rates of selection of Black and White Department employees who applied for vacant positions ("bidders" in Dr. Siskin's terminology) in the Department.[6] He found statistically significant adverse selection results for Blacks - meaning the likelihood of the results occurring absent race being a factor was approximately 5 in 10,000 times for the total time period for which data was provided (2011-2020).[7] (Ex. 42-1, Siskin Dec. Report, pp. 4, 9, 13, 25). That pattern continued for the Class Data Period (2015-2017), although it was not statistically significant because the number of positions that were filled during that shorter time period was too small to draw conclusions from.[8] (Ex. 42-3, Siskin Rebuttal Report, pp. 17-18, 44-47.)

Dr. Siskin's findings are confirmed by the Plaintiffs and affiants who repeatedly applied for positions that they believed offered better opportunities, and were repeatedly denied those positions, with some even forgoing further applications.

Plaintiff David Henry, a plumber for 21 years (mostly in the South District), applied to become a work crew foreman in 2012, but was denied the promotion. (Ex. 9, Henry Dep, 11:2022, 32:9-33:24.) Henry was discouraged from re-applying after talking with Craig Ward (Black), who had applied for the same promotion four times, after passing the written examination but being rejected during the oral (in-person) interview that was almost always conducted by White supervisors who would intentionally score Blacks lower. (*Id.* at 32:1-35:24, 45:9-46:7.)

Plaintiff Donald Anderson is an Assistant District Superintendent, but was only promoted in 2018 *after* this lawsuit was filed. (Ex. 1, Anderson Dep. 87:23-88:24.) Prior to 2018, Anderson had applied for multiple promotions, which were all denied. (*Id.* at 40:1-69:24.)

Plaintiff Kathy Ealy first applied for ACOE in October 2010, and applied throughout the class period, but did not become an ACOE until 2016, even though she was qualified for the job. (Ex. 6, Ealy Dep. 30:19-31:6.) In the interim, less qualified White engineers were promoted to ACOE. (*Id.* at 36:8-37:18.)

Plaintiff Veronica Smith is a construction laborer. (Ex. 23, Smith Dep. 25:23-24.) She unsuccessfully applied for promotions to construction foreman repeatedly (including 2016) and was passed over for promotions in favor of entry-level employees who she initially trained. (*Id.* at 39:20-41:2; Ex. 35, Smith Interrogatory Answers, Answer to Rog 1, p. 3.)

Plaintiff Edmond applied for promotion to Assistant Chief Operating Engineer approximately 18 times, never successfully being selected for the promotion. (Ex. 7, Edmond Dep. 147:3-24.) Edmond believes that Alan Stark impeded his ability to receive any of the promotions. (*Id.* at 29:14-16.) Edmond believes that the culture of racism at the Water Department also impeded his promotion opportunities. (*Id.*)

Numerous other putative class members attested to being denied promotions, so much so many gave up trying. For example, Graylin Clark, a 63-year-old store room clerk and laborer of 24 years, said "Whites always got first dibs on the more desirable jobs" and that "job postings were kept hidden or only made public late so preferred White candidates had an 'inside track' on promotions." (Ex. 45-5, Clark Decl.) Michael Colton stopped applying for promotions after he was "told no so many times." When applying for a Cleaning Foreman job his White supervisor "thought it was funny [...] that I even tried to apply" for a promotion. (Ex. 45-6, Colton Decl.)

L. The City's EEO Policy Failed To Protect Blacks.

1. Defendant Failed To Train The Department On Its EEO Policy.

Defendant maintains a policy that prohibits racial discrimination. (*See, e.g.*, Ex. 51, EEO Policy.) But from 2011 through Commissioner Murphy's resignation, there was no departmentwide training about the City's EEO policy. (Ex. 16, Murphy Dep. 239:18-22; Ex 13, Marrs 30(b)(6) 54:1-57:24; Ex. 19, Pando 30(b)(6) 61:14-62:7.)

Even if the City had trained DWM personnel on the EEO policy, that policy was never enforced in part because the top managers in the Department did not care about it and partly because, even if they had cared, the EEO enforcement team was woefully understaffed during the relevant time period. (Ex. 18, Pando Dep. 11:1-24.)[9] EEO complaints regularly took years to investigate and resolve. "During the time of the alleged harassment in this case [2015 - 2017], the EEO Division was understaffed. Defendant's 30(b)(6) designee testified that, due to understaffing in 2016, there were cases put on hold "regardless if [the EEO Division] believed they were going to be sustained or unsustained." (Ex. 20, Pando *Abreu* 30(b)(6) Dep. 147:22-148:14.) The process was such a joke that even Managing Deputy Commissioner Bresnahan commented about it: "5 years [for HR] to complete [an investigation]; I would have been s*** canned years ago." (Ex. 83, Bresnahan 10/12/2016 Email.)

The City's Department of Human Resources was responsible for investigating discrimination complaints for the DWM (along with all other City departments except Police), but DWM rarely referred complaints to DHR. Examples of the superficial nature of the City's EEO investigations, when they occurred, include:

Case No. 2016 EEO 58 - John Young v. John King - White respondent General Superintendent of Water Management allegedly called a Black complainant construction laborer (with Virtiligo - a patchy skin condition) a "zebra" and "boy" and "nigger"; finding of insufficient evidence after nearly **three years** of investigation (1085 days) (Ex. 86-3, DWM-Edmond 033397, emphasis added);

Case No. 2014 EEO 08 - Willie Davis v. Thomas Mendoza - White Respondent General Superintendent called a Black complainant Engineering Technician IV "little willie," denied him overtime, passed him over for a promotion and refused to provide him with training; unable to move forward with investigation after **three years and three months** of investigation (1189 days) due to absent respondent (Ex. 86-1, Edmond-047499-047505, 047560, emphasis added); and

Case No. 2016 EEO 56 - Florentino Diaz v. John Sheppard - White respondent Foreman of Sewer Pipe Cleaning called Black respondent construction laborer a "nigger"; finding of insufficient evidence after **two years and three months** of investigation (833 days) (Ex. 86-2, Edmond-050375-050377).

Complaints - including complaints involving litigants - took so long to be investigated that Commissioner Conner complained to the Mayor's office. (Ex. 3, Connor Dep. 215:17:20, 222:22223:1, 226:11-227:1, 234, 239:16-22.)

DHR routinely refused to properly investigate complaints that were raised, disregarding its own policy which prohibits investigators from making credibility determinations when presented with competing versions of events from interested witnesses. (Ex. 18, Pando Dep. 46:1-49:24.) Human Resources' standard practice was in fact to *make* credibility determinations that favored the Department even when Black employees made a *prima facie* showing of discrimination. (*Id.* at 48:10-49:6.)

An example is the "investigation" of the pay disparity complaint lodged by Black employee Keith Holmes, the subject of a racist "Ebonics" email exchange between Tom Durkin and Matthew Quinn. (Ex. 81-79, KLD0028513.) Holmes and two White employees were hired for the same job, at the same time, performing the same duties, but the White employees were paid more than Holmes. (Ex. 18, Pando Dep. 37:17-38:24.) The Whites later received an additional salary increase widening the pay disparity. (*Id.*)

Department of Human Resources' practice of ignoring protocol in refusing to investigate was not isolated. (*Id.* at 33:1-35:2, 96:1-103:24, 109:1-115:24, 118:1-121:24) (describing failure to investigate Black females' termination *by* DeCaluwe, where the employee identified two White employees who engaged in similar conduct but were not terminated; DHR never even reviewed the performance evaluations of the White men to determine if there was disparity in discipline.)[10]

Despite the list of EEO complaints a mile long, prior to the OIG's investigation in 2017, only two Department employees were disciplined for engaging in racially discriminatory conduct against Blacks. (Ex. 87, Race Related Disciplines, Retirements and Resignations.) Murphy never disciplined anyone for racist behavior, including Hansen, even though

Hansen's conduct led Murphy to question how Hansen would supervise Blacks. (Ex. 16, Murphy Dep. 199:25-201:4, 239:8-11; Ex. 87, Race Related Disciplines, Retirements and Resignations.)

2. Department Employees Correctly Felt Opposing Race Discrimination Was Futile.

All levels of the Department knew how complainers were regarded. Commissioner Murphy set the Department's tone for how to deal with those who dared to complain. In a communication with Bresnahan, Pope-Andersen and Hansen, Murphy said: "[p]ersonally, I'd like to get rid of the rats." (Ex. 81-80, City Abreu 52864.) The Commissioner's opinion on "rats" was shared by Bresnahan and Hansen and Jennifer Izban (discipline supervisor/coordinator) exchanging messages about "a whistleblower in the crowd. IDOL has been at several of our sites for inspections ... please let everyone know they have to be perfect *[u]ntil we find the rat or they get sick of looking at us*." (Ex. 81-81, City Abreu 042258.)

The view of "rats" was confirmed by Deputy Commissioner Luci Pope-Anderson, who gave the rationale for ignoring and condoning the obvious racism prevalent in the Department's culture as: [Text redacted in copy.] (Ex. 77, OIG Report File for Pope-Anderson, p. 7.)

Similarly, General Foreman Durkin rationalized that a person in his position would not report this type of conduct because [Text redacted in copy.] (Ex. 70, OIG Interview of Thomas Durkin, pp. 35-36, 42, emphasis added.) Putative class members understood complaining was futile. For example, Derick Holland said union grievances and complaints were futile because the persons to whom you would report were the perpetrators of the discrimination. (Ex. 45-19, Holland Decl.)

Indeed, during the purported "re-set" from the racist culture, Commissioner Conner conceded that fear of retaliation within the Department was genuine - so much so that Commissioner Conner rejected the OIG's recommendation to discharge Pope-Anderson. Even an upper-level manager like Pope-Anderson was justified in not having [Text redacted in copy.] (Ex. 78, Connor Memo re Reducing Pope-Anderson Discipline; emphasis added.) If one of the top managers at the Department feared for her job, even though she had access to the highest levels of City personnel, rank and file employees were certainly justified in believing that reporting racism would only beget an attack upon the person doing the reporting (as many felt).

Even if the misconduct had been reported, Plumber Local 130 Agent Michael Tierney summed it up: [Text redacted in copy.] (Ex. 66, OIG Interview of Stanley DeCaluwe, pp. 78-79; emphasis added.) The absence of EEO investigations or discipline further demonstrated to everyone that reporting misconduct would only get the complainant in trouble.

M. A City Council Hearing Failed To End The Racist Culture.

After the press revelations in Summer 2017 and Connor replaced Murphy as Commissioner, the Chicago City Council convened a hearing on the Department's racially discriminatory practices. (Ex. 15, Ald. Moore Dep. pp. 117:2-118:7, 120:13-124:9, 135:12135:17). On January 10, 2018, the City Council's Committee on Human Relations convened a public hearing, during which at least 10 witnesses provided testimony. (Ex. 15, Ald. Moore Dep, pp. 146:20-147:7; *see also* Ex. 38, City Council Hearing Materials.)

In addition to describing common use of racial epithets (*e.g.*, Blacks being called niggers), discriminatory discipline, inability to be promoted, and harsher working conditions, witnesses also described how discipline was used as retaliation. (Ex. 38, City Council Hearing Materials.) Per Alderman Moore, the witnesses who spoke confirmed the culture of racism and Moore said "we could have had more people at that hearing, but too many people were afraid." (Ex. 15, Ald. Moore Dep. pp. 112:67; 121:2-12, 132:5-22, 140:4-22, 148:6-9, 160:25-162:7, 234:23-236:14).

The Committee concluded that a culture of racism, including racial harassment, existed at the Department. (Ex. 15, Ald. Moore Dep.161:13-162:7) Department management, eager to move on from the scandal, put forth a plan to "change the [racist] culture," including establishing a new "zero tolerance" policy for racism and annual EEO training. (Ex. 27, Hernandez-Tomlin 30(b)(6) Dep. Pp. 107:19-108:13, 186:12-19, 201:23-202:9; Ex. 15, Ald. Moore Dep. pp. 169:6182:25).

After Murphy resigned, the Department did conduct generalized EEO training and gender discrimination training, but nothing specific to race discrimination. (Ex. 13, Marrs 30(b)(6) Dep. 56:24-57:11, 67:17-68:2, 69:23-72:3, 112:15-113:6; Ex. 19, Pando 30(b)(6) 73:8-74:1.) Contrary to the Department's written representations at City Council, even that training does not appear to have been provided annually for all employees. (*See, e.g.*, Ex. 25, Stark Dep. 134:24-136:8.)

N. Plaintiff's Sociological Expert Concluded Defendant Created A Hostile Work Environment That Led To Discrimination.

Plaintiffs' expert Charles Gallagher (Professor and former Chair, Department of Sociology and Criminal Justice, La Salle University, Philadelphia) reviewed much of the evidence described above and applied principles sociologists use to assess discrimination in organizations and groups (including cultural "modeling"). He concluded that "[w]hat appears to have happened at DWM was a style of management where racism and use of racial stereotypes was not only permitted but promoted by senior management." (Ex. 40, Gallagher Report, p. 9). As Dr. Gallagher noted:

For those in management positions who were aware of racist or discriminatory behavior but turned a blind eye there is, as Chatterjee and Toffel put it, "the risk of silence, which may be viewed as a sign of tacit approval" (in Krause and Miller p. 1317, 2020). That appears to have happened here, as figurative and literal messages sent by the Water Department's nearly exclusive White senior management (Murphy, Bresnahan and Stark) were being received by predominantly White middle and lower management (*e.g*., superintendents, assistant superintendents, chief operating engineers, and foremen) ([Defendant's] Supplemental Response to Interrogatory No. 19) ... **In short, senior management's overt acts (racist emails and language, discriminatory behavior) and management who did nothing to stop that and other behavior created a workplace hostile to African-Americans and signaled to White workers there would be few or no consequences for engaging in racist behavior, creating a culture where treating African-Americans like second-class citizens was acceptable**.

(*Id.*, p. 10, emphasis added.)

Elaborating, Dr. Gallagher saw an organization where Whites who were over-represented in supervisory and management positions: (1) engaged in typical expressions of White superiority (*e.g*., name-calling, stereotyping and/or demeaning language) and (2) treated Blacks as different or "other" (referencing distinctive food, clothing, music, *etc*. or referring to Blacks as "you people"), noting the combination of these "feelings of superiority and distinctiveness can easily give rise to feelings of aversion and antipathy." (*Id.*, pp. 13-15) (internal quotation omitted). Dr. Gallagher explained that: (3) "the dominant group [Whites] feels entitled to valued social and economic resources" (here, positions, overtime, not being subject to capricious discipline) and (4) Whites perceived threats to losing access to those resources. (*Id.*, pp. 15-16.)

Given the presence of those four factors, Dr. Gallagher wrote that "[t]he racist and discriminatory **actions at the DWM is exactly the outcome social sciences would predict would occur in an environment where systemic racism has been normalized**." (*Id.*, pp. 16-18; emphasis added).

What research suggests is that when racially subordinate groups threaten the position of the dominant group or encroach on what is perceived to be an asset or resource of the dominant group, discriminatory treatment directed at racial minorities often follows. Evidence I have reviewed and considered suggests this is what has occurred at the Department of Water Management.

(*Id.*, pp. 17-18.) Dr. Gallagher concluded:

First, DWM leadership created a hostile work environment for Black workers and this behavior led to race based discriminatory treatment. ...

The racist "top down" culture was fostered, condoned and sanctioned by the Department of Water Management's senior management and according to Black workers['] accounts, occurred at all levels of management and among many rank and file White workers

Second, all the ingredients for racist discriminatory behavior by White management and some White workers to take place at DWM were present.

(*Id.*, pp. 33-34, emphasis in original).

ARGUMENT

Class certification should be granted if Plaintiffs satisfy the requirements of Rule 23(a) and one or more subsections of Rule 23(b) and/or Rule 23(c)(4). *Amchem Prods. v. Windsor*, 521 U.S. 591, 613-16 (1997); *McReynolds v. Merrill, Lynch, Pierce, Fenner & Smith, Inc*., 672 F.3d 482, 490-92 (7th Cir. 2012) (reversing denial of class certification and ordering class certification under Rule 23(b)(2) and (c)(4) in an unintentional employment race discrimination case).

At the class certification stage, the court does not "'adjudicate the case,' but rather 'select[s] the method best suited for adjudication of the controversy fairly and efficiently.'" *Brown v. Cook Cty*., 332 F.R.D. 229, 237 (N.D. Ill. 2019) (*quoting Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013)).

The primary issue is whether the claims are most efficiently determined on a class-wide basis rather than in a multiplicity of individual trials. *See McReynolds*, 672 F.3d at 490.

Courts should not "turn the class certification proceedings into a dress rehearsal for the trial on the merits." *Messner v. Northshore Univ. Health System*, 669 F.3d 802, 811 (7th Cir. 2012). Issues relating to the merits may be considered only to the extent that they are relevant to whether Rule 23 is satisfied. *See Amgen*, 568 U.S. at 465-66 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, n.6 (2011)); *see also* Fed. R. Civ. P. 23(c)(1) Advisory Committee's 2003 Note ("[A]n evaluation of the probable outcome on the merits is not properly part of the class certification decision ....").

Thus, the question here is not whether the Plaintiffs can or will prove their claims, but only whether Plaintiffs satisfy Rule 23's elements - *i.e.*, whether the case fits the procedural requirements of a proper class action or, alternatively, whether each plaintiff and class member must pursue their own claim. This Court should rigorously analyze Rule 23's elements, but that "does not mean the Rule 23 analysis is transformed into a summary judgment motion." *Driver v. Marion Cty. Sheriff*, 859 F.3d 489, 493 (7th Cir. 2017). Plaintiffs need not show they satisfy Rule 23 "to a degree of absolute certainty." *Messner*, 669 F.3d at 811.

Here, a class action should be used to resolve Plaintiffs' claims of systemic discrimination in the Department. Plaintiffs' common evidence includes the City's unprecedented admissions about the Department's hostile work environment, and the admission that it was an "open secret" that the Department was infected with a long-standing "culture" of racism - that was the Department's "everyday business" and "the way that they look at things." (Ex. 2, Bresnahan Dep. 12:23-13:9; Ex. 3, Conner Dep., 140:18-1; Ex. 16, Murphy Dep. 244:1-248:24; Ex. 15, Ald. Moore Dep. 51:1-54:24; Ex. 45-12, ¶15.) This pervasively racist way of doing everyday business impacted every Black employee.

In addition to the admissions, dozens of Black affiants have sworn and witnesses have testified in this case that they endured the Department's hostile work environment. No bureau, division or location was insulated from the harassment; employees of every type and title suffered the same environment. Thus, the common evidence of the deeply-rooted racist culture affecting hundreds of workers ought to be evaluated by one jury in one lawsuit for all class members instead of a series of repetitive, Court-clogging individual jury trials that would tread the same ground.

Further supporting common evidence includes Dr. Siskin's analysis of discipline, overtime, and promotions. Based on the analyses described above, Dr. Siskin concluded that:

· The Department "is using some manner or method of administration or criteria [during the "referral" step], that ha[s] a disparate impact against [Blacks] as compared to Whites" (Ex. 42-1, Siskin Dec. Report, p. 10.)

· The Department "engaged in a widespread pattern or practice of not providing [Blacks] as compared to Whites equal treatment with respect to discipline, overtime opportunities, and promotions (as defined above)" (Ex. 42-1, Siskin Dec. Report, p. 48.)

· "Statistical analyses show that pattern was, generally speaking, consistent across years and bureaus and pools of similarly situated White and [Black] employees, and the disparities were statistically significantly adverse outcomes for [Blacks]" (Ex. 42-1, Siskin Dec. Report, pp. 48-49.)

The Court should certify Plaintiffs' proposed Class and Sub-Classes because the City's liability on Plaintiffs' claims can and

will be established by common evidence, as explained below and in Plaintiffs' Trial Plan (Exhibit A).

(A) Plaintiffs' Proposed Classes

Pursuant to Rule 23, Plaintiffs seek certification of the following class:

Hostile Work Environment Class: All Black employees who worked in the Department between January 1, 2011 and the date of judgment.

Plaintiffs also seek certification of the following sub-classes comprised of members of the Hostile Work Environment Class:
Overtime Sub-Class: Hostile Work Environment Class Members who worked in the Department in a position eligible for Overtime between June 29, 2015 and July 1, 2017, for the Bureaus of Operations and Distribution, Engineering Services, Administrative Support, and Meter Services.

Discipline Sub-Class: Hostile Work Environment Class Members who were formally accused of a disciplinary infraction between June 29, 2015 and July 1, 2017.

Promotion Sub-Class: Hostile Work Environment Class Members who made an unsuccessful application for a position within the Department which was pending or determined between June 29, 2015 and July 1, 2017.

Plaintiffs refer to these "sub-classes" recognizing each must independently satisfy Rule 23. *See* Fed. R. Civ. P. 23(c)(5).

(B) Plaintiffs' Proposed Class Representatives

Plaintiffs request the Court appoint each named Plaintiff to represent the Hostile Work Environment Class.

Plaintiffs propose that Plaintiffs Henry, Anderson, and Laws represent the Overtime SubClass, as all worked in positions eligible for overtime outside the Bureau of Water Supply during the class period.

Plaintiffs request the Court appoint Plaintiffs Anderson, Ealy, Glenn, Hill, Cooper, and Laws to represent the Discipline Sub-Class, as all were issued a notice of pre-disciplinary hearing during the class period.

Plaintiffs propose that Plaintiffs Henry, Ealy, and Smith represent the Promotion SubClass, as all had applications pending during the class period.

Plaintiffs propose that Victor Henderson, Devlin Schoop and Chris Carmichael of Henderson Parks, LLC, J. Bryan Wood of The Wood Law Office, LLC, and Charles Watkins of Guin, Stokes & Evans, LLC serve as Class Counsel.

(C) Laws And Theories Under Which Plaintiffs Proceed

Plaintiffs allege in the Third Amended Complaint (ECF # 194) that Defendant violated their rights under the Illinois Civil Rights Act of 2003, 740 ILCS 23/1, *et seq*,, the Civil Rights Act of 1866, 42 U.S.C. § 1981(a) and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

The Illinois Civil Rights Act, 740 ILCS 23/5, provides:
(a) No unit of ... local government in Illinois shall:

(1) exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination under any program or activity on the grounds of that person's race ...; or

(2) utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race ...

The Civil Rights Act of 1866, 42 U.S.C. § 1981 provides:
(a) Statement of Equal Rights:

All persons ... shall have the same right in every State and Territory to ... the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens ...

***

(c) Protection Against Impairment:

The rights protected by this section are protected against ... impairment under color of State law.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding ...

Under Section 1983, violations of the Fourteenth Amendment's Equal Protection Clause are actionable against local governmental entities even if other statutory remedies may be available. *See Fitzgerald v. Barnstable Sch. Comm*. 555 U.S. 246, 256 (2009).

(1) Harassment / Hostile Work Environment

Racially hostile work environments are actionable under all three statutes. Plaintiffs allege Defendant subjected them to a racially hostile work environment in that: (1) they were subjected to unwelcome harassment; (2) the harassment was on the basis of race; (3) the harassment was severe *or* pervasive to a degree that altered the conditions of employment and created a hostile or abusive work environment; and (4) a basis for employer liability exists. *Robinson v. Perales*, 894 F.3d 818, 828 (7th Cir. 2018); *see also Alexander v. Casino Queen, Inc*., 739 F.3d 972, 982 (7th Cir. 2014).

"Whether harassment was so severe or pervasive as to constitute a hostile work environment is" not resolved on class certification but is "generally a question of fact for the jury." *Johnson v. Advocate Health & Hosps. Corp*., 892 F.3d 887, 900-01 (7thCir. 2018). As this Court explained in in *Brand v. Comcast*, 302 F.R.D. 201 (N.D. Ill. 2014):
The Seventh Circuit has been fairly consistent in concluding that the severe or pervasive use of racial epithets can on its own create an objectively hostile work environment. *See Rodgers v. W.S. Life Ins. Co*., 12 F.3d 668, 675 (7th Cir. 1993) ("Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates.").

Id. at 218 (internal quotation marks and citation omitted). The "severe or pervasive" requirement for hostile work environment "is disjunctive—one extremely serious act of harassment could rise to an actionable level as could a series of less severe acts." *Id.*, at 219 (emphasis added, internal quotation marks omitted).

Plaintiffs assert their hostile work environment claim going back to 2011. They believe that is when the work environment at the Department became actionable and that it is actionable that far back because a racially discriminatory hostile work environment is considered a "continuing violation" which can be challenged for the *entire duration* of the actions in question. *See National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 106-107, 121 (2002); *see also Abreu v. City of Chicago*, 1:19-c-2161, 2022 WL 1487583, at *15 (N.D. Ill. May 10, 2022) ("The Seventh Circuit has since applied the continuing violation doctrine to hostile work environment claims") (citing *National Railroad Passenger Corp*. and *Bright v. Hill's Pet Nutrition, Inc*., 510 F.3d 766, 768 (7th Cir. 2007)). Because Plaintiffs' claims "include at least one act within the time period," the continuing violation theory allows the Plaintiffs to challenge the hostile work environment for the entire duration. *Abreu*, 2022 WL 1487583, at *15.

(2) Establishing Liability Under *Monell*

Municipal entities cannot be held vicariously liable for their employees' actions under Section 1983 on a *respondeat superior* theory. *See Monell v. New York Department of Social Services*, 436 U.S. 658 (1978). Rather, a plaintiff establishes municipal liability by showing that the unlawful conduct "is caused by (1) an official policy adopted and promulgated by its officers; (2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; or (3) an official with final policy-making authority." *Thomas v. Cook County Sherriff's Dept*., 604 F.3d 293, 303 (7th Cir. 2010) (explaining that to show a widespread, well-settled practice, the plaintiff must show "policymakers were 'deliberately indifferent as to [their] known or obvious consequences"' (quoting *Gable v. City of Chicago*, 296 F.3d 531, 537 (7th Cir. 2002)).

In describing the second *Monell* standard, the court in *Abreu* observed that:
"If the same problem has arisen many times and the municipality has acquiesced in the outcome," the court may "infer that there is a policy at work." *Id.; see Jackson v. Marion County*, 66 F.3d 151,152 (7th Cir. 1995) ("The usual way in which an unconstitutional policy is inferred, in the absence of direct evidence, is by showing a series of bad acts and inviting the court to infer from them that the policymaking level of government was bound to have noticed what was going on and by failing to do anything must have encouraged or at least condoned, thus in either event adopting, the misconduct of subordinate officers."). The Seventh Circuit has not established any bright-line rules for how frequently such conduct must occur before labeling it a "practice," though it has held that there "must be more than one instance." *See Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010).

Abreu, 2022 WL 1487583, at *17 (holding a jury could find sufficient evidence of a widespread pattern sufficient for *Monell)*.

(3) Intentional Discrimination In Promotions, Overtime & Discipline

Plaintiffs also allege they were denied equal opportunities for overtime and promotions and were disciplined differently because of intentional discrimination under all three civil rights statutes. Plaintiffs allege these actions contributed to and were part of the hostile work environment and are actionable separately as well.

In *Ortiz v. Werner Enters., Inc*., the Seventh Circuit held that the ultimate issue in an intentional discrimination claim is whether the preponderance of *all of the evidence* (including evidence of context) supports a finding that the adverse employment action in question (failure to promote, assign overtime, subjecting to discipline, *etc*.) was motivated by the plaintiff's race. 834 F.3d 760, 764 (7th Cir. 2016); *see also Igasaki v. Ill. Dep't of Prof'l Regulation*, 988 F.3d 948, 957 (7th Cir. 2021).

Liability on Plaintiffs' federal claims requires proving one of the three mechanisms for liability under *Monell* set forth above, and Plaintiffs have amassed evidence that shows overtime, promotions, and discipline were part of the unwritten cultural policy of denying Blacks equal opportunities within the Department.

(4) Pattern-Or-Practice Of Race Discrimination

Plaintiffs also seek to prove their hostile work environment and their intentional discrimination claims regarding overtime, discipline and promotions using the pattern-or-practice method described in *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 334-36 (1977). Under that method of proof, Plaintiffs will seek to prove that Defendant "regularly and purposely treated Negroes ... less favorably than white persons" with respect to terms and conditions of employment, *i.e.*, overtime, disciplinary action and/or promotion. *Id.* at 335. Plaintiffs will prove this by showing by a preponderance of evidence that "racial discrimination was the [employer's] standard operating procedure, the regular rather than the unusual practice." *Id.* at 336.

However, "[a]t the initial, 'liability' stage ... [Plaintiffs are] not required to offer evidence that each person for whom [they] will ultimately seek relief was a victim of the employer's discriminatory policy." *Id.* at 360. The trial's focus "will not be on the individual [employment] decisions, but on a pattern of discriminatory decision making." *Id.*

If Plaintiffs succeed, "a court's finding of a pattern or practice justifies an award of prospective relief" such as "an injunctive order against continuation of the discriminatory practice" or other relief. *Id.* at 361. Additionally, "proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Id.* at 362.

Plaintiffs seek to recover on this theory for the Hostile Work Environment Class going back to 2011 because a pattern-or-practice is considered a "continuing violation" which can be challenged for the entire duration of practice. *See Guzman v. Northern Illinois Gas Co*., No. 09-cv-1358, 2009 WL 3762202, at *4-5 (N.D. Ill. Nov. 6, 2009) (applying *Morgan* to the pattern-or-practice theory).

(5) Unintentional Discrimination Under The Illinois Civil Rights Act

For the Illinois Civil Rights Act, 740 ILCS 23/1, *et seq*., Plaintiffs need not satisfy any of the *Monell* factors to prove intentional discrimination. 740 ILCS 23/5(a) & (b). Plaintiffs also allege Defendant's treatment of them with respect to overtime, promotions and disciplinary action constituted illegal *unintentional* discrimination. Per the statute's plain language, to prove these claims Plaintiffs will establish Defendant "utilize[d] criteria or methods of administration" with respect to overtime, discipline or promotions "that [had] the effect of subjecting individuals to discrimination based on their race." 740 ILCS 23/5(a)(2). Plaintiffs assert this claim for the two-year period prior to filing this lawsuit - *i.e.*, from June 29, 2015 to July 1, 2017.

I. Plaintiffs' Claims Are Appropriate For Class Treatment.

Cases similar to this one were certified for class action treatment, and those cases were "harder cases" because in those cases the employer did not admit, as it did here, that pervasive racism existed in its workplace.

In *Smith v. Nike Retail Servs., Inc.*, plaintiffs alleged a "culture" of racial animus and sought a hostile work environment class of all Black employees, with subclasses for discrete manifestations of discrimination, including work assignments, promotions and discipline. 234 F.R.D. 648, 666-67 (N.D. Ill. 2006). Nike opposed class treatment, claiming class members worked different shifts for different supervisors, suffered differing types and intensities of mistreatment, and that some lacked injury. *Id.* Noting that the "asserted practices cover a wide and, if the charges are true, appalling range," *id.* at 656, the court certified the requested classes, reasoning with respect to the hostile work claim that the named plaintiffs shared "with class members the common essential claim that a hostile work environment, *manifested in a variety of ways*, existed at Nike Chicago." *Id.* at 660 (emphasis added). Similarly in this case, management subjected Blacks to a hostile work environment that clearly permeated the entire Department.

In *Brand*, this Court certified a class of Comcast employees alleging a hostile work environment under Section 1981 and Title VII, reasoning that there was:

> a significant common question among class members, namely whether they were subject to conditions constituting a hostile work environment at the 112th Street facility based on abusive language, a dilapidated, infested facility, and problematic equipment. Put simply, this common question is whether conditions at 112th Street presented a hostile work environment for the African-American employees there.

Brand, 301 F.R.D. at 223; *see also Adams v. R.R. Donnelley & Sons*, Case No. 96 C 7717, 2001 WL 336830, at *13 (N.D. Ill. Apr. 6, 2001) ("a racially hostile work environment is an appropriate subject of class certification, for by definition ... it involves conduct targeted at a group"); *Markham v. White*, 171 F.R.D. 217 (N.D. Ill. 1997) (certifying hostile work environment class).

The lengthy proceedings in *Brown v. Nucor* demonstrate that discrimination and hostile work environment classes involving different work environments are properly certified even after *Wal-Mart Stores, Inc. v. Dukes*. 576 F.3d 149 (4th Cir. 2009). There, the district court denied plaintiffs' motion to certify hostile work environment and promotions classes but the Fourth Circuit reversed and ordered certification on remand. The class encompassed six autonomous and independent departments; yet, with respect to the hostile work environment claim the Fourth Circuit found:

> sufficient evidence to indicate that all of the black employees were affected by the comments and actions of the white employees and supervisors in other departments. Thus, the affidavits of employees in one department are admissible to prove a plantwide hostile environment that affected employees in other departments, and the plaintiffs have satisfied the commonality requirement for their hostile work environment claim.

Id. at 158 (citing *Holsey v. Armour & Co*., 743 F.2d 199, 216-17 (4th Cir. 2009)). The defendant moved to decertify based on the then-recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). The lower court decertified the promotions claims but left the hostile work environment class in place, explaining:

the plaintiffs have submitted significant proof that the landscape of the total work environment at the Berkeley plant was hostile towards African-Americans and that the defendants failed to take "remedial action 'reasonably calculated to end the harassment.'" [...] a significant number of the plaintiffs have alleged a substantial pattern of racial harassment by their supervisors and coworkers in the Beam Mill. [...] It suffices to say that they are sufficiently numerous and offensive to raise questions of law and fact common to all African-Americans who worked in the Beam Mill.

Brown v. Nucor Corp., 2012 WL 12146620, *24 (D.S.C. Sept. 11, 2012).[11]

Similarly, courts have certified harassment class claims involving sub-classes for specific types of harms. In *Wilfong v. Rent-A-Center, Inc*., the court certified a similar omnibus class covering allegations of discrimination in "Hiring, Promotion, Demotion and Discharge." No. 00-CV-0680-DRH, 2001 WL 1795093, at *2 (S.D. Ill. Dec. 27, 2001). Like these cases, Plaintiffs' motion to certify the hostile work environment class should be granted because they satisfy all Rule 23's requirements.

II. Plaintiffs Satisfy All Rule 23(a) Requirements.

A. Numerosity: Plaintiffs Satisfy Rule 23(a)(1).

Data produced by Defendant shows that the Hostile Work Environment Class includes approximately 1,124 members, the

Overtime Sub-Class includes at least 560 members, the Promotions Sub-Class includes approximately 121 members, and that the Discipline Sub-Class includes approximately 218 members.[12]

Numerosity is easily satisfied here because joinder of the more than 1,100 employees in the putative Class or even the 121 in the smallest Sub-Class is "impracticable." Fed. R. Civ. P. 23(a)(1); *see also Gaspar v. Linvatec Corp*., 167 F.R.D. 51, 56 (N.D. Ill. 1996) (courts "consider factors such as judicial economy and the ability of members to bring individual lawsuits"); *Balderrama-Baca v. Clarence Davids & Co*., 318 F.R.D. 603, 609 (N.D. Ill. 2017) ("many courts have held classes of forty or more members to be sufficiently numerous to warrant class certification"). Based on the objective criteria in Plaintiffs' proposed Class and Sub-Class definitions, class members are easily identifiable, or "ascertainable," from personnel records and data. Joinder of all such employees is impractical, as former employees may have relocated and current employees reasonably fear retaliation for participating. Thus, the classes satisfy Rule 23(a)(1).

B. Commonality: Plaintiffs Satisfy Rule 23(a)(2).

To show commonality after the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, plaintiffs must raise "'a common contention that is capable of classwide resolution"' and "show that 'determination of [the contention's] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."' *Brand*, 302 F.R.D. at 217 (quoting *WalMart*, 564 U.S. at 350)). "'[E]ven a single [common] question' will do." *Wal-Mart*, 564 U.S. at 359 (internal citation omitted); *see also Van v. Ford Motor Co.*, No. 14-cv-8708, 2018 WL 4635649, at *87 (N.D. Ill. Sep. 27, 2018) ("'[i]f the same evidence will suffice for each member to make a *prima facie* showing, then it becomes a common question"') (quoting *Messner*, 669 F.3d at 815).

The glue that holds a hostile work environment case together typically comes from common proof of one or more of the elements of the wrong, which "may be experienced differently from one person to the next, [ ][but] is nonetheless 'a single unlawful practice under Title VII."' *Brand*, 302 F.R.D. at 218 (quoting *Scruggs v. Garst Seed Co.*, 587 F.3d 832, 840 (7th Cir. 2009); *see also Brand*, 302 F.R.D. at 218. Like class damages, the effect of the hostile work environment can impact Blacks differently, yet the existence of the hostile work environment is a common thread warranting class treatment. As outlined above, there are four key elements for the claim:
The multi-factor test for hostile work environment requires a showing "(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) (internal quotation marks omitted).

Brand, 302 F.R.D. at 218.

In this case, each of the elements of Plaintiffs' hostile work environment claim present common questions capable of class-wide resolution, including:
(1) whether the work environment was objectively offensive to Blacks?

(2) whether the harassment Plaintiffs and class members describe was based on race?

(3) whether the conduct was severe or pervasive? and

(4) whether there is a basis for employer liability for the hostile work environment.

Plaintiffs satisfy the commonality requirement because each putative class member's claims will rise or fall based on common evidence for each of these four common questions.

1. Common Evidence Shows The Department's Work Environment Was Objectively Racially Offensive.

Given the language and conduct alleged at the Department (*e.g.*, referring to Blacks as niggers or coons and the presence of nooses, *etc*.), there is no question whether the conduct would be considered objectively offensive. The objective offensiveness of the environment is confirmed by Defendant's own admissions - common to and useable by every Class member - that there was an open secret culture of racism at the Department and that once exposed to the public the highest-level managers had to be terminated or forced out as a result.

Likewise, the OIG's findings that certain conduct by Department managers created a hostile work environment is common evidence all class members will rely upon, as is Murphy's, Bresnahan's, Pope-Anderson's and others' admissions they were engaging in inappropriate conduct that was objectively racially offensive. (Ex. 16, Murphy 261:13-16.)[13] This, and the common evidence discussed above will be used to answer the common question of whether the work environment was objectively hostile. (*See generally* Factual Background Sections C through H, *supra*.)

2. The Race-Based Nature Of The Harassment Is Proved Through Common Evidence.

In *Luckie v. Ameritech Corp.*, the court described "racial slurs" as "overtly race-related behavior." 389 F.3d 708, 713 (7th Cir. 2004). Here, the emails, which all Class members would use, are race-based. Top Department managers admit they were indicative of *racial* harassment. (*See, e.g.*, Ex. 2, Bresnahan Dep. 206:10-207:5 ("but then once you saw it all together, you realized how wrong it was and how hurtful it was. [...] And then it was like, oh, my God, look at all of this [emails]. It's — it was just — it was terrible"); Ex. 16, Murphy, pp. 202-205) (referring to stereotypes about Blacks eating watermelon or chicken, or being more likely to engage in criminal or dishonest behavior or drug use or sub-human). All this is common evidence that would be used to establish each Hostile Work Environment Class member's claims.

3. Common Evidence Will Show Whether The Harassment Was Severe, Pervasive, Or Both.

In *Brand*, the plaintiffs presented evidence from class members about the use of "nigger" or other racially hostile terms. 302 F.R.D. at 219. The Court concluded that the showing was "sufficient to establish 'significant proof' of the common question of whether a hostile work environment existed for African-American employees ...." *Id.* Here, Plaintiffs' forty-seven declarants or affiants, combined with their own accounts and the dozen Department employees who testified before the Chicago City Council in 2018, plus Professor Gallagher's Report, provide a similar basis for a finding of pervasiveness across the Department. That evidence, combined with Commissioner Conner's statements about how racism was part of the Department's "everyday business" and "the way they think," and the Mayor's statements about a culture of racism, shows that racism was pervasive within the Department.[14] The sheer volume of racially offensive emails and affirmative racist conduct like nooses, provides a common body of evidence to use to determine this element of all Class members' claims in one proceeding.

The same is true for the "severity" element of Plaintiffs' and putative Class members' claims. There is abundant common evidence that employees were called niggers, coons, and monkeys. That language is the mark of severe harassment, and is not ambiguous. The fact that supervisors and managers used such language makes it almost certain that it will be found to be severe at trial. *See Gates v. City of Chicago Bd. of Ed*., 916 F.3d 631, 636 (7th Cir. 2018) (noting "we have repeatedly treated a supervisor's use of racially toxic language in the workplace as much more serious than a co-worker's" and "use of the N-word by supervisors has a particularly severe impact on work environments").

Given the evidence, the Court should not hesitate to credit each Plaintiff's and class member's account of the racially hostile work environment, including those regarding nooses. *See Cole v. Bd. of Trustees of N. Ill. Univ*, 838 F.3d 888, 897-98 (7th Cir. 2016) ("[g]iven the status of a hangman's noose as a visceral symbol of death of thousands of African-Americans at the hands of lynch mobs ... we do not flatly reject as insufficiently severe" a single incident of a noose hanging in the workplace that was not directly observed by the plaintiff). Here, there is evidence of three nooses and description of Nazi images, including a swastika. Like the noose in *Cole*, these symbols of terror will help each putative Class member show the harassment that existed was severe *and* pervasive.

4. Common Evidence Will Establish Employer Liability.

Defendant's liability for the hostile environment rests on whether it was aware of the harassment and "[f]ail[ed] to respond to and remedy complaints." *Brand*, 302 F.R.D. at 221. Here, too, employer liability can be proved with common facts. Innumerable managerial employees from the Department were involved in the racially hostile conduct. Defendant's admission it was aware of the hostile environment is found in Mayor Emanuel's statement it was an "open secret" known to the City, the OIG's statement of the existence of an "unrestricted culture of racism," and Commissioner Conner's confirmation that racism was part of the *modus operandi* of the Department. These admissions are common to and usable by all Class members.

Commissioner Conner's testimony that racism against Blacks was the way that White people thought at the Department, and would take years to change - both of which statements confirm City awareness of the problem - is likewise useable by all Class members. In fact, Commissioner Conner's appointment to head the Department and his mandate to "change the culture" is also evidence of the known nature of the problem. Despite that knowledge, Defendant failed to take adequate remedial measures - none whatsoever were taken before 2017 - to reduce or significantly address the harassment before it became a front-page headline.

Given top management's *active participation* in overtly racially discriminatory conduct, Defendant cannot claim it did not know about the hostile work environment that Mayor Emanual told Commissioner Conner was an "open secret." *See Abreu*, *supra*, at *6, *17-19. As the OIG found, innumerable management employees knew about the conduct, should have stopped it, and perpetuated it by not opposing it. The Commissioner sets the tone and operations of the Department, and here the Commissioner and his immediate subordinate Deputy Commissioners were personally involved in reaffirming and perpetuating the racist ideology that Blacks were beneath Whites.

Thus, all Hostile Work Environment Class members will rely on the same evidence of widespread racist emails, widespread racial epithets directed at Blacks, and an ineffective EEO policy which more often resulted in retaliation than remedial action to help prove that the Defendant created a hostile work environment for Blacks. Even the evidence of widespread disparities in rates of overtime, promotion and discipline also can help prove Plaintiffs' claims. The disparities are so unlikely to have occurred absent race playing a factor in the decisions that a jury could rely on them to help determine whether even conduct that may not be obviously racial harassment was, in fact, due to race.

5. Common Evidence Will Show Defendant Had A Widespread Custom Or Practice Of Discriminating Against Blacks.

The same body of evidence described above, which establishes a hostile work environment arising from a long-standing, well-known and Department-wide culture of pervasive racism, is also useable by each Class member to establish a custom and practice under *Monell*. The common evidence - including the emails, the OIG Reports, admissions by the Mayor and Commissioners, the witness testimony and Dr. Siskin's and Dr. Gallagher's opinions and conclusions - bears on whether there was a widespread practice or custom of race discrimination in the Department that, although not officially authorized, was sufficiently well-established to constitute *de facto* policy. *See Abreu*, 2022 WL at *16-18.

Evidence common to the Class also bears on whether there was a *de facto* policy of tolerating and turning a blind eye to racist behavior at the Department, whether Defendant failed to adopt reasonable policies to address the harassment, whether it had no EEO training to speak of, whether it had no mechanism to address complaints of discrimination or racism, and whether it allowed Murphy, Bresnahan, and others to resign without penalty.

Defendant may argue no such widespread practice of race discrimination existed, but any such argument *by definition* will apply to the whole Class. Testimony for example, that there was no widespread racism or tolerance of it is just as relevant to one employee's claim as it is to another's. This common evidence should be presented in one trial.

In addition to the evidence of the hostile work environment, Plaintiffs will also rely on the evidence of statistical disparities found by Dr. Siskin to help show the custom or practice of discriminating against Blacks. Those wide-spread statistical disparities help show that treating Blacks in the Department as second-class citizens was standard operating procedure.

Alternatively, Plaintiffs may use conduct (action and inaction) by Commissioner Murphy to establish liability under *Monell*. Given his authority under municipal code and Personnel Rules, he constitutes a policymaker for purposes of establishing liability (as discussed above in Section B); *see also* Municipal Code of City of Chicago Sections 2-74-080 and 2-106-040 (m).

6. Common Questions Exist For Each Sub-Class.

Common questions also exist for each of the Sub-Classes, both as to determining intentional or unintentional discrimination, including:

Promotion Sub-Class Common Issues

· Whether Defendant engaged in a widespread pattern of denying Blacks equal employment opportunities for advancement to other positions?

· Whether Defendant's methods or criteria for selecting employees for positions (*i.e.*, promotions) had the effect of discriminating against Blacks?

Overtime Sub-Class Common Issues

· Whether Defendant engaged in a widespread pattern of denying Blacks equal opportunities for overtime?

· Whether Defendant's methods or criteria for selecting employees for overtime had the effect of discriminating against Blacks?

Discipline Sub-Class Common Issues

· Whether Defendant engaged in a widespread pattern of disciplining Blacks because of their race?

· Whether Defendant's methods or criteria for disciplining employees had the effect of discriminating against Blacks?

Plaintiffs' expert, Dr. Gallagher, confirms, as common human experience teaches, that a large number of outrageously racist emails could not have circulated freely within the Water Department for years under the noses and often through the accounts of top management unless, as Commissioner Conner testified, the environment was a receptive one in which workplace racism was "everyday business" and "the way that they look at things." (Ex. 3, Conner Dep. 140:24-141:7, 196:3-8.)

Each Sub-Class member also will rely on the same common evidence to establish liability under *Monell*, as all evidence described above bears directly on whether the Department's "culture" of racism resulted in a widespread practice or custom of race discrimination, manifesting itself in the Department's decisions about overtime, promotions and discipline. The same common evidence that will advance the Hostile Work Environment Class members' claims will also advance the Sub-Class claims as well.

As the Seventh Circuit has made clear, a wide variety of circumstantial evidence can be considered in determining whether an employer would have taken an adverse action but for an employee's race. *See, e.g., Vega v. Chicago Park District*, 954 F.3d 996, 1005 (7th Cir. 2020 ("[B]ehavior toward or comments directed at other employees in the protected group is one type of circumstantial evidence that can support an inference of discrimination"); *Hassan v. Foley & Lardner*, 552 F.3d 520, 530 n.4 (7th Cir. 2008) (circumstantial evidence of discrimination includes "evidence, whether or not rigorously statistical,

that similarly situated employees outside the protected class received systematically better treatment") (internal quotation omitted); *see also Ercegovich v. Goodyear Tire & Rubber Co*., 154 F.3d 344, 356 (6th Cir. 1998) (noting that evidence "establishing the existence of a discriminatory atmosphere at the defendant's workplace ... may serve as circumstantial evidence of individualized discrimination directed at the plaintiff").

Commonality also is satisfied for each Sub-Class for Plaintiffs' Illinois Civil Rights Act claims of unintentional discrimination in promotions, overtime assignment and discipline. In addressing federal claims, the Seventh Circuit has explained that unintentional discrimination claims are "well suited for classwide adjudication' because the case turns on whether the practice "disparately impacted the plaintiff class or it did not.' *Simpson v. Dart*, 23 F.4th 706, 712 (7th Cir. 2022) (citing *McReynolds*).

Here, in addition to that common question, Plaintiffs and the putative Class also present statutory interpretation questions set forth above about what Plaintiffs must show to prove unintentional discrimination under the Illinois Civil Rights Act. The Illinois Civil Rights Act's broad plain language prohibits unintentional discrimination that may not constitute a "specific employment practice" (as that term is used in Title VII). Thus, common questions for each SubClass include:

All Sub-Classes - Unintentional Discrimination Common Issues

· Whether Plaintiffs must identify a "specific employment practice" (as required by Title VII but not by ICRA) to pursue a claim for overtime, promotion or discipline discrimination under the Illinois Civil Rights Act?

· If Plaintiffs must identify such a "specific employment practice" under the Illinois Civil Rights Act, have they done so?

· Whether Defendant can assert defenses available based on Title VII's definition of "disparate impact" given the absence of supporting statutory language in ICRA?

For unintentional discrimination claims, Plaintiffs share these common legal questions with each Sub-Class member.

7. Common Factual And Evidentiary Questions Exist.

The pleadings and briefing also frame legal issues that likely will arise as the case progresses, many of which are common to the Class or Sub-Classes:

· Whether enduring the racially offensive work environment was a condition of continued employment?

· Whether it was futile for Blacks to complain about race discrimination?

· Whether Murphy was a "policy maker" when Commissioner or First Deputy Commissioner?

· Whether the OIG's statements that there was a hostile work environment for Blacks constitute admissions of a party opponent?

· What, if any, out of court statements by Mayor Emanuel, Commissioner Murphy and others constitute inadmissible hearsay (*e.g*., whether the Mayor's admission to Commissioner Connor that racism at the Department was an "open secret" is an admission of a party opponent and, therefore, not hearsay under Fed. R. Evid. 801(d)(2))?

· Whether Defendant's failure to provide training on and enforce its EEO policy contributed to the hostile work environment?

As to their federal claims, the common questions Plaintiffs identify are the same type of common question that the Supreme Court and the Seventh Circuit have endorsed as sufficient to satisfy Rule 23(a)(2). In *Chi. Teachers Union*, the plaintiffs alleged intentional and disparate impact discrimination resulting from a small management group's implementation of an overreaching policy to close schools, resulting in terminations disproportionately affecting Blacks. The district court found

no commonality "because the decisions [to eliminate schools resulting in employee terminations] were made using qualitative, subjective, case-by-case review." *See Chi. Teachers Union, Lo. No. 1 v. Bd. of Educ. of Chi*. 797 F.3d 426, 435 and 438 (7th Cir. 2015).

But the Seventh Circuit reversed, explaining "subjective, discretionary decisions can be the source of a common claim if they are, for example, the outcome of employment practices or policies controlled by higher-level directors ... or if all decision-makers act together as one unit." *Id.* Even assuming some individual discretion exercised by Department managers about how to treat workers existed, if that discretion was in furtherance of the overall Department policy of discrimination and hostility, commonality exists. *See Moreno v. Napolitano*, Case No. 11 C 5452, 2014 WL 4911938, at *7-9, 12 (N.D. Ill. Sept. 30, 2014) (finding commonality when plaintiffs challenged defendant's general policies and procedures and rejecting argument that plaintiffs were challenging thousands of individual probable cause decisions).

8. Plaintiffs' Pattern-or-Practice Theory Subsumes All These Questions And Presents Others.

Plaintiffs also seek to pursue relief under a pattern-or-practice theory, whereby they seek to show that racial discrimination was Defendant's standard operating procedure. *Int'l Bhd. Of Teamsters*, 431 U.S. at 336. To make that showing, Plaintiffs will provide answers to all of the aforementioned questions - all of which will provide a common answer to the common question of whether racial discrimination against Blacks was the Department's "standard operating procedure."

Plaintiffs' statistical evidence regarding overtime, discipline and promotions are highly relevant, as are individual accounts of the seventy-five or so Plaintiffs and putative Class members (commonly referred to as "anecdotal" evidence). *See, e.g., Mozee v. American Commercial Marine Service Co*., 940 F.2d 1036, 1042-43 (7th Cir. 1991) (explaining statistical evidence supports unintentional and intentional discrimination claims, and combined with anecdotal evidence can support pattern-or-practice theory). Here, Plaintiffs have a substantial amount of both types and, accordingly, can answer the overarching common question that theory presents.

In conclusion, three key common questions capable of class-wide resolution all require evidence from Plaintiffs and each Class Member: (a) whether there was a hostile work environment in the Department; (b) whether there was a widespread custom or pattern of discriminating against Blacks for purposes of *Monell* liability; and (c) whether discrimination against Blacks was the department's "standard operating procedure"? For each common question, each Plaintiff's and each Class member's experience in the Department constitutes part of the common evidence on which any of them might rely to prove their claims. That would be true regardless of which Plaintiff or putative class member attempted to establish liability under these theories. Accordingly, the same body of common evidence dovetails to answer key elements of liability for each Plaintiff, Class member, and Sub-Class member. *Wal-Mart*, 546 U.S. at 350.

C. Typicality: Plaintiffs Satisfy Rule 23(a)(3).

Rule 23(a)(3)'s typicality requirement focuses on the claims, not the persons — "whether the named representatives' claims have the same essential characteristics as the claims of the class at large." *De La Fuente v. Stokely-Van Camp, Inc*., 713 F.2d 225, 232 (7th Cir. 1983) ("factual distinctions" will not defeat typicality and "similarity of legal theory may control even in the face of differences of fact"). Here, each Plaintiff claims s/he was subjected to Defendant's hostile work environment and certain among them allege they were discriminated against with respect to overtime, promotions and discipline - all part of Defendant's widespread practice of discrimination against Blacks.

Importantly, typicality is "determined with reference to the [defendant's] actions, not with respect to particularized defenses it might have against certain class members." *Wagner v. Nutrasweet Co*., 95 F.3d 527, 534 (7th Cir. 1996). The existence of individualized defenses does not defeat typicality. Plaintiffs' claims of a hostile work environment all arise from the same pattern, practice or course of conduct as the claims of the other Class members—the Department's pervasive culture or policy of practicing and tolerating racism that resulted in racially charged and harassing action, speech and writing within the Department, unequal discipline and denial of overtime and promotions. Plaintiffs' claims are based on the same legal theories — that because the environment at the Department was objectively hostile for racial reasons, and unavoidable to the extent that enduring it in effect was a condition of employment, it is actionable under ICRA and 1981 and/or Section 1983.

Plaintiffs' claims therefore are typical as required by Rule 23(a)(3). *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992).

With respect to the Sub-Classes, the proposed representatives for each suffered the same types of harms they seek to pursue on behalf of the proposed Sub-Classes (*i.e.*, being denied overtime opportunities, being denied promotions, and/or being subject to disciplinary action). As the facts discussed above demonstrate, their claims satisfy the typicality standards for each of their respective Sub-Classes.

D. Adequacy: Plaintiffs Satisfy Rule 23(a)(4).

Plaintiffs satisfy Rule 23(a)(4)'s adequacy requirement if they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *see also Lau v. Arrow Fin. Servs., LLC*, No. 06 C 3141, 2007 WL 1502118, at *6 (N.D. Ill. May 22, 2007). Plaintiffs may satisfy that requirement by showing "that: 1) they do not have interests that conflict with the class as a whole, 2) they are sufficiently interested in the case outcome to ensure vigorous advocacy, and 3) class counsel is competent and willing to vigorously litigate the case." *Zollicoffer v. Gold Standard Banking, Inc*., 335 F.R.D. 126, 158 (N.D. Ill. 2020) (internal quotation omitted). Plaintiffs meet that test. They have no antagonistic or competing interests with other class members. *Rosario*, 963 F.2d at 1018. Plaintiffs seek relief on behalf of all putative Class and Sub-Class members, including declaratory, injunctive and monetary relief which will benefit all class members. *See Gammon v. GC Servs., L.P*., 162 F.R.D. 313, 317 (N.D. Ill. 1995).

They also have a sufficient interest in the outcome of this case. Plaintiffs have been deposed, answered and responded to written discovery, maintained contact with their counsel, and in all ways adequately discharged their responsibilities as class representatives. (Ex. 85-1, C. Carmichael Decl. ¶28; *see* also Exs. 1, 4, 6-9, 11-12, 28-35.) Thus, Plaintiffs are, have been and will continue to be "conscientious representative plaintiff[s]." *Fournigault v. Indep. One Mortg. Corp*., 234 F.R.D. 641, 646 (N.D. Ill. 2006) (internal quotation omitted).

Proposed Class and Sub-Class counsel are likewise adequate because they are "competent, experienced, qualified, and generally able to conduct the proposed litigation vigorously." *Gammon*, 162 F.R.D. at 317. Plaintiffs' proposed counsel - five attorneys from three law firms - collectively have more than 100 years of practice experience and have developed, prosecuted and funded this action diligently and competently against a vigorous defense for more than five years. (*See generally* Ex. 85-1, C. Carmichael Decl.; Ex. 85-2, J.B. Wood Decl.; Ex. 85-3, C. Watkins Decl.) As the record on this motion and docket shows, Plaintiffs' counsel have briefed and argued multiple rounds of discovery and other motions, taken and defended scores of depositions of party and non-party witnesses, reviewed hundreds of thousands of documents and retained and proffered reports from two qualified experts. They have expended substantial effort and, as their track records in this and other cases show, have sufficient skill, experience, resources and qualifications to pursue the case through trial. (*Id.*)

Proposed class counsel collectively have ample experience litigating a wide variety of class cases, including civil rights cases and employment discrimination matters, and have been appointed as class counsel in this District and others. (Ex. 85-3, C. Watkins Decl. ¶ 4; Ex. 85-2, J.B. Wood Decl. ¶¶5-8; Ex. 85-1, C. Carmichael Decl. ¶¶8-10, 20-22, 26.) Thus, Rule 23(a)(4)'s adequacy requirement is satisfied.

III. Plaintiffs Satisfy Rule 23(b)(2) And Rule 23(b)(3)

A. Rule 23(b)(2) Certification Is Appropriate For Each Class.

Rule 23(b)(2) certification is appropriate if "the party opposing the class 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." Fed. R. Civ. P. 23(b)(2).

As described above, Plaintiffs' evidence shows Defendant has implemented and maintains a policy of racial hostility that "applies generally to the class" and discriminated against Black employees. Courts repeatedly have found that "'civil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of Rule 23(b)(2) classes." *Chi. Teachers Union*, 797 F.3d at 441 (quoting *Amchem*, 521 U.S. at 614); *see also Dean v. Int'l Truck & Engine Corp*., 220

F.R.D. 319, 322 (N.D. Ill. 2004) (same); *Allen v. Int'l Truck & Engine Corp*., 358 F.2d 469, 471 (7th Cir. 2004) (reversing denial of certification on harassment claims, ordering certification under Rule 23(b)(2) even though subsequent proceedings for damages would be necessary).

Plaintiffs seek declaratory relief on behalf of the classes (*i.e*., that Defendant violated the laws under which Plaintiffs assert claims and/or that its work environment was objectively hostile against Blacks and/or its practice of discriminating was so widespread and well settled to constitute a *de facto* policy under *Monell* and/or that its methods or criteria for promotion, overtime and/or discipline had the effect of discriminating against Blacks).

Unfortunately, Defendant has not eradicated the long-standing culture of racism at the Department as former Commissioner Connor admitted. That is true notwithstanding the embarrassing departure of top management *en masse* in 2017 and limited EEO training. Nor has Defendant ceased its practice of declining to investigate complaints of race discrimination by Department employees. (*See generally* Factual Background Sections L and M, *supra*).

Thus, Plaintiffs also seek injunctive relief for the classes tailored to end the violations they prove. (ECF # 194, pp. 56-57.) *See Palmer v. Combined Ins. Co. of America*, 217 F.R.D. 430, 437-38 (N.D. Ill. 2003) (finding Rule 23(b)(2) certification appropriate because class-wide prospective injunctive relief, such as company-wide changes to practices or policies, would be warranted on plaintiffs' pattern-or-practice and harassment claims if they prevailed). Such relief is essential to creating and maintaining an equitable environment for all City employees at the Department and ensuring permanent improvements in its work environment.

B. Plaintiffs' Classes Also Satisfy Rule 23(b)(3)'s Requirements.

In addition to declaratory and injunctive relief, Plaintiffs also seek monetary damages on behalf of the Class and each Sub-Class. Certification of the classes for that relief is appropriate because Plaintiffs meet the requirements of Rule 23(b)(3). The common questions identified above predominate over any individual issues Defendants may identify and a class action is the superior method of adjudicating the Plaintiffs' and putative Class members' claims.

1. Plaintiffs' Common Questions Predominate.

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Parko v. Shell Oil Co*., 739 F.3d 1083, 1085 (7th Cir. 2016) (quoting *AmChem*., 521 U.S. 591, 623 (1997)). "Predominance is a qualitative rather than a quantitative concept." *Id.* at 1085. Not every element of Plaintiffs' claims need be susceptible to class-wide proof to satisfy predominance. *Chi. Teachers Union*, 797 F.3d at 444. What matters is whether core common questions override individualized issues.

Here "the key question upon which all of the litigation rises or falls can be answered for every plaintiff": did the Department maintain a culture of racism that created a hostile work environment for Black employees? *Id.* Answering this question would "trigger a liability finding for both the 23(b)(2) and 23(b)(3) class[es] ... [and] eliminate the need for repeat adjudication of this question for determinations of damages or [] injunctive relief." *Chi. Teachers Union*, 797 F.3d at 445.

The same is true of common questions relating to whether Defendant engaged in a pattern-or-practice of discrimination against Black employees.

Likewise, determining whether the Defendant has a practice at the Department of discrimination so widespread and well settled to constitute a *de facto* policy is "particularly appropriate [because] common factual issue[s] [about liability] act[] as a predicate to recovery by any class member" on their claims. *Owner-Operator Indep. Drivers Ass'n, Inc. v. Allied Van Lines, Inc*., 231 F.R.D. 280, 285 (N.D. Ill. 2005) (citing *In re. Allstate Ins. Co*., 400 F.3d 505, 508 (7th Cir. 2005)). As numerous courts have held, the goal when determining liability for all class members in one proceeding is to move the litigation forward efficiently. *Chi. Teachers Union*, 797 F.3d at 443.[15] Certification of the Class and Sub-Classes will ensure this litigation moves forward.

Here, common issues arising from the Department's "culture" of racism predominate. As described above, the common questions are critical to determining each Class and Sub-Class member's claims. Common evidence described above will provide a common answer to questions for all class members (*e.g.*, for elements of the hostile work environment claim, existence of *Monell* liability and/or whether the Department's methods or criteria had the effect of discriminating against the Sub-Classes for overtime, disciplinary actions or promotions).

The mere fact that there may be some individualized damages issues does not defeat the predominance of the central liability issues, or call into question the efficiency of having those liability issues resolved in one proceeding instead of many. *See Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1029-30 (7th Cir. 2018). Any burdens associated with determining individualized damages pale in comparison with the burdens of hearing the same evidence (and potentially reaching different results on the same evidence) in class members' individual lawsuits. As the Seventh Circuit explained, "[c]ommon issues of fact and law predominate *in particular* when adjudication of questions of liability common to the class will achieve economies of time and expense." *Chi. Teacher's Union, Local No. 1*, 797 F.3d at 444 (emphasis added).

As this Court knows, damages issues will not need to be decided for any class member who cannot establish liability, including under *Monell* for federal claims. *See also Healey v. International Broth. Of Elec. Workers, Local Union No. 134*, 296 F.R.D. 587, 594-506 (N.D. Ill. 2013) (explaining limits of *Behrend* and the court's ability to certify a liability-only class under Rule 23(c)(4)).[16] Accordingly, Plaintiffs satisfy Rule 23(b)(3)'s predominance standard.

2. A Class Action Is Superior For Adjudicating Plaintiffs' Claims.

The superiority requirement is also satisfied. Where, as here, "[p]arallel litigation for each class member [...] would entail the same discovery and require multiple courts to weigh the same factual and legal bases for recovery," a class action is deemed superior. *Barnes v. Air Line Pilots Ass'n*, 310 F.R.D. 551, 562 (N.D. Ill. 2015). Answering the questions presented by this case in a class context, such as whether the Department had a policy of racism which resulted in a hostile work environment, "will achieve economies of time and expense" as compared to answering them again and again in multiple lawsuits. *Chi. Teachers Union*, 797 F.3d at 444 (citing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1437 (2013)). There is no reason to litigate this central issue in a multitude of separate cases.

A class action is also superior because some Class members may fear that pursuing their claims individually could negatively affect their employment, or bring reprisals. Given the Plaintiffs' evidence of retaliation, these fears are especially concerning here. *See Warnell v. Ford Motor Co*., 189 F.R.D. 383, 388 (N.D. Ill. 1999) (pattern-or-practice class action allows claims that "otherwise might not be brought" because suing an employer is "a risky and frightening business even for a brave employee.") Connor's acknowledgment that even someone with former Deputy Commissioner Luci Pope-Anderson's rank could not reasonably be expected to challenge the Department's culture proves reprisal is the expected and likely outcome should Class members pursue claims individually. (Ex. 78, Connor Memo re Reducing Pope-Anderson Discipline.)

Those brave enough to come forward may have difficulty finding counsel willing to pursue their claim individually against the Defendant, further favoring class certification as a means for putative class members attaining redress.

3. All Of Rule 23(b)(3)'s Factors Favor Certification.

Rule 23(b)(3) identifies four factors for the Court to consider in determining whether Rule 23(b)(3)'s "predominance" and "superiority" requirements are met. Each weighs in favor of certifying the class.

Plaintiffs are aware of only two lawsuits involving racially discriminatory practices of the City at the Department — *Abreu* and *Outley*, and only *Outley* involved a putative class member (Abreu is Hispanic).[17]

Plaintiffs are not aware of any other putative class members who wish to pursue their claims in a separate action or any who have expressed interest in individually controlling the prosecution of their claims. Fed. R. Civ. P. 23(b)(3)(B).

Plaintiffs prefer concentrating the litigation in this district. Fed. R. Civ. P. 23(b)(3)(C). Even if Defendant preferred to force

each putative Class member to prove his or her case individually, doing so would result in far more difficulties for the Court than managing one lawsuit. Fed. R. Civ. P. 23(b)(3)(D). Presenting Plaintiffs' evidence regarding the common, predominant issues outlined above in one proceeding will be more efficient than the alternative of dozens if not hundreds of individual lawsuits.

Plaintiffs foresee no unusual difficulties arising from the case's status as a class action, particularly in light of the Court's experiences managing such cases. Accordingly, the Court should certify each of the proposed Classes as requested.

IV. Alternatively, The Court Should Certify Liability Issues.

If this Court determines Rule 23(b)(2) and Rule 23(b)(3) certification is inappropriate, Plaintiffs request the Court to certify the classes described above for common issues relating to liability under Rule 23(c)(4). *See* Rule 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."); *see also, e.g., McReynolds*, 672 F.3d at 491.

Resolving the common questions identified in the introduction relating to elements of Plaintiffs' hostile environment claim, *Monell* liability, Plaintiffs' Illinois Civil Rights Act claims and Plaintiffs' pattern-or-practice theory on a class wide basis before the same judge and jury will "greatly simplify the litigation to judgment or settlement of claims," obviating the need for each class member to re-litigate liability issues using the same evidence. *Parko*, 739 F.3d at 1085. Accordingly, as an alternative, Plaintiffs seek certification of those or any other issues the Court deems appropriate for any of Plaintiffs' proposed classes under Rule 23(c)(4).[18]

CONCLUSION

For the reasons above and in Plaintiffs' accompanying motion, Plaintiffs request the Court certify the classes described herein under Rule 23 (b)(2) for declaratory and injunctive relief and under Rule 23 (b)(3) for damages (or, alternatively, for Rule 23(c)(4) for issues relating to liability) and appoint Plaintiffs as class representatives and the undersigned counsel as class counsel as set forth herein.
Respectfully submitted for Plaintiffs and the putative Classes,

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Footnotes

[1] (Ex. 16, Murphy Dep. 244:1-248:24, explaining Murphy read quote and understood it referred to culture of racism, but disagreed with Mayor's characterization; Ex. 25, Stark Dep. 108:21-109:7, same for Stark; Ex. 2, Bresnahan Dep. 12:23-13:9, explaining he heard Mayor say there was pervasive racism at the Water Department; Ex. 15, Ald. Moore Dep. 54:1-24, which states "Q: [...] do you recall the Mayor acknowledging that there was racism within the City of Chicago, Department of Water Management? A: I do remember him acknowledging it.")

[2] All are historically Black neighborhoods in Chicago.

[3] The Appendix contains additional samples, but still not all of the hundreds of racist emails.

[4] Dr. Siskin's work in this district includes serving as an expert on behalf of the City of Chicago analyzing promotions, as well as a matter involving allegations of unequal treatment towards Blacks working at a cable company's southside location. *See Petit v. City of Chicago*, No. 90-cv-4984 & No. 90-cv-9050, 2001 WL 629306, *9-12 (N.D. Ill. May 25, 2001); *see also Brand v. Comcast Corp*., 302 F.R.D. 201, 214-16 (N.D. Ill. 2014).

[5] Each is reflected as being involved in the disciplinary process in the two years prior to filing of this lawsuit in DWM-Edmond028213 Discipline Spreadsheet - CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER.xlsx.

Plaintiffs can provide excerpts from this data at the Court's request.

[6] Dr. Siskin assumed DWM employees who applied for a posted position considered that job to be better and both Plaintiffs and Dr. Siskin describe the better job as "a promotion" even where the position was not technically "above" the job the applicant already held. (Ex. 42-1, Siskin Dec. Report, p. 9; Ex. 17, Owen Dep. 21:12-16 ("Q: Would you agree that if someone is applying for the job, they consider it a better job than the one they have? A: I would assume that's why they are applying").)

[7] Defendant subsequently provided data regarding "unposted" requisitions (*i.e*., jobs were not posted on the City's hiring system). Because the unposted requisitions had no pool of applicants for comparison, Dr. Siskin attempted to "match" those positions with positions that had been posted around the same time. (Ex. 42-2, Siskin Supp. Report, pp. 2-5). Including those additional hypothetical applicants and positions, Dr. Siskin found statistically significant adverse outcomes in selection rates during the Class Data Period. (Ex. 42-2, Siskin Supp. Report, pp. 6-9, Table A16 and A17.) The parties' experts disagree on whether the "unposted" requisitions were positions that would have ever been offered to other applicants. (Ex. 42-3, Siskin Rebuttal Report, p. 16, ¶¶39-41.)

[8] An increased number of observations allows for smaller differences to be statistically significant (*e.g.*, 7 of 10 coin-flips coming up heads is not significant, but 70 of 100 coin flips coming up heads would be statistically significant). (Ex. 42-3, Siskin Rebuttal Report, pp. 2123, ¶¶56-59.)

[9] Mark Pando was responsible for reviewing the case work of Equal Employment Opportunity ("EEO") investigators and formerly worked as an EEO investigator himself. (Ex. 18, Pando Dep. 10:1-24, 16:15-20, 39:1-40:24.) Between 2014 and 2017, Human Resources originally had 4-6 *budgeted* investigator positions, each of whom handled 30 to 40 cases. (*Id.* at 13:1-15:24.) But by 2016, Human Resources effectively had only 3 investigators, each with around **90 cases**, too many to effectively handle. (*Id.*)

[10] This is true even though now DHR has a case management system that allows it to identify when multiple allegations have been made against the same individual, as has been made against Water Department employee Mike Szorc, who allegedly prohibited Latino employees from speaking Spanish in the workplace. (*Id.* at 21:21-22:8; Ex. 17, Owen Dep. 97:1-102:24.)

[11] Thereafter, in connection with another appeal in 2015, the Fourth Circuit reversed the lower court's decertification of the promotions-related class, ordering it to again be certified on remand, once again leaving the hostile work class certification intact. *Brown*, 785 F.3d 895 (4th Cir. 2015).

[12] Plaintiffs derived these from Defendant's Employment Data Spreadsheets-specifically:

(a) Hostile Work Environment: DWM-Edmond-086042-DWM-Edmond-086042 CHIPPS data - CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER.xlsx

(b) Overtime: DWM-Edmond-057138 detail_2015_without_ssn.xlsx, DWM-Edmond-057139 detail_2016_without_ssn.xlsx, DWM-Edmond-057140 detail_2017_without_ssn.xlsx, DWM-Edmond-086042-DWM-Edmond-086042 CHIPPS data - CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER.xlsx

(c) Discipline: DWM-Edmond028213 Discipline Spreadsheet - CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER.xlsx

(d) Promotion: DWM-Edmond-107501-DWM-Edmond-107501 Report-20211006-DWM2011-2012.xlsx, DWM-Edmond-107502-DWM-Edmond-107502 Report-20211006-DWM2013-2014.xlsx, DWM-Edmond-107503-DWM-Edmond-107503 Report-20211006-DWM2015-2016.xlsx, DWM-Edmond-107504-DWM-Edmond-107504 Report-20211006-DWM2017-2018.xlsx, DWM-Edmond-107505-DWM-Edmond-107505 Report-20211006-DWM2019-2020xlsx, DWM-Edmond-086042-DWM-Edmond-086042 CHIPPS data - CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER.xlsx.

Plaintiffs can provide these at the Court's request.

[13] Murphy testified:

Q.—You understand as you sit here today how African-Americans might be offended by others [emails]?

A.—Yes.

Q.—Other emails besides the ones that you found offensive?

A.—I do.

Q.-And would you agree that many of them, even though you may not have felt that way at the time, are *objectively offensive*?

A.—Yes.

Q.—And certainly they would be objectively offensive to African-Americans?

A.—Yes.

Id. (emphasis added).

[14] Bresnahan heard the Mayor say there was "pervasive racism" at the DWM (Ex. 2, Bresnahan Dep. 12:23-13:9; Ex. 3, Conner Dep. 140:24-141:10 and pp. 12-13, stating "Q. Did you know that Rahm Emanuel said the same thing [that there was a pervasive racism at the Water Department]? Did you hear that? [ ] BY MR. HENDERSON: Q You can answer the question. A Did I hear him say it? Yeah.")

[15] *See also McReynolds*, 672 F.3d at 490-91 (certifying under Rule 23(b)(2) and (c)(4), but explaining how liability questions in disparate impact claims were most efficiently decided once); *Allen*, 358 F.3d at 471 (certifying under Rule 23(b)(2), but describing how liability issues will drive litigation); *Brand*, 302 F.R.D. at 220-24 (common question of whether a hostile work environment existed predominated even though class members' experience, testimony and damages differed).

[16] *See also* William B. Rubenstein & Alba Conte, Newberg on Class Actions § 4.54 (6th ed. June 2022) (citing the advisory committee comment and explaining that "the black letter rule is that individual damages calculations generally do not defeat a finding that common issues predominate, and courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damages determinations").

[17] In the *Outley* lawsuit, an Assistant Chief Operating Engineer in the Bureau of Water Supply - alleged denial of promotion based on race in 2017, denial of overtime and a racially hostile work environment that led to his constructive discharge (among other things). *See generally Outley v. City of Chicago et al*.,1:17-c-8633, 2021 WL 4745393 (N.D. Ill. October 12, 2021).

[18] *See also* William B. Rubenstein & Alba Conte, Newberg on Class Actions § 4.90 (6th ed. June 2022) (noting section Rule 23 (c)(4) would be superfluous if a money damages class had to satisfy all of Rule (b)(3)'s requirements and explaining "there is now widespread consensus in support of the broad view that common questions need not predominate in an entire lawsuit or cause of action in order for [(c)(4)] certification to be proper" and that "[a] majority of circuits have provided some endorsement of the broad view".)