E-FILED
Friday, 04 March, 2022 04:46:33 PM
Clerk, U.S. District Court, ILCD

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

DERICK BROWN, ATIBA FLEMONS, and JEFFREY TAYLOR On behalf of themselves and all others similarly situated, **Plaintiffs**, **v.** THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS **Defendant.**	**2:19-cv-02020-JBM-EIL**

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

EXHIBIT INDEX

Exhibit	Description
34	Feb. 14, 2018 OAE Notes of Investigation re: Jeffrey Taylor
35	Nov. 1, 2017 OAE Notes of Investigation re: Jeffrey Taylor
36	July 25, 2018 OAE Report of Investigation and Exhibits re: [redacted] C.A.
37	Declaration of Atiba Flemons
38	Declaration of Derick Brown, Sr.
39	Excerpts of Deposition of Rule 30(b)(6) Representative of UIUC
40	Excerpts of Deposition of Kaamilyah Abdullah-Span
41	Excerpts of Deposition of Heidi Johnson
42	Excerpts of Deposition of Jennie Marie Duran
43	Excerpts of Deposition of Eric Smith
44	Excerpts of Deposition of Celia Remillard
45	Excerpts of Deposition of Derick T. Brown, Sr.
46	Excerpts of Deposition of Atiba Flemons
47	Report of Appeal re: OAE Investigation
48	Excerpts of Deposition of Jeffrey Taylor
49	OAE Draft Report of Investigation re: J.D.
50	OAE Final Report of Investigation re: J.D.

PRELIMINARY STATEMENT

Derick Brown, Atiba Flemons, and Jeffrey Taylor, three Black employees who currently work at Defendant's Urbana-Champaign campus ("UIUC"), now move, on behalf of themselves and those similarly situated, for class certification under Fed. R. Civ. P. Rule 23(a) and 23(b)(2), and alternatively 23(c)(4) ("Rule 23"), for the issue of liability. Plaintiffs charge that UIUC discriminates against its Black employees, perpetuating a hostile work environment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the Illinois Civil Rights Act of 2003, 740 ILCS 23/5 ("ICRA").

Plaintiffs allege that the UIUC Nondiscrimination Policy ("NDP") is discriminatory, that UIUC maintains a pattern or practice of perpetuating harassment against Black employees, and that the unit tasked with preventing and remediating harassment of Black employees, UIUC's Office of Access and Equity ("OAE" and formerly known as "ODEA"), plays a dominant role in carrying out the pattern or practice, with the support of senior UIUC counsel and officers. When OAE is tasked with investigating a complaint of racial harassment or discrimination, OAE's standard operating procedure is to guarantee a finding that a violation of the NDP has not occurred, thus perpetuating racial hostility. Common to the putative class is the "the inexorable zero": UIUC has not sustained a single violation of the NDP where a Black employee complained of racial harassment or discrimination between January 2014 and August 2021[1].

If certified, the putative class intends to seek an injunction to remedy the ongoing problem of racial harassment and discrimination directed against the class members. Plaintiffs propose to certify an injunctive relief class comprising all individuals identifying as Black and/or

[1] Class certification discovery ended in August 2021.

African American who are currently employed at UIUC, or who have been employed by UIUC at any point since January 1, 2014, and who have not held a supervisory position within System Human Resources, Illinois Human Resources, campus unit offices for human resources, or OAE at any point since January 1, 2014. Plaintiffs move to certify a class for declaratory and injunctive relief on the basis of the following policies and practices at UIUC:

> *One:* OAE has a practice of never issuing a finding of a violation of the NDP;
>
> *Two:* OAE refers draft investigatory findings for Legal Review only where there is a preliminary recommendation that a violation of the NDP is indicated, ensuring that UIUC's legal department will override the preliminary determination, as it has done on every such review;
>
> *Three:* OAE knowingly employs a definition of "harassment" constituting a violation of the NDP that is more demanding than the requirements of proving a claim under Title VII, and thus disadvantages those alleging racial harassment, including the putative class members;
>
> *Four:* OAE applies a different definition of "harassment" to complaints involving sexual harassment that entails a less demanding standard than the definition applied in complaints alleging racial harassment, and thus discriminates "because of" race; and
>
> *Five:* OAE maintains a practice of nonenforcement by purposefully disregarding provisions of the NDP aimed at preventing harassment, and by taking no measures to mete out discipline, mandate reporting of racial harassment, or mandate training on the NDP for all employees.

Alternatively, Plaintiffs may seek certification of issues that would be common to any putative class member's claim, such as whether investigations of complaints of racial harassment conducted by OAE are in fact designed to determine whether the NDP was violated.

I. STATEMENT OF FACTS

The University of Illinois at Urbana–Champaign is the flagship state university campus, employing and educating more people than the other University of Illinois campuses combined, and employing between 800 and 1000 Black employees in any given year. *See* **Ex. 6** at Brown et

al.00003638[2]. OAE is the unit charged with investigating all complaints alleging violations of the NDP at the UIUC campus. The NDP applies to all allegations of discrimination and harassment, whether based on race, color, sex, or religion. Plaintiffs Derick Brown, Atiba Flemons, and Jeffrey Taylor are each currently employed at UIUC and have each filed complaints with OAE alleging violations of the NDP due to racial harassment in their respective work areas. Each of these Plaintiffs identifies as Black and/or African American, and each of their complaints to OAE was met with biased investigation processes stemming from a practice of never sustaining an allegation of racial harassment or discrimination, in violation of the NDP.

A. The Policies, Patterns and/or Practices of OAE

1. OAE's "Inexorable Zero"

The office charged with enforcing the NDP at UIUC is OAE.[3] **Ex. 39** at 13-15, 19. OAE is a centralized office at UIUC, separate and independent from the various human resources offices on campus, *see* **Ex. 43** at 13, reporting directly to the Vice Chancellor for Diversity, Equity and Inclusion. **Ex. 41** at 29-31, 40-42. OAE comprises three divisions, the affirmative action division, the ADA (access and accommodations) division, and the EEO division. The EEO division is the unit of OAE that investigates complaints of harassment and discrimination under the NDP. *Id.* at 40. For almost the entirety of the class period, OAE was under the leadership of Director Heidi Johnson (2013 until early 2020), with oversight over (now former)

[2] Hereafter citations to document exhibits will reference only the last five digits of bates numbers.

[3] Complaints of racial discrimination or harassment at the University President's level—the umbrella organization comprising all University campuses—or "System Level," are investigated by a separate unit at the System Level. **Ex. 43** at 13, 24-25. The System Level addresses alleged violations of the NDP on occasion, when, among other reasons, there is a conflict of interest involving OAE. **Ex. 40** at 215-16.

Senior Associate Director of the EEO division of OAE, Kaamilyah Abdullah-Span**. Ex. 41** at 32-38; **Ex. 40** at 41-51. At the start of the class period, there were two investigators in the EEO division handling complaints of harassment and discrimination who reported to Ms. Abdullah-Span: M.T. Hudson and Jennie Duran. As complaints increased, OAE hired several additional EEO investigators. **Ex. 40** at 45-46. The number of EEO investigators at any given point in the class period numbered no more than six, and sometimes as few as two. *See* **Ex. 41** at 40; **Ex. 40** at 42-46, 48. The Senior Associate Director of the EEO division in OAE had knowledge and oversight as to each investigation. **Ex. 41** at 38, 88; **Ex. 39** at 34 ("[Abdullah-Span] saw every single report and complaint that came through our office."). The findings and conclusions issued in every final OAE report of investigation, no matter the investigator involved, reflected the position of OAE with respect to the complaint at issue. **Ex. 40** at 151-52. In this single, centralized, and relatively small setting, OAE carried out a pattern or practice of never finding a violation of the NDP, a pattern or practice that has led to zero findings that the NDP was violated on account of complaints of racial harassment and discrimination made from January 2014 through the discovery period of this litigation (ending August 2021). Of the over 75 OAE investigation files relating to racial harassment complaints of African American employees produced in this litigation, *see* **Ex. 10**, not one of them resulted in a finding of a violation of the NDP. Nor can UIUC recall any such findings. **Ex. 39** at 100; **Ex. 40** at 185; **Ex. 42** at 112-13.

2. Legal Review of Preliminary Findings where Violation of NDP is Indicated

The "inexorable zero" is ensured by OAE's standard practice of having the Legal Department review draft OAE investigation reports, but only where there is a preliminary recommendation made by an individual investigator that the NDP was in fact violated. Johnson, along with the Legal Department, overrode investigators' preliminary determinations any and every time there was such a recommendation. **Ex. 42** at 129 ("Q. Did you ever feel pressure to

make a determination of no violation of the non-discrimination policy? A. Yes. Q. And who did you feel that pressure from, if anyone in particular? A. Heidi. I would say Heidi."). As former UIUC Counsel [redacted] stated to outside counsel during an internal investigation into a complaint of a hostile work environment at OAE, "Internal procedure required him and other members of University Counsel's office to review any claim in which there was a finding of discrimination." **Ex. 27** at 29238, 29250. UIUC admits that this Legal Review is part of OAE's "practice." **Ex. 39** at 171-77. The purpose and effect of this practice is to guarantee that no complaint of harassment or discrimination will lead to a finding of a violation, since, according to UIUC, a violation would subject UIUC to legal liability. **Ex. 40** at 155-56. The practice has been effective: not a single complaint alleging a violation of the NDP has led to a determination by Defendant that the NDP was violated. *See* **Ex. 42** at 113 ("Q. . . . And do you recall any complaint of racial harassment that you handled resulting in a determination that the non-discrimination policy applicable at the time was violated? A. No. I don't -- no, not that I can think of. Q. Do you have a sense of why that is the case? A. Do I have a sense of why that's the case?· Quite frankly, I do. I think it was legal's influence."). UIUC admitted that there was not a single instance of a final determination that the NDP was violated during the entire class period, **Ex. 39** at 100, and produced not a single record of investigation indicating otherwise.

3. The NDP's Definition of Harassment and Retaliation

In aid of OAE's pattern and practice of never sustaining a complaint of racial harassment, discrimination, and/or retaliation for such complaint, and thus perpetuating racial harassment, UIUC maintains biased written definitions of the evidence required to corroborate a charge of harassment and retaliation that bind investigators. These standards are similar albeit in some respects more demanding of complainants than the standards enumerated by the Supreme Court for liability under Title VII. The greatest harm to the targets of racial harassment is that the

evidentiary standards created by the Court are intended to be applied by an impartial factfinder, after plaintiff and defendant have had full access to relevant evidence, the power of subpoena and the opportunity to take testimony under oath. OAE complainants, on the other hand, are completely at the mercy of OAE investigators to conduct impartial interviews of material witnesses provided by complainants. Complainants have no right to be present for these interviews much less ask questions, and the witness interviews or statements are not conducted under oath. **Ex. 40** at 250. OAE investigators control the documents in these investigations. *Id.* at 82-85. Complainants lack the ability to determine what evidence exists much less use it to press their case. Simply put, complainants are lay persons, who have virtually no rights in OAE investigations, conducted by investigators who either are attorneys or are guided by attorneys. The "inexorable zero" is the intended result. Were it not, UIUC would not require the impossible of complainants.

UIUC defines harassment that violates the NDP as follows:

> A form of discrimination and unwelcome conduct based on an individual's status within a Protected Classification. The unwelcome conduct may be verbal, written, electronic or physical in nature. This policy is violated when the unwelcome conduct is based on one or more of the protected classifications (defined below), and is either: (1) sufficiently severe or pervasive; and (2) objectively offensive; and (3) unreasonably interferes with, denies, or limits a person's ability to participate or benefit from educational or employment opportunities, assessments, or status at the University. . . .

NDP, **Ex. 1**. These three elements that UIUC employs to determine whether harassment violates its NDP force complainants beyond the burdens of proof a Title VII plaintiff faces in court. "Severe or pervasive," the first element of the NDP's definition, is the factual showing a plaintiff must make under Title VII before a jury to establish that the harassment unreasonably interfered with the plaintiff's ability to perform his or her job, the third element, and therefore altered the

terms or conditions of employment.[4] By requiring proof of "sufficiency" with respect to the first element that is separate and in addition to the proof required for the third element, UIUC places a greater burden of proof on an employee seeking an investigation and remedial action than a Title VII plaintiff faces in court.[5]

But even if read as consistent with the standard of proof under Title VII, the OAE definition of "harassment" nonetheless frustrates the primary purpose of Title VII, "which is not meant to provide redress but rather to avoid harm."[6] *See,* section II.C.2.c, *infra.* As the former Senior Associate Director of EEO Investigations Abdullah-Span observed, "the nondiscrimination policy by itself does not prohibit certain conduct that is alleged to be harassment until and unless it reaches a standard that parallels the standard applied in a civil damages action for harassment against the university." **Ex. 40** at 155-56; **Ex 7**. That is, to the extent UIUC determines that harassment violates its NDP, it admits it is also legally liable for the harassment. Consequently, OAE *never* issues a finding that the NDP is violated when racial harassment or discrimination, or retaliation for such complaint, is alleged, and thus permits—not prevents—harassment.

---

[4] *See Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 900 (7th Cir. 2018) (observing that to state a hostile work environment claim under Title VII, "plaintiffs must show that (1) they were subject to unwelcome harassment; (2) the harassment was based on their race; (3) the harassment was so severe or pervasive as to alter the conditions of employment and create a hostile or abusive working environment; and (4) there is a basis for employer liability").

[5] The written definition of harassment has been in place since December 2016. Although the prior NDP did not explicitly enumerate the elements of its definition of "harassment" in the same manner, OAE investigators applied the definition of "harassment" in the same way substantively throughout the class period. *See* **Ex. 40** at 115-16.

[6] *Gawley v. Ind. Univ.*, 276 F.3d 301, 312 (7th Cir. 2001) (citing *Faragher v. City of Boca Raton,* 524 U.S. 775, 805-06 (1998)).

Indeed, a task force commissioned by UIUC in 2019 to evaluate this standard in the context of sexual harassment ("2019 Task Force") concluded as follows:

> One problem with policies that focus primarily on legal compliance is that they explicitly prohibit only the most severe or pervasive forms of sexual harassment or quid pro quo sexual harassment. Much like the legal standards on which they are based, policies like this can best be perceived as implicitly permitting many seemingly less severe or pervasive forms of sexual harassment.

Ex. 9 at 03931. UIUC admits that this assessment is true. *See* **Ex. 39** at 146-47. In permitting "seemingly" less severe or pervasive forms of harassment, the policy in fact tolerates harassment that rises beyond that threshold, because it "can embolden a few bad actors to test the limits of the system by engaging in increasingly severe and repeat forms of [harassment] while just skirting the line of what the law deems sufficiently severe or pervasive to prohibit." **Ex. 9** at 03932. Thus, the 2019 Task Force evaluating the standard in the context of sexual misconduct recommended that the "severe or pervasive" element be removed from the policy, so that broader forms of harassment were adequately covered and thus prevented. *Id.* at 21-22. Although UIUC did not adopt this recommendation wholesale, it revised its campus *sexual* misconduct policy in 2020 as a result of the 2019 Task Force report. *See* **Ex. 3** at 1. The revised campus sexual misconduct policy definition of "hostile environment sexual harassment," unlike the definition contained in the NDP, leaves out a requirement of "sufficiency" with respect to whether the alleged conduct is severe or pervasive that is separate and in addition to the final element concerning whether the conduct denies the complainant equal access to the education program or activity. *Id.* at 6. Rather, the policy considers the sufficiency of the severe or pervasive requirement in the context of whether the conduct "effectively denies a person equal access to the University's education program or activity . . . ." *Id.* The revised sexual misconduct policy further acknowledges that "Title IX requires a definition of 'Title IX Sexual Harassment' that

provides a floor—not a ceiling—to the varied forms of misconduct that can be prohibited at a university . . . ." *Id.*

The report issued by the 2019 Task Force made a recommendation not only with respect to the campus sexual misconduct policy but also recommended similar changes to the NDP, noting that "just like the current Sexual Misconduct Policy, the current Nondiscrimination Policy prohibits harassment using definitions imported from the law, which only address hostile environment and quid pro quo forms of harassment":

> The Committee recommends that a future task force consider creating a policy that prohibits not just "harassment," as defined by the current policy, but "harassment and related improper behavior," in a way that is analogous to our recommendations relating to sexual harassment. The amended policy should effectively eliminate the "severe or pervasive" requirement for all forms of harassment.

Ex. 9 at 03948-49. Although the 2019 Task Force included then Director of OAE Heidi Johnson, nothing was done either by OAE or by other management at UIUC to implement this recommendation. **Ex. 39** at 166-67. The NDP continues to permit racial harassment under this biased definition.

Even if the definition of harassment were identical to that under Title VII, UIUC admits that the policy does not prevent such harassment, allowing harassment until it reaches a level of legal liability. Sr. Assoc. Dir. Abdullah-Span testified that the standard "explicitly prohibits only conduct that is sufficiently severe or pervasive," *see* **Ex. 40** at 161, and therefore frustrates the very purpose harassment prevention *before* it rises to a level that violates the law: "I think it is a very high standard, you know, that requires -- requires the alleged complainant to sometimes in some situations have to tolerate probably more than what the average person would consider to be acceptable conduct." *Id.* at 158.

The NDP not only observes a definition of "harassment" that impedes the preventative purposes of Title VII but also maintains an antiretaliation standard that has been expressly rejected under applicable federal law, frustrating the remedial objective of the law. Under the NDP, actions will be deemed retaliatory only if "they have a materially adverse effect on the working, academic, or living environment of a person or if they hinder or prevent the person from effectively carrying out their University responsibilities." **Ex. 1** at 27071. But the U.S. Supreme Court, in considering a worker's retaliation claim under Title VII, rejected the requirement that the challenged actions must be related to the terms or conditions of employment, holding, instead, that for an employer's actions to be retaliatory, they "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe (BNSF) Railway Co. v. White,* 548 U.S. 53, 56, 68 (2006) (citing Title VII's purpose of "[m]aintaining unfettered access to statutory remedial mechanisms"). Thus, the NDP places on a complainant more demanding standards for showing harassment and retaliation than a plaintiff alleging the same under Title VII in federal court.

4. Differing Standards Applied to Racial Harassment

Not only is the NDP standard of harassment biased against findings of a policy violation, but it also discriminates between those alleging sexual harassment and those alleging racial harassment. Although both sexual harassment and racial harassment fall within the ambit of the NDP, *see* **Ex. 40** at 145, in practice, OAE investigators handle allegations of sexual harassment differently from allegations of racial harassment, applying the standard utilized in the sexual misconduct policy to allegations of sexual harassment and the NDP definition of harassment for complaints pertaining to race. *See id.* at 174. Whereas allegations of sexual misconduct have led to some determinations of a policy violation, *see, e.g.*, **Ex. 43** at 64; **Ex. 47** at 03314, the same is

not true with respect to allegations of racial harassment or discrimination. Thus, complainants who allege racial harassment or discrimination are held to a higher standard than those alleging sexual harassment, which UIUC acknowledges is flawed. The NDP is in effect a discriminatory standard against those alleging racial harassment, the vast majority of whom are Black and/or African American. **Ex. 40** at 185; **Ex. 42** at 113. The effect of this biased policy is that it leaves those alleging racial harassment to fend for themselves. In fact, for the entire class period through the present, over the course of over seventy-five formal complaints of racial harassment and/or discrimination, OAE has determined that not a single complaint warranted a finding of a violation of the NDP. *See* **Ex. 39** at 100; **Ex. 42** at 112-13 ("Q. Okay. So that's like a little over 70, 70 to 80 complaints of racial harassment over six years, if I am doing math correctly? A. I would -- I would say yes. Q. Okay. And do you recall of that set how many approximately involved complaints made by employees who identified as black or African American? A. A majority. I would say a huge majority. I would say 80 percent."); **Ex. 40** at 184-85 ("Q. So as you sit here today, you can't recall any allegations of racial harassment that were presented to OAE in your time there that resulted in a finding that the NDP was violated? A. Correct.").

5. Pattern of Nonenforcement

In furtherance of a policy of ensuring that no complaint alleging racial harassment or discrimination in violation of the NDP is ever sustained, OAE observes a practice of non-enforcement. Even though OAE is the sole office charged with enforcement of the NDP, OAE does not carry out enforcement measures, such as discipline, or even ensure that enforcement is carried out by other University administrators. **Ex. 39** at 13-18, 28. Thus, even if OAE made a determination in a given investigation that the alleged harassment constituted a violation of the NDP—and it does not—OAE takes no action to remediate such violation or prevent its recurrence. *Id.* Nor does OAE have any enforcement function with respect to the Campus Code

of Conduct, which OAE investigators often reference in their investigation reports as a fallback standard of which the alleged harassment may be deemed to have run afoul. *Id.* at 96-97. The 2019 Task Force, in fact, rejected the Code of Conduct as an unworkable standard with "general and amorphous" provisions against which alleged harassment or discrimination should be assessed and sanctioned, observing that "the campus code of conduct professional standards are too poorly defined to allow for notice and sanctioning . . . ." **Ex. 9** at 03931; **Ex. 39** at 141-52.

There is no mandatory, regular training on the NDP for UIUC employees. **Ex. 39** at 189; **Ex. 40** at 129-30; **Ex. 42** at 133. Emails are provided to employees with a link to the NDP—nothing more. *Id.* Neither OAE nor any other entity at UIUC provides training in aid of preventing violations of the NDP to managers or non-supervisory employees. Former Sr. Assoc. Dir. Abdullah-Span admitted that the NDP's definition of harassment is itself a hindrance to the prevention of harassment. *See* **Ex. 40** at 158. In fact, no preventive measures are taken whatsoever. **Ex. 39** at 24-28, 31-35.

Even the OAE EEO investigators lack training. The only training administered to them in how to conduct investigations, such as how to interview witnesses and make credibility determinations, was through feedback provided by Sr. Assoc. Dir. Abdullah-Span in the context of reviewing work product. *See* **Ex. 40** at 73-82; **Ex. 42** at 94. This lack of training is reflected in the manner of documentation of complaints and investigation files within OAE: there is no mechanism or system to ensure that all documentation related to a complaint or investigation was saved and stored in a centralized location. **Ex. 40** at 87-93. Maintaining investigation documents in the OAE database is left to the varying practices of individual investigators, and indeed some investigators were less disciplined at maintaining documentation than others. *Id.* at 82-93, 182-83. In addition, there is no standardized practice of tracking complaints or investigations by an

individual complainant, or by the name of an individual respondent to the complaint. **Ex. 39** at 34-35. For example, if an individual harasser is named in separate complaints made by separate complainants, it is left to the whim of individual investigators to run that name through the investigation database to gather information as to a potential pattern of conduct exhibited by that individual. If that investigator is not involved in the other investigations where the accused's name appears, then chances are that the investigator would miss such a potential pattern, even though Sr. Assoc. Dir. Abdullah-Span acknowledged that "unsubstantiated prior accusations can be a factor in determining or concluding whether a subsequent complaint is being substantiated." **Ex. 40** at 209-10.

Investigators are tasked with handling not only complaints filed internally by employees but also complaints filed externally with agencies such as the EEOC, or the Illinois Department of Human Rights. **Ex. 41** at 89-90. With no separation between those investigators handling internal complaints and those responding to external filings on behalf of UIUC, investigators play a dual, and no-doubt conflicted, role of acting as a purportedly neutral fact-finder in OAE's investigations of complaints filed internally and acting as an advocate of UIUC as a named respondent in complaints filed externally—in other words, OAE must *always* find no violation; otherwise, were a Charge with the EEOC filed, UIUC could not defend itself before the EEOC. Acknowledging this conflict, OAE simply stops conducting its own internal investigation to defend UIUC before the external agency. *See* **Ex. 31** at 18308 ("we will have to terminate the internal investigation so that we can manage the EEOC charge."). Moreover, an investigator handling separate complaints, one filed internally and another filed externally, involving different complainants, different factual allegations, but the same accused harasser would find herself in a conflicted role when tasked with acting as a fact-finder in an OAE investigation. This

type of scenario is not out of the question, given the small number of investigators. An investigator would find herself writing a "position statement" to an external agency on behalf of UIUC in that matter while simultaneously considering, evaluating or deciding similar actions in an internal investigation on another separate, unrelated complaint. The possibilities for conflict are thus manifold.

Nor does OAE enforce the reporting of potential violations of the NDP, despite the policy's explicit provision that supervisors or other bystander UIUC employees "should" report the potential violation. **Ex. 41** at 62-63; **Ex. 1** at 27072. Indeed, former Director of OAE Heidi Johnson could not recall a single instance of any one ever having been disciplined for failing to report racial harassment during the class period. **Ex. 41** at 62-66. This non-enforcement stands in stark contrast with enforcement of reporting under the sexual misconduct policy, where the reporting of alleged misconduct is enforced as a matter of policy and practice. **Ex. 40** at 96-97.

B. Examples of OAE's Policies, Patterns and Practices in Action

1. Derick Brown

Named Plaintiff Derick Brown works in the Machine department at UIUC's Facilities and Services ("F&S"), where he has been the only Black employee during the relevant period. He has worked at UIUC as a Machinist since 2006. On at least three occasions beginning in late-2016 or early-2017, Brown complained to Assistant Superintendent of Operation Maintenance Ken Buenting, and Associate Director of Operations, Maintenance, and Alterations Dave Boehm—both in F&S management at UIUC. Brown complained that his supervisor, Chris McCoy, called him "boy," "lazy" and "stupid," **Ex. 45** at 117, 132, 175-76, insulted and demeaned him, saying "after thirteen fucking years you should know how to do your job by now," *id.* at 134, 170, gave him menial assignments, and did not treat his White coworkers in the same way. *Id.* at 56, 61-62. He complained that when McCoy assigned him menial tasks, such as

cleaning, his coworkers would tease him for not doing real mechanical work. Brown reported that when three of his relatives died in 2016, McCoy said, "I hope they get another coffin for you, that way you won't come back." *Id.* at 124-25. By contrast, Brown told Buenting and Boehm that when a White coworker experienced the loss of a relative, the entire Department signed a sympathy card, which McCoy gave the bereaved coworker. *Id.* at 167-68. In his third complaint, Brown told McCoy's supervisors that in August 2015, Brown's coworkers taunted him by fashioning a rag with eyes and mouths holes cut out to look like a Ku Klux Klan hood, and that McCoy laughed when he witnessed this. *Id.* at 116-18.

As the harassment by McCoy and those under his supervision continued unabated, Mr. Brown could not take it anymore. After an incident related to McCoy assigning him a "shit pump" job in the middle of the summer in 2017, Brown reported the racial harassment to OAE. *See id.* at 116 ("For 90 days he kept me in there doing the shit pump, they call it, jobs that the other white employees didn't have the luxury of getting put on them.") Jennie Duran handled the OAE investigation and issued her findings in an investigation report.[7] But at the outset of the investigation in July 2017, Duran met with management of Mr. Brown's department at F&S to notify them of Brown's complaint and shared OAE's "preliminary" finding that a violation of the NDP was not indicated. **Ex. 18** at 06417 ("ODEA stated that preliminary indications are that this case as presented may not meet the legal standards of discrimination under the law but that recommendations could be made to take appropriate action based on violations of Campus Code of Conduct, other Campus Policies, and F&S Policies."); **Ex. 20** at 01895 (notes of July 19, 2020 meeting among Duran, and other F&S management "re: Derrick Brown," reflecting that Duran

[7] *See* **Ex. 16** at 00260 (OAE Report, dated October 5, 2017).

("JMD") stated that she met him yesterday; "it was meeting the standard of inapp. But not sure it rises to the level of harassment/disc. / including the incident w/ the hood / Can use a terrible racial epithet and it is not illegal . . . ."). Sr. Assoc. Dir. Abdullah-Span acknowledged that "it's dangerous to suggest any sort of preliminary findings without having all of the evidence and all of the testimony." **Ex. 40** at 214. Although Abdullah-Span was not aware of other investigators sharing preliminary findings with management at the outset of investigations, *see id.*, the preliminary finding itself was the standard operating procedure.

Mr. Brown learned of OAE's determination that a violation of the NDP was not indicated when Duran issued her report on October 5, 2017. The incident Mr. Brown complained of concerning the Ku Klux Klan hood centered around Mr. Brown's coworker taking a sheet, cutting a triangular hood, cutting holes for the eyes and mouth, and donning what was then obviously intended to be a Ku Klux Klan hood. According to the Report, complainant stated that his Machine Shop Foreman, Chris McCoy, and his White coworkers laughed, and McCoy did not report the incident. The Report notes that OAE investigator Duran "interviewed all individuals who were allegedly present (with the exception of one who has since passed away), and of those witnesses only one (African American) recalls seeing the mask." **Ex. 16** at 00260. The Report omits the fact that the African American witness who corroborated Brown's account was not an employee of Defendant and had no reason to fear retaliation from the foreman. The witness, James Taylor, made a sworn affidavit with his corroborating account on August 31, 2017, which makes plain that he and the since-deceased worker, Kendrick Pratt, both witnessed McCoy and the other White coworkers laughing at the hooded harasser, and were so offended that Mr. Pratt took a picture of them laughing. **Ex. 22**; **Ex. 8**. Although Taylor's sworn affidavit, **Ex. 8**, is not included in OAE's database, the cursory notes of the investigative interview, **Ex. 22**,

with James Taylor are. But the final OAE report credits the White witnesses' accounts over that of Mr. Taylor, in keeping with OAE's standard operating procedure of never issuing a finding that the NDP was violated. The Report acknowledges that if the investigation established by a preponderance of the evidence "the existence of a KKK-style mask. . . this would be unwelcome and intimidating conduct and likely rise to the legal standard." **Ex. 16** at 00262. But it finds that the conflicting testimony precludes such a finding. *Id.* The Report makes no mention that, given the seriousness of the incident, the accused had every reason to lie, that James Taylor was not an employee of the Machine Shop, that he also witnessed McCoy and the others laughing, and that Pratt took a photograph of them laughing. *Id.* Reflective of OAE's standard operating procedure of guaranteeing no findings of a violation of the NDP, Sr. Associate Dir. Abdullah-Span testified that she did not have any reason to think that Taylor's affidavit, even if it were in the files of OAE, would have impacted the outcome of the investigation. **Ex. 40** at 247. Plaintiff Derick Brown, the target of the threat of racial violence, testified as follows:

> They laughed so hard that they could fall out. All the white employees was laughing. . . . Nobody comment on it. I definitely didn't comment because I didn't know what was going on. My life was -- pretty much to me, this could go any kind of way.

Ex. 45 at 97-98. He explained that "so much had happened with that symbol in African-Americans' lives. So many people died, got burned up. I can keep going about how bad that symbol represents African-Americans and their life." *Id.* at 101.[8]

The OAE Report avoided finding a violation of the NDP not only by crediting the accounts of White witnesses over that of an African American witness (and that of Brown himself), but also by isolating the KKK hood incident from other incidents of which Brown

[8] Defense counsel indicated that was unnecessary. *See id.* at 101.

complained, effectively disaggregating Brown's allegations from one another. Although Brown complained to Duran about multiple incidents of racial harassment brought on by Chris McCoy over the preceding years, Duran did not consider these alleged incidents in the aggregate (even though, if assessing a hostile work environment under Title VII, a court *would* generally consider the environment in its totality,[9] thus reflecting OAE's use of a standard even higher than Title VII). The Report notes that, after the KKK mask incident, McCoy told [Brown] in response to the death of three family members that "I hope they got another coffin for you that way you won't come back." **Ex. 16** at 00261. It further notes that "Mr. McCoy, in response to another co-worker's family death, bought a sympathy card and expressed empathy." *Id.* The Report cites several other allegations against McCoy and Brown's White coworkers, probative of racial animus. *Id.* at 00261-62. Yet, the Report ignores these facts in concluding that McCoy's treatment of Brown was not race based—despite evidence of McCoy's racial animus, e.g., McCoy laughing along during the KKK incident and that he referred to blacks as "boys" (which OAE simply ignored). *See* **Ex. 16** at 00262-63 ("In regard to the coffin comments and the profanity combined with referring to him as incompetent, the Complainant is more credible based on the admission of the Respondent and inconsistencies in Respondent's version of the events. Whether the Respondent may have treated Mr. Brown differently than his colleague when they both had deaths in the family and his yelling a profanity combined with his performance, in terms of a racial harassment claim, this type of conduct is not based in a protected classification, and therefore, cannot be considered in a legal context thus a severity and pervasiveness analysis does not apply.").

---

[9] *See Cerros v. Steel Techs., Inc.*, 288 F.3d 1040, 1045-46 (7th Cir. 2002) (discussing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)).

Reflecting on OAE's investigation, Brown testified as follows:

> I think the findings was the low point of my life. I was rejected so much. I was rejected in that shop. I was rejected when they got the findings. How can you not say that's racial when the KKK hood over a guy's face that are all white? And that's not racial to a black man? And they find it not racial? I mean, I'm a lot of things. I grew up in Mississippi. I've seen this, the white supremacy and the white hoods and the stuff where they wrecked people's houses and burned their churches down and all these things. And this is not racial to blacks?

Ex. 45 at 159. The racial harassment Derick Brown experiences at F&S continues to this day. Soon after the investigation, Mr. Brown contacted OAE again to report that his car had been vandalized, and that he believed that the incident was in retaliation for his complaint to OAE. *See* **Ex. 16** at 00261-62. After Mr. Brown filed a police report, OAE determined that the matter was outside its jurisdiction. *Id.* UIUC is not aware of anyone following up, even though it admits that nothing prevented OAE from investigating the reported retaliation. **Ex. 39** at 217-20. As recently as July 2021, Mr. Brown complained to OAE about a sticker he found plastered to his work station that read, "CAUTION REDNECK AREA." Although Mr. Brown took pictures, met with an investigator, and named witnesses he believes might have pertinent information concerning his complaint, Mr. Brown has not heard from the investigators in over two months, and nothing has changed. *See* **Ex. 38**.

2. Atiba Flemons

From 2008 to 2009 and from 2011 to present, the University has employed Named Plaintiff Atiba Flemons as a brick mason in the F&S department at UIUC. Mr. Flemons has had multiple interactions with OAE involving complaints of racial harassment that he filed concerning his White supervisor Bruce Rodgers, among other things.

In May 2012, Flemons reported to OAE that Rodgers had racially harassed him for years. **Ex. 23** at 07472. Flemons told OAE that Rodgers had suggested that Flemons was only hired for

diversity reasons and named White workers he would have hired over Flemons, *see id.,* **Ex. 46** at 55-56, 121-22; referred to Flemons as a "big black guy" in Flemons' and a White coworker's presence when assuring someone on his phone that he had sufficient manpower, *see* **Ex. 23** at 07472-73; **Ex. 46** at 78, 115-16; implied Flemons and his son had a genetic predisposition to stupidity, *see* **Ex. 23** at 07472-73; **Ex. 46** at 78; and frequently yelled and cursed at Flemons in front of his coworkers, disparaged his skills, and excessively scrutinized his work and daily movements, among other harassment. **Ex. 23** at 07472-73, *see also* **Ex. 46** at 104-05, 108-09, 127-31, 138, 140. Rodgers did not treat White workers this way. *See* **Ex. 23** at 07472; **Ex. 46** at 78, 111, 128, 140.

OAE did not investigate Flemons' claims, but instead engaged Flemons and Rodgers in "informal dispute resolution" or "mediation," facilitated by then OAE Sr. Assoc. Dir. Kaamilyah Abdullah-Span. The mediation was not designed to determine whether Rodgers had racially harassed Flemons and what remedial action was necessary. Although Flemons had complained to OAE about all Rodgers' racial harassment as summarized above, during the mediation OAE focused almost exclusively on only one of Rodgers' acts of harassment (*i.e.*, Rodgers' preventing Flemons from attending a retirement party in a disparaging, offensive manner). During the mediation, Rodgers *volunteered* that he had only hired Flemons because he was forced to for "diversity reasons." **Ex. 46** at 119-22; **Ex. 40** at 254-56. Abdullah-Span did nothing to address the comment. *See* **Ex. 46** at 119-22 ("They did nothing. They just said, 'Oh,' everybody looked shocked like they had egg on their face, and they kept going on like it was nothing. I was there for harassment and discrimination. And they did nothing about it. That's why that meeting failed."). The mediation failed to resolve Flemons' dispute with Rodgers.

After repeated complaints to OAE that Rodgers was still treating him the same as he had before the mediation, Flemons spoke to a colleague at F&S who informed him that he had the right to ask for an investigation—something OAE never told Flemons. Rodgers admitted to several of Flemons' complaints, including calling him a "big black guy." Notwithstanding that Rodgers volunteered the racially derogatory "diversity" comment *in front of* OAE Senior Associate Director Abdullah-Span, and the obvious inference that was due such a statement, OAE determined that Rodgers' conduct did not violate the NDP. **Ex. 23**. Rather, OAE concluded that because Mr. Rodgers was disrespectful to White employees, too, the preponderance of the evidence suggested that his disrespectful treatment of Flemons was not race-based:

> The investigation reveals that Mr. Rodgers is responsible for creating and sustaining a challenging and difficult work environment in which a majority of the employees feel demeaned, disrespected, devalued, and unappreciated. Since white employees also reported similar concerns about the work environment and treatment by Mr. Rodgers as Mr. Flemons, we are not able to determine by a preponderance of the evidence that Mr. Flemons was treated differently based on his race by Mr. Rodgers.

Id. at 07476. The obvious flaw in the equal opportunity harasser conclusion reached by OAE is that when racial language is used, it violates Title VII. Because the University found that Rodgers' conduct did not violate the NDP, he continued to racially harass Flemons. As a consequence, Rodgers' subordinates began to follow his lead, calling him racial stereotypes, such as "lazy." **Ex. 46** at 64, 75-78, 103-04.

On June 12, 2014 Paul Rutledge, a White Laborer who assisted Flemons and other Journeymen, complained to Mark Barcus, Assistant Superintendent, Building Maintenance, that Flemons had made vulgar comments or gestures to him. Barcus noted in its email to Sr. Assoc. Dir. Span that Rutledge admitted to calling Flemons a "stupid worthless moot." Departmental human resources notified OAE and directed Rutledge there. **Ex. 32**. Duran completed an "informal" investigation in under a month. Duran acknowledged in her "Informal Resolution

Disposition" report that she "interviewed a few witnesses that allegedly would have seen or heard commentary or possibly witnessed the inappropriate gestures. . . but no one saw first-hand or heard the words or gestures alleged by Rutledge." **Ex. 21** at 07639. Nonetheless, OAE concluded that the White complainant Rutledge was more credible than Flemons, and that Flemons should be told not to speak to him. *Id.* Concluding there was no gender-based harassment, Duran stated that her report "is a clarification of the issues pursuant to the complaint received" and that no "further action in this matter is necessary at this time." *Id.* In other words, although OAE had no evidence that Flemons had done anything wrong, Flemons was directed not to speak to a man he had to see daily at work.[10]

What the OAE report left out was that Rutledge told Duran that he called Flemons names, like "stupid boot" because of Flemons' race. Rutledge admitted to Duran that he repeatedly called Flemons a "stupid boot" because of his race. **Ex. 33** at 22765. Flemons testified that he understood Rutledge's slang as shorthand for the racial slur "boot lip." **Ex. 46** at 61, 165. When Duran interviewed Rutledge he expressed deep distress that Flemons "is [a] *black* man." **Ex. 33** at 22765 (emphasis added). The implication is that had Flemons' alleged gender-based harassment come from a person of his own race he might not have been so upset, implying that the way he responded was racially motivated. Rutledge candidly stated to Duran that he "has called him 'stupid boot' [and] practiced so [he] will not say some worse." *Id.* There is no record of Duran asking Rutledge, "What do you mean by worse," to determine whether he meant a

[10] Notwithstanding Flemons' previous complaint that his supervisors and coworkers stereotyped him as "lazy," *supra*, OAE parroted Flemons' White coworkers' derogatory stereotypes in its Informal Resolution Disposition. OAE stated that Flemons' coworkers described him as "lacking in work ethic and doing substandard masonry work." In contrast, OAE described Rutledge as a "good laborer . . . who just wants his work done well and efficient." **Ex. 21**.

more obvious racial slur. Over the course of OAE's "informal" investigation, Flemons told Duran that when Rutledge called him "stupid boot," and he asked "how" he was saying that, Rutledge responded "you must be stupid, retarded," further parroting racial stereotypes used in the Department. *Id.* at 22766.

On June 19, 2014, Flemons made a complaint to Barcus that "he was walking down the loading dock stairs this morning heading out to work and Paul Rutledge was following behind him and called him a Stupid fucking Boot." **Ex. 13**. Flemons noted that Clint McGraw was present and overheard Paul saying this. *Id.*[11] Barcus and Department HR did not contact OAE or exhibit any concern over the fact that Rutledge had been witnessed by McGraw directing insults at a Black employee because of his race. After Flemons complained to Barcus that Rutledge was calling him a "stupid fucking boot," and named Clint McGraw as a witness to the incident, his Department held its own hearing—but *only* on Rutledge's complaint that Flemons winked at him.

At the hearing the Department refused to hear Flemons' complaint that Rutledge had been calling him a "stupid boot," including sneaking up behind him on the stairs just after Flemons was alleged to have winked, and yelling that at him in the presence of Clint McGraw.[12] Barcus's email acknowledged that Flemons had named McGraw as a witness, but the Department did not interview McGraw as part of its independent investigation. **Ex. 46** at 163.

---

[11] Boatner responded to Barkus that "Paul came by this morning and said that Atiba was winking at him this morning. He seemed to be troubled by this incident." *Id.*

[12] "I brought up the incident on June 19, 2014 when Paul followed me to the stairs. I was told by management that they are not worrying about that right now. 'They're only concerned with what ODEA brought forward." July 31, 2014 written grievance filed on behalf of Flemons, **Ex. 11** at 00059.

On July 30, 2014, Defendant gave Flemons three days off, unpaid, as discipline, for winking at Rutledge. **Ex. 12**. The Department grounded its decision in OAE's Informal Resolution Disposition, which reported on OAE's investigation of Rutledge's prior, unfounded complaint of gender-based harassment, and which did *not* recommend discipline. OAE never investigated Rutledge's complaint that Flemons winked at him after its recommendation that Flemons stay away from Rutledge—the incident for which Flemons was disciplined—nor did it investigate Flemons' complaint of another "stupid fucking boot" insult from Rutledge, which Flemons made on June 19, 2014, two days after OAE conducted its interviews.[13] The Department's rationale for disciplining Flemons was a non-sequitur:

> After reviewing the evidence that was gathered as part of its investigation, the Office of Diversity, Equity and Access found the victim to be more credible than you. Relying on that credibility determination and the overall findings of the Office of Diversity, Equity and Access, the department has reason to believe, and does in fact believe, that the harassment allegations asserted against you are true.

Id.

Flemons' union grieved the suspension resulting from the Department's hearing. At two separate union grievance hearings, Flemons attacked UIUC's refusal to hear his complaint against Rutledge, OAE's refusal to interview McGraw, and the fact that the Department's discipline relied upon OAE's Informal Resolution Disposition—which concluded that no witness had heard the alleged conduct she investigated and no further action was required. The second grievance hearing was chaired by Celia Remillard, the second highest ranking University Human Resources Officer after Eric Smith and was considered an appeal to the Presidential Level. In her

[13] *See* Notes of OAE informal investigation into Rutledge's complaint against Flemons, **Ex. 33**. Neither the notes nor OAE's Informal Resolution Disposition report, **Ex. 21**, mentions winking.

initial written opinion, Remillard trashed the Department's reasoning and OAE's Informal Resolution Disposition:

> As stated above, all of the documents pertaining to this suspension, and the responses to the grievance, have indicated that the discipline was issued based on the ODEA investigation into the allegations of harassment. There is no indication in any of the information presented in the record to show that Flemons was disciplined for disobeying the directive to not have any contact with Rutledge. There is also no compelling evidence that he did in fact speak to Rutledge after being told not to.
>
> At the hearing, Flemons indicated that there are witnesses to the vulgarities that Rutledge has uttered to him, and to attest to the fact that he did not follow Rutledge up the stairs or speak to him on June 19 . However, none of his witnesses were questioned by ODEA or the Department. Subsequently, I contacted Duran to follow-up with Flemons' assertions and to confirm that all of the employees who were named as witnesses were in fact questioned. Her response was that she did not conduct a "formal" investigation but that it was actually a "formal resolution." Moreover, she stated that Flemons did not offer witnesses to be interviewed and was not asked to do so. The individuals that she spoke with were Flemons, his direct supervisor, his former supervisor, and Rutledge.
>
> In [her report] she states "I interviewed a few witnesses that allegedly would have seen or heard commentary or possibly witnessed the inappropriate gestures." Clearly, this is a contradiction to her response to me that no witnesses were interviewed.

See **Ex. 17** at 00050-51. Remillard concluded, "I cannot uphold the Department's decision." *Id.* at 00051. This was not the final decision on Flemons' grievance, however.

On March 4, 2015, System Level HR Director Eric Smith, Smith's direct report Celia Remillard, Labor and Employee Relations officer Leslie Arvan and in-house counsel Craig

Hoefer met to decide Flemons' appeal of the denial of his union grievance. **Ex. 25**, at 00579-95.[14] In Ms. Arvan's notes the speakers are identified by their initials.[15]

The notes begin by addressing Flemons' claim that OAE did not interview the employee, Clint McGraw, who witnessed his allegedly harassing encounter with Paul Rutledge. The meeting notes reflect that Ms. Duran, the OAE investigator, conceded this, although her report stated that she had interviewed witnesses whose names she was not revealing. Smith and Remillard explain why the F&S's decision to discipline Flemons is unsupported and logically flawed. *Id.* at 00587 *et seq.*

Arvan's notes summarize Hoefer's contrary position: It does not matter how inadequate OAE's investigation was, or that OAE's informal report implies that Flemons' witness was interviewed when he was not; rather, F&S's directive, the alleged violation of which led to Flemons' suspension, stemmed from OAE's credibility determination, and that determination, no matter how flawed, must be given deference. Hoefer's comments ignore Smith and Remillard's cogent critique of OAE's process: "It's a classic case of credibility determination—both F&S HRs and ODEA found PR more credible . . . ." Hoefer downplayed the fact that OAE did not interview Flemons' witness. *Id.* at 00587-89. Hoefer explains that UIUC's interest in reliance on OAE investigations trumps Flemons' right to an unbiased investigation: "My concern—is that we undermine the credibility of ODEA." *Id.* at 00589-91. Smith returns to the fact that no reliable credibility determination could have been made without interviewing Flemons' witness:

---

[14] Counsel for Defendant represented that the notes are those of Leslie Arvan, who has since retired.

[15] At their depositions Smith and Remilard were unable to shed any light as to the meaning of the statements Arvan recorded.

> My concern—when look at AF's statement that ODEA didn't interview his witness. When we delve into this . . . Dept now says it was not the [conclusion of the OAE] investig it was [Flemons] violating their directive not to talk to him

Id. at 00591. Smith suggests F&S pulled its new rationale out of a hat: "This became muddled because it turned into something that we never heard of." *Id.* at 00595. Nonetheless, following the meeting concerning Flemons' grievance, Remillard issued a report reversing her initial concerns, letting the discipline against Flemons stand. *See* **Ex. 19**. Remillard wrote UIUC's final decision on Flemons' appeal of his discipline, which parroted the position against which she had argued so vociferously, justifying the suspension as follows: "In fact, Ms. Duran indicated that Rutledge's account of events was more credible based on interviews with him, yourself, and the witnesses." *Id.* at 00083. That is, OAE's flawed credibility determination had far-reaching implications, since management, HR, and even System-level HR had to kowtow to its (and its UIUC Legal influencers') positions. At her deposition, Remillard was unable to recall what persuaded her to reverse her position but asserted she would have maintained a file with the notes or evidence which would make plain the reason for her decision, however, Defendant has been unable to locate any such file.[16]

Flemons continued to experience racial harassment, report it to OAE, and experience OAE's practice of nonenforcement firsthand. On June 27, 2017, Flemons emailed then OAE Director Johnson to report that he had on multiple occasions seen a vehicle bearing confederate flag images in an employee-only University parking lot. **Ex. 5**. Flemons identified himself as an employee in his email and stated as follows:

> I am highly offended by the Confederate flag. It is a symbol of racism which represents hate and oppression towards African Americans. The

[16] *See* **Ex. 44** at 65-66.

> Confederate flag has no place in the workplace and I do not want to be exposed to it when I come to work.

Id. at 01942. Flemons attached several images of the vehicle and its location. *Id.* at 01943-53.

Johnson replied via email that someone from a student-focused organization would be in touch, but no one ever contacted him or otherwise followed up on his complaint. **Ex. 46** at 188-91; **Ex. 41** at 181-87. Although Flemons explicitly stated that his complaint was one based on race and that he viewed the display of the confederate flag on UIUC premises by someone appearing to be an employee to be racially offensive, OAE did not deem the complaint as warranting an OAE investigation or any OAE follow-up. Indeed, OAE did not even include the complaint in its database of complaints based on racial harassment. *See* **Ex. 41** at 183-85. Johnson has no recollection of ever following up on Mr. Flemons' complaint, *see id.* at 185-86, and Mr. Flemons never received any communication from her, anyone else at OAE, or anyone from the student-focused organization about his complaint. **Ex. 46** at 188-91.

Flemons continues to experience harassment at F&S to this day and has reported incidents as recently as the summer of 2021. **Ex. 37**.

3. Jeffrey Taylor

Named Plaintiff Jeffrey Taylor filed a complaint with OAE in October 2017, alleging that several of his supervisors and coworkers in UIUC's Dining department racially harassed him and discriminated against him. Taylor provided several examples of harassment, including being called the N word by a coworker, having knowledge of his supervisor's use of the N word to Taylor's social media friend, and repeated instances of his supervisors treating him worse than White employees, by yelling and cursing at him, and excessively monitoring him and scrutinizing his work.

In keeping with its standard operating procedure, OAE issued a report concluding that Taylor had not experienced racial harassment that was in violation of the NDP. **Ex. 28**. OAE reached this conclusion by ignoring Taylor's complaints regarding the use of the N word, ignoring corroborating evidence from Taylor's witnesses, and confining its report to the actions of just one of Taylor's supervisors, Don Van Liew, despite the fact that Taylor had also complained to OAE about the actions of several of his supervisors and coworkers, including use of the N word. He provided a copy of the text message he received from the coworker that reflected the N word. However, in accordance with its pattern or practice of ignoring material evidence, Taylor's complaints regarding the N word in the workplace were entirely absent from OAE's report. *See* **Ex. 48** at 107; **Ex. 35**.

OAE also ignored and/or whitewashed corroborating evidence concerning supervisor Van Liew. OAE's report cited four accounts of the witnesses it interviewed, each of which corroborated some of the conduct which formed the basis for Taylor's complaints against Van Liew, and two of which directly corroborated Taylor's complaints of an overall racially hostile environment in Dining. One witness, Briscoe Brown, corroborated Taylor's account of a racially hostile environment in Dining, saying there is a "big race problem in Ikenberry [(where Taylor worked)] as well as in the rest of Dining Services," that the problem is manifest in the conduct of both management and non-management, and that he himself sought a transfer away from Ikenberry because of the racially hostile environment. OAE did not account for this directly relevant context in its report, and instead relied on vague characterizations of Van Liew's personality to conclude that Van Liew's conduct could not have been race-based. **Ex. 28**; *see* **Ex. 48** at 109-110.

Another witness, Executive Chef Carrie Anderson, reported to OAE that Van Liew repeatedly harassed Taylor, for example by "yelling" at him and chasing him in "hot pursuit" to the point where Taylor had broken into tears, and described the overall racial tension in Dining, which Taylor and other black employees experienced: "Most of the management is white and most staff are people of color. . . . [T]here is a lack of concern for people of color in the department - a lack of respect - lack of basic understanding of equity." *See* **Ex. 34** at 26815. In its report, OAE explained how Anderson corroborated Taylor's account of Van Liew's underlying conduct; however, none of the racial context of Anderson's account is reflected in OAE's recitation of her interview. *See id.* In addition, Ms. Anderson corroborated Taylor's accounts concerning the use of the N word, including use of the N word by one of the Dining supervisors, Kalan Janowski, White: "It turns out that it was a white supervisor named Kalen - Jeff saw who it was and he felt uncomfortable about it because it was someone he would have to wor[k] . . . He does not want to work for him because he feels this way about people who look like me." *Id.* at 26818. Anderson reported to OAE how the Dining unit management handled the situation, which resulted in no disciplinary action and which made Taylor feel like he was being penalized for reporting the situation. *Id.* However, nothing regarding Taylor's report of the use of the N word is included in the OAE report, let alone Ms. Anderson's corroborating account. **Ex. 48** at 107. Once again, in keeping with its standard operating procedure of ensuring that no complaints of racial harassment result in a violation of the NDP, OAE's report was a whitewash. *Id.*[17]

[17] Two years later, OAE conducted an investigation into the Dining department's treatment of its African American employees and found that there were disparities between White employees and African American employees with regard to disciplinary treatment and employment opportunities. The report referenced "unconscious bias" as a potential issue. However, there was no finding that the NDP was violated, and no follow-up was conducted. **Ex. 24**. There was no revisiting of Mr. Taylor's investigation with respect to this finding.

4. [redacted] J.D.

Class member [redacted] J.D. who is African American, was employed as a [redacted] during the class period. In early 2017, J.D. complained that the Assistant Director of the Parking Department, Michael Wise, who is White, created a racially hostile work environment by, among other things, using the N word "multiple times and made other statements that were derogatory towards African Americans." **Ex. 50** at 04694. A preliminary draft OAE report of investigation into the complaint concluded as follows:

> The evidence obtained during the investigation **does** support by a preponderance of the evidence J.D. claims of racial harassment creating a hostile work environment.
>
> As the evidence shows the Mr. Wise racially harassed J.D. and has created a hostile work environment by using the word "n[*]gger" repeatedly as well as creating an environment filled with outrageous temper outbursts and unreasonably confining him to restrictive spaces, my recommendation is termination of his contract and no supervision responsibility of his only direct report who is African-American from the date of this report onwards.

Ex. 49 at 04873 (emphasis in original). The preliminary draft indicated that the accused harasser Mr. Wise denied using the N word multiple times while admitting to using it in repeating a comment made by J.D. "adamantly denied" this explanation, pointing out that Mr. Wise's statement made no sense. *Id.* at 04871. The preliminary draft further included indications that all witnesses—none of them eye witnesses to the conversation at issue—"separately stated they believed J.D. over Wise," and that the witnesses corroborated other parts of J.D. account. *Id.* at 04872.

However, two months later, Duran reversed herself, issuing a final report with a determination that the alleged conduct does not violate the NDP. **Ex. 50**. The final report indicates a finding that J.D. did experience the racial conduct that he alleged; however:

> The more difficult question is whether that conduct was severe or pervasive. . . . Based upon the application of this case law to the facts that are before

> me, I must conclude that, while the statements attributed to Mr. Wise are clearly repugnant and have no place within the workplace, those statements arising out of a single incident do not by themselves establish the severe or pervasive conduct needed to sustain a hostile work environment claim under the relevant law.

Id. at 04696-97. When asked what had happened between the preliminary draft and the final report that resulted in the change to a finding of no violation of the NDP, OAE investigator Duran testified that the intervening factor was legal review by UIUC counsel. **Ex. 42** at 157. UIUC confirms Duran's testimony. **Ex. 39** at 240-41. In other words, in keeping with its standard practice of sending draft investigation reports indicating a violation of the NDP to the Legal Department for review and reversal, together with its standard operating procedure of ensuring that the NDP's definition of "harassment" applies to ensure that a policy violation is *never* found, review by UIUC Legal ensured that J.D. complaint resulted in a finding of no violation of the NDP. OAE, as a matter of its standard policy, usurped the legal process of adjudicating the matter of "severe" or "pervasive," which in federal court involves a standard that lacks the NDP's additional element of "sufficiency" that is separate and in addition to the element of whether it interferes in the terms of employment, and is otherwise evaluated by a panel of jurors and adversarial representatives before a court of competent jurisdiction, effectively frustrating the underlying aims of the laws it purports to follow. Although Duran recommended termination of Mr. Wise in the final report, there are no records showing that this recommendation was discussed by human resources, let alone carried out. OAE, as a matter of standard practice, does not enforce its own recommendations and does not enforce the Campus Code of Conduct. **Ex. 39** at 96-97.

5. [redacted] C.A.

[redacted] C.A. African American, reported to Associate Dining Director Chris Henning, who reported to Dining Director Alma Dawn Aubrey, who reported to

Housing Director Alma Sealine. In October 2016, C.A. met with Sealine and complained that Dining Director Aubrey had discriminated against her by [redacted]. She cited Aubrey's calling her "show pony" as evidence of racial animus. *See* **Ex. 36** at 30132. C.A. understood the "show pony" comment to mean that Aubrey gave C.A. public-facing assignments solely to advertise her commitment to diversity, not because C.A. exemplified competence.

Associate Dining Director Chris Henning, to whom C.A. reported, stated that he was "aware that C.A. previously reported concerns of racial bias . . . to Ms. Sealine . . . ." *Id.* Consequently, Henning and Aubrey understood that C.A. had complained to their senior leader, Sealine, that Aubrey's management style was discriminatory. On December 5, Sealine formally informed Aubrey that C.A. had concerns about her management style, and specifically cited her "show pony" statement. *Id.* In their conversation about C.A. concerns, Aubrey denied to Sealine ever using the term "show pony," including in reference to C.A. *Id.* at 30132-33. However, when C.A. was forced to escalate her complaint to OAE, Aubrey reversed her previous statement and admitted to OAE that she used the phrase "regularly," albeit without intending a gender-related or racial meaning. *Id.* at 30201. Aubrey therefore lied to her superior, Sealine—risky behavior to be sure—to conceal what she later claimed was normal conduct devoid of gender or racial meaning.[18]

---

[18] Aubrey's explanation to OAE: "by definition it is forcing someone to be the center of attention and to show them off. C.A. contention that Ms. Aubrey does not use that term on a regular basis is erroneous as she regularly refers to herself and other successful members of the food service industry as their 'institution's show ponies' - e.g. NACUF'S Assembly Speech 2016 and Importance of the Advancement of Dining on YOUR Campus Presentation 2015 & 2016." *Id.* at 30201.

During its investigation, OAE interviewed seven witnesses, six of whom were White, many of whom corroborated C.A. race-based allegations, despite that "[m]ultiple witnesses reported concern if Ms. Aubrey learned of their participation in [OAE's] investigation." *See id.* at 30132-36. In its harassment analysis, OAE accounted for a single instance of mistreatment, ignored the balance of C.A. evidence, then concluded that the one fact it acknowledged on its own was not sufficiently severe or pervasive to support an NDP violation. *Id.* at 30139 (focusing only on the "show pony" remarks).

The investigation and the Report reflected many of the practices that guarantee that Black complainants always lose; however, it was OAE's treatment of C.A. retaliation allegations which unmistakably demonstrated that UIUC will not tolerate a finding in favor of a Black employee. OAE's report reflects that, after telling Aubrey of C.A. complaint, Sealine warned against retaliation:

> [She] told Ms. Aubrey, in writing, that there is to be no retaliation against C.A. for reporting her concerns to Ms. Sealine. Ms. Sealine reported that on two other occasions, she directed Ms. Aubrey not to make any changes to C.A. responsibilities (once in writing, once orally).

Id. at 30133.[19]

UIUC's NDP, like Title VII, defines protected activity as either reporting or disclosing a violation, or participating in an investigation. *See* **Ex. 1** at 27071. However, UIUC's definition of retaliatory conduct is significantly less favorable to plaintiffs than the standard applied under

---

[19] Sealine told OAE that her reports routinely discussed any concerns they had with their reports—with her—before taking any action in response. The exception was Aubrey's evaluation of C.A. Sealine told OAE that "she only learned of concerns with C.A. performance after C.A. filed this complaint. Ms. Aubrey's appraisal of C.A. prior to the complaint was reportedly always complimentary; there were never any concerns related to her performance." *Id.*

Title VII, that to be retaliatory, an employer's action need only dissuade a "reasonable worker" from making or supporting a charge of discrimination. *See supra*, section I.A.3 (discussing standard adopted in *Burlington Northern & Santa Fe (BNSF) Railway Co.*). OAE's report notes that under the NDP the evidence must show that " C.A. in good faith, disclosed a violation of this policy, filed a complaint of discrimination, or participated in an investigation, proceeding, complaint, or hearing . . . ," and that, because of C.A. disclosure, UIUC created a "*material adverse impact on* C.A. *work environment and/or have prevented her from effectively carrying out her responsibilities as a University employee.*" **Ex. 36** at 30137 (emphasis added). Thus, OAE's report makes clear that UIUC was using a definition of "materially adverse" that the Supreme Court had previously struck down.

The investigation concluded that Aubrey and Henning removed C.A. from senior management after learning she had complained to Sealine. Such conduct would deter a reasonable worker from complaining about a violation of the NDP. OAE further found that once C.A. filed a complaint with OAE, "[o]ver the course of this investigation, Respondents revealed repeated efforts to besmirch C.A. reputation and record by fabricating information about her despite documentation and testimony to the contrary." *Id.* at 30141. They went so far as to misrepresent prior performance evaluations and claim they gave her an excellent evaluation in 2016 only because they were afraid of being found out by Sealine. *Id.* at 30142. Throughout the investigation, her managers told lies on top of lies to justify what they did in response to her complaint to Sealine. OAE concluded that their "baseless accusation[s] represent Respondents' attempt to disgrace and undermine C.A. *Id.* at 30143.

Nonetheless, OAE concluded that Aubrey, Henning, and therefore UIUC, did *not* violate the antiretaliation provisions of the NDP because the retaliation followed a complaint of

discrimination to a supervisor rather than after a complaint to the OAE, essentially finding, contrary to the purposes of Title VII, including its opposition clause,[20] that employees have *no* protection from retaliation unless and until they make a formal complaint with OAE:

> C.A. elected to proceed with ODEA investigating her allegations on [redacted]. It was at this time that Ms. Aubrey and Mr. Henning were notified that C.A. had filed a complaint alleging discrimination, harassment, and retaliation with ODEA.
>
> * * *
>
> [A] complaint and any alleged retaliation that occurs prior to filing a complaint pursuant to the campus' Nondiscrimination Policy, does not fall within the jurisdiction of ODEA or the retaliation provision of the Nondiscrimination Policy. *As such, while* C.A. *claims that Ms. Aubrey and Mr. Henning decided to reallocate her responsibilities only after she complained about them to Ms. Sealine may be valid, it is not the role of this office or this investigation to make determinations as to reallocated responsibilities that occurred prior to filing with ODEA.* This investigation considers only the alleged retaliatory conduct that occurred after C.A. filed this complaint and ODEA notified the respondents of said complaint.

Id. at 30139-40 (emphasis added). OAE, in keeping with its practice of nonenforcement, simply chose to write out the "opposition clause" from what is considered "protected activity" under federal law, by not considering C.A. initial complaint to Sealine of Aubrey's discriminatory conduct as constituting "protected activity." In addition, OAE found that because C.A. core job duties remained essentially the same—that she "has been able to continue to largely perform the duties consistent with those outlined in the executive chef"—the job reassignment she suffered was not "retaliatory" under the NDP. *Id.* at 30140-41. Thus, not only did OAE observe a standard of what constitutes "protected activity" that is more demanding

---

[20] *See Alamo v. Bliss*, 864 F.3d 541, 555 (7th Cir. 2017) (citing 42 U.S.C. § 2000e-3(a) as "listing protected activities, including 'oppos[ing] any practice made an unlawful employment practice' by Title VII").

than Title VII but it also adhered to a standard of "materially adverse" that has been rejected under federal law.

C. The Impact of OAE's Policies and Practices on its Black Employees

The effects of OAE's aforementioned policies and practices that guarantee that no complaint of racial harassment or discrimination will result in a finding of a violation of the NDP are devastating. As the 2019 Task Force observed in the context of sexual harassment:

> When a campus investigatory or response system is viewed as insufficiently responsive to all forms of sexual harassment, or when it makes severe forms too hard to prove or sanction, many victims are left with the experience or perception that it is futile (and sometimes even more damaging to them than effective) even to report sexual harassment.

Ex. 9 at 03932. UIUC admits that this effect is possible with respect to racial harassment. **Ex. 39** at 152-53. Evidence of this effect is reflected in a report by the Faculty & Staff Assistance Program, a program affiliated with UIUC human resources, following an incident involving an employee's construction of a hangman's noose on UIUC's Facilities & Services premises in 2016. *See* **Ex. 15**. The report conveys responses and reactions from a group of F&S employees surveyed after the incident, including the following:

> • The antagonist assumes a high degree of tolerance in the environment for this type of behavior.
>
> • Tolerance to some degree, appears validated by the absence of response from the most immediate level of supervision.
>
> • The perception of work-place tolerance raises the question of personal safety for some.
>
> • The silent response from African-American workers was interpreted as an acceptance of the futility of expecting a response.
>
> • The silence from the overall F&S population was interpreted as fear of association or fear of repercussion.

Id. Records reflect a delayed response from the complainant's immediate supervisor, who initially had a five-minute conversation with the harasser and sent him back to work. **Ex. 14**. Although OAE became aware of the incident, *see id.*, OAE did nothing to meet with the immediate supervisor or even register the incident in its database of complaints. The survey of employees conducted by the Faculty and Staff Assistance Program following the incident reflects a "perception of tolerance" to the incident by UIUC, **Ex. 15**, which UIUC admits could be reflective of an overall perception of futility with respect to reporting alleged violations of the NDP. **Ex. 39** at 154-55. Although OAE ultimately followed up with a training for certain F&S employees, it occurred more than a month after the hangman's noose incident and was limited to the unit of 50 employees where the incident occurred. *See* **Ex. 29**. OAE's lack of a response was the subject of criticism. In one publicized statement, Dr. Sandra Kato, a mental health specialist who worked with the NAACP in launching an inquiry into UIUC's response to the incident of the hangman's noose, commented, "The noose response represented an empty, symbolic, rhetorical communication devoid of a humanistic approach," and that F&S employees have symptoms consistent with those suffering from post-traumatic stress disorder. **Ex. 30** at 06469.

After other incidents of racial hostility were reported at F&S in late 2015 and early 2016, Sr. Vice Pres. Eric Smith of System-Level Human Resources conducted a survey of F&S employees regarding their experiences in the department, which employs over 500 civil service workers. *See* **Ex. 43** at 81-88.[21] The results reflect widespread frustration with OAE and other departmental management concerning their lack of response to workplace hostility. **Ex. 26**. One employee stated, "[OAE] is a mess. I talked to Mena Pratte-Clarke and she acted like I was an

[21] The published report is available on the F&S website at https://fs.illinois.edu/docs/default-source/news-docs/finalreport.pdf?sfvrsn=506effea_8.

idiot. Jenny and Kaamilyah, there job is to just sweep things under the rug. There is a huge problem with [OAE].” Another commented, “What I've witnessed, working with [human resources] and [OAE] is not always easy.” And another: “HR, SHR, and [OAE] ultimately cares about the University over me.” *Id.* OAE did not follow up on Smith’s report of the survey. **Ex. 39** at 114-15; **Ex. 41** at 122-23.

II. ARGUMENT

Plaintiffs move for class certification under Rule 23(a), (b)(2) and, alternatively, (c)(4) on their *Teamsters* pattern-or-practice claim for racial discrimination pursuant to Title VII and the ICRA. Plaintiffs’ motion for class certification should be granted because Plaintiffs’ claims meet the requirements of Rule 23.

A. Legal Standard

In ruling on a motion for class certification, the Court must take the substantive allegations of the complaint as true. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-178 (1974). The Court should employ a presumption in favor of maintaining a class action because it saves judicial resources and can always be modified as litigation proceeds. *See* Rule 23(c)(1)(C); *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). The class certification decision is not “a dress rehearsal for the trial on the merits.” *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). The inquiry rests on “whether a class action is the proper way to resolve the merits,” not an evaluation of the merits. *Koss v. Norwood*, 305 F. Supp. 3d 897, 915 (N.D. Ill. 2018) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351-52 (2011)) (emphasis added). “Going beyond the limited inquiry required and addressing the merits before class certification puts the cart before the horse.” *Id.* Accordingly, “the court should delve no further into the merits than is necessary to decide whether to certify a class.” *Id.*

For certification under Rule 23, the putative class of plaintiffs, after being defined, must satisfy by a preponderance of the evidence "all four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and any one of the general categories of Rule 23(b)." *Orr v. Shicker*, 953 F.3d 490, 497 (7th Cir. 2020). Here, the proposed class satisfies the prerequisites of Rule 23(a) and the requirements of Rule 23(b)(2). Civil rights cases alleging discriminatory policies or practices, such as this one, are "by definition" class actions provided they meet the other requirements of Rule 23(a). *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982). The Rules Advisory Committee's Comment to Rule 23(b)(2) explains the intended application of the Rule as follows:

> Action or inaction is directed to a class within the meaning of the subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class. Illustrative are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.

Fed. R. Civ. P. 23, note to subdiv. (b)(2); *see also Amchem Prods, Inc. v. Windsor,* 521 U.S. 591, 614 (1997) (holding "[c]ivil rights cases against parties charged with unlawful, class discrimination are prime examples [of Rule 23(b)(2) cases].").

B. Proposed Class Definition

An order certifying a class action must define the class. *See* Rule 23(c)(1)(B). In addition to satisfying the requirements of Rule 23, "a class must be sufficiently definite that its members are ascertainable" and the named plaintiffs must be part of the class. *Mullins v. Direct Digital*, 795 F.3d 654 (7th Cir. 2015). Whether a proposed class is ascertainable is "a question that could be answered based on a list of objective criteria." *Berardi v. City of Pekin*, No. 1:18-cv-01438, 2021 U.S. Dist. LEXIS 74731, at *17 (C.D. Ill. Apr. 19, 2021). Plaintiffs propose the following class definition:

> All individuals identifying as Black and/or African American who are currently employed at UIUC, or who have been employed by UIUC at any point since January 1, 2014, and who have not held a supervisory position within System Human Resources, Illinois Human Resources, campus unit offices for human resources, or the Office of Access and Equity at any point since January 1, 2014.

The class is sufficiently ascertainable because the contours of the class and the identities of each of its members may be derived from UIUC records. UIUC is required to maintain records reflecting the racial backgrounds of its employees in compliance with federal law. *See* "Race and Ethnicity: U.S. Department of Education Guidelines for Post-Secondary Institutions," *available at* https://www.vpaa.uillinois.edu/cms/One.aspx?portalId=420456&pageId=440951 (last accessed on December 28, 2021) ("The University of Illinois, as a federal contractor, is required to maintain and analyze data on the gender, race and ethnicity of employees in compliance with the provision of Executive Order 11246."). This data, reflected on annual EEO-1 reports, is collected from employees on a self-reporting basis. Similarly, whether an employee is a supervisor within the offices of Human Resources, Employee Relations, or the Office of Access and Equity is determinable from UIUC's own records. The class definition is thus based on objective criteria and is therefore ascertainable. In addition, each Named Plaintiff is a member of the class under this proposed definition.

C. The Proposed Class Satisfies the Requirements of Rule 23(a).

1. The Proposed Class Meets the Numerosity Requirement of Rule 23(a)(1)

Rule 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). The "crux of the numerosity requirement is not the number of interested persons *per se*, but the practicality of their joinder in a single suit." *Arenson v. Whitehall Convalescent & Nursing Home*, 164 F.R.D. 659, 663 (N.D. Ill. 1996) (internal quotation marks and citation omitted). There is no mystical number at which the numerosity

requirement is established. *See Hendricks-Robinson v. Excel Corp.*, 164 F.R.D. 667, 671 (C.D. Ill. 1996) (38 class members); *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986) (29 class members); *Flood v. Dominguez*, 270 F.R.D. 413, 417 (N.D. Ill. 2010) ("Generally speaking when the putative class consists of more than 40 members, numerosity is met. . . .").

According to UIUC's own records, the number of non-academic staff identifying as Black in 2015 alone was 529 individuals, well over the threshold for satisfaction of the numerosity requirement. *See* Ex. (Brown et al. 003630) at 03638 (reflecting 12% of 4409 non-academic staff individuals identifying as Black). The number of academic professional staff identifying as Black in 2015 was 243. *Id.* Tenured and tenure-track faculty identifying as Black in 2015 totaled 92 individuals. *Id.* Thus, the total number of UIUC employees identifying as Black in 2015 approached 900. That number is consistent with the range of numbers reflected in prior years' records, dating from 1996 and 2005. *Id.* Likewise, that number is consistent with the range of employees identifying as Black in the years after 2015, according to similar records maintained by UIUC. *See, e.g.*, University Office for Planning and Budgeting, "Profile of Students, Faculty, and Staff by Racial/Ethnic Group, Gender, and Disability University of Illinois Participation and Success, Fall 2019," *available at* http://www.pb.uillinois.edu/documents/participreports/undrepbot19.pdf (last accessed on January 20, 2022). Thus, the proposed class satisfies numerosity under Rule 23(a)(1).

2. The Proposed Class Meets the Commonality Requirement of Rule 23(a)(2)

Rule 23(a)(2) requires there be questions of law or fact common to the class. A common nucleus of operative fact is usually enough to satisfy the commonality requirement. *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). This does not mean that every issue must be common to the class. *Bell v. PNC Bank, N.A.*, 800 F.3d 360, 379 (7th Cir. 2015). Under Rule 23(a), "claims must depend on a common contention . . . capable of class-wide resolution – which

means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Even one issue common to the class will satisfy commonality. *Id.* at 359. "Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*" *Id.* at 352 (emphasis in original).

"The existence of an illegal policy may provide the 'glue' to hold together class members' claims in answering this question." *Porter v. Pipefitters Ass'n Local Union 597*, 208 F. Supp. 3d 894, 905 (N.D. Ill. 2016). But the policy itself is not the only way that a putative class can demonstrate commonality. "[C]ommonality in a pattern or practice case can be shown in one of two ways: (1) through evidence of a biased companywide procedure or (2) through significant proof of a general policy of discrimination that manifests itself in the same general fashion throughout the company." *Porter*, 208 F. Supp. 3d at 905 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)). In other words, commonality may derive not only from a company-wide policy, but also from a procedure that is carried out centrally. As the Seventh Circuit observes:

> [A] company-wide practice is appropriate for class challenge even where some decisions in the chain of acts challenged as discriminatory can be exercised by local managers with discretion—at least where the class at issue is affected in a common manner, such as where there is a uniform policy or process applied to all.

Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of Chi., 797 F.3d 426, 437 (7th Cir. 2015). Thus, commonality exists "if all decision-makers exercise discretion in a common way because of a company policy or practice, or if all decision-makers act together as one unit." *Id.* at 438. "When a small group of decision-makers sits together in a room . . . to evaluate [a subject's] ultimate fate, the concept of a uniform criteria and single-decision maker merge. They are of one

mind, using one process." *Chi. Teachers Union, Local No. 1*, 797 F.3d at 440. So long as the allegedly discriminatory general policies are enforced centrally, rather than by individual supervisors, commonality exists, even where there is some discretion in the policies' execution. *See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488-91 (7th Cir. 2012) (allowing class certification for disparate impact claim challenging companywide practices that local managers had to follow).

Factual variations among the harms experienced by the putative class members will not defeat commonality. *See Patterson v. General Motors Corp.*, 631 F.2d 476 (7th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981). Indeed, a question can be "common despite the fact that individual [plaintiffs] . . . may have been harmed to varying extents or not at all." *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 381 (7th Cir. 2015) (citing *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757 (7th Cir. 2014)). In a pattern or practice case, the existence of the discriminatory policy or practice is the common glue binding the class together, the truth or falsity of which will dispose of a central issue common to each class member. As one authority observes:

> When a plaintiff is alleging the existence of a pattern and practice of discrimination or the existence of a discriminatory policy applicable to the class members, the question of the discriminatory character of defendant's conduct is basic to the action and the fact that the individual class members may have suffered different effects from the alleged discrimination is immaterial for purposes of this prerequisite. . . . [W]hether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class.

7A WRIGHT, MILLER & KANE, Fed. Prac. & Proc. 2d § 1763 (internal quotation marks and citation omitted).

Plaintiffs have presented documentary and testimonial evidence not only of the existence of written policies that are biased against the putative class as a whole, but also of the existence of practices and procedures carried out centrally by the unit in charge of implementing the

NDP—OAE—to which each member of the putative class is subject. UIUC admits that OAE is the sole and centralized unit at UIUC in charge of administering and enforcing the NDP for its Black or African American employees, and that the NDP applies to all employees of UIUC. **Ex. 39** at 13-19; **Ex. 1** at 27070. There is no policy at UIUC, other than the NDP, that addresses complaints of discrimination and harassment with respect to race. **Ex. 39** at 13. The implementation of the NDP is not up to the individual discretion of EEO investigators. Rather, individual investigators abide by the practices and review procedures that are maintained in the written NDP and its accompanying procedures and that are otherwise centrally guided and monitored through OAE's EEO division leadership. **Ex. 41** at 87-88; **Ex. 40** at 76, 123-24. There are "no exceptions" to the NDP, as stated on the face of the policy. *See* **Ex. 1** at 27072. Each member of the proposed class is thus subject to OAE's biased policies and/or practices. Whether a member of the class has reported racial harassment or discrimination to OAE or not, the policies and practices of OAE are already stacked against that class member. Because of OAE's biased pattern or practices, the outcome of any potential report of racial harassment or discrimination is predetermined and the same across the board: a finding that the alleged harassment or discrimination does *not* violate the NDP.

Plaintiffs' evidentiary submissions demonstrate by a preponderance of the evidence that there are multiple issues common to the proposed class that are susceptible to class-wide resolution, including:

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

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

These issues are common both to the claims of the Named Plaintiffs and the claims of the unnamed class members. For these legal and factual questions, class treatment will "generate common *answers* apt to drive resolution of the litigation." *Dukes*, 564 U.S. at 350 (internal quotation marks and citation omitted) (emphasis in original).

a. Pattern or Practice One: The Inexorable Zero

Regarding pattern or practice number "*One*," *supra*, the existence of which explains why UIUC has *never* determined that alleged racial harassment or discrimination constitutes a violation of the NDP, commonality is demonstrated by evidence of the "inexorable zero." *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) ("*Teamsters*") ("[t]he company's inability to rebut the inference of discrimination comes not from a measure of statistics but from 'the inexorable zero.'" (internal citation omitted)); *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 878 (7th Cir. 1994) (same (quoting *Teamsters*, 431 U.S. at 342 n.23)). The "inexorable zero" is evidence of a pattern or practice sufficient to certify a class because it presents an inference of discrimination that is common to the class as a whole. *See Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 661 n.8 (D. Minn. 1991) (granting class certification in a case concerning, *inter alia*, discriminatory promotions and observing "that no 'fine tuning' of statistics can obscure the inference of discrimination raised by

the 'inexorable zero.'" (quoting *Teamsters*, 431 U.S. at 342 n.23)). In other words, Plaintiffs need not present sophisticated statistical analysis to demonstrate that a particular *de facto* policy constitutes a pattern or practice because the "inexorable zero" is sufficient in and of itself as demonstrable evidence of a pattern or practice. *See Barner v. City of Harvey*, No. 95 C 3316, 1998 U.S. Dist. LEXIS 14937, at *155 (N.D. Ill. Sep. 16, 1998) (discussing *Teamsters*, 431 U.S. at 342 n.23)). Examples of pattern or practice cases decided on motions for summary judgment are illustrative of the import and scale of "the inexorable zero." In *Barner*, 68 African American employees of a total of 69 employees were separated from the defendant employer for "budgetary reasons" over a period of three months following the election of a new Mayor. 1998 U.S. Dist. LEXIS 14937. The court there held that although plaintiffs' proffered evidence of statistical analysis lacked sophistication, "the 'inexorable zero' speaks volumes and clearly supports an inference of discrimination." *Id*. at *160. Similarly, in *EEOC v. O & G Spring & Wire Forms Specialty Co.*, a case involving alleged discriminatory hiring, "[n]one of the 87 hires were African Americans." 38 F.3d at 874. Thus, the "inexorable zero" was sufficient to demonstrate an inference of discrimination. *Id.* at 878.

Plaintiffs' evidentiary submissions demonstrate the "inexorable zero." During the entire class period of over seventy-five complaints formally investigated by OAE, no complaints of racial harassment—none whatsoever—led to a determination of a violation of the NDP. *See* **Ex. 39** at 100; **Ex. 40** at 185; **Ex. 42** at 113. The vast majority of these complaints were those of Black and/or African American employees. *See* **Ex. 42** at 113 ("Q. Okay. So that's like a little over 70, 70 to 80 complaints of racial harassment over six years, if I am doing math correctly? A. I would -- I would say yes. Q. Okay. And do you recall of that set how many approximately involved complaints made by employees who identified as black or African American? A. A

majority. I would say a huge majority. I would say 80 percent."); **Ex. 40** at 184-85 ("Q. So as you sit here today, you can't recall any allegations of racial harassment that were presented to OAE in your time there that resulted in a finding that the NDP was violated? A. Correct."). Of the 76 OAE investigation files relating to racial harassment complaints of African American employees that were documented and produced in this litigation, not one of them resulted in a finding of a violation of the NDP. *See* **Ex. 10**. "Zero is not just another number . . . ." *Barner*, 1998 U.S. Dist. LEXIS 14937, at *160. Zero findings of a violation of the NDP of nearly a hundred complaints of racial harassment is "exceedingly improbable," *see Hill v. Ross*, 183 F.3d 586, 592 (7th Cir. 1999) (discussing "inexorable zero" in pattern or practice claim), and is evidence of a discriminatory policy that is common to *all* members of the proposed class. *See Jenson*, 139 F.R.D. at 661 n.8. Therefore, commonality exists with respect to this alleged pattern or practice.

b. Pattern or Practice Two: Legal Review Where a Violation of the NDP is Indicated

The preponderance of the evidence demonstrates the existence of a policy or practice whereby OAE generally refers to UIUC's Legal Department for review and reversal *only* those investigative reports where there is a preliminary finding of a violation of the NDP. Whether there is such a practice is a contention that is common to the class as a whole because the practice emanates from OAE, the central office handling *all* complaints of racial harassment and discrimination. The existence of such a practice is derived from proof common to the class because it is evidence of an organization-wide—here, a UIUC-wide—procedure, *Porter*, 208 F. Supp. 3d at 905, and otherwise is reflected in the doings of the small, centralized group of decisionmakers comprising OAE, in conjunction with the Legal Department. *See Chi. Teachers Union, Local No. 1*, 797 F.3d at 440.

Plaintiffs have easily met the burden of establishing this pattern or practice by a preponderance of the evidence. "Internal procedure required . . . members of University Counsel's office to review any claim in which there was a finding of discrimination." **Ex. 27** at 29238. UIUC admits that this Legal Review is part of OAE's "practice." **Ex. 39** at 171-77. UIUC Counsel referred to the "selection bias" of this practice in discussing "rumors" of "bias" within OAE. **Ex. 27** at 29250.

OAE's investigation of [redacted] J.D. complaint of racial harassment throws this practice into stark relief. There, OAE investigator Duran initially indicated a violation of the NDP after J.D. supervisor was credibly found to have used the "N word" multiple times in the workplace. Subsequent to review by Legal, however, Duran reversed herself, purporting to rest the determination on federal legal standards. *See supra*, section I.B.4; *compare* **Ex. 49** *with* **Ex. 50**. Duran testified that the only intervening factor between the preliminary draft report and the final investigative report was the Legal Department's review and reversal. **Ex. 42** at 157. Defendant UIUC confirms Duran's testimony. **Ex. 39** at 240-41. Thus, there is a preponderance of the evidence pointing to the existence of UIUC's pattern or practice with respect to Legal Review *only* where there are preliminary indications of an NDP violation, and always resulting in reversal of any draft finding of an NDP violation, an issue affecting the class as a whole.

UIUC Legal Department's role in both influencing and defending OAE is evident in former counsel Hoefer's defense of OAE's flawed credibility determination with respect to Paul Rutledge's complaint against Atiba Flemons. Flemons had certainly come out the loser in the farcical OAE "informal disposition resolution." UIUC had no legitimate interest in promoting universal use of an antidiscrimination unit within itself, which furthered discrimination against Blacks. As the Flemons appeal demonstrated, if the various departments became involved in

investigating NDP violations, their lack of sophistication led to messy results. OAE's biased practices, aided by UIUC Legal, are thus far-reaching.

Accordingly, commonality is satisfied.

c. Pattern or Practice Three: The NDP's Prohibitively Demanding Standard

Plaintiffs have presented evidence sufficient to demonstrate commonality regarding pattern or practice number "*Three*," *supra*, pursuant to which OAE knowingly requires complainants to meet a threshold of proof that is as demanding or more demanding than that enforced by courts considering claims of harassment and/or discrimination under Title VII, even where UIUC is on notice of how such standard is biased against complainants. To state a claim for a racially hostile work environment under Title VII, plaintiffs in an adversarial proceeding before a court of competent jurisdiction must demonstrate to a panel of impartial jurors—after having the benefit of legal representation and discovery, including the power to issue subpoenas and depose witnesses under oath—that "(1) they were subject to unwelcome harassment; (2) the harassment was based on their race; (3) the harassment was so severe or pervasive as to alter the conditions of employment and create a hostile or abusive working environment; and (4) there is a basis for employer liability." *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 900 (7th Cir. 2018). But even if read as identical as the standard under Title VII, OAE does not afford complainants the same procedures and protections afforded to complainants in federal court, and the NDP requires proof of "sufficiency" with respect to the "severe or pervasive" element that is *separate and in addition to* the requisite altering of the conditions of employment. *See supra*, section I.A.3; **Ex. 1** at 27071. Thus, the onus that OAE places on a complainant is greater than that placed on Title VII plaintiffs in federal court. This demanding standard – whether one greater than or the same as the standard for demonstrating a violation of Title VII in

court - frustrates not only the purported aims of an employer's investigative procedures but also Title VII's primary objective geared toward preventing further harassment. *See Gawley*, 276 F.3d at 312. Internal employer investigations of racial harassment are required by Title VII to facilitate reporting and remediation of racial harassment *before it becomes severe or pervasive*. *See Alalade v. AWS Assistance Corp.,* 796 F. Supp. 2d 936, 945 (N.D. Ind. 2011) (observing that Title VII's "primary objective" is "not to provide redress but to avoid harm . . . before it becomes severe or pervasive" (internal quotation marks and citation omitted))(emphasis added). *Cf. Chalmers v. Quaker Oats Co.*, 61 F.3d 1340, 1346 (7th Cir. 1995) ("If Quaker's policy were consonant with federal law, Quaker would be hamstrung in its efforts to take measures to stop such conduct before it became so abusive and offensive that the company was vulnerable to a Title VII lawsuit.").

Former Senior Associate Director of the EEO Division of OAE, Kaamilyah Abdullah-Span, having oversight over OAE's investigations of harassment and discrimination throughout the majority of the class period, testified that under the NDP's definition of harassment, UIUC "does not prohibit certain conduct that is alleged to be harassment until and unless it reaches a standard that parallels the standard applied in a civil damages action for harassment against the University." **Ex. 40** at 155-56. She admitted that the standard "explicitly prohibits only conduct that is sufficiently severe or pervasive," *id.* at 161, and therefore thwarts the very purpose of harassment prevention: "I think it is a very high standard, you know, that requires -- requires the alleged complainant to sometimes in some situations have to tolerate probably more than what the average person would consider to be acceptable conduct*." Id.* at 158. Over the course of the various versions of the NDP throughout the class period, the substance of this "very high standard" remained constant. *Id.* at 115-16. OAE maintained this prohibitively demanding

standard despite a 2019 Task Force report concluding that the standard was flawed because it effectively *permits* harassment, "embolden[ing] a few bad actors to test the limits of the system by engaging in increasingly severe and repeat forms of [harassment] while just skirting the line of what the law deems sufficiently severe or pervasive to prohibit." **Ex. 9** at 03932, 03948-49.

The evidence clearly shows by a preponderance of the evidence that UIUC's prohibitively demanding standard applied to allegations of harassment is common to the class as a whole. Documentary and testimonial evidence demonstrates that the NDP's standard definition of harassment applies to all members of the proposed class. **Ex. 39** at 13, 19; **Ex. 1** at 27070. Indeed, it is implemented despite UIUC's notice of the standard's bias against complainants. **Ex. 9** at 03932, 03948-49.

OAE's investigations of the Named Plaintiffs' complaints of harassment, as well as the investigations of complaints made by other unnamed class members demonstrates that this demanding standard of harassment effectively prohibits OAE from issuing findings of violations of the NDP. In investigating Named Plaintiff Derick Brown's complaints of racial harassment, including recurring verbal harassment from his supervisor and the display of a KKK hood, OAE made a "preliminary" finding at the outset of the investigation, which it shared with departmental management months before issuing its investigative report, that a violation of the NDP was not indicated because it did not "meet the legal standards of discrimination under the law . . . ." **Ex. 18** at 06417; **Ex. 20** at 01895. The OAE Report that followed months later was in keeping with that predetermined outcome. **Ex. 16** at 00262. Similarly, class member [redacted] C.A. complaints or racial harassment and discrimination were similarly ignored by OAE and determined to fall below the threshold of sufficiently severe or pervasive. *See* **Ex. 36** at 30139. Likewise, OAE deemed [redacted] J.D. complaint of his supervisor's repeated use of the "N

word" fell short of demonstrating "the severe or pervasive conduct needed to sustain a hostile work environment claim under the relevant law," *see* **Ex. 50** at 04696-97, a determination that is actually and clearly at odds with the relevant case law. *See Gates v. Bd. of Educ. of Chi.*, 916 F.3d 631, 638 (7th Cir. 2019) (recognizing use of the "N word" by a supervisor is sufficient to defeat summary judgment). The prohibitively demanding standards have resulted in OAE's tolerating harassment and emboldening actors to "skirt" the line of what is deemed "sufficiently" severe or pervasive. *See, e.g.*, **Ex. 5**; **Ex. 46** at 188-91 (reflecting Named Plaintiff Atiba Flemons' complaint of confederate flag to OAE Director Heidi Johnson). As the NDP's standard definition of "harassment" applies to all complaints of racial harassment, commonality as to the proposed class is satisfied.

The same is true with respect to the NDP's antiretaliation provision, which adheres to a standard of what is a "materially adverse" action that has been long rejected under federal law. In considering a worker's retaliation claim under Title VII, the Supreme Court rejected a requirement that the challenged actions must be related to the terms or conditions of employment: for an employer's actions to be retaliatory, they "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe (BNSF) Railway Co. v. White,* 548 U.S. 53, 56, 68 (2006) (citing Title VII's purpose of "[m]aintaining unfettered access to statutory remedial mechanisms"). At UIUC, to be considered retaliatory, OAE requires complainants to go beyond the elements of a Title VII claim that were drafted by legislators as a standard by which liability could be evaluated by a panel of jurors in court, which frustrates the purpose of investigation of an alleged violation of the NDP and frustrates the remedial element of the statute geared toward "[m]aintaining unfettered access to statutory remedial mechanisms." *Burlington*, 548 U.S. at 56.

OAE's written policy is explicit in its requirements. *See* **Ex. 1** at 27071. And in practice, it clearly harms members of the class. For example, with respect to [redacted] C.A. complaint of retaliation, Defendant employed the standard rejected by the Supreme Court in 2006: OAE required C.A. to show that UIUC created a "*material adverse impact on* C.A. *work environment and/or have prevented her from effectively carrying out her responsibilities as a University employee.*" *See* **Ex. 36** at 30137. By depriving UIUC complainants of the *Burlington* standard, OAE makes it harder for to find retaliation occurred at UIUC than in court under Title VII. Moreover, in the case of C.A. OAE chose to ignore the fact that after C.A. February 2017 complaint to OAE, Aubrey and Henning continued to retaliate against her throughout OAE's investigation by lying about her—plainly because she had complained to OAE and Sealine—further "besmirching" her reputation. *See id.* at 30141 ("Over the course of this investigation, Respondents revealed repeated efforts to besmirch C.A. reputation and record by fabricating information about her despite documentation and testimony to the contrary.") Such conduct would deter a reasonable employee from complaining to OAE or anyone else, assuming she wanted to remain employed. Instead, OAE chose to adhere to a standard of "materially adverse" that was rejected in *Burlington*:

> As C.A. has been able to continue to largely perform the duties consistent with those outlined in the executive chef, I am unable to conclude that Ms. Aubrey or Mr. Henning has engaged in conduct that is in violation of the retaliation provision of the Nondiscrimination Policy.

Id. at 30140-41. This ignores the fact *Burlington, supra,* rejected a standard of "materially adverse" that requires complainants to show an action related to the terms or conditions of employment, adopting, instead, a standard of what would dissuade a reasonable employee from complaining. Staying withing the four corners of OAE's Report, it is clear that C.A. received another dose of heads-we-win-tails-you-lose justice pursuant to the NDP, based on

standards that are prohibitively more demanding than those applied in court under federal law. As the NDP's standard of antiretaliation applies to the class, it meets Rule 23(a)(2) commonality.

d. Pattern or Practice Four: The NDP as Discriminatory Because of Race

The evidence demonstrates that UIUC employees who file a complaint of harassment because of their race with OAE will be subjected to a standard of proof that is more demanding than the standard of proof applied to complainants who file a complaint of harassment because of their sex. This differential treatment presents an inference of discrimination "because of" race and applies to every member of the proposed class. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1739 (2020) ("[T]he ordinary meaning of 'because of ' is 'by reason of ' or 'on account of.' . . . In the language of law, this means that Title VII's "because of " test incorporates the "'simple'" and "traditional" standard of but-for causation[,] established whenever a particular outcome would not have happened "but for" the purported cause.").

UIUC did not adopt the changes recommended by the 2019 Task Force to its definition of harassment as applied to allegations of racial harassment, although it made effective changes to its *sexual* misconduct policy. *See supra*, section I.A.4; **Ex. 3**. Former Sr. Assoc. Dir. Abdullah-Span confirms that OAE treats allegations of racial harassment under the NDP differently than allegations of sexual harassment—affording the latter a standard of proof that does not require "sufficiency" with respect to "severe or pervasive" as a separate element in addition to the element of interference with the complainant's experience at UIUC. *See* **Ex. 40** at 145, 174. Allegations of sexual misconduct have led to at least one determination of a policy violation,[22] *see, e.g.*, **Ex. 43** at 64, whereas not a single allegation of racial harassment has led to a

[22] If granted as a certified class, Plaintiffs may be entitled to additional discovery with respect to complaints of sexual harassment. *See* Dkt. 49.

determination that the NDP was violated. The issue is common to the class as a whole, since all members of the class are subject to the NDP's discriminatory standard.

e. Pattern or Practice Five: OAE's Nonenforcement of the NDP

The existence of OAE's practice of nonenforcement of the NDP—effectively taking no measures to prevent harassment—is a contention common to the proposed class as a whole. Such a practice effectively amounts to a policy of tolerating harassment, which entitles a class to injunctive relief. *See EEOC v. Int'l Profit Assocs.*, 2007 U.S. Dist. LEXIS 78378, at *43 (N.D. Ill. Oct. 23, 2007) ("[P]roof of such a policy establishes . . . that the employer behaved improperly with respect to a protected group *in general,* and therefore justifies . . . injunctive relief under *Teamsters*."); *see also Van v. Ford Motor Co.*, 332 F.R.D. 249, 275 n.16 (N.D. Ill. 2019) ("The Court also leaves open the possibility that Plaintiffs can establish that they are entitled to injunctive relief based on Defendant's alleged misconduct, as a policy of tolerating sexual harassment is itself a violation."). Evidence of this practice is derived from the central policies and practices of OAE, the sole unit in charge of enforcing the NDP. The preponderance of the evidence points to the existence of such a policy: OAE does not carry out enforcement measures, such as discipline, or even ensure that enforcement is carried out by other UIUC administrators. **Ex. 39** at 13-18, 28, 96-97. In fact, UIUC has no standard disciplinary scheme with respect to alleged violations of the NDP. *Id.* UIUC does not carry out mandatory, regular training on the NDP, other than by sending an email with a link to the NDP. *Id.* at 189; **Ex. 40** at 129-30; **Ex. 42** at 133. UIUC does not even mandate the reporting of allegations of racial harassment. **Ex. 41** at 62-63; **Ex. 1** at 27072.

As one manifestation of its nonenforcement—and, thus, toleration of harassment—OAE simply turns a blind eye to allegations of racial harassment, discrimination, or retaliation, whitewashing those allegations from its investigations. Title VII prohibits retaliation against

employees who have either "opposed" an employment practice that is believed to be unlawful under Title VII (the "opposition" clause) or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII (the "participation" clause). *See Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 274 (2009). An employee need not lodge a formal complaint of discrimination for the antiretaliation provision to apply; rather, simply making known one's stand against an employer's discriminatory actions suffices. *See id.* at 277 ("[W]e would call it 'opposition' if an employee took a stand against an employer's discriminatory practices not by 'instigating' action, but by standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons.") The antiretaliation provision of ICRA is read as consistent with Title VII. *Warr-Hightower v. Ill. Cent. Coll.*, 2017 U.S. Dist. LEXIS 188432, at *27 (C.D. Ill. Nov. 14, 2017).

In the case of [redacted] C.A. claim of retaliation following her complaints of racial harassment, OAE chose not to enforce the antiretaliation provision. OAE effectively neutered the opposition clause of the NDP by ignoring the fact that by her complaining to the senior head of Housing, Sealine, in October 2016, C.A. was opposing what she in good faith believed was discriminatory conduct in violation of Title VII, and thus should have been protected by its antiretaliation provision. OAE's interpretation of its own role—"it is not the role of this office or this investigation to make determinations as to reallocated responsibilities *that occurred prior to filing with ODEA*," *see* **Ex. 36** at 30140 (emphasis added)—is effectively an abdication of its duties under Title VII and creates a hole big enough for UIUC to drive a truck through as soon as any of its employees gets wind that an employee has complained about discrimination. Thus, UIUC can take any retaliatory action it chooses with impunity, robbing the NDP and Title VII of

any teeth. The law may prohibit discrimination, but as the Court noted in creating an implied cause of action for retaliation under 42 USC §1981, read as analogous to Title VII, without a remedy for retaliation, prohibitions on discrimination are meaningless: "to permit the corporation to punish [plaintiff] 'for trying to vindicate the rights of minorities protected by § 1982' would give 'impetus to the perpetuation of racial restrictions on property.'" *CBOCS W., Inc. v. Humphries,* 553 U.S. 442, 447 (2008) (relying on a similar interpretation of 42 U.S.C. §1982, citations omitted).

This example of purposeful nonenforcement is common to the class. In the case of OAE's notice of Paul Rutledge racially harassing Flemons, OAE should have investigated; instead, it completely ignored Rutledge's confession that he treated Flemons differently because of his race. *See supra.* Since Rutledge's insults may have violated the NDP, OAE should have asked Rutledge how frequently he had used this language against Flemons. Pervasive use of racial slurs would create a racially hostile work environment pursuant to NDP and federal law. OAE simply ignored the evidence of racial motivation. Although OAE should have contacted Flemons to advise him he could file a complaint with OAE, she did not.

OAE's whitewashing of Derick Brown's, Atiba Flemons's, Jeffrey Taylor's, and [redacted] J.D. allegations of racial harassment, is similarly evidence of this policy of nonenforcement. By choosing not to enforce the antiharassment and antiretaliation provisions that UIUC is required to enforce pursuant to Title VII, and thus *choosing not to prevent* harassment and discrimination, OAE, and thus UIUC, is effectively tolerating and perpetuating harassment and discrimination. *Id.* Thus, a pattern and practice of tolerating harassment is in itself a violation of Title VII, necessitating injunctive relief. *See Van*, 332 F.R.D. at 275 n.16; *Int'l Profit Assocs.*, 2007 U.S. Dist. LEXIS 78378, at *43.

In the cases where OAE complainants file charges with external agencies, such as the EEOC, OAE investigators simply cease their internal investigations, *see supra*, section I.A.5, effectively retaliating against those complainants for participating in the vindication of their civil rights. *Watford v. Jefferson County Public Schools*, 870 F.3rd 448 (6th Cir. 2017) ("employer's refusal to investigate an employee's internal discrimination complaint because she had filed with the EEOC was retaliation."); *McGrath v. Arroyo*, 2019 U.S. Dist. LEXIS 133769, at *35 (E.D.N.Y. Aug. 8, 2019) ("Plaintiff alleges 'he was told that, because he filed a complaint with the SDHR, the FDNY EEO would not investigate his claims.' This is sufficient to make it plausible that his filing of a claim with SDHR was a cause of FDNY EEO's refusal to further investigate Plaintiff's complaint filed with that office.")

Under these biased policies and practices, OAE carried out sham investigations, or refused to investigate at all upon agency filings, that perpetuated the racial harassment complained about by those employees. Accordingly, Rule 23(a)(2) commonality is satisfied.

3. The Proposed Class Meets the Typicality Requirement of Rule 23(a)(3)

Typicality is satisfied if Plaintiffs' claims "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members" and are based on the same legal theory as that of the other class members. *Arreola v. Godinez*, 546 F.3d 788, 798 (7th Cir. 2008). "The commonality and typicality requirements of Rule 23(a) tend to merge." *Dukes*, 564 U.S. at 349 n.5 (citation omitted). The named representatives' claims must have the same essential characteristics of the claims of the class. *Retired Chicago Police v. City of Chicago*, 7 F.3d, 584, 596-97 (7th Cir. 1993); *Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009). "Typicality is determined with reference to a defendant's actions, not with respect to specific defenses a defendant may have against certain class members." *Porter,* 208 F. Supp. 3d at 908 (citing *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996)). Even if there are factual

distinctions between the claims of the Named Plaintiffs and those of other class members, typicality may still be satisfied because the "similarity of legal theory may control even in the face of differences of fact." *Keele*, 149 F.3d at 595. The Seventh Circuit has explained that typicality does not require "that each member of a class suffer precisely the same injury as the named class representatives." *De La Fuente v. v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983); *see also Tidwell v. Schweiker*, 677 F.2d 560, 566 (7th Cir. 1982).

The Named Plaintiffs' claims are directed at the policies that apply to the class as a whole. The Named Plaintiffs' factual claims arise from organization-wide policies and practices, *supra*, emanating from the central unit, OAE, of a single campus, UIUC, and thus affect the claims of putative class members. All class members, including Named Plaintiffs, were subjected to the NDP and OAE's practices throughout the class period, including the five patterns or practices enumerated, *supra*. A few key actors enforced the policies and practices that are central to Named Plaintiffs' class claims: OAE, including its biased former Director Heidi Johnson, and the UIUC Legal Department working in conjunction with OAE. Second, the Named Plaintiffs and the putative class share the same legal theories, that OAE's manner of implementing the NDP, including the five enumerated patterns or practices, *supra*, are racially discriminatory, in violation of Title VII and the ICRA. *See Porter,* 208 F. Supp. 3d at 908.

That certain class members may never file a complaint of racial harassment or discrimination, or where certain class members may allege different forms of racial harassment or discrimination, is of no import; the effect of UIUC and OAE's policies and practices is the same across the class—that is, never finding of a violation of the NDP. The effect of never finding a violation of the NDP—the "inexorable zero"—is discrimination. Typicality exists here,

where the claims of Named Plaintiffs and the class members stem from a unitary course of conduct, based on the same legal theories. Therefore, Rule 23(a)(3) typicality is met.

4. The Proposed Class Meets the Adequacy Requirements of Rule 23(a)(4)

"To satisfy the adequacy of representation requirement, the class representative must possess the same interest as the class members and not have claims or interests that are antagonistic or conflicting with those of the class." *Porter,* 208 F. Supp. 3d at 908 (citing (*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997); *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)). Here, the Named Plaintiffs have more than adequately represented the proposed class, by providing deposition testimony, by assisting with the fact-finding process, and by their demonstrating knowledge of the facts underlying their legal claims and a basic understanding of the legal claims themselves. Plaintiffs' claims pose no conflict with the claims of other class members, as their legal theories are aligned and stem from the same set of operative facts. All named Plaintiffs have a unified interest in overhauling OAE's discriminatory policies and practices and in implementing broad programmatic changes to the way in which complaints of racial harassment and discrimination are handled by UIUC. None of the Named Plaintiffs had any involvement in the design or implementation of the policies and practices at issue.

Counsel, Friedman & Houlding, LLP, has experience litigating employment discrimination actions around the country. Joshua Friedman has over 30 years of experience in federal employment litigation, including many complex multi-plaintiff hostile work environment and employment discrimination cases. He served from 2014 through 2017 as President of the National Employment Lawyers Association, New York, a bar association whose members principally represent victims of employment discrimination, and served on the board for eight additional years. Rebecca Houlding has more than 25 years of experience in federal employment

litigation, almost exclusively litigating hostile work environment, discrimination and retaliation claims. Friedman & Houlding successfully prosecuted a sex discrimination and sexually hostile work environment class action to a settlement, in the first Title VII class action ever certified in the Norfolk Division of the Eastern District of Virginia. *See Aviles, et al. v. BAE Systems Norfolk Ship Repair, Inc., et al.*, No. 2:13-cv-00418-AWA-RJK (E.D. Va. Sept. 28, 2015) (on order granting preliminary approval of class action settlement, holding plaintiffs represented by "qualified, reputable counsel who are experienced in preparing and prosecuting employment discrimination matters and class actions, including those involving the sorts of practices alleged in the Complaint"). Friedman & Houlding is actively prosecuting a putative class action matter involving retaliation claims under Title VII in the Northern District of Iowa and the U.S. Court of Appeals for the Eighth Circuit. *See Sellars et al v. CRST Expedited, Inc.*, 1:15-cv-00117-LTS-KEM (N.D. Iowa).

Plaintiffs and their counsel have therefore satisfied the adequacy requirement. *See Porter*, 208 F. Supp. 3d at 908-09 (finding Rule 23(a)(4) satisfied, noting "Plaintiffs have participated in the litigation, have been deposed, and have demonstrated a basic understanding of the claims involved in the litigation. The Court does not perceive any issues with Plaintiffs' ability to represent the proposed class. Similarly, Plaintiffs' counsel has adequately represented Plaintiffs throughout the litigation and has extensive experience in employment discrimination litigation.").

D. The Proposed Class Satisfies Rule 23(b)(2).

Plaintiffs seek an injunction for themselves and the putative class. Accordingly, Rule 23(b)(2) certification is the proper mechanism to attain class status. Rule 23(b)(2) certification is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding

declaratory relief with respect to the class as a whole." *Lemon v. Int'l Union of Operating Engineers, Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000). "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Porter*, 208 F. Supp. 3d at 909 (citing *Dukes*, 564 U.S. at 360).

Civil rights cases are "prime examples" of (b)(2) classes. *Chi. Teachers Union*, 797 F.3d at 441 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997)). Courts have long recognized civil rights class actions as paradigmatic Rule 23(b)(2) suits, "for they seek classwide structural relief that would clearly redound equally to the benefit of each class member." *Marcera v. Chinlund*, 595 F.2d 1231, 1240 (2d Cir. 1979), *vacated on other grounds*, 442 U.S. 915 (1979); *Alliance to End Repression v. Rochford*, 565 F. 2d 975, 979 n.9 (7th Cir. 1977) ("Rule 23(b)(2) . . . is devoted primarily to civil rights class actions which allege violations of constitutional rights.") (citing Advisory Committee Notes to the 1966 Amendments to Rule 23.).

That additional, individualized relief may be needed "does not preclude certification of a class for common equitable relief." *Chi. Teachers Union*, 797 F.3d at 442; *Palmer v. Combined Ins. Co. of Am.*, 217 F.R.D. 430, 438 (N.D. Ill. 2003) ("[I]ndividualized assessments are not necessary when it comes to injunctive relief." (citation omitted)). "[A] finding of a pattern or practice of discrimination itself justifies an award of prospective relief to the class." *Cooper v. Fed. Reserve Bank of Richmond,* 467 U.S. 867, 876 (1984).

UIUC administrators in OAE and the Legal Department have engaged in a pattern or practice that perpetuates harassment and discrimination against UIUC's Black employees, and that pattern or practice continues now, without any indication of ceasing. Plaintiffs seek campus-wide changes in the form of declaratory and injunctive relief to address and end this systemic

offense to their civil rights, precisely the type of civil rights action Rule 23(b)(2) was created to end. *See Amchem Prods., Inc.*, 521 U.S. at 614; *Chi. Teachers Union*, 797 F.3d at 441.

Plaintiffs seek the following injunctive and declaratory relief:

(1) Replacement of the EEO Division of OAE with an independent, third-party investigating entity to conduct investigations into allegations of racial harassment and discrimination in violation of the NDP, and thus removing review by UIUC Legal of the investigative findings;

(2) Implementation of the 2019 Task Force's recommendation to remove the "severe or pervasive" requirement from the definition of "harassment" in the NDP;

(3) Implementing a standardized disciplinary scheme whereby discipline for findings of a violation of the NDP is carried out uniformly and progressively (such as a 3-strikes rule), and tracked both in employee personnel files and in an investigative file database maintained centrally, either at a separate non-investigatory division at OAE, or at the System Level of Human Resources;

(4) Mandatory training for all UIUC employees on what is racial harassment and how to report racial harassment;

(5) Mandatory reporting of racial harassment by bystanders and supervisors to whom such harassment is reported;

(6) A declaratory judgment that the policies, patterns and/or practices complained of violate Title VII and ICRA;

(7) Such other and further equitable relief as this Court deems appropriate.

The requested relief does not require an examination into each class member's particular grievances because, if granted, the injunction will apply to the class as a whole and will furnish full and final relief as to the class claims.

If UIUC's practices with respect to the NDP were enjoined for the three named Plaintiffs, the other putative class members will necessarily benefit from that same injunctive relief since they are all subjected to the same practices. As a result, the injunctive relief, under the Court's guidance in *Dukes*, is highly indivisible. *See Porter*, 208 F. Supp. 3d at 909 (citing *Dukes*, 564 U.S. at 360). Thus, Plaintiffs' request for relief is prime for Rule 23(b)(2) certification.

E. **Alternatively, the** Proposed Class Satisfies Rule 23(c)(4).

Rule 23(c)(4) provides that "when appropriate, an action may be brought or maintained as a class action with respect to particular issues." *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012). This Court should certify the proposed class under Rule 23(c)(4) if it finds that it cannot be certified under Rule 23(b)(2). When appropriate, an action may be brought or maintained as a class action with respect to particular issues. Fed. R. Civ. P. 23(c)(4). As the Seventh Circuit observes, "class action treatment is appropriate and permitted by Rule 23 when the judicial economy from consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury." *Id.*

Here, Plaintiffs request that in the event the Court does not grant certification under Rule 23(b)(2), it should alternatively grant certification of an issues class under Rule 23(c)(4) as to the existence of each of the five alleged patterns and/or practices enumerated herein, respectively.

III. CONCLUSION

UIUC's policies, patterns, and/or practices with respect to complaints of racial harassment, discrimination and retaliation render Title VII and ICRA toothless. OAE is not an

enforcer of these laws, as it is required to be; rather than preventing harassment and discrimination, OAE is foremost a tool of UIUC to prevent Black and African American employees from vindicating their civil rights. The harm done, though shameful, is capable of correction. For the foregoing reasons, Named Plaintiffs, on behalf of themselves and the putative class, respectfully request that the Court certify the class and institute the requested injunctive relief.

Dated: January 28, 2022
Mamaroneck, New York

Respectfully Submitted,

By: /s/ Shilpa Narayan

Shilpa Narayan
Rebecca Houlding
Joshua Friedman
Jesse Centrella
FRIEDMAN & HOULDING LLP
1050 Seven Oaks Lane
Mamaroneck, NY 10543
Tel: 888.369.1119 x 11
Fax: 866.731.5553
shilpa@friedmanhouldingllp.com

Counsel for Plaintiffs

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

DERICK BROWN, ATIBA FLEMONS, and JEFFREY TAYLOR On behalf of themselves and all others similarly situated, **Plaintiffs**, **v.** THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS **Defendant.**	**2:19-cv-02020-JBM-EIL**

CERTIFICATE OF SERVICE

I certify that on March 4, 2022, I filed the foregoing using the CM/ECF system, which sends a copy to all counsel of record for the Defendant. This is a redacted document previously filed under temporary seal and served via e-mail on counsel of record for the Defendant on January 28, 2022.

Dated: March 4, 2022
Mamaroneck, New York

Respectfully Submitted,

By: /s/ Shilpa Narayan
Shilpa Narayan

FRIEDMAN & HOULDING LLP
Counsel for Plaintiffs