UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

CATHY SELLARS, **CLAUDIA LOPEZ**, and **LESLIE FORTUNE**, On behalf of themselves and all others similarly situated, Plaintiffs, v. **CRST EXPEDITED, INC.**, Defendant.	)	**Case No. 1:15-cv-00117-LTS**

PLAINTIFFS' RESISTANCE TO
DEFENDANT'S MOTION TO DE-CERTIFY CLASSES

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TABLE OF ARGUMENT

I. INTRODUCTION

The instant Motion to de-certify seeks a second bite at the apple on the issue of class certification, without showing any new grounds to do so. It consists solely of a series of arguments that have already failed at class certification, on a rejected Rule 23(f) petition, and/or in the Court's Order granting class notice. Some of the arguments have been repackaged to give the appearance of newness, while others are a direct rehashing of the exact same caselaw cited and assertions made in previously filed briefings in this action. It all amounts to a request that the Court reverse itself for reasons the Court has already carefully considered and rejected.

Liability is not at issue on this Motion. While Defendant has conflated the summary judgment standard with the Rule 23 requirements repeatedly in its papers, Defendant did not move for summary judgment on Plaintiffs' hostile work environment claim. All that is at issue is the narrow question whether the Court has mistakenly maintained class certification. Notably, Defendant did not even attempt to raise any argument to de-certify the retaliation class: instead, for the first time it finally concedes it does maintain the retaliatory policy Plaintiffs have alleged, after denying that fact throughout this litigation. Since Defendant's only de-certification argument with respect to the retaliation claim is simply to point to its separately filed motion for summary judgment relating to that claim, only the Hostile Work Environment Class is actually at issue on this Motion.

Nothing has changed, factually or doctrinally, to make the Court's ruling granting class certification in this case incorrect. As Plaintiffs stated in their original briefing seeking class certification, they have used class member testimony, Rule 30(b)(6) admissions, CRST managers' testimony, and extensive documentary evidence in the form of CRST's business records to show that the requirements of Rule 23 are satisfied here, where Defendant maintained class-wide policies that created a hostile work environment. Contrary to Defendant's odd claim

that Plaintiffs are no longer relying on Rule 30(b)(6) deposition testimony or other evidence cited in their original class certification briefing, Plaintiffs not only absolutely continue to rely on every piece of evidence already cited, but they also present extensive additional evidence that Defendant maintained the policies alleged. Using Defendant's own admissible business records, recording its handling of the class members' complains, Plaintiffs are adding to the abundant anecdotal evidence that already sufficed for certification of their claims.

Class certification in this case continues to be appropriate for all of the reasons the Court set forth in its original Order certifying the class. All the evidence that supported that decision continues to do so, and Plaintiffs have strengthened their underlying case even further. The only expert report Defendant has presented in support of its request that the Court reverse itself is completely inapposite, since it only addresses the sufficiency of statistical evidence—which Plaintiffs have never purported to use. The class is manageable, and class treatment is by far the most efficient way to adjudicate Phase I of this case. The class further remains ascertainable for the exact same reasons the Court explained when it ordered notice to be sent.

Sixteen months after this case was certified, twelve months after two Rule 23(f) petitions for review were rejected by the Eighth Circuit, and seven months after all class members had received notice, Defendant has failed to show any good reason for this Court to reconsider class certification. Its Motion should be denied.

II. FACTS

A. Background

1. CRST's Highly Centralized Authority over Team Truck Drivers

CRST Expedited is a division of CRST International, Inc., one of the "leading Transportation and Logistics Companies in the U.S., with annual revenues over $1 billion..." P-App 2501. CRST Expedited (hereinafter "CRST") is "the nation's largest team

carrier....Servicing the lower 48 states and Mexico[.]" Id. Plaintiffs Cathy Sellars, Claudia Lopez, and Leslie Fortune are former CRST over-the-road team truck drivers.

CRST employs approximately 7000 truck drivers at any given time. P-App 2369, 25/13-14. Authority over these drivers is highly centralized. Drivers' work is directed by dispatchers, referred to as Driver Managers (formerly Fleet Managers), hereafter referred to as "DMs". P-App 2368, 14/22-24; P-App 2376, 64/10-15. CRST employs approximately 60 DMs in total, working over multiple shifts. P-App 2376, 65/5-8. All DMs work together in a single open work area in a building on CRST's Cedar Rapids campus. P-App 2377, 67/5-11, 68/24-69/7. Only approximately ten Operations Managers supervise the DMs. P-App 2376, 64/16-65/4. They work in the same area, within the same building, as the DMs. The Operations Managers report to only two Directors: [redacted]. P-App 2376, 65/9-14.[1] [redacted] and [redacted] report to CRST President Cameron Holzer. P-App 2370-2371, 29/19-30/1; P-App 2377, 67/12-24.

All drivers are subject to the same CRST harassment policies. P-App 2373, 52/15-24.[2] Karen Carlson, Manager of Employee Relations, has authority over the investigation of harassment or discrimination complaints made by all drivers in the CRST Expedited fleet. P-App 2366, 9/5-16. From June 2013 to approximately April 2014, Carlson alone was responsible for investigating 100% of those complaints. P-App 2367, 11/12-17. In April 2014 she began supervising Chelsea Stoll, Employee Relations Representative. P-App 2366, 8/2-11. As of early 2015, Stoll was replaced by Cassie Burrill. P-App 2366, 8/12-9/1. In late 2015, Carlson began

[1] [redacted] supervises DMs who work with company drivers, which are drivers who operate vehicles belonging to CRST. [redacted] supervises DMs who work with owner-operators, which are drivers who are leasing the vehicle they drive and working towards ownership of that vehicle. Id. 65/9-21. As shown infra, CRST's discriminatory policies and practices apply to company drivers and owner-operators identically, therefore this distinction is irrelevant to the analysis of Plaintiffs' claims.

[2] Where Plaintiffs have any evidence of a change in these policies during the relevant period, they have described the change in their discussion of the specific policy. Otherwise, the evidence is that these have been the policies in place at CRST.

supervising additional Employee Relations Representative Megan Knoot. P-App 2367, 13/12-19. Carlson both conducts investigations and supervises all of Burrill and Knoot's investigations into employee complaints. P-App 2367-2368, 13/23-14/3. Carlson reports to Angie Stastney, Director of Human Resources, but Stastney handles other HR matters and does not generally have any role in investigating employee complaints. P-App 2366-2367, 9/2-4, 9/17-10/21.[3]

2. Team Truck Driving at CRST

Women comprise only about 13% of drivers for CRST Expedited.[4] With only occasional exceptions, such as while waiting to be paired or driving to pick up their next co-driver, all drivers work in pairs. P-App 2369-2370, 25/20-26/4. Each driver can drive no more than 14 hours per day, so co-drivers trade off driving by taking shifts so that the truck can be continuously moving. P-App 2436, ¶5. Each truck contains a small sleeper berth area behind the front seats containing bunk beds. P-App 2391, 136/16-23; P-App 2445, ¶6. The driver who is off can sleep while their co-driver is driving. P-App 2436, ¶5. When the truck is stopped for a more extended period, such as while waiting for the truck's next load to be ready for shipment, drivers may sleep simultaneously and use both bunks. P-App 2445, ¶6.

Drivers make trips across the country picking up and delivering loads. CRST has four Driver Terminals, located in Cedar Rapids, Iowa; Riverside, California; Oklahoma City; and Pennsylvania. P-App 2372, 42/14-43/7. Drivers start and end their trips at these terminals whenever they do not go directly from delivery of one load to pick-up of the next load. Id. 43/8-44/4. The Cedar Rapids and Riverside terminals contain living facilities, including sleeping

[3] Carlson testified that occasionally an employee may "wander up to" Stastney's office, at which point she might receive a complaint, or that in an urgent situation she might be "required to jump in" on an investigation, but that these examples were "not, you know, a routine occurrence[,]" and Carlson would ultimately become aware of any such investigation due to Defendant's tracking mechanisms. Id. 10/10-11/2.

[4] Counsel for Defendant represented at a motion hearing that out of approximately 45,000 employed at some point from 2012 to the present, about 6000 were women. P-App 2434, 15/1-6. This yields an estimate of approximately 13% women.

areas, where drivers stay from time to time. P-App 2372, 44/5-18. During periods when drivers stay at a terminal, they are subject to all the same human resources policies that they are subject to when on the road. P-App 2373, 52/25-53/4.

3. Components of Driver Pay

Drivers are paid using a "split mileage rate." This means that for a given "run" or trip driven by a pair of co-drivers, no matter how much of the trip each driver actually spent behind the wheel, each of them is paid for half the mileage of the trip at their personal rate. P-App 2437, ¶7; P-App 2459, ¶7. For example, if a pair of co-drivers got a load of 2000 miles, and successfully delivered the load, each would be paid for 1000 miles at their own rate per mile. P-App 2437, ¶7. The rate paid per mile varies with the driver's length of experience. P-App 2478. Under the split mileage rate pay system, drivers only earn pay when they are driving a truck. P-App 2437, ¶7; P-App 2459, ¶7. CRST also reimburses for certain truck-related expenses: it pays for "city work," physical loading and unloading of a trailer, making additional stops to do a multi pick up or delivery of a load, passing roadside inspections, and being deprived of use of the sleeper berth for over 8 hours. P-App 2479-2480. Additionally, drivers may receive layover pay if a truck is "available from empty time to dispatched pickup time" for certain specified lengths of time, and may receive pay for periods away from the terminal or home due to truck breakdown or impassable highway conditions. Id.

4. Driver Manager Role

Drivers receive their instructions from DMs. Each DM has a fleet of trucks for which they are responsible at any given time. P-App 2378, 70/16-19. DMs work on multiple shifts covering the full 24-hour day; the after-hours team is smaller, at somewhat less than 50% of the daytime staffing level. P-App 2377, 67/25-68/8, 68/17-23, 69/20-70/1. The length of a particular DM's shift can vary. P-App 1278, 70/2-4.

DMs communicate with drivers using the "Qualcomm" computer system. P-App 2378, 72/12-15; P-App 2482, 16/17-21. The Qualcomm system can perform various functions, one of which is to send text messages back and forth between a DM and their drivers, similar to an e-mail. P-App 2483, 17/13-23. DMs access Qualcomm from computer terminals at their desks. P-App 2482, 16/22-25. Drivers access it through a small computer in the truck that is similar in appearance to a laptop. P-App 2483, 17/1-5. DMs additionally communicate with drivers via phone calls, and at times may communicate with them via email. P-App 2378, 72/16-21. Each DM has a CRST telephone at their workstation; each has a direct line, and callers can also call a general number and be routed to various lines within the system. P-App 2490, 41/17-42/4. All DMs are subject to the same human resources policies and procedures. P-App 2378, 70/5-8.

5. Driver Manager Compensation and Incentive to Keep Trucks Moving

Driver Managers ("DMs") may be paid hourly or on a salary basis. P-App 2354, 37/18-38/8. DMs progress upward through four tiers within the DM ranks, with the bottom tier being paid hourly, and the upper three tiers being salaried. P-App 2354, 39/18-40/3. DMs' eligibility to progress upward through the tiers and increase their pay is based on a series of performance metrics that are tracked by CRST, i.e. a "score card." P-App 2354, 40/4-20; P-App 2358, 58/19-24. All trucks that are in a DM's fleet count toward the DM's metrics, with no trucks excluded due to some specific circumstances. P-App 2360, 65/11-66/6. The metrics on which DMs are assessed are driver retention, truck utilization, on-time service, expenses, in-service (that is, the number of trucks working), and safety. P-App 2355, 41/12-42/10. The metrics are assessed monthly, and on a quarterly basis CRST determines whether the DM may be eligible to move up a tier based on the results, with the actual move upward taking place if the metrics continue to qualify during the following quarter. P-App 2355, 43/1-44/5. For DMs in the top tier, good performance on the metrics can result in merit pay increases. P-App 2359, 62/1-8. If the metrics

do not look good for the DM, s/he may face consequences including probation, sliding town a pay tier, or even being terminated. P-App 2358, 58/25-59/4, 60/5-25. The "truck utilization" metric is the number of miles that the DM's trucks are running during a given period of time. P-App 2356, 47/1-8. The more miles the DM's supervised trucks drive, the better that metric will look for the DM. P-App 2356, 47/9-12. "On-time service" is measured as the percentage of loads that are delivered on time by the DM's trucks. P-App 2356, 47/13-18. The more loads that are delivered on time, the better that metric will look for the DM. Id. 47/19-22. The "expenses" metric tracks how many expenses the DM's trucks have incurred, and is measured in cents per mile. P-App 2357, 50/5-9. For instance, if a driver must be bused from one place to another as a result of getting off a truck, that expense will be counted towards the DM's "expenses" metric. P-App 2357, 51/3-9. "In-service" is the percentage of the DM's total fleet that is working at any given time. P-App 2357, 51/10-52/1. The more trucks that are working, the better this metric looks for the DM. P-App 2357, 52/8-12. The "safety" metric only measures truck accidents per million miles. P-App 2357, 52/16-20. The DMs' incentives are therefore to keep as many trucks as possible moving, for as many miles as possible, with as few delays and as little money spent on drivers as possible, in order to increase the DM's pay and avoid discipline. If a DM has to stop or delay a truck, and/or miss an on-time delivery, due to a sexual harassment complaint, it will therefore negatively impact the DM's metrics, because that truck will not be excluded from the relevant calculations.

6. New Driver Training and Pairing Up

CRST maintains a training program for new truck drivers, including those who have no truck driving experience at all. P-App 2379, 78/11-18. More than half of CRST drivers go through this program. P-App 2379, 80/13-18. Student drivers receive some classroom instruction, do a road test, and then go out over-the-road for 28 days of training with a "lead

driver". P-App 2379, 78/23-79/3, 81/1-8. Students sign a contract providing that they will continue working for CRST for a specified period of time after their training is complete, purportedly to pay CRST back for the value of the training. P-App 2379, 79/4-9. Lead drivers are nominated by operations personnel and reviewed by the Safety department for placement into a certification class. P-App 2493. To be eligible to become a lead a driver needs a minimum of six months recent over-the-road experience, "acceptable" winter driving experience, and ten other specific requirements relating to driving and logging performance (e.g. no more than a certain number of specified types of inspections within a certain period of time, no more than two moving violations within 12 months, etc.). Id. A record free from co-driver complaints or substantiated harassment incidents is **not** an eligibility requirement as stated in CRST's handbook. Id. There are only approximately 25 female lead drivers out of over 500 leads at any given time, so few students who would prefer a female lead will be able to obtain one unless they are willing to wait, unpaid, for one to become available. P-App 2494.

Leads receive a higher split mileage rate of pay than non-lead CRST co-drivers. P-App 2478. Students receive a lower split mileage rate of pay than co-drivers who have passed their training. Id. Leads and students are paired up by a student coordinator, and a lead driver can request to work with a particular student. P-App 2380, 83/13-15; P-App 2379, 81/20-24. When a student begins her training with a lead, the lead's DM becomes the DM for the student as well. P-App 2380, 85/20-24. This means that a lead driver generally works with the same DM throughout the lead's training of successive students. P-App 2380, 85/25-86/3.

Following a student's over-the-road training, she may either pass her training and become a normal CRST co-driver, paid at the higher co-driver rate, or she may not pass. P-App 2381, 89/1-6. The lead driver—who is the only other person present on the truck during the student's training—evaluates the student on approximately twenty different skills and fills out paperwork

assessing her performance on each. P-App 2381, 89/10-18; P-App 2382, 90/20-23. The lead then makes a recommendation as to whether the student should pass her training. P-App 2381, 89/20-24. Typically, no one besides the lead has any direct knowledge of the student's performance during her over-the-road time. P-App 2382, 90/24-91/5. The lead gives this assessment and recommendation to the lead's DM, who has final authority to pass or not pass the student. P-App 2381-2382, 89/7-13, 89/18-90/3. There is nothing besides the lead's assessment and recommendation that the DM considers in making this decision. P-App 2382, 90/8-19.

Once a student has passed her training, she becomes a regular CRST co-driver. Generally, she is provided with a list of potential co-drivers, whom she may call to find a driver to pair with. P-App 2372, 53/19-24. Drivers often request such a list, and their DM sends one through Qualcomm containing names and phone numbers. P-App 2436, ¶6; P-App 2454, ¶6; P-App 2466, ¶6; P-App 2470, ¶5. If the driver was at a terminal, she could also look at a bulletin board where names of available drivers were posted, P-App 2466, ¶6, though this would not be possible if she were away from a terminal at the time. Often, drivers meet once in person, for example at a terminal, before deciding to drive together. P-App 2373-2374, 53/24-54/4. When she has found a co-driver, the driver informs her DM of the proposed pairing, and if it is not disapproved, the pair can begin driving and earning pay. P-App 2374, 54/20-24. Defendant could not identify any policy prohibiting DMs from requiring that their drivers enter into a particular co-driver pairing. P-App 2374, 55/11-13. DMs do at times tell drivers they cannot pair with a particular co-driver, for example, because they live too geographically far away from one another. P-App 2438, ¶20; P-App 2439, ¶23. Since drivers earn nothing during the process of locating a co-driver, they must agree to a pairing quickly unless they can afford to wait without pay. A female driver can choose to only drive with other women, but she will be unpaid for all of the time she is waiting for another woman to become available. P-App 2375, 61/14-19. This

gives her a strong incentive to agree to drive with men. An employee charged with providing lists of available co-drivers told driver [redacted] "if I wanted to wait for a female co-driver, I would starve, because 'we don't have any women.'" P-App 2473-2474, ¶8-9.

7. Sexual Harassment at CRST

Female drivers at CRST have been subjected to a hostile work environment based upon their sex. *See* Plaintiffs' description of the forms this sexual harassment has taken in Dkt. 35-1 at 10-11. Since the nature of CRST drivers' work is that paired co-drivers work throughout the 24-hour period, emergent sexual harassment or assault issues can frequently arise outside of business hours. If a female student or driver is harassed by her lead or co-driver on the road, then if it is during business hours, and she has access to a telephone, she can call the HR Service Center line with a complaint. P-App 2387, 117/7-19. This complaint will "ultimately" reach the Employee Relations representatives. Id. However, this line is not staffed 24 hours/day. If the victim calls during off-hours, she will simply be sent to voicemail. P-App 2388, 118/3-17; 118/25-119/6. If the victim knows the direct number for Human Resources, she can call it to complain; however, Human Resources is not staffed overnight. During off hours, no one will be present to take the complaint, and it will go to voicemail as well. P-App 2388, 118/25-119/6. CRST maintains a single 24-hour hotline number, operated by a third-party vendor. P-App 2387, 117/7-22. The hotline staffer can take notes regarding a victim's complaint, which are subsequently electronically sent to Karen Carlson. P-App 2387-2388, 117/22-118/2. However, the hotline staffers have no authority to take any action on a driver's complaint. P-App 2388, 118/20-24. The result is the same: no assistance to the employee until, at soonest, the following business day.

Karen Carlson has authority over the investigation of harassment or discrimination complaints made by all drivers in the CRST Expedited fleet. P-App 2366, 9/5-16. When it

receives notice of a sexual harassment complaint, HR enters the complaint into a spreadsheet, and fills out an investigation form concerning the complaint. P-App 2383-2384, 101/23-102/15; P-App 2410, 55/7-13. This form is supposed to include notes of any questions and answers from an interview with the complaining employee, and an interview with the alleged harasser. P-App 2384, 102/13-103/6, 103/22-104/4; P-App 2410, 55/14-22. At the conclusion of its investigation, HR makes and records in the investigation form its determination as to whether or not the victim's complaint has been corroborated. P-App 2384, 105/5-10; P-App 2386, 113/2-8; P-App 2404, 30/4-7. HR then determines whether some form of discipline should be imposed and records the discipline in its form. P-App 2384, 105/18-23; P-App 2402, 15/11-19; P-App 2403-2404, 29/25-30/11. Contrary to Defendant's claim that its Human Resources investigator "looks at whether there are prior complaints against the accused driver" as part of this process (Def. Mem. 8), Carlson, in her capacity as a Rule 30(b)(6) witness, admitted that the existence of prior complaints (which are not corroborated under Defendant's standard), will not impact CRST's determination as to whether the instant complaint is deemed corroborated: "Q. ….where you are investigating a subsequent complaint against someone who has been the subject of a prior complaint, do you take into account the existence of the prior uncorroborated complaint in deciding whether or not the new accuser is telling the truth? A. No. Each case is going to stand on its own merit." P-App 2392, 151/6-13 (emphasis added). Regardless of the outcome it reaches, CRST never informs the victim of what it decided about her complaint: CRST's policy is not to tell women whether or not their complaint has been found "corroborated," nor whether or not any discipline was ever imposed as a result of the complaint. P-App 2340, 104/21-105/18.

CRST has employed, and still employs, specific classwide policies in handling sexual harassment complaints which have created and fostered a hostile work environment for female drivers: It has a pattern or practice of refusing to find complaints corroborated unless they are

supported by the testimony of an eyewitness or an admission by the alleged harasser; it has a pattern or practice of failing to discipline drivers even when it determines a complaint has been corroborated; and it has a pattern or practice of failing to discipline DMs who do not follow CRST's own purported rules requiring them to immediately separate the drivers and elevate sexual harassment complaints to HR when they learn of such complaints. Each of these policies is discussed below in turn.

B. Failure to Corroborate Complaints Without an Eyewitness or Admission

As Defendant admitted through its Rule 30(b)(6) witness, Karen Carlson, CRST will not corroborate sexual harassment complaints based on evidence other than a third person eyewitness who was on the truck seeing the harassment, or an admission by the alleged harasser:

> Q: If the allegations of harassment concerned behavior that occurred on the truck while the drivers are there together, would it ever be possible for you to find that harassment was corroborated based on evidence other than a third person eyewitness who was on the truck seeing harassment?
>
> A. Not unless there was an admission by the accused individual.

P-App 2395, 164/20-165/4. In a work environment where drivers spend the majority of their time on a truck with only one other individual, the straightforward, known consequence of this policy is that it will be nearly impossible for any woman to prove she was sexually harassed by her co-driver on a truck.

Using Defendant's own business records produced in discovery, Plaintiffs have compiled pursuant to Fed. R. Evid. 1006[5] a list of all documented complaints of sexual harassment by a

[5] F.R.E. 1006 permits the use of "a summary, chart, or calculation to prove the content of voluminous writings. . . that cannot be conveniently examined in court . . ." Plaintiffs have compiled three charts which excerpt data from all of the investigations conducted by Defendant during the class period of sexual harassment complaints. These three charts are not samples of complaints made by a population of class members, they are all the complaints made by the population. No statistical analysis, such as regression analysis, is conducted. Where calculations are set forth, they are straightforward addition and division. As required by the Rule, the records from which the data are extracted are provided in Plaintiffs' Appendix, and the source of each piece of information is individually cited in the Appendix. Although Defendant produced all investigation documents in its possession pertaining to any

female driver against a male driver during the class period that Defendant deemed to have been corroborated. See Figure 1, P-App 1-2. Each investigation record reveals whether Defendant's finding of corroboration was based upon a witness whose account Defendant relied upon, and/or upon admissions by the alleged harasser when he was interviewed by HR. See Id. This compilation underscores that, just as Carlson admitted, Defendant has a pattern or practice of only finding complaints to be corroborated when there is an eyewitness or an admission by the harasser: either an eyewitness or an admission was the basis of 54 out of the 56 total corroborated cases. *See Id*. In other words, only in two exceptional cases throughout the entire class period did Defendant find a complaint had been corroborated despite the harasser denying his conduct and no witness being present; these two cases are the exceptions that prove the rule.[6]

In their Motion seeking class certification, Plaintiffs provided multiple anecdotal examples of CRST simply disregarding evidence that could have corroborated sexual harassment. *See* Dkt. 35-1 at 13-14. Now, Plaintiffs have compiled pursuant to Fed. R. Evid. 1006 a complete list of all documented complaints of sexual harassment by a female driver against a male driver during the class period which Defendant deemed not to have been corroborated, which reflects CRST's pattern or practice of refusing to find complaints corroborated without an eyewitness or an admission. *See* Figure 2, P-App 3-10. According to its own business records, CRST found 209 sexual harassment complaints by female drivers against

complaint logged in its PWE charts, including some complaints by male drivers and/or complaints not pertaining to sexual harassment, only sexual harassment complaints by female drivers against male drivers are summarized in Figures 1, 2 and 3.

[6] This puts the lie to Defendant's claim that it would "find [a complaint] corroborated based on the statement from the accuser and the accused, in addition to any witnesses, pictures, messages, things of that nature." Def. Mem. 14, *citing* D-App. 68. The reality is that its pattern or practice is simply not to do so, given that it has only done so twice throughout the entire class period. Both cases involved exceptional circumstances in which seriously offensive text messages had plainly been sent from the alleged harasser's cell phone. See Figure 1, cases of [redacted] and [redacted] (P-App 1). As Plaintiffs show *infra*, Defendant's pattern or practice is to refuse to find corroboration based on such evidence in nearly every case.

male drivers not to be corroborated during the class period. Figure 2, P-App 3-10. In nearly 60% of those cases (that is, 124 of the 209 cases), CRST's own investigation records show that it disregarded evidence that could potentially have corroborated the victim's complaint, because it did not consider that evidence to be eyewitness testimony or an admission of sexually harassing conduct. *See* Figure 2, P-App 3-10. Specifically, in 36 cases a witness was identified who could have provided evidence supporting the victim's complaint (including e.g. witnesses who reportedly heard harassment over the telephone although they were not physically present, and witnesses who saw the harasser's conduct before or after the time the drivers spent alone on the truck); in 19 cases evidence existed that could have supported the victim's complaint (such as text messages, pictures, a police report, or some other document that CRST either did not obtain or refused to credit); in 52 cases the alleged harasser made admissions that could have supported the victim's complaint (but which CRST deemed not an admission of sexual misconduct), and in 17 additional cases more than one of those forms of evidence was available (e.g., a complaint involved both a witness whom CRST did not contact and text messages they did not seek to obtain). *See* Figure 2, P-App 3-10. This means that in nearly 60% of "uncorroborated" cases, CRST simply refused to obtain or credit evidence that could have distinguished the case from a true "he said/she said" situation (in which CRST's conceded policy is to never credit a woman's complaint, rather than to assess which party's account is more credible). *See* Def. Mem. 25 n.5 ("....[T]here is nothing wrong with CRST's approach of requiring evidence beyond the complaint to corroborate it"). In a workplace where women's complaints are never credited absent some extrinsic evidence, and where Defendant has a pattern or practice of disregarding all corroborating evidence other than an eyewitness's account or an admission of sexual misconduct by the alleged harasser, a huge proportion of sexual misconduct will simply be deemed unproven —meaning sexual harassment goes unpunished and is in fact allowed to thrive.

When confronted with examples of Defendant's policy of refusing to find corroboration based on anything but an eyewitness or an admission at her deposition, Employee Relations Manager Karen Carlson could not explain why HR has routinely disregarded evidence that could have supported corroboration of harassment victims' complaints. For instance, Leslie Fortune complained about her lead driver [redacted]. P-App 2511. Carlson confirmed that [redacted] lied to Human Resources when he was interviewed about the complaint, claiming he had not required Fortune to share a hotel room with only one bed, when in fact he had done so. P-App 2413, 102/24-103/3. Nevertheless, Carlson did not find the complaint to be corroborated. She could not explain why:

> Q. ....Why was Mr. [redacted] only terminated for texting [while driving] if you were able to confirm that he had required his student or co-driver to stay in a hotel room with one bed with him and then lied to human resources about it?
> A. I can't answer that.

P-App 2413, 103/4-9.

On a different occasion, Fortune complained that her co-driver [redacted] had, among other things, sexually propositioned her more than once, and called her a "lot lizard" (truck driver slang meaning prostitute) to another driver, [redacted]. P-App 2504-2505. Carlson's investigation form only records a single message left for [redacted]. P-App 2506. Carlson concedes that drivers are required to cooperate with Human Resources investigations. P-App 2415, 109/12-14. Yet she could not say she had ever tried calling again, nor that she had emailed; nor could she say that she had asked [redacted]'s driver manager to send her a Qualcomm message directing her to contact Human Resources. P-App 2414, 105/25-106/11, 106/22-107/15. Carlson concedes she has the ability to ask a driver manager to get a driver on the phone and connect the driver with Human Resources; she further has the ability to require an employee at a CRST terminal to meet a driver and from whom she needs information when that driver stops at the terminal. Id. 107/23-108/5. Yet she also could not say she had made any further

efforts to reach three other witnesses identified by Ms. Fortune, [redacted], [redacted], and [redacted], besides a single telephone message. Id. 108/17-109/11; 109/15-110/10; 111/13-20.

On a separate occasion, Leslie Fortune complained that a co-driver had engaged in harassing conduct including discussing how a prostitute "made his dick get hard" and calling Ms. Fortune a "psychotic fat black bitch." P-App 2519. Carlson could not say she had ever attempted to contact a police officer Ms. Fortune identified as a witness to her complaint, even though she concedes she could have simply called the police station in the relevant jurisdiction. Carlson P-App 2417, 120/2-22. Further, Carlson concedes that in her interview of the alleged harasser, he stated Ms. Fortune was "not his kind of lady....physically, mentally....she's fat, chubby." P-App 2416, 116/14-23. She admits that this "could" make it more likely that Ms. Fortune's complaint about being called a "fat black bitch" was true. Id. 116/24-117/6. Later in Carlson's interview of the alleged harasser, she concedes that he stated "[h]e's ready to get a white co-driver now. Yes, he's bringing race into it. Black folks are cool, but with this company he is going to...." etc. Id. 117/7-19. Carlson concedes this comment "could have a bearing" on whether or not Ms. Fortune's complaint that she was called a "psychotic fat black bitch" was true. Id. 117/20-25. Nonetheless, the only "outcome" Carlson found in this investigation was that she "could not corroborate wrongdoing except for what sounds like general disagreements and bickering back and forth." Id. 118/4-8 (emphasis added). Indeed, in her judgment, the fact of this individual making a racially derogatory comment to HR about black people did not tend to corroborate that he had made a racially derogatory comment the driver on the truck. P-App 2417, 119/4-10.

On another occasion, Claudia Lopez complained that [redacted] engaged in harassing behavior, including touching her repeatedly and telling her "he wants to marry her after

he's back from 28 days" of training, in the presence of witness [redacted]. P-App 2550, 2552. HR's investigation form records [redacted] admitting to touching Ms. Lopez, and Carlson concedes his conduct "would be a violation" of the sexual harassment policy. P-App 2553; P-App 2419, 149/1-8. The form further records [redacted] telling HR: "That was a joke about marrying her[,]" thus admitting he made the comment. P-App 2553. Nonetheless, the investigation form does not reflect a finding of corroboration, and reflects no discipline. P-App 2555. Moreover, Carlson testified that she did not even "know if I would or would not have contacted [witness [redacted]] based on what I'm seeing here" in the form, P-App 2419, 151/2-15, even though the form describes the alleged harasser getting close to witness [redacted] and Ms. Lopez and asking them if they were married, telling Ms. [redacted] that her "shirt was too long" as she walked away from him (meaning that it was concealing her rear end), and even though the form lists [redacted] along with another driver, [redacted], as "witnesses to the incident you described." P-App 2551-2552. In fact, the form indicates no attempt to contact either witness, nor could Carlson say she had done so. P-App 2550-2555; P-App 2420, 153/8-17, 154/2-5. Carlson admits it "could be" an error not to contact them. P-App 2419-2420, 152/25-153/7. Lopez subsequently submitted a written statement identifying another driver, [redacted] with whom she had discussed the harassment, and who told the alleged harasser "bug off buddy." P-App 2502. Carlson concedes there is no indication HR ever attempted to contact [redacted] even though Carlson acknowledges that written statements should be reviewed for any new information they may yield to the investigator, and even though she admits that [redacted] "could have been" a person who should have been called. P-App 2420-2421, 156/25-157/13, 158/10-13.

Carlson's subordinates followed the same pattern or practice of disregarding any evidence of harassment that was neither the testimony of an eyewitness on the truck, nor an admission by

the harasser. For instance, Employee Relations Representative Cassie Burrill handled the complaint of [redacted] in which she complained that her co-driver had addressed her as "sexy, cutie, hottie[,]" told her "he had a really hard time waking me up and that he was going to start climbing in the bed and grabbing my ass and my titties to wake me up[,]" talked about her breasts, and "[y]elled at her for being on the phone with her boyfriend[,]" among other offensive behavior. P-App 1407-1408. When asked if she had witnesses, Ms. [redacted] told Burrill that "I was on the phone with my boyfriend [redacted] the second time [the harasser] blew up at me and he heard all of it." P-App 1409; P-App 2405, 51/14-18. Yet, as Burrill concedes, there is no evidence that HR even attempted to interview this witness to ascertain what he heard. P-App 2405-2406, 51/19-52/2. In fact, she testified that even if the witness Ms. [redacted] identified confirmed that he did hear what Ms. [redacted] reported he had heard, that could not impact the outcome of the investigation. P-App 2406, 52/3-7. Unsurprisingly, CRST refused to find the complaint to be corroborated. P-App 1413.

Similarly, Employee Relations Representative Megan Dudley handled the complaint of [redacted], who complained that her male lead driver tickled and touched her, told her about the size of his penis, and "[g]rabbed tootsie pops asking if he could insert it in her so it would have extra flavor[,]" among other sexually offensive behavior. P-App 247-248. When Dudley interviewed the alleged harasser, he told her "[w]hen you are having a conversation with a woman, this talk happens[,]" referring to telling his student Ms. [redacted] that he had a "very lousy marriage" and was seeking "companionship." P-App 250. Yet Dudley testified that a statement of this type made to HR did not tend to make it more likely that the accuser's complaint was true. P-App 2424, 32/7-15. Moreover, she testified that the alleged harasser's statement to HR that "[p]ersonally, I'm a flirt" was not relevant in any way to the outcome of the investigation. P-App 2425-2426, 34/25-35/3.[7]

[7] Despite the alleged harasser's open admission that he made the "tootsie pop" comment in this

Similar examples of CRST's refusal to corroborate a complaint based on anything other than an eyewitness's testimony, or an admission to sexual misconduct by the alleged harasser, are contained throughout the additional investigation forms compiled in Figure 2, at P-App 3-8.

C. Failure to Discipline When Complaints Are Corroborated

CRST has a pattern or practice of failing to discipline the majority of drivers even in the unusual circumstances where sexual harassment complaints are deemed corroborated. CRST Employee Relations—that is, Karen Carlson and her subordinates—determine what discipline should be imposed as an outcome of their investigation and record it in the HR investigation form. P-App 2390, 131/17-20; P-App 2402 15/11-19; P-App 2403-2404, 29/25-30/11. Contrary to CRST's attempt to muddy the waters by implying that Operations may elect not to follow this recommendation (HR "recommends a course of action to be imposed by" the DM, Def. Mem. 9-10), they cannot do so: [redacted] who has worked as both a Driver Manager and an Operations Manager (that is, manager of Driver Managers), concedes he has no input in either of those roles into what discipline should be imposed on drivers who violate the harassment policy. P-App 2351, 25/6-9; P-App 2347-2348, 11/24-12/8 ("Q. ….were you personally involved in disciplining any of the drivers? A. No. Not outside of what HR instructs me to do."). [redacted], a Senior Driver Manager during the class period, concurred that CRST's response to complaints was determined by HR, and "I just, in the end, was either told 'male-only,' 'female-only,' 'terminated.'" P-App 2429-2430, 42/15-43/4.

As Plaintiffs explained at class certification, CRST's standard response to complaints of sexual harassment is to designate the accused driver as "male only" or "no females"--meaning that the complained-of male driver can drive only with other males. P-App 2398, 178/13-23. This designation, which is used in numerous cases where CRST finds harassment to be

case, Defendant neither revoked his lead certification nor took any other disciplinary action. P-App 253; see also Section II(C), *infra*, concerning Defendant's failure to discipline.

uncorroborated, is not disciplinary: it does not reduce a driver's pay, and it is not considered a disciplinary warning. Id. 180/16-20; 181/5-8. For instance, Karen Carlson admitted that her reasoning for changing alleged harasser [redacted] to a "male only" status was actually to give *him* "a measure of protection from a similar claim arising in the future." P-App 2418, 125/8-126/1. At times, CRST sends a copy of its sexual harassment policy to the alleged harasser—and Karen Carlson admits CRST also at times sends the policy to the woman complaining of harassment, as well. P-App 2411-2412, 64/11-65/3. Clearly, sending a copy of the policy is not disciplinary when CRST takes the exact same action toward the victim as toward the alleged harasser; Carlson admits the policy is sent "to the accused individual just as kind of an FYI." P-App 2385, 106/15-18. CRST Operations Manager [redacted] concurs that sending a copy of the policy is not disciplinary in any way. P-App 2349, 21/12-15.

At class certification, Plaintiffs provided multiple anecdotal examples of CRST's policy of failing to impose discipline in action. *See* Dkt. 35-1 at 20-21. But now, in addition, the anecdotal evidence contained in CRST's own business records conclusively reveals its pattern or practice of failing to impose discipline even when sexually harassing conduct is deemed to have been corroborated: Defendant's own records reveal that in over 60% of the cases where Defendant deemed some sexually harassing conduct to have been corroborated (that is, in 34 out of the 56 corroborated complaints), Defendant imposed no discipline at all. *See* Figure 3, P-App 11-12. In other words, even if a harasser's conduct was actually deemed corroborated by CRST, it was far more likely than not that the harasser would emerge with no disciplinary consequences whatsoever—not even a warning.

In five of those cases, Defendant directed the harasser to sit through the same "Positive Work Environment" ("PWE") training again that he had already sat through earlier in his employment. *See* Figure 3, P-App 11-12. The training takes only approximately one to three

hours. P-App 2350, 23/16-22. It has no actual disciplinary impact: Karen Carlson admits PWE retraining does not impact a driver's pay, it is not a suspension, and it is not a written warning. P-App 2417, 119/11-17. In the remainder of the cases (that is, in over half of all corroborated complaints), Defendant not only imposed no discipline but did not even make the token gesture of directing the corroborated harasser to repeat his PWE training. *See* Figure 3, P-App 11-12.

Moreover, although CRST's corporate designee testified that "any corroborated harassment....of a Title VII nature" will result in termination, P-App 2396, 170/2-9 (emphasis added), in reality, even in the very rare cases where Defendant did find the complaint to have been corroborated, and did impose some form of discipline, it was not necessarily termination. Among the 22 cases where Defendant actually imposed discipline, eight of them were something short of termination.[8] Id. Mainly these instances involved revoking a lead's certification either temporarily or permanently, which reduced his pay but allowed him to continue working as a co-driver; in two instances, a driver was merely given a final warning. *See* Figure 3, P-App 11-12.

A range of extremely offensive harassing conduct that CRST deemed to have been corroborated went completely un-punished—not prompting even so much as a warning—as a result of Defendant's policy, pattern or practice of failing to discipline the majority of harassing drivers. See, e.g., CRST's own business records recording the conduct it deemed corroborated in its records describing its investigation of each of the following women's complaints:[9]

- [redacted]: Corroborated that "inappropriate messages were sent to [redacted] by" the harasser (P-App 2061), including a message that said "do you think we might be able to

[8] Carlson's subsequent testimony revealed that she did not consider "inappropriate joking of a sexual nature" to necessarily constitute a Title VII violation. Depending on her assessment of the circumstances she may not find it to be "true sexual harassment or discrimination under Title VII guidelines." P-App 2397-2398, 174/7-175/1.

[9] Notably, even where Defendant found some harassing conduct to be corroborated, it almost always refused to find the majority of the conduct the victim had complained of, generally including the most offensive conduct, to be corroborated.

masturbate in the same room at the same time, your choice of video" (P-App 2059), a message that said "if you really don't like me enough for casual sex when we are locked in a small room all alone then you really need to move on," (P-App 2058), and a message that said "you'll have to get off my truck in 28 to make way for next female" (Id.).

- [redacted]: Corroborated that harasser, a lead driver, "said he likes a sexy grease monkey" (when victim commented that she liked working on cars), and told student "unless we are fucking, I will not be giving you $300." (P-App 731, 738).
- [redacted]: Corroborated "inappropriate comments of a sexual nature made by" the harasser, a lead driver, which according to HR's own notes of the harasser's interview specifically included telling the victim he "had a pocket pussy and it split in half shortly after [he] got it" (P-App 86) and telling victim she "could sleep naked[.]" (P-App 85).
- [redacted]: Corroborated an "unprofessional comment by [redacted][,]" specifically, according to HR's own notes, telling the victim that "I know of a way you could take care of it...I meant that she could masturbate." (P-App 110)
- [redacted]: Corroborated "inappropriate sexual conversations with female student" by lead driver harasser (P-App 252), which according to HR's notes of his own admissions, included talking about the size of his penis, "grabb[ing] a tootsie pop and ask[ing] if [he] could insert it in her so it would have extra flavor[,]" telling her "I have a very lousy marriage. I'd like to see someone I could train and we could team up. I want companionship[;]" harasser told Human Resources while being interviewed that "[w]hen you are having a conversation with a women this talk happens".... "personally I'm a flirt[.]" (P-App 250)
- [redacted]: Corroborated that harasser told victim that "she must have slept with her former co driver [redacted] because she talked about him so much." (P-App 1310)

- [redacted]: Corroborated that harasser "called [redacted] an inappropriate name of a sexual nature" and noted that two witnesses as well as the victim "say that [the harasser] did make physical contact with [redacted]." (P-App 1073)
- [redacted]: Corroborated that harasser, who was a lead driver, "told [redacted] she was beautiful," that he "held hands with [redacted] and rubbed her arms," that he "called [redacted] his work wife," that he "shared a motel room" with his student victim contrary to CRST's own policy, and that he told victim "she wasn't able to leave his sight[.]" (P-App 1287-1288)
- [redacted]: Corroborated that harasser, a lead driver, made "inappropriate comments pertaining to [the victim's] looks (you have pretty feet) and scent (oh you smell so good)[,]" that he "told [redacted] that she could sleep on the bottom bunk" (while he was present in the bottom bunk), and that he "grabbed her hand and asked her to say a prayer with him[;]" according to HR's notes harasser additionally told HR that "[e]specially since she's a woman. I have to look after her." (P-App 841, 844)
- [redacted]: Corroborated harasser "smacked [victim's] butt."[10] (P-App 366)
- [redacted]: Corroborated, based upon the lead driver's own admissions, that when drivers learned they had to stay in a hotel the harasser told student victim "oh you're not going to take advantage of me are you?", and when the hotel employee began planning to place them in the same hotel room and student protested, he told student "are you afraid to be with [me]?" (P-App 369)
- [redacted]: Corroborated that harasser "looked down [redacted]'s shirt." (P-App 1160).

[10] Defendant recommended that the harasser in this case be terminated—but only for an unrelated infraction of possessing a weapon on the truck. With respect to the sexual harassment, it merely noted that his "team preference has been switched to male only." P-App 366.

None of the men in this list, whose offensive conduct had been deemed corroborated by Human Resources, was disciplined for it in any way. Further, none was warned; and none was even directed to sit through PWE training again. Moreover, these examples are on top of those already discussed in Plaintiffs' motion for class certification, all of which remain relevant and none of which are repeated herein. *See* Dkt. 35-1 at 20-21. Where harassing male leads and co-drivers know that even in the rare case where Human Resources concurs that they engaged in offensive sexual conduct, the majority of the time they will face no consequences whatsoever, CRST is creating and encouraging a hostile environment in which harassment is allowed to flourish.

D. Policy of Failing to Discipline DMs who Do Not Promptly Respond Appropriately to Complaints

As Plaintiffs explained at class certification, CRST provides no means of communicating with Human Resources during off-hours; therefore a sexual harassment or assault victim's only source of immediate assistance during off-hours is from the DMs in dispatch. See Dkt. 35-1 at 21-22. CRST's Director of Human Resources, Angela Stastny, concedes that driver managers who receive sexual harassment complaints should be disciplined if they do not immediately convey sexual harassment complaints to Human Resources, or if they permit the truck to continue onward after learning of a sexual harassment complaint:

> Q. If a driver manager doesn't immediately convey a sexual harassment complaint that they have learned of to HR, they should receive some form of discipline, right?
> A. Correct.
> Q. And same with a situation where the driver manager has permitted the truck to continue onward past the point where they learned about a sexual harassment complaint situation on the truck, right?
> A. Correct.

P-App 2337, 6/17-20; P-App 2339, 96/12-21. CRST Operations Manager [redacted] admits that DMs are required to notify HR of a sexual harassment complaint "[a]s soon as they conclude the

conversation" in which they become aware of the complaint. P-App 2346, 6/7-13. Speaking for the company, CRST's Rule 30(b)(6) witness also concedes that a DM who receives a sexual harassment complaint is required to split the drivers. P-App 2388, 120/9-16. However, CRST has a policy, pattern or practice of simply tolerating DMs' failure to promptly separate the drivers and failure to convey the complaint to Human Resources upon receiving a harassment complaint, issuing no discipline at all. Plaintiffs provided multiple anecdotal examples of CRST's failures in this regard at class certification. *See* Dkt. 35-1 at 22-23. Additional discovery since that time has further borne out the pattern.

CRST, through its Rule 30(b)(6) witness, could not name any DM who had ever been disciplined for encouraging a woman complaining of sexual harassment to stay on the truck and keep going, rather than separating the drivers immediately. P-App 2389, 126/22-127/1. That is unsurprising, because CRST has not made efforts to ensure DMs are handling complaints appropriately: Angela Stastny does not routinely review sexual harassment investigation forms to check whether there is any indication that the driver manager responsible for the harassment victim failed to handle the complaint appropriately. P-App 2338, 91/2-8. Indeed, Human Resources performs no regular review of how driver managers respond to sexual harassment complaints. P-App 2409, 29/23-30/1. Stastny could not recall a single instance in which a driver manager was terminated for failing to comply with what she termed CRST's "policy of reporting allegations....to human resources timely and promptly." P-App 2339, 93/16-94/14.[11] Nor could she name any instance where a driver manager was disciplined for failing to appropriately handle a sexual harassment complaint, apart from whatever might be contained in CRST's files. P-App 2339, 95/15-96/11.

Human Resources decides whether or not a DM should be disciplined for mishandling a

[11] The only instance she could think of was that of [redacted], who was not a driver manager, and therefore not relevant to this policy. Id.

driver's harassment complaint. P-App 2362-2363, 81/8-82/17. For any situation in which discipline is actually imposed upon a DM who has failed to handle a driver's sexual harassment complaint appropriately, a disciplinary action form is filled out and stored in the employee's file, as well as within the Human Resources employee relations files. P-App 2338, 92/10-20. Plaintiffs sought and obtained in discovery all disciplinary action forms relating to any driver manager's failure to timely or properly respond to a complaint of sex discrimination or sexual harassment. P-App 2548. Only three such forms were produced for the entire class period. P-App 2496-2500.[12] None of these disciplinary actions related to any of the anecdotes demonstrating DMs' failure to properly handle sexual harassment complaints that were described in Plaintiffs' original motion for class certification—meaning that in all of those instances already described to the Court, the DM's failure went entirely unpunished. *See* Dkt. 35-1 at 22-23.

But the picture is even worse with the benefit of additional discovery. Simply based upon CRST's own business records recording its handling of class members' complaints, Plaintiffs have identified numerous additional anecdotal examples of DMs' failures to handle a sexual harassment complaint properly, a non-exclusive list of which are set forth below:

Victim's Name	***Brief Description of Failure***	***Discipline?***
[redacted]	Hung up on complaining driver, left her stranded off truck, did not escalate complaint to HR. (P-App 664).	No
[redacted]	Told harassment victim "I don't believe that happened, I don't believe he would do something like that[,]" did not escalate complaint, and did not separate drivers. (P-App 1097).	No
[redacted]	Did not separate drivers nor escalate complaint to HR. (P-App 994).	No

[12] Besides those three, Defendant only produced one other record of such discipline of a DM, and it related to discipline issued in a case that occurred in 2011, well before the class period in this case.

[redacted]	Harassment victim was told to "put up with it for awhile." (P-App 899).	No
[redacted]	"Laughed it off" when victim complained of harassment, did not separate drivers and asked "can you stick it out for a few more days," did not escalate complaint to HR. (P-App 1037).	Written warning. (P-App 2496)
[redacted]	Did not separate drivers nor escalate complaint to HR. (P-App 1249, 1251).	No
[redacted]	Did not separate drivers. (P-App 454).	No
[redacted]	Told victim "he's never had any problems with [the alleged harasser] before[,]" did not separate drivers nor escalate complaint to HR. (P-App 694).	No
[redacted]	Did not separate drivers nor escalate complaint to HR. (P-App 64).	No
[redacted]	Did not separate drivers, told victim to "put on [her] big girl panties[,]" and failed to escalate complaint to HR. (P-App 346).	No
[redacted]	Neither separated drivers nor escalated sexual harassment complaint to HR. (P-App 634).	No
[redacted]	Did not separate drivers. (P-App 102).	No
[redacted]	Weekend DM did not separate drivers nor escalate complaint to HR. (P-App 1128).	No
[redacted]	Did not separate drivers following complaint. (P-App 698, 707).	No
[redacted]	Did not escalate to HR. (P-App 1165).	No
[redacted]	Did not separate drivers.(P-App 166-169).	No
[redacted]	Did not separate drivers nor escalate to HR following complaint. (P-App 936).	No
[redacted]	Did not separate drivers following complaint, became angry with harassment victim when she fled truck, and failed to escalate complaint	No

	to HR. (P-App 928, 934).	
[redacted]	Did not escalate complaint to HR. (P-App 24).	Termination. (P-App 2500)
[redacted]	Did not separate drivers following harassment complaint, but rather had them continue on to complete a load pickup and relay. (P-App 880).	No
[redacted]	Did not separate drivers nor escalate immediately to HR. (P-App 39-41).	No
[redacted]	Did not escalate complaint to HR. (P-App 910).	No
[redacted]	Did not separate drivers, told victim to "give it another go[,]" and did not escalate complaint to HR. (P-App 114).	No
[redacted]	Did not separate drivers nor escalate complaint to HR. (P-App 107).	No
[redacted]	Did not separate drivers, told victim "[l]et's see if we can work it out and call me at the end of the week to let me know how it is going[,]" and did not escalate complaint to HR. (P-App 645).	No
[redacted]	Returned drivers DM believed to be "in a dating relationship" to driving on truck together after complaint male driver had choked female driver, rather than keeping them separated. (P-App 856-857).	No
[redacted]	Did not separate drivers nor escalate to HR. (P-App 1392).	3-day suspension. (P-App 2498)
[redacted]	Did not escalate complaint to HR. (P-App 743).	No
[redacted]	DM ([redacted]) did not separate drivers nor inquire into complaint. (P-App 765).	No

These thirty additional examples of DM failures (which are on top of the seven examples of DMs' failures described in declarations attached to Plaintiffs' original motion for class certification) are far from an exclusive list of occasions on which DMs failed to follow CRST's claimed policy for handling a sexual harassment complaint. Yet only three out of these thirty-

seven total examples resulted in any discipline at all--meaning that discipline is a rare circumstance. The rule, rather than the exception, is no discipline at all. Insofar as there are even more examples of this policy of tolerating DMs' failures than those already listed, the pattern only becomes starker, since the entire universe of disciplinary actions against DMs for such failures are just the three unusual occasions documented. That is, the picture can only get worse for Defendant with additional examples of DM failures presented at later stages of this case.

Worse yet, Driver Managers who fail to handle a sexual harassment complaint appropriately once, with no consequences, can go on to do the same thing two times, three times, or more due to Defendant's policy of failing to discipline them for these failures. With DMs simply failing to timely escalate complaints, and urging women to continue working with their harassers rather than offering aid, a hostile work environment flourishes at Defendant. [redacted] is only one example of such a DM. She handled the sexual harassment complaint of Named Plaintiff Claudia Lopez against co-driver [redacted] on October 23, 2014. P-App 1438-1444. Rather than immediately separating the drivers in Tennessee upon receiving Ms. Lopez's complaint that she had woken up to find her co-driver "laying on top of [her,]" [redacted] directed them to drive to Memphis, Arkansas together to relay their load to a different driver team, leaving Lopez on the truck with her harasser. P-App 1438; P-App 166-168.[13] [redacted]'s failure to immediately separate the drivers was known to Human Resources, since she described it in an e-

[13] To the extent Defendant argues that [redacted]'s claim that Lopez "wanted me to get them to [the Oklahoma City driver terminal]" means that Lopez wished to stay on the truck with her harasser, even if that were true, it would not be relevant to whether Defendant is ignoring its DMs' failures to comply with what it claims to be company policy for handling complaints. Further, where Lopez's other option was to be taken off the truck in Memphis, AR, a city where Defendant has no driver terminal, and therefore where she could not immediately find another co-driver in order to avoid waiting and losing pay, it is unsurprising if Lopez requested to be taken off the truck at a driver terminal where she could quickly find a new co-driver instead.

mail which was copied directly into HR's investigation form. Id.[14] However, [redacted] was never disciplined for the failure.

On November 3, 2014, [redacted] handled the complaint of [redacted] against co-driver [redacted], who she complained, among other things, "asked for sex every day[,]" "got very graphic regarding what he was wanting to do with [me]," "made comments to several vendors and our DM that I was his girlfriend[,]" and "blew up at me because I told him I wouldn't have sex with him and wouldn't be his girlfriend." P-App 2538-2546. Ms. [redacted] reported to Human Resources that when she complained to [redacted], she "keeps saying put [on] your big girl panties...she has said that on numerous occasions..." P-App 2539. She further reported that "my friend came in to talk to [redacted] about the [harassment] situation and she rolled her eyes about me....All I want to do is work....I would like to sit down as an adult and I would like to hash this out." P-App 2540. Human Resources noted in its own file that it "spoke with [redacted] on 11/4/14 at 12:56pm and she admitted to telling [redacted] to put her big girl panties on. I advised her that the comment was unprofessional and should not be used going forward." P-App 2543 (emphasis added). Once again, [redacted] was not disciplined for telling Ms. [redacted] to "put her big girl panties on" when she complained of sexual harassment rather than promptly separating the drivers and escalating the complaint.

Weeks later, [redacted] handled the complaint of student driver [redacted] against her lead driver [redacted], who complained that he was "asking many sexual questions" of her, including "how I felt about one night stands[,]" "if I had any crazy [sex] stories[,]" "if I had any

[14] Plaintiffs anticipate Defendant may argue that the content of investigation records in which drivers have complained about DMs' failures, and/or in which DMs have admitted to their failures, is hearsay. On a motion to de-certify, there is of course no prohibition against considering hearsay evidence, but this argument fails regardless: Plaintiffs can offer a record documenting a DM's failure for the non-hearsay purpose of showing what information Defendant was considering at the time it made the decision whether or not to discipline the DM, regardless of whether the information in the record itself is hearsay or is subject to some exception. Plaintiffs further note that the majority of the records discussed in this brief are business records, which will not be excluded as hearsay in any case.

limits, referring to sex," and discussing how his wife "said she misses his passionate sex." P-App 1394-1399. An email chain between Ms. [redacted] and [redacted], which [redacted] forwarded to Human Resources, reveals [redacted]'s failure to promptly separate the drivers, as well as her attempts to make [redacted] feel guilty for complaining about sexual harassment:

> [redacted] 11/20/2014, 4:49PM]: "that is strange because I have never had any one ever complain about that about him.. and he trains mostly women because we dont' [sic] have very many that will train women, . [sic] Unfortunately I will need to address this immediately in the morning with HR.. and it is too bad because he is a good trainer w/good knowledge. I will figure out where to get you to.. are you okay for the night?" P-App 2564.

[redacted], clearly afraid, responded:

> [[redacted] 11/20/2014 4:59PM]: "Maybe [other students] just haven't spoken up cause he only takes it so far to see if I continue the conversation but I don't. I stuck it out this far because I've been desperate for money but I don't want to be on the truck anymore. I'll be ok for the night but I'm not gonna lie, I was afraid of speaking up and worried how he's going to react. Should I have him drop me off somewhere?" Id.

Rather than immediately separating the drivers, [redacted] attempted to deter her by claiming her ability to separate them was contingent on a rerouting: [redacted] 11/20/2014 5:08PM]: "if you want off the truck tonight the only thing I can do is see if we can route you guys to Riverside.. and pull. [sic] the load to KY.. please let me know." P-App 2563.

[redacted], continuing to stress the seriousness of her complaint, replied:

> [[redacted] 11/20/2014 5:29PM]: "Hello I should probably also add that when he said his wife missed his passionate sex, he said he doesn't remember when that alternate personality that his wife calls 'Antonio' comes out. Another reason why I don't wanna stay on the truck." Id. When [redacted] replied that she would "need to wait till night Manager gets a plan[,]" [redacted] responded "Ok good cause I'm getting pretty anxious and I don't wanna spend another night here." Id.

Not long afterward, [redacted] definitively ignored what Defendant claims to be its policy of separating harassment victims from their harassers, informing [redacted] that she had to finish the delivery with her harasser:

> [redacted] 11/20/2014 7:41PM]: "You guys are 9 hrs out of blythe..u need to deliver the load

and then we will figure out how to get to Riverside..do not get off at a truck stop..that is worse..ok?" Id (emphasis added).

[redacted] forwarded this entire exchange to Employee Relations representative Chelsea Stoll, once again specifying that she had planned "to get them to Riverside to split up" rather than separating them immediately. P-App 2562. Despite this flagrant failure to follow what Defendant claims to be its policy, [redacted] again was never disciplined.

On yet a fourth occasion, [redacted] handled the complaint of [redacted] against co-driver [redacted] on January 11, 2017, including that [redacted] "propositioned her" and threatened that "if she kept yelling at him that she would see the 'devil come out in him'." P-App 994-1007. [redacted] described her complaint, her desperation to work, and [redacted]'s complete failure to immediately separate the drivers and escalate the complaint to Human Resources, when she was finally interviewed by HR: "I called my DM yesterday and asked her to take me off the truck...I told her he wants to lay in bed with me, show me his thing, he commented about my breasts bouncing up and down...he asked to come to my hotel room...I told the DM [[redacted]] I don't want to file no charges, I just want off this truck....She said we could take a load to TX and he will drop you at the OKC terminal....Then they canceled our load to TX and we got a load to CA and were going to split in Riverside, it was a longer trip, but I agreed to that....[following a confrontation] we both called the [driver] manager [redacted]...he is getting in my face. She said you should have just went to sleep last night, don't be trying to police him....She told me to get off the truck....I just want to finish my contract, I have 3 months left, I just want a female co-driver or to drive solo....I reported it the day before and was trying to get it situated...." P-App 996-997.

While [redacted] had disregarded what CRST claims is its policy by failing to separate the drivers and escalate Ms. [redacted]'s complaint, Ms. [redacted] had tried to be accommodating by

finishing the work [redacted] tasked her with; this angered [redacted], who lashed out, as Ms. [redacted] later explained to Human Resources:

"When I talked to [redacted] [after my original interview with Human Resources] she was upset with me...she said I made it seem [to Human Resources] like they weren't going to let me off the truck, she felt you all were telling her I said she didn't let me off the truck... she was upset with me....she said I was a pain over the Qualcomm. When I complained she didn't believe me, she said I should have been in the bunk minding my business....This has lowered my self esteem and made me depressed due to conversations with her and the messages she was writing about me...she was upset with me....she went off on me when I told her he was trying to assault me, she made it seem like it was my fault." P-App 999 (emphasis added).

When Human Resources spoke with [redacted] about her interactions with Ms. [redacted] she admitted that [redacted] had called her the day before, in her words, "screaming, ranting and raving, saying no one will put their hands on me[,]" and that [redacted] had told her it was "implied" that the harasser was talking to her about sleeping with him. P-App 1004-1005. She later admitted [redacted] had "said [he] propositioned her[.]" P-App 1006. She further admitted that she had sent a Qualcomm message saying "what a pain" in response to [redacted]'s request for a bus ticket home following the harassment, merely explaining that "I didn't know she could see those....how could she see that?" P-App 1006. Revealingly, [redacted] declared she "had a feeling [[redacted]] was trumping it up." P-App 1005. Despite her obvious and abject failure to follow CRST's claimed policies, Human Resources simply told [redacted] that if a driver mentions harassment, she should remove her right away. P-App 2431, 96/7-14. Yet again, for a fourth time, [redacted] was not disciplined in any way.

[redacted] was far from the only DM who repeatedly failed to follow CRST's claimed policies, without ever being disciplined. As another example, in February 2014 student driver

[redacted] complained that her lead driver slept in the truck nude, refused to stop when she told him it bothered her, and yelled at her. P-App 371-374. She informed Human Resources that when she complained about this to DM [redacted] "[h]e told her..can you deal with one more day." P-App 373. [redacted] was not disciplined for his failure to immediately separate the drivers rather than encouraging her to continue driving with the alleged harasser. Later, in June 2015, driver [redacted] reported that [redacted] attempted to stop her from separating from the co-driver who was sexually harassing her, and tried to require her to keep driving with him to move a load. P-App 2532-2537.[15] Again, he was not disciplined. Instead, he was subsequently promoted to the position of Operations Manager, where he supervised DMs. P-App 2344-2345, 3/9-4/6.

Unsurprisingly, [redacted]'s DM supervisees were consequently free to engage in the same conduct he had as a DM. In August 2016 driver [redacted] complained that when she reported her co-driver's harassing conduct (which included approaching her in his boxers and sitting on her bed while she was lying down, watching videos of half-naked women in the cab of the truck, and slapping her on the back several times while she was driving), her DM [redacted] "asked why did you get off, he was being rude and hung up on me...he said he would call me back and hung up and then never called me back." P-App 664. He left Ms. [redacted] stranded off the truck, did not escalate the complaint to HR, and "didn't offer nothing" to assist with the costs of a hotel or transportation, leaving Ms. [redacted] to reach out to a different DM for help on the following Monday. P-App 664. [redacted]'s supervisor was [redacted] P-App 668.

[15] [redacted] described his actions to CRST in an email: "I believe that Fleet Manager [redacted] [sic] initiated efforts to have me terminated from CRST, in retaliation for making claims of sexual harassment against [co-driver] [redacted]. I had notified Fleet Manager [] [redacted] about my sexual harassment claims prior to my final load delivery. I also spoke to the Operation[s] Manager above [redacted], when I refused to relay my final load. My final load destination was to Downey, California, but [redacted] tried to initiate a relay in Missouri for a load to Washington State which I refused because I did not want to continue driving with [the alleged harasser]. The Operation[s] Manager accused me of making a sexual harassment claim without evidence, and he disconnected the phone call with me." P-App 2536.

When interviewed by Human Resources, [redacted] admitted that Ms. [redacted] had "said something about [the alleged harasser] sitting in his boxers on the bed[,]" and that he "probably should have sent an email to you guys" in Human Resources conveying the sexual harassment complaint (which he did not), nor could he deny having hung up on Ms. [redacted]. P-App 668-669. In the face of all these failures to comply with CRST's purported policy, [redacted] was never disciplined—nor was [redacted] disciplined for permitting his supervisee to engage in this conduct.

Where CRST engages in a pattern or practice of countenancing DMs' failures to follow what it claims to be its policy—to immediately separate drivers and escalate the complaint to Human Resources following a complaint of sexual harassment, it is plain to DMs that they need not take sexual harassment allegations seriously. Instead, DMs are free to resist stopping the truck and urge the victim to complete her load, to keep the DM's compensation metrics as favorable as possible. *See* facts, section II(A)(5), *supra*. Where DMs who have routinely failed to follow the policy are even promoted into a supervisory role, it only compounds the problem by further ensuring DMs will face no scrutiny or pressure from above to handle sexual harassment complaints appropriately. Under these conditions, sexual harassment is permitted to continue and to flourish at CRST.

III. PROCEDURAL HISTORY

Plaintiffs filed their Complaint on October 30, 2015. Dkt. 2. They served their first discovery requests on January 4, 2016. Discovery continued actively over the next seven months, before Plaintiffs filed their motion for class certification on August 1, 2016. Dkt. 35. They supported their motion with anecdotal (rather than statistical) evidence, including Rule 30(b)(6) testimony of Karen Carlson, Defendant's Employee Relations Manager, declarations from class members, and documentary evidence obtained in discovery, including but not limited

to Defendant's business records documenting its handling of certain class member complaints. *See* Exhibits 1-35 to Dkt. 35. Defendant opposed the motion on September 1, 2016, relying inter alia on *Dukes v. Wal-Mart*, 564 U.S. 338 (2011) (Dkt. 55 at, e.g., 38-43, 48-49), and *EEOC v. CRST Van Expedited, Inc*., 611 F.Supp.2d 918 (N.D. Iowa 2009) (Dkt. 55 at e.g. 3, 39, 45), both of which decisions were already several years old by that time. *See* Dkt. 55. Discovery was stayed for five months, pending the Court's decision. *See* Dkt. 80.

The Court issued its Order certifying both a Hostile Work Environment Class and a Retaliation Class on March 30, 2017. Dkt. 85. It defined the Hostile Work Environment Class as follows:

> All women who were or are employed as team truck drivers by CRST Expedited, Inc. at any time from October 12, 2013 to the present, who have been subjected to a hostile work environment based on sex as a result of any of the following alleged CRST policies:
> (1) failing to find their complaints were corroborated without an eyewitness or admission,
> (2) failing to discipline drivers after complaints were corroborated; and
> (3) failure to discipline DMs for failing to promptly respond to sexual harassment complaints.

Dkt. 85 at 55. Pursuant to Rule 23(c)(4)(A), the Court further certified the following issues with respect to the Hostile Work Environment Class:

> [W]hether CRST has any of the following policies, patterns or practices that create or contribute to a hostile work environment:
> (1) failing to find their complaints were corroborated without an eyewitness or admission,
> (2) failing to discipline drivers after complaints were corroborated and
> (3) failure to discipline DMs for failing to promptly respond to sexual harassment complaints[.]

Id. at 54-55. The Court recognized in its decision that Plaintiffs intended to prove their claims using anecdotal, not statistical, evidence, specifically holding that "Plaintiffs' reliance on anecdotal evidence to establish a pattern or practice does not defeat commonality." Id. at 35.

On April 13, 2017, Defendant filed a Rule 23(f) Petition seeking Eighth Circuit review of this Court's decision certifying the Retaliation Class and Hostile Work Environment Class. App.

No. 17-8018, Entry ID 4524505. The Eighth Circuit denied Defendant's petition. App No. 17-8018, Entry ID 4534434 (8th Cir. May 9, 2017).

On May 23, 2017 Defendant sought *en banc* rehearing of the Eighth Circuit's denial of its 23(f) petition. App. No. 17-8018, Entry ID 4539632. Defendant argued, among other things, that *Webb v. Exxon Mobil Corp.*, Case No. 15-2879 (May 11, 2017), at that time a recently decided case, made class certification inappropriate because "[t]he reasoning in *Webb*....is directly contrary to the reasoning of the district court in this case." Id. at 8. Once again, the Eighth Circuit denied Defendant's petition and refused to hear the appeal. App. No. 17-8018, Entry ID 4554769 (8th Cir. July 7, 2017).

On July 26, 2017, at the direction of the Court, the parties made a joint filing setting forth Plaintiff's request for class notice and Defendant's opposition thereto. Dkt. 101. *Inter alia*, Defendant argued in this statement that the classes certified by the Court were unascertainable because "Plaintiffs' failure to identify class members and their proposed two-phase trial creates an impermissible fail-safe class." Id. at 14. The Court squarely rejected Defendant's ascertainability argument, holding:

> ….Plaintiffs are not required to identify every possible class member who is entitled to damages at this time. As plaintiffs note, CRST is essentially attempting to re-litigate the issue of class certification by arguing the class is not ascertainable. Notably, ascertainability is not a Rule 23(a) requirement. Moreover, I addressed CRST's concerns regarding the subjective component of a hostile work environment claim by finding that the classes could be certified only as to the liability question in Phase I and that individual class members would be required to prove in Phase II that they (1) subjectively perceived the work environment to be hostile and (2) suffered damages....

Dkt. 104 at 9-10. The Court authorized notice to the class on September 25, 2017. Id. Notice was sent pursuant to that Order, with follow-up notice mailed to additional class members later disclosed by Defendant pursuant to the Court's Orders of October 12 and December 13, 2017. Dkt. 107, 119.

On January 31, 2018, only five days before discovery was scheduled to close on February

5, Defendant requested that the discovery period be extended another two months to April 5, and that it be permitted to depose eighteen completely absent class members. *See* Dkt. 134. Plaintiffs had not opposed Defendant's requests to depose any class member from whom a declaration had been submitted in this case, and by that date Defendant had deposed the three Named Plaintiffs and two additional class members whose depositions they had sought. *See* id. However, Plaintiffs opposed Defendant's request to depose eighteen additional class members who had never submitted declarations, nor inserted themselves into this litigation in any way, and whose identities had been known to Defendant throughout the case. The class members had merely been listed in supplemental initial disclosures by Plaintiffs' counsel, and Plaintiffs had offered alternative less burdensome forms of discovery (such as a questionnaire) targeted at those eighteen individuals, all of which Defendant rejected. *See* Dkt. 143 at 13. As Plaintiffs explained in their briefing, they did "not have a basis to seek declarations from class members in the absence of any motion [e.g. for summary judgment] by Defendant, which will determine what information, if any, is relevant to the arguments in the motion and not already available from some other source." Dkt. 143 at 10. The Court granted the motion to extend the discovery deadline but denied the request to depose persons who had never submitted declarations nor otherwise participated in the case, holding that "Defendant has not shown a need sufficient to allow discovery from, let alone depositions of, these absent class members at this stage in the case. It also appears that a significant amount of information that could be obtained through depositions or other discovery is already available in Defendant's own files that have been produced as part of discovery in this case...." Dkt. 153 at 3.

On January 31, 2018, also for the first time, Defendant sought permission to submit an expert report. Dkt. 134. The Court granted Defendant's request (*see* Dkt. 153), and Defendant served a report by Mary Baker, Ph.D., on March 5, 2018. *See* D-App 77-85. However, this

report was completely irrelevant to whether Plaintiffs could prove their case using solely anecdotal evidence, as explained by Dr. Louise Fitzgerald, whose expert report Plaintiffs submitted in rebuttal on March 30, 2018. *See* D-App 73-76. Dr. Fitzgerald explained that:

> What Dr. Baker ignores is that plaintiffs are NOT offering statistical evidence. Dr. Baker characterizes class counsels' proffer of evidence as a "non-random sampling proposal"; it is no such thing. Rather, it constitutes a proffer of anecdotal evidence, explicitly recognized and accepted as such by Judge Strand....
>
> [E]vidence [of the alleged company policies] de facto precludes the need for sampling, because the entire population of drivers is affected by this policy....in fact, testimony from even a small number of class members concerning the existence of company-wide policies (not to mention corroborating testimony from the defendants' 30(b)(6) witness), can prove the existence of policies which affect all class members.

D-App 75-76 (emphasis added).

Defendant filed the instant Motion to De-Certify on April 26, 2018, and simultaneously filed a Motion for Partial Summary Judgment only as to Plaintiffs' retaliation claims, which Plaintiffs are separately opposing. Dkt. 171, 172. Defendant has not moved for summary judgment on Plaintiffs' hostile work environment claims, and its time to do so will expire thirty days following a ruling on the instant Motion to De-Certify. *See* Dkt. 134.

IV. ARGUMENT

A. LEGAL STANDARD

After a class certification order has been entered, the Court retains the option to modify it in light of subsequent developments in the litigation. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982); see also Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."). Regarding motions to de-certify a class, the Eighth Circuit has noted that "[g]enerally, the proponent of a motion bears the initial burden of showing that the motion should be granted." *Day v. Celadon Trucking Servs*., 827 F.3d 817, 832 (8th Cir. July 5, 2016). Because "a district court maintains an independent duty to assure that a class continues to be certifiable under Rule 23(a)[,]"....[this] lends further

support for requiring the movant [on a motion to de-certify] to bear the burden of showing that the district court mistakenly maintained class certification." *Id.* The Eighth Circuit further holds that the "law of the case" doctrine, while "not an absolute bar to modification of a certification order," is relevant to motions to de-certify, and that its "policy principles apply." *Id.*, citing 3 William B. Rubenstein, Newberg on Class Actions § 7:39 (5th ed. 2013) (noting that if a defendant can require a court to revisit certification decisions without any showing whatsoever and place the onus on the plaintiff to once again prove certification, "its incentives will be skewed"). Moreover, in a case where notice to potential class members had already been approved, and where "the employees addressed the objections that [defendant] raised and [defendant] did not file any additional objections[,]" the Eighth Circuit held that "principles of fair adjudication require [defendant] to provide good reason before the district court revisits the issue [of class certification]." *Day*, 827 F.3d at 832. As the Eighth Circuit noted, "[i]n 2003, Congress amended Rule 23 to prohibit 'conditional' certification. Certification orders must undergo 'rigorous analysis,' *see Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006), and now have a more tested quality to them." *Id.* at 832, n. 7.

B. THE COURT'S RULING THAT THE HOSTILE WORK ENVIRONMENT CLASS SATISFIES THE COMMONALITY AND PREDOMINANCE STANDARDS IS CORRECT

At this late stage of the case, following a class certification Order issued based on a "rigorous analysis," following issuance of class notice over seven months ago, and following two failed Rule 23(f) petitions seeking to overturn this Court's class certification Order, Defendant has failed to show that the Court has mistakenly maintained Plaintiffs' case as a class action. It has failed to show any change, whether doctrinal or evidentiary, that justifies requiring the Court to revisit the issue of class certification, instead merely recycling and re-packaging the same arguments already rejected in the Court's original certification and notice rulings. Defendant's

motion should be denied.

1. The Court's Reasoning in Finding Commonality and Predominance Retains its Full Force

On March 30, 2017, after seven months of discovery, this Court certified hostile work environment and retaliation[16] classes in this pattern or practice sex discrimination case. Dkt. 85. Specifically, the Court certified a Hostile Work Environment Class of women employed as team truck drivers during a specified date range who have been subjected to a hostile work environment based on sex as a result of any of the following alleged CRST policies: 1) failing to find their complaints were corroborated without an eyewitness or admission, 2) failing to discipline drivers after complaints were corroborated, and 3) failure to discipline DMs for failing to promptly respond to sexual harassment complaints. Dkt. 85 at 54-55. With regard to the first policy, despite Defendant's argument that "each instance of alleged harassment is unique[,]" *Id.* at 31, the Court found that the commonality requirement had been satisfied because Rule 30(b)(6) testimony by Karen Carlson "provides some evidence that CRST maintains a policy or practice with regard to "he said/she said" complaints by requiring either an eyewitness statement or an admission to find that the complaint was legitimate." *Id.* The Court also relied on Declarations Plaintiffs submitted demonstrating CRST's refusal to consider other potentially corroborating evidence, which further supported its finding of commonality. Id. at 31-32.

With regard to the second policy, the Court again rejected Defendant's argument that "this issue cannot be resolved on a class basis because it depends on individual circumstances and no common contention or common answer exists[,]" *id*. at 34, finding that there was commonality,

[16] As Plaintiffs explain *infra*, Defendant has made no independent argument to de-certify the Retaliation Class in this Motion, only referring to and incorporating its arguments in the separate motion for partial summary judgment filed on the same date as its motion to de-certify. *See* Dkt. 171. It has finally conceded in its motion for partial summary judgment that the policy at issue for the Retaliation Class exists, therefore Plaintiffs need only address the Hostile Work Environment Class here, and further, incorporate by reference their opposition to Defendant's Motion for Partial Summary Judgment. See Dkt. 184.

and discussing at length examples Plaintiffs had provided of CRST failing to discipline drivers even when harassment was corroborated. Id. at 32-34. And with regard to the third policy, the Court specifically held that "Plaintiffs' reliance on anecdotal evidence to establish a pattern or practice does not defeat commonality[,]" Id. at 35, and held the commonality requirement was satisfied here where "the class will attempt to prove, through a series of examples, that CRST had a pattern or practice in responding to DMs who failed to act promptly in responding to complaints of sexual harassment...." *Id.* The Court therefore held that the commonality requirement was satisfied for the Hostile Work Environment Class.

In analyzing whether the requirement of predominance was satisfied pursuant to Rule 23(b)(3), the Court specifically assessed "whether, given the factual setting of the case, if the plaintiffs['] general allegations are true, common evidence could suffice to make out a prima facie case for the class." Dkt. 85 at 44. The Court found that "[b]ifurcating each class action into two phases avoids the possibility that individualized questions will predominate common questions" at Phase I, where only liability is at issue, and noted that "[t]his approach has been used by numerous courts." *Id*. at 46 (citing cases). The Court held that "the common issues as to liability will predominate over individualized issues." *Id*. at 47.

2. *Webb* does nothing to undermine the Court's findings of commonality and predominance, and Defendant's argument to the contrary has already failed at the Eighth Circuit

Defendant has failed to show that the Court's analysis, summarized *supra*, was in any way flawed; instead, it simply recapitulates already-rejected arguments. First, Defendant points to *Webb v. Exxon Mobil Corp.*, 856 F.3d 1150 (8th Cir. 2017), claiming that it is a new case showing the Court's decision was wrong because liability cannot be proven "simply by aggregating individual circumstances." Def. Mem. 18. But Defendant already made and lost this argument about *Webb* in its failed Rule 23(f) petition for *en banc* rehearing. *See* App. Case

No. 17-8018, Entry ID 4539632 (May 23, 2017). As it does in its instant Motion, Defendant argued there that the "reasoning in *Webb*—that it is inappropriate to certify a class unless the claims in the case may be resolved in a common way for the entire class—is directly contrary to the reasoning of the district court in this case[,]" and that *Webb* shows "individual issues predominate over common ones." *Id*. at 8. Since the Court has been well aware of these arguments in the failed appeal for over fourteen months, Defendant seeks to "require [the] court to revisit [the] certification decision[] without any showing" that the Court's decision to maintain certification has been erroneous. *See Day*, 827 F.3d at 832. Defendant's argument to de-certify due to *Webb* fails on this basis alone.

But additionally, Defendant has misrepresented the holding of *Webb* in an attempt to imply that the legal standard for predominance has changed since the Court's Order granting class certification in the instant case. It has not. The crux of Defendant's argument is that certification "is appropriate only where Plaintiffs demonstrate that they can....proffer[] 'common evidence'--that is, evidence that is common to each member of the class and does not vary from individual to individual." Def. Mem. 20. In other words, Defendant argues that evidence which comprises specific examples of Defendant applying its policy cannot be the basis of a finding of commonality. But this is simply not how *Webb* defined "common evidence".

The problem in *Webb*, a case about liability for pipeline breaches (not an employment action nor even a discrimination case), was that the showing <u>of liability</u> varied from class member to class member. *See Webb*, 856 F.3d at 1156-1157. *Webb* was brought by easement holders who owned land along a defendant company's 850-mile-long subterranean oil pipeline. Id. at 1154. They sought to litigate on a class action basis the question whether the defendant had breached each and every one of their easement contracts. The pipeline had released oil from certain segments of the line, on different dates over a period of 26 years, in different localities.

Id. The court held that, as in another pipeline case, "[t]he plaintiffs here may assert all of the pipe for 850 miles is bad, but demonstrating breach is more complicated[,]" meaning that determining whether any of the properties had actually been contaminated at all would require a "property-by-property assessment" to determine **liability** for breach. It further held that "[b]eyond determining liability," other individualized issues existed that predominated over common issues.

Notably, although Defendant characterizes *Webb*'s holding as new, it actually simply follows the older case *Ebert v. Gen. Mills, Inc*., 823 F.3d 472 (May 20, 2016), another property contamination case in which the need to make a "property-by-property" assessment meant that the *liability* determination varied from class member to class member. *See Webb*, 856 F.3d at 1156-57 (following *Ebert*). In fact, once again repeating old arguments, Defendant has made the same argument from *Ebert* in the instant Motion that it made in its papers opposing class certification. Compare Dkt. 172-1 at 22 (claiming *Ebert* makes class certification inappropriate) *with* Dkt. 55 at 65-66 (same).

By contrast, in the instant case Plaintiffs have alleged classwide policies that created a hostile work environment, so Defendant's liability for creating such an environment can and will be determined through common evidence that the policies existed. That common evidence of the policies can and will include both testimony of Rule 30(b)(6) witnesses, human resources investigators, and managers at Defendant, as well as anecdotal evidence providing specific examples of Defendant carrying out its policies. Defendant's business records documenting what actions it took and what decisions it made about each class member's sexual harassment complaint comprise a series of specific, anecdotal examples of the manner in which Defendant carries out its policies, which can be offered as evidence proving that the policies in fact existed. The showing of Defendant's liability therefore does not vary from class member to class member,

as it did in the pipeline cases. To the contrary, common issues necessarily predominate at the liability phase in bifurcated *Teamsters* cases such as this one. *See, e.g., Alvarado*, 1995 U.S. Dist. LEXIS 10084, *19-20 ("[T]he court finds that the questions whether the defendants have a policy or practice of discrimination, and whether there exists a hostile work environment at the defendants' plant are central to the class members' claims....Although the court will be required to make individual fact determinations on the issue of entitlement and extent of damages, common questions clearly predominate over any questions affecting the individual class members.").

The Court in its class certification Order in this case, correctly, has already applied the well-established law of this Circuit in analyzing whether "common evidence could suffice to make out a prima facie case for the class." Dkt. 85 at 44. There is no new standard to be applied, and Defendant's request to de-certify on this basis should be denied.

3. Plaintiffs continue to rely on all the evidence supporting their original motion for class certification, have not "disclaimed reliance" on any evidence, and all of Defendant's commonality and predominance arguments are merely a rehashing of arguments already rejected by the Court

Next, in an argument that is not substantively distinct from its misinterpretation of the *Webb* case, *supra*, Defendant claims the Court should reverse its findings of commonality and predominance because Plaintiffs' "'common evidence' is nothing more than an aggregation of individualized inquiries into each complaint, unaided by any expert guidance or analysis." Def. Mem. 22. Once again, Defendant's argument fails: the suggestion that the class members' claims are "too individualized" to satisfy Rule 23 is simply the same argument already considered and rejected by this Court at class certification. *See, e.g.*, Dkt. 85 at 33-34 (rejecting Defendant's arguments that there is no commonality because "plaintiffs merely describe individual examples of alleged harassment" which "does not demonstrate a policy of CRST, but plaintiffs' own

assessment of a unique fact pattern of alleged harassment[,]" and that "this issue cannot be resolved on a class basis because it depends on individual circumstances").[17]

Perhaps realizing that it had to alter its approach in some way, Defendant now attempts to portray its old argument as new by claiming there is now an absence of common evidence, where there was not one before: CRST claims Plaintiffs have "announced a new approach to Phase I" and have "disclaimed reliance on those sources" that supported their motion for class certification, including "documentary evidence, anecdotal evidence in the form of declarations from female drivers, and numerous admissions by Defendant." Def. Mem. 21. This claim is astonishing. Plaintiffs have never, and would never, disclaim reliance on any of the evidence that proves their case. Defendant's only basis for so alleging is a single statement in Plaintiffs' resistance to a motion to extend scheduling order deadlines: "....as Plaintiffs explained during the [hearing], the policies at issue in Phase I of this case concern how Defendant handles sexual harassment complaints, therefore Plaintiffs will be using Defendant's own files recording how it handled each and every class member sexual harassment complaint in order to prove the policies." Dkt. 141-1 at 11-12 (emphasis omitted). It is a wild leap to conclude that because Plaintiffs will rely on Defendant's investigation files as proof of Defendant's policies, they have "disclaimed" reliance on any other form of evidence of those policies, let alone all the other sources of proof they have already presented to the Court. To be abundantly clear, Plaintiffs continue to rely upon all of the evidence that supported their original motion for class

[17] Defendant even cites much of the same caselaw in the instant Motion that it cited in its brief opposing class certification, to argue that plaintiffs' claims are "too individualized" or an "aggregation of individualized circumstances" and therefore commonality and/or predominance cannot exist. *Compare, e.g.*, Dkt. 172-1 at 23 (citing *Elkins v. Am. Showa Inc*., 219 F.R.D. 414, 424 (S.D. Ohio 2002) for proposition that class certification is inappropriate where plaintiffs' proof is an "aggregation of individual circumstances") *with* Dkt. 55 at 65 (citing *Elkins* for proposition that class certification is inappropriate because of "[t]he need for repeated individualized inquiries"). As Plaintiffs already explained in their Reply in further support of class certification, unlike in *Elkins*, "[q]uestions concerning [Defendant's] across the board policies predominate over how individual class members were affected personally by them" in this case. Dkt. 65 at 45-46 (distinguishing *Elkins*).

certification, as well as additional party admissions via Rule 30(b)(6) testimony, new testimonial evidence from Defendant's own managers, and additional documentary evidence including but not limited to many more of Defendant's own sexual harassment complaint investigation files. *See* facts, *supra*.

Defendant's baseless claim that the Court should reverse itself because Plaintiffs have "disclaimed reliance" on all of the proof that supported class certification is the entire basis of ten pages of its brief. *See* Def. Mem. 21-31. But without that claim, all Defendant's arguments as to commonality and predominance are simply a rehashing of its assertion, already rejected at class certification, that the class members' claims are "too individualized," with no new facts or doctrine to support them.

a) Defendant has no new argument as to the policy of refusing to corroborate complaints

Defendant has a policy of refusing to corroborate complaints without an eyewitness to the harassment or an admission by the alleged harasser. Defendant argues that Plaintiffs "plan to use [only] CRST's files to establish this policy," whereas Plaintiffs "relied on different evidence in their certification motion[,]" including but not limited to testimony by Karen Carlson conceding that she could never find harassment was corroborated without an eyewitness or an admission. Def. Mem. 25. Plaintiffs continue to rely on Carlson's testimony, along with all additional evidence of the policy learned during discovery.

Repeating the same arguments rejected at class certification, Defendant goes on to argue that Plaintiffs "mischaracterized" Carlson's testimony, which has already been evaluated by the Court. Def. Mem. 25; *see* Dkt. 85 at 31 (considering Carlson's testimony and finding that it "provides some evidence that CRST maintains" the policy alleged). Defendant then cites to what it claims are two anecdotal examples of CRST "terminating male driver after finding complaint against him corroborated notwithstanding lack of admission or eyewitness account[.]" Def.

Mem. 26. Defendant's two anecdotal examples (out of a class of nearly three hundred), even if they had been what Defendant claims, would not make the Court's finding of commonality wrong: ultimate proof of the policies alleged is a matter for summary judgment and trial, whereas the sole issue on this Motion is whether the requirements of Rule 23 are satisfied. Any conflict between the parties' contrary anecdotes "may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class." *Blades v. Monsanto Co*., 400 F.3d 562, 567 (8th Cir. 2005). But Defendant's anecdotes are not even examples contrary to the policy Plaintiffs have described. D-App 103 is a termination notice, but the person terminated was not a "male driver" as Defendant claims—he was a terminal manager at Defendant who was alleged to have exchanged nude photographs with an employee on his cell phone. What Defendant found or did not find in his case is inapposite to the policy Plaintiffs have alleged, regarding harassment complaints by and against drivers. *See* D-App 103; P-App 2527 (letter terminating [redacted] from his position as "Terminal Manager"). The other anecdote Defendant points to also does not document CRST "terminating male driver after finding complaint against him corroborated[:]" the driver in question was terminated only because he was imprisoned. D-App 107. Defendant actually made no finding of corroboration in this case. D-App 109 (listing no finding as to corroboration under "findings," and merely noting harasser "was terminated on 2/6/15. He was in jail."). The fact that these are the only two purported counter-examples Defendant could muster to dispute the existence of this policy is telling.

Finally, still pursuing its argument that Plaintiffs have "disclaimed reliance" on all their evidence of the policy of refusing to corroborate complaints, Defendant argues that for any complaint file relied on by Plaintiffs as anecdotal evidence of this policy, "CRST will be entitled to present evidence showing that the file is incomplete or that CRST's finding of no

corroboration was justified, resulting in hundreds of mini-trials." Def. Mem. 27. This is again simply a reprise of Defendant's argument at class certification that the claims are too "individualized" for commonality to be satisfied. *See, e.g.,* Defendant's Brief opposing class certification, Dkt. 55 at 52 ("Whether harassment could have been corroborated and whether the correct measure of discipline had been implemented can only be assessed relative to each putative class member's claim, and no common contention or common answer exists...."). Moreover, Plaintiffs note that CRST certainly will not be entitled to present any evidence of its actions (or inaction) in response to driver sexual harassment complaints that it has not already produced to Plaintiffs in response to their discovery requests. Defendant has made no new argument, factual or doctrinal, regarding the policy of refusing to corroborate complaints that makes the Court's Order granting class certification erroneous.

b) Defendant has no new argument as to the policy of failing to discipline drivers when complaints are corroborated

Defendant flatly repeats the identical argument made at class certification with respect to this policy: that "individual inquiries will predominate." Def. Mem. 27; *compare to* Dkt. 55 at 65 (arguing predominance requirement not satisfied and citing cases regarding "[t]he need for repeated individualized inquiries"). It presents no new fact nor newly decided case: it simply takes issue with the reasoning of the Court in its original decision. Among other things, Defendant claims that "it is [] not clear what qualifies as 'discipline'....Does designating a driver as 'male only,' an automatic response that CRST takes to complaints, count?" Def. Mem. 28. Yet Defendant's question is addressed directly by the Court in its class certification Order: "Plaintiffs state that CRST's standard response to complaints of sexual harassment is to designate the accused driver as "male only"....Plaintiffs allege this designation, which is also used in instances when the harassment cannot be corroborated, is not disciplinary and demonstrates tolerance of a hostile work environment." Dkt. 85 at 32. Defendant argues that "[b]ecause the adequacy of the

discipline depends on the severity of the alleged harassment, analyzing this Hostile Work Environment policy will require a detailed inquiry into each and every complaint[,]" Def. Mem. 28, which is again the identical argument already made and rejected at class certification. *See* Order, Dkt. 85 at 33 ("CRST argues that discipline imposed is commensurate with culpability. It states that plaintiffs merely describe individual examples of alleged harassment...They argue this issue cannot be resolved on a class basis because it depends on individual circumstances....While both parties intend to rely on anecdotal evidence to demonstrate that such a pattern or practice does or does not exist, I find that the overall claim and its associated issues satisfies the commonality requirement."). In sum, Defendant makes no new argument whatsoever regarding the policy of failing to discipline drivers, and the Court's reasoning in its Order granting class certification stands.

c) Defendant has no new argument as to the policy of failing to discipline driver managers

Defendant offers only a few sentences of argument about this policy, boiling down to a complaint that the policy "demands even more individual inquiries." Def. Mem. 29 ("What constitutes....a response, a prompt response, or even a sexual harassment complaint is far from obvious."). Once again, Defendant has merely reprised its arguments already rejected at class certification. *See* Order, Dkt. 85 at 34-35 ("[CRST] note[s] that 'promptly' is a subjective term that must be assessed based on actual circumstances and in relation to the severity of the specific instance of alleged harassment....Plaintiffs' reliance on anecdotal evidence to establish a pattern or practice does not defeat commonality....Here, the class will attempt to prove, through a series of examples, that CRST had a pattern or practice in responding to DMs who failed to act promptly in responding to complaints of sexual harassment...."). Defendant has pointed to no new facts or law regarding the policy of failing to discipline driver managers that impugns the Court's logic in its Order granting class certification.

d) None of the caselaw cited by Defendant supports its claim that using Defendant's own business records as evidence of its policies is an impermissible "aggregation of individualized inquiries"

Since Plaintiffs have not "disclaimed" any of their evidence, including the deposition testimony and declarations described in the fact section *supra*, Defendant's argument that the class members' claims are "too individualized" because of Plaintiffs' additional use of Defendant's own business records fails with no need for any further analysis. But in any event, the caselaw cited by Defendant on this point does not support its argument. *Ebert* and *Elkins* (cited at Def. Mem. 22-23, and already cited in Defendant's original opposition to class certification) are inapposite for the reasons already set forth. *See* page 44, and page 46 n.17, of the instant Memorandum. Defendant's description of *Powers v. Credit Management Services, Inc.*, 776 F.3d 567 (8th Cir. 2015) is so vague as to completely obscure its extremely context-specific holding: in that Fair Debt Collection Practices Act (FDCPA) case, the plaintiffs were represented by attorneys when the defendant tried to collect from them, and sent them discovery requests that the plaintiffs claimed were "unreasonable." The Eighth Circuit reversed because the lower court had applied an "unsophisticated consumer" standard under the FDCPA, but it should have applied a "competent lawyer" standard. *Powers*, 776 F.3d at 573-574. The court explained that a "competent lawyer brings a [collections] discovery dispute that cannot be resolved informally to the court, which rules on fact-intensive questions of reasonableness on an adequate record"--therefore individualized questions of factual context predominated in an FDCPA class action alleging that collection efforts involved "unreasonable" discovery requests. Id. at 575. This case, which is based on the very specific context of the FDCPA, simply says nothing about what types of hostile work environment claims are "too individualized" for class treatment, in contrast to a case like *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 664 (D. Minn. 1991), which is directly on point. See Dkt.35-1 at 37, 51 (discussing *Jenson*).

Defendant attempts to shoehorn another Eighth Circuit case, *Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926 (8th Cir. 2008), into supporting its argument, without success. Defendant claims this case demonstrates that "making that showing [of a "general policy" that violates Title VII] is even more difficult where plaintiffs offer nothing more than aggregating individual complaints and responses[,]" and that the case "highlighted several shortcomings in this approach"--but *Adams* was not even a class action case, and it says nothing at all about the propriety of "aggregating individual complaints" to prove a pattern or practice, nor what type of evidence is "too individualized" to satisfy the Rule 23 predominance standard. *See Adams*, 538 F.3d at 928 (describing case brought by a single plaintiff). *Adams* was actually a supervisor harassment case where an individual employee tried to defeat the employer's *Faragher-Ellerth* defense by arguing that in several specific instances involving other employees, the defendant had failed to follow its anti-harassment policy in one way or another. Id. at 930. The court considered the specific facts of each of these alleged instances and found that "a reasonable jury could not conclude on the record that [defendant] did not implement its stated anti-harassment policy in an effective way." Id. at 931. This case is simply completely inapposite to the question what type of evidence can be used to prove a general policy of discrimination in a class action.

Defendant fares no better in citing cases outside of this Circuit. *Madrigal v. Tommy Bahama Group, Inc*., 2011 U.S. Dist. LEXIS 157098 (C.D. Cal. June 27, 2011) was a case in which the plaintiffs alleged managers had orally told them to buy store uniforms and have them dry cleaned, which would have violated California state law. However, the claims were too individualized because they depended upon knowing what "what each manager [orally] instructed" a subset of employees to do, "how each employee interpreted the instruction[,]" and other subjective factors including employees' "subjective beliefs that Defendant provided an insufficient number of uniforms." Id. at *20-21. In contrast, the instant Plaintiffs have presented

evidence of objective and company-wide policies that do not depend upon the subjective perspectives of any class member—for example, Karen Carlson's admission that Human Resources would not find a complaint to be corroborated absent an eyewitness or an admission by the alleged harasser. *See* facts, *supra.*

Another case Defendant cites, *Mendez v. U.S. Nonwovens Corp*., 314 F.R.D. 30 (E.D.N.Y. Jan. 15, 2016) was a Fair Labor Standards Act case, which held that determining whether individual supervisors "require[d] factory and warehouse workers to perform overtime work, work before or after their shifts, or work during meal-time breaks for which they were not properly compensated" involved too many individual inquiries to bring an overtime and straight-wages class claim. Id. at *50-51. Again, Plaintiffs in the instant case have produced evidence of company-wide policies constituting the decisions of CRST Human Resources (i.e., refusing to issue discipline when a complaint has been deemed corroborated) that do not depend on assessing different instructions from individual managers in individual cases. The problem for the plaintiffs in *Valerino v. Holder*, 283 F.R.D. 302 (E.D.Va. May 31, 2012), a disparate treatment employment discrimination case also cited by Defendant, was that just as in *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338 (2011) they had alleged a "policy of permitting discretion" in pay and promotion decisions which they claimed "amounts to a general policy of discrimination[.]" *Id.* at *314. Exactly as in *Wal-Mart*, there was no commonality because "[i]t remains 'quite unbelievable' that all Marshal and Assistant Directors would exercise their discretion in a common way without some common direction." Id. By contrast, in the instant case, Plaintiffs have not alleged that discretion played any part in Defendant's policies, and there is no need to evaluate the individual discretionary decisions of one manager after another to determine whether they were the result of discriminatory animus.

Notably, all of the foregoing cases were decided well before Defendant briefed its

opposition to class certification in the instant case. This is not new caselaw, and nothing in it warrants revisiting the Court's class certification order. Defendant's repeated invocation of a "new approach" in which Plaintiffs have "disclaimed reliance" on all the evidence they relied upon at class certification is a sham, dreamed up to provide an excuse for Defendants to seek a re-hearing of the same arguments the Court already carefully considered and rejected at class certification. Its motion to de-certify should be denied.

4. Plaintiffs are proving their case via anecdotal evidence, they are not required to rely upon statistical evidence, and Defendant's expert report is inapposite to whether Plaintiffs have satisfied Rule 23

Notwithstanding CRST's reliance on two anecdotal examples which it (wrongly) claims demonstrates that it does not have a policy of not sustaining complaints, Defendant next argues that the Court should reverse itself because there is "no evidence that the alleged discriminatory policies exist[,]" where Plaintiffs have employed anecdotal – rather than statistical- evidence to prove their case. *See* Def. Mem. 31 *et seq*. Defendant relies on an expert report that does not (and cannot properly) opine on the sufficiency of Plaintiffs' anecdotal evidence. It also cites to findings relating to the sufficiency of evidence in a different litigation, *EEOC v. CRST Van Expedited, Inc*., 611 F.Supp.2d 918 (N.D. Iowa 2009), which covered a different time period at Defendant, proceeded under a different theory, was decided on a completely different record, and did not pose the same questions to the Court as are posed in the instant case. Moreover, Defendant's arguments concerning this case are once again a reprisal of the ones it has already made at class certification, which failed. Plaintiffs' anecdotal evidence is sufficient to meet the requirements of Rule 23, and Defendant's motion should be denied.

a) Plaintiffs have presented sufficient anecdotal evidence to satisfy Rule 23

It is well established that pattern or practice claims may be proven using anecdotal evidence alone, and statistical evidence is not required. *Catlett v. Missouri Highway & Transp.*

Com., 828 F.2d 1260, 1265 (8th Cir. 1987) ("[A]necdotal evidence recounting instances of discrimination against specific class members....alone may be sufficient to establish a pattern or practice of discrimination[.]"). At class certification, the Court already determined that Plaintiffs had shown sufficient anecdotal evidence to satisfy the requirements of Rule 23 and maintain a class action: "Plaintiffs' reliance on anecdotal evidence to establish a pattern or practice does not defeat commonality....I find that plaintiffs have established commonality with regard to their claim that CRST creates or tolerates a hostile work environment through the alleged patterns and practices." Dkt. 85 at 35. Defendant has not shown that the evidence already relied upon in support of class certification is invalid or may not be considered by the Court.

Further, since the time of class certification, Plaintiffs have obtained additional evidence that Defendant maintained the policies in question. *See, e.g.*, P-App 1-2292, 2336-2364, 2401-2432, etc. Therefore, Defendant has moved the Court to reverse itself with no new basis to do so, and its request should be denied.

Since it cannot show that anything must be removed from the record that the Court already held sufficient to support class certification, Defendant instead falsely claims Plaintiffs have "concede[d]....their anecdotal evidence does not permit certification." Def. Mem. 33. It bases this falsehood on a sentence taken out of context from Plaintiffs' resistance to a motion to extend discovery: "Plaintiffs plainly cannot prove using class member testimony that, inter alia, Defendant had a pattern or practice of failing to corroborate complaints of harassment without an eyewitness or admission by the harasser, or that it had a pattern or practice of failing to impose discipline even when it corroborated a complaint of sexual harassment." Id. Far from "conced[ing]" that they cannot satisfy Rule 23, Plaintiffs were making an obvious point: the evidence proving that Defendant refused to impose discipline on a harasser must come from somewhere other than a class member's testimony, because Defendant did not tell the class

members whether or not their alleged harasser had been disciplined. P-App 2340-2341, 104/21-105/18. Plaintiffs have never suggested that they would not or could not rely on other forms of evidence to establish these policies. Plaintiffs have presented evidence concerning whether or not the alleged harassers were disciplined, not from class members without access to such information, but from a different source: Defendant's own business records, which record its disciplinary decisions for each alleged harasser.[18] *See* facts, section II(C), *supra*.

Similarly, while class member testimony can provide evidence of what information was made available to Defendant, the decision as to which complaints could be deemed "corroborated" comes from Defendant's own business records, the Human Resources investigation file of each complaint, since Defendant did not tell class members whether or not their complaint had been deemed corroborated. *See* facts, section II(B), *supra*. Just as they explained in their motion seeking class certification, Plaintiffs are proving the existence of Defendant's policies through "documentary evidence" including Defendant's personnel files and business records documenting actions taken with respect to each harassment complaint, "anecdotal evidence in the form of declarations from female drivers, and numerous admissions by Defendant" in the form of Rule 30(b)(6) testimony, and testimony from managers and human resources employees. Dkt. 35-1 at 34; see facts, *supra*.[19]

Plaintiffs' anecdotal evidence is therefore sufficient to show the classes satisfy the

[18] Defendant attempts to distinguish the instant case from *Jenson v. Eveleth Taconite Co.*, 824 F.Supp. At 879-83, by arguing that case was supported by "extensive anecdotal accounts[,]" which it claims to be in contrast to the instant case. Def. Mem. 36-37. This argument actually goes to the merits (i.e. whether Plaintiffs can prove liability), which are not at issue on this motion, rather than the only question at issue here: whether the Court was incorrect in finding that the requirements of Rule 23 are satisfied. But in any event, what Defendant ignores is that voluminous business records in this case document Defendant's handling of each class member complaint, revealing in precise detail what policies it maintained and patterns or practices it engaged in—an extensive and thorough type of evidence not available in *Jenson*. *See* facts, *supra*.

[19] As is obvious from the extensive testimony cited here, Defendant's claim that"Plaintiffs have not offered any testimony of any kind to support their claim that there is a 'general policy' at CRST of tolerating sexual harassment" is facially untrue. Def. Mem. 32.

requirements of Rule 23. Yet despite the well-established rule that statistical evidence is not required to prove a pattern or practice case (see *Catlett*, *supra*), Defendant implies that there is something inappropriate about a reliance on anecdotal evidence alone, claiming: "CRST has been unable to locate any case certifying a Title VII pattern or practice claim where the plaintiffs have not offered any expert or statistical testimony." Def. Mem. 33. By lumping together both disparate treatment cases and hostile work environment cases within the category of "Title VII pattern or practice claim[s]," Defendant has elided an important distinction: disparate treatment claims, such as class actions alleging discriminatory failure to promote or systematic underpayment of the plaintiff class, regularly rely on expert statistical evidence. But often where a class action includes both a disparate treatment class and a hostile work environment class, the plaintiffs rely on anecdotal evidence alone to prove their hostile work environment claim. *See, e.g.*, *Brown v. Nucor Corp*., 2012 U.S. Dist. LEXIS 190946, *71-72 (D.S.C. Sept. 11, 2012) (denying motion to de-certify hostile work environment class where plaintiffs' proof of hostile environment consisted of anecdotal evidence alone, and finding that "the plaintiffs have submitted significant proof that the landscape of the total work environment at the Berkeley plant was hostile towards African-Americans and that the defendants failed to take 'remedial action reasonably calculated to end the harassment'"); *BreMiller v. Cleveland Psychiatric Inst*., 195 F.R.D. 1 (N.D. Ohio 2000) (denying motion to de-certify hostile work environment class based on proof consisting solely of anecdotal evidence, including affidavits and deposition testimony).

Just as the Court already held it to be at class certification, Plaintiffs' anecdotal evidence remains sufficient to satisfy the requirements of Rule 23.

b) Defendant's expert report is irrelevant to a case being proven through anecdotal, not statistical, evidence

Since it has failed to show that any of the evidence already held sufficient to satisfy Rule 23 must be discarded, Defendant instead decries the absence of "statistically significant

anecdotal evidence[.]" Def. Mem. 15. That is a meaningless phrase, since statistical and anecdotal evidence are two completely different methods of proof. *See Catlett, supra*. But in other words, Defendant cherry-picks a small subset of the evidence Plaintiffs have submitted in support of class certification—six affidavits submitted by class members—and pretends as though it is the only evidence Plaintiffs have presented, so that its expert may opine that the cherry-picked evidence is not statistically significant. *See* Def. Mem. 33. This argument fails for multiple reasons.

First, Defendant's argument conflates the Rule 23 standard with the standard of proof at summary judgment or at trial. To the extent Defendant has implied that Plaintiffs must show they can conclusively prove liability on this motion, Defendant is simply wrong: this is not a motion for summary judgment or jury trial, and all that is at issue are the requirements of Rule 23. *See, e.g.*, Def. Mem. 34 (citing from report of Mary Dunn Baker to argue Plaintiffs' evidence is "too imprecise to be used by the fact-finder to make the class-wide liability decisions in this case"), Def. Mem. 35 (arguing anecdotes in Plaintiffs' class certification briefing demonstrating failure to discipline are not "reliable in proving or disproving the elements of the relevant cause of action"). Simultaneously with filing the instant Motion, Defendant filed a motion for partial summary judgment directed only at the Retaliation Class, Dkt. 171, which Plaintiffs have opposed (Dkt. 184). If Defendant sought to apply the summary judgment standard to the Hostile Work Environment class as well, it could have made such a motion, but it did not.

Second, as the Court already recognized at class certification, Plaintiffs are not relying solely on "six putative class members[']" affidavits to show that their claims satisfy Rule 23. Def. Mem. 33. Already at the time the Court certified this case, Plaintiffs had submitted Rule 30(b)(6) deposition testimony from Karen Carlson and extensive documentary evidence in the form of CRST's own records showing the existence and operation of the policies. *See* Dkt. 35-1,

exhibits 1-2, 12-35. Plaintiffs have now additionally submitted voluminous supplementary evidence including but not limited to testimony from eight additional management depositions, personnel records recording discipline, email correspondence, and business records documenting how Defendant handled each complaint of sexual harassment during the class period, whether it deemed each complaint "corroborated" or not, whether it disciplined the alleged harasser or not, and whether it disciplined the involved Driver Manager or not, among other facts. *See* facts, *supra*. This comprises numerous anecdotes which show how Defendant followed the policies Plaintiffs have alleged. Defendant's claim that Plaintiffs have relied only on "anecdotal evidence from six putative class members" is therefore false.

Third, since Plaintiffs have not sought to prove their case statistically, through six class member affidavits or otherwise, Defendant's expert report is completely inapposite to class certification. Defendant summarizes Baker's report in a single paragraph, claiming it shows that "Plaintiffs' proffered anecdotal evidence, even if it includes [hypothetical future declarations from 18 women disclosed in Plaintiffs' Initial Disclosures], is 'far too imprecise to be used by the fact-finder to make the class-wide liability decisions in this case'...[the evidence] yields margins of error at the 95% confidence level ranging from" one percentage to another. Def. Mem. 34. But the expert report of Louise Fitzgerald, Ph.D., Professor Emeritus of Psychology and Gender and Women's Studies at the University of Illinois at Urbana-Champaign, explains why Baker's conclusions are simply irrelevant:

> ….As a research psychologist who has conducted thousands of statistical analyses over a period of some 30 years, I appreciate and agree with Dr. Baker's statement that in order to arrive at statistically valid conclusions about a population, it is necessary to randomly sample from that population in sufficient numbers to produce stable estimates within a narrow margin of error and sufficient confidence of accuracy.
>
> What Dr. Baker ignores is that plaintiffs are NOT offering statistical evidence. Dr. Baker characterizes class counsels' proffer of evidence as a "non-random sampling proposal"; it is no such thing. Rather, it constitutes a proffer of anecdotal evidence, explicitly recognized and accepted as such by Judge Strand....

> ….Dr. Baker carries her focus on the necessity of statistical proof to the point that she ignores the obvious: If there exists sound evidence of a company policy that (1) makes it virtually impossible to corroborate harassment allegations (e.g., the requirement for an eye witness or confession) and/or (2) systematically disadvantages accusers via company standard operating procedure (i.e., removing the accuse[r] from the truck once an allegation has been made), such evidence de facto precludes the need for sampling, because the entire population of drivers is affected by this policy....in fact, testimony from even a small number of class members concerning the existence of company-wide policies (not to mention corroborating testimony from the defendants' 30(b)(6) witness), can prove the existence of policies which affect all class members.
>
> ….It is my professional opinion that Dr. Baker's opinions – however statistically accurate they may be – are irrelevant and off the mark, and her report misses the point.

D-App 75-76, Expert Report of Louise Fitzgerald, Ph.D. (emphasis added). As Dr. Fitzgerald aptly explained, a report deeming Plaintiffs' evidence "statistically insignificant" is meaningless when Plaintiffs have not purported to offer any statistical proof. And particularly on this motion, where liability is not at issue and the anecdotal evidence originally submitted in class certification briefing was already held to be sufficient to meet the requirements of Rule 23, a hypothetical discussion of how liability could or could not be proven statistically is even further off base.

Because Plaintiffs have shown that the voluminous evidence they have submitted (not limited to six declarations) satisfies the Rule 23 standard, and because Baker's report is entirely inapposite to that issue, Defendant's request for the Court to reverse itself on class certification should be denied.

c) Defendant has made no new argument concerning the EEOC litigation

Finally, Defendant has pointed to a different litigation, *CRST Van Expedited, Inc.*, 611 F.Supp.2d 918 (N.D. Iowa 2009), in which CRST was the defendant, arguing that a judge found there was nothing in the record of that case showing CRST's "failures were part of a pattern or a practice of tolerating sexual harassment[.]" Def. Mem. 31-32.[20] But Defendant made the exact

[20] Defendant intersperses this argument with argument about statistical evidence and Baker's

same argument at class certification, and the Court directly addressed and rejected it:

> [CRST] points out that this court previously dismissed a contention that CRST maintained a "'standard operating procedure' to tolerate sexual harassment." *CRST Van Expedited, Inc.*, 611 F.Supp.2d at 952. CRST's argument misconstrues the nature of plaintiffs' claims. Individual instances of harassment are not at issue here, as they were in the prior case. Plaintiffs' Hostile Work Environment Class seeks to prove that CRST maintains an objectively hostile work environment by way of the three identified policies.

Dkt. 85 at 52-53. Not only are the claims at issue here different from the ones in the EEOC litigation, but the evidence in the record in each case is completely different: as only one example, the EEOC did not present evidence that removing women from their trucks in response to a sexual harassment complaint resulted in a loss of pay. *See EEOC v. CRST Van Expedited, Inc*., 1:07-cv-00095-LRR, Doc. 197 (April 30, 2009).[21] The Court plainly could not rule on the question whether such a loss of pay was retaliatory in the EEOC litigation, since that question was never presented in the first place. Since Defendant's argument concerning the EEOC litigation was already considered and rejected by the Court, and since in any event that litigation involved completely different issues, Defendant has failed to show that the evidence in the instant case does not satisfy the requirements of Rule 23.

C. THE CLASS IS MANAGEABLE AND ISSUE CERTIFICATION IS APPROPRIATE

Defendant makes no argument that the classes fail to satisfy the superiority requirement of Rule 23(b)(3) that is independent from its arguments against commonality and predominance, discussed *supra*. *See* Def. Mem. 38 ("As discussed above, individual questions will predominate over any common questions....[that] makes the superiority requirement more difficult to meet.").

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report, but the connection between the two topics is somewhat murky. Plaintiffs' understanding is that Defendant intends to imply that the EEOC litigation foreclosed Plaintiffs' ability to prove this case through anecdotal evidence alone, and that statistical evidence is therefore required, even though that is inconsistent with settled law. *See Catlett, supra*.

[21] Indeed, during the time period at issue in the EEOC litigation student drivers were paid under a completely different scheme than the one at issue in this case. *See Id*. at 36 (explaining trainee drivers earned a flat rate).

Once again, Defendant asks the Court to reverse itself on this issue without showing that any new facts or doctrine justify that request, and therefore its motion should be denied. See *Day*, 827 F.3d at 832. (where notice to class had been approved, and where "the employees addressed the objections that [defendant] raised and [defendant] did not file any additional objections[,]" holding "principles of fair adjudication require [defendant] to provide good reason before the district court revisits the issue [of class certification]").

1. The classes are manageable

Manageability will "rarely, if ever, be in itself sufficient to prevent certification of a class." *Campbell*, 253 F.R.D. at 605, *citing Klay v. Humana, Inc*., 382 F.3d 1241, 1272 (11th Cir. 2004). Defendant's manageability argument is simply the assertion that individualized issues predominate over common questions, which it contends would result in "try[ing] the claims at issue through hundreds of mini-trials[.]" Def. Mem. 38. For the reasons already discussed *supra*, that is false. It is also the same argument Defendant made in its original resistance to class certification, which the Court has already considered and rejected. *Compare* Dkt. 55 at 67 (arguing that "[t]he divergent nature of internal complaints of sexual harassment and the scope of alleged injuries will result in little to no overlap in proof of putative class members' claims here") *with* Dkt. 85 at 48 (rejecting Defendant's argument and holding that "[c]lass resolution of [the liability] issues will promote efficiency because the evidence offered in support of liability as to each class will need to be presented only once."); *compare* Dkt. 55 at 66 (arguing in resistance to class certification that "[t]he circumstances [in this case] are comparable to those in *Elkins*") *with* Dkt. 169-2 at 38-39 (citing *Elkins* in the instant Motion to argue that class certification here "does not streamline proceedings").

Plaintiffs' evidence of Defendant's policies that created a hostile work environment will prove the common liability question for all class members: whether or not Defendant maintained

these policies which created a hostile work environment for female drivers. It is vastly more efficient to address the liability question for all class members than it would be to conduct nearly three hundred separate litigations seeking to resolve the same issue, and it poses far less risk of inconsistent rulings. *See Scott v. Aetna Servs*., 210 F.R.D. 261, 268 (D. Conn. 2002) (finding class action is superior because, inter alia, it "would eliminate the risk that the question of law common to the class will be decided differently in each lawsuit").

Oddly, Defendant also points to Phase II of *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997), implying that those proceedings were excessively lengthy ("and that was just to resolve sixteen class member claims[,]" Def. Mem. 39), evidently in an effort to show that Plaintiffs' class action is unmanageable. This is illogical: first, the instant Classes have been certified only for Phase I of this case, so there is no manageability question posed as to Phase II. Second, Defendant is simply proving Plaintiffs' point: if Defendant asserts that adjudication of individual damages claims in Phase II will be time-consuming, it is plain that additionally adjudicating each and every liability claim separately, instead of on a class basis, would multiply the time consumed by these proceedings hundreds of times over. The comparison to *Jenson*—which was held to be a manageable class action—merely underscores the superior nature of class treatment of this case. *See also Markham v. White*, 171 F.R.D. 217, 224 (N.D. Ill. 1997) (finding class treatment of hostile work environment claims superior and holding that "[r]equiring each class member to bring a separate action would require repetition of largely the same evidence as to [defendants'] conduct. Subjecting the class members, [defendants,] and the federal courts to separate lawsuits would needlessly waste everyone's time and money").

2. Issue certification is appropriate

Defendant's argument that the Court should reverse its certification of a series of specific issues pursuant to Rule 23(c)(4)(A) is, again, conclusory and repetitive: it merely argues that the

issues should be de-certified "for the reasons outlined above" regarding manageability. Def. Mem. 39. Its only support is a citation to *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008)--the same case Defendant already cited and discussed at length in its resistance to Plaintiff's original motion for class certification. *Compare* Dkt. 169-2 at 39 (arguing based on *St. Jude* that issue certification is inappropriate because of predominance of individual issues) *with* Dkt. 70 at 55 (same). For all the reasons discussed *supra*, and because Defendant has made no new argument that justifies reconsidering the Court's decision, issue certification is appropriate and Defendant's motion should be denied.

D. THE HOSTILE WORK ENVIRONMENT CLASS IS ASCERTAINABLE

Once again seeking reconsideration of this Court's Orders with no new grounds, Defendant argues that the hostile work environment class is a fail-safe class and is not ascertainable. Def. Mem. 40-42. Defendant made the same argument in opposition to Plaintiffs' request to send notice to the class. *See* Dkt. 101 at 14[22] ("Plaintiffs' failure to identify class members and their proposed two-phase trial creates an impermissible fail-safe class. Were the Court to proceed with a bifurcated trial, Plaintiffs propose somehow determining liability in Phase I and determining individual entitlement to relief in Phase 2. In effect, Plaintiffs propose impermissibly delaying determination of class membership until after resolution of the class liability."). The Court explicitly considered, and rejected, Defendant's ascertainability argument in its Order granting class notice:

> ….Plaintiffs are not required to identify every possible class member who is entitled to damages at this time. As plaintiffs note, CRST is essentially attempting to re-litigate the issue of class certification by arguing the class is not ascertainable. Notably, ascertainability is not a Rule 23(a) requirement. Moreover, I addressed CRST's concerns regarding the subjective component of a hostile work environment claim by finding that the classes could be certified only as to the liability question in Phase I and that individual

[22] Since Defendant's ascertainability arguments are unchanged from those it made in the joint filing regarding class notice, and to avoid burdening the Court with repetitive briefing, Plaintiffs respectfully refer the Court to, and incorporate, their own arguments and citations in that same filing, set forth in Dkt. 101 at 11-12.

> class members would be required to prove in Phase II that they (1) subjectively perceived the work environment to be hostile and (2) suffered damages....
>
> At this stage, plaintiffs are not required to determine whether individual class members meet the subjective criteria and can prove damages. The purpose of Phase I is to resolve the certified issues with respect to each class regarding liability....The PWE charts are the best resource for identifying class members at this time. While that list may be over-inclusive, the notice accounts for that....Of course, each individual's class eligibility may be verified at Phase II.

Dkt. 104 at 9-10 (emphasis added). Since Defendant has no new basis for its ascertainability argument and is merely reiterating arguments already rejected, its motion to de-certify the class as "not ascertainable" should be denied on this basis alone. Moreover, as the Court explained in its Order granting class notice, some of the women who received class notice may not ultimately be entitled to damages at Phase II; therefore, contrary to Defendant's "fail-safe" argument, this case is exactly the opposite of a situation where the class is comprised of "*only* those who are *entitled* to relief[.]" Def. Mem. 41, *quoting Young v. Nationwide Mut. Ins. Co*., 693 F.3d 532, 538 (6th Cir. 2012) (class definition acceptable where it included "both those entitled to relief and those not").

For the reasons set forth by the Court, *supra*, the class definition does not constitute a fail-safe class, and Defendant's motion to de-certify on this basis should be denied. Plaintiffs contend that no alteration to the class definition is necessary. Nonetheless, should the Court find that it would be useful to add to the class definition for specificity or for some other reason, Plaintiffs suggest that adding a phrase specifying that the women included in the class are those who "have made a documented complaint" to CRST would eliminate any purported (and meritless) ascertainability argument by Defendant while changing nothing substantively about the class: it aligns with the list of women who have received notice, since notice has been based upon Defendant's own records of sexual harassment complaints it received; it does not alter any aspect of the Court's Rule 23 analysis since it refers to the same group of women whose

experiences and evidence have already been considered throughout this case in assessing numerosity, commonality, and the other requirements; and as does the current definition, it includes both those who are and those who may not be entitled to relief in the form of Phase II damages. Since Defendant's ascertainability argument is meritless, Plaintiffs emphasize they do not concede nor suggest that any such addition is necessary or even helpful, but merely provide this option should the Court find it useful.

E. DEFENDANT MAKES NO BONA FIDE ARGUMENT TO DE-CERTIFY THE RETALIATION CLASS

Concurrently with the instant Motion, Defendant filed a Motion for Partial Summary Judgment solely directed to the class retaliation claim. *See* Dkt. 171. In the instant Motion, it merely states without support that Plaintiffs' "retaliation claim is without merit" for the reasons alleged in the summary judgment papers, and that therefore "there can be no Retaliation Class." Def. Mem. 43-44. This is not a bona fide argument to de-certify the Retaliation Class—it is simply an attempt to apply the summary judgment standard to a de-certification motion. Defendant has failed to address the Rule 23 standard whatsoever, and its request to de-certify the Retaliation Class should be denied for that reason alone.

Significantly, Defendant actually admits class treatment is entirely appropriate on the retaliation claim. Whereas when Plaintiffs moved for class certification Defendant opposed their motion claiming that "individual circumstances determine who gets off the truck and who stays[.]" Dkt. 85 at 26 (as summarized by the Court), and that "[i]f and how CRST [separates drivers] depends upon practical circumstances that cannot be reduced to a single policy and will vary among the putative class members[,]" Dkt. 55 at 48 (in Defendant's own briefing) (emphasis added), now Defendant has reversed course, and finally concedes that it maintains exactly the policy Plaintiffs have alleged from the start: it removes women from their trucks in response to sexual harassment complaints (which deprives them of pay). See Def. Mem. 43

(admitting that "Plaintiffs' alleged 'retaliation' claim is based on a practice that CRST actually has. CRST....remove[s] an individual who complains of sexual harassment" from her truck in response to her complaint) (emphasis added). Plainly, where Defendant finally admits after years of litigation that it actually engages in the policy that it previously denied and that Plaintiffs have alleged all along, the requirements of Rule 23 are satisfied.

Plaintiffs address Defendant's liability arguments concerning the Retaliation Class in their Opposition to Defendant's Motion for Partial Summary Judgment, Dkt. 184, and will solely and briefly note here that Defendant's claim in the instant Motion that "the Eighth Circuit has explicitly endorsed this practice[,]" of removing women from their trucks and cutting their pay in retaliation for making sexual harassment complaints, is simply untrue. Def. Mem. 43. The decision cited by Defendant was not based upon a factual record of CRST leaving women wholly unpaid, or cutting their pay, in connection with removing them from their trucks in response to a harassment complaint. *See EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 693 (8th Cir. 2012). There is a vast chasm between a factual scenario where an employee is suspended with full pay for lodging a Title VII complaint, and one where an employee is suspended without pay for the same thing—and the Court in the EEOC litigation, *supra*, was never presented with the latter fact pattern. The Eighth Circuit has never ruled on the question at issue in Defendant's Motion for Partial Summary Judgment, and the EEOC litigation certainly provides no justification to de-certify the instant action.

Because Defendant has made no showing that the Retaliation Class fails to satisfy Rule 23, and additionally for all the reasons set forth in Plaintiffs' Opposition, Dkt. 184, Defendant's request to de-certify the Retaliation Class should be denied.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to De-Certify the classes should be denied.

Dated: July 27, 2018

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CERTIFICATE OF SERVICE

I hereby certify that today, July 27, 2018, I served the foregoing Response in Opposition to Defendant's Motion to De-Certify by filing on ECF, which transmits notice to all counsel of record.

Dated: July 27, 2018

_____/s/ Giselle Schuetz_____
By: Giselle Schuetz