IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

CATHY SELLARS, CLAUDIA LOPEZ and LESLIE FORTUNE, On behalf of themselves and all others similarly situated,	)	**No. 1:15-cv-00117-LTS**
Plaintiffs,	)	**DEFENDANT'S RESISTANCE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**
vs.	)	
CRST EXPEDITED, INC.,	)	***FILED UNDER SEAL***
Defendant.	)	

Defendant CRST Expedited, Inc. submits the following resistance to Plaintiffs' Motion for Class Certification.

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I. Introduction

With apologies to Tolstoy, all happy trucks are alike; each unhappy truck is unhappy in its own way. The Plaintiffs struggle to identify either common facts or law, let alone "policies, patterns, or practices" susceptible of a "common answer" illustrates nothing so much as the frustration of jamming a square peg into a round hole.

The starting place for examining Plaintiffs' theory is the massive, failed government prosecution which concluded that CRST did not brook sexual harassment as a "standard operating procedure." *E.E.O.C. v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918, 952 (N.D. Iowa 2009). The conceit of the Plaintiffs' attempt to revive the theory abandoned by the EEOC involves a supposition at the outset that the 125 claimed reports of violations of company policy (or law) each: a) Had merit; b) Were not resolved by application of the company's successively enhanced prevention and remediation efforts; c) Where meritorious required a uniform response; and, d) Resulted in common harms, despite the necessarily unique aspects of each report. Understandably, the Plaintiffs would prefer to catapult

themselves past these messy questions and impose a construct upon CRST which, effectively, assumes liability.

Indeed, "[s]exual harassment pattern or practice cases are special." *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 934. Title VII bars disparate treatment—intentional discrimination "with respect to…terms, conditions, or privileges of employment, because of…sex." 42 U.S.C. § 2000e-2(a)(1). The law of sex harassment is an outgrowth of this statutory proscription, refined successively through the decisions in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (introducing the concept of the hostile working environment), *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (clarifying the elements of such an environment, including both the objective and subjective perception of the underlying conduct), and culminating in the 1998 decisions of *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), which continue to guide and control courts' application of Title VII to individual claims of sex-based harassment.

The Plaintiffs' approach is to rush ahead to the final, remedial element of the *Faragher-Ellerth* paradigm. They grab what is traditionally an affirmative defense out of CRST's hands by asserting purported policies as the basis for liability. In so doing, Plaintiffs neglect to observe that the applicability and effect of CRST's preventive and remedial efforts depend on each set of circumstances. Moreover, they overlook the central core elements of liability (an objectively and subjectively sexually offensive environment) as they must in order to achieve even a modicum of commonality among the 1750 mobile workspaces at CRST. This is not a step easily skipped.

The Plaintiffs seek to boldly go where no plaintiffs have (successfully) gone before by grafting a variant of the *Teamsters* model for proving disparate treatment of a protected class of individuals onto the substantive proscriptions of highly individualized harassment law. This bad fit is made worse with Plaintiffs' leap past proof of sufficiently common underlying actionable conduct to their preferred imposition of a slew of remedies to a heterogenous array of supposed wrongs. In attempting to impose social or industrial engineering upon this private employer's workplace, Plaintiffs ask the court to do exactly what this court has long been loathe to do: Serve as a "super personnel council," second guessing the employer's efforts to balance the need to operate its enterprise with its need to comply with the law.

Especially given this highly individualized variant of sex discrimination, in the 1750 diffuse workspaces operated by CRST, Plaintiffs are unable to establish to the standards of Rule 23 sufficient commonality or typicality to warrant certification of a class. The relative rarity of the occurrence of even reported misconduct of the sort claimed by the named Plaintiffs, the wildly varying nature of the conduct (when reported), and array of remedies to fit the individual situation all militate against the notion that collective, rather than individual, adjudication is most efficient. Operating on the fringes of the substantive and procedural law, and lacking the glue to hold their claims together, Plaintiffs would set this Court out on an experiment fraught with practical and Constitutional impediments that make a class proceeding inferior.

II. Background

A. CRST is a Gateway into Commercial Trucking, Particularly for Women

The trucking industry has a chronic driver shortage, which produces both competition for qualified drivers and turnover at rates not experienced in most other labor markets. The industry also has a chronic gender imbalance. CRST is one of the few "training companies"—enterprises which serve as a gateway to the industry for those not already in it and for women in particular. CRST facilitates training of approximately 4000 people annually at its initial expense. Licensure to earn a good living the balance of their working lives comes at the price and obligation to CRST for less than a year.

CRST's business niche is expedited freight. CRST has more than 3,500 drivers on the road at any one time and operates the transportation industry's largest fleet of team drivers. (*See* Defendant's Appendix in Support of Resistance to Plaintiffs' Motion for Class Certification, filed herewith, ("D-App.") 1, Declaration of Chad Brueck, ¶3). Team driving permits CRST to make deliveries faster than its competitors, because two drivers working together are able to make deliveries faster than one driver working alone. (Id.) A single CRST truck is capable of operating as many as twenty-two hours in a day. (Id.) Being a member of a two-person driving team for CRST presents unique working conditions.[1] (Id.) As a team driver, each driver spends the vast majority of every day in a semi-tractor with a single co-worker. (Id.) The tractor cab is a combination driving/living compartment, consisting of two front seats and a sleeping berth area with two bunk beds. (Id.) Depending

[1] As noted by Chief Judge Linda R. Reade in her April 30, 2009 Order granting CRST's motion for summary judgment on the EEOC's pattern or practice claim and dismissing such claim with prejudice, "CRST's drivers share more in common with astronauts, submariners or lighthouse watchmen than they do with the average office worker." *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 940.

on freight availability and other logistical factors, team drivers may be out on the road for long stretches of time. (D-App. 1-2, Brueck Declaration, ¶3).

Driver turnover rates in the over-the-road transportation industry reach approximately 165% annually. (D-App. 2, Brueck Declaration, ¶4). Given the difficulty posed by the labor market in hiring experienced drivers, CRST focuses on hiring entry-level drivers and offers both in-house and third-party training opportunities. (D-App. 5, Declaration of Laura Wolfe Declaration, ¶4). To keep pace with labor demands and turnover, CRST's goal is to hire 7,000 drivers per year. (Id.)

CRST is three to four times more successful than the industry average in attracting and retaining women as drivers.[2] As of August 23, 2016, 2016, CRST employed 447 female drivers out of 3725 total drivers (12%). (D-App. 12, Declaration of Angela Stastny, ¶17). CRST has taken measures aimed at recruiting female drivers. For instance, in June 2014, CRST placed an advertisement promoting job opportunities and a sign-on bonus in the industry magazine *Team Drivers & Women in Trucking*. (D-App. 13-14).

B. CRST Ensures its Student Drivers are Sufficiently Prepared

CRST does not just send newly licensed drivers out on the road. For their good, CRST's good, and the good of the motoring public, the company requires (though the federal law does not) that new drivers observe experienced drivers, and gain experiences, for approximately one month (24 to 28 days depending on the number of miles logged during this time) before pairing with co-drivers of their own choosing. Upon a "new" driver obtaining their CDL and successfully completing CRST orientation, the "student driver" is

[2] As of April 2009, CRST's driver population was 14% female which, given the availability of women in the relevant labor market, was "more than three times as many female drivers as an expert would predict." *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 941.

paired with a more experienced "lead driver." (D-App. 6, Wolfe Declaration, ¶9). The goal of this over-the-road training period is to increase the overall skill of the CRST driving force and prevent accidents. (Id.) It is rare that a student driver spends her entire training period working with the same lead driver. (D-App. 6, Wolfe Declaration, ¶10). For example, a lead driver may go on home time, the truck may need to go in the shop for maintenance, or a student driver may request to be paired with a new lead driver. (Id.)

Multiple factors may impact the actual length of a student driver's over-the-road training period. (D-App. 6, Wolfe Declaration, ¶11). Unforeseen mechanical failure or a lack of freight/load, lead driver home time, or a complaint requiring pairing with a new lead driver may result in some delay. (D-App. 6-7, Wolfe Declaration, ¶11). However, depending on number of days and the number of miles the student driver has driven, the Driver Manager and Safety Department may decide to promote that student to co-driver status. (D-App. 7, Wolfe Declaration, ¶11). Every case is handled on an individual basis. (Id.) Unless a driver's training period is extended beyond 90 days (which no one has alleged or substantiated), there is no economic detriment to a "student driver" designation versus a "co-driver" designation. (D-App. 7, Wolfe Declaration, ¶12). Upon the completion of her over-the-road training period, a student driver is elevated to "co-driver" status. (D-App. 7, Wolfe Declaration, ¶13). Today, there are 54 females out of 617 total student drivers (9%). (D-App. 7, Wolfe Declaration, ¶14).

Lead Drivers are screened based on their driving and employment record for issues such as accidents, unsafe driving, and to determine whether the candidate has a gender-specific driving preference indicated in his/or her driver file. (D-App. 7, Wolfe Declaration, ¶15). A candidate wishing to become certified as a lead driver must also complete a day and

a half long lead driver certification class, including specific training on CRST's policy prohibiting sexual harassment in the workplace.[3] (D-App. 7, Wolfe Declaration, ¶¶16-17). CRST's lead driving training class was modified in 2013 and again in 2016 to provide for additional PWE and conflict management training. (D-App. 8, Wolfe Declaration, ¶19). There are between 525 to 600 certified Lead Drivers working for CRST at a given time. (D-App. 8, Wolfe Declaration, ¶20). There are currently 23 female lead drivers of 531 total lead drivers (4%). (Id.)

CRST has also implemented a Senior Lead Program, which was designed to provide tenured lead drivers with additional training on prohibited harassment, conflict resolution and training techniques. (D-App. 8, Wolfe Declaration, ¶21). Current data reveals that senior lead drivers have experienced results ranging from 10% to 24% more success in completing the training of their assigned students. (D-App. 8, Wolfe Declaration, ¶22). Of the 12 current senior lead drivers, one is female (8%). (Id.)

C. Driver Pairing Assignments

The industry gender imbalance, and the law, obligate CRST to necessarily pair men with women.[4] *See* (D-App. 2, Brueck Declaration, ¶5) (stating that CRST has a gender-

[3] CRST refers to this type of training as "PWE" training, which stands for **P**ositive **W**ork **E**nvironment. As set forth herein, CRST provides PWE training throughout its organization on a regular and ongoing basis.

[4] In previous cases against trucking companies that had adopted same-sex team driver policies, the EEOC investigated, threatened suit and sought punitive damages. *See EEOC and Clouse v. New Prime, Inc.*, No. 6:11-cv-03367 MDH (W.D. Mo.). In 2014 a federal judge ruled that New Prime, Inc. engaged in a pattern or practice of unlawful gender discrimination law by requiring that female truck driver applicants be trained only by female trainers. In May 2016 New Prime was permanently enjoined from engaging in this practice and the court ordered that New Prime shall not implement a same-sex trainer policy. In June 2016 the EEOC announced that New Prime agreed to pay over $3.1 million to settle the matter.

neutral policy with respect to its driver teams). To fail to do so would serve as an unnecessary bar to women entering the industry. In addition to being discriminatory in violation of law, it would exclude virtually half of the eligible work force in a labor market facing chronic shortages.

Numerous mechanisms exist to successfully match drivers. CRST employs a Student Coordinator whose job it is to assist and support pairing student drivers with lead drivers. (D-App. 2, Brueck Declaration, ¶5). The Student Coordinator assists and supports student/lead driver pairings in all CRST terminals. (Id.) Lists of available co-drivers names and numbers are present at all CRST terminals; they are accessible on the truck; and they are available from Driver Managers. (Id.) CRST also hosts "meet and greet" sessions regularly at its terminals to allow drivers to interact and find compatible co-drivers. (Id.) Lists of available drivers can also be found on CRST's Facebook page. (Id.)

Once a driver pairing is made and the team is assigned a Driver Manager, drivers can work with their Driver Manager to request a new driver (whether student, co or lead). (D-App. 2, Brueck Declaration, ¶6). Student drivers can request to be paired with a lead driver of a certain gender and those requests will be honored. (Id.)

D. Driver Pay is Measured Based on Duration of Experience

CRST pays drivers on a per mile basis. (D-App. 2, Brueck Declaration, ¶7). For new drivers, one of three pay schedules applies depending on whether the driver has a license and prior experience; a license and no prior experience; or a license obtained through CRST-funded training and no experience. (Id.) Irrespective of which class the driver fits in, pay increases are triggered based on the length of service with CRST measured according to calendar dates. (D-App. 2-3, Brueck Declaration, ¶7). Under the pay schedules effective on

and after October 15, 2013, a student driver's pay rate increases one cent per mile following completion of three months of service. (D-App. 3, Brueck Declaration, ¶7). To qualify, the student driver must be released to the status of co-driver. (Id.) Nonetheless, the training program only lasts up to 28 days, so there is a negligible chance of a driver remaining active at CRST and failing to have his or her skills evaluated by the time three months have lapsed. (Id.)

E. Driver Managers

All driving teams, regardless of the status of the drivers, are supervised by a Driver Manager.[5] (D-App. 3, Brueck Declaration, ¶8). Driver Managers are based in Cedar Rapids, Iowa, so communication occurs via phone, email, and Qualcomm messaging. (Id.) CRST analyzes Driver Managers objectively and subjectively. (D-App. 3, Brueck Declaration, ¶9). Quantitative criteria in evaluating Driver Manager performance include: production (miles completed relative to number of trucks); number of trucks in service on a daily basis; driver retention; on-time delivery; safety performance (accidents per million miles); and cost management (expenses per million miles). (Id.) These measures are often interrelated. (Id.) For instance, if a Driver Manager must separate drivers, production might be slightly less than it otherwise would have been, but the equally weighted element of driver retention could be expected to improve as a result of the attentiveness to a driver's needs. (D-App. 3-4, Brueck Declaration, ¶9). Qualitatively, Driver Managers benefit from safety compliance that transcends collision metrics; extra time and effort; completion of special projects; and any other factors that cannot be reduced to numbers. (D-App. 4, Brueck Declaration, ¶9).

[5] Driver Managers are more generally referred to or thought of as "dispatchers" and have previously been referred to as "Fleet Managers" at CRST.

Ultimately, however, Driver Managers must comply with their obligations, such as sexual harassment reporting, or they are subject to suspension or termination. (Id.)

F. CRST Prohibits Sexual Harassment

CRST does not have a standard operating procedure of allowing sex based harassment (or retaliation). To the contrary, it strives to have one of the most thorough programs in the industry in existence to prevent, encourage the reporting of, and remediate such conduct. CRST has a written policy prohibiting sexual harassment in its workplace, as well as prohibiting other forms of unlawful employment discrimination and retaliation.[6] CRST's policy is set forth both in a handbook which is distributed to all drivers; as well as in a separate handbook which is distributed to all office/administrative employees, including Driver Managers. (D-App. 16-21, 30-33, Excerpts from CRST's Driver and Office Employee Handbooks). CRST's written policy regarding Unlawful Discrimination and Harassment (Positive Work Environment) states that CRST "prohibits sexual harassment"; provides that those who report it "will NOT be subject to ANY form of retaliation"; sets forth a complaint procedure; and charges personnel with reporting responsibilities. (Id.) CRST's Code of Business Conduct and Ethics also addresses sexual harassment in the workplace:

> [T]he work environment must be free of any form of discrimination and conduct which may be considered harassing, disruptive or intimidating. Harassment based on sex . . . is strictly prohibited. All instances of harassment in any form are to be reported immediately to the appropriate Supervisor or the Human Resources Department.

(D-App. 23-24, 36, Excerpts from CRST's Driver and Office Employee Handbooks).

[6] CRST's policy has only improved since Chief Judge Linda R. Reade found in her April 30, 2009 Order granting CRST's motion for summary judgment on the EEOC's pattern or practice claim that CRST had a facially valid anti-sexual harassment policy. *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 952. Compare CRST's current anti-harassment policy (D-App. 16-21) with the policy cited in Judge Reade's Order (D-App. 25-28).

CRST implements these procedures from its headquarters in Cedar Rapids, Iowa, where it directs all of its transportation operations; develops and implements company policy and protocol; and maintains personnel files, payroll data, trip inquiries, Qualcomm messages, and other employment and operational information. (D-App. 4, Brueck Declaration, ¶10). CRST's Human Resources, Safety, and Payroll Departments are all located at its Cedar Rapids headquarters. (Id.)

G. CRST Trains Extensively on Sexual Harassment Prevention and Enforcement

New drivers, lead drivers, and Driver Managers are subject to extensive efforts to reinforce prevention, reporting, and remediation of sexual harassment. (*See* D-App. 5-6, Wolfe Declaration, ¶¶5-8) (describing driver orientation where CRST's sexual harassment policy is distributed and acknowledged); D-App. 6, Wolfe Declaration, ¶6; *see also e.g.* D-App. 94, 122, 165, 206, 270, 290, 317 (policy acknowledgements); D-App. 59, Carlson Dep. p. 136:1-5 (describing video presentations entitled "CRST Harassment Prevention and Reporting for Drivers" and "In This Together" presented to new drivers); D-App. 42, Carlson Dep. p. 18:4-7 (describing distribution of business cards with reporting phone numbers); D-App. 6, Wolfe Declaration, ¶8 (describing specialized training for lead drivers to re-emphasize policy prohibiting sexual harassment and other forms of unlawful discrimination in the workplace, including video entitled "CRST Harassment Prevention and Reporting for Lead Drivers"); D-App. 55, Carlson Dep. p. 121:14-16 (describing annual sexual harassment training for Driver Managers); D-App. 55, Carlson Dep. p. 121:20-22 (describing periodic, additional training for Driver Managers to reinforce the importance of timely and appropriate responses to sexual harassment allegations throughout the year)).

CRST also advertises its sexual harassment policies internally. CRST displays posters at all company locations[7] that include information about federal equal employment opportunity law and CRST's policy against sex discrimination, including sexual harassment and unlawful retaliation. (*See e.g.* D-App. 68, photograph of posters). The postings at terminals provide information on "ReportLine," a toll-free phone number employees may call 24 hours a day, seven days per week to report any manner of unprofessional, illegal and unethical behavior, including sexual harassment. (Id.; *see also* D-App. 9-10, 54 Stastny Declaration, ¶6; Carlson Dep. pp. 116:19-25, 117:19-24). In addition, CRST publishes newsletters, memoranda and other materials that reiterate and reinforce its sexual harassment policies. (D-App. 10, Stastny Declaration, ¶7). Going back to 2012 and before, the Human Resources Department sends all drivers a copy of CRST's sexual harassment policy via Qualcomm on a quarterly basis. (D-App. 10, Stastny Declaration, ¶8). Starting in 2015, CRST began sending periodic Qualcomm messages emphasizing its expectations concerning sexual harassment along with reminders as to how drivers can report complaints and the applicable phone numbers. (D-App. 46, Carlson Dep. pp. 40:21-41:3). The CRST sexual harassment policy and various reporting mechanisms are also posted on the driver pay site, where drivers access and view their twice-weekly pay statements. (D-App. 46, Carlson Dep. pp. 40:21-41:10).

H. Reporting Sexual Harassment

Multiple avenues exist for CRST drivers to report sexual harassment. (D-App. 51, 59, Carlson Dep. pp. 101:4-15, 25, 102:1-3, 136:7-10). Redundancies exist in an effort to

[7] As noted above, in addition to its location in Cedar Rapids, Iowa, CRST has terminals in Carlisle, Pennsylvania, Riverside, California, and Oklahoma City, Oklahoma and Jacksonville, Florida. (D-App. 4, Brueck Declaration, p. 4).

support CRST's efforts to root out and remedy sexual harassment and other unlawful employment practices in its workplaces. (D-App. 9, 59, Stastny Declaration, ¶9; Carlson Dep. p. 136:7-10); *see also* D-App. 71, Mara Dep. p. 16:18-21) (describing instant messaging through the Qualcomm system on trucks); D-App. 49, Carlson Dep. pp. 72:12-73:5 (stating that Driver Managers routinely provide their personal cell phone numbers to their drivers); D-App. 54, 60, Carlson Dep. pp. 116:19-24, 138:19-24 (stating that drivers may call an Operations Manager, who supervises Driver Managers); D-App. 54, Carlson Dep. p. 117:1-4 (stating that a call to CRST's main number reporting a potential sexual harassment situation will be routed immediately to Human Resources)). If a driver making a complaint does not receive an immediate response via one reporting mechanism, she may utilize another resource and work her way up CRST's chain of command.[8] (D-App. 17, 19-21, Excerpts from Driver Handbook); (D-App. 41-42, 54, Carlson Dep. pp. 17:4-19:4, 117:4-19) (stating that CRST operates an internal HR Hotline from 7:00 a.m. to 5:30 p.m. (central time) and has a HR email in-box HR@crst.com (which is in addition to ReportLine, described above)).

CRST maintains an open door policy. Drivers at CRST's Cedar Rapids terminal may visit the Human Resources Department in person and speak to any member of the Human Resources Team, including Vice President of Human Resources Brooke Willey. (D-App. 10, 40, Stastny Declaration ¶10; Carlson Dep. p. 10:10-21). Drivers at CRST's other terminals may report concerns to any management employee who, in turn, has been trained to forward any such complaint immediately to CRST's Human Resources Department. (D-App. 54-59, Carlson Dep. pp. 116:22-117:4, 121:25-122:2, 128:14-18, 132:8-13, 137:21-24).

[8] As set forth in Plaintiffs' brief, Cathy Sellars' complaint was ultimately elevated to and resulted in personal and/or telephonic meetings with CRST's top level executives.

Finally, student drivers are advised—and common sense dictates—that they should involve law enforcement as is warranted to ensure their personal safety and well-being. (D-App. 58, Carlson Dep. p. 130:4-13). Likewise, Driver Managers and Human Resources employees do not hesitate to involve law enforcement to maintain security of a driver's person and property. (D-App. 58, Carlson Dep. p. 130:14-25). Notably, despite Plaintiffs' references in pleadings and in court, incidences of "sexual assault" as reported to law enforcement are less than rare.

I. Responding to Sexual Harassment Complaints

CRST has developed a specific protocol for Driver Managers and other managers to follow upon receiving a complaint of sexual harassment. (D-App. 54-59, Carlson Dep. pp. 116:22-117:4, 121:25-122:2, 128:14-18, 132:8-13, 137:21-24). "Managers who become aware of any incidents or alleged incidents of discrimination or harassment must immediately report them to the Human Resources department representative." (D-App. 21, Excerpts from Office Employee Handbook). "Managers may not to try to resolve allegations of such behavior on their own." (Id.) "Any manager who fails to report allegations of discrimination or harassment may be subject to discipline, up to and including termination." (Id.)

The CRST Office Employee Handbook also sets forth specific procedures for supervisors when handling the complaints of drivers, who are almost always working in distant locations. (D-App. 31-32). Namely,

> the driver's responsible [driver] manager should determine whether the driver wishes to be removed from the situation, and if so, re-assign the driver to a new lead driver or co-driver as the case may be. The [driver] manager is to work with the Human Resources [D]epartment to arrange for the driver to make a statement of complaint.

(Id.)

On rare occasion, a Driver Manager or other supervisory employee has not immediately involved Human Resources and/or separated the team. Such instances were met with swift repercussions. For example, in September 2011, (then) Driver Manager [redacted] took immediate action to separate a team wherein a student driver complained of sexual harassment, but did not immediately involve Human Resources. (D-App. 10, Stastny Declaration, ¶11). He was given a three-day unpaid suspension for violating CRST's policy. (Id.) More recently, in December 2015, former Driver Manager [redacted] was terminated when it was discovered that he failed to promptly notify the Human Resources Department after being notified of a complaint of sexual harassment. (D-App. 10-11, Stastny Declaration, ¶11). Mr. [redacted] had received previous warnings for unsatisfactory performance. (Id.) In December 2015, [redacted] Terminal Manager for CRST's Riverside, California terminal, was terminated, when it was discovered that he had not followed CRST's policy in forwarding complaints of sexual harassment to Human Resources.[9] (Id.)

Driver Managers may arrange to move the complaining driver to the nearest safe location as soon as reasonably practical, even if the complaining driver indicates that she feels safe and does not need to be immediately extricated from the situation. (D-App. 53, 56-58, Carlson Dep. pp. 106:3-6, 122:12-16, 129:15-130:25). Driver Managers are authorized to arrange for hotel rooms or other lodging for the separated driver, as well as transportation and meal allowances. (D-App. 58, Carlson Dep. pp. 131:12-132:1). If the complaining driver wishes to be removed from the truck but does not feel she can safely do so, Driver Managers are trained and authorized to "manufacture" a scenario which would require the

[9] While there were additional reasons underlying Mr. [redacted] termination, his failure to report sexual harassment complaints was certainly a factor.

truck to stop at a terminal, or the nearest truck stop. (D-App. 11, Stastny Declaration, ¶12). For example, a Driver Manager may send a Qualcomm message to the truck that there is maintenance due on the truck, or that the Driver Manager has been contacted by the complaining driver's family and there is a personal/family situation necessitating her exit from the truck. (Id.)

J. Investigating Sexual Harassment Complaints

CRST's Human Resources Department logs every complaint[10] and immediately commences an investigation. (D-App. 51-53, Carlson Dep. pp. 101:23-107:8). If the complaint comes directly to Human Resources, the Driver Manager will be immediately advised and efforts will be commenced to safely separate the accusing driver from the accused. (D-App. 53, Carlson Dep. p. 106:1-5). Human Resources ensures the accuser has funds available to take care of her personal needs and takes steps to pair her with a new driver, where necessary. (D-App. 53, Carlson Dep. p. 106:6-10).

Pertinent records (Qualcomm messages, trip inquiries, student surveys, driver files, etc.) are gathered, a line of questioning is developed, and the accused is questioned. (D-App. 52, Carlson Dep. pp. 103:22-104:3). The investigator checks the PWE ER spreadsheet to discern whether the accused has been the subject of prior complaints. (D-App. 52, Carlson Dep. p. 104:4-19). The goal in investigating any harassment/discrimination complaints is to have an initial call made to the accuser within 24 hours of receipt of a complaint. (D-App. 52, Carlson Dep. p. 102:15-17).

Witnesses are interviewed and all other evidence considered. (D-App. 52, 61, Carlson Dep. p. 104:25-105:23, 148:9-19). If repeated attempts to contact the identified

[10] All employment related complaints are logged in what is internally referred to at CRST as the "PWE ER" chart or spreadsheet. "ER" in this context stands for "Employee Relations."

witnesses are unsuccessful, the investigator will send a letter requesting contact and cooperation with the investigation. (D-App. 61, Carlson Dep. p. 148:9-19).

If the accusations cannot be corroborated, Human Resources re-educates and reinforces to all parties CRST's policy prohibiting harassment by sending them copies of the policy via certified mail. (D-App. 53, Carlson Dep. pp. 106:11-107:8). The accuser is advised that the investigation has been completed and contact information is provided should she have questions or concerns going forward. (D-App. 53, Carlson Dep. pp. 106:23-107:1).

Even absent corroboration, an accused male driver will be changed to a "male only" team preference. Per CRST policy, a driver accused of sexual harassment is never re-assigned to drive with an accuser, even if the claim cannot be corroborated. (D-App. 50, Carlson Dep. p. 84:3-24). If founded, the accused driver will face disciplinary action up to and including termination. (D-App. 53, Carlson Dep. p. 107:1-8). The discipline meted depends on the individual circumstance, and may also involve (1) verbal warnings, (2) written warnings, (3) counseling sessions with Human Resources, Operations, Safety, and/or other personnel, and (4) removal of lead driver certification. (D-App. 20-21, 64, 67, Excerpts from Driver Handbook; Carlson Dep. pp. 169:9-170:1, 185:10-186:1).

A "male only" team preference designation[11] lasts indefinitely and can only be removed by CRST's Human Resources Department. (D-App. 65-66, Carlson Dep. p. 178:24-179:9). The male only designation is recorded in the driver database, known as the emulator system. (D-App. 66, Carlson Dep. p. 181:9-16). To avoid the possibility of human error, if a Driver Manager attempts to pair a driver with a NF designation with a female co-

[11] A "male only" designation is also and conversely referred to as a "no females" designation or "NF." (D-App. 65, Carlson Dep. p. 178:6-12).

driver, the system is programed to respond with an error message and reject the pairing. (D-App. 72, Mara Dep. p. 45:13-24).

If a lead driver is accused of harassment, it is CRST's policy to not pair that lead driver with another student pending the outcome of an investigation. (D-App. 67, Carlson Dep. pp. 183:25-184:18). Further, in investigating complaints involving lead drivers, former students are contacted and interviewed to determine the possibility of prior, unreported misconduct. (D-App. 52, Carlson Dep. p. 104:4-19). The investigation also involves a review of the lead driver's performance history and any prior student evaluations. (Id.)

K. Unique Circumstances Dictate When and How to Separate Drivers Following a Complaint of Sexual Harassment

While it may occur most frequently that the driver making the harassment complaint is removed from the truck, such is not a policy applied across by board by CRST, but rather depends on the individual circumstance. (D-App. 56, Carlson Dep. p. 122:9-22). If a student driver lodges a complaint against a lead driver, the student is removed from the truck because company policy prohibits student drivers from driving solo prior to the completion of their over-the-road training. (D-App. 56, Carlson Dep. p. 122:16-21). If a student driver lodges a complaint against a lead driver who is an owner/operator, then the student or co-driver is removed from the truck because it is the owner/operator who owns the truck. (D-App. 11, Stastny Declaration, ¶14). This also applies to a company/co-driver who lodges a complaint against an owner/operator. (Id.) If a lead driver complains that she was subject to harassment from a student driver, the student is removed from the truck per company policy, not the complaining driver. (D-App. 56, Carlson Dep. p. 122:16-19).

If a driver is removed from the truck to guarantee the driver's safety and facilitate a swift investigation, CRST makes every effort to pair and get the driver back on the road as soon as possible and appropriate. (D-App. 53, 56, Carlson Dep. pp. 106:3-10, 123:1-3).

Prior to July 2015, where a delay in the pairing and continuation of driving might exceed 48 hours, the complaining driver received layover pay of $40/day (assuming the complaining driver was located at a remote site and not at her home). (D-App. 12, Stastny Declaration, ¶16). Drivers in this situation also had their lodging and transportation costs pre-paid and/or reimbursed. (Id.). For example, "vouchers" were arranged by Driver Managers at nearby hotels. (Id.) The Driver Manager alternatively could "advance" funds on the driver's ComData card[12] for her to use to pay for the hotel and transportation. (Id.) As the driver payroll/settlement system was then (before July 2015) devised, those "advanced" funds would be subsequently deducted from the driver's pay, but the driver would be reimbursed upon submission of her receipts. (Id.)

To streamline the process, in July 2015, CRST instituted a new practice/policy known as "HR Layover Pay." (D-App. 43, Carlson Dep. pp. 27:22-28:5). Under CRST's HR Layover Pay policy, a driver separated from her truck as a result of reporting harassment or discrimination (of any nature) receives $100 per day until they are paired with a new co or lead driver, decline a team pairing or arrive home. (D-App. 44-45, Carlson Dep. pp. 33:1-34:6). Also, under CRST's HR Layover Pay policy, rather than have lodging and transportation advances recouped and then reimbursed, they are no longer recouped

[12] A ComData card is similar to a debit card, assigned to each driver, onto which driver pay, advances, and money to cover other expenses can be loaded and from which recoupments can be deducted.

from a driver's pay but simply made immediately accessible on a driver's ComData card. (Id.)

L. Incidence of Sexual Harassment Allegations Among CRST's Drivers

The incidence of reported harassment is low, with just 125 reported complaints out of what is likely at least 6750 male-female driver pairs over a three year period.[13] Plaintiffs can offer no statistical proof to demonstrate that the incidence of reported claims is any greater than that found insufficiently prevalent seven years ago:

> From January 1, 2005 through September 8, 2008, CRST employed 2,701 female drivers who were teamed on at least one occasion with at least one male driver. In the same period, 146 of CRST's female drivers alleged sexual harassment by at least one male driver. Those 146 female drivers represent 5.4% of the total 2,701 female drivers employed by CRST who were teamed with at least one male driver during the period.
>
> Over the same time period, there were 6,978 female-male driving teams. The 146 female drivers made a claim of harassment involving 188 of these teams. Therefore, 2.7% of all female/male teams involve a complaint of sexual harassment.
>
> The 6,978 female/male teams drove a total of 373,841 trips during the January 1, 2005 through September 8, 2008 period. The 188 teams that include a claim of harassment made 3,121 trips. Therefore, 0.8% of the total number of trips involved teams in which a complaint of sexual harassment was made.
>
> The 6,978 female/male teams drove a total of 684,581 days. The teams that include a claim of harassment drove 5,826 days. Therefore, 0.9% of all days driven involved teams where a complaint of sexual harassment was made.
>
> The 6,978 female/male teams drove a total of 226,445,880 miles. The teams where a claim of sexual harassment was made represent 1,804,804 miles. Therefore, 0.8% of all the miles driven were by teams where a complaint of sexual harassment was made.

CRST Van Expedited, Inc., 611 F. Supp. 2d at 946.

[13] It is a conservative estimate that each of the 2250 women hired from 2013-2016 (13% of all hires) drove with at least three different male drivers.

M. Each Driving Harassment Allegation is Unique

The company's anti-harassment policies contemplate the obvious—that no two complaints will be alike, nor is a single solution likely to either prevent all such complaints or remediate each situation. The definition of what may be unlawful harassment invites as much—i.e., the law's own use of both the "reasonable woman" standard and the "subjectively offensive" standard to define the wide array of conduct which any person may find offensive in any one of CRST's 1750 mobile workplaces at any given moment. While the Complaint, and some of the moving papers in this case, suggest rampant "sexual assault" or "abuse," nearly all of the reports tend towards lesser conduct which CRST policy proscribes, such as unwanted remarks, attention, and so on.

The situations of the three named Plaintiffs and the four affiants procured serve to illustrate the wide variances in reported conduct.

1. Claudia Lopez

Lopez attended trucking school at Hawkeye Community College in Waterloo, Iowa (D-App. 79, 91, Declaration of Karen Carlson, ¶5 and Exhibit A).

While at the training center, Lopez reported that a fellow student, [redacted] was being too "touchy." On April 17, 2014, Lopez submitted an email statement. (D-App. 80, 92, Carlson Declaration, ¶6 and Exhibit A). The same day, CRST investigator [redacted] contacted Lopez and conducted an interview. [redacted] also interviewed [redacted] (D-App. 80, Carlson Declaration, ¶6). [redacted] was directed to have no further contact with Lopez. His team preference was changed to male only. (Id.)

After Lopez graduated, she attended CRST's new driver orientation in Cedar Rapids, Iowa in May 2014. (D-App. 80, Carlson Declaration, ¶7). Lopez acknowledged receiving CRST's Driver Handbook on May 8, 2014. (D-App. 80, 93, Carlson Declaration,

¶7 and Exhibit A). Lopez acknowledged receiving CRST's anti-harassment policy on May 8, 2014. (D-App. 80, 93-95, Carlson Declaration, ¶7 and Exhibit A).

On May 13, 2014, a complaint was lodged against Lopez by a CRST shuttle driver. (D-App. 80, 96-101, Carlson Declaration, ¶8 and Exhibit A). The shuttle driver was transporting CRST student drivers to their lodging. (Id.) Lopez told the shuttle driver that if he did not take her where she wanted to go that she would claim he tried to rape her. (Id.) The incident was witnessed by others on the shuttle. (Id.) Lopez was counseled regarding the incident and received retraining on CRST's positive work environment policies. (D-App. 80, 96-102, Carlson Declaration, ¶8 and Exhibit A).

On July 7, 2014, Lopez contacted Driver Manager, [redacted] stating that her co-driver, [redacted] had asked her to shower with him. (D-App. 80, 103, Carlson Declaration, ¶9 and Exhibit A). Lopez was already off the truck and [redacted] got her a hotel room for the evening. (Id.) The following day on July 8, 2014, Carlson contacted Lopez and interviewed her regarding her complaint against [redacted] (D-App. 80, 104-107, Carlson Declaration, ¶9 and Exhibit A). Lopez declined to provide a written statement. (Id.) Carlson attempted to reach the witness identified by Lopez, but was unable to do so. (D-App. 80-81, 106, Carlson Declaration, ¶9 and Exhibit A). Carlson also interviewed [redacted] and he denied any wrongdoing. (D-App. 81, 108-110, Carlson Declaration, ¶9 and Exhibit A). [redacted] driver preference was changed to male only. (Id.) Lopez was back on the road on a different truck with a different co-driver by July 9, 2014. (D-App. 81, 111-112, Carlson Declaration, ¶9 and Exhibit A). Lopez was sent a follow up letter regarding her complaint against [redacted] on July 11, 2014. (D-App. 81, 113, Carlson Declaration, ¶9 and Exhibit A).

On October 23, 2014, Lopez complained to her Driver Manager, [redacted] that she woke up and her co-driver, [redacted] was lying on top of her. (D-App. 81, 114-116, Carlson Declaration, ¶10 and Exhibit A). Lopez stated that [redacted] had apologized and asked [redacted] to route them to Oklahoma City. (Id.) [redacted] refused and instead Lopez was separated from [redacted] immediately, provided a motel and rental car to get to Oklahoma City. (Id.) [redacted] team preference was changed to male only. (D-App. 81, Carlson Declaration, ¶10). Lopez went back on the road on a different truck on October 28, 2014. (D-App. 81, 117-118, Carlson Declaration, ¶10 and Exhibit A). Lopez received layover pay for the time that she was unable to drive due to being removed from the truck. (D-App. 81, 119, Carlson Declaration, ¶10 and Exhibit A).

Lopez did not make any complaints to CRST regarding a co-driver named [redacted] (D-App. 81, Carlson Declaration, ¶11). Lopez did not make any complaints to CRST regarding sexual comments allegedly made to her at the Riverside or Cedar Rapids Terminal. (D-App. 81, Carlson Declaration, ¶11).

Lopez last worked on December 21, 2014. CRST terminated her employment on February 20, 2015 after she failed to report. (D-App. 81, 120, Carlson Declaration ¶12, and Exhibit A).

2. Cathy Sellars

Sellars attended CRST's new driver orientation in Riverside, California in December 2013. (D-App. 81, 121, Carlson Declaration ¶13, and Exhibit B). Sellars acknowledged receiving CRST's anti-harassment policy on December 11, 2013. (D-App. 81, 122-123, Carlson Declaration ¶13, and Exhibit B). Sellars acknowledged receiving CRST's Driver Handbook on December 16, 2013. (D-App. 81, 124, Carlson Declaration ¶13, and Exhibit

B). Sellars signed an authorization allowing CRST to deduct advancements from her pay on December 16, 2013. (D-App. 81, 125, Carlson Declaration ¶13, and Exhibit B).

In late 2013, Sellars complained to CRST Riverside Terminal Manager, [redacted] regarding [redacted] (D-App. 82, Carlson Declaration, ¶14). Sellars stated that she did not wish to talk to human resources, but wanted [redacted] to leave her alone. (Id.) [redacted] spoke to [redacted] and directed him to have no further contact with Sellars. (Id.) CRST Human Resources was not notified of any complaint by Sellars regarding [redacted] (Id.)

On January 7, 2014, Sellars called her Driver Managers to relay that she did not feel safe with her lead driver, [redacted] (D-App. 82, 126-129, Carlson Declaration, ¶15 and Exhibit B). Sellars was immediately removed from the truck and provided with a hotel room. (D-App. 82, 127, 130, Carlson Declaration, ¶15 and Exhibit B). Sellars was reimbursed for her expenses in getting off the truck. (D-App. 82, 131, Carlson Declaration, ¶15 and Exhibit B). The same day Carlson interviewed Sellars regarding her complaints about [redacted] (D-App. 82, 126-129, Carlson Declaration, ¶15 and Exhibit B). Carlson also interviewed [redacted] who denied Sellars' claims. (Id.) [redacted] team preference was changed to male only. (Id.)

On Sunday, January 26, 2014, Sellars left Carlson a voicemail stating that she had a video of her lead driver, [redacted] driving drunk. (D-App. 82, 132-134, Carlson Declaration, ¶16 and Exhibit B). Carlson called Sellars the next morning and interviewed her regarding her complaints about [redacted] (Id.) Sellars did not allege any sexual harassment by [redacted] (Id.) Carlson also interviewed [redacted] who denied Sellars' allegations of wrongdoing. (Id.) Sellars was separated from [redacted] and provided a hotel

room and bus ticket back to Riverside, California, as she requested. (D-App. 82, 135, Carlson Declaration, ¶15 and Exhibit B).

On February 12, 2014, Sellars complained to Driver Manager, [redacted] about her lead driver, [redacted] (D-App. 82, 136-150, Carlson Declaration, ¶17 and Exhibit B). When Sellars indicated [redacted] had a knife, she was instructed to call 911 immediately. (D-App. 82, 139-140, Carlson Declaration, ¶17 and Exhibit B). Sellars got off the truck and was provided with a hotel room and a bus ticket back to Riverside, California. (D-App. 82, 137, Carlson Declaration, ¶17 and Exhibit B). On February 13, 2014, Carlson contacted Sellars to interview her regarding her complaints about [redacted] (D-App. 82-83, 151-160, Carlson Declaration, ¶17 and Exhibit B). Carlson provided Sellars with the number for CRST's Employee Assistance Program and encouraged her to use their services. (D-App. 83, 154, Carlson Declaration, ¶17 and Exhibit B). Carlson also interviewed [redacted] on February 13, 2014. (D-App. 83, 155-158, Carlson Declaration, ¶17 and Exhibit B). Carlson interviewed witness [redacted] on February 13, 2014 as well. (D-App. 83, 159-160, Carlson Declaration, ¶17 and Exhibit B). [redacted] was counseled regarding behavior and told to have no further contact with Sellars. (Id.) Sellars received layover pay and was reimbursed for her expenses in getting off the truck. (D-App. 161, Exhibit B to Carlson Declaration).

Sellars was paired with a female lead driver to complete her training. (D-App. 83, 162-163, Carlson Declaration, ¶18 and Exhibit B).

Mike Gannon, then Group President, Fixed Assets for CRST International, Inc., spoke with Cathy Sellars by telephone in March 2014. (D-App. 74, Declaration of Mike Gannon, ¶¶2-3). Gannon does not recall Sellars asking him "what are you going to do when

they kill one of these women?" (D-App. 74, Declaration of Mike Gannon, ¶3). Gannon would not have and did not reply, "well, we'll deal with that when it happens." (Id.)

On March 18, 2014, Sellars met with Carlson and Cameron Holzer, President of CRST, regarding her concerns. (D-App. 76, 83, Declaration of Cameron Holzer, ¶3; Carlson Declaration, ¶19). During this meeting, Sellars reported for the first time that she had been injured while on the truck with [redacted] (D-App. 77, 83, Holzer Declaration, ¶6; Carlson Declaration, ¶19). Due to her report of injury, Holzer and Carlson took steps to assist Sellars with workers' compensation including providing her with hotel accommodations in Cedar Rapids while she communicated with CRST's workers' compensation department and attended doctors' appointments. (D-App. 77, 83, Holzer Declaration, ¶7-11; Carlson Declaration, ¶19).

Sellars' workers' compensation case was closed on November 23, 2015, due to Sellars abandoning treatment. (D-App. 83, Carlson Declaration, ¶20).

3. Evangelina Martinez

Martinez attended CRST's new driver orientation in Riverside, California in March 2014. (D-App. 83, 164, Carlson Declaration, ¶21 and Exhibit C). Martinez acknowledged receiving CRST's anti-harassment policy on March 27, 2014. (D-App. 83, 165-167, Carlson Declaration, ¶21 and Exhibit C). Martinez acknowledged receiving CRST's Driver Handbook on March 24, 2014. (D-App. 83, 167, Carlson Declaration, ¶21 and Exhibit C). Martinez signed an authorization allowing CRST to deduct advancements from her pay on March 24, 2014. (D-App. 83, 168, Carlson Declaration, ¶21 and Exhibit C).

On May 13, 2014, Martinez's co-driver, [redacted] [redacted] reported issues with Martinez to his Driver Manager, [redacted] [redacted] He reported Martinez was refusing to drive.

(D-App. 84, 169-171, Carlson Declaration, ¶22 and Exhibit C). [redacted] again complained about Martinez on May 14, 2014 and [redacted] spoke with Martinez. (D-App. 84, 172-177, Carlson Declaration, ¶22 and Exhibit C). On May 15, 2014, [redacted] reported that Martinez was driving unsafely, failing to apply the brakes and making a u-turn in the middle of the street. (D-App. 84, 178-184, Carlson Declaration, ¶22 and Exhibit C). Martinez was instructed that she could no longer drive until she spoke to the CRST Safety Department. (D-App. 84, 180, Carlson Declaration, ¶22 and Exhibit C).

After an altercation involving Martinez attempting to remove her belongings from the truck on May 16, 2014, Martinez complained to [redacted] regarding [redacted] (D-App. 84, 185, Carlson Declaration, ¶23 and Exhibit C). Martinez had not made any previous complaints of harassment against [redacted] to [redacted] (Id.) Martinez was provided with a hotel room and bus ticket to return to Riverside, California. (D-App. 84, 188, Carlson Declaration, ¶23 and Exhibit C). Martinez was reimbursed for the hotel room and the bus ticket was not deducted from her wages. (D-App. 84, 194-198, Carlson Declaration, ¶23 and Exhibit C).

Martinez was contacted by [redacted] the same day and interviewed regarding her allegations against [redacted] (D-App. 84, 186-189, Carlson Declaration, ¶24 and Exhibit C). [redacted] attempted to reach a witness named [redacted] whose contact information was provided by Martinez, but was unable to communicate with her due to a language barrier. (Id.) [redacted] was also interviewed by Carlson and he denied Martinez's allegations. (D-App. 84, 190-193, Carlson Declaration, ¶24 and Exhibit C). [redacted] team preference was changed to male only. (Id.) On May 30, 2014, Carlson sent a follow up letter to Martinez regarding the investigation. (D-App. 84, 199, Carlson Declaration, ¶24 and Exhibit C).

Martinez did not make any other complaints of harassment to CRST. (D-App. 84, Carlson Declaration, ¶25).

Martinez began driving with female co-driver Veronica Saur on June 1, 2014. (D-App. 85, 200-203, Carlson Declaration, ¶26 and Exhibit C). Martinez next drove with female co-driver [redacted] beginning on June 26, 2014. (Id.)

Martinez failed to report back to work after June 30, 2014 and CRST terminated her employment on July 16, 2014. (D-App. 85, 204, Carlson Declaration, ¶27 and Exhibit C).

4. Leslie Fortune

Fortune attended CRST's new driver orientation in Cedar Rapids, Iowa in October 2013. (D-App. 85, 205, Carlson Declaration, ¶28 and Exhibit D). Fortune signed her acknowledgement of CRST's anti-harassment policy on October 14, 2013. (D-App. 85, 206-208, Carlson Declaration, ¶28 and Exhibit D). Fortune acknowledged receiving a copy of CRST's Driver Handbook on October 14, 2013, which contains a listing of all phone numbers. (D-App. 85, 209, Carlson Declaration, ¶28 and Exhibit D).

Fortune submitted a written complaint regarding lead driver, [redacted] which was received by Carlson on November 24, 2013. (D-App. 85, 210, Carlson Declaration, ¶29 and Exhibit D). Carlson attempted to reach Fortune to conduct an interview regarding her complaints on several occasions, but Fortune did not return her calls. (Id.). Carlson interviewed [redacted] regarding Fortune's complaints. (D-App. 85, 212-216, Carlson Declaration, ¶29 and Exhibit D). Carlson also followed up with witnesses to confirm [redacted] statements. (Id.) Carlson found that [redacted] gave untruthful statements and, upon completion of the investigation, [redacted] employment was terminated. (D-App. 85, 217, Carlson Declaration, ¶29 and Exhibit D).

On December 29, 2013, Fortune provided a written statement detailing her complaints against co-driver, [redacted] to [redacted] (D-App. 85, 218-222, Carlson Declaration, ¶30 and Exhibit D). [redacted] provided Fortune's statement to Carlson via email. (D-App. 85, 223, Carlson Declaration, ¶30 and Exhibit D). Carlson interviewed Fortune regarding her complaints about [redacted] on January 15, 2014. (D-App. 85, 224-227, Carlson Declaration, ¶30 and Exhibit D). Carlson also interviewed Fortune's Driver Manager and witnesses as well as [redacted] regarding her complaints. (D-App. 85, 227-231, Carlson Declaration, ¶30 and Exhibit D). Fortune did not report any concerns to her Driver Manager while she was on the truck with [redacted] (Id.) [redacted] team preference was changed to male only as a result of Fortune's complaint. (D-App. 86, 231-232, Carlson Declaration, ¶30 and Exhibit D). Carlson sent a follow up letter to Fortune regarding the investigation on March 3, 2014. (D-App. 86, 223, Carlson Declaration, ¶30 and Exhibit D).

Fortune never reported any complaints regarding her co-driver, [redacted] Trip records show that Fortune and [redacted] did make a stop in St. Louis, Missouri on or about January 8, 2014. (D-App. 86, 234, Carlson Declaration, ¶31 and Exhibit D). However, after the stop in St. Louis, Fortune continued on the truck with [redacted] for eight more days before their trip ended in Riverside, California on January 16, 2014. (D-App. 86, 235, Carlson Declaration, ¶31 and Exhibit D). Payroll records show that Fortune was paid for her miles during this trip. (D-App. 86, 236-238, Carlson Declaration, ¶31 and Exhibit D).

On April 15, 2014, Fortune provided a written statement detailing her complaints against co-driver, [redacted] to [redacted] (D-App. 86, 239-246, Carlson Declaration, ¶32 and Exhibit D). Fortune did not complain to her Driver Manager while she was on the truck with [redacted] (D-App. 86, 247-252, Carlson Declaration, ¶32 and Exhibit D). [redacted]

provided Fortune's statement regarding [redacted] to Carlson via email. (D-App. 86, 253, Carlson Declaration, ¶32 and Exhibit D). [redacted] interviewed Fortune regarding her complaints against [redacted] on April 22, 2016. (D-App. 86, 254-257, Carlson Declaration, ¶32 and Exhibit D). Carlson interviewed [redacted] on April 22, 2016. (D-App. 86, 258, Carlson Declaration, ¶32 and Exhibit D). Carlson followed up with Fortune on April 22, 2016, providing her with information for CRST's Employee Assistance Program. (D-App. 86, 261-262, Carlson Declaration, ¶32 and Exhibit D). [redacted] was required to undergo re-training on CRST's PWE policies. (Id.) Carlson sent a follow up letter to Fortune regarding the investigation on April 23, 2014. (D-App. 86, 263, Carlson Declaration, ¶32 and Exhibit D).

On May 23, 2014, Fortune reported a complaint regarding her co-driver, [redacted] to her Driver Manager, [redacted] (D-App. 86, 264, Carlson Declaration, ¶33 and Exhibit D). Fortune did not make any report of sexual harassment against [redacted] (Id.) [redacted] immediately separated Fortune and [redacted] made arrangements for Fortune to get off the truck in Oklahoma City and provided her with a hotel room for the evening. (D-App. 87, 266-267, Carlson Declaration, ¶32 and Exhibit D). Fortune was permitted to continue solo on the same truck the next day. (Id.)

Fortune made a complaint to CRST's ethics hotline on May 24, 2014, complaining that [redacted] was sending her threatening text messages. (D-App. 87, Carlson Declaration, ¶34). Again, Fortune did not allege sexual harassment by [redacted] (Id.) Carlson interviewed Fortune and [redacted] regarding her complaints. (Id.) [redacted] was instructed to refrain from texting Fortune. (Id.) Carlson followed up with Fortune on June 2, 2014 and confirmed that [redacted] was no longer texting her. (Id.)

Fortune never reported any complaints regarding her co-driver, [redacted] (D-App. 87, Carlson Declaration, ¶35).

Fortune last worked January 20, 2015. CRST terminated her on February 27, 2015 after she failed to report back to work. (D-App. 87, 268, Carlson Declaration, ¶36 and Exhibit D).

5. Sandra Encinas

Encinas attended CRST's new driver orientation in Riverside, California in June 2012. (D-App. 87, 269, Carlson Declaration, ¶37 and Exhibit E). Encinas acknowledged receiving CRST's anti-harassment policy on June 11, 2012. (D-App. 87, 270-272, Carlson Declaration, ¶37 and Exhibit E). Encinas acknowledged receiving CRST's Driver Handbook on June 11, 2012. (D-App. 87, 273-274, Carlson Declaration, ¶37 and Exhibit E). Encinas signed an authorization allowing CRST to deduct advancements from her pay on June 11, 2012. (D-App. 87, 275, Carlson Declaration, ¶37 and Exhibit E).

On August 16, 2012, Encinas complained that her co-driver, [redacted] was being verbally abusive. (D-App. 87, Carlson Declaration, ¶38). Encinas was removed from the truck and provided with a hotel room. (Id.) Encinas was reimbursed for the cost of the hotel room on August 30, 2012. (D-App. 87, 276, Carlson Declaration, ¶38 and Exhibit E).

On September 29, 2013, Driver Manager, [redacted] received a qualcomm message from Encinas' co-driver, [redacted] stating that he had called the police because Encinas had accused him of sexual assault. (D-App. 88, 277-279, Carlson Declaration, ¶39 and Exhibit E). By the time the message was received, Encinas had already exited the truck at the Riverside terminal. (Id.) Carlson contacted Encinas on October 1, 2013 and interviewed her regarding the situation with [redacted] (D-App. 88, 280-282, Carlson

Declaration, ¶39 and Exhibit E). Carlson also contacted [redacted] and interviewed him regarding Encinas' complaints. (D-App. 88, 284-286, Carlson Declaration, ¶39 and Exhibit E). [redacted] was restricted to driving with only males as a result of Encinas' complaint. (D-App. 88, 287, Carlson Declaration, ¶39 and Exhibit E). On October 4, 2013, Carlson sent Encinas a follow up letter regarding her investigation. (D-App. 88, 288, Carlson Declaration, ¶39 and Exhibit E). Encinas never reported any complaints regarding [redacted] during her employment. (D-App. 88, Carlson Declaration, ¶40).

6. Veronica Saur

Saur attended CRST's new driver orientation in Riverside, California in November 2013. (D-App. 88, 289, Carlson Declaration, ¶41 and Exhibit F). Saur acknowledged receiving CRST's anti-harassment policy on November 12, 2013. (D-App. 88, 290-292, Carlson Declaration, ¶41 and Exhibit F). Saur acknowledged receiving CRST's Driver Handbook on November 12, 2013. (D-App. 88, 293-294, Carlson Declaration, ¶41 and Exhibit F). Saur signed an authorization allowing CRST to deduct advancements from her pay on November 12, 2013. (D-App. 88, 295, Carlson Declaration, ¶41 and Exhibit F).

On January 12, 2014, Saur called Driver Manager, [redacted] and complained about her co-driver, [redacted] (D-App. 88, 298, Carlson Declaration, ¶42 and Exhibit F). [redacted] advised Saur to obtain a police escort to retrieve her belongings from the truck and provided her with a hotel room for the evening and a rental car to return to the Riverside terminal. (D-App. 88, 297-298, 300, Carlson Declaration, ¶42 and Exhibit F). The cost of the hotel and rental car were not deducted from Saur's pay. Saur was reimbursed for the hotel cost and received breakdown pay when the new truck to which she was assigned

required maintenance. (D-App. 88-89, 301, 308-311, Carlson Declaration, ¶42 and Exhibit F).

Carlson contacted Saur on January 14, 2014 and interviewed her regarding her complaints about [redacted] (D-App. 89, 299-301, Carlson Declaration, ¶43 and Exhibit F). Carlson provided Saur with the information for CRST's Employee Assistance Program. (Id.) Carlson did not refuse to listen to Saur's recording of [redacted] Carlson also interviewed [redacted] the same day. (D-App. 89, 302-305, Carlson Declaration, ¶43 and Exhibit F). [redacted] team preference was changed to male only. (D-App. 89, 306, 312 Carlson Declaration, ¶43 and Exhibit F). Carlson did not advise Saur that she found nothing had happened with [redacted] but sent a follow up letter regarding the investigation to Saur on March 4, 2014. (D-App. 89, 313, Carlson Declaration, ¶43 and Exhibit F).

Saur was terminated on June 24, 2014 by the Safety Department after being involved in four accidents in 2014. (D-App. 89, 314, Carlson Declaration, ¶44 and Exhibit F).

7. Kathy Von Hatten

Von Hatten (A/k/a Kathy Owens) attended CRST's new driver orientation in Cedar Rapids, Iowa in August 2012. (D-App. 89, 315, Carlson Declaration, ¶45 and Exhibit G). Von Hatten acknowledged receiving CRST's anti-harassment policy on August 13, 2012. (D-App. 89, 316-318, Carlson Declaration, ¶45 and Exhibit G). Von Hatten acknowledged receiving CRST's Driver Handbook on August 13, 2012. (D-App. 89, 319, Carlson Declaration, ¶45 and Exhibit G).

Upon hire, Von Hatten entered into a Driver Employment Contract with CRST, which obligated her to work for the company for a period of eight months. (D-App. 89, 321-323, Carlson Declaration, ¶46 and Exhibit G).

Von Hatten requested to be paired with co-driver, [redacted] upon hire. (D-App. 89, 315, Carlson Declaration, ¶47 and Exhibit G). Von Hatten drove with [redacted] from August 20, 2012 through September 12, 2012. (D-App. 89, 324-325, Carlson Declaration, ¶47 and Exhibit G). CRST has no record of receiving any complaints from Von Hatten regarding [redacted] (D-App. 90, Carlson Declaration, ¶48).

Von Hatten drove with co-driver, [redacted] from November 4, 2012 through November 13, 2012. (D-App. 90, 326-327, Carlson Declaration, ¶49 and Exhibit G). CRST has no record of receiving any complaints from Von Hatten regarding [redacted] (D-App. 90, Carlson Declaration, ¶50).

CRST has no record of receiving any complaints from Von Hatten regarding CRST Riverside Terminal Manager, [redacted] (D-App. 90, Carlson Declaration, ¶51

Von Hatten last worked for CRST on December 19, 2012. (D-App. 90, 330, Carlson Declaration, ¶52 and Exhibit G). Von Hatten voluntarily terminated her employment on January 15, 2013 when CRST declined to pay for her stolen GPS. (Id.) Von Hatten did not complete the eight-month term of her employment contract and was thus ineligible to work in the trucking industry for another company until her contractual obligation to CRST was fulfilled. (D-App. 90, 331-332, Carlson Declaration, ¶53 and Exhibit G).

III. Argument

A. Hostile Work Environment Pattern or Practice Claims

A hostile work environment sex discrimination case requires Plaintiffs to prove "(1) the plaintiff belongs to a protected group; (2) the plaintiff was subject to unwelcome harassment; (3) a causal nexus exists between the harassment and the plaintiff's protected group status; and (4) the harassment affected a term, condition, or privilege of

employment." *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 928 (quoting *Gordon v. Shafer Contracting Co.,* 469 F.3d 1191, 1194–95 (8th Cir. 2006)). Additionally, where a co-worker commits the alleged harassment, Plaintiffs must prove that the employer "knew or should have known of the conduct and failed to take proper remedial action." *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 928 (quoting *Joens v. John Morrell & Co.,* 354 F.3d 938, 940 (8th Cir. 2004) (quoting *Dhyne v. Meiners Thriftway, Inc.,* 184 F.3d 983, 987 (8th Cir.1999))). "To prove sexual harassment is sufficiently unwelcome to be actionable under Title VII, a plaintiff must meet an objective standard and a subjective standard regarding the harassment itself." *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 928.

"A pattern or practice case seeks to eradicate systemic, company-wide discrimination and focuses on an objectively verifiable policy or practice of discrimination by a private employer against its employees." *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 930 (quoting *E.E.O.C. v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1070 (C.D. Ill. 1998)). If a class is certified, the Eighth Circuit applies a modified *Teamsters* burden-shifting approach in sexual harassment pattern or practice cases. *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 937 (citing *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997)). It is modified in that "a determination that the employer engaged in a pattern or practice of discrimination by maintaining a hostile environment does not entitle every member of the plaintiff class to a presumption that they were sexually harassed—the burden of persuasion does not shift to the employer." *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 936 (quoting *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 876 (D. Minn. 1993)). "Instead, the burden of persuasion remains on the individual class members; each must show by a preponderance of the evidence that she was as affected as the reasonable woman." *CRST Van Expedited, Inc.*, 611

F. Supp. 2d at 936 (quoting *Jenson*, 824 F. Supp. at 876). "Because the employee's subjective response to acts of sexual harassment is an essential part of proving a claim of hostile environment sexual harassment, a presumption that the employer discriminated against individual class members may not arise from a determination that the reasonable woman would have been affected by the acts of sexual harassment." *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 936 (quoting *Jenson*, 824 F. Supp. at 876).

B. Applicable Standard for Class Certification

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 564 U.S. at 350; *see also Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir. 2013) (quoting *Coleman v. Watt,* 40 F.3d 255, 258 (8th Cir. 1994)) ("In order to obtain class certification, a plaintiff has the burden of showing that the class should be certified and that the requirements of Rule 23 are met.").

It is sometimes "'necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Wal-Mart*, 564 U.S. at 351 (quoting *Gen. Tel. Co. of the Sw. v. Falcon,* 457 U.S. 147, 161 (1982)). The analysis will potentially overlap the merits of the plaintiff's underlying claim. *Wal-Mart*, 564 U.S. at 351. "[T]he district court may 'resolve disputes going to the factual setting of the case' if necessary to the class certification analysis." *Bennett v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011) (quoting *Blades v. Monsanto Co.,* 400 F.3d 562, 567 (8th Cir. 2005)).

C. Plaintiffs Fail to Meet Their Burden on the Preconditions of Fed. R. Civ. P. 23(a)

1. Plaintiffs "gerrymandered" their theory of class certification around this Court's earlier finding against the EEOC that CRST does not tolerate harassment

CRST entered the crucible nearly a decade ago on allegations of sexual harassment and emerged having had its operating procedures vindicated by ruling of this Court. *See CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 952 ("[T]he court holds that the EEOC has presented insufficient evidence to show that CRST has engaged in a pattern or practice of tolerating sexual harassment of its female drivers. Based upon the record presently before the court, a reasonable jury could not find that it is CRST's 'standard operating procedure' to tolerate sexual harassment."). CRST's practices have become all the more exacting since then. *See supra*, § II (describing CRST's prevention and remediation practices). Left with no room for supposition as to the existence of a traditional Title VII pattern or practice case, Plaintiffs have impermissibly stuffed the putative class representatives' unique sets of facts into a class certification theory hinged on the sufficiency of CRST's remedial measures. *See, e.g.,* Plaintiff's Brief, p. 31 (asserting basis for commonality in whether "a policy of tolerating sexual harassment of women" exists).

Rather than asserting any central intent by CRST to discriminate, Plaintiffs here effectively seek to establish that CRST negligently failed to act after notice in order to construct a class supporting a pattern or practice of resistance to Title VII's rights. "In a pattern-or-practice case, the plaintiff tries to 'establish by a preponderance of the evidence that ... discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice.'" *Wal-Mart*, 564 U.S. at 352 n.7 (quoting *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 358 (1977)). "If he succeeds, that showing will support a

rebuttable inference that all class members were victims of the discriminatory practice, and will justify 'an award of prospective relief,' such as 'an injunctive order against the continuation of the discriminatory practice.'" *Wal-Mart*, 564 U.S. at 352 (quoting *Teamsters,* 431 U.S. at 361).

The underpinnings of Plaintiffs' theory of class certification on liability drop away when considering the contortions necessary to maintain that CRST tolerated the alleged harassment of all female drivers from October 12, 2013 onward or retaliated against them. Plaintiffs impermissibly assume that each complaint of harassment was valid; that CRST's response was identical to complaints of harassment of various degrees of severity; and that policy changes implicated by any given complaint would be identical irrespective of the unique qualities of each complaint.[14] Viewed in this context, "policies" asserted as the hub that links the putative class members' allegations together are exposed as no more than enterprising, and flawed, constructs.

[14] Below, CRST demonstrates that sexual harassment complaint protocols are tailored to particular circumstances of alleged harassment such that commonality and typicality are lacking under Federal Rules of Civil Procedure 23(a) (2) and (3). For related reasons, Plaintiffs' motion for class certification must be denied on the basis that the proposed class is insufficiently numerous and the named Plaintiffs will not adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a) (1) and (4). As to numerosity, the unique circumstances of each harassment complaint serves to limit the putative class to only the particular allegations of the named Plaintiffs, which is well short of the number of plaintiffs required. As to adequacy, the applicable CRST procedures and their operation vary based on the harassment complained of such that the Plaintiffs necessarily lack the same interest and have not suffered the same alleged injury as other putative class members. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625–26 (1997) ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. '[A] class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members.'") (citations omitted). As a result, each putative class member could be expected to offer evidence on the allegedly discriminatory nature of different components of CRST's alleged policy such that they would be inadequate representatives regarding other types of alleged harassment implicating different alleged policies.

2. Commonality requires a common contention and a common answer, not a theory of liability susceptible only to individual review

To frame the deficiency in Plaintiffs' class certification theory in terms of art crystallized by the Supreme Court in 2011, the negligence-based theory of sexual harassment policy remediation (and the pre-*Wal-Mart* cases Plaintiffs rely on to build it) fails to provide a common contention paired with a common answer. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart*, 564 U.S. at 349–50 (citation omitted) (quoting *Falcon*, 457 U.S. at 157); *see also* Fed. R. Civ. P. 23(a)(2) (requiring "questions of law or fact common to the class"). "Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor." *Wal-Mart*, 564 U.S. at 350. "That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. "In a Title VII disparate treatment case, for instance, the parties seeking certification must show that 'examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*'" *Bennett*, 656 F.3d at 814 (quoting *Wal-Mart*, 564 U.S. at 350). "A proponent of class certification cannot show commonality by demonstrating merely that the class members have all suffered a violation of the same provision of law." *Bennett*, 656 F.3d at 814.

CRST's earlier vindication when faced with allegations of a pattern or practice of sexual harassment underscores the significance of *Wal-Mart*'s requirement that Plaintiffs present "significant proof" that CRST "operated under a general policy of discrimination" to demonstrate commonality sufficient for class certification. *Wal-Mart*, 564 U.S. at 353.

The employer in *Wal-Mart* maintained a policy forbidding sex discrimination and imposing penalties for denial of equal employment opportunity. *Wal-Mart*, 564 U.S. at 353. The Court rejected the argument that a "policy" of delegated discretion to low-level managers produced sufficient commonality to maintain a class pattern or practice claim. *Wal-Mart*, 564 U.S. at 355.

CRST's demonstrated unwillingness to tolerate sexual harassment places the circumstances here on a different plane than cases cited by the Plaintiff. *See CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 952 ("Based upon the record presently before the court, a reasonable jury could not find that it is CRST's 'standard operating procedure' to tolerate sexual harassment."); *c.f., e.g., Brand v. Comcast Corp., Inc.*, 302 F.R.D. 201, 219 (N.D. Ill. 2014) (describing the volume of named plaintiffs and putative class members who heard use of racial epithets in case relied on by Plaintiffs). Plaintiffs compound their error by relying, in part, on cases decided without the benefit of the heightened burden recognized in *Wal-Mart*. *See, e.g., Smith v. Nike Retail Servs., Inc.*, 234 F.R.D. 648, 661 (N.D. Ill. 2006).

Wal-Mart drew extensively on *Falcon*, a decision that recognized proof of an individual plaintiff's claim of discrimination under Title VII would not necessarily "require the decision of any common question" as to a class of individuals. 457 U.S. at 157-159. *Falcon* observed that an allegation that "discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified." *Falcon*, 457 U.S. at 157. A "wide gap" exists between an individual's ability to prove injury on discriminatory grounds with an "other otherwise unsupported allegation that the company has a policy of discrimination," on the one hand, and "the existence of a class of persons who have suffered the same injury as that individual, such

that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims," on the other. *Falcon*, 457 U.S. at 157-58. *Falcon*, which involved a challenge to an employer's promotion practices, recognized that a putative class representative's individual proof of discrimination "would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of petitioner's promotion practices, (2) that petitioner's promotion practices are motivated by a policy of ethnic discrimination" that is pervasive, "or (3) that this policy of ethnic discrimination is reflected in petitioner's other employment practices, such as hiring, in the same way it is manifested in the promotion practices." *Falcon*, 457 U.S. at 158.

3. Plaintiffs' commonality arguments are intrinsically deficient because Plaintiffs may not presume putative class members' complaints were substantiated

To circumvent *Wal-Mart*, Plaintiffs ask the Court to flip the Title VII analysis on its head by assuming the validity of 125 sexual harassment reports, that CRST's response was identical in six respects, and that those who complained of harassment were unsatisfied with the investigation and disposition of their complaints. These assumptions undermine "significant proof" of a "general policy of discrimination" mandated by *Wal-Mart*. Each response to an allegation of harassment cannot be equated to the named Plaintiffs' experiences.

Plaintiffs have not examined the veracity of those 125 instances of alleged sexual harassment, how CRST's procedures operated to address each one, or the accuser's satisfaction with the outcome of CRST's investigation. *See CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 957 ("CRST does not operate a unified workplace. Its workplaces are largely the cabs of hundreds upon hundreds of semi-truck tractors. As a consequence, there is little

reason to assume all allegedly aggrieved persons were subjected to the same harm, just as a court might presume in the mine-run case with a unified workplace.") For instance, the named Plaintiffs would lump their cases in with a putative class member who alleged her fellow driver called her "dyke" and "dumb ass." (Exhibit 13, Plaintiff's Motion for Class Certification, Dkt. 13-14, Line No. 85, pp. 12, 30, 48, 66); *see also Meritor*, 477 U.S. at 67 ("[N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII.").

The deficiency in this aspect of Plaintiffs' theory of commonality is exemplified in *Smith v. Ergo Sols., LLC*, 306 F.R.D. 57, 67 (D.D.C. 2015). The putative class representatives in *Smith* pleaded to their personal experiences, but the court found that a list of alleged victims and generalized allegations were insufficient to achieve commonality. *Id.* Furthermore, *Smith* observed that "the claims of female employees who experienced actual harassment are different from those who experienced only the allegedly hostile workplace environment." *Id.*

This Court must have "at least some information to determine whether Plaintiffs' experiences were indeed common or typical among female," *id.* at 68, employees, and Plaintiffs have not offered sufficient proof to the putative class members' experiences. Plaintiffs' failure to vet the operation of CRST procedures or to conduct analysis on the 125 complaints asserted is not surprising given that the efficacy of CRST's sexual harassment complaint procedure plainly does not lend itself to a representative liability analysis in a way that an alleged injury that could be reduced to a mathematical calculation would. *C.f. Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (ruling that a study conducted to

show the average time spent donning and doffing protective gear would have been admissible in 3,344 individual lawsuits).

The six purported "policies" identified by Plaintiffs are no more than anecdotal experiences reduced to the most general terms to give the illusion of widespread application. *See* Plaintiffs' Brief, pp. 12-23 (describing putative class representatives' alleged experiences after complaining of harassment). The circumstances are all too similar to the claim rejected by this Court over six years ago:

> To be certain, the EEOC has presented the court with anecdotal evidence that some of CRST's managers occasionally failed to deal appropriately with female drivers' complaints of sexual harassment over the years. While this may subject CRST to liability as to individual women at trial, the EEOC has not presented sufficient evidence to show that tolerating sexual harassment was "the regular rather than the unusual practice' at CRST."

CRST Van Expedited, Inc., 611 F. Supp. 2d at 952. As set forth below, each purported "policy" lacks significant proof of its existence, let alone its applicability to each putative class member's particular circumstances.

a. CRST response to each instance of alleged harassment must be tailored to the facts, and consequences exist irrespective of corroboration

CRST imposes measures to properly prevent, investigate and remedy harassment that are effective irrespective of corroboration, but the handling of each uncorroborated allegation is necessarily unique. Plaintiffs have failed to offer the significant proof demanded by *Wal-Mart* that CRST maintains a common "policy" of harassment based on its response to "he said, she said" claims. Fact-dependent consequences and/or remedial measures befall accused harassers irrespective of corroboration. For instance, CRST documents alleged harassment and, in virtually all cases, the accused person is marked as a driver that will no longer be permitted to be paired with female drivers. (D-App. 50, Carlson Dep. p. 84:3-24).

Thus, the key is not corroboration or lack thereof, and Carlson's testimony represents neither a pattern or practice of tolerating harassment by CRST, but rather, it represents the reality facing all employers in addressing the vast majority of sexual harassment allegations. Even absent corroboration, CRST takes prompt remedial action to remedy the situation and prevent future harassment. It separates the drivers, re-educates and reinforces its policies and precludes those male drivers accused of harassing a female driver from being paired with another female. Such measures virtually eliminate the opportunity for recurrence, which arguably more than the law requires.

This Court has recognized the inherent challenge for CRST in handling "he said, she said" accounts in its decision dismissing the EEOC's pattern or practice claim:

> The EEOC excoriates CRST's Human Resources Department for failing to make formal findings of fact and, based upon such findings, discipline harassers. The EEOC's argument ignores reality and settled Eighth Circuit Court of Appeals case law. The EEOC's argument ignores reality by confusing CRST with a court or some other body empowered by law to make such findings. Unlike a court or administrative organization such as the EEOC, CRST's Human Resources Department does not possess the power to compel sworn testimony under penalty of perjury. It should come as no surprise to the EEOC, then, that CRST's investigations do not always produce sufficient information upon which to base a decision as important as deciding whether an employee should be fired for misconduct. Many adjudicative bodies, including the EEOC, who possess such powers are themselves unable to reach conclusions of ultimate fact in every case.
>
> The EEOC's argument ignores settled Eighth Circuit Court of Appeals case law. "[T]here is no 'requirement that the employer credit uncorroborated statements the complainant makes if they are disputed by the alleged harasser.'" *Adams,* 538 F.3d at 930 (citation omitted). While the court must assume all of the female drivers' allegations to be true for purposes of Rule 56, it does not follow that CRST's dispatchers or other managers were required to have done the same if and when those women reported their allegations in accordance with CRST's anti-sexual harassment policy. Because of the relatively unique nature of CRST's "workplace," nearly every complaint of sexual harassment creates the classic "he said/she said" situation. Even if CRST's Human Resources Department were a court or other adjudicative body, justice is due to the accuser *and* the accused. *Snyder v. Massachusetts,* 291

> U.S. 97, 122, 54 S.Ct. 330, 78 L.Ed. 674 (1934) (Cardozo, J.). As it is, it appears to be CRST's policy and usual practice to bar alleged harassers from driving with women without making formal factual findings.

CRST Van Expedited, Inc., 611 F. Supp. 2d at 955. In this context, Plaintiffs cannot seriously contend that CRST admitted a policy of never finding harassment. Instead, CRST must acknowledge the practical difficulty of doing so while at the same time offering preventive and remedial measures that function whether a complaint could be corroborated or not by refusing to pair an accused driver with female drivers going forward.

Even in the unlikely event that a previously accused driver is inadvertently paired with a female driver[15], CRST's investigation as a matter of course involves looking into any history of complaints. *See* (D-App. 52, Carlson Dep. pp. 103:22-104:3) (describing record research). The circumstances that dictate if and how to discipline a driver will necessarily vary as to each putative class member. For instance, an allegation of harassment with parallels to an earlier yet uncorroborated (or perhaps unreported) instance of alleged harassment may be given additional credence. *See* (D-App. 52, Carlson Dep. p. 104:4-19) (stating that former students are contacted as part of investigation). On the flip side, an unsubstantiated allegation of harassment from an accuser who made the claim only after unsuccessfully seeking to break financial obligations in the training contract might be perceived as less credible. *C.f.* (D-App. 90, Carlson Declaration, ¶48-53). (stating that CRST has no records of a complaint during affiant Von Hatten's employment and that she had not completed her contracted term of employment in exchange for CRST funded training). The discipline meted depends on the individual circumstance, and may also involve (1) verbal warnings, (2) written warnings, (3) counseling sessions with Human Resources, Operations,

[15] An anomaly no named Plaintiff or affiant has even alleged, let alone proven, in this case.

Safety, and/or other personnel, and (4) removal of lead driver certification. (D-App. 20-21, 64, 67, Excerpts from Driver Handbook; Carlson Dep. pp. 169:9-170:1, 185:10-186:1).

b. Safety is the top priority following an allegation of harassment and determining who leaves the truck depends on individual circumstances

CRST prioritizes the safety of its drivers by separating the accuser and the accused upon a complaint of harassment. If and how CRST does so depends on practical circumstances that cannot be reduced to a single policy and will vary among the putative class members. *See supra* § II.K. (describing exemplary circumstances that dictate whether and how to separate drivers). Plaintiffs fail to offer significant proof under *Wal-Mart* that all putative class members requested or considered requesting separation from the accused; that CRST should have separated them; or that separation actually occurred in all 125 instances of alleged harassment. Complaints of harassment sometimes merely involve a request for assistance to correct the conduct complained of, meaning the accuser has no desire to get off the truck. *See* (D-App. 53, 56-58, Carlson Dep. pp. 106:3-6, 122:12-16, 129:15-130:25).

Even if the nature of a complaint calls for the separation of the drivers, practical realities in the trucking industry prevent any sort of uniform response as to whether the accused or accuser is removed from the truck. For instance, Plaintiffs have not addressed, let alone offered significant proof, as to what portion of the 125 complaints of alleged harassment involved an accused who was an owner-operator and therefore could not be separated from the truck. (*See* D-App. 12, Stastny Declaration, ¶15 (stating that a portion of the accused drivers were owner-operators). Plaintiffs concede that a student driver could not continue in the truck alone. (Plaintiff's Brief, p. 15, n.9). If a lead driver complains of

harassment from a student driver, the student will be removed from the truck. (D-App. 56, Carlson Dep. p. 122:16-19).

Under these circumstances, the common contention and a common answer required by *Wal-Mart* are lacking. Plaintiffs have not offered significant proof that the putative class members' cases implicate a common contention over alleged injury resulting from removal or the threat of removal of an accuser from a truck for complaining of harassment. Even if they had, Plaintiffs have not offered significant proof that the assessment of who to remove from the truck could be evaluated untethered from the individual circumstances involving licensing, truck ownership, the nature of the load on the truck, and so on.

c. CRST has covered transit and lodging costs following allegations of harassment during the putative class period, but the particular policy has changed and the mechanism to cover costs depended on how and where those costs were incurred for each woman

CRST covers transit and lodging costs of anyone protected following a complaint of harassment. Plaintiffs' claim of a purported "policy" of failing to do so demonstrates a failure to examine the individual circumstances of compensation. The mechanism for reimbursement changed in 2015. Prior to 2015, the practice depended on the most expedient way to pay transit and lodging costs on short notice from afar.

Before July 2015, an accuser was compensated at a rate of $40 per day if a delay in pairing the driver exceeded 48 hours and she was at a remote location rather than her home. (D-App. 12, Stastny Declaration, ¶16). Lodging and transportation costs were pre-paid and/or reimbursed. (Id.) For instance, CRST often paid the hotel directly via voucher. (Id.) If the Driver Manager instead needed to advance money to cover costs, other steps were required in order to properly document and reimburse the cost of lodging. (Id.) (describing

advance of fixed sum, deduction from pay, and reimbursement of deduction upon submission of receipts). In July 2015, CRST implemented its HR Layover Pay policy, which compensates the driver at $100 per day until the separated driver is paired with a new driver. (D-App.43, 44, Carlson Dep. pp. 27:22-28:5; 33:1-34:6). In addition to the flat rate, the new policy ensures that no advances for lodging or transportation are ever deducted from a complaining driver's pay, thereby eliminating the need to submit receipts and process reimbursements.

Under the former policy, it may not have been obvious that CRST had covered the costs. For example, a complaint of harassment might not surface until after CRST had deducted money it advanced. (D-App. 12, Stastny Declaration, ¶16). In this scenario, CRST could not have yet known that it would need to cover those costs and would only do so once it became aware of the reason for transit and lodging expenses. (Id.) Any claim that CRST did not cover transit or lodging costs must be evaluated individually to trace the costs, deductions, and reimbursement. The putative class members were subject to different policies regarding lodging and travel expenses depending on when an alleged incident occurred, and the individual circumstances may have implicated different mechanisms within the reimbursement policy.

Taking a step back, at a more basic level, Plaintiffs cannot establish that a common answer exists regarding transit and lodging costs because Plaintiffs have not shown whether separation from the truck was even implicated for any significant portion of putative class members. Based on the individual assessments necessary, Plaintiffs have not offered significant proof that CRST operated under a general policy of discrimination to satisfy *Wal-Mart*'s burden for class treatment.

d. Pay increases depend on calendar dates in each trainee's contract, not completion of driver training

Plaintiffs cannot show commonality as to putative class members in their contention that those who complain of harassment extend their training time and allegedly must work for a longer period of time at a lower wage. Compensation rates are set according to calendar dates within a contract, not completion of training. (D-App. 2-3, Brueck Declaration, ¶7). The first pay increase is triggered by the passage of three months, not by the completion of training. (D-App. 3, Brueck Declaration, ¶7). While only co-drivers are eligible, the training program's duration up to 28 days makes it exceedingly unlikely a driver will remain active at CRST and fail to progress to co-driver after three months.[16] (Id.) As a result, Plaintiffs have not met *Wal-Mart*'s "significant proof" standard to establish that all putative class members were subject to a general policy of discrimination on that basis. The Court may not simply take the Plaintiff's allegations as true, and it must find that Plaintiffs have not met their burden as to the putative class members because there is no proof possible that compensation increases are dependent on completion of training.

e. The ability and need to impose discipline for alleged harassment is inextricably tied to the circumstances and severity of alleged harassment

At CRST, discipline is commensurate with culpability. *See* (D-App. 53, Carlson Dep. p. 107:1-8) (recognizing disciplinary action up to and including termination); *see also, e.g., supra* §§ II.H.-II.K. (describing range of procedural responses to a complaint of harassment). In asserting that CRST fails to impose discipline for corroborated harassment, Plaintiffs collide with the hurdle that insulates disciplinary action from class resolution: Plaintiffs

[16] Again, Plaintiffs cite to no record evidence of such an anomaly actually occurring, let alone a "pattern or practice" of such events.

describe particular examples of alleged harassment, assert that it had been corroborated, and argue that CRST should have imposed discipline. This is not a policy. It is Plaintiffs' individualized assessment of a unique fact pattern of alleged harassment. Plaintiff cannot extrapolate from unproven allegations of a few to establish a class. *Smith*, 306 F.R.D. at 67.

Plaintiffs here, like the EEOC over six years ago, err in believing CRST's investigations are such that they can "always produce sufficient information upon which to base a decision as important as deciding whether an employee should be fired for misconduct." *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 955. Adjudicative bodies that hold subpoena powers "are themselves unable to reach conclusions of ultimate fact in every case." *Id.* Plaintiffs cannot assume that CRST's investigations flawlessly detect and corroborate harassment in every instance. Unproven anecdotes are no basis to second-guess CRST's finding regarding harassment. More significantly, such anecdotes provide no basis to assume that harm is identical to that allegedly suffered by 125 putative class members or that CRST would have failed to find and discipline alleged harassment in all 125 instances. 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 under *Wal-Mart*.

f. The need to act promptly, and even what is considered prompt, depends on the circumstances and severity of alleged harassment

Plaintiffs once again point to several specific anecdotes that fail to establish the common contention or common answer required by *Wal-Mart* in asserting that CRST Driver Mangers' did not act "promptly" in responses to allegations of harassment. The term "promptly" is a decidedly relative term that must be assessed based on actual circumstances and in relation to the severity of an allegation of harassment. For instance, a CRST Driver

Manager's response will always be less prompt than if the alleged subject of harassment were to dial 911 for the police. If something short of police involvement is called for, CRST responds to complaints of harassment as the workplace realities and circumstances dictate.

After receiving a complaint through any of the numerous mechanisms available for reporting, CRST ensures that the driver is safe and makes a fact-dependent assessment of when and how the drivers should be separated. (*See* D-App. 53, 56-58, Carlson Dep. pp. 106:3-6, 122:12-16, 129:15-130:25) (recognizing varying obligations in relation to separating drivers). This may range from contacting law enforcement for an imminent threat, manufacturing a reason to direct the truck to a safe location or terminal nearby for a less pressing situation, or allowing the drivers to finish the route if the destination is near and the situation does not demand immediate separation. The internal and third-party reporting opportunities made available to drivers trigger an investigation protocol that requires involvement of CRST's Human Resources department. (D-App. 16-21, Excerpts from Driver Handbook). Failure to comply with reporting to Human Resources has, in the past, contributed to suspension or termination of Driver Managers. (D-App. 10-11, Stastny Declaration, ¶11).

The form of compliance and any deviation from CRST practices to ensure that complaints are addressed in a timely manner vary depending on when and how the complaints are submitted, in addition to the substance of any given complaint. Plaintiffs have not offered significant proof that each putative class member faced the same obstacles in response time as the unsubstantiated anecdotal experiences offered. Even within the scope of the anecdotes alleged, significant proof is lacking that the same CRST procedures were implicated, let alone deficient.

Taken collectively, the variety of individual circumstances that contribute to each investigation of alleged harassment in each tractor make the theory for class certification here distinct from the uniform circumstances faced by class members in cases where courts certified a common class. *C.f. Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 662 (D. Minn. 1991) (describing "systemic offenses" that "were so pervasive as to create an 'oppressive work environment,'" including "open display of pictures of nude females" and "incidents of physical harassment" at a taconite mine); *Newsome v. Up-To-Date Laundry, Inc.*, 219 F.R.D. 356, 362 (D. Md. 2004) (relying on "recurrent and widespread" use of racially hostile speech); *Warnell v. Ford Motor Co.*, 189 F.R.D. 383, 387 (N.D. Ill. 1999) (pointing to "the landscape of the total work environment" at an automobile assembly plant). By comparison, the question of commonality based on CRST's drivers' experiences with the operation of CRST harassment enforcement measures depends on the circumstances. As a result, Plaintiffs have not offered sufficient proof that "to determine whether Plaintiffs' experiences were indeed common or typical among female" employees. *See Smith*, 306 F.R.D. at 67.

4. Commonality is lacking because CRST's liability for policy changes are intrinsically linked to particular instances of alleged sexual harassment

Any changes to CRST's preventive or remedial measures are inextricably linked to particular instances of alleged sexual harassment. *See Elkins v. Am. Showa Inc.*, 219 F.R.D. 414, 418 (S.D. Ohio 2002) (quoting *Rosenberg v. University of Cincinnati,* 654 F. Supp. 774, 777 (S.D. Ohio 1986), *modified,* 118 F.R.D. 591 (S.D. Ohio 1987)) ("Commonality cannot exist where plaintiffs' claims 'do not relate to general policies and practices which are allegedly discriminatory, but rather to individualized claims of discrimination which could not possibly present common questions of law or fact sufficient to justify class action

treatment.'"). Purported procedural deficiencies and the alleged need for corrections in the case of the named Plaintiffs cannot be presumed to apply to dozens of other putative class members whose experiences are in all likelihood different. *See Smith*, 306 F.R.D. at 67 ("But this bare allegation asks the Court to do rather a lot of extrapolating from the personal experiences of a handful of named plaintiffs.").

One cannot assume that the circumstances of any given instance of alleged harassment triggered a duty to amend CRST policies. The operation of and any duty to alter the six alleged "policies" asserted by the Plaintiffs cannot be viewed in the abstract and must be considered in relation to particular circumstances. *See supra*, §§ III.C.3.a.-f. (describing Plaintiffs' failure to offer "significant proof" that CRST "operated under a general policy of discrimination" because of the varied issues implicated in an investigation of each putative class member's case). Furthermore, even if such a duty exists, one cannot assume that CRST breached such a duty by failing to amend its policies. On the contrary, CRST's practices to prevent or remediate sexual harassment have been the subject of continuous improvement during a period of intense external scrutiny. (*See, e.g.,* D-App. 8, Wolfe Declaration, ¶¶21-22) (describing Senior Lead Program initiative); D-App. 43, Carlson Dep. pp. 27:22-28:5) (describing "HR Layover Pay" policy to replace reimbursement of transit and lodging expenses)). Even if a putative class representative were to prove a Title VII violation based on the handling of her internal complaint, this would not "justify the additional inferences," *Falcon*, 457 U.S. at 158, that the allegedly discriminatory treatment is typical and rises to a policy of discrimination. Plaintiffs cannot establish a "common contention" because the circumstances of other women who made harassment complaints is at best the subject of impermissible extrapolation from the anecdotal experiences alleged.

See Smith, 306 F.R.D. at 67; *Falcon*, 457 U.S. at 157–58 (observing "the tenuous character of any presumption that the class claims are 'fairly encompassed' within" any single Title VII claim).

One court has rejected class treatment of the alleged failure to correct sexual harassment policies even before *Wal-Mart* confirmed the heavy burden plaintiffs must meet to achieve commonality. *See Elkins*, 219 F.R.D. at 424. *Elkins* rejected plaintiffs' argument "that the issues of whether defendant knew that the work environment at the plant was hostile and whether defendant took steps to remedy the problem are common to the class." *Id.* Much as here, plaintiffs argued that liability rested with the defendant's alleged failure to "deal with harassment in an effective manner" and could be adjudicated without inquiry into individualized issues. *Id. Elkins* disagreed on the basis that (1) not all putative class members suffered from a hostile work environment and (2) "the issue of whether defendant failed to deal with harassment in an effective manner is a determination which must be made on a case-by-case basis and which depends to a large extent on the frequency and severity of the conduct alleged by the complaining individual." *Id.*

CRST investigated and responded to complaints of harassment, and the disposition of each matter is intrinsically tied to the varied nature of the complaints received. *See Elkins*, 219 F.R.D. at 424 ("The record discloses that defendant did investigate and respond to various complaints of sexual harassment and that its responses ranged from determining to take no action to terminating the offending employee, with some employees being suspended without pay and others being moved to different areas of the plant or to different shifts."). Of course, denial of class certification will not prevent individual plaintiffs from asserting that "management did not attempt, or failed, to deal with her complaints in an

effective manner," but "establishment of that fact as to one or several plaintiffs does not lend itself to the conclusion that as to the class generally, defendant had a practice of not effectively responding to complaints of sexual harassment." *Id.* at 424.

5. Typicality is lacking because Plaintiffs cannot meet their burden to show that resolution of the putative class representatives' claims will prove all claims

Plaintiffs have not met their burden to establish that the claims of the putative class representatives are typical of the class of all female CRST employees in the proposed class. *See* Fed. R. Civ. P. 23(a)(3); *Falcon*, 457 U.S. at 159 ("If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action."). Where proof of the putative class representatives' claims will not prove the claims of putative class members, typicality is lacking. *See Elkins*, 219 F.R.D. at 425 ("Nonetheless, this is not a case where a named plaintiff who proved her own claim would prove anyone else's. The named plaintiffs have not shown that their claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members."); *Marquis v. Tecumseh Products Co.*, 206 F.R.D. 132, 158 (E.D. Mich. 2002) ("The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class.") (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998)).

The plaintiffs in *Elkins* failed to satisfy the typicality requirement in a Title VII sexual harassment case. *Elkins*, 219 F.R.D. at 425. The named plaintiffs did not show their claims arose "from the same event or practice or course of conduct that gives rise to the claims of other class members":

> As indicated above, whereas one named plaintiff may have been subjected to extensive harassment of an egregious nature in the form of repeated lewd

> remarks, sexual advances, or unwanted touching, another may have experienced an isolated harassing remark or have overheard sporadic comments about other females which, standing alone, would not be sufficiently severe or pervasive to support a discrimination charge. Similarly, whereas one plaintiff may herself have been the target of harassment, another female employee may have simply observed behavior directed toward another which would not necessarily support a sexual harassment charge by the non-targeted employee. For these reasons and those discussed above in connection with the commonality requirement, the conduct complained of is too divergent and of such widely variant severity and duration to allow the Court to attribute a collective nature to it. Accordingly, the typicality requirement is not satisfied.

Id. As in *Elkins,* Plaintiffs have no basis to assert that each female employee who reported was subject to the same alleged experiences of the class representatives.

Plaintiffs apparently hope to bypass the incident-specific response required to any given internal complaint of sexual harassment in a fashion squarely rejected well before *Wal-Mart*. In *Marquis*, plaintiffs sought "to bridge this gap between individual claims and an across-the-board attack by citing Defendant's allegedly chronic and repeated failures to take appropriate action in response to complaints of sexual harassment, and then arguing that this is tantamount to a policy or practice of permitting, or perhaps even encouraging, widespread sexual harassment at Defendant's facility." 206 F.R.D. at 161. Yet, each putative class representative could succeed on their claims without establishing a company-wide policy. *See id.* ("[I]t is enough to show that each of them was the target of unlawful conduct, and that management failed to prevent, correct, or otherwise adequately address these particular incidents.") The ability of plaintiffs, in *Marquis* and here, to prevail without all class members doing so means that the case is "not ineluctably a case about a corporate policy or practice of discrimination." *Id.*; *see also Falcon*, 457 U.S. at 158 (ruling that a putative class member's proof of a Title VII violation would not "justify the additional

inferences" that the allegedly discriminatory treatment is typical and rises to a policy of discrimination).

Even if Plaintiffs were entitled to dictate the purported "policies" CRST implemented in response to harassment complaints, thereby converting the *Faragher-Ellerth* paradigm into no more than a straw man, they cannot show that other procedures did not pick up the slack where these "policies" allegedly fell short. For instance, even though a student driver's training may be briefly delayed to ensure her safety, training time is but a fraction of the period prior to a new driver's first pay increase to leave room for contingencies. (*See* D-App. 2-3, Brueck Declaration, ¶ 7) (describing pay increases). Even if Plaintiffs prevailed in showing a purported policy were discriminatory as to any of them, typicality is lacking because such proof would not demonstrate that each putative class member had not been caught by the safety net of another CRST policy.

Furthermore, Plaintiffs have advanced no data to show that putative class members' circumstances implicated a duty to change CRST policy or whether CRST failed to change its policy following any given instance of alleged harassment. As discussed in relation to commonality, the operation and any duty to alter the six alleged "policies" asserted by the Plaintiffs cannot be viewed in the abstract and must be considered in relation to particular circumstances at particular points in time. *See Falcon*, 457 U.S. at 158 n.13 ("The commonality and typicality requirements of Rule 23(a) tend to merge."). With any given internal complaint of harassment, CRST may offer evidence to show that no duty to take remedial action existed or, even if it did, the duty had not been breached because of how CRST's policy changed.

6. The Retaliation Sub-Class is not susceptible to class treatment on broader basis

Alleged "policies" that form a basis for Plaintiffs' allegations of hostile work environment are also asserted as a basis for class certification of a retaliation class. *See* Plaintiffs' Brief, pp. 39-41, 43. Retaliation under Title VII requires showing (1) engagement in protected activity; (2) an adverse employment action; and (3) a causal link between the protected activity and the adverse employment action. *Wagner v. Campbell*, 779 F.3d 761, 766 (8th Cir. 2015). "[R]etaliation must be the 'but for' cause of the adverse employment action." *Blomker v. Jewell*, --- F.3d ----, No. 15-1787, 2016 WL 4157594, at *6 (8th Cir. Aug. 5, 2016) (quoting *Jackman v. Fifth Judicial Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2528, (2013))).

Each plaintiff must individually prove retaliation, and a defendant "is entitled to establish as to each plaintiff a legitimate reason for any adverse action taken against that plaintiff, and each plaintiff must then have the opportunity to establish that the reason offered is pretextual." *Elkins*, 219 F.R.D. at 425. In *Elkins*, plaintiffs had not identified any issues underlying the retaliation claims susceptible to class-wide resolution. *Id.*; *see also Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 676 (N.D. Ga. 2001) ("Plaintiffs' claims of retaliation are fact-intensive and require a showing of intentional discrimination.").

At a minimum, Plaintiffs have not met their burden to establish typicality or commonality for the retaliation class for the same reasons they have failed to do so for the hostile work environment class. *See supra*, §§ III.C.1.-5. The deficiencies discussed above that follow from assuming the validity of complaints of harassment and that a common policy response is appropriate to each allegation are equally applicable here. Plaintiffs' have merely asserted circumstances allegedly experienced by the putative class representatives,

including the missed opportunity to earn pay, alleged obligations to cover lodging and transit costs, and delays in training.[17] *See* Plaintiffs' Brief, pp. 40. The three putative class representatives' experiences cannot be extrapolated into a "policy," as set forth above under *Falcon* and *Smith*.

The particular proof required for a retaliation claim places class certification further from reach. *See, e.g., Elkins*, 219 F.R.D. at 425 ("Plaintiffs' retaliation claims are even less conducive to class-wide adjudication based on a lack of commonality among such claims."). Plaintiffs have offered nothing to show that retaliation was the "but for" cause of the putative class members' alleged experiences following the filing of an internal complaint. Furthermore, the named Plaintiffs' showing of that fact would not satisfy each putative class member's ability to show that they experienced identical treatment and it was the "but for" cause of filing an internal complaint. A variety of other nondiscriminatory reasons may exist why a driver would miss an opportunity to earn pay, cover lodging and transit, or experience delays in training irrespective of whether a putative class member filed an internal complaint. *See Blomker*, No. 15-1787, 2016 WL 4157594, at *6 (quoting *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 90–91 (2d Cir. 2015)) ("It is not enough that retaliation was a "substantial" or "motivating" factor in the employer's decision."); *see supra* §§ III.C.3.b.-d. (explaining how issues will vary as to putative class members on these issues). If resolution in "one stroke" is necessary to achieve commonality and typicality, *Wal-Mart*, 564 U.S. at 350, the putative class members' retaliation claims cannot satisfy the standard.

[17] As set forth above, these allegations have largely been debunked by the contemporaneously maintained record evidence cited by CRST.

7. The California Sub-Classes are not certifiable for the additional reason that California's FEHA does not apply extraterritorially

The California Fair Employment and Housing Act ("FEHA") does not apply extraterritorially, so the Court must reject Plaintiffs' attempt to generate sub-classes of individuals who were allegedly harassed or retaliated against in California by operation of alleged corporate policies and procedures involving alleged actions that took place outside of California.[18] *See Campbell v. Arco Marine, Inc.*, 42 Cal. App. 4th 1850, 1852 (1996) (ruling that FEHA "should not be construed to apply to non-residents employed outside the state when the tortious conduct did not occur in California"); *Anderson v. CRST Int'l, Inc.*, No. CV 14-368 DSF MANX, 2015 WL 1487074, at *4 (C.D. Cal. Apr. 1, 2015) ("The Court concludes that FEHA is inapplicable when the challenged conduct occurs outside of California.").

Plaintiffs assert violation of Title VII and seek class treatment for the portion of their claim tied to CRST's alleged "general policy of discrimination," (Plaintiffs' Brief, p. 34). Yet, CRST's home office in Iowa is responsible for company policies and hosts the Human Resources department tasked with handling complaints of harassment. (D-App. 4, Brueck Declaration, ¶10). Plaintiffs' allegations therefore demonstrate that the particular tortious conduct at issue for class certification purposes—supposed "policy" liability—occurred outside of California. In other words, *Campbell* dictates that alleged FEHA liability does not apply to the alleged tortious conduct claimed by the Plaintiffs that occurred in Iowa.

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[18] Plaintiffs initially filed this lawsuit in the Central District of California. *See Sellars v. CRST Expedited, Inc.*, No. 5:15-CV-00969 PA (DTBx) (C.D. Cal.). CRST thereafter moved to transfer venue. Plaintiffs and CRST stipulated to dismiss the California action without prejudice. *Docket Index No. 31, Sellars v. CRST Expedited, Inc.*, No. 5:15-CV-00969 PA (DTBx) (C.D. Cal. September 18, 2015). In the dismissal, Plaintiffs and CRST further stipulated to extend the statute of limitations applicable to Title VII actions imposed by federal statute. *See id.*

The sweeping and unsubstantiated allegations of harassment in California asserted by Plaintiffs are insufficient to overcome the lack of extraterritorial effect of FEHA as it relates to class certification on the basis of CRST's alleged policies. *See* Plaintiffs' Brief, p. 30-31 (alleging harassment in California); *see id.* pp. 32-33 n.12, p. 39 n.13 (referencing FEHA in relation to the California sub-class). Plaintiffs' baseless assertion that "many women will have experienced harassment in California," (Plaintiffs' Brief, p. 31), is simply irrelevant to class certification on the issue of CRST liability for alleged policies generated and implemented in Iowa. In sum, no common question of law or fact exists under Federal Rule of Civil Procedure 23(a)(2) as to a California sub-class, because no claim for liability exists under FEHA.

D. Plaintiffs Fail to Satisfy the Requirements Fed. R. Civ. P. 23(b) or 23(c)(4)

Even if each of the preconditions of Rule 23(a) were satisfied, Plaintiffs' claims are inherently antagonistic to class treatment. The differences in particular allegations of sexual harassment, or the remedial measures necessary in view of particular allegations, make this case unsuited for any of Rule 23(b)'s molds. Furthermore, Plaintiffs' attempt to maintain a class action under Fed. R. Civ. P. 23(c)(4) is indistinguishable from the relief they seek under Rule 23(b) and must likewise be rejected.

1. Certification under Fed. R. Civ. P. 23(b)(3)—whether alone or as a hybrid—would be improper because issues vary by plaintiff and a class action would be inferior to individual disposition.

Plaintiffs first contend that the action may be maintained under 23(b)(3), despite the requirements that (1) "questions of law or fact common to class members predominate over any questions affecting only individual members" and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ.

P. 23(b)(3). Plaintiffs alternatively seek to have their claims for liability certified under 23(b)(2) and damages certified under 23(b)(3). As discussed below, certification under 23(b)(3) generally or only with respect to damages is inappropriate.

a. Common questions of fact or law do not predominate

Rather than establishing predominance, Plaintiffs effectively ask the Court to assume its existence. The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623 (1997). "[T]he predominance criterion is far more demanding" than Rule 23(a) commonality requirement. *Amchem*, 521 U.S. at 623–24. "This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson Foods*, 136 S. Ct. at 1045 (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:50, pp. 196–197 (5th ed. 2012) (internal quotation marks omitted)).

Plaintiffs' theory of predominance is tied to CRST's alleged policies and practices regarding harassment. (Plaintiffs' Brief, p. 48.) Yet, CRST's policies strictly and indisputably prohibit sexual harassment. *See CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 952 ("It is undisputed that tolerating sexual harassment is not CRST's official policy. To the contrary, at all relevant times CRST has had a facially valid anti-sexual harassment policy, which it distributed to its employees."). As a result, Plaintiffs ask the Court to nonetheless assume that sexual harassment has occurred in dozens of instances, so that this Court may then

prescribe the panacea to harassment, leaving the existence of harassment to be established in a later phase of the case. Whether modifications to CRST policies were necessary must be measured against particular allegations. For instance, a putative class member who filed an internal complaint about the casual, yet impermissible, use of sexually discriminatory language by the accused may have had no desire for either driver to get off the truck. CRST would have addressed the problem, resistance to that individual's Title VII rights would certainly have been lacking, and no modification of CRST practices would have been implicated. *See Elkins*, 219 F.R.D. at 427 ("The need for repeated individualized inquiries demonstrates that the predominance requirement is not satisfied."); *see also supra* §§ III.C.3.a.-f. (describing individualized inquiries required for putative class members).

Problems likely to follow if this case were carved to fit the mold of a class action is well captured in a case relied on by Plaintiffs, albeit addressing a substantive claim other than Title VII:

> The district court abused its discretion in determining that the individualized issues in this case "do not predominate over the common issues for those questions for which certification is sought." Indeed, it is the deliberate limiting of issues by this district court in this case that is problematic. ***Stated earlier, all actions can be articulated so that there are common questions. Here, by bifurcating the case and narrowing the question for which certification was sought, the district court limited the issues and essentially manufactured a case that would satisfy the Rule 23(b)(3) predominance inquiry.*** Concluding "that questions on individualized exposure will not be addressed as part of [the] questions for which the Court will agree to certify the class" complicates the litigation of the elements necessary to resolve the plaintiffs' claims. ***The district court's narrowing and separating of the issues ultimately unravels and undoes any efficiencies gained by the class proceeding because many individual issues will require trial.***

Ebert v. Gen. Mills, Inc., 823 F.3d 472, 479 (8th Cir. 2016) (emphasis added). *Ebert* goes on to recognize that certifying on the limited issue of liability will nonetheless leave unanswered liability determinations for individual treatment, as well as determinations on causation and

damages. *Ebert*, 823 F.3d at 479. Likewise here, even if Plaintiffs were permitted to split off a portion of their liability showing, the volume of plaintiff-specific hostile work environment and retaliation determinations remaining would undo any purported efficiency gained.

b. A class proceeding would not be superior

The Court need only attempt to imagine the unwieldy structure this case would assume if the proposed class were certified to determine the inferiority of a class action solely to determine CRST's liability for the alleged procedural responses to the named Plaintiffs' internal complaints. The circumstances are comparable to those in *Elkins*, where a class proceeding was found to be inferior. 219 F.R.D. at 426-27. Plaintiffs concede that additional proceedings would be necessary for each putative class member, questions of liability as to each individual putative class member would remain unanswered, and, if CRST were found not to have tolerated harassment of the class representatives, putative class members might still try to assert a hostile work environment based on their particular experiences. *See id.*

Notably, "the most compelling reason for finding superiority in a class action—the existence of a negative value suit—is absent from most Title VII . . . cases," because the claims have relatively substantial value and the availability of attorney's fees remove traditional disincentives to individual lawsuits. *Burrell v. Crown Cent. Petroleum, Inc.*, 197 F.R.D. 284, 291–92 (E.D. Tex. 2000); *Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 549 (D.N.J. 2001) ("[T]his is not a negative value suit. As the Supreme Court stated in *Amchem,* "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (quoting *Amchem*, 521 U.S. at 617).

Plaintiffs in *Burrell* advanced similar arguments for superiority to those asserted by the Plaintiffs here: "Plaintiffs argue that certification under 23(b)(3) is proper because common issues relating to a class-wide 'pattern or practice' of discrimination clearly predominate over issues related to the recovery of compensatory and punitive damages." 197 F.R.D. at 290. Beyond the financial incentives in individual Title VII cases, *Burrell* found that a class proceeding would not be superior because of the individual issues that would remain. *Id.* at 291.

Likewise, the Title VII violation asserted in *Reap*, albeit related to alleged age discrimination, involved a "highly individualized nature of the determination of disparate treatment and damages" involving the proof of a larger number of putative class members' claims in "a very complicated and prolonged trial." 199 F.R.D. at 549. "This approach would have to be repeated again if the trial were bifurcated into liability and damages stages." *Reap*, 199 F.R.D. at 550. The 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.

Reap goes further to question the ability to separate liability and damages phases at all: "Under the Seventh Amendment to the United States Constitution, the jury who hears the evidence in the liability phase of the case might also be required to hear the evidence in the damages phases." *Reap*, 199 F.R.D. at 550 (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422-25 (5th Cir. 1998)); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) ("The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another

finder of fact."). The unworkability, inefficiency, and, perhaps, unconstitutionality of a class proceeding under these circumstances demonstrate that individual proceedings would be superior for the claims asserted here.

2. Certification under Fed. R. Civ. P. 23(b)(2) is inappropriate because the unique nature of allegations of harassment do not implicate any single policy change

Certification of a class action to obtain injunctive relief as to CRST policies is inappropriate because, as discussed extensively above, CRST has already implemented and continuously seeks to improve policies to prevent, detect and remedy sexual harassment. The courts are not suited to act as a CRST human-relations czar, who would implement widespread policy changes without individualized proof as to the effectiveness of CRST's past practices. "Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.'" *Amchem*, 521 U.S. at 614 (citation omitted); *see also* Fed. R. Civ. P. 23(b)(2). "Although a Rule 23(b)(2) class need not meet the additional predominance and superiority requirements of Rule 23(b)(3), 'it is well established that the class claims must be cohesive.'" *Ebert*, 823 F.3d at 480 (quoting *Barnes v. Am. Tobacco Co.,* 161 F.3d 127, 143 (3d Cir.1998)). In part on the basis of a lack of cohesiveness, *Ebert* rejected the sort of "hybrid" certification sought by Plaintiffs here.

As discussed above, the Court may not assume that sexual harassment has occurred or what affirmative policies would best mitigate the indeterminate alleged harassment experienced by putative class members. A duty or breach of a duty to make policy improvements can only be gauged relative to particular circumstances. "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each

member of the class." *Wal-Mart*, 564 U.S. at 360. Plaintiffs cannot establish a single form of injunctive relief that may be sought for each and every putative class member, because the policy changes implicated would depend on the particular experience of each putative class member.

3. Certification under Fed. R. Civ. P. 23(c)(4) fails to alleviate any of the previously articulated concerns

In the Eighth Circuit, Rule 23(c)(4) does not serve to reduce any of the previously discussed concerns regarding the lack of predominance of issues, inferiority of a class proceeding, or the unworkability of injunctive relief. Federal Rule of Civil Procedure 23(c)(4) provides: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." The various U.S. Circuit Courts of Appeal "have disagreed over the extent to which the ability to certify issue classes alters the predominance requirement." *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 272–73 (3d Cir. 2011); *see also Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 202, n.25 (3d Cir. 2009) (describing circuit split). Ultimately, the limited guidance available from the Eighth Circuit demonstrates that certification under Rule 23(c)(4) on CRST's liability would be inappropriate without considering the traditional obstacles to certification. *See In re St. Jude Med., Inc.*, 522 F.3d 836, 841–42 (8th Cir. 2008).

The Fifth Circuit raised the concern that Rule 23(b)(3)'s predominance requirement would be meaningless if issues could be indiscriminately severed. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that

allows courts to sever the common issues for a class trial. Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended." (citations omitted)). Later, the Fifth Circuit found that "certifying the first stage of the pattern or practice claim under (b)(3)"—what Plaintiffs seek to do here—"is foreclosed by *Castano.*" *Allison*, 151 F.3d at 421. Other Circuit Courts of Appeal have disagreed, stating that courts may certify a class under Rule 23(c)(4) "regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement." *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006).

As the Eighth Circuit observed, however, "[e]ven courts that have approved 'issue certification' have declined to certify such classes where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation." *In re St. Jude Med., Inc.*, 522 F.3d at 841. *St. Jude* reversed the district court's class certification order out of a concern that individual issues as to the elements of the plaintiffs' case would predominate. *Id.* at 840-41. In this respect, the Eighth Circuit's appears unwilling to allow 23(b)'s requirements to be completely ignored in a case where, as here, barriers to certification exist under Rule 23(b).

E. The Rules Enabling Act's Limitations Prohibit Class Certification Here

Class certification would violate the Rules Enabling Act's requirement that rules of procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b); *see also Wal-Mart*, 564 U.S. at 367 (rejecting "Trial by Formula" as it would interfere with defenses to individual claims to which the employer would have been entitled); *Ortiz v.*

Fibreboard Corp., 527 U.S. 815, 845 (1999) (observing that "[t]he Rules Enabling Act underscores the need for caution" in proceeding as a class); *Amchem*, 521 U.S. at 613 (observing that "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act").

The central thrust of Plaintiffs' theory of class certification is the assertion that CRST tolerated the harassment of all putative class members. (Plaintiffs' Brief, p. 31.) If the class were certified, CRST would be deprived the opportunity to mount a defense that its policy appropriately addressed fact-specific determinations as to alleged harassment of each and every putative class member. Additionally, for each putative class member who filed an internal complaint, CRST is entitled to present evidence and prove that its policy effectively addressed the concerns raised. Alternatively, CRST is entitled to present evidence that it modified its policy to address any inadequacy exposed by a given internal complaint of harassment. Certification here would deprive CRST of the substantive rights in requiring putative class members to meet their burden of proof and allowing CRST to present its defenses as to each putative class member. *See Wal-Mart*, 564 U.S. at 367 ("[A] class cannot be certified on the premise that [the employer] will not be entitled to litigate its statutory defenses to individual claims."); *see also In re St. Jude Med., Inc.*, 522 F.3d at 840 (recognizing the defendant would be permitted to present direct evidence specific to an element of each plaintiff's claim and reversing class certification because "plaintiff-by-plaintiff determinations" would be required).

Plaintiffs hope to sidestep CRST's right to present individual defenses in reliance on the *Teamsters* method of proof, but the format of Plaintiffs' claim will not permit individualized defenses to be stripped out for a later hearing. "The Supreme Court has

instructed that in pattern-or-practice class actions, the plaintiffs can first 'demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer,' after which members of the class will have the benefit of the presumption at his or her individualized hearing (now known as a *Teamsters* hearing) that 'individual [employment] decisions were made in pursuit of the discriminatory policy.'" *In re Johnson*, 760 F.3d 66, 74-75 (D.C. Cir. 2014) (quoting *Teamsters,* 431 U.S. at 359-60); *but see CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 936 (quoting *Jenson*, 824 F. Supp. at 876) (describing modified *Teamsters* approach in the Eighth Circuit). *Johnson*, however, does not account for a scenario where the basis for liability will center on the sufficiency of CRST's remedial efforts following particular instances of alleged harassment that cause those policies to operate in different ways, in the backdrop of a prior court ruling dismissing for lack of evidence the contention that CRST maintained a "'standard operating procedure' to tolerate sexual harassment." *CRST Van Expedited, Inc.*, 611 F. Supp. 2d at 952.

CRST's remedial efforts, couched as an alleged "policy of tolerating sexual harassment of women," (Plaintiffs' Brief, p. 31), can only be tested against particular, substantiated instances of alleged harassment. The potential defenses illustrate how CRST's rights would be abridged if a class were certified contrary to *Wal-Mart*'s prohibition against a trial by formula. Depending on the particulars of putative class members' claims, for instance, CRST may show that the policy worked effectively; it lacked knowledge of a policy's practical effect as to a particular complainant; or it developed corrective measures in view of a complaint.

F. Class Certification Here Would Violate U.S. Const. Article III, Section 2

A class premised on CRST's purported failure to remediate harassment threatens to include members who have suffered no injury in fact and therefore have no standing under Article III, Section 2 of the United States Constitution. Standing requires an injury in fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), *as revised* (May 24, 2016) (citing *Lujan,* 504 U.S. at 560). "An injury in fact is a 'direct injury" resulting from the challenged conduct. *McClain v. Am. Econ. Ins. Co.*, 424 F.3d 728, 731 (8th Cir. 2005) (quoting *Steger v. Franco. Inc.,* 228 F.3d 889, 892 (8th Cir.2000)).

A class proceeding is not freed from the constraints of Article III. *See Amchem*, 521 U.S. at 613 (observing that "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act"). "Although federal courts 'do not require that each member of a class submit evidence of personal standing,' a class cannot be certified if it contains members who lack standing." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (quoting *Denney v. Deutsche Bank AG,* 443 F.3d 253, 263–64 (2d Cir.2006)).

Assuming, without conceding, that use of the *Teamsters* method of proof in a sexual harassment case comports with Article III's requirements insofar as it frees class representatives from proving each putative class member was a victim of an alleged "discriminatory policy," *Teamsters*, 431 U.S. at 360, Plaintiffs here have nonetheless narrowed their claims in such a way that injury in fact would not inherently exist for all

putative class members as in a typical *Teamsters* case. Standing in *Teamsters* appears to be premised on proof of a broad-based discriminatory policy that affects each member of a class. *See Teamsters*, 431 U.S. at 359 (describing impetus for the method of proof described). For instance, *Teamsters* left opened the possibility of discriminatory injury against those who had not applied for a job on the basis that "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." *Teamsters*, 431 U.S. at 365-66.

Here, however, Plaintiffs have limited their claim in such a way that the alleged Title VII violations would not necessarily affect every woman who internally complained of harassment, let alone those who had not. The purported "policies" serving as a basis for alleged liability do not apply to each putative class member. (*See, e.g.,* D-App. 12, Stastny Declaration, ¶15 (stating that a portion of the accused drivers were owner-operators who could not be separated from their trucks); D-App. 43-45, Carlson Dep. pp. 27:22-28:5; 33:1-34:6) (describing adoption of HR Layover Pay policy to replace reimbursement of lodging and transit expenses)). If a putative class member's complaint were invalid or it did not invoke one of the six alleged "policies," putative class members had no injury in fact. Moreover, Plaintiffs assert liability for CRST's alleged unwillingness to change its policy following complaints of harassment, a basis for liability which is necessarily measured against particular complaints received. Plaintiffs cannot assume each class member suffered any injury that gives rise to constitutional standing without individualized proof of each claim in such a way that class treatment impossible.

WHEREFORE, for all the foregoing reasons, Defendant CRST Expedited, Inc. respectfully requests that the Court issue an Order denying Plaintiffs' Motion for Class Certification and for whatever additional relief the Court deems just and necessary.

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2016, I filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following:

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