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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

DANIELLE JOHNSON, Plaintiff, v. STATE OF OREGON, by and through the STATE OF OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY *et al*. Defendants.	No. 24-cv-00279-JR **PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATIONS [ECF 31]**

Plaintiff Danielle Johnson hereby objects to the Findings and Recommendation ("F&R") of Magistrate Judge Russo [ECF No. 31], recommending that the Court deny in part and grant in part Defendants' Partial Motion to Dismiss the Complaint.

PRELIMINARY STATEMENT

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(3), this Court should, after *de novo* review, reject those portions of the F&R that recommend granting Defendants' Motion to Dismiss Plaintiff's Sixth and Seventh Claims for Relief alleging hostile work environment discrimination based on race pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and 42 U.S.C. §§ 1981 & 1983, respectively, and should enter an order denying Defendants' motion as to those claims.

In the F&R, the Magistrate Judge recommends that the Court deem the allegations in the complaint insufficient to state a hostile work environment claim. To reach this conclusion, the Magistrate Judge committed several critical errors. First, the Magistrate Judge ignored or distorted the vast majority of the allegations in the complaint. And in one important area where the Magistrate Judge did not flat out ignore the allegations, she improperly re-characterized them as alleging solely that Plaintiff "disagrees" with the principles of "Diversity, Equity and Inclusion" (DEI) and so-called "anti-racism." This selective and distorted re-conceptualization of the complaint misconceives the judicial role in deciding a motion to dismiss—the Court's job is to read the complaint in the light most favorable to the non-moving party, not (as the Magistrate Judge has unfortunately done here) to minimize and simplify the pleadings into oblivion. When viewed in the appropriate light, the complaint contains scores of factual allegations outlining specific tangible employment discrimination, officially-enforced racial segregation, specific hostile official messaging aimed both at Plaintiff in particular and at her racial group in general, and specific instances of hostile comments from co-workers, each of

which, standing alone, is sufficient to state a claim, and all of which, taken together, create a truly compelling case for relief.

Second, the Magistrate Judge did not apply the proper legal standard. As explained in detail in Plaintiff's opposition to Defendants' motion to dismiss, there are *two distinct and independent* ways an employer can create a hostile work environment: (1) through tangible, concrete discriminatory practices that disadvantage members of the plaintiff's race, whether or not the plaintiff is a direct victim of those practices; and (2) through the expression of racially derogatory ideas and messages (by the employer itself and/or by co-workers who are unchecked by the employer). As explained in Plaintiff's opposition, Ms. Johnson's complaint alleges *both types* of hostile work environment. But the F&R completely ignores half of Plaintiff's argument, focusing solely on the "hostile messaging" theory. For this reason alone, the recommendation should be rejected. And, even with respect to the single theory that the Magistrate Judge chose to address, the F&R gets the law wrong. Finally, the F&R contains a number of irrelevant and unsupported statements of personal opinion and improper factual determinations that should be rejected by the Court.

For these reasons, the Court should reject the F&R to the extent it recommends dismissing Plaintiff's Sixth and Seventh causes of action and to the extent it includes gratuitous assertions that are both irrelevant to the underlying motion and unsupported by the record.

FACTUAL BACKGROUND

The following is a brief summary of the allegations in the complaint. Please see the complaint [Dkt. 1] and Plaintiff's Opposition to Defendants Partial Motion to Dismiss [Dkt. 27] at 2-10 for a full recitation of the facts relevant to a determination of this matter.

Plaintiff Danielle Johnson is employed as a procurement and contract specialist by the Oregon Department of Environmental Quality ("DEQ"). Compl. ¶ 22. Ms. Johnson is categorized as white. DEQ engages in race-based hiring and human resources practices. Among other things, DEQ has directed its employees to "reduce[] white employee representation in favor of non-white representation," *id.* ¶ 41, *see also id.* ¶ 47, and has adopted a number of policies toward that end. DEQ's own data shows that these efforts have been effective and that there is a significant hiring bias against white applicants.

Separate from these tangible acts of employment discrimination, DEQ runs racially segregated programs and activities. For example, DEQ has created so-called "safe spaces," that are exclusively available to non-white employees. DEQ pays wages to non-white employees during the time they spend in these "spaces." There is no equivalent program to pay white employee wages during time spent experiencing "safety."

Separate from both DEQ's tangible employment practices and from its creation of segregated spaces and programs, DEQ has, for years, promoted and tolerated the expression of ideas and messages that are racially divisive and hostile to white employes.[1] DEQ has done this directly through its own messaging and the messaging of its hired consultants, and indirectly by allowing co-workers and supervisors to make racially hostile comments on a regular basis without correcting their behavior.

[1] The messaging is also hostile to non-white employees because it casts them as hapless victims of "whiteness" who lack agency, cannot focus on the "written word," and do not value "individualism." Compl. at 17 n.2. Needless to say, these stereotypes are deeply offensive and inaccurate.

Plaintiff brings two sets of claims in her complaint. First, she brings claims of hostile work environment discrimination based on all three categories of misconduct by DEQ (engaging in tangible employment discrimination; promoting racially segregated programs and activities; and through the expression of hostile ideas and messages). Second, Plaintiff brings claims alleging retaliation. As detailed in the complaint, Plaintiff vocally questioned the legality of DEQ's practices. For that she was disparaged in agency-wide communications (where she was effectively labeled "racist" by the top official in the agency), demoted, suffered a pay cut, and subjected to a sham investigation into whether *she* caused harm to others. Defendants have not moved to dismiss retaliation claims,[2] but have moved to dismiss the discriminatory work environment claims. In the F&R, the Magistrate Judge recommends dismissal of the hostile work environment claims. For the reasons stated below, the Court should reject the recommendation and enter an order denying Defendants' motion to dismiss Plaintiff's Sixth and Seventh causes of action.

ARGUMENT

I. Standard of Review

A Magistrate Judge's recommendations regarding a motion to dismiss for failure to state a claim are subject to *de novo* review. Fed. R. Civ. P. 72(b); *see also U.S. v. Raddatz*, 447 U.S. 667, 674 (1980). "In conducting a *de novo* review, the district court is not bound by the recommendations of the magistrate judge, and may accept, reject, or modify the recommended

[2] Plaintiff brings retaliation claims under both federal and state law. Defendants have moved to dismiss the state law claims and Plaintiff does not object to the F&R to the extent it recommends dismissal of those claims. Defendants did not move to dismiss the federal retaliation claims and they are not at issue here.

decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." *Houff v. Blacketter*, No. CV 06-445-PK, 2009 WL 252156, at *1 (D. Or. Feb. 2, 2009) (internal quotation marks, citations omitted), *aff'd*, 402 F. App'x 167 (9th Cir. 2010).

On the underlying motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must accept all factual allegations in Plaintiff's complaint as true, and draw all reasonable inferences in her favor. *See Ass'n for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011). In other words, no inferences may be drawn in favor of Defendants. *See id.; see also Tyler v. Hennepin Cnty., Mn.*, 598 U.S. 631, 637 (2023) (at this stage, a plaintiff "need not definitively prove her injury or disprove the [defendant's] defenses"). All that is required is that the plaintiff allege sufficient facts to support a "plausible" claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

II. The Recommendation Ignores or Distorts the Vast Majority of the Allegations in the Complaint

A. *The Magistrate Judge Improperly Weighed Evidence and Ignored Allegations in the Complaint Establishing that DEQ Engages in Tangible Employment Discrimination*

As alleged in the complaint, DEQ rejects a policy of equal employment opportunity because providing equal opportunities to individuals regardless of their race or other immutable characteristics allegedly will fail to "result in a workforce that includes appropriate representation of women, minorities, and people with disabilities in all job classifications." Complaint [ECF No. 1] ("Compl.") ¶ 37 *quoting* DEQ Affirmative Action Policy, Compl. Exhib 4 [ECF No. 9-4] at 42. As might be expected however, DEQ's written policies "pay lip service to the idea that [it] is 'committed to . . . Equal Employment Opportunity.'" Compl. at 9 n.1; *see also id.* Exhib. 4 at 42. As noted in the complaint, "[t]his statement is false." Compl at 9 n.1.

Similarly, DEQ's public facing policies say that DEQ "does not discriminate based on race . . . ," *Id.* Exhib 4. at 7, but that statement, too, is false. In the F&R, however, the Magistrate Judge improperly weighed evidence and gave credence to the idea that DEQ's materials "intimate [they] were committed to achieving equality in the workplace through legal means," which the Magistrate Judge found to be an "obvious alternative explanation" for DEQ's alleged misconduct. F&R at 18.[3]

The Magistrate Judge also effectively ignored allegations that, notwithstanding protestations that it follows the law, DEQ's own data demonstrates that it discriminates against white job applicants. As noted in the complaint, DEQ has published information showing that

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[3] Even leaving aside the impropriety of the Magistrate Judge suggesting factual determinations at this stage of the litigation, DEQ's materials do not support the Magistrate Judge's inference. DEQ's Affirmative Action Plan provides contradictory statements which show that Defendants do, in fact, intend to violate the law in the pursuit of equal outcomes. The Plan states,

> A policy of equal employment opportunity will not necessarily result in a workforce that includes appropriate representation of women, minorities, and people with disabilities in all job classifications. Affirmative Action provides active, assertive, and positive steps for eliminating the intended or unintended effects of past and present discrimination in the workplace. Because DEQ believes diversity makes good business sense, its Affirmative Action Plan identifies goals that will help develop and maintain a workforce that reflects the demographics of Oregon; encourages career development and employee advancement; and provides employees with the tools necessary to serve a more diverse customer base.

Compl. Exhib. 4 at 42 (underlining in original). This statement demonstrates a commitment on Defendants' part to make employment decision on the basis of race. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 272 n.9 (2023) ("SFFA") (Thomas, J. concurring) ("In a zero-sum game . . . any sorting mechanism that takes race into account in any way has discriminated based on race to the benefit of some races and the detriment of others." (citation omitted)). And the Affirmative Action Plan does not stand alone. DEQ's top leadership has stated over and over again that the agency seeks to change the racial balance of its workforce. Compl. ¶¶ 41, 47-52.

for almost all racial groups, "the difference between the group's representation in DEQ's candidate pool and representation among those actually hired . . . was minimal." Compl. ¶ 39. The sole exception was white applicants "whose representation among those hired by DEQ was almost 10% less than in the applicant pool." *Id.* To make this more vivid, a table published in DEQ's own documents supporting the existence of a significant anti-white hiring bias is reproduced below:

	% of Applicant Pool June 2016 to June 2017	% of New Hires June 2016 to June 2017	% of Difference Between Applicant Pool and New Hires	% of Applicant Pool June 2017 to June 2018	% of New Hires June 2017to June 2018	% of Difference Between Applicant Pool and New Hires
Female	46	43.7	-2.3	45	48.2	3.2
Male	51	56.2	5.2	50	51.8	1.8
Declined to Answer	3	0	-3	3	0	
Unknown	0	N/A	N/A	2	N/A	N/A
Total	**100**	**99.9**	**N/A**	**100**	**100**	**N/A**
American Indian or Alaskan Native	1	1.5	.5	2	0	-2
Asian	8	3.12	-4.88	7	7.8	.8
Black or African American	4	1.5	-2.5	3	.8	-2.2
Decline to Answer	6	17.18	11.18	7	24.6	17.6
Hispanic or Latino	5	1.5	-3.5	6	1.75	-4.25
Hispanic/Asian	<1	0	-<1	<1	0	-<1
Native-Hawaiian or Other Pacific Islander	1	0	-1	1	0	-1
Two or More Races	5	6.25	1.25	5	4.4	-.6
White	70	69	-1	69	60.5	-9.5
Total	**100**	**100**	**NA**	**100**	**99.9**	**N/A**
Veterans	**7.9**	**10.9**	**3**	**6.8**	**7**	**.2**
People with Disabilities	**0**	**1.5**	**1.5**	**1**	**8**	**7**

Exhibit 4 at 9.[4]

As far as Plaintiff is aware, this is the most recent data that DEQ has released to the public. Of course, should Plaintiff's claims proceed past the pleading stage (as they are clearly entitled to do), Plaintiff expects additional evidence of discriminatory hiring to be developed in discovery. At the very least, the minimal data DEQ has released to the public to date generates a reasonable inference supporting the allegations in the complaint that DEQ does indeed discriminate based on race in its human resources practices. The Magistrate Judge, however, simply swept DEQ's data and the allegations in the complaint aside, giving no weight to them whatsoever. F&R at 1-25. This was entirely improper on a motion to dismiss for failure to state a claim. *See, e.g.*, *Ass'n for Los Angeles Deputy Sheriffs*, 648 F.3d at 991; *see also Whitewater W. Indus., Ltd. v. Pac. Surf Designs, Inc.*, No. 3:17-CV-01118, 2017 WL 4518526, at *3 (S.D. Cal. Oct. 10, 2017).

The Magistrate Judge also ignored other specific allegations of concrete discrimination by DEQ. For example, the complaint alleges that:

- DEQ has a policy in favor of paying a "racial wage premium," to non-white employees, Compl. ¶ 104;
- DEQ made changes to its recruitment process specifically intended to generate outcomes more favorable to non-white applicants and less favorable to white ones such as removing hiring decisions from the people most knowledgeable and giving it to employees under direct supervision of Defendant Robertson, *id.* ¶¶ 54-56;

[4] The red arrow does not appear in DEQ's materials. It was added here to highlight the critical row of data.

- DEQ instructs it employees to prioritize non-white employees for mentoring opportunities and other activities that affect the likelihood of promotions and salary increases, *id.* ¶ 50;

- DEQ instructed its employees that, during hiring panels, they were "expected to give a preference to [] non-white applicant[s], whether or not [their] experience, training, and talents made [them] a superior candidate," *id.* ¶ 49.

As before, the Magistrate Judge erroneously failed to give any of these allegations weight in her analysis, choosing instead to give credence to the "obvious alternative explanation" that DEQ simply wanted to act "through legal means." F&R at 18.

The Magistrate Judge also justified her general dismissal of Plaintiff's allegations with the ironic assertion that *the allegations in the complaint* are "conclusory." F&R at 17. But this sweeping disregard of Plaintiff's highly detailed factual allegations is erroneous.

To take just one example, there is nothing conclusory about the allegation that DEQ's own data shows a significant anti-white bias in hiring. Compl. ¶¶ 39-40; *see also id.* Exhib. 4 at 9. Dismissing allegations such as these is plain error.

To take another example: Plaintiff alleges with specificity that DEQ leadership repeatedly told employees they were required to "de-center" the voices of white employees and to "elevate" the voices of non-white employees during business meetings and other official functions. *Id.* ¶¶ 51-52. There is nothing conclusory about these allegations. Nor is there anything conclusory about the obvious inference to be drawn from such a command. DEQ's official view on DEI is that traditional modes of merit-based hiring and decision making do not result in a racial mix that appropriately "reflects the demographics of Oregon." *Id.* ¶ 38. Everything done in the name of DEI is meant to achieve a different racial balance in employment. There would be no point in commanding employees to "de-center" white

employees' views if that didn't somehow advance the racial balancing goal. And it obviously *does* advance that goal. If employees are required as a condition of employment to give more attention to the "voices" of non-white employees, that necessarily means that those employees stand a better chance of gaining leadership roles, promotions, mentoring opportunities and many other "soft HR" items that are crucial to building a career than the employees who are subject to the opposite treatment of having their views "de-centered."

Moreover, the Ninth Circuit has squarely rejected the position taken by the Magistrate Judge. In *McGinest v. GTE Serv. Corp.*, the court held that a plaintiff's "personal observations regarding the manner in which African-American employees were disfavored in relation to white employees . . . did not consist of mere 'conclusory allegations.'" 360 F.3d 1103, 1114 n.5 (9th Cir. 2004); *see also id.* at 1107-08 (crediting as non-conclusory such allegations as that a supervisor's conduct of forcing the plaintiff to "work under dangerous conditions . . . without proper equipment," even though "not accompanied by explicit racial comments" was nevertheless "because of my race."); *see also id.* at 1130-32 (focusing on two sets of arguably conclusory allegations). Even more than in *McGinest*, Ms. Johnson's allegations may not simply be slapped with a "conclusory" label and disregarded. First, *McGinest* was decided on summary judgment. Here, at the motion to dismiss stage, Ms. Johnson's allegations are entitled to even more deference. Second, unlike in *McGinest*, where the plaintiff's testimony was often aimed at inferring race-based motivations from acts that, on their face, could have been interpreted as race neutral, in this case DEQ explicitly stated over and over that it would treat its employees differently based on their race. Accordingly, Ms. Johnson's allegations stand on even firmer footing than the testimony in *McGinest*.

By ignoring key allegations and improperly dismissing others as conclusory, the Magistrate Judge erred. This Court should reject the F&R.

B. *The Magistrate Judge Improperly Ignored Allegations Establishing that DEQ Creates Racially-Segregated Programs and Spaces*

As alleged in the complaint, DEQ has created racially segregated programs for employees. DEQ pays its non-white employees for up to one hour per week of time spent in "safe spaces" from which white employees are excluded. Compl. ¶ 42. Even leaving aside that the fact that employer-sanctioned segregation by race—even if "equal"—is, in and of itself, intrinsically unlawful, *see e.g., Hunter v. Army Fleet Support*, 530 F. Supp. 2d 1291, 1295-96 (M.D. Ala. 2007) (employer-sponsored segregation "is invidious and offensive because it is inherently demeaning") (citations omitted), these practices clearly disadvantaged white employees. DEQ does not offer to pay its white employees for time spent away from the regular business of the agency to experience "safety."

Moreover, such spaces are the locus for discussions of "obvious importance to agency leadership." Compl. ¶ 43. Given the intense focus on race and DEI at DEQ, and given repeated assertions by the highest levels of DEQ leadership that addressing "historical wrongs" through "anti-racism" work is one of the highest priorities of the agency, *id.* ¶ 41, being able to participate in discussions on these topics is of obvious importance to any given employee's promotional and leadership prospects. But since white employees are systematically excluded from the "spaces" in which much of this discussion occurs, their career prospects are systematically diminished by DEQ. *Id.* ¶ 43. Again, the Magistrate Judge simply ignored these allegations and gave them no weight whatsoever in her analysis. This was improper on a motion to dismiss.

C. *The Magistrate Judge Improperly Re-Framed Allegations that Plaintiff Was Subjected to Pervasive Official Messaging Conveying Racially Divisive and Hostile Views as Alleging Mere "Disagreement" with DEI*

As alleged in the complaint, for years, DEQ has "assigned employees various reading materials that ascribe[] highly pejorative stereotypical character attributes and behaviors to 'whiteness.'" *Id.* ¶ 60. Among other things, these negative stereotypes include "ingratitude," habitually "talking behind the backs of other employees," being unable or unwilling to "learn[] from mistakes," failing to encourage "thoughtful decision-making [or] to consider consequences," being willing to "'sacrific[e]' other persons 'to more quickly win victories for white people,'" and "defensiveness." *Id.* In one document, "DEQ saw fit to endorse the statement, 'whiteness is a death sentence.'" *Id.* ¶ 61.

The Magistrate Judge appeared to acknowledge that the referenced materials do, in fact use these terms as descriptive of "whiteness." F&R at 4 n.1. However, the Magistrate Judge then seemed to excuse these expressions on the basis that terms such as "'white supremacy culture' [are] not meant to describe *all* white people but rather the norms of *white middle-class and owning-class culture*, nor [are they] meant to limit the discussion to race, although race is a foundational component." *Id.* (emphasis added). Leaving aside that it is entirely improper on a motion to dismiss for a Magistrate Judge set forth her own personal gloss on the meaning of "whiteness" and similar terms, even taking her assertions at face value, they do not diminish the hostility expressed by DEQ or show that the complaint somehow fails to state a valid hostile work environment claim.

While it would theoretically be possible for an employer to denigrate the "norms of . . . middle-class and owning-class culture," without running afoul of federal laws against

employment discrimination, that is not what DEQ has done. DEQ assigned readings on the inherent moral and epistemological failings of "whiteness." If an employer says "whiteness is bad" (which is simplification of what happens at DEQ, but just barely) a white employee will reasonably feel assaulted, whether or not that employee, upon deep reflection and subtle reasoning figures out that the "whiteness" of which the employer speaks is not the "whiteness" of *all* white people, but rather "the norms of white middle-class and owning-class culture." *Id*. And, it should not be forgotten that it is DEQ and the DEI practitioners of the world who chose to use the modifier "white," not Plaintiff or other innocent employees. If, as the Magistrate Judge seems to suggest, DEQ was primarily concerned with *class-based* modes of thinking that allegedly do harm in the world, it could have focused on the "middle-class," not the "*white* middle-class." DEQ's assigned readings racialize what might otherwise be class-based social critiques. Plaintiff noticed (as would anyone with eyes to see) and the Magistrate Judge's attempt to sanitize these materials as class-focused in some significant respect is not persuasive.

In any event, as alleged in the complaint, in addition to these written materials, during required training sessions, and in other communications, DEQ and its spokespeople further communicated DEQ's official views that:

- "[w]hite folks are unconsciously invested in racism," Compl. ¶ 64;
- whites invariably have a number of unflattering "underlying beliefs" including "I am superior," *id*. ¶ 66;
- to be white is to fail to understand racism and to exhibit "white fragility," *id.* ¶ 65-67;
- "to be white is to hoard power," *id.* ¶ 78;
- "to be white is to disdain the contributions of non-white people," *id.*;

- to be "out of control [is] 'tightly connected to whiteness,'" *id.* ¶ 102;
- "white folks" are morally inferior "with respect to being able to judge whether their language [is] 'harmful,'" *id.* ¶¶ 103.

Employees are required to read, absorb and act on these statements. *Id.* ¶¶ 62, 69. DEQ does not present these opinions as one among many possible views, but as undeniable facts. *Id.* ¶ 85. Indeed, if any employee questions these statements, they are accused of "resisting" and are punished. *Id.* ¶ 114; *see also id.* ¶ 65.

In the F&R, the Magistrate Judge took all of these specific examples of racially hostile messaging and repackaged them in one sentence, asserting that Plaintiff's "complaint is solely about her disagreement with . . . DEI materials disseminated in the workplace." F&R at 22; *see also id.* (suggesting, misleadingly, that Ms. Johnson's complaint boils down to the idea that "merely discussing the influence of racism on our society . . . violate[s] federal law." (internal quotation marks, citation omitted)). Respectfully, the Magistrate Judge's re-framing of the complaint in this way constituted plain error.

Plaintiff's claims are not based on mere "disagreement" with DEI materials. Indeed, in the complaint, Plaintiff does not even say one way or another if she agrees that to be white is to be selfish, or that white people (or perhaps only "white middle-class and owning-class" people) believe "I am superior," just to take two examples of DEQ's messaging. Plaintiff did not include any such allegations in her complaint for the obvious reason that disagreement with racially hostile opinions is not an element of a hostile work environment claim.[5] Plaintiff's potential

[5] In fact, Plaintiff does disagree with DEQ's assertions about "whiteness" and with other unsupported claims of DEI in general, such as that statistical disparities along racial lines necessarily reflect "systemic racism." The point here, however, is that she did not plead any

disagreement with DEQ's assertions is not the point. The point is that DEQ has discriminated against some of its employees on the basis of their race by creating a work environment that is intentionally made seriously uncomfortable for them, including by reminding them (over and over again) that in DEQ's eyes, they cannot claim credit for their accomplishments (which are due to unearned white privilege), that they are morally suspect in virtue of their immutable characteristics, that their interests and views should be de-centered, etc… This case is not about a philosophical disagreement; it is about Plaintiff having to go to work every day knowing her employer harbors deep racial hostility against her.

The Magistrate Judge's failure to assess the legal sufficiency of the allegations as actually set forth in the complaint (as opposed to the Magistrate Judge's re-framed version of the complaint) was error, and the Court should reject the F&R recommendation for this reason alone.

D. *The Magistrate Judge Ignored Allegations that Plaintiff's Co-Workers and Supervisors Regularly Make Racially Hostile Comments without Correction by DEQ.*

Finally, independent of DEQ's official communications in written materials and DEI trainings, Plaintiff alleges that she has been repeatedly exposed to racially hostile expression by co-workers and supervisors, but that DEQ has done nothing to stop the hostility.

Among other common expressions of hostility by Plaintiff's co-workers and supervisors are the views that

- "white employees . . . cannot take credit for their accomplishments because they are the result of unearned 'privilege,'" Compl. ¶ 87;

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facts related to her disagreement in the complaint, which makes sense because such feelings are irrelevant to her hostile work environment claim.

- "white employees' 'voices' are not worth listening to and [that] non-white 'voices' are the only ones that can express truth," *id*. ¶ 88;
- "only white people can be racist," *id*. ¶ 89;
- "it is impossible to be racist against white people," *id*.;
- "discrimination against white people is legitimate," *id*. ¶ 90.

DEQ does nothing to prevent its employees from making these hostile statements. *Id.* ¶ 91. To the contrary, it encourages them. *Id.* Indeed, DEQ's materials explicitly seek to *cause* "discomfort" in white employees for being white. *Id.* Ex. 5 at 20. As further detailed below, it has been settled for decades that hostile work environment claims can be based solely on racially hostile comments like these from co-workers, if not corrected by an employer. The Magistrate Judge, however, completely ignored this entire category of allegation. The F&R should be rejected for this reason alone.

III. The Magistrate Judge Misapplied the Law to the Allegations in the Complaint.

There are at least two well-established ways for an employer to create a hostile work environment: (1) engaging in concrete acts of discrimination against members of the plaintiff's race (whether or not the plaintiff is a direct victim of the discrimination) and (2) communicating racially hostile words and ideas. Plaintiff has pleaded both theories of hostile work environment discrimination. Not only did the F&R completely ignore the first theory of recovery, passing it over in utter silence, but for the sole theory that the F&R discussed, the Magistrate Judge applied the wrong legal standard.

A. *Plaintiff's Allegations of Concrete Employment Discrimination and Racial Segregation, Standing Alone, Are Sufficient to State a Claim.*

As set out in detail in Plaintiff's opposition to Defendants' motion to dismiss, it has long

been recognized that an employer who engages in concrete racial discrimination necessarily sends a message to members of the disfavored race that they are not on equal footing with favored races. Plaintiff's opposition brief in response to Defendants' motion to dismiss made the following argument in this regard:

> Whether the employer discriminates against customers of the same race as the plaintiff or fellow employees of the same race, the outcome is the same: concrete acts of open and intentional discrimination can lead to hostile environment discrimination against the plaintiff. *See, e.g.*, *Rodgers*[*v. E.E.O.C.*], 454 F.2d [234,] 237-39 (employer discriminated against customers of the same race as the plaintiff); *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981) (same); *McGinnest*, 360 F.3d at 1117 (racial hostility targeting other employees); *Myers v. Ameritech Corp.*, No. 01-71025, 90 Fair Empl. Prac. Cas. (BNA) 1600, 2002 WL 31994281, at *3, *9 (E.D. Mich. May 13, 2002) (that employer "fired two white managers as 'scapegoats'" to "appease" black employees contributed to "intimidating, hostile, [and] offensive work environment" suffered by other white employees); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 175 n.17, [176] (D.C. Cir. 1976) (black employee who himself had not suffered from racially discriminatory hiring, could nevertheless state a "claim of current injury" because the employer's "hiring practices support an atmosphere of discrimination" and an "environment . . . of racial intimidation"); *see also Jones v. W. Suffolk B.O.C.E.S.*, No. 03-CV-3252, 2005 WL 8161144, at *6 (E.D.N.Y. Mar. 11, 2005) (citing *Gray* and a "long line of federal cases" countenancing claims that discriminatory employment acts, even if not directly aimed at the plaintiff, can create a hostile work environment); *cf. Turner v. Barr*, 806 F. Supp. 1025, 1027 (D.D.C. 1992) (that other employees of a different race from the plaintiff "were given a wider range of opportunities for advancement as well as overtime, is just another indication of the hostile work environment the Plaintiff has endured").
>
> In such cases the "alleged injury is not vicarious." *Leibovitz v. New York City Trans. Auth.*, 252 F.3d 179, 188 (2d Cir. 2001) (emphasis added). One of the terms, conditions and privileges of employment that must be administered evenhandedly, irrespective of race, is the intangible psychological "fringe" of working in a setting that is not racially hostile. As should be obvious—even absent any derogatory written or oral statements—if employees of a certain race come to work every day and see that colleagues of the same race are systematically, intentionally, and openly being denied promotions, mentoring opportunities, salary increases, and the like based on their race, and that other-race employees are being "elevated" and otherwise privileged because of their race, the workplace will be reasonably viewed by the disfavored group as imbued with hostility.

Pl's Opp'n to Defs' Partial Mot. to Dismiss [ECF No. 27] at 14-15.

Another way an employer can signal hostility to some of its employees based on their race is to create or tolerate conditions of racial segregation in work spaces and programs. In her opposition to Defendants' motion to dismiss, Plaintiff made the following argument on this point:

> Separately, in another line of cases, courts have determined that an employer's creation or tolerance of racially-segregated programs or work spaces can be sufficiently hostile to constitute discrimination in the provision of intangible psychological benefits. *See, e.g.*, *Garcia v. Denver Health Med. Ctr.*, No. 22-cv-01651-CNS-MEH, 2023 WL 22186, at *4 (D. Colo. Jan. 3, 2023) (plaintiff was segregated from other employees and excluded from team events due to her race); *Pezoa v. Co. of Santa Clara*, No. C 05-03717 JF, 2006 WL 2263946, at *1-6 (N.D. Cal. Aug. 8, 2006) (allegations of "physical segregation" between "Latino Group" and "Vietnamese Group" workers supports hostile work environment claim, even in the absence of "economic harm"); *Turner*, 806 F. Supp. at 1028-29 (in majority-black U.S. Marshals' office, segregation of squad room desks into a black area at the front and a less desirable white area, known as "Georgetown," at the back, contributed to hostile work environment); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977) (fire department tolerance of voluntary "supper clubs" that used city facilities and excluded black firefighters created hostile environment); *see also Hunter v. Army Fleet Support*, 530 F. Supp. 2d 1291, 1295-96 (M.D. Ala. 2007) ("An employer's intentional creation and maintenance of racially segregated crews is just as invidious and offensive to the notions of equality at the heart of Title VII and § 1981 as would be segregated water fountains . . . Such intentional racial segregation in the workplace, even without loss of tangible benefits, is invidious and offensive because it is inherently demeaning.") (citations omitted); *cf. Vrinceanu v. King Co.*, No. C23-423RSM, 2023 WL 4704794, at *4-5 (W.D. Wash. Jul. 24, 2023) (finding "racially-segregated," "BIPOC only" work event "troubling," but dismissing pro se claim for lack of standing).
>
> Applying these principles, as outlined above, plaintiff alleges a widespread and ongoing program of concrete racial discrimination by defendants in all aspects of employment. Among other things, defendants hire by race, promote by race, fix salaries by race, and determine which employees should receive mentoring and recognition by race. Compl. ¶¶ 37-39, 41, 44-45, 47-56. Moreover, DEQ has created segregated programs and spaces for its employees, including spaces where career-building activities happen that are off limits to white employees. Id. ¶¶ 42-43, 115. These are not secret activities. Everyone at DEQ knows the discrimination

> is going on.
>
> All of this activity cannot help but send the clear message that in DEQ's view, members of some races are highly favored and some are disfavored. This is sufficient in and of itself to make out a hostile work environment claim. *Garcia* 2023 WL 22186, at *4; *Pezoa*, 2006 WL 2263946, at *1-6; *Jones*, 2005 WL 8161144, at *6; *Myers*, 2002 WL 31994281, at *3, *9; *Turner*, 806 F. Supp. at 1027; *Firefighters Inst. For Racial Equality*, 549 F.2d at 514-15; *Gray*, 545 F.2d at 173, 175 n.17; *Rodgers*, 454 F.2d at 237-39; *see also Vrinceanu*, 2023 WL 4704794, at *5; *Hunter*, 530 F. Supp. 2d at 1295-96.

Id. at 15-17.

Plaintiff quotes these passages from her opposition brief at length because, to read the F&R, one would never know that these arguments were in play. The Magistrate Judge simply ignored this whole line of reasoning, and declined to assess the allegations in the complaint against these standards. F&R at 17-23. For this reason alone, the Court should reject the F&R.

B. *On the "Hostile Messaging" Theory, the Magistrate Judge Applied an Incorrect Legal Standard*

Plaintiff's final hostile work environment theory (the only one actually addressed by the Magistrate Judge) is that Ms. Johnson's workplace was imbued with messages any reasonable observer would take as racially hostile, unwelcoming, and severe. The basic theory of a hostile messaging case is that an employer "convey[ed] the message that members of a particular race are disfavored and that members of that race are, therefore, not full and equal members of the workplace." *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1083 (3d Cir. 1996).

As noted in Plaintiff's opposition to the motion to dismiss, racially derogatory and unwelcoming messages can come from a number of sources, including

- a plaintiff's co-workers, *see*; *Mais v. Albemarle Co. Sch. Bd.*, 657 F. Supp. 3d 813, 821-22, 828-29 (W.D. Va. 2023); *Woods v. Graphic Comms.*, 925 F.2d 1195, 1198 (9th Cir. 1991);

- a plaintiff's supervisors or others in positions of authority over the plaintiff, *Rodgers v. Western-Southern Life Ins. Co.,* 12 F.3d 668, 675 (7th Cir. 1993) ("[A] supervisor's use of [derogatory] term[s] impacts the work environment far more severely than use by co-equals");

- in the most severe cases, directly from the employer in communications of official policy, training materials and the like, *see, e.g.*, *Diemert v. City of Seattle*, 689 F. Supp. 3d 956, 960 ("[M]andatory [Race and Social Justice Initiative] trainings [and other official communications] pervasive[ly] focus[ed] on race and 'supposed 'white supremacy'' created hostile environment); *Mais*, 657 F. Supp.3d at 819 (mandatory "anti-racism" training targeted certain employees and "demonized [them] . . . for being white.").

Here, Plaintiff was subjected to harassing statements from all three directions. *See* Compl. ¶¶ 87-90 (hostile comments by co-workers); *id*. ¶¶ 77, 82, 125 (hostile comments by supervisors and managers); *id*. ¶¶ 60-61, 65-67, 78 (hostile comments set forth in official trainings and executive-level communications).

In recommending dismissal of Plaintiff's hostile messaging claim, however, the Magistrate Judge applied a different, and incorrect, legal standard. According to the F&R, three recent decisions—*Young v. Colo. Dep't of Corrs.*, 94 F.4th 1242 (10th Cir. 2024), *De Piero v. Pennsylvania State Univ.*, No. CV 23-2281, 2024 WL 128209 (E.D. Pa. Jan. 11, 2024), and *Diemert v. City of Seattle*, 689 F. Supp. 3d 956 (W.D. Wash. 2023)—establish special rules of pleading for cases the Magistrate Judge described as involving "exposure to DEI materials in the workplace." According to the Magistrate Judge's analysis, a plaintiff in such a case must allege "more than exposure" to those materials including "specific instances of verbal or physical assault, name-calling, or [] other forms of abuse." F&R at 20, 22. But the Magistrate Judge's analysis gets things exactly backwards. Contrary to the F&R, *Young*, *Diemert*, and *De Piero* strongly *support* Ms. Johnson's claims, and provide no basis for dismissal of the complaint.

De Piero and *Diemert* both involved claims by white plaintiffs that workplace expression

directly inspired by DEI and "anti-racist" concepts created a hostile work environment. In *Diemert*, the plaintiff was labeled "privileged" "racist," and "hateful." 689 F. Supp. 3d at 961. He was told that "because he [was] white, he did not have the right to speak about oppression faced by Black people," and that it is "impossible to be racist toward 'white people.'" *Id.* He was accused of enjoying "white privilege" when he retained his position. *Id.* at 960. And was exposed to a trainer's hostile statement that "white people are like the devil." *Id.* at 961. Similarly, in *De Piero*, the plaintiff was instructed to treat others differently based on their race, 2024 WL 128209 at *1, was exposed to a training contractor who "intimated that 'white colleagues' should feel like 'the problem'" and encouraged them to "feel uncomfortable about race," *id.* at *2, and received emails from a Director-level manager calling out white employees' alleged "internalized white supremacy," and instructing them to "hold other white people accountable," *id.* at *1.

Even without any programs of tangible racial discrimination, such as the ones engaged in here by DEQ, the courts in those cases had no trouble deeming these DEI-inspired derogatory statements to be "verbal[] assault[s]" based on race sufficient to create a hostile environment. *De Piero*, 2024 WL 128209 at *7. *Diemert* and *De Piero* thus strongly support Ms. Johnson's claim. Ms. Johnson too was subjected to very similar racially hostile communications. The Magistrate Judge, however, misread *Diemert* and *De Piero* to impose heightened pleading standards on (presumably) white plaintiffs bringing hostile work environment claims in the DEI context. According to the Magistrate Judge, such a plaintiff must plead "conduct beyond the EDI trainings themselves—namely, physical aggression and/or repeated and direct race-based comments from co-workers and supervisors." F&R at 21. This is incorrect.

First, although it is true that the plaintiff in *Diemert* alleged that when he reported concerns that his supervisor committed acts of nepotism, the supervisor "chest bumped" him, 689 F. Supp. 3d at 961, there is no suggestion in that case whatsoever that "physical aggression" is a prerequisite to a hostile work environment claim. Nor could there be. Cases are legion finding hostile work environment liability in the absence of physical assault allegations. *See*, *e.g.* *Young*, 94 F.4th at 1249-1256; *De Piero*, 2024 WL 128209, at *6-8; *Mais*, 657 F. Supp. 3d at 828-29; *Turner*, 806 F. Supp. at 1027-29. Indeed, the defendants in *De Piero* raised the same argument adopted by the Magistrate Judge here, but that argument was rejected by the court. *De Piero*, 2024 WL 128209 at *7 (acknowledging that *Diemert* included allegations of physical assault, but holding that distinction to be irrelevant).

Second, there is no requirement ruling out hostile work environment claims in the absence of "repeated and direct race-based comments from co-workers and supervisors." F&R at 21. Obviously, depending on the facts of the case, even a one-time "indirect" race-based comment could be enough to create a hostile work environment. A hypothetical "Jews go home" banner on the side of a factory, or a song featuring a racial slur piped over an office public address system, could easily give rise to liability. Indeed, the Magistrate Judge acknowledged that, standing alone, "a diversity and inclusion training could be so offensive, and so hostile to White employees, that it could create a hostile work environment." F&R at 19 (internal quotation marks, citation omitted). In the present case, the content of the readings required by DEQ and the content of the training programs was enough to create a hostile work environment, just as in *De Piero* and *Diemert*.

But even more important, Ms. Johnson *has pleaded* "conduct beyond the [DEI] trainings themselves," F&R at 21, and a great deal of it. Among many other things, the complaint alleges concrete and tangible employment discrimination against white applicants and employees, racially segregated programs, and regular racially hostile messaging both from DEQ and from co-workers and supervisors, unchecked by their employer.[6]

Finally, contrary to the Magistrate Judge's analysis, *Young* also strongly supports, rather than undermines Ms. Johnson's claims. In *Young*, a corrections officer alleged that he was exposed to a "single training session," 94 F.4th at 1251 n.2, consisting of "online modules" to be "complete[d] on [his] own computer[]." *Id.* The materials included statements about "whiteness," and essentialist claims such as that "all whites are racist, that white individuals created the concept of race in order to justify the oppression of people of color, and that 'whiteness' and 'white supremacy' affect all 'people of color within a U.S. context.'" *Id.* at 1246. The materials further promoted concepts such as "white fragility," and the idea that

[6] Plaintiff also notes that in the context of her retaliation claims (which are not at issue on this motion to dismiss) she alleged hostile comments specifically directed at her. After Plaintiff questioned the legality of DEQ's race-based employment practices, she was publicly called out in an e-mail from defendant Feldon to all of DEQ's more than 700 employees. Compl. ¶ 125; Ex. 9. Defendant Feldon referred to Ms. Johnson's discourse during the meeting as a "public incident[]" that demonstrated an alleged "racis[t]" culture within the organization, and stated that Ms. Johnson's questions amounted to "aggressive resistance," and "hurtful comments." *Id.* Defendant Feldon "apologized" to the individuals allegedly harmed by Ms. Johnson's statements. *Id*. While the Magistrate Judge opined that the harsh language in this e-mail did not literally amount to an explicit accusation that Plaintiff "engag[ed] in a racist diatribe," F&R at 22 (internal quotation marks, alteration, citation omitted), that determination was unsupported. The Magistrate Judge (again) improperly refused to read the materials in the light most favorable to the non-moving party. The e-mail from Defendant Feldon most definitely can be interpreted (and, as discovery will show, *was in fact interpreted by its recipients*) to state that Ms. Johnson's discourse was "tantamount to a racist diatribe." Compl. ¶ 125.

"white individuals" were wrong when they believed that "whatever success they had was a result of their own merit, as opposed to the simple product of past forms of race discrimination." *Id.* at 1246-47.

The Tenth Circuit had no trouble determining that these kinds of sentiments could constitute *race-based harassment*. *Id.* at 1250-51. Indeed, the court held that they "echoe[d] the racist views espoused by the co-workers and supervisors in [other hostile work environment cases]," *id.* at 1254, and could (if repeated) amount to a "constant drumbeat of essentialist, deterministic, and negative language," concerning plaintiff's race, *id.* at 1253 n.4.

The Tenth Circuit, however, affirmed dismissal of the employee's complaint because, under the specific facts alleged, the harassment occurred *only one time* in an online training module, was not followed up by any other communications, and did not occur in a context involving any other factors that would signal that white employees were a disfavored group. *Id.* at 1245-51. The Tenth Circuit outlined the conditions under which these kinds of expressions *would* be sufficient to state a claim, including if the race-based trainings were not one-time occurrences, but were part of an "ongoing, continuing commitment" to similar trainings, *id.* at 1252 n. 2; there were allegations that the training-based messaging was "[t]aken seriously by managers and co-workers," *id.* at 1251; employees who objected to the trainings "risk[ed] being individually targeted for discriminatory treatment," *id.*; the trainings took place within a broader context of discrimination by the employer, including if the employer "explicitly or implicitly reward[ed] discriminatory outcomes," *id.*; the trainings were accompanied by threats that government employees "either endorse a particular race-based ideological platform or risk losing their jobs," *id.* at 1252 n.2.

All of the factors that the Tenth Circuit identified that would support a hostile work environment claim are present in Ms. Johnson's complaint. Here, Ms. Johnson did not sit at an anonymous workstation to complete a one-time computer module on "anti-racism," she was required to ingest these messages as a regular and repeating part of everyday life in the Department of Environmental Quality. Compl. ¶¶ 58-85. The messaging was "taken seriously" by other employees, supervisors and managers (indeed, the messages are regularly repeated by co-workers and supervisors). Compl. ¶¶ 86-90. Employees not only risk being targeted if they object, Ms. Johnson herself was retaliated against for speaking up. *Id.* ¶¶ 114-31. As cases such as *Diemert*, *De Piero* and *Young*, make clear, Plaintiff has pleaded a viable hostile work environment claim.

At bottom, the Magistrate Judge erred by treating Plaintiff's claims as asserting that "merely discussing the influence of racism on . . . society . . . violate[s] federal law." F&R at 22 (quoting *Young*, 94 F.4th at 1253 n.4). But that is not at all what Plaintiff's complaint (as fairly construed) does and the Court should reject the F&R.

IV. The Magistrate Judge Improperly Expressed Personal Opinions on Disputed Topics.

Separate from the substantive analysis of Plaintiff's claims discussed above, the Magistrate Judge included within the F&R statements of personal opinion that should not be adopted by this Court.

First, the Magistrate Judge quoted at length e-mails from Ms. Johnson to her supervisor Ned Fairchild in which Ms. Johnson raised questions about the legality of DEQ's racial preference regime and expressed her disagreement with the view that statistical disparities in outcomes such as employment necessarily demonstrate the existence of racial bias. F&R at 8-10

(quoting Plaintiff's view that "it [is] as absurd to assume that the only explanation for disproportionate representation by skin color is discrimination, as it is to assume that the only explanation for disproportionate representation by hair color or eye color (or any other characteristic) is discrimination." (emphasis in original)). These are perfectly legitimate and widely held points of view, including by many of the leading academics and public intellectuals of our time.

The Magistrate Judge, however, apparently does not see it that way. Instead, in the F&R, the Magistrate Judge asserted that the "emails to Mr. Fairchild suggest [Ms. Johnson] collectively made statements that could objectively be construed as not anti-racist." F&R at 19. While difficult to parse, and with due respect to the Magistrate Judge, this statement is both highly troubling and inappropriate, and should be rejected by the Court. When one cancels out the double-negative in the Magistrate Judge's sentence, it appears to assert that (according to the Magistrate Judge), Ms. Johnson's views "could objectively be construed as ~~not anti-~~racist." While Plaintiff does not lightly attribute to the Magistrate Judge a statement accusing Plaintiff of harboring "racist" views, it is hard to understand this sentence any other way.

While it should not need to be said, neither Ms. Johnson nor her views are racist. Quite the contrary, Ms. Johnson believes that racism—especially treating people differently because of the color of their skin—is wrong and deeply immoral. Consistent with her strong stand against racism, she does not believe racial preferences in employment are appropriate. She further does not believe that the bald fact of statistical racial disparities in such things as employment outcomes and educational attainment (to take two examples), necessarily reflects racial bias, the influence of "structural racism," (an ill-defined and slippery term if ever there was one), or any

other mono-causal factor. That does not make her a racist. Indeed, she joins with many leading academics and intellectuals who hold similar views (many of whom happen to be black). *See, e.g.*, Coleman Hughes, The End of Race Politics: Arguments for a Colorblind America (2024), John McWhorter, Woke Racism (2021), Thomas Sowell, Discrimination and Disparities (2018). To be fair to the Magistrate Judge, there may be a difference between being "objectively not anti-racist" and "racist," but one does not readily spring to mind. If the Magistrate Judge meant something else, Plaintiff respectfully submits that she should have said so in plain language.

Second, in a somewhat similar vein, the Magistrate Judge also offered her personal opinions on the topics discussed in the e-mails between Ms. Johnson and Mr. Fairchild. The Magistrate Judge stated her view that "structural racism and implicit bias are, at this point in time, well-documented facets of American society . . . even if they remain divisive concepts within certain communities." F&R at 19 n.5. Apparently, according to the Magistrate Judge, to think otherwise is "objectively . . . not anti-racist." *Id.* at 19.

These statements of personal opinion are not proper, and should be rejected by the Court. As noted above, there is most definitely *not* a consensus (among academics or otherwise) that ill-defined concepts of "structural racism and implicit bias," are "facets of" contemporary American society, or that they are primarily or even significantly responsible for statistical disparities in various societally-important metrics. *See supra* at 28; *see also* Kendall Qualls, *The Scandal Hidden in Plain Sight*, JOURNAL OF FREE BLACK THOUGHT, Aug. 26, 2024 ("[T]he racial disparities experienced over the last 50 years are not the result of systemic racism, white

privilege, or the fault of 'Western Civilization.'")[7]; Lee Jussim, *Twelve Reasons to Be Skeptical of Common Claims About Implicit Bias*, PSYCHOLOGY TODAY, Mar. 21, 2022 (debunking "implicit bias" claims); Heather Mac Donald, *The False 'Science' of Implicit Bias*, WALL STREET JOURNAL, Oct. 9, 2017 (same). Indeed, Justices of the Supreme Court disagree with the Magistrate Judge. "Justice Jackson's race-infused world view falls flat at each step. Individuals are the sum of their unique experiences, challenges, and accomplishments. What matters is not the barriers they face, but how they choose to confront them. And their race is not to blame for everything—good or bad—that happens in their lives. A contrary, myopic world view based on individuals' skin color to the total exclusion of their personal choices is nothing short of racial determinism." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 280, (2023) (Thomas, J, concurring).

Moreover, the Magistrate Judge's opinion is not supported by expert testimony, data, or record evidence of any kind, let alone by the allegations in the complaint, which are the proper focus on a motion to dismiss for failure to state a claim. Given that this is a motion to dismiss for failure to state a claim, Plaintiff submits that the Magistrate Judge's assertions of personal opinions are out of place. Accordingly, the Court should reject these parts of the recommendation.[8]

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[7] https://freeblackthought.substack.com/p/the-scandal-hidden-in-plain-sight

[8] The Magistrate Judge cited two cases when sharing her views on the alleged influence of "structural racism" in society. F&R at 19 n.5, *citing LA Alliance for Human Rights v. Cnty. of L.A.*, 14 F.4th 947, 952 (9th Cir. 2021) and *United States v. Modeste,*, 2023 WL 2986933, *3 (D. Alaska Apr. 18, 2023). But these cases offer only the opinion of a district court judge expressed in *dicta* and unsupported by record evidence that "structural racism" exists, *Modeste*, 2023 WL 2986933, *3 n.29, and a ruling by the Ninth Circuit *vacating as an abuse of discretion* a

CONCLUSION

For the foregoing reasons, the Court should reject the F&R to the extent it recommends dismissal of Plaintiff's Sixth and Seventh causes of action and should enter an order denying Defendants' motion to dismiss those claims. The Court should also decline to adopt the Magistrate Judge's personal opinions as outlined above.

DATED this 17th day of September 2024.

Respectfully submitted,

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preliminary injunction based on a district court's *sua sponte* research into "structural racism" that neither party had argued for, *LA Alliance for Human Rights*, 14 F.4th at 952-61. These cases do not lend any support to the Magistrate Judge's statement.

CERTIFICATE OF SERVICE

I certify that on September 17, 2024, I served the foregoing **PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S FINDING AND RECOMMENDATIONS** **[ECF 31]** upon the parties hereto by the method indicated below, and addressed to the following:

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_____ HAND DELIVERY
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