James L. Kerwin*
William E. Trachman*
Grady Block*
Mountain States Legal Foundation
2596 S. Lewis Way
Lakewood, Colorado 80227
303-292-2021
jkerwin@mslegal.org
wtrachman@mslegal.org
gblock@mslegal.org
**Pro Hac Vice*

Herbert G. Grey, Attorney at Law
OSB No. 810250
4800 SW Griffith Drive, Suite 320
Beaverton, Oregon 97005
503-641-4908
herb@greylaw.org

Attorneys for Plaintiff

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 OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS [ECF 19]** **ORAL ARGUMENT REQUESTED**

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INTRODUCTION

Plaintiff Danielle Johnson has the legal right to be free of racial discrimination and hostility in the workplace, and to speak freely on matters of public concern without fear of retaliation. Defendants violated those rights. They nevertheless move to dismiss Ms. Johnson's racial discrimination claims—but not her free speech claims—for failure to state a claim.

In their motion, defendants give short shrift to plaintiff's complaint, attempting to condense forty-seven pages of carefully pled factual allegations into a half-page summary, and wishing away the rest of plaintiffs' allegations with the ironic assertion that they are merely "conclusory." But defendants cannot win with magic words. There is nothing "conclusory" about the allegations in the complaint. Instead, plaintiff provides detail after detail of defendants' years-long, ever-intensifying campaign to discriminate against white applicants and employees in all aspects of employment—from hiring, to promotions, to mentorship opportunities, to deciding even whom to listen to in meetings, and whom to ignore. Plaintiff also provides paragraph after paragraph of detailed allegations concerning defendants' program to communicate and reinforce their views about race—specifically that there are *immutable* and *inarguable* differences between white employees and non-white employees, that one group is worthy of praise, and the other carries indelible moral stains, that one group valiantly struggles against "whiteness" while the other cynically takes advantage of its unearned "white privilege," and that one group is most definitely welcome while the other is—at best—barely tolerated. These allegations, all of which are true and must be taken as true on this motion to dismiss, more than satisfy the pleading standards set forth in the Federal Rules of Civil Procedure.

In addition to their argument concerning the sufficiency of plaintiff's racial discrimination claims, defendants move to dismiss or otherwise modify various state and federal

claims on procedural grounds. For the reasons that follow, defendants' motion should be denied.

FACTUAL BACKGROUND

I. Plaintiff Danielle Johnson

Danielle Johnson is a dedicated public servant who has worked for the Oregon Department of Environmental Quality ("DEQ") as a procurement and contract specialist since 2018. Complaint [ECF 1] ("Compl.") ¶¶ 9, 20, 22. Ms. Johnson believes that all persons should be treated equally, without regard to the color of their skin. *Id.* ¶¶ 6, 82. Until Ms. Johnson expressed misgivings about the legality of DEQ's racially discriminatory conduct (detailed below), she was a rising star in the agency. *Id.* ¶¶ 9, 20, 22, 28-33. But after she expressed her views, DEQ brought the hammer down, demoting her, defaming her, cutting her pay, and subjecting her to a six-month "investigation," into whether *she* caused "harm" to others by referencing laws against racial discrimination. *Id.* ¶¶ 7, 34, 124-31.

II. DEQ adopts discrimination, racial hierarchy, and hostility as its official policies

For some years (with a notable burst of intensity beginning in the summer of 2020), DEQ and its upper management—including defendants Leah Feldon, Richard Whitman and Penny Robertson—increasingly based employment decisions on race, and worked to instill a culture of racial hierarchy, with employees classified as white on the bottom and employees classified in other racial groups ranked ever higher. *Id.* ¶¶ 11-13, 36-45, 46-57. They did so in three distinct ways: (1) by engaging in widespread acts of tangible employment discrimination against white applicants and employees; (2) by creating racially segregated programs that excluded whites; and (3) by relentlessly communicating racially disparaging opinions presented as undeniable fact.

A. <u>DEQ engages in widespread discrete acts of tangible racial discrimination</u>

DEQ has not been shy about its intent to manipulate decisions on hiring, promotions,

salaries, and mentoring opportunities to better "reflect[] the demographics of Oregon." *Id.* ¶ 38. DEQ has adopted official affirmative action plans that require concrete racial balancing in employment. *Id.* ¶¶ 37, 39-40. And its top leaders have directed employees to adopt "hiring and promotional practices that reduce[] white employee representation in favor of non-white representation." *Id.* ¶ 41; *see also Id.* ¶ 47 (DEQ instructed staff that "their job responsibilities now included a duty to . . . decreas[e] the proportion of white employment and increas[e] the proportion of non-white employment.").

DEQ has also adopted as official DEQ policy the recommendations of an outside consulting firm called "Engage to Change." *Id.* ¶ 44. Those policies "explicitly reject[] treating individuals as equally as possible, without regard to race, culture, or ethnicity" as well as rejecting efforts to "comply[] with federal and state laws." *Id.* ¶¶ 44-45. Among other policies adopted by DEQ at the encouragement of Engage to Change is to pay a "racial wage premium . . . to non-white employees" to compensate for the "'invisible labor' of being non-white." *Id.* ¶ 104. Further, "DEQ [has] instructed its employees that, whenever an opportunity presented itself, they were expected to advance the interests of non-white applicants and employees at the expense of anyone who had 'experienced white privilege,' meaning anyone categorized as white." *Id.* ¶ 48. Employees are on official notice that they are "expected to give a preference to [a] non-white applicant, whether or not his or her experience, training, and talents [make] him or her a superior candidate for the job." *Id.* ¶ 49.

Similarly, DEQ has implemented programs to change the way employees' contributions are evaluated, giving a boost to racially favored groups, and necessarily downgrading the prospects of disfavored groups. Among other things, DEQ requires its employees to "'elevate' non-white employees in terms of mentorship, recognition at staff meetings, and other 'soft-HR'

items." *Id.* ¶ 50. DEQ also requires its employees to "'de-center' the voices of white employees and to 'center voices of color.'" *Id.* ¶ 51. These directives require that "non-white employees be permitted to speak [at meetings], and that their views be accepted as valid, while the views of white employees [are] to be treated with skepticism or dismissiveness." *Id.* ¶ 51.

DEQ has also changed human resources procedures to generate outcomes more favorable to non-white applicants and employees and less favorable to white ones. For example, in September 2022, defendant Robertson took primary hiring responsibility away from "the people in the agency most knowledgeable about the requirements of the job being filled," and gave it to "human resources employees under [her] supervision . . . with the intention that [hiring] decisions could more easily be made in a way that would reward favored racial groups, at the expense of disfavored groups." *Id.* ¶¶ 54-56.

Pursuant to these official policies and directives, a significant number of jobs, promotions, salary increases, desirable work assignments, and mentorship opportunities have been re-directed away from white applicants and employees to members of other racial groups. *Id.* ¶¶ 39, 58. In other words, DEQ has engaged in widespread acts of employment discrimination against white applicants and employees. DEQ's practice of making tangible employment decisions on the basis of race continues to this day, and there is no indication that, absent relief from this Court, the misconduct will cease.

B. <u>DEQ creates racially segregated programs</u>

DEQ has also implemented a series of race-segregated programs. For one example, DEQ has established so-called "safe spaces" in which "topics of obvious importance to agency leadership (and hence to any given employee's chances for promotion)" are discussed. *Id.* ¶¶ 42-43. Crucially, those "spaces," are "exclusively for non-white employees." *Id.* ¶ 42. For another

example, during official training sessions, DEQ and its agents have created segregated "breakout rooms" for non-white employees and have "explicitly forb[idden] white employees from joining [the] rooms." *Id.* ¶ 115. DEQ's racially segregated programs continue to this date and there is no indication that, absent relief from this Court, the misconduct will cease.

C. DEQ supports its program of discrimination with near-constant hostile messaging

To "reinforce its discriminatory regime," *id.* ¶ 3, DEQ has inundated Plaintiff's workplace with an unrelenting series of messages—delivered in written materials, mandatory training sessions, and informal conversations—expressing the quasi-religious views of so-called "anti-racism," that are really racially divisive opinions hostile both to white employees (cast as villains intent on maximizing their unearned "privilege") and to the very racial groups DEQ pretends to be helping (cast as mere victims who lack agency, cannot focus on the "written word," and do not value "individualism").

(1) *Written materials*

For several years and continuing to date, "DEQ [has] assigned employees various reading materials that ascribed highly pejorative stereotypical character attributes and behaviors to 'whiteness.'" *Id.* ¶ 60; *see also Id.* ¶ 70. These 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.* ¶ 60. In one document, "DEQ saw fit to endorse the statement, 'whiteness is a death sentence.'" *Id.* ¶ 61.

Other DEQ-required materials insist that all "[w]hite folks are unconsciously invested in racism," and that whites invariably have a number of (unflattering) "underlying beliefs" including "I am superior." *Id.* ¶ 66. The materials assert that to be white is to fail to understand racism and to exhibit "white fragility." *Id.* ¶ 65-67. DEQ requires its employees to adopt views such as "to be white is to hoard power, or that to be white is to disdain the contributions of non-white people." *Id.* ¶ 78.

Employees are required to read and absorb 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 (quoting mandatory materials outlining the dogma of "white fragility," which holds that when a white person does not automatically accept as true the assertion that all unequal outcomes are the result of racism, he or she is engaging in "argumentation," which is a "defensive move[]" that "function[s] to reinstate white racial equilibrium."), 85. Plaintiff is a case in point—for merely questioning whether DEQ's widespread discrimination in employment was legal (it was not), Ms. Johnson suffered a demotion, a cut in pay and the humiliation of being called out by the head of the agency for alleged "racism" as well as being subjected to a six month investigation into whether *she* did "harm" to others through her speech. *Id.* ¶¶ 97-161.

(2) Racialized trainings

DEQ employees are required to attend so-called "anti-racism" trainings. *Id.* ¶ 75. The trainings repeat many of the racially derogatory opinions set forth in DEQ's written materials. *Id.* ¶ 102. And facilitators often tack on additional racially hostile assertions such as that to be "out of control [is] 'tightly connected to whiteness,'" or that "white folks" are morally inferior

"with respect to being able to judge whether their language [is] 'harmful.'" *Id.* ¶¶ 102-03. DEQ's messaging continues to date and there is no indication that, absent relief from this court, its misconduct will cease.

III. DEQ's racially discriminatory conduct and messaging has serious negative consequences for Ms. Johnson personally and on the environment as a whole

Taken as a whole, DEQ's practices and policies send a very clear message: white employees are lucky to be where they are; having benefitted from "systemic racism," and unearned "white privilege," they cannot take pride in or credit for their accomplishments; whites have had their day, and it is time to "elevate" their alleged victims (i.e. non-white employees). This message is *not* merely the result of DEQ's "anti-racist" programming, but also results from the concrete practices DEQ follows to hire, promote, and mentor employees based on race and to create segregated programs that can only be accessed by employees belonging to favored groups.

DEQ's actions are "not meant to be (nor were they taken as) mere academic exercises [rather, they are] meant to be internalized by all DEQ employees, and acted upon in the day-to-day functioning of DEQ." *Id.* ¶ 77. DEQ employees are further admonished to "hold white colleagues in their midst 'accountable,'" *id.*, should they step out of line. And DEQ's practices have borne fruit, "it is commonplace within DEQ to hear employees, including managers and supervisors, make derogatory statements about white people." *Id.* ¶ 86. Among other common expressions of hostility at DEQ are the views that

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

IV. DEQ retaliates against Ms. Johnson for raising valid concerns about its program of discrimination and segregation

Although many employees disagree with DEQ's views on race and with its race-based employment practices, few are willing to risk saying so. DEQ has seen to that by making it clear that "employees . . . could face disciplinary consequences for failing to internalize and act on DEQ's materials and communications." *Id.* ¶ 83; *see also id.* ¶¶ 84, 94.

Ms. Johnson, however, "found the courage to speak up in opposition to DEQ's illegal conduct in the hope the agency might change course." *Id.* ¶ 97. To that end, in a July 2023 meeting, Ms. Johnson "asked whether it was 'legal to deliberately treat people differently based on their race or any other protected class status in employment decisions?'" *Id.* ¶ 107.[1] Rather than answer the question, DEQ's consultant opined that the "laws"—in this case meaning Title VII of the Civil Rights Act of 1964, the Fourteenth Amendment to the Constitution, and other anti-discrimination laws—were not "just." *Id.* ¶ 112. The consultant then accused Ms. Johnson

[1] In their motion, defendants mischaracterize Ms. Johnson's question as "challeng[ing] a speaker about the validity of DEI principles." Defs' Partial Mot. to Dismiss ("Br.") [ECF 19] at 3. There was nothing "challenging" about Ms. Johnson's question and seeking information about the *legality* of a practice does not question the "principles" of that practice (there are, of course, *many* grounds on which to challenge the "principles" set forth in DEQ's materials, such as they are, but Ms. Johnson did not go that route). More to the point, on this motion to dismiss, the allegations of the complaint must be taken as true. Defendants' attempt to re-write Ms. Johnson's allegations to fit defendants' own narrative should be disregarded by the Court.

of exhibiting "resistance," attacked her personally, and suggested to other meeting participants that they should be enraged and feel harmed by her speech. *Id.* ¶ 114. The conversation then turned to a discussion of how DEQ could prevent other employees from raising questions about DEQ's racial preferences and other practices, including how management should best set an example to deter further communication like Ms. Johnson's, lest it "harm" listeners. *Id.* ¶ 116.

Unsurprisingly, within days, DEQ, through defendants Feldon and Robertson, took several actions against Ms. Johnson that set an example to other employees that they had better keep quiet. First, Ms. Johnson was publicly called out in an email from defendant Feldon to all of DEQ's more than 700 employees. *Id.* ¶ 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 that her questions amounted to "aggressive resistance," and "hurtful comments," that were tantamount "to a racist . . . diatribe." *Id.*[2]

[2] In their motion, defendants attempt to dispute the facts of the agency-wide e-mail, offering the Court a strained interpretation that it does not "describe, imply, or allude to Plaintiff as 'racist.'" Br. at 3 n.1. This is incorrect. As alleged in the complaint and as can be seen on its face, the e-mail does indeed refer to Ms. Johnson's discourse as a "'public incident[]' that demonstrated an alleged continuing "racis[t]" culture within the organization. Compl. ¶ 125; Ex. 9 (asserting that Ms. Johnson's discourse showed that "we have much work ahead of us as we move toward a workplace culture that embraces *anti-racism and equity*" (emphasis added)). The e-mail further accuses Ms. Johnson of engaging in "aggressive resistance," and uttering "hurtful comments," that were tantamount "to a racist . . . diatribe." *Id.* Based both on the face of the e-mail and under the facts alleged in the complaint, the e-mail was reasonably understood by its recipients to most definitely imply that Ms. Johnson's words were "racist," or, at the very least tantamount to racist. Hundreds of DEQ employees attended the meeting referred to in the e-mail and were aware that Ms. Johnson was the speaker being accused of "resistance." It strains credulity to assert, as defendants appear to do, that by omitting Ms. Johnson's name from her e-mail, defendant Feldon effectively blunted the force of her attack. In any event, defendants' argumentation is inappropriate on this motion to dismiss. Plaintiff, not defendants, is entitled to all reasonable inferences here, and the Court should disregard defendants' attempt to muddy the waters. *See Florence v. Seggos*, No. 21-834, 2022 WL 2046078, *2 (2d Cir. June 7, 2022) (District Court committed reversible error when it made an inference in favor of the defendant in a Title VII context).

DEQ then followed up by demoting Ms. Johnson, cutting her pay and subjecting her to an "investigation" into whether she had caused "harm." *Id.* ¶¶ 127-129.[3] Defendants' retaliation worked: other employees "know Ms. Johnson has been targeted by the highest level of DEQ management [and] some of them have taken [d]efendants' representations to heart, and believe the lie that Ms. Johnson is in fact a 'racist,' and treat her accordingly, with hostility and distaste." *Id.* ¶ 150. Her career prospects have been damaged and her professional network is in tatters due to defendants' conduct. *Id.* ¶¶ 146-54, 159, 161.

STANDARD OF REVIEW

In evaluating a motion to dismiss under Rule 12(b)(6), a court must accept all factual allegations in the 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

[3] Once again in their motion, defendants attempt to re-write the facts to fit their narrative. Defendants allege that DEQ was "worried about the impression Plaintiff was providing as a management service employee," and that it merely "suspended" Ms. Johnson's position "while an independent investigation was done." Br. at 3-4. None of these allegations are true. Defendants retaliated against Ms. Johnson because they disagreed with her speech, and in an attempt to send a message to other employees that they should think twice before "resisting" (*i.e.*, discussing) DEQ's efforts to impose a racially hierarchical culture. Compl. ¶¶ 111, 116-17, 124, 159. There did not merely "suspend" her, they demoted her (though after she threatened legal action, they reversed their decision, as detailed in the complaint). *Id.* ¶¶ 140-45, 155-59. There was no "independent investigation." *Id.* Again, after Ms. Johnson threatened legal action, DEQ and the Oregon Department of Administrative Services worked together to paper over its retaliation, continuing to *blame Ms. Johnson* for the actions taken against her and signaling that they believe they were "justified all along and, legal technicalities aside, it was a *good thing* to demote Ms. Johnson, cut her pay, and brand her a 'racist' for pointing out the illegality of DEQ's practices." Compl. ¶ 157; *see also id.* ¶¶ 140-56, 158-60.

the plaintiff allege sufficient facts to support a "plausible" claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). With respect to claims pursuant to Title VII of the Civil Rights Act of 1964, it is not necessary for a plaintiff to allege a prima facie case of racial discrimination. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002) (a prima facie case is an "evidentiary standard, not a pleading requirement"); *cf. E.E.O.C. v. Concentra Health Servs., Inc.*, 496 F.3d 773, 782 (7th Cir. 2007) ("Once a plaintiff alleging illegal discrimination has clarified that it is on the basis of her race, there is no further information that is both easy to provide and of clear critical importance to the claim."). Instead, a Title VII complaint need only give the defendant fair notice of the plaintiff's claim. *Swierkiewicz*, 534 U.S. at 512.

ARGUMENT

I. Plaintiff has stated viable (indeed compelling) claims that defendants imposed a discriminatory, hostile work environment – (claims six & seven)

Ms. Johnson's sixth and seventh claims allege violations of Title VII and 42 U.S.C. § 1981, respectively, based on defendants' creation and tolerance of a racially discriminatory environment. Because the substantive standards are the same for both claims, *see Manatt v. Bank of Am., N.A.*, 339 F.3d 792, 797 (9th Cir. 2003), they are analyzed together.

A. Legal Standards

Pursuant to Title VII, it is an "unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . ." 42 U.S.C. § 2000e-2(a)(1). In addition to protecting against discrimination in "economic" or "tangible" employment decisions such as hiring, discharge, and compensation, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), the statute has long been interpreted to forbid discrimination with respect to "intangible fringe benefits" of

employment, which include the "emotional and psychological stability of . . . workers." *Rodgers v. E.E.O.C.*, 454 F.2d 234, 237-39 (5th Cir. 1971); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-69 (1986) (following *Rodgers* in the context of a sex-based discrimination claim); *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) (*Rodgers*/*Meritor* apply in racial context); *Ellison v. Brady*, 924 F.2d 872, 876 (9th Cir. 1991).

Accordingly, an employer violates Title VII if it subjects certain employees to an inferior psychological environment because of their race, just as an employer violates the law if it provides inferior compensation or other "tangible" items to employees because of their race. *See, e.g., Rodgers*, 454 F.2d at 238; *see also Ellison*, 924 F.2d at 876. Because discrimination on the axis of "psychological fringe benefits" may be more subjective than differences in "economic" or "tangible" benefits, courts have long been concerned that employers might face hostile environment claims based on *de minimis* misconduct such as the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee." *Meritor*, 477 U.S. at 67 (quoting *Rodgers*, 454 F2d at 238).

To solve this problem and "shield employers from . . . the idiosyncratic concerns of the rare hyper-sensitive employee," *Ellison*, 924 F.2d at 879, claims based on discrimination in "psychological" or "environmental" benefits must meet a "sufficiently severe or pervasive" threshold. The test is usually phrased as the requirement that complained-of conduct is so "severe or pervasive [that it] alter[s] the conditions of employment and create[s] an abusive working environment." *Id*. The test has both a subjective and objective component. *See Harris*, 510 U.S. at 21-22; *see also Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990) ("The objective standard protects the employer from the 'hypersensitive' employee but still serves the goal of equal opportunity."). The objective component of the analysis is performed

from the perspective of a reasonable person in the plaintiff's position. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1115 (9th Cir. 2004).

At the same time that courts have shown concern that employers be protected from idiosyncratic and hyper-sensitive plaintiffs, the Supreme Court has noted that the "severe or pervasive" standard is meant only to screen out claims based on "merely offensive" conduct and *de minimis* psychological intrusions. *Harris*, 510 U.S. at 21; *see also, e.g.*, *Bonds v. Leavitt*, 629 F.3d 369, 385 (4th Cir. 2011) ("Normally petty slights, minor annoyances, and simple lack of good manners will not give rise to a hostile environment claim.") (cleaned up) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). The Court emphatically warned against the danger of imposing too high of a burden on plaintiffs, noting that Title VII does not require a plaintiff to be driven to a "nervous breakdown" in order to succeed on a claim. *Harris*, 510 U.S. at 22; *see also id. at* 21 (the appropriate standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."). The Ninth Circuit too has emphasized this point. *See Ellison*, 924 F.2d at 878 ("Title VII[] . . . comes into play long before the point where victims . . . require psychiatric assistance."); *see also id. at* 877 ("It is the [complained of] conduct which must be pervasive or severe, not the alteration in the conditions of employment.").

B. Application: DEQ has created an atmosphere of racial hostility through concrete discrimination and through derogatory messaging

There are two ways that an employer can discriminate with respect to psychological benefits. First, an employer who engages in discrete acts of "discriminatory treatment through concrete actions," can create a hostile environment. *McGinest*, 360 F.3d at 1107. Second, an employer can independently violate the law through "written and oral derogatory statements."

Id.

(1) DEQ has engaged in widespread acts of concrete racial discrimination that, in and of themselves, create a hostile work environment

Taking the first category: an employer who runs racially-segregated programs or 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. 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*, 454 F.2d at 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, 173, 175 n.17 (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.

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.

In seeking dismissal of Ms. Johnson's claims, defendants do not address the allegations of tangible discriminatory conduct and whether that conduct, even standing alone, is sufficient to create a hostile work environment (it is). Plaintiff anticipates that defendants may attempt to assert in reply that DEQ's misconduct is not relevant because Ms. Johnson was not directly impacted by its employment discrimination which was targeted at other white employees and applicants, not Ms. Johnson herself. This argument should be rejected for three reasons.

First, on a motion to dismiss a "[d]efendant cannot raise new arguments in a reply brief." *Pranger v. Oregon State Univ.*, No. 21-CV-00656-HZ, 2023 WL 111983, at *5 (D. Or. Jan. 4, 2023). Second, even assuming defendants' argument would properly be before the Court, it fails because Ms. Johnson *was* impacted by defendants' race-based human resources decisions. At the very minimum, her voice was diminished necessarily when others' voices were "elevated" based on their race. "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." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 272 n.9 (2023) ("SFFA") (Thomas, J. concurring) (citation omitted). Defendants have for years sorted the "voices," prospects for mentorship, etc. of non-white employees to the top of the heap. DEQ's capacity to do such things as listen to employees' ideas and provide mentorship is limited and, in the zero-sum competition to be heard, mentored, and nurtured in one's career, Ms. Johnson has suffered from DEQ's practices.

Finally, and perhaps most importantly, defendants are flatly wrong on the law. As outlined above, the central question in an "environmental" Title VII claim is whether an employer is discriminating against certain employees in the provision of psychological fringe

benefits by imposing a hostile environment on some, but not others, based on their racial classifications. While most cases proceed on the basis that an employer is tolerating or engaging in a pattern of written and oral derogatory statements, that does not mean that where an employer *does directly discriminate* in concrete ways against others of the same race as the plaintiff (be they co-workers or even customers), the environment has not been poisoned. The cases unanimously reject defendants' position. *See, e.g.*, *Myers*, 2002 WL 31994281, at *3, *9; *Gray*, 545 F.2d at 173, 175 n.17; *Jones*, 2005 WL 8161144, at *6; *Rodgers*, 454 F.2d at 237-39.

(2) DEQ has imbued the workplace with racially derogatory written and oral statements that, in and of themselves, create a hostile work environment

Separate and apart from the hostility created when an employer openly and intentionally discriminates based on race, in what has become the most commonplace type of "working environment" discrimination, employers may also violate Title VII through "written and oral derogatory statements." *McGinest*, 360 F.3d at 1107. In such a case, employers are liable where derogatory statements "convey[] 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)

Racially derogatory statements by a plaintiff's co-workers can satisfy this test. *See Diemert v. City of Seattle*, 689 F. Supp. 3d 956, 960-61 (W.D. Wash. 2023) (co-workers attaching derogatory labels to plaintiff such as "privileged" "racist," and "hateful" exude hostility); *Mais v. Albemarle Co. Sch. Bd.*, 657 F. Supp. 3d 813, 821-22, 828-29 (W.D. Va. 2023) (statements by co-workers comparing the plaintiff to "old racists who told people of color to go to the back of the bus," and stating that the plaintiff was "acting . . . like a typical defensive white person" contributed to hostile work environment); *Woods v. Graphic Comms.*, 925 F.2d 1195,

1198 (9th Cir. 1991)*; Turner*, 806 F. Supp. at 1028 (co-workers' references to plaintiff as a "white ass[]" create hostility).

Moreover, as courts uniformly recognize, racial hostility coming not from co-workers, but from supervisors or others in positions of authority over the plaintiff is even more severe. *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")*; see also Quantock v. Shared Mktg. Servs., Inc.*, 312 F.3d 899, 904 (7th Cir. 2002) ("[I]n light of Lattanzio's significant position of authority at the company and the close working quarters within which he and Quantock worked, a reasonable jury could find the sexual propositions sufficiently 'severe,' as an objective matter, to alter the terms of Quantock's employment."); *Taylor v. Metzger*, 706 A.2d 685, 691–92 (N.J. 1998) ("[T]he severity of the remark in this case was exacerbated by the fact that it was uttered by a supervisor or superior officer. Defendant was not an ordinary co-worker of plaintiff.").

And, where derogatory statements are embedded in *training sessions* and other official communications, the hostility is at its peak. This is so because these kinds of communications cannot be interpreted as the potential views of a few "bad seeds" at the co-worker or even local managerial level, but actually represent the *official policy* of the employer from the very highest levels on down. Moreover, where, as here, official trainings go beyond sharing hostile views and shade into *instructing employees to believe and internalize racially hostile stereotypes about themselves*, they represent the worst form of harassment. *See, e.g.*, *Diemert*, 689 F. Supp. 3d at 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); *id.* (training programs that involve messages such as "all white people have

white privilege and are racist," contribute strongly to a sense of hostility felt by the targeted group); *Mais*, 657 F. Supp.3d at 819 (mandatory "anti-racism" training targeted certain employees and "demonized [them] . . . for being white."); *De Piero v. Pennsylvania State Univ.*, No. CV 23-2281, 2024 WL 128209, at *1 (E.D. Pa. Jan. 11, 2024) (employer-sanctioned training sessions that "address[] racial issues in sweeping, absolute terms" create hostility); *Young v. Colo. Dep't of Corr.*, 94 F.4th 1242, 1254 (10th Cir. 2024) (racially hostile training materials).

Applying these principles, Ms. Johnson has pleaded a viable hostile work environment claim based on written and oral derogatory statements. DEQ has engaged in a years' long campaign of messaging on race that repeatedly and unmistakably sends a message to white employees: your kind had its day; you should no longer expect to be treated based on your merit (which is just white privilege anyway); and you need to move aside and hold yourselves (and other white employees) "accountable." [4] Here, plaintiff was not merely subjected to harassing statements by co-workers—although that itself would be enough; instead, she was affirmatively trained in *what to believe* about her race, her personal qualities as an individual, and even her own internal thoughts. It is hard to conceive of a more hostile working environment that one

[4] Notably, if the training had taken place in an educational environment, it would have constituted racial harassment in violation of Title VI of the Civil Rights Act. *See* U.S. Dep't of Educ. Off. for Civ. Rts., ANNUAL REPORT TO THE SEC'Y, PRESIDENT, AND CONGRESS, at 46 (2021) ("[P]olicies or pedagogical practices that perpetuate the idea that students may be categorized by race, assigned a set of characteristics, and be considered to possess certain characteristics based on that race, may subject students or staff to discrimination in violation of Title VI."), available at https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf (last visited Jul. 2, 2024). These Title VI principles apply to Ms. Johnson's Title VII claim. *See, e.g.*, *SFFA*, 600 U.S. at 290 (Gorsuch, J., concurring) ("This Court has long recognized, too, that when Congress uses the same terms in the same statute, we should presume they have the same meaning. And that presumption surely makes sense here, for as Justice Stevens recognized years ago, both Title VI and Title VII codify a categorical rule of individual equality, without regard to race.") (internal citations and quotation marks omitted).

where an employer's official employee training demands its employees to believe negative stereotypes about themselves in order to succeed and advance. Respectfully, plaintiff submits that the allegations in the complaint, when viewed in any reasonable light, are far more than enough to state a hostile work environment claim at the motion to dismiss stage. *See*, *e.g.*, *Diemert*, 2023 WL 5530009, at * 1-2; *Mais*, 657 F. Supp. 3d at 821-22, 828-29; *Woods*, 925 F.2d at 1198*; Turner*, 806 F. Supp. at 127; *Rodgers*, 12 F.3d at 675; *Quantock*, 312 F.3d at 904.

(3) The conjunction of DEQ's tangible racial discrimination and its racially derogatory written and oral messaging creates a synergistic effect and heightened levels of hostility

As noted above, employers create a hostile work environment either by engaging in open and intentional acts of concrete discrimination or by creating or tolerating racially derogatory messaging. Ms. Johnson has alleged sufficient facts to state a claim under either theory.

But further, where, as here, an employer has *both* engaged in widespread acts of tangible racial discrimination and allowed repeated derogatory comments about the disfavored racial group, the racial hostility is at its maximum. As the Tenth Circuit put it recently, where so-called "anti-racist" messaging is "[t]aken seriously by managers and co-workers," and thereby supports or "promote[s] racial discrimination and stereotypes within the workplace [including] racial preferences in hiring, firing, and promotion decisions," the racial environment is hostile. *Young*, 94 F.4th at 1251. Even worse is a situation in which "employees who object to these types of messages risk being individually targeted for discriminatory treatment—especially if employers explicitly or implicitly reward discriminatory outcomes." *Id.*; *see also id.* at 1245 ("As other courts have recognized, race-based training programs can create hostile workplaces when official policy is combined with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment.").

This is just commonsense. These different aspects—tangible employment discrimination, segregation, and hostile messaging—are mutually reinforcing. Simply hiring or promoting by race (as defendants do) is bad enough, sending a clear message to the disfavored race that "we don't want your kind," but when these tangible instances of employment discrimination are reinforced by messaging that, in effect, says, "if you don't like it, you are just displaying *your* white privilege and internal racism," (as defendants also do) the synergistic effect is greater than the sum of its parts. Ms. Johnson has pleaded a viable claim for hostile work environment discrimination under this theory as well.

C. Defendants' straw man argument does not defeat plaintiff's claims

Against all of this, defendants make a cursory two-step argument. First defendants misrepresent Ms. Johnson's claim as being "solely about her disagreement with DEI materials provided in the workplace." Br. at 8. Second, they cite to three recent cases they say "discuss whether DEI materials give rise to a claim for hostile workplace [sic]," and which they misread to establish a rule that where "DEI materials" are involved, a hostile work environment plaintiff must allege "specific instances of verbal assault, name-calling, or [] other forms of abuse" in order to satisfy the "severe or pervasive" standard, something they (incorrectly) assert Ms. Johnson has not done. Br. at 7-8 (citing *Young*, 94 F.4th 1242; *Diemert*, 689 F. Supp. 3d 956; and *De Piero*, 2024 WL 128209). Defendants' argument fails at many points along the way.

First, the argument is a straw man and should be rejected for that reason alone. Ms. Johnson's claims do not arise from mere "disagree[ment] with DEI materials." Rather, as detailed above as well as in her 237-paragraph complaint, plaintiff's claims are based on a large number of discrete tangible instances of discrimination and a multi-year campaign of relentless messaging demonizing white employees and "whiteness" and intimidating into silence those who

may disagree. Because defendants all but ignore plaintiff's claims, the Court should refuse to consider their motion. *Haynes v. Carnival Corp.*, No. 20-21921-CIV, 2020 WL 7711642, at *3 (S.D. Fla. Dec. 29, 2020) (denying motion to dismiss where the defendant "constructs a straw man and fights it hard, but it does not acknowledge—much less grapple with—the contents of the complaint.").

Second, there is no distinct category of claims under Title VII for cases involving "DEI materials," any more than there is a distinct analysis for discrimination claims brought by white employees, simply because they are white. Title VII protects all persons equally from discrimination based on their race, including persons categorized as "white." *See, e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976). This includes discrimination in the provision of intangible psychological benefits such as a workplace free from racialized hostility. *See, e.g.*, *Young*, 94 F.4th at 1249-1256*; De Piero*, 2024 WL 128209, at *6-8*; Diemert*, 689 F. Supp. 3d at 962-64; *Mais*, 657 F. Supp. 3d at 828-29; *Turner*, 806 F. Supp. at 1027-29.

Moreover, the phrase "DEI materials" lacks analytical content. One can easily conceive of "DEI materials" that are benign—say materials that talk about the history of the civil rights movement or "merely discuss[] the influence of racism on our society," *Young*, 94 F.4th at 1253 n. 4—but one can also conceive of "DEI materials" that are so shockingly racist that even a single instance of them is enough to create a hostile working environment. Painting with the broad brush of "DEI materials" does not help. What is required is engagement with the specific allegations of the complaint, which is something that defendants do not at all do in their motion.

Turning to the appropriate analysis (*i.e.*, applying legal authorities to the *actual allegations* in the complaint), it is clear that the three cases cited in defendants' brief *strongly*

support Ms. Johnson's claims and provide no basis whatsoever for dismissal. In two of the three cases cited by defendants, the courts denied the defendants' motions to dismiss. In those cases, the plaintiffs, who happened to be white, brought hostile work environment claims primarily of the derogatory statements type. *De Piero*, 2024 WL 128209 at *1-8; *Diemert*, 689 F. Supp. 3d at 960-63. The complained-of conduct included

- hostile comments by co-workers because of the plaintiff's race, including
  - labeling the plaintiff "privileged" "racist," and "hateful"; *Diemert*, 689 F. Supp. 3d at 961,
  - asserting that "because he [was] white, he did not have the right to speak about oppression faced by Black people"; *id.*, and
  - asserting that "resistance to wearing [COVID-19] masks . . . was . . . led by white males"; *De Piero*, 2024 WL 128209 at *1,
- racially hostile comments by supervisors and managers, including
  - asking "what could a straight white male possibly offer our department?"; *Diemert*, 689 F. Supp. 3d at 960,
  - stating it is "impossible to be racist toward 'white people'"; *id.*,
  - stating that by not quitting his job, the plaintiff was "us[ing] his white privilege to retain the position and that he was denying a person of color an opportunity for promotion"; *id.* at 961,
  - instructing the plaintiff to "discard his own race-neutral grading rubric" and instead give race-based preferences and demerits, *De Piero*, 2024 WL 128209 at *1,
- hostile race-based official trainings and executive-level communications, including
  - employer-sanctioned trainings "address[ing] racial issues in sweeping, absolute terms"; *id.*
  - treating training participants differently depending on their race, including by instructing white people "to hold [their breath] just a little longer—to feel the pain"; *id.*,

- training contractor "intimat[ing] that 'white colleagues' should feel like 'the problem'" and encouraging them to "feel uncomfortable about race"; *id.* at *2,
- emails from a Director-level manager calling out white employees' alleged "internalized white supremacy," and directing them to "hold other white people accountable"; *id.* at *1,
- applying "Race and Social Justice Initiative . . . trainings . . . differently to City employees depending on their racial identity"; *Diemert*, 689 F. Supp. 3d at 960,
- focusing on alleged "white supremacy" in trainings; *id.*,
- requiring employees to play "privilege bingo"; *id.* at 961,
- countenancing training consultants statements such as "white people are like the devil"; *id.*

Even without getting to any programs of tangible racial discrimination, such as the ones engaged in here by defendants, the courts in these cases had no trouble deeming these kinds of derogatory statements to be "verbal[] assault[s]" based on race sufficient to create a hostile environment. *Diemert*, 689 F. Supp. 3d at 963; *see also De Piero*, at (describing defendants' trainings as "discuss[ing] racial issues in essentialist and deterministic terms—ascribing negative traits to white people or white teachers without exception and as flowing inevitably from their race.").[5] So too here, Ms. Johnson has been exposed to:

- hostile comments by co-workers because of Ms. Johnson's race, including
  - "white employees . . . cannot take credit for their accomplishments because they are the result of unearned 'privilege'"; Compl. ¶ 87

[5] *Diemert* also included allegations that when the plaintiff reported concerns that his supervisor committed acts of nepotism, the supervisor "chest bumped" the plaintiff. 689 F. Supp. 3d at 961. To the extent that defendants appear to be arguing that an "assault" of the kind alleged in *Diemert* is somehow necessary to state a hostile work environment claim, Br. at 8, a figurative mountain of cases refute their position. *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.

- "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

- hostile comments by supervisors and managers because of Ms. Johnson's race, including
  - that her questions about the legality of DEQ's practices were a "public incident[]" that demonstrated an alleged continuing "racis[t]" culture within the organization; *id.* ¶ 125,
  - she engaged in "aggressive resistance," and "hurtful comments," that were tantamount "to a racist . . . diatribe"; *id.*,
  - that employees must "hold white colleagues in their midst 'accountable'"; *id.* ¶ 77,
  - requiring her (and others) to violate her own internal ethical commitment to treat individuals equally based on their personal merit without regard to race; *id.* ¶ 82,

- hostile race-based official trainings and executive-level communications, including
  - characteristics of 'whiteness" include
    - "ingratitude," *id.* ¶ 60,
    - habitually "talking behind the backs of other employees," *id.*,
    - being unable or unwilling to "learn[] from mistakes," *id.*,
    - failing to encourage "thoughtful decision-making [or] to consider consequences," *id.*,
    - being willing to "'sacrifice' other persons 'to more quickly win victories for white people," *id.*, and
    - "defensiveness." *id.*
  - "whiteness is a death sentence'"; *id.* ¶ 61,

- all "[w]hite folks are unconsciously invested in racism"; *id.*,
- whites invariably have a number of "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.*

Just like in *Diemert* and *De Piero*, Ms. Johnson's allegations are sufficient to state a claim. But even more, these are just a subset of the allegations that must be taken into account on this motion to dismiss. Unlike in *Diemert* and *De Piero*, Ms. Johnson has also pointed to a widespread program of tangible racial discrimination by defendants, including race-based hiring, promotions, and mentoring as well as racially segregated programs and work spaces. Accordingly, Ms. Johnson's claims are far stronger than the ones in *Diemert* and *De Piero*.

Finally, defendants point to a single case in which a white employee's recent hostile work environment claim was dismissed at the pleading stage—*Young v. Colo. Dep't of Corrections*. But *Young* 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 "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 lead to a "constant drumbeat of essentialist, deterministic, and negative language," concerning plaintiff's race, *id.* at 1253 n.4; *see also id.* at 1255 (further noting that when employees are treated differently "on the basis of race, [the employer] engages in the offensive and demeaning assumption that employees of a particular race, because of their race, think alike.").

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 consisting of any other factors that would signal out-group status to white employees. *Id.* at 1245-51. The court distinguished the situation alleged in the complaint with others in which a hostile work environment claim *would* be viable, including cases in which,

- 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" such that discrimination and stereotyping would find purchase in the workplace, *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.

Needless to say, every one of the factors that the Tenth Circuit said would support a hostile work environment claim, but that was missing from the complaint in *Young*, is present in Ms. Johnson's complaint—and much more. Here, defendants have not required Ms. Johnson to sit at a relatively anonymous workstation to complete a one-time computer module on "anti-racism," they have made it a regular and repeating part of everyday life in the Department of Environmental Quality. Compl. ¶¶ 58-85. Defendants' messaging was most definitely "taken seriously" by other employees, supervisors and managers. *Young*, 94 F.4th at 1251. Indeed, it is commonplace to hear defendants' racialized opinions echoed back at DEQ. Compl. ¶¶ 86-90. Employees definitely risk being targeted if they object – just look at what happened to Ms. Johnson. *Id.* ¶¶ 114-31. And, as noted extensively above, defendants not only "explicitly . . . reward discriminatory outcomes," *Young*, 94 F.4th at 1251, they have positively made them a job requirement. Compl. ¶¶ 37-57. For all of these reasons, defendants' motion to dismiss claims six and seven must be denied.[6]

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[6] In their brief, defendants attempt to discard a number of the allegations in the complaint as "conclusory." Br. at 4-5 (pointing to Paragraphs 36, 41, 43, 46, 47, 49, 58 & 67 of the Complaint). That effort fails. While conclusions of law, "unwarranted deductions of fact, [and] unreasonable inferences," *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), *opinion amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001), are not cognizable on a motion to dismiss, the allegations set forth in the targeted paragraphs do not fall into any of those categories.

First, none of the allegations are conclusions of law—they are all allegations of fact—and plaintiff does not understand defendants to argue otherwise. Second, to the extent these factual allegations are "conclusions," as opposed to some other kind of factual allegation (a dicey proposition given that *all* human knowledge is arguably assembled from "conclusions" about reality), they are most definitely not *unwarranted* or *unreasonable* ones. Given the other known facts, presented in great detail throughout the complaint, the "conclusion" (if it is one) set forth

Aside from seeking dismissal of claims six and seven for failure to state a claim, defendants have moved to dismiss or otherwise modify certain other claims for various procedural reasons. Each such request is taken up below.

II. Although defendants Feldon and Robertson are appropriate defendants for purposes of the second claim for relief, plaintiff does not object to their dismissal from the claim

Defendants Feldon and Robertson assert that they are "not appropriate defendants" for purposes of plaintiff's second claim for relief pursuant to Title VII because such claims can only be brought against a plaintiff's "employer," not individual supervisors. Br. at 6. Contrary to defendants' position, where, as here, a government employee sues a supervisor in his or her official capacity,[7] the supervisor is the "functional equivalent" of the employer itself and is an

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in paragraph 43, for example, that the topics being discussed in racially segregated breakout rooms were "of obvious importance to agency leadership (and hence to any given employees' chances for promotion)" is clearly *reasonable* and *warranted*. So too for the other allegations targeted by defendants.

Moreover, the Ninth Circuit has squarely rejected defendants' position. In *McGinest*, 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 at 1114 n.5; *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 *McGinnest*.

[7] Defendants Feldon and Robertson are sued in both their individual and official capacities. Compl. ¶¶ 11, 13.

appropriate defendant. *Nouchet v. Mandalay Corp.*, No. 16-cv-00712, 2017 WL 985648, at * 2-3 (D. Nev. Mar. 14, 2017). However, where, as here the plaintiff has also sued the employer directly, the official capacity claim against the supervisor is duplicative and may safely be dropped. *Id.* Accordingly, plaintiff does not object to dismissal of the second claim for relief as against defendants Feldon and Robertson only.

III. Plaintiff's fourth, fifth and eighth claims for relief seeking damages from the individual defendants are not barred by the Eleventh Amendment

In her fourth, fifth, and eighth claims, Ms. Johnson seeks relief under Oregon statutes for unlawful retaliation and for race-based discrimination. Defendants seek dismissal of those claims pursuant to the Eleventh Amendment. "The Eleventh Amendment bars claims for damages against a state official acting in his or her official capacity. It does not, however, bar claims for damages against state officials in their personal capacities." *Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir. 2016) (citation omitted). Accordingly, to the extent that plaintiff's fourth, fifth and eighth claims for relief seek damages against defendants Feldon, Robertson, and Whitman in their individual capacities, the Eleventh Amendment does not apply and the claims should be allowed to go forward. *Accord Flores v. Or. Dep't of Corr.*, No. 22-cv-01399-SB, 2024 WL 2300771, at * 7 (D. Or. May 21, 2024) (Beckerman, M.J.).[8]

IV. The State of Oregon should not be substituted for the individual defendants on the state law claims

Defendants assert that ORS 30.265(3) requires that the State of Oregon be substituted for the individual defendants on plaintiff's state law claims. Br. at 9. This position is simply

[8] Plaintiff does not object to dismissal of her fourth, fifth and eighth causes of action as against DEQ and individual defendants Feldon and Robertson in their official capacities, pursuant to the Eleventh Amendment.

incorrect. The statute provides that where a complaint against individual government actors "*alleges damages* in an amount equal to or less than the damages allowed under [other statutes]," and other conditions are met, the State is to be substituted as the defendant. ORS 30.265(3) (emphasis added). Here, however, plaintiff has *not alleged a specific damages amount*. Accordingly, ORS 30.265(3) does not apply. *See, e.g.*, *Achcar-Winkels v. Lake Oswego Sch. Dist.*, No. 3:15-CV-00385-YY, 2017 WL 2291338, at *9-10 (D. Or. May 25, 2017) (where a complaint "does not expressly allege a specific amount of damages . . . ORS 30.265(3), which prohibits actions that allege damages below the applicable cap . . . , [does] not apply"); *see also Monson v. Oregon*, No. 22-cv-00604-AA, 2023 WL 6174382, at *2 (D. Or. Sept. 22, 2023) ("Courts of this District have routinely held that, absent the allegation of a specific dollar amount equal to or less than the required amount, defendants may not rely on ORS 30.265(3) to compel substitution of a public body in place of individual defendants.").

V. The Court should not strike plaintiff's claims for injunctive relief

Defendants ask the court to strike the requests for injunctive relief set forth in paragraphs C, D, I and J of the prayer for relief, based on allegations that, "[t]he claims in the Complaint relate to retrospective events only" and that the Eleventh Amendment prohibits injunctive relief where "no continuing violations exist." Br. at 9-10. But this is (again) simply wishful thinking on defendants' part. The complaint most definitely does not only "relate to retrospective events." Rather, every single one of the practices Ms. Johnson complains of continues to this day. Defendants have not stopped their practice of discriminating on the basis of race in hiring, promotions, salaries, mentoring, and other aspects of employment; defendants have not stopped requiring employees to absorb and agree with their derogatory opinions concerning allegedly innate and immutable racial characteristics; and defendants have not stopped threatening

retaliation against employees who engage in "resistance" to these practices. Defendants may not simply re-write the complaint to suit their defenses. Because the complaint alleges ongoing violations, defendants' argument fails entirely.[9]

CONCLUSION

The Court should deny Defendants' Partial Motion to Dismiss in its entirety. In the event that the Court is inclined to grant any part of any Defendants' motion, Plaintiff further requests leave to amend to address any perceived inadequacies in the Complaint.[10]

DATED this 3rd day of July 2024.

Respectfully submitted,

/s/ James Kerwin
James Kerwin*
William E. Trachman*
Grady Block*
MOUNTAIN STATES LEGAL FOUNDATION
2596 S. Lewis Way
Lakewood, Colorado 80227
Tele: (303) 292-2021
Fax: (877) 349-7074
jkerwin@mslegal.org
wtrachman@mslegal.org
gblock@mslegal.org
**Pro Hac Vice*

Herbert G. Grey, Attorney at Law

[9] Defendants finally request that the prayer for pre-judgment interest on the state law claims be stricken. Br. at 10-11. It is not necessary for the Court to strike anything from the Complaint on this score. Paragraph N of the prayer for relief seeks "pre- and post-litigation interest as authorized by law." To the extent that defendants disagree that pre-judgment interest on the state law claims is "authorized by law," they can raise that argument at a later stage of these proceedings, when appropriate.

[10] In the Ninth Circuit leave to amend must be granted with "extreme liberality." *City of Fernley v. Conant*, No. 22-15400, 2023 WL 2549792A, *2 (9th Cir. Mar. 17, 2023).

OSB No. 810250
4800 SW Griffith Drive, Suite 320
Beaverton, Oregon 97005
503-641-4908
herb@greylaw.org

Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 10,662 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

CERTIFICATE OF SERVICE

I certify that on July 3, 2024, I served the foregoing PLAINTIFF'S OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS [ECF 19] upon the parties hereto by the method indicated below, and addressed to the following:

Jill Conbere	_____HAND DELIVERY
Jill Schneider	_____MAIL DELIVERY
Oregon Department of Justice	_____OVERNIGHT MAIL
100 SW Market Street	_____TELECOPY (FAX)
Portland, OR 97201	_____E-MAIL
Attorney for Defendants	☒ E-SERVE

/s/ James L. Kerwin
James L. Kerwin*
William E. Trachman*
MOUNTAIN STATES LEGAL FOUNDATION
2596 S. Lewis Way
Lakewood, Colorado 80227
Tele: (303) 292-2021
Fax: (877) 349-7074
jkerwin@mslegal.org
wtrachman@mslegal.org
**Pro Hac Vice*

Herbert G. Grey, Attorney at Law
OSB No. 810250
4800 SW Griffith Drive, Suite 320
Beaverton, Oregon 97005
(503) 641-4908
herb@greylaw.org

Attorneys for Plaintiff