

# INITIAL EVIDENTIARY REPORT

## DISCRIMINATION AND RETALIATION PRACTICES AT IOWA WORKFORCE DEVELOPMENT

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## **Summary of the Problem**

We have identified within Iowa Workforce Development systemic racial discrimination practices focused on African Americans but likely bleeding into other non-white groups, combined with continuous intentional retaliation toward any who seek to challenge or expose the discrimination.

This 40 page report refers to a 1,380 page appendix. It is based upon a review of more than 15,000 documents and information from over more than 40 witnesses and spans several years. Much remains to be done, but the evidence shows that Employee Services, with the protection and approval of others within IWD upper management, has engaged in a pattern of discrimination and retaliation directed primarily at African Americans. The evidence will show this practice has included acts and policies that are beyond offensive in the State's most important employment agency. Some of the practices include; employing the use of tests designed to discriminate against African Americans, intentionally providing misleading and inaccurate information to African Americans to interfere with, and has using schemes of discrimination and retaliation designed to deny African Americans promotion opportunities. IWD has also engaged in abuse of power and intentional retaliation to shut down all who have attempted to stand up and correct this systemic discrimination.

IWD is an agency with Affirmative Action policies on record that are intended to act as a barrier to discrimination and as such, the methods of discrimination used by IWD were designed to hide their extent and impact. IWD

set up systems to hide discrimination within seemingly arbitrary rules, rule changes, claimed errors and subjective decision-making. The pattern of retaliation appears as an extra layer or barrier to discourage those who attempt to expose the illegal practices.

One problem identified in this Report is the consolidation of power within Employee Services over hiring and promotion as well as the abuse of that power. The simple consolidation of power does not always imply *abuse* of power. If it turned out that the supervisors making hiring decisions on their own were racist in some way, the consolidation of power in an agency free from bias could be a good thing. Unfortunately, in this case it appears that the fox was placed in charge of the hen house.

The allegations in this report are directed primarily at the Employee Services division under the control of Jackie Mallory, with the assistance, or at least the protection, of the former Assistant Director of IWD, Jane Barto, and the former Director of IWD, Richard Running. There are also connections and apparent complicity within The Department of Administrative Services (DAS, formerly IDOP) and other departments within IWD, but the extent of any complicity, or any danger remaining from discrimination in other departments requires separate investigation.

Within this report, we discuss evidence of discrimination that emanates from five different discrimination barriers. Each of those barriers acts

independently and may combine with others to negatively impact the opportunities of African Americans to equal employment. They are as follows:

1. Obviously the remnants of *historical racism* create gaps in education and income earning for African Americans and which formed the original basis for affirmative action policies in Iowa. (Appendix 16, 17)
2. *Hidden bias* represents a layer of varying degrees of subconscious bias and stereotypes regarding African Americans that remains one of the largest barriers faced by African Americans. This is explained in more detail in Appendix 2.
3. *Resentment by management or whites* toward the very existence of Affirmative Action plans. Regardless of whether such plans are good or bad, the majority of negative associations with such plans fall on the shoulders of Blacks. We separate this concern because it exists regardless of any conscious or subconscious bias toward Blacks in general and has an independent affect on perceptions regarding the ability of Blacks.
4. *Overt racial bias*, or what we term more willful forms of bias toward non-whites with a particular focus on African Americans within Employee Services. This is what most might refer to as *racism* and is shown within the evidence of:
  - a. The use of invalid tests to exclude African Americans from hiring. This includes the use of a test that Employee Services was aware had an adverse impact on African Americans. (Appendix 16)
  - b. A pattern of providing false or misleading information to African Americans as a means of controlling their hiring and promotions within IWD.
  - c. A pattern of exercising control and specific efforts to deny jobs to the most qualified African Americans over and above the many barriers already in place to make advancement difficult.
  - d. Evidence of racial stereotypes and more overt negative attitudes regarding Blacks by certain managers and within Employee Services as the agency that controls all hiring and promotions in IWD.

- e. A pattern of hiding and even destroying information to cover the use of screening devices that adversely affect African Americans. This includes hiding the existence of reports showing the testing was invalid, deleting emails and hiding other relevant documents.
5. *Retaliation* as a deterrent and as a means of isolating and removing employees from IWD that prevents exposure of the discrimination.

There is no question each of these different barriers has an independent negative impact on the rights of African Americans as they could have upon any minority group singled out for their attention. When layered on top of each other within the same system they create almost impassible barriers for all but the lucky few who those in power deign to allow through.

Please be advised that the we have placed discussions regarding the background of the case and discussions regarding *historical racism*, *hidden bias* and *resentment* at the front of this Report. Such discussions are more technical in nature and may not appear as significant as the more well understood allegations of overt racism or retaliation or abuse of power, but they provide important context. They also clearly provide the *foundation* for a system that allows the more well known and obvious abuses. It is our view that the more obvious problems cannot be permanently solved without a proper understanding of every aspect of discrimination.

As you review this report it may be tempting to focus only on the allegations of racism, the abuse of power and the schemes of retaliation as those barriers are much easier to identify. The evidence of the more obvious barriers will likely provide the basis for immediate and decisive action, but we urge a

complete and proper repair of the work environment at IWD that is designed to deal with each layer of discriminatory barriers. Overt racism can only grow within a system that is ripe for it. If the system is properly cleared of the underlying foundations for racism it cannot gain a foothold. It certainly could never have the far reaching effects similar to the situation at IWD without the added layers of hidden bias, resentment and fear existing within a significant segment of management and potentially some of the workforce.

### **Background Information**

A small group of attorneys within the State along with their clients effectively operate as private Attorneys General for the enforcement of the federal and state civil rights laws.<sup>1</sup>

We are presenting this detailed information to you consistent with our ethical duty to individual clients, and pursuant to our duty to prevent discrimination as civil rights attorneys. We do so despite the fact it is not necessarily in our best interests as private lawyers to expose the entire case prior

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<sup>1</sup> We are not overstating this role. The Courts recognize the knowledge and expertise required to understand, investigate and pursue complex civil rights litigation normally reaches beyond the capability of a local civil rights commission or the government. Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit “does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest importance Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968); *see also* City of Riverside v. Rivera, 477 U.S. 561, 575 (1986). “[C]ivil rights suits ‘seek to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms....’” Villano v. Boynton Beach, 254 F.3d 1302, 1305 (11th Cir. 2001) (quoting City of Riverside v. Rivera, 477 U.S. at 574).

to litigation, or provide opportunities to a defendant to engage in action that will in effect, undermine the economic value of the case. It is our normal practice, however, to provide opportunities to repair discrimination when we believe there is an interest from the employer or agency to do so. The fact that this problem is so offensive and harmful to the entire State makes it even more important that we offer the chance to repair it.

Some history on how we came to be involved in this matter is relevant to explain how this systemic discrimination existed under the very nose of State government, the Attorney General's office, as well as most civil rights lawyers in the state. This is no small feat and it highlights both the insidious nature of the discrimination and some of the problems of *hidden* bias. Only by understanding every aspect of how this problem arose can the State of Iowa work to eradicate it at IWD, make certain it does not exist in other agencies, and prevent it from recurring in the future.

Mr. Carroll's firm and my firm are separate entities. We each have been practicing in the area of employment law and civil rights law for 12 years. Separately and together we have been investigating and pursuing through various legal avenues the rights of individual African Americans discriminated against by IWD for the last five years. In 2002, I represented a Black female and an Hispanic female who were concerned that they were intentionally moved within IWD to place them at risk for layoff, and that when they were laid off, they were denied

proper recall rights. Further, when they filed complaints of discrimination with the Iowa Civil Rights Commission they suffered retaliation through a continued denial of opportunities to be recalled or promoted back within IWD. In 2001, Mr. Carroll began representing a woman named Beverley Kennedy (now Clark) who also suffered retaliation and denial of several promotions within IWD. When Mr. Carroll and I pursued these claims separately, we were unaware of how our claims overlapped.<sup>2</sup> We were initially unable to obtain evidence of a larger practice of discrimination because it was so effectively hidden.

### **Background on Discovery of Discrimination and Retaliation Practices**

This report later identifies in more detail several barriers to the discovery of the discrimination. A barrier that Mr. Carroll and I see quite often is the willingness of layers of upper management staff to protect and defend the decisions of lower management. That phenomenon is relatively common and does not necessarily suggest that upper management has the same racial bias as the lower manager.

In this case, IWD went beyond the normal defensive posture where upper management protects decisions by lower management. In this case, there is evidence that management at the highest level and with the most power were *participating in and directing* the discrimination and schemes to retaliate and hide

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<sup>2</sup> My representation of the Black female and the Hispanic female was unsuccessful because we did not realize until too late, that the source of the discrimination was not their former manager, but emanated primarily from Employee Services.

the discrimination. Some examples of these practices include Employee Services developing a scheme to avoid hiring an employee in violation of the law under the direct approval of Jane Barto, and on a prior occasion taking specific action to stop the hire of a Black female, Linda Barnes, in favor of a white female. Those two examples were done with clear contempt for the rights of the employee as well as the risk of getting caught.

This matter came to light more clearly during November of 2004 and leading into the spring of 2005. Mr. Carroll had been representing Ms. Clark regarding her individual claims for discrimination up to that time. Pursuant to discovery the State provided several boxes containing over 15,000 pages of files to Mr. Carroll. Those files contained many position folders and supporting documentation on the detail from the hiring and promoting process for 80-100 positions at IWD from 2000 to 2003.

Before he could begin a thorough search of those files, Mr. Carroll was forced out of the case in November, 2004 because of a conflict.<sup>3</sup> As a result, Mr. Carroll referred Ms. Clark to Mr. Newkirk. At that time the case appeared to be one of hidden bias with a dose of retaliation against Ms. Clark for her efforts to complain about the adverse impact a test being used by IWD was having on the

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<sup>3</sup> See reference to Randy Graves in Appendix 9, p. 424-433, and references in witness information in Appendix 1, p 8, 13. Mr. Graves was represented in a criminal matter by a person in Mr. Carroll's firm and who was going to be witness in the Clark case. Mr. Graves was a white male who threatened and bullied two Black females including Ms. Clark and remained unpunished by Mallory and Barto and in fact protected by them. Mr. Graves made threats that should have warranted his immediate termination, but he was retained as a means of harassment and as a bully to Blacks.

rights of African Americans. Upon assuming the case, the task remained to review the 15,000 documents provided by the State as well as to categorize them and understand them. During late 2004 and with increasing intensity during January through April of 2005, Ms. Clark and Mr. Newkirk personally reviewed and categorized all of these documents.

We were initially reviewing the files for patterns or evidence of *hidden* bias. As defined in this report, this type of bias reflects the existence of a variety of negative perceptions, stereotypes and attitudes, often at a more subconscious level, that affect decision-making of whites regarding African Americans.

(Appendix 2) This type of discrimination is different from what the average person thinks of as *overt racism*. The existence of hidden bias does not always suggest the existence of hatred or dislike or overt stereotype within the decision-maker. It suggests that at some level of consciousness, there exists some degree of negative attitudes about the minority group in question. Hidden bias causes negative thoughts from the decision-maker to attach to the Black person sitting in front of them. Those negative attitudes in turn affect the decision-maker's perception of the Black person's ability, character, or record.<sup>4</sup> We refer to this as *hidden bias* because it is often entirely hidden from view and can be hidden even from the mind of the person engaging in discrimination if operating on a purely

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<sup>4</sup> The existence of hidden bias does not mean that the bias exists *only* at a subconscious level. It merely means that bias of some degree definitely exists at least at the subconscious level. It may very well also exist at a conscious level and may exist alongside more overt racial bias or racism.

subconscious level. It is therefore necessary to search for evidence of it within the choice of language, tone, attitude and other subtle actions of the decision-maker.

We therefore were initially searching through thousands of pages of position folders looking for tell-tale signs of *uncertainty* regarding Ms. Clark's intelligence or character. We were searching for comments upon Ms. Clark's use of language or concerns about her intelligence unsupported by her employment record as they can indicate both overt racial bias and hidden subconscious bias.<sup>5</sup> Specifically we looked for evidence that suggested *ingrained negative perceptions* regarding African Americans. We also searched for evidence of retaliation tied to her complaints of discrimination and, of course, kept an eye out for evidence of more willful forms of racial bias.

Our search revealed that Ms. Clark faced hidden discrimination barriers in the *perception of her qualifications*, and which would arise at various points in the promotion process. In reviewing her paper qualifications and comparing them to the whites who were hired, we began to see evidence of a pattern of discrimination against her and other African Americans.

We discovered that she would not be selected for an interview when she was equally qualified and often more qualified than the white person awarded the job. This phenomenon *could* be explained by nothing more than subconscious negative perceptions regarding race that exist across a broad range of Americans.

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<sup>5</sup> Randy Graves stated that he viewed Ms. Clark as lazy and that she "speaks in Ebonics." There was some evidence of doubt regarding Ms. Clark's math skills that appeared to have no tie to any actual failure in the area of math.

Given the numbers of persons who appeared to be involved in the selection and interview process for promotions at IWD, it would only take one or two of them with subconscious negative perceptions regarding Blacks to adversely affect someone like Ms. Clark. (See figures A-6, A-7, A-8 in Appendix 2, p.34-36) While at this point we were only reviewing the matter for hidden bias, it was apparent that additional barriers existed that prevented Ms. Clark's *paper* qualifications from being considered equally with those of whites on a consistent basis. It occurred to us this could be because the managers who were selecting and interviewing Ms. Clark were simply being told not to consider *her* in order to retaliate against her for her complaints of discrimination, and of course there could have been much higher levels of racial bias than first suspected.

As we reviewed the files during January, February and March of 2005, and as we took depositions and obtained information from over 40 witnesses, we began to see a pattern of willful discrimination and retaliation that was clearly layered on top of any hidden or purely subconscious bias. The nature of what I term, *more willful or malicious* forms of bias, was quite ingenious. It was a pattern placed within a scheme that allowed for complete plausible deniability, at least when each person or instance was taken in isolation.<sup>6</sup>

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<sup>6</sup> The selection process for a new hire or promotion at IWD follows a certain path. There is the identification of a need for a position; there is a request to DAS for a *certification list* that contains all employees who are minimally qualified and have followed the processes to stay on the Cert. List; there is the delivery of the CERT list to Employee Services; there is a screening process at IWD to narrow the list to those who either can be interviewed by managers or who are selected for interviews for the managers; there is the interview process and finally there is the decision of whom to hire from the top three persons interviewed.

The ingenious nature of the discrimination was to randomly use every single point along this process to set up barriers to hiring and promotions of Blacks. A Black employee might be on the list, might be removed from the list, might get screened out one time, then screened in the next time, then interviewed once, then not and so forth. However, the same excuse was never used and appeared to the casual observer to be random. The seemingly arbitrary nature of the mistakes, misinformation and excuses coming from Employee Services and even from DAS keeps everyone guessing and prevents any one person pointing the finger at any one point in the process or at any one person

In other words, the sheer variety of methods, seeming mistakes, excuse and misinformation used by Employee Services to deny opportunities and to retaliate prevented visualizing the pattern. As a position was opened and the process followed to fill that position there were numerous opportunities for Employee Services to stop the advancement of one or more persons at any one of several stops along the way. This pattern manifested itself primarily through the actions of Employee Services under the supervision of Jackie Mallory, who has been the head of Employee Services for many years.

The interviews and documents showed not a complete stoppage of all Black hires, but the placement of a filter over their opportunities governed only by the safety net of the State's Affirmative Action policy. Over the past few years increasing effort has been exerted to get around even those minimum standards by placing requirements on positions that suggest an interest in hiring Hispanics

rather than Blacks. It remains to be seen if IWD truly has an interest in hiring Hispanics, but the evidence suggests they IWD is focusing on Hispanics because of negative perceptions regarding Blacks, not for any altruistic purpose.<sup>7</sup>

### **Factors at Work that Hid Discrimination and Retaliation.**

A variety of factors have prevented discovery of this practice before now. Some of these factors are clearly beyond the control of any one agency or system of remedies. The following bullets separately identify these barriers so that, when possible, a remedy can be developed to prevent a recurrence of this problem:

- Discrimination claims regarding African Americans are difficult under the best of circumstances. Few lawyers take them on with regularity given barriers to seeing discrimination and the complexity of the issues.
- Most people do not understand how discrimination works and that regardless of whether it is based purely on subconscious bias or overt racism, it primarily *affects perception*. It leads lawyers, agencies, those who investigate and the Courts down the wrong path because everyone is looking for the wrong type of discrimination.
- It is actually not that common to find a pattern of overtly planned discrimination and retaliation. There are often individuals who engage in such behavior and there are employers who look the other way, but to find a large entity facilitating systemic discrimination and retaliation is thankfully, relatively rare.
- The level of control exercised by management was so complete that it allowed Employee Services to arbitrarily change rules and practices and casually provide excuses that have the appearance of being unrelated to race and which on their face do not appear related to race or retaliation, but

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<sup>7</sup> One issue is the *Spanish speaking* requirement placed on several positions that would appear to have no relation to the numbers of persons who only speak Spanish and who might also be claiming unemployment benefits or other benefits managed by IWD.

have the effect of placing limits on the numbers of African Americans and other un-desirable employees from getting through. This control also allowed Ms. Mallory to hire employees around her who were willing to enforce practices of selecting employees based on race and other protected classifications.

- The discrimination was hidden by the complete control exercised by Jackie Mallory and Jane Barto and was approved or at least negligently ignored by the management above and to some extent around both of them. Again, having the three top levels of management working together either by design or through negligence is a very difficult barrier to overcome, and again, not nearly as common in 2006 as in 1966.
- The control allowed a pattern of retaliation to exist and put a strangle hold on the information showing discrimination. The machinery was at all times poised to shut down those few who might be willing to come forward.
- Ms. Mallory and IWD exercised control over the information and even the investigation process to further cover up any discrimination. The State was insulated from criticism even from the ICRC because of its affirmative action policy and the assumption that such a policy would protect African Americans from discrimination.
- The Iowa Civil Rights Commission is an agency too under-funded to break through the misinformation provided by IWD under the cloak of its Affirmative Action credentials.
- IWD is represented by a well-trained legal staff in the Attorney General's office. The system is designed so that IWD has its own private law firm to help defeat the claim of discrimination rather than expose it. This is not a criticism of the AG's office, it is simply a practical recognition of a system that leaves only private lawyers as the primary group to expose discrimination. The numbers of those who are willing to take on the massive task of exposing discrimination is dwindling rapidly.

## Evidence and Conclusions from Evidence

The documents in this matter consist of more than 15,000 pages as well as depositions and interviews of 35 witnesses, plus anecdotal information obtained regarding information from and the experiences of another 15 people.

The problems identified here appear to have escalated around the time that Jane Barto decided to move control over the hiring and promotions into the Employee Services division. From that point, Ms. Mallory, with the apparent approval of those above her, began to take serious steps to limit and control the numbers of African Americans employed at IWD. As you likely know, because the state is an affirmative action employer, it should be impossible for someone to prevent the hiring of *all* Black employees. Our investigation has shown that IWD, with the assistance of at least one person within DAS itself, have taken steps to *limit the hiring and promotions of Black employees to the minimum required by any affirmative action plan.*<sup>8</sup>

IWD does not refuse to hire all African Americans. IWD takes steps to keep the numbers of Black employees hired at, or just below the requirements of the State Affirmative Action plan. In other words, they use that plan as a ceiling, rather than a floor. IWD also refuses to promote any Black other than when circumstances or a desire for plausible deniability may force it. IWD refuses to

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<sup>8</sup> There needs to be a review of the practices of the State's Affirmative Action plan. It is unclear when African Americans get any benefit from the plan or if all of the benefit goes to women and more recently, Hispanics or other groups viewed as minorities, but viewed by Employee Services as at least more desirable than Blacks.

promote any person, Black or White, who dares to complain or stand up for their rights. Most of those who do so are fired or forced to leave IWD.

A review of the evidence uncovered several barriers that have been allowed to develop or which were intentionally put in place to control the numbers of African Americans hired at IWD.

### **Barriers Based on Hidden Racial bias and Resentment**

There is evidence of degrees of hidden racial bias that may be purely subconscious or touch upon more intentional stereotypes and negative perceptions of Blacks. That hidden bias in turn influences the decision-making in way that adversely affects Black employees within IWD. The evidence of this practice comes from the testimony of Ms. Clark who's failure to obtain a single promotion during 2000-2003 can only be explained by some degree of hidden bias. There are clearly indicators within the interview notes and comments that suggest negative perceptions about her ability and the relative ease with which a completely unqualified white person can obtain the advisor position shows this bias is in play.<sup>9</sup> As previously indicated, this *hidden* form of racial bias is common and sets up barriers to the advancement of African Americans regardless

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<sup>9</sup> It is likely a kindness for us to suggest that hidden bias may be a larger part of the problem. The indicators within Employee Services and the failure of anyone to challenge the overt discrimination shown by Employee Services in Des Moines, Waterloo and Cedar Rapids suggests racism, not merely hidden subconscious bias. Even if there were zero anecdotal evidence of hidden bias, the testing done of whites nationwide shows that it is almost impossible for even a reasonably fair system to be free from hidden bias. The easiest way to determine the extent of this problem is through mass testing of all management and executive officers by use of the Implicit Bias Test described in Appendix 2.

of the existence of more willful dislike or racism toward African Americans that appears to also exist in IWD.

This type of hidden bias manifests itself as follows: A supervisor who interviews an African American may make stereotyped or unfair assumptions about the African American's ability (at a subconscious or slightly conscious level). That supervisor will then allow those negative perceptions regarding the Black candidate to *influence or filter* decision-making during the interview or during the decision of whom to select for the position.

Please consider Appendix 2 and look at figures, A-6, A-7 and A-8 starting on page 34 of the Appendix. It is important to try and visualize how a subconscious or hidden *perception* of Blacks can *filter* information and, in turn, affect any of 100 decision points in a decision-maker or chain of decision-makers. Only one such decision subtly influenced by bias can effectively stop the progress of an African American.

This type of bias is a formidable barrier that all African Americans face within this State every day of their lives.<sup>10</sup> It is entirely different and distinct from the traditional *historical* reasons given for affirmative action identified in the State's employment policies. (Appendix 16, 17) The traditional reasons reflected in the policies of the state are based on the idea that because Blacks were

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<sup>10</sup> If you review Appendix 2, figure A-1, you can see that when we refer to bias, we do not always mean racism or discrimination based on malice. Subtle or hidden bias can be purely the product of subconscious negative thoughts that affect perception and can exist in the most open-minded of persons. It nevertheless acts as a substantial barrier to the progress of African Americans and one can argue, it is a stronger barrier than even overt racism within one manager in the chain of decision-makers.

subjected to such extreme levels of racism and hatred during slavery and up until the civil rights movement, that the impact of that racism on the education and economic status of Blacks causes barriers to equality to remain. It is further supported by the idea that if racism placed whites in position of power 40 years ago, that likely entrenches whites in such positions to remain as a barrier to the advancement of Blacks for many years. Affirmative Action was one minor tool used to help insert Blacks into the employer and into management as a method of overcoming the barriers caused by past racism.

If we view advancement to the top an employer as a foot race, the white employee, because of *historical racism*, is starting 10 yards ahead in a 100 yard dash. It is not the fault of the white person that they got that head start, but that head start exists none-the-less, and Iowa by having the policy in place has stated quite clearly that such a head start is unfair. The policy of affirmative action was supposed to operate over the past 40 years to reduce that head start and place Blacks on equal footing in the employment arena.

The barrier of hidden bias is different because it reflects an *ongoing and current* barrier that African Americans must face each day when they walk into the work place. It impacts their rights to receive employment decisions unaffected by negative perceptions that touch upon their skin color, physical features or culture. Continuing with the analogy of the race between a white person and a Black to the top of their company, if the white person has a 10 yard head start, the nature of *hidden* bias, even assuming it is purely subconscious, is like a headwind

that solely affects the Black person's lane. However, this headwind, unlike the head start caused by the past effects of racism, is arguably the responsibility of white coworkers and managers and cannot be blamed by them on the actions of grandparents and great-grandparents during slavery or Jim Crow.

Another barrier results from resentment within Employee Services and other management employees to the mere *existence* of the state's Affirmative Action policy. Call it fear of quotas or a belief that the program is one of undeserved entitlement, but the resentment is real.<sup>11</sup> In short, this resentment contributes to the barriers faced by qualified African Americans even assuming the levels of negative racial bias toward Black employees are actually very small and even assuming the barriers of historical racism for a particular Black individual are also very small. This resentment barrier exists simply because of a failure of proper training of employees to respect reasons for the existence of such programs and policies. (See Proposed Remedies, Appendix 19) Such resentment affects how Blacks who are up for promotion are perceived by decision-makers. Returning to our analogy, even when Blacks do manage to beat the white person's

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<sup>11</sup> The resentment is apparent from testimony from clients, but also appears within the documents to some extent. Appendix 8 concerns the denial of a position to Violet LeFlore. IWD informed the Iowa Civil Rights Commission that there was no underutilization of minorities in the position sought by Ms. LeFlore. Ms. LeFlore was not even asking for a hire based on Affirmative Action policies, she was simply filing a complaint because the managers were using racial stereotypes and developing schemes to stop her from promotion or get her to quit. This statement shows that the first thought of IWD was "we did not discriminate because we did not have to give the Black employee preferences." Such a consideration should not have crossed the mind of IWD. It is also telling that there were 23 Black advisors one year and 23 the next year. This anecdotal information supports the need for further investigation into whether IWD and possibly the DAS view the Affirmative Action policy as a ceiling on Black hires, rather than as a floor designed to act as a barrier to intentional discrimination.

head start and fight through the headwind, such resentment is like the crowd watching the race remaining in sullen silence as they *believe* the Black only won the race because the *Black person* was given a head start or some *unfair* preference.

We have mentioned these two underlying layers of bias and resentment because they form the foundation upon which more willful discrimination rests. Even in a system free from all forms of willful discrimination or racism, those two layers remain and act as substantial barriers to the advancement of Blacks in IWD. One cannot deal properly with overt racial bias, willful discrimination and retaliation without understanding that even if it were possible to identify and fire every single racist, substantial hidden barriers remain that operate to slow or prevent the advancement of African Americans in the workplace.

### **Barriers Based on Willful Racial Bias and Retaliation**

The more familiar layers of willful discrimination and retaliation are barriers that we normally associate with the phrase *discrimination*, and are based on a plan or scheme to deny African Americans equal access to positions within IWD. Going with our analogy one last time, this type of plan acts as a set of hurdles placed solely in the lane of the Black person running the race. Those hurdles are in addition to the head start, the headwind and the sullen silent crowd. It truth it adds both a set of hurdles to leap, it adds a judge of the race who winks at the white runner before the starting gun and allows someone to try and trip the

Black person during the race. In a system of this nature, the only Blacks who advance are *those that the person controlling the race intends to get through*. The agency controlling the race in this case is Employee Services.

Ms. Mallory is the head of Employee Services. At the present time and for a number of years, her office holds almost total control of the hires and promotions in IWD including control or at least influence over each part of the hiring and promotion process. Her office determines whether to open a position, what qualifications the position requires, the screening process prior to selection for interviews, the process of interviews, the scoring methods and results of interviews, the final selection for a position, as well as retaining power to change or close the position prior the final selection for the position. Employee Services has the power to set up a different hurdle for African Americans at any point along that process.

We have discovered a pattern hidden very carefully in the mess of documents and the testimony of our clients and other witnesses. The pattern is not to deny every Black candidate a job, but to deny all who *complain* a job and to deny as many Black employees as possible a job to keep the numbers at the bare minimum required by the affirmative action policy. This practice is not simply based on hidden bias or subconscious resentment but appears far more willful in its nature and its design. That practice and policy is primarily enforced by Employee Services with at least protection from Barto, Running and what we believe is some assistance from one or more people within DAS.

## **Customer Service Testing Barrier**

Employee Services used a variety of screening devices to control the flow of African Americans into IWD and to almost completely stop the promotion of African Americans into position of power within IWD. In 1998, IWD, and Ms. Mallory, purchased a customer service test to be used as a pre-interview screening device for the position of workforce advisor. Because Iowa is an Affirmative Action employer it is completely improper to use a test that has an adverse impact on Black employees who take the test. (Appendix 16, 17) The test that Employee Services was attempting to use was originally validated in 1993 and was found not to have an adverse impact on Blacks taking the test.<sup>12</sup> However, in 1995, after additional research and testing, the test was found even *by the company that designed and sold the test* to have an adverse impact on African Americans. The company put that finding directly in the validation report written in 1995. (Appendix 3, p. 122) The 1995 report was never changed and remains the only validation report for that test.

Jackie Mallory purchased the test in 1998 and put it into use in 1999. It certainly appears that at the time she purchased this test she was aware of the impact on Blacks shown by the most recent validation report and knew that the use of such a test was improper. The validation report of 1995 was available and in

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<sup>12</sup> It is generous to call that test in 1993 properly validated. It was validated by the person who designed the test, owned the test and was selling the test. It was based on one set of data from California and it may be that an independent expert would have realized that the test, as originally validated, was in fact invalid and improper for use in a State agency.

use and would have been provided to the State of Iowa when it purchased the test in 1998. In spite of that knowledge, Ms. Mallory and IWD chose to use it as a screening device. It is telling that the only validity report kept on file by IWD and the only one that was ever produced to Mr. Carroll in litigation was the 1993 Validity report. IWD buried the existence of the 1995 validity report to hide the impact on African Americans. It appears that she or her office, falsely used the *prior validation report from 1993* to cover the fact that the test had an adverse impact on African American employees.<sup>13</sup>

Ms. Clark took this test and for some reason could not reach the minimum passing score (set by Jackie Mallory) of 140. This was in spite of Ms. Clark receiving excellent reviews in the area of customer service by the State. Ms. Clark believed that the test was not measuring the skills valued by the State of Iowa and was it was unfair to stop her from advancing within Iowa based on a test that had nothing to do with the job. It later turned out that in her own way Ms. Clark was questioning the *content validity* and the *adverse impact* of the test. Ms. Clark was experiencing the exact reason why the test was found to have an adverse impact on African Americans. Differences in education and culture can prevent a passing score unrelated to ability.

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<sup>13</sup> The deposition of Oscar Spurlin, the owner and developer of the test is attached. Mr. Spurlin made it quite clear that the 1995 report was the one that was used. There is no evidence to suggest that Employee Services was duped, not only because Mr. Spurlin makes it clear the 1995 is provided, but we obtained the proper report from Mr. Spurlin just by sending him an email and asking his company. They were not trying to hide anything.

Ms. Clark brought her concerns about the test to Jackie Mallory and Richard Running in 2000. (Appendix 3, p. 231) She did so without any degree in statistics or psychology. The fact that this woman, who could not pass the test could figure that out is a testament to the fallibility of the test itself (and a testament to why you do not judge the ability of African American employees based on test scores).

As a result of her documented complaints, Richard Running and Jackie Mallory were forced to at least pretend to investigate the matter. It is our belief that during the entire investigation into the use of this test during the spring of 2000, IWD was fully aware the test was invalid and was intentionally hiding that fact. Through the persistence of Ms. Clark efforts in 2000, and likely to avoid risking discovery of their efforts to hide the invalid test, IWD temporarily gave up using the test at least for internal hires. IWD still used the test for external hires up until 2003 and as of 2005, was still trying to bring the test back into use.<sup>14</sup> Even at that time, the fact that the test was invalid and that IWD likely knew it was invalid remained hidden. It remained hidden because of the pattern of retaliation practiced by IWD, by the blatant removal of the Black EEO officer from the investigation into the test and the corresponding placement of white individuals in

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<sup>14</sup> There is some speculation that the only reason the test was stopped at all was because Richard Running took it and got a low score. IWD did not take the entire test out and remained committed to trying to use the test again if they could get away with it. Mallory testified in her deposition in early 2005 that IWD was thinking of using the test again. Ms. Mallory testified that she was claiming that the use of this test was not a problem. (Appendix 4. p. 289-292)

charge of the investigation who were more favorable to Ms. Mallory, and by the willingness of Employee Services to hide or even destroy documents.<sup>15</sup>

After Ms. Clark complained about this test she began to see additional barriers to her getting promoted, even in positions that had nothing to do with the test.<sup>16</sup> Her name was left off certification lists by DAS several times. When she would be the most qualified on paper she could be left off the CERT list or not interviewed or not hired. (Appendix 13, 14, 15) Once the test was taken out of use Ms. Clark was denied every single promotion for which she tried. One of the most specific acts of discrimination was when Ms. Clark applied for an ITSW3 position, which would have been far below advisor and yet above her secretary II position. (Appendix 11) Ms. Clark applied and was interviewed and scored the highest. During that process another employee was allowed to sign up beyond the eligibility deadline for the promotion, was selected for an interview after being given that preference to get her into the process, and was hired *in spite of having a lower interview score than Ms. Clark.*<sup>17</sup> When Ms. Clark tried to get an

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<sup>15</sup> The investigation of discrimination and issues that touched upon affirmative action hiring should have fallen to Harvey Andrews, the only Black employee who remained in Employee Services. Mr. Andrews was removed from the investigation because of a conflict of interest, which other than some stereotype within Employee Services that viewed it as a conflict that he was Black and Ms. Clark was Black, did not exist. Mr. Andrews was replaced by two white males who were clearly in management and trusted by Mallory. It made no sense to remove the Black employee qualified to review the information because he worked for Ms. Mallory and then allow Ms. Mallory to choose the people who would investigate her actions.

<sup>16</sup> The Customer Service Test was only being used to screen the highest paid non-management position at IWD, that of Workforce Advisor.

<sup>17</sup> The person hired was far below the qualifications of Ms. Clark. It should not have been close. They inserted this woman into the process because she had minority status (Indian) and that

investigation into this allegation of retaliation, Employee Services claimed that Ms. Clark was the person who wanted this employee to interview and be permitted to join the process late. This was a complete fabrication by Employee Services, bought by the investigation team hook line and sinker.<sup>18</sup>

Even assuming the customer service test did not adversely affect African Americans, evidence shows that Ms. Mallory's office took steps to both apply the test results differently based on race and interfere and control who was interviewed as often as possible. Ms. Mallory applied her own version of reverse affirmative action to certain white employees.

The minimum score on the test was 140. This passing score was higher than that suggested by the person who developed the test and was set arbitrarily by Mallory. The rules set by Employee Services dictated that if you reached the minimum score of 140 you could get an interview, if you did not, you were prohibited from getting an interview. (Appendix 4, p. 284) Ms. Clark did not reach the passing score of 140, but other African Americans did reach that score. Yolanda Shook and others reached a score above 140 but were told by Mallory's office that *their scores were not high enough to be interviewed*. (Appendix 1 – witness information, p. 13)

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provided plausible deniability for denying Ms. Clark her promotion on the heels of her complaints and to prevent claims of discrimination based on race.

<sup>18</sup> This team was the same team hand selected by Mallory to review the complaints regarding the Customer Service Test.

There were examples of whites who did not reach the score of 140 being interviewed for the position<sup>19</sup> as the same time as African Americans were being told they could not be interviewed if they scored below 140 and some who did score about 140 were also told they did not qualify. Given a White person a chance to interview with a score below 140 was a rare event given that there were normally many whites available to compete with the African Americans. It was therefore not necessary to give this preference so long as the numbers of Blacks selected for interviews could be limited through other means. The fact that it occurred even once is very telling given that fact. However, the fact that one of those examples involved Ms. Mallory violating her own rules to allow an interview by a white person, for the sole purpose of selecting the white person over a Black person who had passed the test is far beyond merely *telling*.

### **Examples of Barriers During Promotion Process**

Therefore one barrier was the adverse impact of the test used.<sup>20</sup> If a Black employee jumped over that barrier they would be provided with false or misleading information regarding the test to deny them an interview. If that did

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<sup>19</sup> A prime examples of this is documented in the email exchange in Appendix 7, p. 374-380. A white female eventually chosen by Mallory over Linda Barnes (Black) for the position was allowed to interview in spite of having a score well below 140. (Appendix p. 394) There appear to be other examples of this in the CERT lists that show a person interviewed or hired while their test score appears to be below 140. A more detailed search of all CERT lists used from 1998 to the end of 2003 both internally and externally needs to be made as the documentation maintained by IWD was so disorganized that there are likely other examples of this practice within the documents.

<sup>20</sup> Ms. Mallory was well aware that tests can adversely affect African Americans. Her use of this test was not simply an error. (Appendix 4, p. 289-290)

not work the selection process could be manipulated to keep one or more Blacks off the list to reduce the chance of them getting the top score in an interview.<sup>21</sup>

The screening process that preceded an employee being granted and interview was entirely controlled by Employee Services. Screening devices measured employees in 10 areas to reach a score and a certain number of the top scores from that screening device were then granted an interview for the position. Therefore, that screening process allowed Mallory's employees to apply subjective perceptions to the candidates affected by hidden bias, or allowed direct manipulation of the score within that screening device. For example, one screening device used measured diversity. Ms. Clark was given a 2 out of 5 on diversity. Aside from being a Black female, she had experience in her church, the community and in former employment in areas of diversity far beyond that of others. Several white employees without such experience were rated as a 5 in diversity. It only takes 1 or 2 or 3 points to change the outcome of a screening device and whether a Black employee will get a chance to interview. Again the practice was to not *always* deny Blacks entrance into the interview process. The

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<sup>21</sup> It is important to remember that it does not take as much manipulation as one might think to stop or limit the advancement of 99% of all African Americans. The percentage of African Americans is sufficiently low in IWD that keeping 1 or 2 off the list will provide plausible deniability for why none was hired. The process also has the effect of discouraging people from trying as the final purpose is to get zero Blacks or at best one to the interview process. When Blacks would make it through, there were other methods that could be used including simply scoring the white person higher, offering the job to a less disfavored minority, or directly interfering with the promotion.

purpose was to deny opportunities in order to limit their chances to promote and to retain plausible deniability.

A screening process barrier was not always used to maintain plausible deniability. It did not always work as sometimes, there literally was no one white person close enough in qualifications to the Black person to push one through or their might be too many Blacks in the process. In such a situation the position could be closed or the CERT list would be allowed to expire with no selection. If that did not work, the position could be reclassified. (Appendix 12. p 466-486) If that was not used, then the position could be opened up for contract transfer.<sup>22</sup> If that did not work someone within DAS might cooperate with Employee Services to *accidentally* leave people off the list.<sup>23</sup> If none of those worked the African American still faced the interview process where white persons who were under the supervision and control of Jackie Mallory and Jane Barto would be waiting or Ms. Mallory would have someone from her staff involved in the interview. If, an African American leaps all those hurdles and manages to make it to the top three interview scores, and also manages to find white supervisors who value him or her above the other two person's interviewed, Employee Services would still reach out

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<sup>22</sup> This practice has continued even after IWD resolved some of Ms. Clark's claims. A number of African Americans applied for advisor positions in 2005. When that overloaded the list with Black employees, Employee Services changed the method of filling those positions to avoid being forced to hire one of them. This occurred in December of 2005.

<sup>23</sup> Appendix 15, p. 791-797.

and interfere with the promotion, or simply select someone else, and in one case, make the position disappear to prevent a Black from being promoted.<sup>24</sup>

### **Examples of Misinformation and Document Manipulation Barriers**

In addition to specific manipulation of screening devices, or closing of lists, or delays in filling positions, there were a variety of misinformation and feigned excuses provided by Employee Services to Blacks seeking promotion.

All of the African Americans interviewed tell stories of how *mysteriously*: they would be not be on CERT lists that came from DAS, or would be on the list one month and later removed from lists for the same type of job or a lower job and denied interviews and otherwise prevented from consideration for various positions. They would be told by DAS that their resumes were not updated, or that they forget to check the *travel requirement*, or that “oops we made an error”, or “sorry, you forget to update your address.” The problem was, that all of the African Americans could swear they had done all these things. They did check the travel box, they did update their resume or they should have been on the list because they were already qualified the last time it came open. It is difficult to document this particular method of discrimination because the excuses are so

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<sup>24</sup> Appendix 10 shows the documentation regarding the ITS1 position. IWD never produced documents showing this position existed because Ms. Clark was about to be hired into it, and Employee Services made it disappear. Ms. Clark and other witnesses recall her applying for and being ready to accept this position and yet Mallory and even the supervisor who was supposed to be hiring Ms. Clark, could not recall the position. Only after it became apparent that we had a emails showing the position did in fact exist, did Employee Services *find* CERT lists showing the position had been opened up.

subtle and varied and because no record of DAS making such changes exists, at least on paper. The stories are too consistent to be coincidence. As time went on and the African Americans realized something was going on, they began to pay closer attention to whether they had checked the box or updated a resume and yet they continued to get similar excuses as to why one or more of them might be off a list. (Appendix 1, witness information grid)

We uncovered examples of our clients being removed from lists by actions that could have only occurred within DAS, which suggests someone in that agency was assisting Employee Services. Once the CERT list left DAS and came over to Employee Services, there are examples of our clients being clearly qualified and not even considered for a job, being the most qualified and not even interviewed, being the most qualified and not hired<sup>25</sup>, being the only person qualified and not hired and finally, when the individual small barriers set up by Employee Services allowed an African American to get through, there is evidence that Employee Services would directly interfere on their own or with the assistance of DAS to stop the hire, to close the list, to delay the selection, to remove the person from the list.

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<sup>25</sup> Appendix 12, 13 and 14 are examples of Ms. Clark being denied positions when she was the only person on the list or clearly more qualified. Appendix 12 was one of the more blatant cooperative efforts of DAS and Employee Services to get Ms. Clark off the list and then hire less qualified people before she got on it again and/or without telling her she was on the list.

## **Examples of Specific Interference Barriers**

Situations occurred where an African American would be on the qualified list, would make it through the interview process and would actually have supervisors who wanted to hire them and *still*, Employee Services would reach out and stop the advancement of the Black employee. The Black person ran the race, jumped the hurdles and was about to cross the finish line when someone intervened.

One of the clearest examples is shown in the attached email exchange shown in Appendix 7. p. 374-380. In that email it was clear that supervisors were interviewing for an advisor position and that three people were up for the position, one Black employee and two white. Linda Barnes (Black) achieved a good score on the test and interviewed well and was viewed as desirable by the supervisors. Under normal circumstances she would have been awarded the job just as when white candidates passed all these barriers and they were hired. However, when Ms. Mallory's office learned that Linda Barnes was to be hired, she and her employees took steps to delay the hiring decisions to push for the hire of one of the two whites. When the supervisors again asked to hire Ms. Barnes because the white employee suggested by Employee Services was not qualified, Employee Services then delayed the process so the other white employee (who had not even passed the test at the time the interview was granted) could retake the test so she would be eligible for hire. Employee Services then forced the supervisors to hire

the white employee. This is all well documented because we were able to get those records before Ms. Mallory or Ms. Barto thought to destroy them.

The evidence of the conspiracy lies in the concerted efforts it would take to prevent the hire and promotion of so many African Americans under the very nose of Running and Barto, as well as the evidence that Ms. Mallory has been allowed to garner all the power and support she needs by Ms. Barto and Mr. Running to engage in this behavior.

Attached are a series of emails regarding a woman who was required to be recalled by the union contract. (Appendix 5) The series of emails attached as in Appendix 5, p. 353-355 show that Jackie Mallory sent an email to Jane Barto and others suggesting that the filling of the position be delayed through use of a temp to prevent the need to recall this woman. She referred to the woman as a “bad apple” because she was partly disabled from carpal tunnel syndrome. Ms. Mallory was openly proposing violating the ADA, the work comp laws and the union contract by creating a false method to deny an employee their job.

You will note that the email from Mallory was copied to Ms. Barto. Ms. Barto responded by approving the decision of Ms Mallory to violate the union contract and the ADA. The top part of the email exchange shows Byron Orton challenging this violation of the law. It obviously did not take a lawyer to see what they were doing was illegal.<sup>26</sup>

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<sup>26</sup> Some investigation needs to be done into the removal of Byron Orton. Mr. Orton was clearly challenging some of the practices of Barto and Mallory and it is odd that he, not them was driven

This is just one *documented* example of the power of Jackie Mallory and her and Ms. Barto's willingness to provide patently false reasons to deny employment rights through delay the filling of positions. This is a prime example that shows that Mallory was likely engaging in similar actions to delay positions, close positions, remove people from lists as well as use a host of other small barriers to any employee she viewed as a bad apple.

This example also shows how openly and *casually* she and Barto would suggest they violate the law and how calculatingly they worked to develop a scheme to deny employees their rights. It shows how casually they referred to such a scheme indicating that it was a common practice.<sup>27</sup> It also shows the sheer power they had, given that they would ignore the risks of being exposed by those around them. It is our view the only explanation for why they did this was due to intimidation from the practice of retaliation, as well as confidence that they controlled the chain of command up to and including Mr. Running. This shows the Ms. Mallory had no problem reaching out and stopping the progress of any employee she chose during her entire career. Whether she had such power prior to Barto should be the subject of further investigation.

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from his post in 2005. Ms. Mallory identified Mr. Orton as the person who exposed the "bad apple" emails on page 338 of the Appendix. Mr. Orton was not the person who exposed this, but it is telling that the manager who was willing to stand up and challenge the practices of discrimination was forced to leave, while Ms. Mallory and Barto remained in power.

<sup>27</sup> Witness Carol Dymond who was employed in Employee Services recalls other examples of such efforts. (Appendix 1)

## **Racial Animus Barrier Within Employee Services**

There is also evidence of racial animus directly from Ms. Mallory and from within others in Employee Services. Within the last eight years alone, there are four examples of Black employees working directly for Ms. Mallory's department and either being fired, forced to resign or having their position eliminated.<sup>28</sup> We have interviewed two those four employees who will testify regarding the open disdain that Ms. Mallory exhibited toward them as the only Black employees in the office including the efforts she and other whites in Employee Services used to drive Black employees out.<sup>29</sup> (Appendix 1, p.4 and 7)

One telling example is the demotion of Harvey Andrews. Mr. Andrews was a Black employee who was also the EEO officer and responsible for investigating claims of discrimination as well as watching over affirmative action hiring. Mr. Andrews was told his job was eliminated and he was demoted to Advisor. Unknown to Mr. Andrews, his job was not eliminated, but was taken over by a white female.<sup>30</sup> (Appendix 6, p. 367-368)

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<sup>28</sup> There is information that Employee Services may have recently hired another African American. This was likely done only in response to the requirement in the settlement agreement with Ms. Clark in 2005, and it is unlikely that the African American hired has any influence over the hiring or promotion process.

<sup>29</sup> Glen Howard was forced out or fired. Theresa Jefferson was given an impossible task and then fired for being unable to accomplish it. Sandi Brown was ostracized and forced to leave. Harvey Andrews had his job eliminated and yet he was replaced with a white female.

<sup>30</sup> Appendix 4, p. 299 and Appendix 6, 337-339 show that regardless of why Mr. Andrews was removed from Employee Services, his duties were taken over by a white female who was also directly involved in the efforts to retaliate against Ms. Clark in denying her the ITSW3 position and possibly the ITS1 position.

## **Retaliation Barrier**

There were several examples of Employee Services reaching out to punish Ms. Clark for her complaints. They included direct interference with her obtaining the ITSW3 position in July of 2000, a denial of a host of advisor positions in 2001, 2002 and stopping and making the ITS1 position disappear in order to force Ms. Clark to leave IWD. The witness information in Appendix 1 shows other claims of retaliation and a pattern that extends beyond racial lines. Carol Dymond was fired by Barto and Mallory due to her sending letters complaining regarding the CIETC money. Others who have suffered retaliation include Linda Pippen and Violet LeFlore and possibly Byron Orton, the former Commissioner of Labor.

Appendix pages 418-423, and witness references in Appendix 1 tell part of the tale of Carl Scharff. Mr. Scharff was white male and an Executive Officer working in Cedar Rapids. He was a witness to specific racial discrimination by his managers and of a scheme to hire Violet LeFlore and then force her to quit. Mr. Scharff was fired by IWD in direct retaliation for his standing up for the rights of a minority.

## **Barriers to Promotion in Management**

Two of the clients we represent are Alex Walker and Carter LeFlore. They have been seeking management positions for a number of years and have been denied at every turn. Those men are both highly qualified and have been denied in favor of less qualified whites, or in one case, a completely unqualified Hispanic

who appears to have been hired in violation of the requirements of the position simply to avoid hiring a Black into a management position. Further investigation needs to be done into who is cooperating with Mallory's office to stop the promotions of Blacks into upper management. Mr. Walker recalls being interviewed by Mike Wilkinson who was the same individual who apparently fired Carl Scharff. Mr. LeFlore recalls something similar. The evidence at this point consists of testimony and the documentation needs to be reviewed in greater detail as this barrier appears to extend back for 10 years.

### **Destruction of Documents**

We have been able to uncover a few examples of the interference and control of Mallory, but as the Governor has now learned, many documents and emails are likely lost as both Ms. Barto and Ms. Mallory have covered their tracks through the destruction and dumping of documents.<sup>31</sup>

We have enclosed the deposition pages of Ms. Mallory where she admits that this incident with the "bad apple" email occurred, but that *the emails that I have attached were deleted from the State system.* (Appendix 4, p. 337-339) There are at least two other examples of documents being claimed to be *lost* by Mallory's office including volumes of customer service test scores as well as documents regarding the ITS1 position previously mentioned.

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<sup>31</sup> The fact that Jane Barto's secretary may have been dumping other documents regarding the CIETC matter requires that great care be given to any document or computer search.

## **Recommendation for Further Investigations and Electronic Document Search**

The evidence presented here is what we have been able to obtain *so far*, given the limits on our access to documents, email, personnel interviews and other information. Even based on this limited information, there is overwhelming evidence of a pattern of discrimination and retaliation by Employee Services and enabled by the failures of Ms. Barto and Mr. Running, but more needs to be done to determine the full extent of damage done to the progress of African Americans within IWD.

Additional work needs to be done to complete an entire review of all hiring and promotion decisions involving African Americans over the last 5-10 years. The information we have is based on anecdotal evidence, extensive documentation of years 2000-2003, and limited documentation of prior and subsequent years. It is likely that this represents the tip of the iceberg.

The attached witness grid in Appendix 1 shows that there is more than a professional courtesy and shared subconscious racial bias connection between Employee Services and DAS. Jackie Mallory is the head of Employee Services. Ms. Mallory has a relative working in DAS who both lives with her and they apparently talk several times a day. There is witness testimony that aside from any issues of nepotism or access to DAS files through this relative that may share some degree of negative feelings regarding African Americans. (See Appendix 1, p. 4, 5 and 7 – witnesses Christina Dykstra, Theresa Jefferson and Sandi Brown)

Further investigation needs to be done into the processes within DAS that would even allow a single person to change computer files, take employees off lists, or forget to put them on lists that provide them with opportunities for advancement.

There needs to be a statistical analysis of the affirmative action hiring requirements of the State. It is improper to use women or Hispanics to replace such requirements on African Americans, when the historical basis for such requirements was to benefit African Americans and the continued pattern of discrimination and retaliation appears to be focused on that group.

IWD should be instructed to check for lost and deleted emails between Mallory, Barto, Running and other employees in Employee Services and DAS. An investigation into how emails like the “bad apple” email were deleted from a government system and likewise how employees in DAS or Employee Services can be allowed to change CERT lists without any record of the change being created. IWD should be required to retain all such emails and other documents in storage until they can be reviewed. As it appears there is a practice of casually deleting emails and hiding documents, a search should be made of all computers used by Mallory, Barto, Running and other employees indemnified as having participated in the discrimination. These computers should be examined for the deletion or evidence of a more complete wiping of the system. IWD should save and maintain images any computers used by these individuals as well as all email servers that IWD management employees may have used from 2000 to the present.

## **Proposed Remedies**

The purpose of providing this report is to try and correct the problem, not only for the benefit of our clients and potential clients, but really to avoid further shame upon the entire state. Appendix 19 is a list of proposed remedies to address these matters or at least provide an outline of how to attack the underlying problems. Further investigation may reveal the need for all of these remedies or possibly even stronger ones.