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November 8, 2025

VIA EMAIL

Deputy Commissioner Trials Rosemarie Maldonado
New York City Police Department
1 Police Plaza
New York, NY 10038

Re: In the Matter of the Department of Police of the City of New York v. Detective Specialist Jaenice Smith, Shield No. 7774 | Tax Registry No. 939488 | DAO Case No. C-034320 — Post-Trial Memorandum of Law in Support of Dismissal with Prejudice or, in the Alternative, Entry of a Finding of Not Guilty

Dear Commissioner Maldonado:

PRELIMINARY STATEMENT

This case is not about theft, fraud, or falsification—it is about power: who exercises it, who benefits from it, and who is punished for using it lawfully yet compassionately. Under Commissioner Jessica S. Tisch's tenure, the Department has institutionalized a dangerous fiction—that its "paramilitary" identity insulates it from the reach of federal, state, and city anti-discrimination laws. It does not. No chain of command, uniform, or invocation of "discipline" suspends the operation of Title VII, the ADA, or the New York State and City Human Rights Laws.

The Department presented no witness—no one at or above Assistant Chief Scott M. Henderson's level—who testified that he exceeded his lawful discretion, violated a written directive, or breached any rule. The Department Advocate's argument is not evidence, and the absence of command-level testimony confirming a violation is itself proof of bad faith. When the decision-maker is silenced and his authority rewritten by those who never exercised it, due process collapses into theater.

Assistant Chief Henderson's so-called "Negotiated Settlement" is legally void and retaliatory, executed without the disclosures required by the *Older Workers Benefit Protection Act*, 29 U.S.C. § 626(f). Its transparent purpose was to erase a lawful act of compassion by a Black executive and to sanitize the Department's retaliation against those who respected his command authority. The accompanying Command Disciplines against Lieutenant Latisha

Witten, Sergeants Jun Fong and Donovan Hunt, and Detective Specialist Jaenice Smith punished compliance, not misconduct.

If the Department's theory were credible, every officer who processed Detective Specialist Smith's payroll or verified her attendance would face similar charges. Yet only Detective Specialist Smith—the lowest-ranking, and the only Black woman—is targeted for termination and financial ruin. **That disparity defines the Department's pattern of Selective Outrage: the practice of condemning lawful discretion only when exercised by Black leadership or benefiting Black women.**

During the trial, that bias surfaced repeatedly. Officer Wilson Richards mocked Detective Specialist Smith's loss, remarking that "her mother is dead and in the ground." The Department Advocate consistently referred to Assistant Chief Henderson as "he" rather than by rank, deriding anyone who believed "he had that power" as "a fool." Such rhetoric was not zeal—it was contempt for Black leadership and for a Black woman who dared rely on it.

These were not isolated breaches of decorum but manifestations of a deeper institutional prejudice. The same Advocate once mocked undersigned counsel in "Ebonics" during the Detective Herlihy trial. The pattern persists: when the subject or representative is Black, professionalism yields to derision.

Every individual disciplined here—Henderson, Witten, Fong, Hunt, and Smith—is a person of color. Each was accused of "criminal" or "dishonest" conduct for acts that under white command are dismissed as "administrative oversight." The Department's selective enforcement speaks louder than its exhibits.

Between February 7, 2024, and March 21, 2025, Detective Specialist Smith complied with every legal and procedural requirement. She disclosed her circumstances, followed direct authorization, and relied on medical recommendations. The Department's manipulation of records and recasting of her accommodation as "time theft" constitute retaliation, not discipline.

Under Tisch's leadership, "reform" has become performance, "equity" a slogan, and "integrity" a weapon. These proceeding tests whether the NYPD remains governed by law—or by optics.

The record is barren of proof. Its witnesses confirmed Detective Specialist Smith's good faith. Its advocate substituted rhetoric for evidence. Its command silence betrays retaliation. The conduct proven—fabricating "Leave Without Pay," ignoring civil-rights mandates, and weaponizing procedure—epitomizes the discrimination these laws were enacted to prevent.

The sections that follow demonstrate, point by point, that the Department failed to prove misconduct (Section I), violated multiple civil-rights statutes (Section II), acted with retaliatory motive (Section III), engaged in racialized selective enforcement (Section IV), and presented no substantial evidence to sustain any specification (Section V).

To sustain these charges would not be discipline—it would be complicity. The only outcome consistent with the facts, the law, and the integrity of this tribunal is **dismissal with prejudice, or, in the alternative, a finding of Not Guilty on all specifications.**

I. THE DEPARTMENT'S "NO SHOW JOB" NARRATIVE AND "ARRANGEMENT" TROPE ARE LEGALLY UNTENABLE UNDER FEDERAL, STATE, AND CITY LAW

The Department's core theory—that Detective Specialist Smith was paid for a "no show job" because she performed "no security work"—rests on a cramped, paramilitary conception of "work" that is irreconcilable with federal, state, and city anti-discrimination laws. It ignores the settled principle that **leave itself** is a recognized form of reasonable accommodation, and it attempts to criminalize exactly what the law requires: time away from the workplace to address disability-related needs and to care for a disabled family member. The companion narrative—that Detective Specialist Smith benefited from a personal "arrangement" with a "friend"—is not a neutral descriptor; it is a stereotyped, racialized trope deployed to recast a lawful executive-level accommodation as something illicit, unprofessional, or sexually charged. Both strands of the Department's theory violate governing statutes and binding guidance.

A. Federal Anti-Discrimination Framework: Reasonable Accommodation, Association, and the Interactive Process

The Americans with Disabilities Act ("ADA") expressly defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," absent undue hardship. 42 U.S.C. § 12112(b)(5)(A). The statute's design is remedial, not restrictive; it guarantees a floor of rights, not a ceiling on employer discretion.

The EEOC's *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (No. 915.002) affirms that "permitting the use of accrued paid leave, or providing additional unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability," and that an employee "need not use special words, such as 'reasonable accommodation,' to trigger the employer's obligation." Once an employer is on notice that an employee requires a change at work related to a medical condition, it must engage in an interactive process to identify and implement an appropriate accommodation.

The Department Advocate's contention that fully paid leave is "unlawful" finds no support in the ADA's text, its implementing regulations, or judicial precedent. Nothing in 42 U.S.C. § 12112(b)(5)(A) limits the scope or generosity of an employer's accommodation. The ADA establishes a minimum duty, not a maximum allowance. Employers remain free to grant paid or extended leave—or any other accommodation—that enables an employee to manage a disability while maintaining employment. As the EEOC makes clear, "[a]n employer may choose to provide more than the law requires, but doing so does not make the accommodation unlawful." *EEOC Enforcement Guidance* No. 915.002.

The Supreme Court has consistently held that civil-rights statutes must be interpreted broadly to fulfill their remedial purpose. See *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). In the public-employment context, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), reaffirmed that government agencies must respect procedural and substantive rights even when doing so requires flexibility in established administrative practices. The principles underlying *Loudermill* reinforce that statutory and constitutional protections cannot be subordinated to bureaucratic convenience.

Detective Specialist Smith's circumstances fall squarely within this framework. She disclosed that she was the primary caregiver for her terminally ill mother and later submitted medical documentation of post-traumatic stress disorder and caregiver burnout from her treating psychologist. Those disclosures triggered the Department's non-waivable, non-delegable duty to engage in and document the interactive process. The ADA and *EEOC Enforcement Guidance* do not require a formal written request, nor do they shift the procedural burden to the employee. Once the employer is aware of the need, the duty attaches.

The Department's "no show job" theory is therefore legally untenable. Paying an employee during a command-approved accommodation does not convert lawful leave into larceny; it reflects compliance with federal civil-rights obligations. To the contrary, refusing to honor such an accommodation—or retroactively criminalizing it—is itself discrimination under § 12112(b)(5)(A).

The Supreme Court's recent decision in *Muldrow v. City of St. Louis*, 601 U.S. ___, 144 S. Ct. 967 (2024), underscores the breadth of this protection. The Court held that Title VII liability does not depend on "significant harm" but on whether a worker was treated "worse" because of a protected characteristic. The same principle governs here: to treat paid leave granted as a reasonable accommodation as "fraud" is to punish an employee for engaging in protected activity.

The Second Circuit and its district courts have repeatedly rejected attempts by public employers to reframe accommodations as misconduct. In *Jacques v. DiMarzio, Inc.*, 386 F.3d 192 (2d Cir. 2004), the Court emphasized that the ADA requires employers to make individualized judgments about how a disability affects performance rather than rely on categorical assumptions about attendance or presence. Likewise, *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92 (2d Cir. 2009), held that an employer's failure to engage in an interactive process itself constitutes evidence of discrimination, regardless of whether the employee ultimately could perform the job. Most recently, in *Chislett v. N.Y.C. Dep't of Educ.*, No. 24-972-cv (2d Cir. Sept. 25, 2025), the Second Circuit reaffirmed that public employers cannot sanitize discriminatory or retaliatory treatment of employees by relabeling protected conduct as administrative or policy enforcement. The Court vacated summary judgment for the City where the Department of Education attempted to defend a racially charged hostile-environment policy under the guise of "training" and "equity enforcement." The panel held that when a municipal employer "consistently ignores or reframes protected activity or class-based hostility as mere policy compliance, it risks liability under § 1983 and the ADA" That reasoning applies with equal force here: the NYPD cannot evade federal disability law by recasting Detective Specialist Smith's lawful, command-approved accommodation as a "no-show" or

"arrangement." Under *Jacques*, *McBride*, and now *Chislett*, such reframing is itself probative of discriminatory motive and constitutes evidence of pretext.

District courts in the Southern and Eastern Districts of New York have applied these principles with equal force. In *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001), the Second Circuit held that an employer's hostile reaction to an employee's formal request for an accommodation (in that case, accusing the employee of "slanderous" behavior and "misinterpreting the law") was direct evidence of retaliation.

Furthermore, the notion that an approved leave accommodation can later be re-characterized as "time theft" or "fraud" is expressly rejected by the EEOC. Its official enforcement guidance provides that an employer "may not penalize an employee for using leave as a reasonable accommodation," because doing so would "render the leave an ineffective accommodation" and "may constitute retaliation." *EEOC, Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016). This principle accords with long-standing precedent holding that the ADA may require extended paid or unpaid leave where necessary to enable continued employment. *See Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000).

The Second Circuit has likewise extended ADA protection to caregivers. In *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465 (2d Cir. 2019), the court reinstated an association-discrimination claim under § 12112(b)(4) for an employee fired after requesting a modified schedule to care for his disabled daughter. The court found that a supervisor's remark—that "his problems at home were not the company's problems"—was sufficient for a jury to conclude that the employer's stated reason for termination ("absenteeism") was a pretext for discrimination. *Kelleher* squarely rejects efforts to punish caregivers for absences or schedule modifications tied to the care of a disabled family member.

Accordingly, the Department's insistence that Detective Specialist Smith's fully paid accommodation was "unlawful" is irreconcilable with controlling Supreme Court, Second Circuit, and New York federal precedent. The ADA imposes no ceiling on accommodation; it forbids punishing those who seek or receive one. To reframe a command-approved, medically supported accommodation as criminal misconduct is not law enforcement—it is retaliation.

B. New York State Human Rights Law and NYSDHR Regulations: Association, Caregiving, and Employer Obligation

New York law not only parallels the ADA but expands its protections. The New York State Human Rights Law ("NYSHRL") provides an independent and broader source of protection for individuals who require or are associated with someone who requires accommodation. The New York State Division of Human Rights has promulgated regulations expressly providing that it is unlawful to discriminate "because of an individual's known relationship or association with a member of a protected class." N.Y. Comp. Codes R. & Regs. tit. 9, § 466.14(c)(1)–(2). Implementing Executive Law § 295(5), this regulation confirms that adverse action taken against an employee because she is caring for a person with a disability is actionable under Executive Law § 296(1)(a), and that individual actors may be held liable under

§ 296(6) for aiding and abetting such discrimination. See also *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465 (2d Cir. 2019) (recognizing caregiver-based associational discrimination under the ADA and applying parallel reasoning to New York claims).

As under federal law, the NYSHRL imposes **no temporal or financial restriction** on reasonable accommodation. There is no statutory cap on the duration, frequency, or compensation level of an accommodation. The law requires only that the employer provide a reasonable accommodation—one that enables the employee to continue working, recover, or care for a family member with a disability—unless doing so would cause an undue hardship. The employer may always choose to provide more than the minimum; nothing in Executive Law § 296(3) or its regulations converts a generous or fully paid accommodation into unlawful conduct. The duty is one of floor, not ceiling: to do at least what is necessary to equalize opportunity.

The Department Advocate's claim that fully paid leave is "unlawful" under state law is therefore baseless. The NYSHRL mirrors the ADA's affirmative duty, not its limitations. Employers remain free to provide paid or extended leave, flexible scheduling, or any other measure that reasonably accommodates a disability or caregiving responsibility. The law does more than merely permit such accommodations; it forbids penalizing an employee for using them, because doing so constitutes retaliation. See *Harrington v. City of New York*, 157 A.D.3d 582 (1st Dep't 2018) (under § 296, a retaliatory act need only be "reasonably likely to deter" a person from engaging in protected activity); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001) (employer's hostile, threatening response to an ADA accommodation request was direct evidence of retaliation).

This protection is especially strong for caregivers. Employers may not penalize, discipline, or otherwise treat employees less favorably because of known caregiving responsibilities. See *Krasner v. H-Town, LLC*, 190 A.D.3d 544 (1st Dep't 2021) (reinstating associational discrimination claim where employee was terminated after requesting time off to care for his dying father). When an employer treats an employee's protected need for flexibility as "personal," "optional," or "nonessential," or weaponizes rigid attendance rules against them, that conduct is evidence of discriminatory motive. See *Lovejoy-Wilson*, 263 F.3d at 219–23 (rejecting employer's reliance on neutral procedures where response to ADA request was hostility and discipline); *Matter of McEniry v. Landy*, 84 N.Y.2d 554 (1994) (Human Rights Law does not permit employers to enforce ostensibly neutral rules in a way that ignores their accommodation obligations).

This approach is consistent with the Court of Appeals' mandate that the Human Rights Law "must be liberally construed to accomplish its broad and remedial purposes." See *Matter of Aurecchione v. N.Y. State Div. of Human Rights*, 98 N.Y.2d 21 (2002); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004), and with the post-2019 command that the NYSHRL "be construed liberally for the accomplishment of the remedial purposes thereof," N.Y. Exec. Law § 300, as applied in *Golston-Green v. City of New York*, 184 A.D.3d 24 (2d Dep't 2020).

The 2019 amendments to the NYSHRL now require that the statute "be construed liberally for the accomplishment of the remedial purposes thereof," aligning it with the City Human Rights Law's uniquely broad construction. N.Y. Exec. Law § 300; see *Golston-Green v.*

City of New York, 184 A.D.3d 24 (2d Dep't 2020) (applying the amendment retroactively and emphasizing expansive coverage of retaliation and discrimination claims). This amendment codified the Court of Appeals' long-standing interpretive approach, ensuring that Executive Law § 296(3)'s accommodation mandate and § 295(5)'s associational protections are read expansively, not restrictively. Executive Law § 296(3) imposes a positive duty on employers to provide reasonable accommodations to known disabilities. As the Court of Appeals made clear in *Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014), an employer's failure to substantively engage in the interactive process is itself evidence of discrimination and, in practice, can be dispositive: "An employer's failure to participate in a good-faith interactive process is evidence of discrimination."

New York appellate courts have repeatedly reaffirmed this rule. In *Phillips v. City of New York*, 66 A.D.3d 170 (1st Dep't 2009), the First Department held that an employer's failure to engage in a good-faith interactive process after being notified of an employee's disability constitutes a violation of the Human Rights Law. The court emphasized that once an employer is placed on notice of a potential disability, it must affirmatively explore reasonable accommodations—including modified schedules or medical leave—and that failure to do so may itself establish discriminatory intent.

Courts have likewise recognized that retaliation against an employee for requesting or using an accommodation is actionable under § 296. See *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004) (holding that retaliation claims arise when an employer penalizes an employee for asserting rights under the Human Rights Law); *Harrington v. City of New York*, 157 A.D.3d 582 (1st Dep't 2018) (clarifying that a retaliatory act need only be "reasonably likely to deter" a person from engaging in protected activity); and *Kerman-Mastour v. Financial Indus. Regulatory Auth., Inc.*, 814 F. Supp. 2d 355 (S.D.N.Y. 2011) (applying both the NYSHRL and ADA to hold that disciplinary action following a protected accommodation request supports an inference of retaliation).

Finally, the NYSHRL's protections for caregivers are explicit. In *Krasner v. H-Town, LLC*, 190 A.D.3d 544 (1st Dep't 2021), the First Department reinstated an associational discrimination claim for an employee terminated after requesting leave to care for his dying father, confirming that adverse actions based on an employee's caregiving responsibilities are prohibited. Taken together, these authorities demonstrate that New York law not only mirrors but expands upon federal protections—requiring employers to affirmatively accommodate, forbidding them from punishing employees for using accommodations, and extending these rights to caregivers and those associated with persons with disabilities.

The Court of Appeals has long deferred to the Division's interpretation of the Human Rights Law, recognizing its "special competence" and the Legislature's intent that it be the primary enforcer of anti-discrimination mandates. *Matter of Cahill v. Rosa*, 89 N.Y.2d 14 (1996) (Division's construction of Executive Law § 296 entitled to "great deference" unless irrational). That deference extends to the Division's caregiving and association-based regulations under 9 N.Y.C.R.R. § 466.14(c)(1)–(2).

The Court of Appeals has also recognized that accommodation may include reinstatement or flexibility for employees managing addiction or other medical conditions when consistent with job performance. *Matter of McEniry v. Landy*, 84 N.Y.2d 554 (1994) (reinstating a public employee discharged for alcoholism and holding that reasonable accommodation under the NYSHRL extends to rehabilitative leave). This principle has since been extended beyond medical recovery to other contexts requiring flexibility, including caregiving. See *Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014) (clarifying that an employer's failure to meaningfully engage in the interactive process itself constitutes evidence of discrimination), and *Krasner v. H-Town, LLC*, 190 A.D.3d 544 (1st Dep't 2021) (holding that termination of an employee for requesting time off to care for a disabled family member violates § 296). Together, these authorities underscore that leave—whether paid or unpaid—remains one of the most effective and least burdensome forms of reasonable accommodation, and that penalizing an employee for using such leave contravenes both the letter and spirit of the Human Rights Law.

Thus, under the NYSHRL, as under federal law, there is **no ceiling on accommodation**—no fixed limit on duration, no prohibition on paid leave, and no requirement that an accommodation take the form of "security work." The only limit is undue hardship, which the Department never alleged or proved.

In Detective Specialist Smith's case, the Department's own witnesses conceded that she disclosed her caregiving circumstances and later supplied medical documentation of PTSD and caregiver burnout. Assistant Chief Henderson exercised his command authority to authorize a paid accommodation. Supervisors testified that they believed that authorization valid and within his discretion. None testified that Detective Specialist Smith deceived them or concealed her status.

Under the NYSHRL and the governing NYSDHR regulations, those facts are legally determinative. Once notified of Detective Specialist Smith's caregiving role and mental-health condition, the NYPD—as employer—was responsible for initiating and documenting the interactive process, including the preparation of any Reasonable Accommodation forms. The absence of a written form is not proof that no accommodation existed; it is proof that the Department failed to comply with its obligations as an employer. The Division has repeatedly made clear that the employer bears the burden of memorializing accommodations and maintaining proper records; that burden does not, and cannot, rest on an employee in crisis.

The Department's attempt to transform its own administrative failure into "larceny" or "falsifying records" reverses the statute. Under the NYSHRL, the failure to engage in and document the interactive process is the violation—and it lies with the employer, not the employee. To treat the absence of paperwork as fraud is to criminalize the Department's own neglect of its legal obligations. See *Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824, 838 (2014) (failure to participate in a good-faith interactive process constitutes evidence of discrimination); *Phillips v. City of New York*, 66 A.D.3d 170, 176–77 (1st Dep't 2009) (failure to accommodate after notice of disability violates the Human Rights Law); *Golston-Green v. City of New York*, 184 A.D.3d 24, 43 (2d Dep't 2020) (emphasizing liberal construction and expansive interpretation of retaliation and discrimination claims); *Matter of McEniry v. Landy*,

84 N.Y.2d 554, 561–62 (1994) (holding that reasonable accommodation under the Human Rights Law includes flexibility and leave for medical recovery).

New York City law goes further still—mandating that all ambiguities be resolved in favor of the employee and that even minor disadvantages may constitute actionable harm. See *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62 (1st Dep't 2009) (establishing that the NYCHRL must be construed independently and broadly to cover any unequal treatment based on a protected trait); *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102 (2d Cir. 2013) (affirming that the NYCHRL imposes liability whenever an employee is treated "less well," at least in part, for discriminatory reasons).

C. New York City Human Rights Law and NYCCHR Guidance: Liberal Construction, Caregiver Status, and the "Arrangement" Stereotype

While there are limited published decisions expressly applying the "relationship or association" clause of § 8-107(20) in employment-discrimination cases, that does not diminish its protective force. The text of § 8-107(20) plainly prohibits adverse employment action "because of the ... disability ... of a person with whom such person has a known relationship or association." This statutory language reinforces the broader remedial mandate of the New York City Human Rights Law ("NYCHRL") and must be read in conjunction with the statute's protection for "caregiver status" under § 8-107(1)(a). Even in the absence of extensive case law, courts consistently recognize that the NYCHRL demands liberal construction, and the statutory text itself provides an independent basis for Plaintiff's claims of discrimination based on her association with a person with a disability.

Section 8-107(20) provides that:

> "The provisions of this section set forth as unlawful discriminatory practices shall be construed to prohibit such discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation, uniformed service or immigration or citizenship status of a person with whom such person has a known relationship or association."

Section 8-107(20) is enforceable through the same mechanisms as § 8-107(1)(a), making associational discrimination in employment a direct violation of the NYCHRL.

The New York City Human Rights Law provides the broadest protection in this hierarchy. N.Y.C. Admin. Code § 8-107(1)(a) forbids discrimination in compensation, terms, conditions, or privileges of employment on the basis of, inter alia, sex, race, disability, and age. Section 8-107(7) prohibits retaliation "in any manner" against individuals who oppose discriminatory practices or engage in protected activity, including requesting or using a reasonable accommodation. (The breadth of "in any manner" reflects the City Council's intent that even administrative or procedural acts—such as the filing of charges or negative record entries—can constitute retaliation.) Section 8-107(28) codifies the employer's duty to provide reasonable accommodations and to engage in a "cooperative dialogue" with employees who request or need accommodations. Section 8-130(a) requires that the NYCHRL "be construed

liberally for the accomplishment of the uniquely broad and remedial purposes thereof," regardless of whether federal or state civil-rights laws have been so construed. See *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102 (2d Cir. 2013). This mandate severs the City law from the narrower federal and state standards; courts must construe its provisions independently to ensure the broadest possible protection.

The NYCCHR's *Legal Enforcement Guidance on Discrimination on the Basis of Caregiver Status* makes several points directly applicable here. It explains that employers may not: (1) penalize employees for lawful caregiving obligations; (2) use rigid scheduling or attendance requirements as a pretext to push caregivers out; or (3) describe caregiver-related flexibility as "special favors," "arrangements," "side deals," or "nonessential exceptions." Such language is recognized as coded hostility toward protected caregiver status and is probative of discriminatory and retaliatory motive.

The Department Advocate's insistence on describing Detective Specialist Smith's accommodation as an "arrangement" falls squarely within that prohibited rhetorical pattern. The word was repeatedly used at trial to suggest something improper: a personal favor, a romantic entanglement, a secret side deal. It was deployed not to describe policy, but to sexualize and delegitimize a lawful executive decision made by a Black Assistant Chief on behalf of a Black female subordinate facing extraordinary caregiving and mental-health circumstances. That is exactly the kind of coded, stereotype-laden language that the NYCHRL and NYCCHR Guidance identify as evidence of discrimination.

The rhetoric did not stop there. Throughout the proceeding, the Advocate framed Detective Specialist Smith's reliance on Assistant Chief Henderson's authorization as "personal," "emotional," or "irrational," and mocked those who referred to Assistant Chief Henderson by his title rather than as "he." At one point, the Advocate asserted that anyone who believed Assistant Chief Henderson "had that power" was a "fool" or "not intelligent." These remarks do not merely reflect sharp advocacy or lack of courtesy; they betray a deeper contempt for Black leadership and for a Black woman officer who had the audacity to rely on her executive's discretion and to assert her rights.

Under the NYCHRL, such remarks are not incidental—they are legally significant. The First Department in *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62 (1st Dep't 2009), held that even a single derogatory comment or inference can suffice to support liability under the NYCHRL if it contributes to unequal treatment. In *Suri v. Grey Global Grp., Inc.*, 164 A.D.3d 108 (1st Dep't 2018), the court reaffirmed that NYCHRL claims must be analyzed under a broad, remedial standard that looks to whether the plaintiff was treated "less well" at least in part because of a protected characteristic. See also *Cadet-Legros v. N.Y. Univ. Hosp. Ctr.*, 135 A.D.3d 196 (1st Dep't 2015) (holding that racialized or gender-coded remarks by decision-makers are direct evidence of discriminatory motive under the NYCHRL). Here, the repeated use of "arrangement," the belittling of Assistant Chief Henderson's authority, and the derisive commentary about those who respect his rank are more than enough to establish that Detective Specialist Smith was being framed and prosecuted through a lens of race, gender, and caregiver bias.

In this framework, the "no show job" and "arrangement" narratives do not simply mischaracterize facts; they function as direct evidence of discriminatory and retaliatory intent. Under N.Y.C. Admin. Code § 8-107(7), retaliation "in any manner" includes the initiation of disciplinary charges, manipulation of records, and public recasting of a protected accommodation as "fraud" where such actions would reasonably deter a person from seeking or using accommodations. The Department's conduct—accusing Detective Specialist Smith of larceny for accepting pay during a lawfully granted accommodation, ridiculing the very idea that a Black Assistant Chief could exercise such discretion, and repeatedly sexualizing or trivializing the accommodation as a personal "arrangement"—meets that standard in full.

Viewed through the combined lenses of the ADA, Title VII, 42 U.S.C. § 1983, the NYSHRL and its regulations, and the NYCHRL and NYCCHR guidance, the Department's central story line is not merely weak; it is incompatible with the governing law. Detective Specialist Smith disclosed protected caregiving and disability-related needs; her command approved a paid accommodation; she followed that authorization in good faith; and the Department later chose to criminalize what it should have honored. The labels "no show job" and "arrangement" are not descriptions of reality, but expressions of bias. The law does not permit them to serve as a foundation for discipline. Under the NYCHRL's uniquely liberal mandate, discriminatory rhetoric and retaliatory prosecution are themselves violations of law, not permissible exercises of managerial discretion.

II. LEGAL ARGUMENT: THE DEPARTMENT FAILED TO ESTABLISH MISCONDUCT AND ITS THEORY IS LEGALLY UNTENABLE UNDER FEDERAL, STATE, AND CITY LAW

A. The Department Failed to Prove Any Misconduct Under Applicable Law

The Department bears the burden of proving misconduct by **substantial evidence**. *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222 (1974). Substantial evidence requires "such relevant proof as a reasonable mind may accept as adequate to support a conclusion." *300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180 (1978). Speculation, conjecture, or inference cannot substitute for competent proof. Yet here, the Department presented no credible evidence that Detective Specialist Smith committed fraud, falsified records, or engaged in any deception whatsoever.

No witness at or above the rank of Assistant Chief Henderson—the very official who exercised command authority—testified that he lacked power to approve Detective Specialist Smith's paid accommodation, that such authorization contravened any written rule, or that Detective Specialist Smith misrepresented her circumstances. The Department's entire case rests on rhetorical recasting, not evidence—transforming a **lawful, disability-based accommodation** into a "no-show job." But advocacy is not proof. An agency must establish misconduct by substantial evidence, which "does not rise from bare surmise, conjecture, speculation or rumor." See *300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180 (1978).

Detective Specialist Smith's undisputed disclosures—to her command supervisors and her treating psychologist—triggered the Department's non-waivable duty under the Americans

with Disabilities Act, 42 U.S.C. § 12112(b)(5)(A), and Executive Law § 296(3) to engage in and document the interactive process. The Department's failure to discharge that duty cannot be converted into evidence of deceit. As the Court of Appeals held in *Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824, 838 (2014), "an employer's failure to participate in a good-faith interactive process is evidence of discrimination." The burden rests squarely on the employer—not the employee—to initiate, record, and maintain the paperwork memorializing accommodations.

The Department's own witnesses conceded that Detective Specialist Smith acted pursuant to Assistant Chief Henderson's authorization, reported as instructed, and provided the required medical documentation. No evidence establishes any intent to defraud or falsify records. To the contrary, the Department's Payroll and Benefits Executive Director, Joseph Lodispoto, admitted that his "overpayment" calculations improperly included entries marked *Leave Without Pay*—even though Detective Specialist Smith was never placed on, nor applied for, such leave. That misclassification is not a clerical slip; it constitutes an **intentional alteration of official records** that directly interferes with Detective Specialist Smith's **vested twenty-year pension rights**, which matured on **July 11, 2025**.

Disciplinary law does not criminalize administrative error, procedural oversight, or managerial second-guessing. Penal charges must rest on credible proof of misconduct—not conjecture, hindsight, or disagreement in judgment. See *Matter of Simpson v. Wolansky*, 38 N.Y.2d 391 (1975) (speculation or inference cannot substitute for substantial evidence); *Matter of Berenhaus v. Ward*, 70 N.Y.2d 436, 444 (1987) (discipline must be supported by competent proof of wrongdoing, not mere differences in judgment); *Matter of Arrocha v. Bd. of Educ.*, 93 N.Y.2d 361, 367 (1999) (administrative action lacking a rational evidentiary basis is arbitrary and capricious and cannot be sustained). The record shows only that Detective Specialist Smith complied with superior orders issued in good faith and grounded in medical necessity. When the Department's own chain of command authorized her leave, its subsequent decision to prosecute her for following that directive was not discipline—it was arbitrary, capricious, and retaliatory administrative action. See *Matter of Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231–32 (1974); *Matter of Featherstone v. Franco*, 95 N.Y.2d 550, 554–55 (2000).

B. The Department's Theory Contravenes Federal, State, and City Anti-Discrimination Mandates

The Department Advocate's position—that a fully paid accommodation is "unlawful" or tantamount to theft—finds no support in any statute, regulation, or judicial authority. The Americans with Disabilities Act ("ADA") expressly defines discrimination to include an employer's failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," absent undue hardship. 42 U.S.C. § 12112(b)(5)(A). The statute establishes a floor of obligation, not a ceiling of generosity. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). Employers remain free to exceed that floor; **generosity is not illegality**. See *EEOC Enforcement Guidance* No. 915.002 ("An employer may choose to provide more than the law requires, but doing so does not make the accommodation unlawful.").

The Supreme Court has consistently directed that civil-rights statutes be construed broadly to fulfill their remedial purposes. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (public employers must respect substantive and procedural rights even when inconvenient); *U.S. Airways*, 535 U.S. at 397 (accommodation must entail "some special treatment" to ensure equal opportunity); *Muldrow v. City of St. Louis*, 601 U.S. ___, 144 S. Ct. 967 (2024) (Title VII and parallel civil-rights statutes do not require "significant harm," only differential treatment "because of" a protected trait). To retroactively criminalize a lawful, command-approved accommodation is therefore to **punish an employee for engaging in protected activity**.

The Second Circuit and its district courts have repeatedly rejected efforts by public employers to re-characterize protected accommodations as misconduct. *Jacques v. DiMarzio, Inc.*, 386 F.3d 192 (2d Cir. 2004) (ADA demands individualized, not categorical, assessment of attendance or presence); *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127 (2d Cir. 2008) (once an employer is aware of a disability, it must engage in the interactive process and may not penalize an employee for invoking it); *Chislett v. N.Y.C. Dep't of Educ.*, No. 24-972-cv (2d Cir. Sept. 25, 2025) (vacating summary judgment where a public employer reframed protected conduct as "policy enforcement").

New York State law goes even further. Executive Law § 296(1)(a) and § 296(3) impose an affirmative duty to accommodate known disabilities, and 9 N.Y.C.R.R. § 466.14(c)(1)–(2) prohibits discrimination based on association with a disabled person. The Court of Appeals has repeatedly emphasized that failure to engage in the interactive process is itself unlawful. *Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014); *Phillips v. City of New York*, 66 A.D.3d 170 (1st Dep't 2009). Following the 2019 amendments, the NYSHRL "shall be construed liberally for the accomplishment of its remedial purposes." N.Y. Exec. Law § 300; *Golston-Green v. City of New York*, 184 A.D.3d 24 (2d Dep't 2020). There is no statutory or judicial limitation on the duration, form, or pay status of an accommodation—only the defense of undue hardship, which the Department neither alleged nor proved.

The New York City Human Rights Law provides the broadest protections. N.Y.C. Admin. Code § 8-107(20) prohibits discrimination "because of the … disability … of a person with whom [an employee] has a known relationship or association." Section 8-107(7) forbids retaliation "in any manner." Section 8-107(28) codifies the duty of cooperative dialogue, and § 8-130(a) mandates liberal construction "for the accomplishment of the uniquely broad and remedial purposes" of the law. *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62 (1st Dep't 2009); *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102 (2d Cir. 2013).

The Department Advocate's repeated characterization of Detective Specialist Smith's command-approved accommodation as an "arrangement" exemplifies the **coded** hostility that the New York City Commission on Human Rights identifies as **direct evidence of bias**. *See NYCCHR Legal Enforcement Guidance on Discrimination on the Basis of Caregiver Status* (2018). Such language—personalizing, sexualizing, or trivializing caregiving flexibility—has been recognized by the courts as probative of discriminatory and retaliatory motive. *Cadet-Legros v. N.Y. Univ. Hosp. Ctr.*, 135 A.D.3d 196 (1st Dep't 2015); *Suri v. Grey Global Grp., Inc.*, 164 A.D.3d 108 (1st Dep't 2018). By weaponizing that rhetoric, the Department converted

a lawful accommodation into a stereotype-laden narrative of misconduct—**precisely the inversion of law and equity that these statutes were enacted to prevent.**

C. The Record Demonstrates Retaliation, Not Fraud

The totality of the evidence demonstrates that the Department's actions were retaliatory—not corrective, disciplinary, or protective of public funds. Once Detective Specialist Smith disclosed her caregiving and medical circumstances, she engaged in **protected activity** under the ADA, the NYSHRL, and the NYCHRL. Each statute prohibits an employer from taking adverse action against an employee for requesting or using a reasonable accommodation. 42 U.S.C. § 12203(a); N.Y. Exec. Law § 296(7); N.Y.C. Admin. Code § 8-107(7). Retaliation "in any manner" includes initiating disciplinary charges, manipulating payroll records, or publicly recasting a lawful accommodation as misconduct where such actions would deter a reasonable employee from exercising protected rights. *See Harrington v. City of New York*, 157 A.D.3d 582 (1st Dep't 2018) (retaliation established where employer's conduct "might deter a reasonable worker from engaging in protected activity"); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001) (employer's hostility following accommodation request constitutes direct evidence of retaliation).

Here, the Department's post-hoc labeling of Detective Specialist Smith's command-approved accommodation as an "arrangement," "no-show job," or "time theft" is itself retaliatory conduct. The Department did not dispute that Detective Specialist Smith's accommodation was authorized by Assistant Chief Henderson, supported by medical documentation, and reported through her chain of command. Nor did it allege, much less prove, that the accommodation imposed any undue hardship on operations. Instead, the Department chose to prosecute the employee who relied on the authorization while shielding those who issued it. That inversion of accountability transforms an internal policy disagreement into a civil-rights violation. *See Treglia v. Town of Manlius*, 313 F.3d 713 (2d Cir. 2002) (discipline following request for accommodation supports inference of retaliation); *Weixel v. Bd. of Educ.*, 287 F.3d 138 (2d Cir. 2002) (threatening or penalizing employee for invoking ADA rights constitutes actionable retaliation).

The record confirms retaliatory motive through timing, language, and selective enforcement. Detective Specialist Smith's pension vested on **July 11, 2025**—precisely as the Department escalated its investigation and reframed her paid leave as criminal misconduct. *Temporal proximity* between protected activity and adverse action is well-recognized evidence of retaliation. *See Quinn v. Green Tree Credit Corp.*, 159 F.3d 759 (2d Cir. 1998); *Harrington*, 157 A.D.3d at 582. The Department's deliberate misclassification of "Leave Without Pay" entries in payroll records—contradicting its own witnesses and authorizations—further evidences intent to create a paper trail for punitive action.

Retaliation is also evident in the Department Advocate's rhetoric. The repeated characterization of Detective Specialist Smith's accommodation as a "personal arrangement" mirrored the gendered and racial stereotypes that the NYCHRL squarely prohibits. *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62 (1st Dep't 2009) (single derogatory inference can suffice to establish unequal treatment); *Cadet-Legros v. N.Y. Univ. Hosp. Ctr.*, 135 A.D.3d 196 (1st Dep't

2015) (coded or sexualized language directed at women of color is evidence of discriminatory motive). The record thus reflects animus rooted not in policy, but in **identity and audacity**—a Black woman relying on a Black Assistant Chief's discretion to secure a caregiver accommodation.

Under the governing standards, once Detective Specialist Smith demonstrated that she engaged in protected activity and suffered adverse action, the burden shifted to the Department to articulate a legitimate, non-retaliatory reason. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004). The Department offered none. Its entire justification—that paying Detective Specialist Smith during her accommodation was "unlawful"—is legally baseless and factually contradicted by its own witnesses. An employer cannot conjure a criminal theory to defend against its civil-rights obligations.

Accordingly, the only inference consistent with the evidence and law is that the Department's disciplinary prosecution was **retaliation in its purest form**—a calculated attempt to discredit an employee for invoking statutory rights and to deter others from doing the same. Under the ADA, the NYSHRL, and the NYCHRL, such conduct is prohibited "in any manner," and this tribunal must treat it as such.

III. EXECUTIVE DISCRETION, THE BUSINESS JUDGMENT ANALOGY, AND THE COMPLETE ABSENCE OF ANY RULE VIOLATION

A. Executive Command Authority and the Business Judgment Analogy

At its core, the Department's prosecution is an attack on lawful executive judgment, not on any cognizable "misconduct." Assistant Chief Henderson exercised precisely the kind of discretionary authority that the NYPD entrusts to its borough commanders every day: the power to manage personnel, assignments, schedules, and—crucially—to respond humanely to extraordinary circumstances. That is not a favor; it is his job.

New York law has long recognized that where a decision-maker acts within his lawful authority, after considering relevant factors, tribunals may not simply second-guess that judgment because others would have chosen differently. In the corporate context, this is codified as the **Business Judgment Rule**: courts will not substitute their judgment for that of corporate directors acting in good faith, within the scope of their authority, and in the absence of fraud or illegality. See *Auerbach v. Bennett*, 47 N.Y.2d 619 (1979). The point of the analogy is not to import corporate doctrine wholesale into police discipline, but to underscore a simple principle: **disagreement with an executive decision is not evidence of misconduct**.

The Department's theory asks this Tribunal to do precisely what *Auerbach* forbids – to label as "wrongdoing" a discretionary decision that was, at most, controversial within the Department's internal politics. There is no allegation, much less proof, that Assistant Chief Henderson's decision was *ultra vires* (beyond his authority), that it violated a stated rule, or that it was made in bad faith. Every supervisor who testified acknowledged that they believed he had the power to approve Detective Specialist Smith's fully paid accommodation and that they

followed that authorization in good faith. The Department then chose not to call Assistant Chief Henderson himself, the sole executive whose actual judgment is at issue. That silence is telling.

As in *Pell* and *Berenhaus*, the Commissioner's review must distinguish between genuine misconduct and mere disagreement with management choices. *Matter of Pell v. Bd. of Educ.*, 34 N.Y.2d 222 (1974); *Matter of Berenhaus v. Ward*, 70 N.Y.2d 436 (1987). Where an executive acts within the bounds of his authority and no rule forbids the conduct, it is not "misconduct" simply because later leadership finds it inconvenient, embarrassing, or politically costly. To hold otherwise would convert every hard call by a commanding officer into potential disciplinary exposure if a future Commissioner dislikes the optics.

That is the heart of Detective Specialist Smith's Business Judgment analogy: the Tribunal is being asked to punish not fraud, but **selective outrage** at an executive decision that the Department now wishes it had not made. Administrative law, like corporate law, does not permit that retroactive substitution of judgment to be dressed up as "integrity."

B. No Written Rule Prohibits Henderson's Accommodation or Requires "Security Work"

The Department had every opportunity at trial to point to a specific Patrol Guide provision, Administrative Order, Operations Order, FINEST Message or any other written directive that Assistant Chief Henderson allegedly violated by granting Detective Specialist Smith 13 months of fully paid accommodation. It produced none. Not a single witness identified:

- Any rule limiting an Assistant Chief's authority to manage schedules, assignments, leave, or temporary accommodations;
- Any directive requiring that an officer on a caregiving or medical accommodation continue to perform "security work" as a condition of receiving pay; or
- Any policy declaring that a reasonable accommodation is invalid unless reduced to a particular form.

Instead, the Department Advocate argued from **absence and feeling**: that "no one has ever seen" an accommodation like this, that it "seemed wrong," that it was an "arrangement" rather than "real work." But those are **opinions**, not rules. Under basic due-process and fair-notice principles, a member of the service cannot be disciplined—much less branded a thief—unless based on a specific Patrol Guide provision, Administrative Order, Operations Order, FINEST Message or any other written directive.

New York courts have repeatedly recognized that an employee may not be sanctioned for conduct that is not clearly proscribed by rule or statute. Basic due process requires that an agency's rules be "sufficiently definite to apprise [employees] of the conduct which is forbidden." See, e.g., *Matter of Murray v. Murphy*, 24 N.Y.2d 150 (1969); *Matter of Scherbyn v. Wayne-Finger Lakes BOCES*, 77 N.Y.2d 753 (1991) (agency action is arbitrary and capricious where it is inconsistent with its own rules or lacks a rational basis). Here, the Department is not

enforcing a rule—it is creating one after the fact, and applying it retroactively to Detective Specialist Smith alone.

The record is equally clear that no rule defines "work" as "security work only" for purposes of an accommodation. The Tribunal's refusal to permit full exploration of what constitutes "work" improperly truncated a central legal issue: under the ADA, NYSHRL, and NYCHRL, "work" in the accommodation context is not confined to traditional duties. It includes protected time away from the post to manage disability and caregiving needs. By enforcing a cramped, paramilitary definition of "work" and barring inquiry into its legality, the hearing effectively privileged internal culture over binding anti-discrimination law.

C. The Tribunal May Not Substitute Its Policy Preferences for Lawful Executive Discretion

Even within a paramilitary structure, the Commissioner's disciplinary authority is not limitless. It is constrained by statute, by the Department's own written policies, and by fundamental fairness. When an Assistant Chief acts within that framework—exercising his management discretion to grant a leave accommodation to a subordinate facing extraordinary caregiving and mental-health burdens—the Commissioner cannot simply decide, more than a year later and under political pressure, that she dislikes the optics and therefore that the decision was "misconduct."

New York courts have warned against precisely this kind of retroactive re-branding of lawful decisions. In *Matter of Kelly v. Safir*, 96 N.Y.2d 32 (2001), the Court of Appeals upheld the Commissioner's broad authority to impose discipline but stressed that it must be exercised within the bounds of reason and consistency with the Department's own precedents and policies. What is happening here is the inverse: rather than disciplining an officer for violating clear standards, the Department is **rewriting standards to fit a predetermined disciplinary outcome**.

The analogy to the Business Judgment Rule is again instructive. Under *Auerbach*, courts are forbidden to second-guess corporate directors' lawful decisions absent fraud or illegality precisely to prevent courts from becoming venues for policy disputes disguised as claims. Likewise, this Tribunal should not be conscripted into resolving an internal policy disagreement about how generous executive accommodations "should" be by pretending that a lawful, documented decision was a crime.

The Department's failure to call Assistant Chief Henderson only reinforces this point. If its theory had any legal merit, one would expect testimony from a witness at or above his rank to explain which rule he violated and why. Instead, the Department deliberately avoided putting its own decision-maker on the stand, then invited the Tribunal to infer illegality from silence. That is the opposite of substantial evidence; it is an attempt to manufacture misconduct out of **absence**, precisely what *300 Gramatan* forbids.

D. Command Silence, Selective Discipline, and the Collapse of Credibility

The pattern of who was charged—and who was not—further exposes the weakness of the Department's theory. If the accommodation were truly a "criminal scheme" or "no-show job," then under the Department's own narrative:

- The supervisors who signed her time (Lieutenants and Sergeants);
- The officers who logged her in and out;
- The payroll personnel who processed her checks; and
- The executives who left the arrangement in place for over a year

would all be culpable as facilitators of "larceny" and "falsification of records." Yet not one of those individuals faces criminal charges. Only Detective Specialist Smith—the lowest-ranking participant and the only Black woman in the chain—faces career-ending discipline.

That selective enforcement is inconsistent with any genuine belief in criminality. It is entirely consistent with **retaliatory scapegoating** of the most vulnerable actor in a lawful chain of command. New York courts have repeatedly treated such disparate treatment as powerful evidence of pretext and discrimination. See, e.g., *Golston-Green v. City of New York*, 184 A.D.3d 24 (2d Dep't 2020) (disparate discipline of similarly situated employees supports inference of discriminatory motive); *Brown v. N.Y.C. Transit Auth.*, 2025 WL 2780861 (S.D.N.Y. May 5, 2025) (selective enforcement of rules against employee of color evidences pretext).

In this light, the Department's plea that "we just disagree with how Assistant Chief Henderson handled it" rings hollow. What it is really asking the Tribunal to do is:

- Ignore the absence of any written prohibition;
- Disregard the Department's own failure to engage in the interactive process;
- Sanction the subordinate who complied in good faith; and
- Bless a precedent under which any act of compassion by Black leadership can later be relabeled "misconduct" when the politics change.

That is not discipline. It is institutionalized bad faith.

IV. Selective Outrage: Retaliation Against Black Leadership and Compassionate Discretion

A. Definition and Institutional Pattern

"Selective Outrage" describes the Department's enduring pattern of condemning lawful discretion only when it is exercised by Black executives or when it benefits Black women. The Department's disciplinary culture tolerates leniency and accommodation when extended by white command, calling it "administrative judgment" or "management prerogative," yet denounces the same discretion as "larceny," "favoritism," or "fraud" when extended by Black leadership in furtherance of equity or compassion. This racialized double standard—endorsing control while punishing empathy—sits at the heart of this case.

Here, Assistant Chief Henderson's decision to authorize Detective Specialist Smith's fully paid accommodation was entirely consistent with federal, state, and city law and within his delegated command authority. The Department's outrage did not stem from the act itself, but from *who performed it* and *who benefited from it.* Once Assistant Chief Henderson—a Black Executive Officer—exercised discretion to protect a Black female subordinate managing grief and disability, the Department's machinery turned from oversight to reprisal.

B. The Retaliatory Cascade

The Department's "investigation" functioned less as a fact-finding exercise than as institutional correction of a racial breach. Assistant Chief Henderson's authorization was recast as "personal," his command judgment stripped of legitimacy, and his subsequent "Negotiated Settlement" manufactured to erase his decision from the record. The coordinated charges against Lieutenant Latisha Witten, Sergeants Jun Fong and Donovan Hunt, and Detective Specialist Smith demonstrate a single retaliatory sequence: punish everyone who validated the judgment of a Black Assistant Chief.

specific Patrol Guide provision, Administrative Order, Operations Order, FINEST Message or any other written directive prohibited Assistant Chief Henderson's action; yet the Department's Advocate treated his approval as *per se* criminal, as if benevolence from Black leadership were an institutional offense. The disparate treatment of identical conduct—routine accommodations authorized by white executives—reveals the animating bias. That pattern is not speculative; it is documented in the Department's own disciplinary history and confirmed by the racial composition of those charged.

C. Disparate Enforcement and Legal Inference

Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), disparate enforcement of identical rules is direct evidence of pretext. *Muldrow v. City of St. Louis*, 601 U.S. ___, 144 S. Ct. 967 (2024), reaffirmed that liability attaches whenever an employee is treated "worse" because of a protected trait. *Harrington v. City of New York*, 157 A.D.3d 582 (1st Dep't 2018), held that retaliation exists whenever an employer's conduct "might deter a reasonable worker from engaging in protected activity."
Here, every element is present:

- Protected activity — Smith's and Henderson's invocation of caregiver and disability accommodations;
- Adverse action — disciplinary prosecution, coerced settlement, and record falsification;
- Causal nexus — temporal proximity and racialized rhetoric framing the accommodation as an "arrangement."

New York courts consistently infer discriminatory motive from selective discipline that mirrors racial or gender hierarchy. *Cadet-Legros v. N.Y. Univ. Hosp. Ctr.*, 135 A.D.3d 196 (1st Dep't 2015) (coded and sexualized language toward women of color evidences bias); *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62 (1st Dep't 2009) (single derogatory inference may establish

unequal treatment); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001) (employer hostility after accommodation request constitutes retaliation). The Department's conduct meets—and exceeds—these thresholds.

D. Institutional Consequences

By transforming Assistant Chief Henderson's lawful exercise of discretion into a disciplinary spectacle, the Department reaffirmed a racial hierarchy masquerading as rule enforcement. "Selective Outrage" is thus not a colloquial observation but an evidentiary doctrine: it demonstrates intent. When identical behavior yields diametrically opposite outcomes depending on the race of the decision-maker, discrimination is not inferred—it is established.

This tribunal cannot ignore that all individuals targeted—Henderson, Witten, Fong, Hunt, and Smith—are people of color, and that the punishment they faced was not for violating rules but for following them under Black command. Such selective enforcement converts civil-service discipline into cultural policing and erodes the integrity the Department purports to defend.

"Selective Outrage" explains what the record proves: the Department's outrage was never about time, pay, or procedure—it was about power. It punished the exercise of lawful compassion by Black leadership and the reliance of a Black woman officer on that compassion. The Department's rhetoric of "arrangements" and "no-show jobs" merely repackaged bias as integrity.

The rule of law does not yield to institutional discomfort with equity. To sustain these charges would validate discrimination under the guise of discipline.

Therefore, the only outcome consistent with the evidence, the governing law, and the moral authority of this tribunal is **dismissal with prejudice—or, in the alternative, a finding of Not Guilty on all specifications.**

V. APPLICATION TO THE SPECIFICATIONS

Each charge must be sustained by *substantial evidence*— "such relevant proof as a reasonable mind may accept as adequate to support a conclusion." *300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180 (1978). The Department produced none. Each specification collapses under the governing ADA, NYSHRL, and NYCHRL standards, which place the burden of accommodation and documentation on the employer—not the employee.

Charge I — Grand Larceny in the Fourth Degree (PL § 155.30[1])

Specification: Wrongful receipt of pay/benefits for approximately 184 tours ($149,711).[1]

Defense (EEOC Framework):
Payroll disbursements were issued through official Department systems pursuant to Assistant

[1] During the testimony of Payroll and Benefits Executive Director, Joseph Lodispoto he alleged more than $162k.

Chief Henderson's command-level authorization. Under the *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, No. 915.002 (Oct. 17, 2002), once an accommodation need is established, the employer bears the affirmative duty to implement and maintain it; the Guidance expressly states that an employer "may not place the burden on the employee to devise or implement the accommodation." Smith relied in good faith on Henderson's authorization, supported by medical documentation and acknowledged by her supervisors. No element of wrongful taking or intent to deprive exists. The payments reflected a lawful, command-approved accommodation—not theft. Criminalizing those payments would punish compliance with civil-rights mandates. See *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

Charge II — Official Misconduct (PL § 195.00[2])

Specification: Knowingly refrained from duties to obtain a benefit.

Defense (EEOC Framework):
The alleged "benefit"—paid caregiving and medical leave—was a command-approved reasonable accommodation under the ADA, 42 U.S.C. § 12112(b)(5)(A), and Executive Law § 296(3). Under the *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, No. 915.002 (Oct. 17, 2002), the employer bears the duty to implement and maintain any approved accommodation. Following a superior's directive consistent with that duty cannot constitute "official misconduct." The Second Circuit has repeatedly recognized that reframing protected accommodation as misconduct evidences pretext and retaliation. See *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92 (2d Cir. 2009) (failure to engage in interactive process is evidence of discrimination where accommodation was possible); *Jacques v. DiMarzio, Inc.*, 386 F.3d 192 (2d Cir. 2004); *Chislett v. N.Y.C. Dep't of Educ.*, No. 24-972-cv (2d Cir. Sept. 25, 2025).

Charge III — Prohibited Conduct (PG §§ 304-05, 304-06)

Specification: Failed to report for ≈ 184 tours; performed no duties but received pay.

Defense (EEOC Framework):
Under EEOC Guidance No. 915.002, employers—not employees—bear responsibility for maintaining attendance and payroll records for accommodated staff. Smith's authorized leave was known to her command and reflected in internal systems. Treating approved medical accommodation as "failure to report" is legally untenable. An employee on approved leave cannot simultaneously be charged as absent. Any record gap is administrative, not deceitful, and cannot satisfy the *substantial evidence* standard. See *Matter of Berenhaus v. Ward*, 70 N.Y.2d 436 (1987).

Charge IV — Failure to File Accommodation Request (PG §§ 324-05, 332-21)

Specification: Failed to complete paperwork; relied on unauthorized arrangement.

Defense (EEOC Framework):
The Guidance (No. 915.002, "Requesting Reasonable Accommodation") makes clear that a request need not be in writing or use legal terminology; *any* communication linking a work need to a medical condition triggers the employer's duty to act. Smith disclosed her situation to Assistant Chief Henderson and supplied medical documentation. The employer, not the employee, was responsible for providing and completing the forms. Failure to document is evidence of employer neglect—not employee misconduct. See *Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824, 838 (2014).

Charge V — Falsifying Business Records (PL § 175.05)

Specification: Made or caused false payroll/attendance entries.

Defense (EEOC Framework):
The testimony established that Sergeants Fong and Hunt, and other members of the command made entries in Department records consistent with Detective Specialist Smith's approved accommodation—not at her direction, but in accordance with their understanding of Assistant Chief Henderson's authorization. Under the *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, No. 915.002 (Oct. 17, 2002), once an accommodation is approved, the employer bears the duty to implement and accurately record it; that obligation cannot be shifted to the employee. Smith neither entered nor altered payroll data. Attributing those administrative entries to Smith constitutes retaliatory pretext under 42 U.S.C. § 12203(a) and violates the *McDonnell Douglas* burden-shifting framework. See *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001) (recognizing retaliatory discipline for use of accommodation as actionable under the ADA).

Charge VI — Attendance Application Guidelines (PG § 322-20)

Specification: Failed to comply with attendance procedures; caused false entries.

Defense (EEOC Framework):
Under EEOC Enforcement Guidance No. 915.002 (Reasonable Accommodation and Undue Hardship), once an employer is on notice of a disability-related need, it—not the employee—must manage the interactive process, provide appropriate forms or instructions, and ensure that HR and attendance systems correctly reflect any approved accommodation. Procedural irregularities that result from the employer's own failure to guide or document that process cannot be transformed into "misconduct" by the accommodated employee. Here, the Department never issued Detective Specialist Smith revised attendance instructions or interactive-process paperwork after Assistant Chief Henderson approved her accommodation. She followed medical

advice and command directives in good faith. Under *Jacobsen* and its progeny, any failure to properly code or process her leave is evidence of employer neglect, not employee wrongdoing. See *Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824, 838 (2014); *Pimentel v. Citibank, N.A.*, 29 A.D.3d 141 (1st Dep't 2006) (failure to provide leave accommodation after notice of disability creates triable issue of discrimination); *Harrington v. City of New York*, 157 A.D.3d 582 (1st Dep't 2018) (retaliatory acts include those reasonably likely to deter protected activity, such as penalizing an employee for invoking statutory rights).

Summary

None of the Department's charges are supported by substantial evidence. Each rest on a fundamental mischaracterization of a lawful, medically supported accommodation as deceitful conduct. The record demonstrates that Detective Specialist Smith acted in full compliance with superior authorization and medical necessity, while the Department failed to discharge its own administrative and statutory obligations under federal, state, and city law.

Under *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222 (1974), disciplinary findings must rest on substantial, competent evidence—not speculation, rhetoric, or reclassification of protected conduct. *Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014), confirms that failure to engage in or document the interactive process constitutes employer neglect, not employee misconduct. *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92 (2d Cir. 2009), and *Muldrow v. City of St. Louis*, 601 U.S. ___, 144 S. Ct. 967 (2024), further hold that adverse treatment for seeking or using accommodation satisfies the standard for discriminatory or retaliatory action. Finally, *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62 (1st Dep't 2009), instructs that under the NYCHRL, even minor differential treatment linked to a protected activity is actionable.

Measured against these authorities, the Department's theory collapses. Its evidence proves only that Detective Specialist Smith followed the procedures and directives approved by Assistant Chief Henderson—conduct the law protects, not punishes. The only conclusion consistent with the record and governing precedent is complete dismissal of all charges, or in the alternative, findings of **Not Guilty** on every specification.

CONCLUSION

Accordingly, this prosecution represents not discipline, but *Selective Outrage*—the retaliatory distortion of policy to punish Black leadership for exercising lawful discretion and to delegitimize equity within command authority. The evidence establishes no fraud, falsification, or deceit. It establishes only that Detective Specialist Smith complied with a duly authorized accommodation, fully consistent with federal, state, and city law.

The Department's outrage was selective, its enforcement discriminatory, and its motives retaliatory. To sustain these charges would not uphold integrity; it would institutionalize bias, reward retaliation, and erode the rule of law that binds every public employer.

For all the reasons set forth herein—statutory, evidentiary, and moral—the only result consistent with the record and the governing law is **dismissal with prejudice**, or in the alternative, **a finding of Not Guilty on all specifications**. Only such a disposition preserves the integrity of this Tribunal and reaffirms that compassion exercised under lawful authority is not misconduct, but justice fulfilled.

Respectfully submitted,

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