2005 WL 6077505 (N.D.Ill.) (Trial Motion, Memorandum and Affidavit)
United States District Court, N.D. Illinois.
Eastern Division

Keith SMITH, et al., Plaintiffs,
v.
NIKE RETAIL SERVICES, INC., Defendant.

No. 1:03CV09110.
December 23, 2005.

Plaintiffs' Memorandum of Law in Support of Motion for Class Certification

One of Plaintiffs' Attorneys, Noelle Brennan, Ines Monte, Brennan & Monte, Ltd., 321 S. Plymouth Ct., Suite 1515, Chicago, Illinois 60604, (312) 431-1801, (312) 341-1808 (fax).

Randall D. Schmidt, Edwin F. Mandel Legal Aid Clinic, 6020 S. University Ave., Chicago, Illinois 60637, (773) 702-9611, (773) 702-2063 (fax).

Honorable Milton I. Shadur.

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I. INTRODUCTION

In this lawsuit, eighteen current and former African-American employees of Defendant Nike Retail Services, Inc. ("Defendant") allege that Defendant has engaged in an on-going practice of race discrimination against its African-American employees. Specifically, Plaintiffs contend that during their employment at Niketown Chicago ("NTC"), Defendant violated their rights by: (1) segregating its African-American employees into the lowest paying jobs; (2) failing to provide African-American employees with equal promotional opportunities; (3) disciplining and terminating African-American employees pursuant to rules that were not enforced the same way against Caucasian employees; (4) treating its African-American employees less favorably in terms of benefits and classification; and (5) maintaining a hostile work environment for all its African-American employees based on this disparate treatment, coupled with a workplace filled with racial slurs by managers and employees, unfounded accusations of theft and abuse of discount and commission policies overwhelmingly directed at African- American employees, and unwarranted and excessive monitoring of African-American employees and customers. *See* Ex. 1, Pis.' Second Am. Compl. at ¶¶ 32-42, 118, 120.[1]

Based on the pervasive nature of NTC's discriminatory conduct towards its employees and customers and the corresponding common issues of fact and law involved in these claims, Plaintiffs seek to prosecute this action as a class suit and seek to represent the entire class of employees who were subjected to NTC's race discrimination between December 17, 1999 and the present date. *Id.* at ¶ 31. In support of Plaintiffs' Motion for Class Certification, Plaintiffs submit this Memorandum of Law along with the attached Appendix of Deposition Excerpts, Declarations, and Exhibits.[2] As detailed below, the Court should grant Plaintiffs' Motion for Class Certification in its entirety.

II. FACTS

Defendant Nike Retail Services, Inc. is a global sports company that produces and sells a massive range of sporting goods throughout the world, including through fifteen "Niketown" retail stores. PSAC at ¶¶ 18-19. Chicago is home to the Niketown flagship store ("NTC"), located at 669 N. Michigan Avenue in Chicago, Illinois. *Id.* at ¶ 21, Berry Decl. at ¶ 6. The named Plaintiffs in this lawsuit and the putative class they seek to represent worked at NTC at some point between December 17, 1999 and the present. *Id.* at ¶¶ 48, 52, 56, 60, 64, 68, 72, 76, 80, 84, 88, 92, 96, 100, 104, 108, 111, 114.

A. Niketown Chicago ("NTC")

NTC opened its doors in 1992 and since then, has occupied five floors and a basement at its location on Michigan Avenue. Berry Decl. at ¶ 5. As a flagship store, NTC draws large numbers of customers, including tourists from all over the world. *Id.*

at ¶ 6. To serve those customers, NTC employs hundreds of individuals in different positions, including sales people, stockroom employees, cashiers, "Loss Prevention" employees, customer service employees, maintenance employees, managers, and administrative support employees. *Id.* at ¶ 6.

Despite an abundant interest on the part of African-American job applicants for sales positions within NTC, NTC's workforce is largely segregated. In fact, as Plaintiffs in this case allege, NTC's entire culture is characterized by animus and distrust of African-American employees and customers. The result is a work environment where African-American employees and customers are routinely scrutinized and harassed, African-American job applicants and employees are segregated into low paying jobs in the stockrooms and as cashiers, African-American employees are singled out for discipline and termination under rules that are rarely enforced against others, African-American employees are thwarted in their efforts to obtain better jobs within NTC, and African-American employees are not even afforded the benefits they are entitled to for their work.

NTC has gotten away with this pattern of discrimination, despite the existence of corporate centralized written policies and rules that are supposed to apply equally across all locations. Alphonse Dep. at 59. These rules address discrimination and harassment in the workplace, disciplinary policies, time and attendance, employee discounts, commissions, and a myriad of other issues. *See* Ex. 2, Excerpts from Defendant's Corporate Policies. Defendant also maintains centralized policies regarding its "Loss Prevention" department which is charged with deterring and responding to theft and other losses at Defendant's stores. *Id.*

Nevertheless, as NTC's own corporate representatives testified, the implementation and enforcement of these corporate policies is left to the discretion of the managers at the local store. Alphonse Dep. at 60. In fact, there is no corporate vigilance over the implementation and enforcement of these policies and rules at the local store level. *Id.* at 106-107. Without corporate oversight to ensure that policies are being enforced in an objective and non-discriminatory fashion at the store level, NTC's managers have exercised unfettered discretion to discriminate against African-American employees in the application of policies and enforcement of rules.

B. Hostile Work Environment[3]

Plaintiffs allege that all African-American employees working at NTC between December 17, 1999 and the present have been unlawfully subjected to a hostile work environment due to their race. This claim is premised on evidence that NTC routinely subjected its African-American employees to disparate treatment along with evidence that the workplace was permeated with racial slurs, unfounded accusations of theft and abuse of discount and commission policies, and unwarranted monitoring of African-American employees and customers.

Racial epithets, such as "nigger" "jigaboo" "uneducated project people" "reggin" ("nigger" backwards) "monkey" "nizza" "nig" and "suction lips" were *repeatedly* used to refer to African-American employees and customers at NTC by managers, including the Loss Prevention Manager, Dan Cruz, several stockroom managers, and other managers, as well as by non-African-American employees. *See* Steele Decl. at ¶ 3; Young Dep. at 119-124; Reed Decl. at ¶ 6; J. Brown Decl. at ¶ 10; Smith Dep. at 129-130.

Additional racial and offensive comments made by *managers* at NTC include:
• "I heard a Black man can jump and run real fast, so hurry up and get them shoes."

• "You're lucky to be light-skinned."

• "You have a big nose, I can tell you're Black."

• "Black people are so stupid."

• "Mexicans will get the sales [positions] then Blacks."

R. Jackson Dep. at 224-225; Young Dep. at 93-97; Rogers Dep. at 91.

In the same vein, Lori Wigod (Caucasian), a high-ranking NTC manager repeatedly referred to African-Americans as "those people" when speaking to Caucasian employees, or "you people" when speaking directly to African-American employees. A. Brown Dep. at 275; Smith Dep. at 394-395; Lewis Dep. 213-214; Sanders Decl. at ¶ 5.

Significantly, Wigod first served as NTC's Human Resources Manager from July 5, 2000 until October 25, 2001. *See* Ex. 3, DEF085151 through DEF085246 (spreadsheet of all employees of NTC between 12/1/1999 - 8/31/2004). She then became NTC's Store Manager from October 26, 2001, until she was terminated by Defendant in 2005, well-after this suit was brought. *Id*. No Human Resources Manager was hired to replace Wigod once she became Store Manager and she essentially continued to serve as HR Manager, as well. Lewis Dep. at 325.

When African-American males entered the store, Wigod would state "here comes trouble." Duckworth Dep. Vol. II at 119; Posey Dep. at 312. On one occasion, while Wigod lectured a subordinate about cleanliness, she stated "this is how the master's house is supposed to look." Sanders Decl. at ¶ 6.

Not surprisingly, despite numerous complaints by various African-American employees to Wigod, when she was HR Manager and Store Manager, no action was taken to rectify the harassment. Young Dep. at 125-128; Lindberg Dep. at 263; Lewis Dep. at 224. For example, when John Lewis complained to Wigod that a Caucasian sales associate referred to an African-American cashier as a "nigger" no corrective action was taken by Wigod. *Id.* at 224.

Apart from being regularly subjected to racial epithets, African-American employees were routinely treated as thieves or potential thieves. They were regularly falsely accused of theft; subjected to excessive "pat downs" and searches by Nike employees; subjected to surveillance inside and outside of the store; and interrogated by Nike managers to coerce "confessions" of wrongdoing.

Virtually every African-American employee testified extensively about the offensive "check out" procedures that NTC employed with its African-American employees, but not with similarly-situated Caucasian employees. Unlike Caucasian employees, African-American employees were routinely subjected to thorough searches, frisks, and pat downs, every time they exited the store. They were regularly required to lift their shirts, shake their pants, show their shoes, empty their bags, and remove their jackets. *See* Smith Dep. at 254 ; McDougal Dep. at 226-229; Barbee Dep. at 68-72; A. Brown Dep. at 242, 263; B. Brown Dep. at 267, 271-274; D. Brown Dep. at 86, 94, 109- 113, 121-122; Duckworth Dep. Vol. II at 109-115; Hudson Dep. at 115, 135-136; Jackson Dep. at 147-149; Lewis Dep. at 165-170; Lindberg Dep. at 209-214; Page Dep. VII. at 12-17; Posey Dep. at 307-308; Readus Dep. at 166-168; Rogers Dep. at 259, 268-269; Walker Dep. at 127-128; 141-145 ; Young Dep. at 478; Williams Decl. at ¶ 3; Walls Decl. at ¶ 9.

In fact, though African-American employees could not leave the store until they had undergone such check-out, by contrast, Caucasian employees could exit the store just by waving up at the security camera stationed at the door or at a manager looking down from the veranda. Lewis Dep. at 146-147; Bourn Decl. at ¶ 10; Lieteau Decl. at ¶ 12; Sanders Decl. at ¶ 10.

Nike's Loss Prevention department also targeted African-American employees for theft both inside and outside of the store. Cruz, the Loss Prevention Manager who referred to African-Americans as "jigaboos," specifically instructed his staff to scrutinize African-American employees more closely. *See* Steele Decl. at ¶¶ 3, 5; Crisp Decl. at ¶ 4. Numerous employees testified about being subjected to this heightened surveillance, as well as being followed inside *and* sometimes outside of the store by Loss Prevention. A. Brown Dep. at 134; B. Brown Dep. at 269-270, 275; D. Brown Dep. at 150-151; Hudson Dep. at 113; Lindberg Dep. at 247; Posey Dep. at 268-269; Young Dep. at 472- 473; Reed Decl. at ¶ 8.

NTC managers and Loss Prevention staff also manufactured accusations of theft against African-American employees and conducted "interrogations" intended to coerce confessions of some wrongdoing. Plaintiff Vernetta Duckworth testified that she was subjected to an interrogation by LP which resulted in her termination. Duckworth Dep. Vol. I at 38-39. At first, the questions focused on whether other sales associates engaged in commission fraud. When Duckworth denied knowledge of commission fraud by others and denied engaging in fraud herself, the LP agent said "oh, so [you're] just Miss Goody Two Shoes." Duckworth Dep. Vol. I at 32-33. As Duckworth testified, when she continued to deny engaging in any fraudulent behavior, LP tried to intimidate Duckworth, putting a folder on the table and stating "I have every purchase that you ever made." *Id.* at 35. Duckworth explained:

He kept getting up and leaving. He got on the phone, he got up and sat down, kept getting up and leaving. ... And then he started going into -- start asking me other different questions, calling me -- Basically, he was loud, screaming at me, hollering... I guess I wasn't telling him what he wanted to hear, and he just started screaming, hitting stuff all on the table,

going back and forth, in and out .... I didn't understand. I didn't know what I had done, so I didn't understand why he was treating me like that.

He told me I had to write out a statement, and during that statement what I was writing down wasn't what he wanted to hear or wanted me to write down, so I had to scratch off and start all over again, scratch off, start over again. And every time I didn't write down what he want[ed], he hit the table, bam, or he'll leave out, get on his phone. I was up there two-and-a-half hours, so I was going through all this. Whenever I didn't write down what he wanted, I say what he wanted in the words he wanted -- not say the words, but what he wanted to hear, he would get mad and frustrated and he'll leave out and then he'll come back. So he'll repeat what I said -- "Now, you -- He'll tell me this and tell me that, and -- tell him, no, that's not what happened. "Well, that's what -- and he'll hit the table with something and he'll go back out. This was going on for almost two-and-a-half hours. So at that particular time I'm tired, exhausted. I'm like, okay, whatever I have to do to save my job, that's what I will do."

Duckworth Dep. at 38, 47-48.

Eventually, after several hours of these abusive tactics, Duckworth wrote out a statement falsely confessing to abusing her employee discount. *Id.* at 49-50. Others experienced similar harassment and coercion. *See* Readus Dep. at 114-120, 125; B. Brown Dep. at 228-229, 173-174; D. Brown Dep. at 140-142; Posey Dep. at 132-133.

Finally, NTC created a hostile environment for its African-American employees through its demeaning and offensive treatment of African-American customers.[4] As testified to by numerous individuals, NTC would routinely ask African-American employees to "keep an eye" on African-American customers, but never asked them to do this with Caucasian customers. *See* Chapple Decl. at ¶ 3; McCullough Decl. at ¶ 11; Johnson- Wakama Decl. at ¶ 6; Lindberg Dep. at 250.

Plaintiffs also observed that NTC's Loss Prevention team closely monitored African-American customers, but not Caucasian customers. One manager testified that whenever an African-American male customer entered the store, Loss Prevention alerted LP employees, store managers and other employees with radios, by referring to these customers as "98's." Barlow Dep. at 325, 331, 333. They would then communicate the location of the "98" so that the individual could be monitored. *Id.* at 336, 342. Loss Prevention did not have any code or other signal to alert others when any Caucasian customers entered the store. *Id.* at 325-328.

A cashier on the first floor, who has worked for NTC since its opening to the present date, testified that **every time** an African-American male entered the store, the Loss Prevention employee stationed at the door would announce the arrival with instructions to monitor the customer. This cashier repeatedly confronted the Loss Prevention associate about the impropriety of his conduct, but he responded that he was simply "doing what he was told." Page Dep. Vol. II at 109-110.

Essentially every employee who worked outside of the stockrooms testified to observing the monitoring of African-American customers for suspicion of theft. *See* B. Brown Dep. at 189, 193-195; Duckworth Dep. Vol. I at 105-106; Lindberg Dep. at 240- 242, 251, 254; Readus Dep. at 177-180; Young Dep. at 385-387; Posey Dep. at 295, 310- 311; Parte Decl. at ¶ 3; Chapple Decl. at ¶ 3. Indeed, African-American NTC employees were themselves followed when shopping with their family members or friends. *See* Hudson Dep. at 99-100; Barlow Dep. 179; Reed. Decl at ¶ 8.

After receiving repeated complaints from African-American employees about Nike's offensive profiling of African-American customers, an African-American manager showed a documentary to staff employees that addressed racial profiling for theft and the faulty premise behind such profiling in an effort to discourage such profiling by NTC. Barlow Dep. at 176-180, 387-393. That manager was subsequently reprimanded by a senior manager. *Id.* at 180.

By contrast, Caucasian customers were hardly monitored at all. Duckworth Dep. Vol. I at 164-165. Indeed, Loss Prevention was so intent on watching the African-American customers that Caucasian shoplifters were observed simply walking out of NTC without paying for merchandise. Barbee Dep. at 216-218; Page Dep. Vol. II at 113; Posey Dep. at 298-299.

African-American customers were also held to stricter standards when making returns or exchanges as compared to Caucasian customers who returned or exchanged merchandise. Barbee Dep. at 129-130, 136. In addition, NTC would give cash back to white customers making returns while denying cash to similarly situated African-American customers. Barbee

Dep. at 182. NTC also gave discounts to Caucasian customers that it refused to give to African-American customers. Barbee Dep. at 164- 165.

On one occasion in 2002, Wigod allowed a Caucasian customer to return a three year-old pair of shoes, while refusing to permit an African-American customer to return shoes purchased two weeks earlier. A. Brown Dep. at 149-153. "It didn't matter to [Wigod] because he was black. He could not return that shoe." Id. at 152. One class member summarized NTC's policy as follows:

> the majority of the white customers were able to return just about any and everything with or without a receipt. The black customers, you know, they would come in sometimes with a receipt and still [only] get a store credit.

A. Brown Dep. at 156. *See also,* Lindberg Dep. at 254-255; Page at 34, 36-38, 40-41; Posey Dep. at 301; Barbee Dep. at 182; Young Dep. at 388-394; Bourn Decl. at ¶ 9; Hayes Decl. at ¶ 9; Pinkston Decl. at ¶ 4.

NTC cashiers also testified to being phoned by Loss Prevention as an African-American customer approached the cash register and were instructed to ask for identification to ensure the names and signatures matched. Barbee Dep. at 375-378; Page Dep. Vol. II at 144-146; Hudson Dep. at 132-133. One cashier testified that when African-American customers attempted to make large purchases on credit cards, Cruz would instruct her to "fake swipe" the credit card (prompting a decline) and call the bank issuing the card to ask for a "physical description." Young Dep. at 371-377. *See also,* Barbee Dep. at 191-192; B. Brown Dep. at 277-280; Duckworth Dep. Vol. I at 163-164.

Even African-American professional athletes were subjected to NTC's racially motivated scrutiny. In 2002, Wigod permitted Kansas City Royal player Mike Sweeny (Caucasian) to "comp" Michael Jordan "Limited Edition" shoes within days of her decision refusing to allow White Sox player Willie Harris (African-American) to do the same. A. Brown, Dep. at 142-145. Similarly, in 2002 several Green Bay Packers players, including Aman Green, Gilbert Brown and Antonio Freeman (all of whom receive merchandise from NTC in the form of "comps") were followed by Loss Prevention because they allegedly looked "suspicious." A. Brown Dep. at 154-155. On another occasion in 2002, Cleveland Cavaliers coach John Lucas was shopping at Nike with his son and an African-American Cleveland player. A. Brown Dep. at 157-158. Despite the fact that Lucas was a well known coach and a regular customer at NTC, Wigod refused to allow him to return some t-shirts and a shirt he purchased for his wife. A. Brown Dep. at 158-161. One witness to this incident described it as follows:

> Lori just talked to him as if he was nobody. I mean, she just totally told him, you know, I don't believe that you bought that with your own money. I believe you got it with the comp, so therefore, you can't return it, bottom line.

A. Brown Dep. at 158. Similarly, when Chicago Bulls player Tyson Chandler came into NTC to buy some shoes, Loss Prevention Manager Daniel Cruz followed him around to ensure he was not trying to steal from NTC. Duckworth Dep. Vol. I at 99-105. *See also,* Duckworth Dep. Vol. I at 98-99 (LP following African-American baseball player); Barbee Dep. at 251-252 (two African-American athletes denied "comp" benefits by Lori Wigod)

C. Disparate Treatment of African-American Employees

1. Segregation Into Lower-Paying Jobs

Documents produced by Defendant show the undeniable racial segregation in NTC's workforce, particularly for positions in the stockrooms and as cashier. *See* Ex. 4, Table of African-American and Caucasian Employees in Stockroom Positions, and Ex. 5, Table of African-American and Caucasian Employees in Cashier Positions, as excerpted from Ex. 3. Several named Plaintiffs and other African-American employees testified that they were segregated into the lowest paying jobs at Niketown, though better paying positions they were qualified to perform were available. *See* Young Dep. at 20-23, 29-38; R. Jackson Dep. at 48; Lieteau Decl. at ¶ 3.

A direct assistant to a General Manager at Niketown Chicago testified that it was Niketown Chicago's regular practice to tell

African-American candidates for employment that they had to start in the stockroom to get their "foot in the door" and "work their way up." Pinkston Decl. at ¶ 8. Oftentimes these African-Americans were better qualified than the non-African-Americans who were assigned the more desirable, better-paying positions outside of the stockroom. *Id.*

Between December of 1999 and August of 2004, NTC employed a total of 129 employees in its stockrooms. *See* Ex. 3. Of those, only 10 were Caucasian. *See* Ex. 4, Table of African-American and Caucasian Employees in Stockroom Positions as excerpted from Ex. 3, DEF085151 through DEF085246 (spreadsheet of all employees of NTC between 12/1/1999 - 8/31/2004). However, *seventy-nine* were African-American. *Id.* A closer look at the Caucasian employees shows that 6 of the 10 worked in the stockroom for less than 3 months. *Id.* Moreover, only 3 of the Caucasian employees hired were hired as "regular" employees. *Id.*

The working conditions in the stockroom were undeniably poor. These positions were universally referred to as "back of the house" positions, including by Defendant's corporate representatives. Alphonse Dep. at 124, 126, 127-128. Employees were confined in windowless work areas. Plaintiffs complained that the stockrooms were dark, dirty and had poor ventilation. Plaintiff Ria McDougal described it this way:

> [We] had to stay in the stockroom all day, no air, no windows to see outside, no general public. It was like being incarcerated, in jail, prison. It was just a different environment compared to what the salespeople were experiencing. We were literally locked in a box. ... Because that's what it felt like, I was in jail. I've never been locked up before outside of working in the Nike stockroom, but I can imagine what it feels like to be incarcerated.

McDougal Dep. at 186-87. *See also,* Sanders Decl. at ¶ 3.

Additionally, the stockroom, maintenance and cashier positions were among the lowest paid at NTC. In general, these positions paid $8.00 per hour. PSAC at ¶ 32. In comparison, sales positions were commission jobs that usually paid substantially more. PSAC at ¶ 32.[5]

There is overwhelming anecdotal evidence supporting Plaintiffs' contention that NTC managers intentionally engaged in racial discrimination with respect to job assignments during the relevant time period. For example, a number of named Plaintiffs who applied to work at NTC were automatically assigned to work in the stockroom. These Plaintiffs include D. Brown (PSAC at ¶ 68), Jackson (*Id.* at ¶ 92), McDougal (*Id.* at ¶ 52), Smith (*Id.* at ¶ 48), Walker (*Id.* at ¶ 68), and Young (*Id.* at ¶ 108). Several employees testified to the fact that though they were not specifically applying for a stockroom position, NTC hired and assigned them to the stockroom. D. Brown Dep. at 40; Jackson Dep. at 47-48; McDougal Dep. at 37-38, 41; Smith Dep. at 83, 96-97; Walker Dep. at 31, 40-41; and Young Dep. at 20-23, 31-33.

NTC' s treatment of Plaintiff DaJauna Young is typical of its treatment of this group of Plaintiffs. In March 2002, Young filled out an employment application and indicated that she was interested in a cashier position. Young. Dep. at 20-23. Young then met with a manager, and, at his suggestion, filled out a second application indicating that she was interested in either a cashier or sales position. *Id.* at 22-24. When Young called Jenkins to find out about the status of her application, Jenkins told Young that there were no open positions in either sales or cashier but that there were positions available in the stockroom. Young was then interviewed and offered a position in the stockroom. *Id.* at 31-33.

Young accepted the position in the stockroom. When Young attended her training class, she learned that four of the ten individuals in her training class had been hired as sales associates. *Id.* at 33. At least two new Caucasian sales associates had been interviewed *after* Young. *Id.* at 33.

Even when African-American employees were actually hired into sales positions, they were discriminated against in job assignments and often relegated to the lower- paying, part-time, non-specialist sales positions, that were not located on the first floor, where the majority of business occurred. McCullough Decl. at ¶ 9; Berry Decl. at ¶ 7.

Until recently NTC's "Sales Associates" worked as commissioned sales people, earning up to 8 percent commission on all sales they made. Berry Decl. at ¶ 7.[6] The earning potential for Sales Associates was significantly higher in certain departments such as Men's Running, and significantly lower in others, such as Girls Clothing. *Id.* A select group of Sales Associates were designated by NTC as "Sports Specialists." *Id.* These sales people were trained in and assigned by NTC

management to work exclusively in certain sport departments of the store where sales figures were high. *Id.* By contrast, regular Sales Associates were rotated by their managers in and out of various departments on their assigned floor. *Id.* These "Sports Specialists" positions were highly coveted. During the period between January of 2001 and May of 2003, less than twenty-five percent of employees holding the Sports Specialist position were African-American. Of those African-Americans that *were* awarded Specialist status, most of them were placed in the Basketball room. PSAC at ¶ 33; Berry Decl. at ¶ 7.

2. Discrimination in Promotion Opportunities

NTC systematically and routinely failed to provide African-American employees equal promotional opportunities. Plaintiffs Barlow, A. Brown, B. Brown, D. Brown, Duckworth, Hudson, Jackson, Lewis, McDougal, Posey, Readus Smith, Walker, and Young each sought promotions to better positions. They were all either discouraged from applying for the position or were rejected after they applied for position. *See* Barlow Dep. at 150, 185, 112-115; A. Brown Dep. at 116-19; B. Brown Dep. at 24-26, 125-133; D. Brown Dep. at 57-64; Duckworth Dep. Vol. II at 8-10, 84-85; Hudson Dep. at 70-78, 108-11; Jackson Dep. at 66-67; Lewis Dep. at 267-268, McDougal Dep. at 48- 58; Posey Dep. at 67-69, 221-23; Readus Dep. at 54-59; Smith Dep. at 285-87, 299-303; Walker Dep. at 66-74; and Young Dep. at 205, 207, 210-211, 221-224, 238, 246-49.

Many Plaintiffs testified that some open positions were not posted within NTC. *See, e.g.*, A. Brown Dep. at 118; Hudson Dep. at 110-11; Jackson Dep. at 133; McDougal Dep. at 50-51, 53; Smith Dep. at 263, 285-86, 432; and Young Dep. at 455. Instead, NTC recruited applicants for these positions at predominately Caucasian suburban high schools. *See* A. Brown Dep. at 118, 120-23; Walker Dep. at 67; Lewis Dep. at 93-94, 33.

NTC delegated promotion and transfer decisions to the managers at NTC. According to Jovita Alphonse, a Senior Human Resources official at Defendant's corporate headquarters, it was in the discretion of the managers at the store level to decide how to communicate job openings and whether to even consider internal applicants. Alphonse Dep. at 134-137. In fact, there was no requirement that existing employees be advised of new openings or promotional opportunities at all. *Id.*

There is ample additional evidence of NTC' s systematic failure to provide African-American employees equal opportunities to obtain better positions. Reginald Reed began his employment at NTC in the stockroom, like so many other African-American employees. Reed Decl. at ¶ 2. He soon sought a promotion to sales. Every time he expressed his desire for such a position to various managers, "they gave some excuse, like I was not familiar with the product or they would say that no positions were available. Instead of considering me for the position, Niketown hired outside people who were not Black and who did not have knowledge of the product for sales positions during this time." Reed Decl. at ¶ 5. Another employee who sought a position in payroll was rejected in favor of a less qualified Caucasian external applicant. McCullough Decl. at 5.

3. Discrimination in Discipline and Terminations

Every one of the named Plaintiffs in this case testified to incidents showing that Defendant routinely applied its workplace rules and practices in a racially-biased manner. For example, the employee discount policies at NTC have been routinely differentially enforced based on race. Duckworth Dep. Vol. II at 180, 188, 213, 190. NTC managers would regularly let non-African-Americans go over their pre-set employee discount limit, while adhering to the discount limit when ringing up African-American employees. Johnson-Wakama Decl. at ¶ 7; Newsome Decl. at ¶ 7; Posey Dep. at 276, 279; Reed Decl. at ¶ 9; Lieteau Decl. at ¶ 11; Granger Decl. at ¶ 5. Non-African-American employees at NTC, including a current Caucasian sales associate, used their employee discounts for individuals who were not on their approved discount list without repercussion, while many African-American employees have been terminated for this same behavior. Chapple Decl. at ¶ 5. A Loss Prevention employee testified that Caucasian managers even allowed Chicago Police officers to use their employee discount in violation of the policy. One of these managers was Dan Cruz, the Loss Prevention manager at NTC. Crisp Decl. at ¶ 5.

Plaintiff John Lewis discovered he had his employee discount shopping privileges suspended in the summer of 2002, when he came to make a purchase and was refused by Wigod. Lewis Dep. at 456-457. Wigod had Lewis' discount privileges suspended because a Caucasian employee had offered to use her discount on his behalf when Lewis had reached the allotted limit on his own discount privileges.[7] As Lewis testified, "throughout the time I worked at Nike we were given a limit to how much we could purchase on our discounts. When that limit was done ... then ... other people ... .would use their limit to help

you out. And that was a regular thing at Niketown ... [T]here were several times when a Caucasian manager ... actually made purchases for [him]" with her discount without any negative repercussions. *Id.* at 452. Others were subjected to the same discriminatory enforcement of the employee discount policy and employee return policy. A. Brown Dep. at 105; Duckworth Dep. Vol. II at 62-70.

Even when Caucasian employees, including managers, openly used their employee discounts on behalf of wholly unauthorized individuals, they would suffer no consequences. Lewis Dep. at 441-442. This was the case for several management and non-management individuals who exchanged the use of their employee discount with individuals who worked as valets at parking garages near NTC's Michigan Avenue location. Duckworth Dep. Vol. II at 179-180. These valets would regularly come in to the store and offer $5 parking in exchange for the use of an individual's employee discount. Lewis Dep. at 441. Numerous Caucasian employees and managers accepted their offer, though it was strictly against NTC policy, without any repercussions. *Id.* As one Plaintiff testified, NTC selected not to enforce its employee discount in these cases, as the Caucasian managers themselves would ring up these sales for Caucasian employees. Duckworth Dep. Vol. II at 179-181. Similarly, the Caucasian NTC employees would "trade" the use of their employee discounts with Caucasian retail employees of other retailers, like Gap, Burberry and others. Duckworth Dep. Vol. II at 181-183. Managers overlooked these violations. *Id.* at 182.

On one occasion, Lori Wigod placed limits on African-American employees' purchase of "Air Force Ones," a popular gym shoe, stating "all you people are going to do is just extend it your friends." Young Dep. at 484-485. Notably, Lori Wigod openly violated company policy by returning a jacket for full value at NTC, though the item had been purchased for less than half its price at Nike's Outlet store. Duckworth Dep. Vol. II at 178. Rules regarding "commission violations" and making "bulk sales" by sales associates have similarly been regularly used to discipline African-American employees, but not similarly-situated Caucasian employees. *See* Posey Dep. at 81-82, 89-92; 106, 118, 121-123; A. Brown Dep. at 128.

When Plaintiff John Lewis complained to an African-American manager about NTC's selective discipline regarding employee discounts, she responded by saying, "John, you know you can't do anything outside of the box." Lewis Dep. at 452.

Additionally, NTC managers selectively enforced time and attendance rules to the detriment of African-American employees. Several Plaintiffs testified that African- American employees were regularly disciplined for calling in sick, or other attendance and tardiness infractions, while Caucasian employees who engaged in the same conduct were not. See Lindberg Dep. at 44, 47, 63, 108-109, 118, 123, 188; Posey Dep. at 260- 261, 273-275, 292; Hudson Dep. at 63-69; Duckworth Dep. Vol. I at 185-186; Duckworth Dep. Vol. II at 78-82; D. Brown Dep. at 77-79; Barbee Dep. at 75-76; Young Dep. at 70-84, 101-106; McDougal Dep. at 74-76, 159; A. Brown Dep. at 100-101; Reed Decl. at ¶ 11; Williams Decl. at ¶ 7; Lewis Dep. at 310-315.

As Plaintiff John Lewis testified, NTC's unequal application of the attendance rules on the basis of race was on-going throughout his entire employment with NTC. Lewis Dep. at 378. Lewis complained to several managers about this harassment. *Id.* at 325, 327-328, 378-385. Notably, numerous written reprimands Lewis received lacked validity, since, often times, *all* the employees on the opening shift would punch in late because management's "morning huddle" or "morning announcements" with the employees went over in length. *Id* at 305-306. Lewis noticed that he was being called into the office for these alleged "tardiness" issues on a regular basis, while Caucasian employees who had punched in late alongside him were not. *Id.* Though several Caucasian employees had similar patterns of late punches as Lewis did, they were not similarly disciplined. *Id.* at 314-315, 318-319.

In March of 2002, Lewis received another written reprimand for time and attendance issues. As Lewis testified, he spoke to his manager Loya'l Lowe, who is African-American, about this particular write-up. Lewis Dep. at 324. During this discussion, Lowe, told him "he [wa]s sorry ... but he was told by Lori [Wigod] to check all of my punches and to make sure that ... [Lewis] was documented for it properly. And that's why he had to do it." *Id.* at 325. Lewis then told Lowe:

> this is ridiculous. ... I feel that Lori ... is prejudiced against me because of my color ... And I told him that I need someone who I can talk to, you know, who can actually do something about the problem, you know. I mean, because we didn't have anyone in human relations. We didn't have an HR manager there, because the HR manager was Lori. And the store manager was Lori. And Lori was the individual who was, you know, prejudiced. Therefore, I mean, I had no one to talk to. ... If Lori tells him to document the punches to say I'm late, you know, regardless of whether they are valid or not, and regardless of whether the Caucasians in the store were doing them or not, then he had to do that and he had to confront me with

> it. ... [I]t just wasn't fair what was going on ... I just felt, you know, discriminated against. And I tell you, it was a horrible feeling." Lewis Dep. at 325, 327-328.

Though Lewis complained to Defendant's corporate office about the racial discrimination, nothing was done to remedy the problem. *Id.* at 329.

The statistical evidence in this case also demonstrates that African-American employees have also been terminated at a *significantly* higher rate than Caucasian employees at NTC. Based on personnel information provided by Defendant, NTC employed approximately 234 African-American employees between December of 1999 and August of 2004. *See* Ex. 3. NTC terminated at least 72 of these African-American employees for violation of company rules, including attendance rules and employee discount rules. *See* Ex. 6, Termination Table as excerpted from Ex. 3. During the same time frame, Defendant employed approximately 117 Caucasian employees. *See* Ex. 3. However, Defendant only terminated 9 of these employees for violation of company rules. *See* Ex. 6. **Less than 8%** of the Caucasian employees working at NTC between December 1999 and August 2004 were terminated for attendance or violation of company rules. **But more than 33%** of all African-American employees working during this time period were terminated for attendance or violation of rules. *See* Exs. 3, 6.[8]

Several former NTC African-American employees testified about their pretextual terminations for violations of policies that were not enforced against Caucasian employees. *See* PSAC at ¶¶ 48, 49(c), ¶ 69(c), ¶ 85(d); McDougal Dep. at 126-130, 163; Lindberg Dep. at 146, 152; Duckworth Dep. Vol. II at 32-38, 47-54; B. Brown Dep. at 148-149, 158; Reed Decl. at ¶ 8; Lieteau Decl. at ¶ 14; McCullough Decl. at ¶ 12; Granger Decl. at ¶ 6.

4. Discrimination in Benefits

NTC also discriminated against its African-American employees through its practice of hiring African-American employees as part-time employees and denying them benefits, though they worked hours that should have entitled them to these benefits. Between December of 1999 and August of 2004, NTC hired 138 African-Americans into "part-time" slots, while only 40 Caucasians were hired as "part-time." *See* Ex. 7, Part- Time Status Employees as excerpted from Ex. 3. Plaintiffs Barbee, A. Brown, B. Brown, Duckworth, Hudson, Jackson, Readus, Smith, and Young all testified in their depositions that they were hired as part-time employees without benefits. These Plaintiffs stated that they requested benefits but NTC denied those requests. A. Brown Dep. at 60-61; D. Brown Dep. at 52-55; Hudson Dep. at 106-107; Jackson Dep. at 64, 119; Lewis Dep. at 446-448, Readus Dep. at 32-34; Smith Dep. at 286-287; Young Dep. at 259. *See also*, Newsome Decl. at ¶¶ 3-5; Johnson-Wakama Decl. at ¶ 3; Lieteau Decl. at ¶ 3; Reed Decl. at¶ 3-4.

According to Defendant's corporate benefits policy, retail employees are categorized four ways: Full-time regular working 30-40 hours per week; Part-time regular working 20-29 hours per week; Part-time regular working under 20 hours per week; and Seasonal. *See* Ex. 2, DEF 098968-098669. This employment status determines the benefits to which the employee is entitled. Full-time employees are eligible to receive a full array of benefits including paid time off, health benefits, dental benefits, vision benefits, access to healthcare reimbursement accounts, life insurance, and short and long term disability. *See* Ex. 8, DEF 097643. Part-time employees working 20-29 hours per week are also entitled to some of these benefits during the first open enrollment period after the employee has worked for NTC for 12 months. *Id.* While medical, dental and vision benefits are offered to these part-time employees, Defendant does not pay any portion of the cost of the benefit. *Id.*

Defendant's policy also provides that an employee's status should change if his or her normal hours of work change for an indefinite period of time. As a rule of thumb, Nike's policy indicates that if an employees hours change for 90 consecutive days, so should that employee's status. Notwithstanding this policy, several Plaintiffs worked more than 29 or 30 hours a week, yet were denied full-time status and benefits. *See* A. Brown Dep. at 78-79, D. Brown Dep. at 55; Duckworth Dep., Vol. I at 141-47, Vol. II at 73; Jackson Dep. at 53, 119; Readus Dep. at 31-32; Smith Dep. at 61. Other Plaintiffs worked between 20 and 30 hours but did not receive benefits. D. Brown Dep. at 55. For example, Jason Readus worked in the stockroom an average of over 25 hours per week. However, during his entire tenure at NTC, he was classified as a part-time employee. Readus repeatedly asked managers why he was not receiving benefits. Though he was told by managers that they "would look into it," nothing was ever done. Readus Dep. at 45-47.

Enforcement of Nike's full-time/part-time policy is left to the discretion of the local store. Thus, the local store is allowed to decide whether to classify an employee as full-time or part-time. Alphonse Dep. at 103-105. The managers in the local stores are also allowed to decide whether to change the status of an employee based on the number of hours that employee works. As a consequence, African-American employees were regularly excluded from "full-time" status on the basis of their race.

III. PROPOSED CLASSES

As detailed above, there is ample evidence that NTC subjected its African-American employees to a hostile work environment in violation of § 1981. Accordingly, Plaintiffs seek to have the Court certify one general class of all African-American employees who were employed at Niketown Chicago anytime between December 17, 1999 and the present date as a "Hostile Work Environment Class".[9] All eighteen named Plaintiffs in this action represent the proposed Hostile Work Environment Class.

Further, based on the claims in this action, Plaintiffs propose that the Court also certify the following four subclasses under Title VII and § 1981:[10]

(1) A "Job Segregation/Wage Disparity Subclass" consisting of all current and former African-American employees of Niketown Chicago during the period between December 17, 1999 and the present who were assigned to lower paid positions in the stockroom or as cashiers because of their race. This Subclass is represented by Plaintiffs Smith, McDougal, Walker, D. Brown, Hudson, Young and Jackson;
(2) A "Promotion Subclass" consisting of all current and former African-American employees of Niketown Chicago during the period between December 17, 1999 and the present who were denied promotions or deprived of the ability to pursue promotions because of their race. Plaintiffs Smith, McDougal, Lewis, Duckworth, Walker, Readus, A. Brown, D. Brown, B. Brown, Jackson, Hudson, Young, Barlow, and Posey are the proposed representatives for this Subclass;

(3) A "Discipline Subclass" consisting of all current and former African-American employees of Niketown Chicago during the period between December 17, 1999 to the present who suffered from racially-biased application of workplace rules and regulations, including but not limited to, time and attendance, employee discount, employee checkouts, suspensions, and terminations. All eighteen named Plaintiffs represent the Discipline Subclass.

(4) A "Benefits Subclass" consisting of all current and former African-American part-time employees of Niketown Chicago during the period between December 17, 1999 and the present who applied for, requested, and/or were entitled to benefits but were denied those benefits because of their race. The proposed representatives of this Subclass are Plaintiffs Smith, Duckworth, A. Brown, Readus, Jackson, B. Brown, Barbee, Hudson, and Young.

IV. ARGUMENT

A. Plaintiffs' Claims are Appropriate for Class Treatment

As recognized by the Supreme Court, "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving class wrongs" where "common questions of law or fact are typically present." *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977). The Seventh Circuit has recently reaffirmed that allegations of a hostile environment, which collectively "constitute[] one unlawful employment practice," are appropriate for class treatment. *Allen v. International Truck and Engine Corp.*, 358 F.2d 469, 472 (7th Cir. 2004) (quoting *AMTRAK v. Morgan*, 536 U.S. 101, 117 (2002)) (directing district court to certify race hostile work environment/harassment class). *See also, Markham v. White*, 171 F.R.D. 217 (N.D. Ill. 1997) (class action certified where plaintiffs alleged harassment and hostile work environment); *Warnell v. Ford Motor Company*, 189 F.R.D. 383 (N.D. Ill. 1999) (class action certified where plaintiffs alleged harassment and hostile work environment).

Similarly, courts routinely certify class actions alleging wide-spread discrimination in promotions. *Palmer v. Combined Insurance Company of America*, 217 F.R.D. 430 (N.D. Ill. 2003) (class action certified where plaintiffs alleged pattern of

discrimination in promotions); *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 22718 (S.D. Ill. Dec. 27, 2001) (class action certified where plaintiffs alleged pattern of discrimination in promotions); *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619 (N.D. Ill. 1989) (same).

The same is true for denial of benefits and segregation/wage claims. *Valdez v. Local 25, SEIU*, 1990 U.S. Dist. LEXIS 7660 (N.D. Ill. June 22, 1990) (class action certified where plaintiffs alleged discriminatory distribution of benefits); *Helms v. Local 705 International Brotherhood of Teamster*, 1998 U.S. Dist. LEXIS 5382 (N.D. Ill. April 15, 1998) (class action certified where plaintiffs alleged improper denial of benefits); *Liberles v. County of Cook*, 709 F.2d 1122 (7th Cir. 1983) (class action certified where plaintiffs alleged discrimination in wages); *Wagner v. NutraSweet Co.*, 170 F.R.D. 448 (N.D. Ill. 1997) (class action certified where plaintiffs alleged discrimination in wages); *Bennett v. Central Tel. Co.*, 97 F.R.D. 518 (N.D. Ill. 1983) (class action certified where plaintiffs alleged exclusion and segregation based on gender).

Finally, courts have properly granted class certification in cases where the plaintiffs have alleged discriminatory treatment in discipline and terminations. *Toney. v. Rosewood Care Center of Joliet*, 1999 U.S. Dist. LEXIS 4744 (N.D. Ill. Mar. 31, 1999) (class action certified where plaintiffs alleged pattern of discriminatory discipline and termination); *Battle v. White Cap, Inc.*, 1999 U.S. Dist. LEXIS 4658 (N.D.Ill. March 30,1999) (class action certified where plaintiffs alleged pattern of discrimination in application of disciplinary rules); *Binion v. Metropolital Pier & Exposition Auth.*, 163 F.R.D. 517 (N.D. Ill. 1995).

Recently a federal District Court for the Northern District of Illinois granted class certification in litigation almost identical to the instant case. *Toney*, 1999 U.S. Dist. LEXIS 4744. In *Toney*, the plaintiffs alleged that they and other African-American employees were subjected to systematic discrimination, including the maintenance of a hostile work environment, the disparate enforcement of work rules, the disparate treatment of African-American employees regarding vacation time and job duties, and the pretextual termination of African-American employees on account of race. The putative class members worked in different positions, on different shifts, and under different managers. *Id.* at * 28-29. The *Toney* plaintiffs provided anecdotal evidence of the disparities in treatment, along with statistical evidence of disparate rates of termination between African-American and other employees. *Id.* at * 21. As in the present case, the plaintiffs in Toney alleged that the defendant's actions intentionally discriminated against African-Americans. *Id.* at 17.

The Court granted the plaintiffs' motion for class certification, finding it was appropriate to certify: (1) a general class of all African-American employees; (2) a subclass of all African-American employees who were terminated for pretextual reasons or who were constructively discharged; (3) a subclass of all African-American employees who were subjected to adverse employment decisions, including disparate discipline, due to race; and (4) a subclass of all current and former African-American employees who were subjected to a hostile work environment. *Toney*, 1999 U.S. Dist. LEXIS 4744 at 31-32. In accordance with this and other cases cited above, Plaintiffs' proposed classes should be certified.

B. Legal Standard Applicable Under Rule 23

Plaintiffs have the burden to demonstrate to the Court that they have satisfied the requirements of Fed. R. Civ. P. 23(a) for each class they seek to have certified. This requires showing: (1) that the class is too numerous to make joinder practicable; (2) that there are common questions of fact and law; (3) that the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) that the representative parties will fairly and adequately protect the interests of the class. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161, (1982). In addition, Plaintiffs must also meet one of the requirements listed under Rule 23(b).

Although it is Plaintiffs' burden to demonstrate that the case satisfies the requirements of Rule 23, they need not demonstrate that they will prevail on the merits in order to satisfy Rule 23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). In this regard, the Court should not resolve any factual disputes and should not conduct a preliminary inquiry into the merits of the suit. *Id.; Orlowski v. Dominick's Finer Foods, Inc.,* 172 F.R.D. 370, 373-74 (N.D. Ill. 1997). Rather the Court should accept as true all of Plaintiffs' allegations and supporting evidence. Eisen, 417 U.S. at 177; *Owner- Operator Independent Drivers Assoc. v. Allied Van Lines, Inc.*, No. 04 C 3207, 2005 U.S. Dist. LEXIS 23350, *3, n.4, *23, Appendix (N.D. Ill. May 23, 2005); *Johns v. DeLeonardis*, 145 F.R.D. 480, 482. (N.D. Ill. 1992), *Riordan v. Smith Barney*, 113 F.R.D.60, 62 (N.D. Ill. 1986). The Court's role is to determine whether the Plaintiffs are asserting a claim which, assuming its merits, would satisfy the requirements of Rule 23. *See* H. *Newberg, Newberg on Class Actions*, § 24.13 at 60 (3d ed. 1992) (hereinafter

"Newberg"); *Eisen*, 417 U.S. at 178.

Plaintiffs' claims in this action are precisely the type of "class wide wrongs" the Supreme Court has suggested are appropriate for class action treatment. As detailed below, Plaintiffs meet all the requirements for class certification for each of the proposed classes. Accordingly, Plaintiffs' Motion for Class Certification should be granted.

C. Plaintiffs Satisfy Requirements Under Rule 23(a)

1. Numerosity Requirement Met

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P 23(a)(1). To determine whether joinder is impracticable courts must consider the circumstances unique to each case. *Swanson v. Am. Consumer Indus.,* 415 F.2d 1326, 1333 (7th Cir. 1969). These circumstances include whether class members are able to bring individual suits and whether it is judicially efficient for the court to try such individual suits. *Gaspar v. Linvatec Corp.,* 167 F.R.D. 51, 56 (N.D. Ill. 1996). As noted by the Seventh Circuit, "to require a multiplicity of suits by similarly situated small claimants would run counter to one of the prime purposes of a class action." *Swanson v. American Consumer Indus.,* 415 F.2d 1326, 1333 (7th Cir. 1969).

Additionally, the plaintiffs must provide some evidence or reasonable estimate of the number of class members, however, if the plaintiffs are unable to provide exact numbers, a good faith effort is sufficient to establish the number of class members. *Long v. Thornton Township High Sch. Dist. 205,* 82 F.R.D. 186, 189 (N.D. Ill. 1979). "[W]hile there is no threshold number requiring or barring a finding of numerosity, a class of more than 40 members is generally believed to be sufficiently numerous for Rule 23 purposes." Toney, 1999 U.S. Dist. LEXIS 4744 at * 6. *See also Chandler v. Southwest Jeep-Eagle Inc.,* 162 F.R.D. 302, 307 (N.D. Ill. 1995) (permissive joinder deemed inappropriate when class members number 40 or more); *Hendricks-Robinson v. Excel Corp.,* 164 F.R.D. 667, 671 (C.D. 111.1996) (joinder considered impracticable where class consists of 38 members). Here, common sense dictates that the numerosity requirement is met for each class.

The Hostile Work Environment Class, defined as "all current and former African-American employees of Niketown Chicago during the period between December 17, 1999 and the present who were subjected to a hostile environment," meets Rule 23(a)'s numerosity requirement. Based on personnel information provided by the Defendant, this class would include at least 234 individuals. *See* Ex. 3, DEF085151 through DEF085246 (spreadsheet of all employees of NTC between 12/1/1999 - 8/31/2004).

Plaintiffs' proposed Segregation/Wage Subclass is defined as "all current and former African-American employees of Niketown Chicago during the period between December 17, 1999 and the present that applied for jobs at Niketown and were segregated into the stockroom and cashier positions on the basis of their race." This class would include more than 100 members. See Exs. 3, 4, 5. Accordingly, this class meets the numerosity requirement.

The Promotion Subclass also meets the numerosity requirement. This subclass is defined as "all current and former African-American employees of Niketown Chicago during the period between December 17, 1999 and the present that were denied promotions or deprived of the ability to pursue promotions because of their race." It is conceivable that this subclass has 234 members based on the extensive testimony cited above reflecting NTC's failure to post positions, discouragement of African-Americans from submitting applications, and managers' failure to forward applications to the appropriate parties. Additionally, numerous individuals testified that they were rejected for promotions due to their race.

The Discipline Subclass also meets the numerosity requirement. This subclass is defined as "all current and former African-American employees of Niketown Chicago during the period between December 17, 1999 to the present who were subjected to discriminatory discipline and/or termination because of their race." First, at least 72 African-American employees were terminated during this period for alleged attendance violations or violations of company policy. *See* Ex. 6. As described above, these rules were enforced against African-Americans but not against other employees. Moreover, Plaintiffs estimate that the subclass of individuals subjected to some level of discipline short of termination will consist of all 234 African-American employees employed during the identified timeframe. *Id.*

Finally, the Benefits Subclass also meets the numerosity requirement. This subclass is defined as "all current and former

African-American part-time employees of Niketown Chicago during the period between December 17, 1999 and the present that applied for, requested, and/or were entitled to benefits but were denied those benefits because of their race." The Benefits Subclass has approximately 138 members. *See* Ex. 8, (Table of African-American Part-Time Employees).

2. Commonality Requirement Met

Rule 23(a)(2) requires that there be questions of law or fact common to the class. Commonality is satisfied where the named plaintiffs' claims of discrimination are based on policies, patterns or practices of defendant that affect not only them, but also which similarly victimize the putative class members. "[T] he cases have not been overly restrictive in setting out the requirements for commonality, with the existence of a common nucleus of operative fact usually being enough to qualify .... *Owner-Operator Independent Drivers Assoc.*, 2005 U.S. Dist. LEXIS 23350 at *3, citing *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992). In order to satisfy this requirement, there needs to be *just one* common question of law or fact. *Arenson v. Whitehall Convalescent and Nursing Home,* 164 F.R.D. 659, 663 (N.D. Ill. 1996). Moreover, factual variations among the experiences of class members do not preclude meeting the commonality requirement for class certification. *Rosario,* 963 F.2d at 1017-18.

In this case, the common nucleus of operative fact center on NTC's pattern of discrimination against its African-American employees. NTC's discrimination against African-Americans occurred in the following ways: the segregation of the workforce, the denial of promotions, the use of disparate discipline and terminations, and the denial of benefits. The fact that the defendant engaged in standardized conduct by subjecting its African-American employees to disparate treatment in discipline, benefits, and promotions supports a finding of a common nucleus of operative fact. *Keele v. Wexler,* 149 F.3d 589, 594 (7th Cir, 1998). *See also, National Organization of Women v. Scheidler,* 172 F.R.D. 351, 357 (N.D. Ill. 1997); *Alliance to End Repression,* 565 F.2d at 978.

NTC's pattern of discrimination, along with the repeated use and tolerance of racial slurs and epithets in the workplace and the demeaning treatment of African- American employees and customers as thieves, also serves as the common nucleus of operative fact related to Plaintiffs' claim that NTC created a hostile work environment for all of NTC's African-American employees. Class treatment in this case is wholly appropriate. *Edmonson v. Simon,* 86 F.R.D. 375, 380 (N.D. Ill. 1980) ("Where an across-the-board or permeating policy of discrimination is alleged in a class action, the requirement of [commonality] is satisfied.")

Even though individuals may have experienced the hostile environment differently, that will not defeat commonality. *Warnell v. Ford Motor Co.,* 189 F.R.D. 383 (N.D. Ill. 1999) (finding that sexual harassment claims could be addressed on a class-wide basis and that the common question of law in such cases is whether a reasonable woman would find the work environment hostile); *Markham v. White,* 171 F.R.D. 217, 222 (N.D. Ill. 1997) ("inquiry into each class member's subjective perception and response will of course be relevant to damages. But individual differences in that respect do not detract from the satisfaction of the commonality standard.")

Moreover, in the present case, Defendant's corporate headquarters delegated authority for the implementation and enforcement of its corporate practices and policies regarding harassment, job assignments, promotions, discipline/termination, and benefits to NTC's local management team. This unchecked delegation of authority was used in a racially biased manner against African-American employees, as demonstrated by the statistical and anecdotal evidence detailed above, and is sufficient to establish Rule 23(a)'s requirement of commonality. *See Caridad v. Metro-North Commuter Railroad,* 191 F.3d 283 (2d Cir. 1999) (delegation to supervisors of discretionary authority to make employment decisions without sufficient oversight gave rise to common questions sufficient to satisfy Rule 23(a)(2)); *Rossini v. Ogilvy & Mather, Inc.,* 798 F.2d 590, 598 (2d Cir. 1986) (system in which promotion decisions are made by one central group satisfies Rule 23(a)); *Binion v. Metropolitan Pier and Exposition Auth.,* 163 F.R.D. 517, 523-26 (N.D. Ill. 1995) (commonality existed when plaintiff provided testimony and evidence showing the operation and effect of an identifiable discriminatory discipline policy); *Orlowski,* 172 F.R.D. at 373-74.

A finding of commonality is further supported because two key individuals were directly and consistently implicated in the claims of discrimination reflected in each of the proposed class and subclasses, Store Manager Lori Wigod and Loss Prevention Manager Dan Cruz. These two managers were directly involved in the subjective decision-making process for employment issues at NTC. Wigod was the Human Resources Manager for NTC beginning in July of 2000. She was

subsequently promoted to Store Manager in October of 2001. *See* Ex. 2. In her role as both Human Resources and Store Manager, she was intimately involved in implementing and enforcing work place policies regarding the hiring, promotion, discipline, termination, benefits, and harassment of NTC employees.

Similarly, Cruz was hired as a member of Loss Prevention in November of 1999. He was promoted to Loss Prevention Manager in June of 2001. *Id.* Cruz was responsible for implementing the Loss Prevention policies and practices that are at issue in this case, including directing the surveillance of NTC's African-American employees and African-American customers, implementing investigation and interrogation practices, and applying employee check-out procedures, among others. Thus, the Court should find that the Hostile Environment Class and the four Subclasses meet the commonality requirement under Rule 23.

3. Typicality Requirement Met

The issue of typicality is closely related to that of commonality. *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir. 1992). To satisfy the typicality requirement of Rule 23 (a)(3), the named Plaintiffs must have the same interest and suffer the same injury as the class members. *Falcon,* 457 U.S. at 156. The named representatives' claims should have the same essential characteristics as the claims of the class. *De La Fuente v. Stokely-Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir. 1983). A plaintiff's claims are typical if (1) they arise from the same event, practice, or course of conduct as the claims of the other class members, and (2) the claims are based on the same legal theory. *Id.* There can be factual distinctions between the claims of the named plaintiffs' claims and the class members' claims: similarity of legal theory is sufficient. *Id.* In fact, Rule 23(a)(3) "requires neither complete co-extensivity nor even substantial identity of claims." *Owner-Operator Independent Drivers Assoc.,* 2005 U.S.Dist. LEXIS 23350 at *6. "Typicality under Rule 23(a)(3) should be determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *Wagner v. Nutrasweet Co.,* 95 F.3d 527, 534 (7th Cir. 1996).

As recently explained in a Northern District of Illinois class certification decision, "[w]hether the [employer' s] management decisions originated from a common decision maker or individual department heads is of little consequence, 'since the named plaintiffs have allegedly suffered various forms of employment discrimination, they share common factual and legal issues with other black employees who were or are subject to these alleged policies of discrimination." *Daniels v. FRB,* 194 F.R.D. 609, 615 (N.D. Ill. 2000), quoting *Lawson v. Metropolitan Sanitary District,* 102 F.R.D. 783, 792 (N.D. Ill. 1983).

Here, Defendant's standard conduct toward the African-American Plaintiffs, supports a finding that the discriminatory conduct caused a common injury typical of the classes' claims as required by Rule 23(a)(3). Moreover, the claims of Plaintiffs and the class members are based on the same legal theory. Namely, that Nike violated § 1981 by engaging is a pattern of disparate treatment that was so severe that it created a racially hostile work environment for all African-American employees in Niketown Chicago. Similarly, Plaintiffs' claims with respect to the four subclasses are all based on violations of Title VII and Section 1981, the members of which were subjected to the same discriminatory treatment, including segregation, denial of promotions, discriminatory discipline and/or promotions, and denial of benefits. Thus, Plaintiffs meet the typicality component for the main class and the four subclasses.

4. Adequate Representatives Requirement Met

Rule 23(a)(4) requires that named class representatives "will fairly and adequately protect the interests of the class." This requires the demonstration of three elements:

(1) the chosen class representative cannot have antagonistic or conflicting claims with other members of the class ...; (2) the named representative must have a sufficient interest in the outcome to ensure vigorous advocacy ...; and (3) counsel for the named plaintiff must be competent, experienced, qualified, and generally able to conduct the proposed litigation vigorously.

Gammon v. G.C. Services Limited Partnership, 162 F.R.D. 313, 317 (N.D. Ill.1995) (citations omitted). Indeed, "[t]he burden of demonstrating adequacy under this standard, nevertheless, is not a heavy one." *Nielsen v. Greenwood,* 1996 WL 563539, (N.D. Ill. 1996) (citing *Surowitz v. Hilton Hotels Corp.,* 383 U.S. 363, 366 (1966)).

In this case, Plaintiffs satisfy the elements of this requirement. Plaintiffs do not have antagonistic or conflicting claims with other members of the class. Plaintiffs and the class members are African-Americans who at some point during the period between December 17, 1999 and the present were employed at Niketown Chicago. The fact that some Plaintiffs may have had differing levels of success obtaining limited promotions and/or benefits does not render them unsuitable as class representatives. "[T]he real question ... is not whether [these plaintiffs] have been 'successful,' but whether progress toward even greater success in [their] professional career has been impeded by reason of [discrimination]." *Wagner v. Taylor,* 836 F.2d 578, 591 (D.C. Cir. 1987). In addition, the fact that one named Plaintiff held a management level position, and therefore may be deemed an "agent" of Nike for some limited purposes, does not prevent him from being an adequate class representative. In addressing this precise issue, the Court in *Wilfong v. Rent-A-Center,* 2001 U.S. LEXIS 22718 (S.D. Ill. December 27, 2001) explained the following: "only a conflict that goes to the very subject matter of the litigation will defeat a party's claims of representative status." *Id.* at * 25 (internal quotations and citation omitted). Thus, the proposed representatives of the main class and each of the subclasses have the same interests as the class and subclass members: to demonstrate and remedy the occurrence of discriminatory practices by Nike in Niketown Chicago.

Plaintiffs also satisfy the second part of this prerequisite to class certification. Plaintiffs have a sufficient interest in the outcome to ensure vigorous advocacy. The burden of establishing this element is not difficult. A class representative need only possess general knowledge of the case and participate in discovery. *Thompson v. City of Chicago,* 2002 U.S. Dist. LEXIS 10627 at *18 (N.D. 111. June 11, 2002); *Sebo v. Rubenstein,* 188 F.R.D. 310, 316 (N.D. Ill. 1999).

In this case, the named Plaintiffs certainly have "a sufficient interest" in the outcome of the case. All of the Plaintiffs have a general understanding of the foundation of the case and each has responded to written discovery and been deposed by Nike's attorneys. This qualifies them as "conscientious representative plaintiffs" and satisfies this element. *Robles v. Corporate Receivables, Inc.* 220 F.R.D. 306, 314 (N.D. Ill. 2004).

Finally, Defendant has conceded that Plaintiffs' attorneys are qualified and able to conduct the proposed litigation vigorously.

D. Plaintiffs Satisfy Requirements Under Rule 23(b)

As noted above, in addition to the requirements of Rule 23(a), a party seeking class certification must also satisfy at least one of the three additional requirements specified in Rule 23(b). In this case, Plaintiffs have brought suit alleging that Nike engaged in a practice of racial discrimination affecting a large number of employees. Plaintiffs seek both equitable relief, including back pay and injunctive relief, along with monetary damages, including compensatory and punitive damages. Plaintiffs thus seek to have the class and subclasses certified for the purpose of equitable relief under Rule 23(b)(2). Plaintiffs seek to have the damages claims under a hybrid Rule 23(b)(2) and (b) 3 approach or, alternatively, under Rule 23(b)(3). *See Allen,* 358 F.3d at 472.

1. Rule 23(b)(2) Requirements Met

Under Rule 23(b)(2), an action is suitable for certification whenever "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Plaintiffs satisfy this test. As detailed above, the heart of Plaintiffs' allegations is that NTC engaged in a pattern of discriminatory behavior directed at African-American employees which affected every African-American employee in that store. Further, Plaintiffs seek declaratory and injunctive relief sufficient to end Nike's pattern of discrimination and prevent future harm to Plaintiffs and the class.

As discussed in the Amended Complaint and the fact section above, Nike has "acted ... on grounds generally applicable to the class." Moreover, Plaintiffs seek systemic injunctive relief. As the Seventh Circuit explained in *Allen,* because systemic injunctive relief is sought in class actions alleging wide-spread discrimination, such relief will affect all African-American employees and not only the named plaintiffs. Thus, the equitable aspects of the case are inherently class-wide. *Allen,* 358 F3d. at 471. The Court reasoned that class certification is preferable because "class certification obliges counsel (and representative plaintiffs) to proceed as fiduciaries for all [minority] employees, rather than try to maximize the outcome for these [named plaintiffs] at the potential expense of the other [minority employees] .... *Id.* "A Rule 23(b)(2) class is especially appropriate [when] ... the gravamen of the ... Amended Complaint is the elimination of discriminatory employment practices." *Lawson,* 102 F.R.D. at 793.

2. Hybrid Approach Proper Under Rule 23(b)(2) and Rule 23(b)(3)

Plaintiffs' damages claims are appropriate for class certification under Rule 23(b)(3) (as explained below). As the Seventh Circuit has stated, "for many years Rule 23(b)(2) was the normal basis of certification in Title VII pattern-or-practice cases." *Jefferson v. Ingersoll International, Inc.,* 195 F.3d 894, 896 (7th Cir. 1999). Prior to 1991, Title VII class actions were traditionally certified under Rule 23(b)(2) because Title VII plaintiffs were allowed only equitable relief. In addition to declaratory or injunctive relief, equitable relief also includes back pay. *Id.* However, the Civil Rights Act of 1991 allowed Title VII plaintiffs compensatory and punitive damages. *Id.*

The Seventh Circuit has stated that an employment discrimination case that seeks both equitable relief and damages may be inappropriate for certification solely under 23(b)(2) because it may not meet the requirement that damages be incidental to the injunctive or declaratory relief sought. *Lemon v. International Union of Operating Engineers, Local No. 139, AFL-CIO,* 216 F.3d 577, 580 (7th Cir. 2000). In determining whether certification solely under Rule 23(b)(2) is appropriate, courts must be mindful of the constitutional due process rights of the class members. *Jefferson,* 195 F.3d at 897.

Notably, the Seventh Circuit has acknowledged that a "hybrid" approach may be used to reach the efficiency gains of 23(b)(2) and the due process concerns of 23(b)(3). *Id.* at 899 ("bifurcate the proceedings - certifying a Rule 23(b)(2) class for equitable relief and a Rule 23(b)(3) class for damages"). *See also Lemon,* 216 F.3d at 581-82; *Allen v. International Truck and Engine Corporation,* 358 F.3d 469, 471 (7th Cir. 2004).

Thus the class and the subclasses in the instant case should be certified under Rule 23(b)(2) for the declaratory and equitable relief and Rule 23(b)(3) for compensatory and punitive damages.

3. Rule 23(b)(3) Requirements Met

Alternatively, the class should be certified entirely under Rule 23(b)(3). Rule 23(b)(3) allows an action to be maintained as a class if the court finds that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). In determining "superiority" the court should look to non-exhaustive factors: the interest of class members in individually controlling separate actions, any litigation concerning the controversy already commenced, the desirability or undesirability of concentrating the litigation, and the manageability of the class action. *Id.* The Seventh Circuit has concluded that classes seeking substantial damages may be certified under Rule 23(b)(3). *See Jefferson v. Ingersoll International Inc.,* 195 F.3d 894, 898 (7th Cir. 1999); *Lemon v. International Union of Operating Engineers, Local No. 139, AFL-CIO,* 216 F.3d 577, 581 (7th Cir. 2000) (citing *Jefferson,* 195 F.3d at 899).

The common questions of law and fact in this case predominate over any individual issues. The dominant legal issues are whether and to what Nike engaged in a pattern of discrimination against its African-American employees. A decision on this issue will determine whether injunctive relief is appropriate and whether individual employees are entitled to damages. Only the extent of the damages will be an individual question. "The necessity of answering individual questions after answering common questions will not prevent a class action." *Heastie v. Community Bank of Greater Peoria,* 125 F.R.D. 669, 676 (N.D. Ill. 1989). *See also Carnegie v. Household International, Inc.,* 376 F.3d 656, 661 (7th Cir. 2004) (explaining the possibilities for a court to handle the individual damages in a class action).

The predominance requirement is also generally satisfied where a "common nucleus of operative fact", for which the law provides a remedy, exists among all class members. *Chandler v. Southwest Jeep-Eagle, Inc.,* 162 F.R.D. 302, 310 (N.D. Ill. 1995) (citing *Halverson v. Convenient Food Mart,* 69 F.R.D. 331, 335 (N.D. Ill. 1974). In this case, there is a common nucleus of operative fact that concerns the store-wide treatment of African-American employees. It would be inefficient to hold separate trials at which each plaintiff would be allowed to present evidence of the store-wide environment.

Further, a class action is superior to other available methods for resolving this case. In particular, a class action will allow the consolidation of what otherwise would be hundreds of individual trials on the issues of liability, damages and injunctive relief. The core questions in this case, whether Nike engaged in a store-wide pattern of discrimination and to what extent, will rely on the same proof. Thus, a class action is far more desirable than individual trials. Also, the size of the class in this case,

approximately 250 people, poses no unusual manageability concerns.

The addition to the predominance and superiority requirements, the Rule 23 Advisory Committed Notes explain that courts should certify a class when certification "would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated without sacrificing procedural fairness." *Anchem Products, Inc. v. Windsor,* 521 U.S. 591, 615 (1997) (citing Adv. Comm. Notes, 28 U.S.C. App., p. 697). Certifying this class under Rule 23(b)(3) will allow the Court to efficiently address the similar claims of discrimination while preserving procedural fairness through notice and an opportunity to opt-out. *See Jefferson,* 195 F.3d at 898. Therefore, this Court should find that plaintiff's evidence satisfies the requirements of Rule 23(b)(3) and certify the class under Rule 23(b)(3).

V. CONCLUSION

For the reasons set forth above, Plaintiffs ask this Court to certify the general class and four subclasses set forth in Plaintiffs Motion For Class Certification and allow the named Plaintiffs to represent the classes. Plaintiffs further request that the Court appoint Noelle Brennan, Ines Monte and Randall D. Schmidt to represent the class and subclasses.