UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

DOBSON COLLINS, an individual, on behalf of himself and others similarly situated,

Plaintiff,

vs.

EXECUTIVE AIRLINES, INC., a Delaware corporation d/b/a AMERICAN EAGLE AIRLINES, INC., and FLAGSHIP AIRLINES, INC., a Delaware corporation,

Defendants.
_____/

Case No. 96-1104-CIV-KING
Magistrate Stephen T. Brown

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT OR FOR SUMMARY JUDGMENT, OR, ALTERNATIVELY, TO LIMIT DISCOVERY TO ISSUE OF CLASS CERTIFICATION

Plaintiff, DOBSON COLLINS, on behalf of himself and others similarly situated, by and through undersigned counsel, hereby respectfully opposes Defendant's Motion to Dismiss Plaintiff's Complaint or for Summary Judgment, or, Alternatively, to Limit Discovery to Issue of Class Certification ("Motion"). Plaintiff states as follows:

I. INTRODUCTION

The defendants in this action have moved for dismissal of certain claims in Plaintiffs' Class Action Complaint for Declaratory, Injunctive, and Other Relief ("Complaint"). Principally, defendants argue that certain of plaintiff's judicial claims exceed the scope of the underlying EEOC charge, and that plaintiff has not made requisite allegations to sustain the class claim in Count III of the Complaint. In support of their Motion, defendants have introduced certain evidentiary matters beyond the four corners of the Complaint to show what the defendants

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perceive to be technical pleading deficiencies that require dismissal.[1] See, e.g., Defendant's Memorandum of Law in Support of Defendants' Motion ("Def. Memo"), Exhibits ("Exh.") "3," "5" and "6." The defendants' evidentiary presentation is selective and misleading.

Though the EEOC charge on which defendants focus was filed in May, 1994, see Complaint, Exh. "C," the origins of this lawsuit are more distant. In 1991, Dobson Collins first filed a Charge of Discrimination alleging racial discrimination in relation to the defendants' failure to promote him and to adjust accordingly his pay rate. The charge of racial discrimination was resolved when American Eagle entered into a Negotiated Settlement Agreement with Mr. Collins in which it agreed, inter alia, to promote him and adjust his pay; not to penalize or retaliate against him; and to "re-emphasize its EEO Policy to all of its Maintenance Employees," and particularly those "who perform in a supervisory or lead capacity." Complaint, Exh. "A." Thus, as early as 1991, American Eagle was on notice of alleged race discrimination in general at its Miami maintenance facility, and specifically against Mr. Collins.

In 1993, Mr. Collins filed another charge with the EEOC, alleging that he had been discriminated against on the basis of race and retaliated against for filing the previous charge against American Eagle. See Def. Memo, Exh. "4." The charge alleged in essence that a disciplinary action taken against Mr. Collins had been a pretext for race discrimination and retaliation. Id. The charge put the company on notice again of alleged race discrimination.

In 1994, less than two months after the 1993 charge was resolved, Mr. Collins filed the charge that underlies this lawsuit relating to another alleged disciplinary action taken against him

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[1] Presumably, that is why the defendants alternatively style their Motion as one for summary judgment. See FED. R. CIV. P. 12(b) (motion to dismiss for failure to state a claim upon which relief can be granted will be treated as one for summary judgment if "matters outside the pleadings are presented to and not excluded by the court"). Defendants clearly do not address their Motion to the substantive merits of the claims in the Complaint, nor could summary judgment be granted on the merits because the defendants have not shown or attempted to show the absence of a triable issue of fact as to any issue or claim. See FED. R. CIV. P. 56(c); S.D. FLA. L.R. 7.5. Therefore, plaintiff herein confines his argument to the technical, Rule 12(b)(6) grounds of dismissal urged by the defendants.

by Noel Franz, a white supervisor at the Miami facility. Complaint, Exh. "C." The charge briefly described the facts of the alleged disciplinary action that Mr. Collins believed constituted retaliation by Mr. Franz. See id. Mr. Collins further alleged that the retaliatory act was part and parcel of the "adverse terms and conditions of employment" to which he had been subjected at the Miami facility. Id. Describing the basis of the discrimination, Mr. Collins checked the "retaliation" box on the EEOC form. Id. Additionally, Mr. Collins also checked the "Continuing Action" box in describing the dates of discrimination. Id. In December, 1994, Mr. Collins amended the charge to include within its scope his retaliatory termination by Mr. Franz. See Def. Memo, Exh. "1." Thus, from 1991 through the end of 1994, Mr. Collins had filed no less than three EEOC charges against American Eagle alleging race discrimination and retaliation.

Also in 1994, four other black employees of American Eagle's Miami facility filed charges of race and national origin discrimination against American Eagle. See attached Exh. "1" (charge of Oswald Russell, 2/23/94); Exh. "2" (charge of Anthony Lee, 6/13/94); Exh. "3" (charge of Oren Camejo, 8/17/94); Exh. "4" (charge of Charles McLean, 8/29/94). The charges alleged a variety of discriminatory conduct, including, but not limited to, discriminatory demotions without prior notice of alleged poor performance, unwarranted and discriminatory disciplinary actions, and the inclusion in personnel files of false performance write-ups. Like Mr. Collins' 1994 charge, the charges identified Noel Franz as a central figure in their allegations of race and national origin discrimination. The charges also generally alleged that blacks were the victims of race discrimination at the Miami facility. See, e.g., Exh. "2" (alleging that "the other Black employees were having the same problems with Mr. Franz that I had"); Exh. "4" (alleging that "all of the black employees are treated less favorably than other employees").

Clearly, the EEOC and defendants were on notice of all of these charges and the facts alleged therein by late summer, 1994. By then, American Eagle knew that nearly half of its

black employees that it has so far identified, see Def. Memo, Exh. "5," had filed charges of race and national origin discrimination against it. They knew that Noel Franz played a central role in the perpetration of the discrimination alleged. They knew that the problem affected all black employees at the Miami facility. In fact, the defendants' own exhibits show that they were well aware of the scope of the charges and investigated them. In correspondence attached to the defendant's memorandum in support of their Motion, their counsel referenced all of the charges and stated that, "[b]ased on our conversations, we have made certain inquiries and done some investigation into the claims your clients have made against Flagship and Mr. Franz." See Def. Memo, Exh. "3;" see also Exh. "5," attached hereto (defense counsel's letter of December 23, 1994, stating that "we have begun reviewing the charges brought by your four clients and Mr. Camejo"). It was against this backdrop that Mr. Collins filed the Complaint instituting this action when the EEOC issued him a right-to-sue letter.

For the reasons stated below, Mr. Collins' individual hostile work environment claims in Counts I-II of the Complaint, and the hostile work environment class claim in Count III, do not exceed the scope of Mr. Collins' charge. Further, the class claim in Count III is maintainable as alleged pursuant to FED. R. CIV. P. 23(a). Therefore, the hostile work environment claims alleged in Counts I, II, and III of the Complaint should not be dismissed, and discovery should not be limited to class certification issues if the class claim in Count III is not dismissed.

Mr. Collins also states individual retaliation claims in Counts I (pursuant to Title VII) and II (pursuant to 42 U.S.C. § 1981). Courts considering the issue since Congress amended 42 U.S.C. § 1981 in 1991 have all held that retaliation claims are actionable thereunder, as clearly intended by Congress. Finally, plaintiff does not oppose the dismissal of the Complaint as against Executive Airlines, Inc.

II. THE INDIVIDUAL AND CLASS HOSTILE WORK ENVIRONMENT CLAIMS DO NOT EXCEED THE SCOPE OF THE UNDERLYING EEOC CHARGE

Defendants assert that the Complaint exceeds the scope of the underlying EEOC charge in three respects: (1) that the race discrimination claims are not reasonably related to the allegations of Mr. Collins' charge; (2) that Mr. Collins' retaliation claims include allegations of fact not included in his EEOC charge; and (3) that the class allegations also exceed the scope of the underlying charge. Def. Memo at 5-10. Defendant's objections are not well founded.

A. The Racially Hostile Work Environment Claims Are Reasonably Related to the Allegations in Mr. Collins' Administrative Charge

Selectively and narrowly construing Mr. Collins' 1994 EEOC charge, defendants assert that Mr. Collins' hostile work environment claims exceed the scope of his charge, as Mr. Collins "specifically alleged . . . only that we was charging retaliation for a previously retaliation charge he did not pursue." Id. at 7. Mr. Collins' EEOC charge, however, is not so narrowly drawn.

First, Mr. Collins' 1994 charge must be read in the context of the prior 1993 charge with respect to which he alleges retaliation occurred. The 1993 charge, contrary to defendants' representation, alleged both race discrimination and retaliation, not just retaliation. See Def. Memo, Exh. "4." To view the retaliation Mr. Collins alleged in the 1994 charge wholly apart from the context of race discrimination alleged in the 1993 charge requires one to ignore the obvious factual linkage between the 1993 charge and Mr. Collins' retaliatory termination: In 1993, Mr. Collins alleged that American Eagle had taken disciplinary action against him as a pretext for racial discrimination and retaliation for filing a prior EEOC charge. See id. Specifically, the 1993 charge concerned the requirement that Mr. Collins sign a "Letter of Commitment" in which he "acknowledged" that he had a "performance problem," and could be "discharged without further warning." Id.; see also Complaint, Exh. "B" (Letter of Commitment). Similarly, the 1994 charge alleged that American Eagle, through Noel Franz, had taken pretextual

disciplinary action against Mr. Collins around the beginning of May, 1994. See Complaint, Exh. "C." In addition, the December, 1994 amendment alleged that Mr. Collins' employment had been terminated on the very same pretext of "conduct and job related problems by Noel Franz." Def. Memo, Exh. "1." The "Final Advisory" letter that Mr. Collins received from Mr. Franz notifying him of his discharge specifically advised Mr. Collins that he was being terminated for breach of the "Letter of Commitment" that had been the subject of Mr. Collins' 1993 charge:

> On May 13, 1993, you signed a Letter of Commitment which you and I understood as a good faith promise on your part to attain a satisfactory level of performance and conduct in our best interest. Your Counseling Record before and after your Letter of Commitment reflects management's positive efforts to obtain your cooperation and to obtain from you correction of your performance and conduct.
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> This last incident described above is a breach of your commitment. I hereby inform you of the termination of your employment with Flagship Airlines.

See Complaint, Exh. "D."

Clearly, then, the facts in the 1993-94 charges form a continuous chain of allegations originating with the 1993 charge, in which Mr. Collins alleged that he had been discriminated against on the basis of race. This is supported by the fact that in both the May, 1994 charge and its December, 1994 amendment, Mr. Collins designated the complaint as a "Continuing Action" in describing the temporal scope of the charge. See Complaint, Exh. "C;" Def. Memo, Exh. "1;" cf. Prizevoits v. Indiana Bell Tel. Co., Inc., 882 F. Supp. 787 (S.D. Ind. 1995) (dismissing Title VII harassment claims exceeding temporal scope of EEOC charge where charge concerned only events surrounding discharge, and plaintiff did not check "continuing action" box). Further, Mr. Collins' 1994 charge specifically placed the retaliation alleged therein in the context of "adverse terms and conditions of employment." Complaint, Exh. "C;" Def. Memo, Exh. "1."

Thus, in context, Mr. Collins' judicial allegations concerning a racially hostile work environment are indeed "reasonably related to" the factual allegations in Mr. Collins' 1994

charge, which itself is inextricably entwined with the 1993 charge of racial discrimination.[2] For example, the Complaint alleges the same events as Mr. Collins' 1993-94 charges. See Complaint at ¶¶ 13-20, 23-25. Like the charges, the Complaint locates the specific incidents in the context of the adverse terms and conditions of employment in the maintenance facility's racially hostile environment. See id. at ¶¶ 1-2, 27, 31, 34, 41, 44, 46, 52. And both the Complaint and charges describe the centrality of Noel Franz as a primary perpetrator of the harassment of, and discrimination against, Mr. Collins and other employees. See id., passim.

Other courts have sustained judicial hostile work environment claims where there was a far less obvious relationship between those claims and underlying EEOC charges. In one such case, a plaintiff attempted to allege claims for retaliatory discharge and harassment in the form of abusive language, threats of personal injury and property damage, unnecessary surveillance, and more strenuous work assignments than other employees with similar job classifications. Aponte v. National Steel Serv. Ctr., 500 F.Supp. 198, 201 (N.D. Ill. 1980). The underlying charge related only to retaliatory discharge, and the court noted that the plaintiff "alleged harassment without outlining how the harassment related to the plaintiff's eventual retaliatory discharge." Id. Nonetheless, the court sustained the harassment claim because, "[i]f the alleged harassing acts were part of a design to force the plaintiff out because of his prior charges . . ., a reasonable relation between the charge and complaint exists . . . ." Id.

In another case, the plaintiff's EEOC charge alleged that the only date on which sex discrimination occurred was on September 10, 1991, the date of her termination. Greene v. Term City, Inc., 828 F.Supp 584,587 (N.D. Ill. 1993). The one-sentence factual narrative alleged

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[2] Besides ignoring the inherent factual relationship between the 1993-94 charges, the defendants' technical argument is at odds with the "utmost liberality" with which courts must interpret EEOC charges in order to effect the remedial purposes of Title VII. See Wright v. Manatee Cty., 717 F.Supp. 1493, 1497 (N.D. Fla. 1989). Moreover, the requirement that an EEOC charge limit the scope of a subsequent judicial complaint is not a jurisdictional one. Babrocky v. Jewel Food Co. & Retail Meatcutters, 773 F.2d 857, 864 (7th Cir. 1985).

simply that the plaintiff had been discriminatorily discharged because she complained about an ageist and sexist remark by a company officer. Id. The defendant argued that the hostile work environment claim was substantively and temporally outside the scope of the plaintiff's charge, which related only to her alleged discriminatory discharge on September 10, 1991. Id. The court conceded that the complaint "assert[ed] several claims that exceed the literal language of her EEOC/IDHR charge, including[] a sexually hostile work environment from September, 1990 to September, 1991." Id. Nonetheless, the court sustained the hostile work environment claim because the complaint included allegations about derogatory remarks made in the year prior to the plaintiff's discharge that reasonably connected the complaint to the charge.[3] Id. at 587-88.

Still other courts have repeatedly noted the inherently close relationship between Title VII race discrimination claims and subsequent retaliation charges predicated on the filing of earlier race discrimination claims, finding the two reasonably related. See Carter v. South Central Bell, 912 F.2d 832, 841 (5th Cir. 1990); Gottlieb v. Tulane Univ. of La., 809 F.2d 278, 284 (5th Cir. 1987); Daines v. City of Mankato, 754 F.2d 681, 696 (D. Minn. 1990); Keeley v. Citibank, N.A., 711 F.Supp. 157, 160-61 (S.D.N.Y. 1989).

In sum, the racially hostile work environment claims in the Complaint are reasonably related to the underlying charge and should not be dismissed.

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[3] Defendants cite Williams v. Little Rock Mun. Water Works, 21 F.3d 218 (8th Cir. 1994), to show that the instant hostile work environment claims are outside the scope of Mr. Collins' EEOC charge. Several facts distinguish Williams from this case. First, the Williams' plaintiff's judicial complaint attacked several specific policies as racially discriminatory that had no analogue whatsoever in the charge of retaliation, or in her earlier charge of racial discrimination, or that could even arguably have arisen out of them. For example, her judicial complaint attacked the defendant's allegedly discriminatory job classifications, hiring practices, and wrongful terminations, whereas her retaliation charge and prior charge attacked only her own discharge and the company's failure to promote her. 21 F.3d at 221. Mr. Collins, by contrast, has alleged a racially hostile work environment claim that relates directly to his allegation in the 1994 charge that he had been subjected to "adverse terms and conditions of employment," as well as to his earlier 1993 racial discrimination charge. See Complaint, Exh. "C;" Def. Memo, Exh. "1." Further, the plaintiff in Williams did not allege in her EEOC charge that her underlying claim for retaliation was a "continuing action" relating to her prior charge, as Mr. Collins did in his 1994 charge. Finally, in Williams it was "uncontroverted that the EEOC only investigated the allegations of retaliation," 21 F.3d at 223, whereas here, the scope of the EEOC's investigation is yet unknown and cannot therefore provide a basis for dismissal.

B. Certain Allegations That the Defendants Assert Are Outside the Scope of the 1994 EEOC Charge Relate to the Hostile Work Environment Claims and Are Reasonably Related to the Charge

Defendants also contend that allegations in the Complaint regarding (i) the noose Mr. Collins found with his name on it, (ii) the overexposed Polaroid picture purporting to depict Mr. Collins and Mr. Russell in blackface, and (iii) the prevalence of racial slurs at the Miami facility are outside of the scope of Mr. Collins' retaliation charge. Def. Memo at 7-8; see also Complaint at ¶¶ 21-22, 27(a). The defendants, however, misconceive the relationship between those allegations and the claims in the Complaint. Those allegations represent manifestations of the racially hostile work environment at the Miami facility. To show that a hostile work environment exists, a plaintiff must show, inter alia, that harassment is "sufficiently severe or pervasive to alter the conditions of the [victim's] employment and create an abusive working environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405 (1986) (internal quotations omitted). "Pervasiveness" is shown by the totality of the circumstances, including the frequency of discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with the employee's work performance. Harris v. Forklift Sys., Inc., ___ U.S. ___, 114 S.Ct. 367, 371 (1993). Consequently, the allegations to which defendants object relate directly to Mr. Collins' racially hostile work environment claim at the Miami facility, which, as explained above at Part II.A, is reasonably related to the allegations in his 1994 charge. Cf. West v. Philadelphia Elec. Co., 45 F.3d 744,755-56 (3rd Cir. 1995) (holding that allegations concerning nooses, Ku Klux Klan "Christmas card", voodoo doll, and harassing conversations established racially hostile work environment); Butler v. Coral Volkswagen, Inc., 629 F. Supp. 1034 (S.D. Fla. 1986) (holding that racially hostile work environment existed where black employee faced constant racial epithets; discriminatory work assignments; managers participated in or tolerated harassment, and failed to remedy serious adverse conditions).

Moreover, the harassing acts described in the Complaint are not of such a permanent nature that they would trigger Mr. Collins' awareness of the need to assert his rights with respect to those events. See West, 45 F.3d at 756 ("[T]he harassment did not cause a discrete event such as a lost job or a denied promotion and, thus, it did not trigger a duty of the plaintiff to assert his rights arising from that deprivation."); see also Berry v. Board of Supervisors of LSU, 715 F.2d 971, 981 (5th Cir. 1983) (same). Consequently, the fact that Mr. Collins' December, 1994 amendment to his charge focused on his retaliatory discharge -- an event sufficiently permanent to trigger his awareness of the need to assert his rights -- and did not focus on the other incidents, is of little consequence. In any event, the allegations regarding the noose, the Polaroid, and pervasive racial slurs are reasonably comprehended within Mr. Collins' allegations in his 1994 charge concerning the "adverse terms and conditions of [his] employment." They may also relate to retaliation against him, a fact unknown as yet. At a minimum, however, the particular incidents were clearly part of the racially hostile environment at the Miami facility.

Finally, defendants disingenuously assert that Mr. Collins' "new allegations . . . did not place defendants on notice" as to the hostile work environment or retaliation claims. Def. Memo. at 7-8. However, on December 7, 1994, the plaintiff's attorneys met with defense counsel to discuss the very allegations at issue, as well as the five pending EEOC charges against the company. During that meeting, the plaintiff's attorneys specifically notified defense counsel of the noose incident, the Polaroid picture, and the racially hostile work environment; defense counsel examined the noose and photocopied the Polaroid. Defense counsel acknowledged as much in January 9, 1995, correspondence, in which he referred to the December 7, 1994 meeting:

> In our meeting, you summarized certain incidents your clients have described to you, alerted us to the existence of discrimination charges filed by some of those clients and generally described an environment that your clients regard as racially hostile. Of particular concern is the length of rope, tied in a noose, that you

> produced for our view and a polaroid photograph that appears to portray a black person in a negative manner.
>
> * * *
>
> As required by EEOC Guidelines and Company Policies, Flagship will continue to conclusion a thorough and objective investigation, and will take whatever action may be indicated by the results of this expanded investigation.

Exh. "6," attached (emphasis added). Thus, defendants were on notice of the incidents with respect to which they assert they were not on notice, and they acknowledged as much in writing.

Since the particular allegations at issue relate to the hostile work environment claims in the Complaint, which are comprehended within Mr. Collins' 1994 charge, those allegations should not be stricken.

C. The Defendants and EEOC Were on Notice of Classwide Discrimination, and the Class Claim Should Be Sustained

Defendants' last technical objection to the Complaint is that the class allegations in Count III exceed the scope of Mr. Collins' underlying EEOC charge. Def. Memo at 9-10. As the defendants' authorities recognize, the purpose of the requirement that a judicial complaint be limited by the scope of an underlying EEOC charge "is that the defendant must have notice of the charge, and the EEOC must have the opportunity to investigate and conciliate the charge, in order to attempt to obtain voluntary compliance with Title VII." Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 127 (7th Cir. 1989); Grayson v. K-Mart Corp., 79 F.3d 1086, 1107 (11th Cir. 1996). Here, the EEOC and the defendants certainly had notice that, at the time Mr. Collins' 1994 charge was pending, nearly half of all of the black employees at American Eagle's Miami facility had filed charges alleging race and national origin discrimination. The fact that nearly half of the black employees at the Miami facility had filed discrimination charges by the end of summer, 1994, should have been enough by itself to put EEOC and the defendants on notice of a potential class action alleging racial discrimination.

Moreover, two of the charges specifically alleged that defendants' racially discriminatory policies and practices affected all black employees at the Miami facility. Mr. Anthony Lee's Charge of Discrimination, filed June 13, 1994, stated that "Mr. [Noel] Franz has exhibited open bias against Black employees, and me especially. . . . In fact, the other Black employees were having the same problems with Mr. Franz that I had." Exh. "2" (Affidavit of Anthony Lee). Further, Mr. Lee's Affidavit, at ¶ 7, states "Class Allegation" and lists several other black employees. Id. Additionally, the charge filed by Mr. Charles McLean on August 29, 1994, states that "[a]ll of the other employees in the department are white Americans or hispanics. I believe that all of the black employees are treated less favorably than other employees . . . ." Exh. "4" (Affidavit of Charles McLean, attachment p. 1). Clearly, if notice to the EEOC and defendants is the issue, by late summer, 1994, defendants and the EEOC were on notice of alleged race discrimination against all black employees at the Miami facility, and the central role that Noel Franz played in causing and perpetuating that environment. See Exh. "6" (letter of defense counsel referencing "an environment that your clients regard as racially hostile").[4]

III. A RACIALLY HOSTILE WORK ENVIRONMENT CLASS CLAIM IS PROPERLY ALLEGED IN COUNT III OF THE COMPLAINT

Count III expands Mr. Collins' individual claims in Counts I-II relating to the racially hostile work environment into a class claim covering all past, present, and future employees who have been or may yet be injured by that environment. Defendants argue that the class alleged in Count III cannot be sustained because Mr. Collins has alleged an "across-the-board" class claim whose allegations do not meet the requirements of FED. R. CIV. P. 23(a). Def. Memo at 10-11.

[4] Should this Court conclude that the EEOC and defendants were not on notice of a potential class action challenging the discriminatory, hostile environment at American Eagle's Miami facility, or that Count III cannot be sustained on Mr. Collins' charge, plaintiff respectfully requests leave to amend the Complaint to add Anthony Lee as a named plaintiff to cure the technical defect asserted by the defendants.

Defendants, however, misconceive the nature of the claim, and the allegations in Count III are sufficient for the purposes of Rule 23(a).

A. Count III Alleges a Single Claim Attacking the Defendants' Racially Hostile Work Environment, Not an "Across-the-Board" Claim Attacking Numerous Discriminatory Practices

Defendants construe Count III as a broadside attack on a variety of discriminatory practices that fail to show a relationship between Mr. Collins' individual retaliation claims and the other discriminatory practices the defendants believe Count III addresses. Defendants argue that the "across-the-board" attack on all of their discriminatory employment practices cannot be maintained because, in their view, the injury alleged in Mr. Collins' retaliation claims is not representative of the interests of other class members who may have suffered injuries resulting from different types of discriminatory practices. Def. Memo at 10-11 (citing General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 102 S.Ct. 2364 (1982)).

Unlike the Falcon plaintiff, however, Mr. Collins has not in Count III alleged multiple claims challenging distinct discriminatory practices different than his individual claims. Rather, Count III contains only a single claim on behalf of the class -- i.e., one that challenges the same racially hostile work environment that has injured Mr. Collins. That Count III refers to other types of discriminatory practices as manifestations of the hostile work environment is solely by virtue of Mr. Collins' attempt to show the pervasiveness of the racial discrimination at the Miami facility. One of the elements of a hostile work environment claim is that discrimination is sufficiently severe or pervasive to alter conditions of the victim's employment and to create an abusive working environment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405 (1986); West v. Philadelphia Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995). Only by considering the totality of the circumstances can one determine whether discrimination is "pervasive." Harris v. Forklift Sys., Inc., ___ U.S. ___, 114 S.Ct. 367, 371 (1993).

Consequently, defendants have misconstrued the claim in Count III as an "across-the-board" class claim directed at practices different than those that have injured Mr. Collins.

B. The Allegations in Count III Meet the Requirements of Rule 23(a)

1. Numerosity

Defendants contend that the allegations in Count III are insufficient to meet the numerosity requirement of Rule 23(a) because the putative class size "at most" is twelve, all of whom could practicably be joined in one action. Def. Memo at 12-13. The allegations in Count III are sufficient to meet the numerosity requirement for two related reasons.

First, the "proper focus is not on the numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors." Phillips v. Joint Legis. Comm., 637 F.2d 1014, 1022 (5th Cir. Feb. 23, 1981). Here, the proposed class includes members who cannot be joined. The class does not consist only of past or present black employees of American Eagle "who have been [or] are . . . adversely affected" by the hostile environment, but also includes all future employees who "will be adversely affected" by that environment. Complaint at ¶ 50. Because joinder of unknown future class members is necessarily impracticable, courts have found that classes including such members meet the numerosity requirement. See Phillips, 637 F.2d at 1022; Jones v. Diamond, 519 F.2d 1090, 1100 (5th Cir. 1975); Jack v. American Linen Supply Co., 498 F.2d 122, 124 (5th Cir. 1974); Armstead v. Pingree, 629 F. Supp. 273, 279 (M.D. Fla. 1986).

Moreover, Count III seeks, inter alia, prospective injunctive relief against the defendants' racially hostile work environment. Complaint at 17. Where class plaintiffs have sought such relief, courts have also found the numerosity requirement met, even where the plaintiff has made only "speculative and conclusory" allegations as to class size. Stambaugh v. Kansas Dep't of Corrections, 151 F.R.D. 664, 673-74 (D. Kan. 1993); see also Jones, 519 F.2d at 1100 ("Smaller

classes are less objectionable where . . . the plaintiff is seeking injunctive relief on behalf of future class members as well as past and present members."); Armstead, 629 F. Supp. at 279.

2. Commonality

Defendants argue that Mr. Collins does not allege instances of discrimination against other black employees, but has alleged only "actions directed solely at him" which "do not present common questions of fact or law." Def. Memo. at 14. Again, defendants are mistaken.

Count III does allege instances of discrimination against other black employees in common with Mr. Collins. Paragraph 49 incorporates by reference ¶ 27, where Mr. Collins alleges that other mechanics and technicians at the Miami facility have been the victims of the "hostile and abusive work environment" tolerated and perpetrated by Mr. Franz and others. Paragraph 27 also sets out numerous other overt manifestations of the racially hostile work environment at the Miami facility. (These allegations are entirely consistent with the allegations set forth in the EEOC charges attached at Exhs. "1"-"4").

Moreover, because Count III alleges a class claim challenging the same type of discrimination that Mr. Collins individually challenges in Counts I and II, Count III raises common questions of law and fact. Allegations of similar discriminatory employment practices satisfy the commonality (and typicality) requirement of Rule 23(a). Shipes v. Trinity Indus., 987 F.2d 311, 316 (5th Cir. 1993); Adames v. Mitsubishi Bank, Ltd., 133 F.R.D. 82, 90 (E.D.N.Y. 1989) (citing Falcon, 457 U.S. at 159 n.15, 102 S.Ct. at 2371 n.15). The common questions include, but are not limited to: whether class members have suffered intentional discrimination because they are black, especially with respect to the actions of Noel Franz; whether discrimination is pervasive, or isolated to certain individuals; whether the environment has adversely affected class members such that it has unreasonably interfered with their work performance; whether the environment would detrimentally affect a reasonable person; and

whether defendants knew of, or could be charged with knowledge of, the existence of the hostile work environment, and particularly the actions of Noel Franz. Cf. Jenson v. Eveleth Taconite Co., 139 F.R.D. 657 (D. Minn. 1991) (certifying class of female employees alleging existence of sexually hostile work environment where claim presented common question whether "women where treated differently because of their gender and subjected to a hostile work environment"). Contrary to defendants' contention, this is not a case in which the class claim seeks to challenge racially discriminatory practices different than those the plaintiff suffered. Cf. Washington v. Brown & Williams Tobacco Corp., 959 F.2d 1566 (11th Cir. 1992).

3. Typicality and adequacy of representation

Defendants further contend that Mr. Collins' claims are not typical of the class he seeks to represent because his "multiple disciplinary encounters with his employer" raise a "myriad of defenses applicable only to [his] claims." Def. Memo. at 15. For the same reason, defendants argue that Mr. Collins cannot be an adequate class representative. Id. at 15-16.

Again, defendants misconceive the nature of the claim in Count III. Mr. Collins has not alleged a retaliation claim in Count III, but a hostile work environment claim. Mr. Collins' employment history, while perhaps relevant to his individual retaliation claims in Counts I and II, is not necessarily relevant to the hostile work environment claim in Count III. A putative class representative can logically be the victim of a hostile work environment, notwithstanding any disciplinary infractions the representative may have incurred. To that extent, Mr. Collins can adequately represent the class of similarly situated employees. Moreover, the alleged "disciplinary encounters" may have been, as Mr. Collins has alleged, a pretextual manifestation of the discrimination pervading the work environment.

Further, defendants' precise argument was rejected by another court. See Tucker v. Union Underwear Co., 144 F.R.D. 325 (W.D.Ky. 1992). In Tucker, the defendant argued that the

plaintiff's claim was atypical because her individual claim was subject to a "unique defense" involving her "poor performance and disciplinary problems." Id. at 329. The court found, however, that because the plaintiff sought to bring a class claim concerning gender classifications that pervaded all decisions affecting the putative class, the plaintiff's claims were typical. Id.

Moreover, the typicality requirement is met when named plaintiffs advance the same legal or remedial theories as those supporting the claims of the class members. Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985). Here, Count III requires proof of the same prima facie elements as Mr. Collins' hostile work environment claims in Counts I and II. Count III is also based on the same civil rights statutes (Title VII and 42 U.S.C. § 1981) as Counts I and II. Thus, Mr. Collins' individual hostile work environment claims are typical of those of the class. Id.

Similarly, Mr. Collins will adequately represent the class because he seeks to redress the same discriminatory work environment to which the unnamed class members are subjected. See Kreuzfeld A.G. v. Carnehammar, 138 F.R.D. 594, 600 (S.D. Fla. 1991).

IV. MR. COLLINS' CLAIM FOR RELIEF FOR THE DEFENDANTS' RETALIATORY CONDUCT VIOLATES, AND IS ACTIONABLE UNDER, 42 U.S.C. § 1981

Count II of the Complaint alleges that the defendants' unlawful, retaliatory conduct against Mr. Collins violates 42 U.S.C. § 1981, as amended. Section 1981(a) provides in pertinent part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." In 1991, Congress expanded the scope of 42 U.S.C. § 1981[5] by amending it to add subsection (b):

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[5] In 1989 -- contrary to the understanding of the vast majority of lower federal courts which had considered the question -- the U.S. Supreme Court held that § 1981 "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contractual relations." Patterson v. McLean Credit Union, 491 U.S. 164, 171, 109 S.Ct. 2363, 2369 (1989). Congress enacted the 1991 amendments to § 1981 in part to "overrule" Patterson. See Rivers v. Roadway Express, Inc., ___ U.S. ___, 114 S.Ct. 1510, 1516 n.6 (1994).

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C.A. § 1981(b) (West's 1994) (emphasis added). Defendants argue that Count II cannot be brought pursuant to § 1981, as amended.[6] Def. Memo at 17-19.

The only courts that appear to have directly addressed the issue whether retaliation claims are actionable pursuant to § 1981, as amended, have unanimously decided that such claims are actionable. Williams v. Carrier Corp., 889 F. Supp. 1528, 1530 (M.D. Ga. 1995) ("[T]his court must conclude that a retaliatory discharge claim is cognizable under § 1981 as it presently exists."); Wilborn v. Primary Care Specialists, 866 F. Supp. 364, (N.D. Ill. 1994) ("The Court finds as a matter of law that a retaliatory action taken against an employee as a result of the employee's filing of a race discrimination claim . . . is actionable under 42 U.S.C. § 1981."); Adams v. City of Chicago, 865 F. Supp. 445, 446-47 (N.D. Ill. 1994) (holding that plaintiff stated retaliation claim under § 1981). Other courts, without directly addressing the issue, have either applied, or affirmed the application of, § 1981, as amended, to retaliation claims. See Steverson v. Goldstein, 24 F.3d 666, 670 (5th Cir. 1994); Lewis v. American Foreign Serv. Ass'n, 846 F. Supp. 77, 79-80 (D.D.C. 1993). Yet another court, while finding that "the Civil Rights Act of 1991 now provides a remedy for retaliatory discharge under § 1981," dismissed a retaliation claim only because the conduct at issue occurred before November 21, 1991, the effective date of the amendments. Carr v. F.W. Woolworth Co., 883 F. Supp. 10, 14 (E.D.N.C. 1992). We have found no case subsequent to the 1991 amendments holding that a retaliation claim cannot be maintained under § 1981, nor have defendants cited any such case. The only

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[6] Plaintiff notes for the sake of clarity that the defendants have not moved to dismiss Mr. Collins' individual retaliation claim in Count I of the Complaint, brought pursuant Title VII.

post-amendment cases defendants cite actually support the fact that § 1981 now covers retaliation claims. See Def. Memo. at 18 (citing Steverson, 24 F.3d 666; Adams, 865 F. Supp. 445).

Nonetheless, defendants assert that Congress did not really intend for the 1991 amendments to § 1981 to apply to retaliation claims, but only to "race discrimination" claims, dismissing references to retaliation claims in the legislative history as "tangential." Def. Memo at 18-19. Yet, defendants do not explain why an employer's retaliation against a non-white person for complaining of racial discrimination with respect to an employment contract falls outside of the scope of Congress' express intent to expand § 1981 "to include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation and hiring." H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 92 (1991), reprinted in 1991 U.S.S.C.A.N. 549, 630. Moreover, with respect to the expanded definition of "make and enforce contracts" in § 1981(b), Congress instructed that the language in subsection (b) "is intended to be illustrative, rather than exhaustive." Id. (emphasis added). Defendants, however, interpret the language of subsection (b) to be exhaustive, rather than illustrative: "The plain language of Section 1981, as amended, provides a remedy for race discrimination, not retaliation." Def. Memo at 18-19 (emphasis in original). Defendants' interpretation plainly contradicts congressional intent.

More generally, it is axiomatic that the "clear mandate from Congress" in Title VII to end racial discrimination in employment "must not be hampered by a strict construction of the statute and a battle with semantics." Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970); see also Joyner v. Monier Roof Tile, Inc., 784 F. Supp. 872, 879 (S.D. Fla. 1992) ("[T]he purpose of the [Civil Rights] Act of 1991, like the Civil Rights Act of 1964, is to promote equality in our nation and to provide a remedy for victims of discrimination and harassment in the workplace."). Were defendants' argument given credence, the very protection Congress intended to bestow by expanding the scope of § 1981 would be defeated:

> The recognition of the right of action for retaliation under section 1981 is simply another application of a straightforward syllogism: if an employee is granted certain substantive rights against his or her employer, the employer may not punish the employee's assertion of those rights, since this would allow the employer to take away a right to protection conferred by statute.

Malhotra v. Cotter & Co., 885 F.2d 1305, 1315 (7th Cir. 1989) (Cudahy, J., concurring). This court, consistent with the other federal courts which have considered the issue, should not permit the defendants to do that. Mr. Collins' retaliation claim is cognizable under § 1981.

V. PLAINTIFF DOES NOT OPPOSE THE DISMISSAL OF THE COMPLAINT AS AGAINST THE DEFENDANT EXECUTIVE AIRLINES, INC.

Based on the representations in defendants' memorandum at page 19, plaintiff does not oppose the dismissal of the Complaint as against Executive Airlines, Inc.

VI. THE COURT SHOULD NOT LIMIT DISCOVERY TO CLASS CERTIFICATION

Finally, defendant requests the Court to limit discovery to certification issues if the class claim is not dismissed, establish a discovery schedule for discovery on class issues, and to establish a date by which plaintiff is required to move for certification. Def. Memo at 19-20. While plaintiff does not oppose the last two requests, plaintiff does oppose the limitation on discovery proposed by defendants. Defendants offer only the conclusory assertion they would be "unduly burdened" by classwide discovery, without specifying what burden that would entail. Defendants also cite Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566, 1571 (11th Cir. 1992), in support of their request. That case is inapposite because the Eleventh Circuit found persuasive in that case the fact that the plaintiffs were unable to support certification after they had obtained classwide discovery for three years. Id. No similar circumstance exists here. Discovery should be permitted on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was served via U.S. Mail this 8th day of July, 1996, upon: Terence G. Connor, Esq., MORGAN, LEWIS & BOCKIUS, L.L.P., 5300 First Union Financial Center, 200 S. Biscayne Boulevard, Miami, Florida 33131-2339.

_____
BRIAN M. TORRES, ESQ.

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