

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:11-CV-21457-MARTINEZ-MCALILEY

SHACK SHEDRICK,
JEROME MITCHELL, MILTON DAVIS,
JOHN WILLIAMS on behalf of
themselves and all those
similarly situated,

Plaintiffs,

v.

DISTRICT BOARD OF TRUSTEES
OF MIAMI-DADE COLLEGE,

Defendant.

CLASS ACTION

JURY TRIAL DEMANDED

PLAINTIFFS' MOTION AND MEMORANDUM OF LAW TO
CERTIFY CLASS ACTION

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BEFORE HON. JUDGE MARTINEZ

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1. Introduction: The College Failed to Protect its Black Custodians from Discrimination by the Administrative Services Division.

The Plaintiffs request that this case be certified as a class action under Rule **23(b)(1), (b)(2) and (b)(3)** of the Federal Rules of Civil Procedure. There are five counts in this case: Count (1) one (racial discrimination in violation of Title VII); Count (2) two (retaliatory discrimination under Title VII); Count (3) three (racial discrimination in violation of 42 USC 1981); Count (4) four (racial discrimination in violation of the Florida Civil Rights Act); and Count 5 (retaliatory discrimination under FL Civ. Rights Act). The Plaintiffs' claims, in their most elementary form, are that they were discriminated against because of the color of their race (*i.e.* black);¹ that the College ignored its own policies prohibiting discrimination, and its policies on dealing with discrimination were entirely too subjective and/or illusory.

The Plaintiffs are asking for certification early because courts around the nation agree that class certification should be done quickly, and of course, not upon the merits of the case. This is for a number of reasons, including, so that a court can determine whether class wide discovery is appropriate. In this case, no class wide discovery has occurred, so in addition to certification, the Plaintiffs will ask this Court to order the Defendants to produce the names and contact information of the class members, and to allow class wide discovery.

Further, this is not *Wal-Mart v. Dukes*² - where there is a massive class of 1.5 million individuals challenging a nationwide practice being held together by single thread of commonality. This Class is focused. The commonality and typicality requirements weave the Class together forming a tight rope. In fact, this case concerns racial discrimination by a

¹ In the context of civil rights cases, federal courts often grant class certification for claims asserted under Title VII and Section 1981. See *Alexander v. Local 496, Laborers' International Union of North America*, 177 F.3d 394, 408 (6th Cir. 1999), cert. denied, 528 U.S. 1154 (2000)(involving claims of discrimination against union for discriminating practices and policies); *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 1999); *Latino Officers Ass'n City of New York v. City of New York*, 209 F.R.D. 79 (S.D.N.Y.2002).

² *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (U.S. 2011)

particular *division*, within one college, towards one group of rank-and-file employees; (in *particular* those in custodial services). The class is over 40 but less than 1000. Simply stated, it is ideally suited for class certification.³

Even though a motion for class certification is not a decision upon the merits, the Plaintiffs present, in summary fashion, some of the types of conduct and theories of discrimination the Plaintiffs allege, intend to prove, or already have evidence of. Accordingly, what follows is a brief summary of the discrimination and theories being asserted.

a. Subjective Personnel Practices: “The Baez Wink” and Failure to Monitor

The Class experienced excessively subjective personnel practices. For example, (1) write-ups were not investigated; (2) rebuttals to those write-ups were not explored; (3) firings and discipline were “rubber stamped;” (4) personnel files were falsified with fraudulent documents; and (5) the division head, Gloria Baez, has no meaningful check or audit as to who was fired. For all intents and purposes, she had complete control as to who would stay and who would go. As Dean Gloria Baez, J.D., testified in another case where her conduct as it relates to racial discrimination was at issue:

“Q: How many times have they [referring to HR] not followed your recommendation?”

A: They have never not followed my recommendation.”⁴

In addition, individual Hispanic and white supervisors had unfettered disciplinary authority and there was no meaningful grievance process. Testimony during one of the Plaintiffs’ depositions

³ There are two major categories of racial discrimination—intentional discrimination (sometimes known as *disparate treatment*) and – neutral conduct that has an adverse impact on a protected group (often called *disparate impact* or *adverse impact*). Both are found here.

⁴ Exhibit 1 - Deposition of Gloria Baez in Pg. 106 (from *Turner v. Miami Dade College*, 09-22090)

summed up the Divisions practices well: “*from when Gloria Baez came about and she started creating a paper trail on me, as well as the other black employees at the college.*”⁵

Unfortunately there was nothing the black custodians could do. They tried filing complaints about the discrimination internally--but they were quickly shut down. As Jerome Mitchell testified regarding his conversation with the Kendall campuses’ black executive, Joy Ruff, “*she found Gloria Baez not guilty, so that was the end of that conversation.*”⁶ Or as Milton Davis testified (when he tried explaining to his supervisor, Assistant Director of Custodial Services, Eduardo Padilla, that another black custodian didn’t do anything wrong), he told me to: “*Just get out of my office.*”⁷ And it’s no wonder, the College’s own policy on dealing with discrimination is to attempt to deal with “*complaints by informal resolution*”⁸ thereby allowing management to cover up, ignore, and/or have unfettered subjective control about whether something was ripe for more formal of a grievance process.⁹ This allowed their Human Resource Officer, Clive Bridges, to “*brush... off*” complaints of discrimination and harassment.¹⁰ It also meant no meaningful record of discrimination charges was properly kept.

b. Statistics: 87 black jobs lost since 2006-2011 (441 – 354) while Hispanic jobs grew by approximately 100. How did that happen?

A shockingly unequal and statistical anomaly of black custodial jobs were lost while Hispanic jobs reached new heights. Such data is the text book evidence of discrimination theory often called disparate impact.¹¹ The Supreme Court in *Hazelwood School Dist. v. United States*

⁵ Exhibit 2 – Shedrick Deposition Pg. 74

⁶ Exhibit 3 – Mitchell Deposition Pg. 103

⁷ Exhibit 7 –Davis Deposition Pg. 74-75, 77 (“*I tried to explain that Roy had done nothing wrong. Eduardo became extremely hostile and wouldn’t let me speak*”).

⁸ Exhibit 4 – Manual of Procedure 1665 Section D

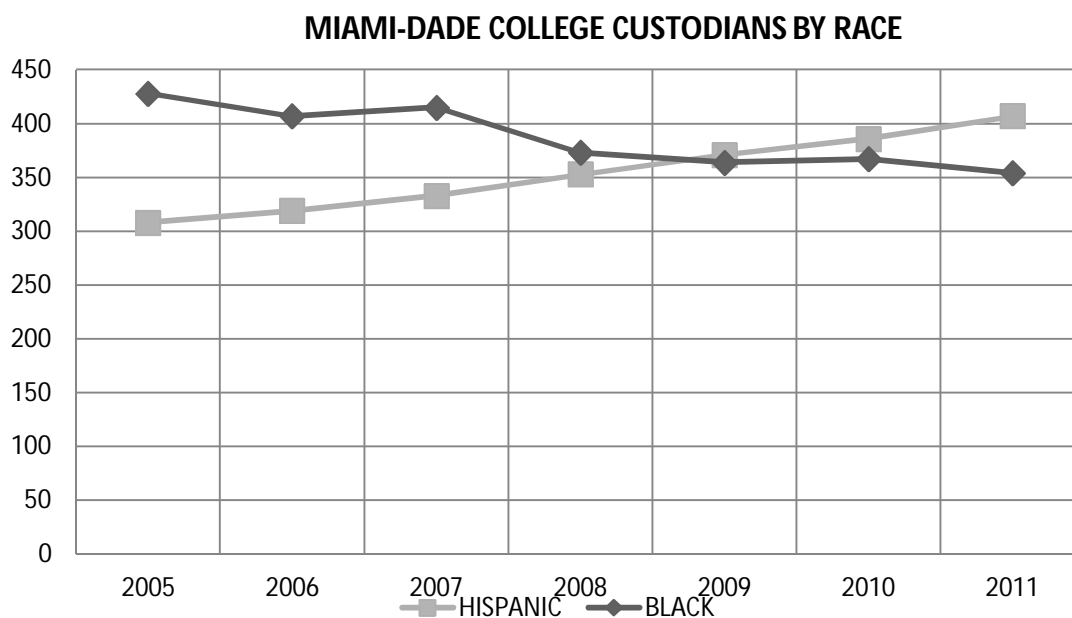
⁹ “If the complaint cannot be resolved through the informal resolution process, a formal complaint may be filed as outlined in this procedure.” (emphasis added) See Exhibit 4 – Manual of Procedure 1665 Section D.

¹⁰ Exhibit 7 – Davis Deposition Pg. 85.

¹¹ Also known as adverse impact.

agrees, noting that “where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.”¹²

The Defendant’s Administrative Services Division has managed to reduce the amount of black custodians by an alarming 11 percent in just six (6) years; simultaneously, the amount of Hispanic custodians increased by about 11 percent. The below graph represents the data already obtained to corroborate these facts:¹³



And it is no wonder that the black custodian jobs were not being replaced regularly.

Testimony revealed that when black candidates were being considered, there candidacy was thoroughly discouraged, if not outright denied:

“this was a situation where the qualified candidate, ... was a black male who he had interviewed and he [Mark Mills] was about to give the position to and once Gloria Baez found out that Mark Mills was getting ready to hire a black male, there was a conversation amongst the two where Gloria Baez chewed Mark Mills There were several positions that became available and Mr. Mills

¹² *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308 (U.S. 1977)

¹³ See Exhibit 5 - Miami Dade Employee Breakdown by Race and Working Division from 2005/06 School Year to 2010/11 School Year.

indicated that he was chewed out by Gloria Baez and a Hispanic female was given that position.”¹⁴

c. Discriminatory Discipline and Treatment: why were black employees treated so differently?

In this case, the black custodians were written up in higher percentages as compared to any other group. Black custodians were punished with more severity than any other group for the same alleged violations. In fact, in some instances, supervisors would actually go out of their way to cover up mistakes on the job by non-black employees. As Shack Shedrick testified:

“Eduardo Padilla had exonerated four Latin employees¹⁵ and he was completely tarnishing the black employees’ files by constantly harassing, attacking, reprimand[ing] and belittling the black employees that worked within Campus Services.”¹⁶

“Roy Augustus [the black individual that issued the written reprimands] was made to apologize to the four non-black employees by Eduardo Padilla. He had to apologize for reprimanding them.”¹⁷

“Ed Padilla then informed Roy that he was not going to allow them to issue the reprimand to the four Hispanic employees”¹⁸

In addition, non-black custodial employees received preferential treatment in terms of working conditions and job assignments. For example, Mr. Shedrick testified that Mr. Padilla approached him at the end of shift to inform him that another custodian, a Hispanic male, was going to be working in the warehouse after he left. Mr. Shedrick recommended that this “gentleman wash a load of dirty mopheads,”¹⁹ but Mr. Padilla responded “he’s not going to be washing any mops.”²⁰ Washing mops is not one of the sought after custodial duties; as Mr. Shredrick put plainly: “that gentleman did not want the Hispanic employees to do the dirty jobs.

¹⁴ Exhibit 2 - Shedrick Deposition Pg. 145

¹⁵ These four employees were custodians. See Exhibit 2 - Shedrick Deposition Pg. 54.

¹⁶ Exhibit 2 - Deposition of Shack Shedrick pg. 49-50

¹⁷ Exhibit 2 - Shedrick Depo pg. 53-54

¹⁸ Exhibit 2 - Shedrick Depo. Pg 162

¹⁹ Exhibit 2 - Shedrick Depo pg. 59

²⁰ Exhibit 2 - Shedrick Depo. Pg. 60

In fact, the black employees were going to get the dirty jobs.”²¹ Black custodians were also forced to “*pressure clean*” during “*cold weather*” spans, while Hispanic custodians generally did not.²²

One of the Hispanic supervisors well known for his discriminatory behavior was Eduardo Padilla. Mr. Padilla was the Assistant Director of Custodial Services. He would regularly discriminate against the black custodians and attempt to write them up for any anything he could, even going so far as to order them to break from company policy, then write them up when they didn’t deviate from company policy, peppering their files with discipline to get them suspended and ultimately terminated. Mr. Shedrick testified to one such example, explaining how Mr. Padilla ordered him to provide him with Mr. Shedrick’s set of keys to the warehouse—instead of putting them in the key “*box.*”²³ (Company protocol was to make sure that key sets assigned out, were put back in to the key box so as to not allow keys to go missing or any mischief to be blamed for others using signed out sets of key.²⁴) Afterwards, Mr. Shedrick was suspended.²⁵ But when he asked the college to investigate and speak with Mr. Padilla about the discrimination, he was first told that he was right the “*keys needed to be returned to the box*” and that Mr. Padilla would be spoken to “*regarding this matter,*”²⁶ only later to have these statements magically become “*retract[ed].*”²⁷

In a reverse situation, Plaintiff, Jerome Mitchell, asked his supervisor if he could skip signing out of work (an alleged company procedure)²⁸ because he sustained “*chemical burns*”²⁹

²¹ Exhibit 2 - Shedrick Depo. Pg. 148

²² Exhibit 2 - Shedrick Depo. Pg. 149-150

²³ Exhibit 2 - Shedrick Depo. Pg. 61

²⁴ Exhibit 2 - Shedrick Depo. Pg. 62

²⁵ Exhibit 2 - Shedrick Depo. Pg. 63

²⁶ Exhibit 2 - Shedrick Depo. Pg. 64

²⁷ Exhibit 2 - Shedrick Depo. Pg. 64

²⁸ Exhibit 3 - Mitchell Depo. Pg. 42

²⁹ Exhibit 3 - Mitchell Depo. Pg. 38

on his foot when the college did not provide him with the proper safety gear. He didn't want to walk the entire way back to the security guard house with the bleeding and burning foot. His supervisor, Omira Gil, granted his request, and he went to see a doctor.³⁰ Adding insult to his already injured foot, he had a "write-up" waiting for him the next week.³¹ To make matters worse, he wrote a rebuttal to explain what happened and the permission he received, but when he asked the college if they spoke with his witness they said "no."³² As Mr. Mitchell testified about this incident and his rebuttal report, I "*would really appreciate the college staff listening to my frustrations and allowing me to just do my job and work.*"³³

d. The Defendant's attitudes towards race were expressed through their words and actions, including falsifying personnel records.

As Mr. Shedrick testified: "*Yes. It was discriminatory on his part, because it wasn't just me. All of the black employees that worked within the Campus services were being harassed, scolded, reprimanded and later terminated by this administration.*"³⁴ Ruby Turner, who brought a discrimination case against the college, also noted how it wasn't just the alarming number of black custodians that were being fired and written up. One senior college official flat out told her that, "*he's going to get rid all of the old black workers.*"³⁵ While another college official told the black custodians they "*look like a bunch of monkeys.*"³⁶ While yet another said that "*I'm going to make sure that all black workers get replaced.*"³⁷

³⁰ Exhibit 3 - Mitchell Depo. Pg. 38

³¹ Exhibit 3 - Mitchell Depo. Pg. 38

³² Exhibit 3 - Mitchell Depo. Pg. 38

³³ Exhibit 3 - Mitchell Depo. 43

³⁴ Exhibit 3 - Shedrick Depo. Pg. 58.

³⁵ Exhibit 6 - Turner Deposition Pg. 94

³⁶ Exhibit 3 - Mitchell Deposition Pg. 117

³⁷ Exhibit 6 - Turner Deposition Pg. 102-104

When it came time to reduce the workforce, less tenured Hispanic custodians were kept, while black custodians were let go. As Mr. Mitchell testified:³⁸

A: That's why they said they let me go, but how come they didn't let go of the Spanish people that were working there with us?

Q. Did they let go of some of the other Hispanic custodians?

A: I have no idea, but I know she [referring to a less tenured Hispanic custodian] is still working there and she had just started working there, so how come they didn't let her go if it was for budget reasons?

On more than one occasion, the undersigned's investigation into discrimination has led to the discovery of personnel file documents being forged with signatures. In Mr. Shedrick case, a write-up about an incident that occurred at work purported to bear his signature and indicating that "*I concur*" was placed next to it, as if to say Mr. Shedrick agreed with the contents of the write-up.³⁹ However, Mr. Shedrick testified that this is not his signature and he does not know who wrote it.⁴⁰

In an even more egregious example, Milton Davis testified that he indeed did turn in a resignation letter (albeit because he was given no other choice) to which he did indeed sign.⁴¹ However, he later discovered that the College had instead created a fictitious resignation letter and tried to make it like Dean, Gloria Baez, was giving him a choice about the resignation and that he had quit on his own without any pressure from the College.⁴² These two sham documents in personnel files demonstrate that the College's personnel records are not complete and accurate. If they did this to two of the four black custodians already in this suit, how many more are out there?

³⁸ Exhibit 3 - Mitchell Deposition Pg. 130

³⁹ Exhibit 2 - Shedrick Deposition Pg. 73

⁴⁰ Exhibit 2 - Shedrick Deposition Pg. 73

⁴¹ Exhibit 7 Davis Deposition Pgs. 40-41.

⁴² Exhibit 7 - Davis Deposition Pgs. 20-25

Nevertheless, the patterns and practices of discrimination suffered by the black custodians make this case ideal for certification. As discussed more fully below, the number that suffered discrimination is too numerous that joinder would be impractical. The representative Plaintiffs experienced the same acts of racial discrimination as the class, their claims are typical, the questions of law and fact are common, and the representatives can fairly and adequately protect the interests of the class. The Court should grant Plaintiffs' Motion.

2. Nature of the Class & Proposed Class Definition.

The proposed class consists of:

All persons who are black and who were, or are, employed by Miami-Dade College as a custodian at any time between November 2005, through the date of the final disposition of this Action (herein "the Class").

As noted within the definition, the Class is focused and limited. It is job specific. It is also division specific (because custodians are overseen by the Administrative Services Division and its management (*e.g.* Dean of Administrative Services, Campus Services Director, Custodial Services Director, Custodial Services Asst. Director, and other employees of to the Dean and custodial services). It is limited to one college.⁴³ And it is limited to one type of employee—custodial workers.

On information and belief the class is over 40 individuals but less than 1000. Currently the class is estimated to be 451 present and former black custodians.

3. The Purposes of Rule 23 Class Actions.

Class actions serve an important function in our system of civil justice. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99, n. 11 (1981) (noting that the policy underlying Rule 23 favors handling litigation in which common interests or common questions of law or fact prevail in a

⁴³ Florida's higher education system has dozens of community and bachelor granting institutions

single lawsuit). Rule 23 strikes a balance between the need for and efficiency of a class action and the interests of class members in pursuing their claims individually. Or as the Second Circuit said in *In re Drexel Burnham Lambert Group* in 1992, it is appropriate where individual adjudications would take many years and would drastically increase the legal expenses for all parties -- where joinder of all claimants would be expensive, time consuming, and logistically unfeasible.⁴⁴ From the defendants' perspective, a class action provides a single proceeding in which to determine the merits of the plaintiffs' claims and, therefore, may protect defendants from repeated and potentially inconsistent adjudications. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-403, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)

4. Rule 23's Structure.

According to the Eleventh Circuit in *Luna v. Del Monte Fresh Produce (Southeast), Inc.*: Federal Rule of Civil Procedure 23 allows certification of class action under (b)(1) and (b)(2) if

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.⁴⁵

While, the Eleventh Circuit in *Luna* held that to maintain a class action under Fed. R. 23(b)(3), besides demonstrating the requirements of 23(a), the district court should also "find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."⁴⁶

⁴⁴ *Luna v. Del Monte Fresh Produce (Southeast), Inc* 354 Fed. Appx. 422 (11th Cir. Ga. 2009) See also *Drexel*, 960 F.2d 285, 290 (2d Cir. 1992).

⁴⁵ 960 F.2d at 290.

⁴⁶ *Luna v. Del Monte Fresh Produce (Southeast), Inc.*, 354 Fed. Appx. 422, 424 (11th Cir. Ga. 2009)

However, in 1997, the D.C. Circuit in *Eubanks v. Billington* that these three categories of class actions *are not mutually exclusive*, and a class may be certified under more than one category.⁴⁷ As a practical matter, the Second Circuit said in 2001 in *In re Visa Check / Mastermoney Antitrust Litig.*, “once a court has found that a class action is maintainable under any single category of Rule 23(b), there is no necessity of showing that it may also be brought under any other.”⁴⁸

In 1998, in *Messier v. Southbury Training School* the District of Connecticut reminded us that there are “important procedural distinctions” between classes certified under Rule 23(b)(3) and classes certified under Rule 23(b)(1) and (2).⁴⁹ As explained in 1998 in *Flanigan v. General Electric*, certifications under Rule 23(b)(1) and (b)(2) are described as “mandatory classes” because the class member may not opt out of the action and bring separate litigation that might prejudice other class members or the defendant.⁵⁰ By contrast, as the *Messier* Court said, Rule 23(b)(3) allows class members an “absolute right to opt out” and pursue their claims individually.⁵¹ The 1998 D.C. Circuit in *Thomas v. Albright* said the drafters of Rule 23 did not provide that absolute right for Rule 23(b)(1) and (b)(2) because the group nature of the harm alleged and the broad character of the relief sought assure that the class is relatively cohesive and homogenous.⁵²

The requirements for certification under Rule 23(b)(1) and (b)(2) are different from those for Rule 23(b)(3). Rule 23(b)(1) covers cases, like this one, in which defendants are, according to *Amchem* “obliged by law,” “to treat the members of the class alike; while Rule 23(b)(2) focuses on cases, also like this one, where class-wide injunctive or declaratory relief may be

⁴⁷ 110 F.3d 87, 91 (D.C. Cir. 1997).

⁴⁸ 280 F.3d 124, 145 (2d Cir. 2001).

⁴⁹ 183 FRD 350, 353 (D.Conn. 1998).

⁵⁰ 1998 U.S. Dist. LEXIS 22873, *19 (D. Conn. 1998).

⁵¹ *Messier*, supra.

⁵² 139 F.3d 227 (D.C. Cir. 1998).

needed to remedy a generally applicable policy or practice.⁵³ By comparison, *Amchem* says Rule 23(b)(3) covers cases “where class action treatment [is] not as clearly called for” but where a class action could be convenient or desirable, including complex litigation for money damages, and where, under Rule 23(b)(3), the district court must find two additional factors--predominance and superiority--before certifying the class.⁵⁴

5. A Claim for Certification Does Not Review the Merits of the Suit.

In this instance, the Plaintiffs’ action satisfies the criteria in all three subsections of Rule 23(b). Still, as the Third Circuit held in *Wetzel v. Liberty Mut. Ins.*: “an action maintainable under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior res judicata effect and to eliminate the procedural complications of (b)(3).”⁵⁵

And while it is true that plaintiffs bear the burden of demonstrating that the class satisfies the requirements of Rule 23,⁵⁶ this does not mean that plaintiffs have to prove their cases at the class certification stage. The Supreme Court in *Eisen v. Carlisle & Jacquelin* found that “**nothing in either the language or history of Rule 23 gives a court any authority to conduct a preliminary inquiry into the merits of a suit** in order to determine whether it may be maintained as a class action.”⁵⁷ Rulings by our circuit courts agree that as with a motion to dismiss, the district court for class certification purposes **is to accept the substantive allegation in the complaint as true.**⁵⁸ As the Middle District of Florida said in *Fuller v. Becker & Poliakoff, P.A.*, 197 F.R.D. 697, 699 (M.D. Fla. 2000), “the Court will not examine the merits of

⁵³ 521 U.S. at 614, 117 S.Ct. at 2245.

⁵⁴ *Id.*

⁵⁵ 508 F.2d 239, 253 (3d Cir.), cert. denied, 421 U.S. 1011 (1975).

⁵⁶ 126 F.3d 372, 375 (2d Cir. 1997).

⁵⁷ *Eisan*, 417 U.S. 156, 177 (1974); *Caridad*, 191 F.3d 283, 291 (2d Cir. 1999) cert. denied, 529 U.S. 1107 (2000)(quoting *Eisan*).

⁵⁸ *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999); *Shayne v. Madison Square Garden*, 491 F.2d 397, 398 (2d Cir. 1974); *Nelson v. United States Steel Corp.*, 709 F.2d 675, 679 (11th Cir. 1983) (quoting *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974))

the case. Rather, the substantive allegations of the complaint should generally be taken as true.”⁵⁹

The reasoning for this is simple, as the Southern District of Florida said in *Neumont v. Florida*, 198 F.R.D. 554, 556 (S.D. Fla. 2000), “the question of class certification is a procedural one, distinct from the merits of the action.” And “in deciding a motion for class certification the court must accept all allegations of the complaint as true and assume that cognizable claims are stated.”⁶⁰ Here the Complaint is a thirty three (33) page detailed account of the discrimination and retaliation that took place at the College.⁶¹

6. A Claim for Certification is Reviewed with Considerable Discretion, Liberally and Doubt Resolved in Favor of Certification.

A liberal construction of Rule 23 should be favored.⁶² In *Marisol A.* the Court held “A district court’s decision to certify a class will be overturned only if the district court abused its discretion. A reviewing court must exercise *even greater deference* when the district court *has certified a class* than when it has declined to do so.”⁶³ Supporting further, the liberal broad interpretation of Rule 23, the Southern District of Florida in 1996, relying on the Supreme Court in *Eisenberg v. Gagnon*⁶⁴ said that “**the interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action.**”⁶⁵

⁵⁹ See also *Dyer v. Publix Super Mkts., Inc.*, 2000 U.S. Dist. LEXIS 4455 (M.D. Fla. Mar. 21, 2000) (“In deciding a motion for class certification the Court should not conduct an inquiry into the merits of the case.”); *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002).

⁶⁰ *Neumont* at 557, quoting the Supreme Court in *Eisen*, 417 U.S. at 177-78. See also, the Southern District of Florida, *In re : John Alden Fin. Corp. Secs. Litig.*, 1996 U.S. Dist. LEXIS 22361 (S.D. Fla. Sept. 30, 1996) (“In determining whether the named plaintiffs have met their burden, the court’s inquiry is limited to whether the requirements of Rule 23 have been satisfied; therefore, the court shall not consider the merits of the plaintiffs’ claims.”)

⁶¹ First Amended Complaint is Docket Number 7

⁶² *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 179 (2d Cir. N.Y. 1990), cert. denied, 498 U.S. 1025 (1991).

⁶³ *Marisol A.*, *supra*, 126 F.3d at 375 (citations omitted). (emphasis added). See also *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1303 (11th Cir. Fla. 2008), A district court’s decisions regarding class action suitability are reviewed for abuse of discretion. A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in reaching its decision, or makes findings of fact that are clearly erroneous.

⁶⁴ 417 U.S. 156, 177-78

⁶⁵ *In re : John Alden Fin. Corp. Secs. Litig.*, 1996 U.S. Dist. LEXIS 22361 (S.D. Fla. Sept. 30, 1996); See also, 766 F.2d 770, 785 (3d Cir.), cert. denied, 474 U.S. 946 (1985).

Finally, a district court has discretion about when to determine class action status, however, the Eleventh Circuit in its 2008 decision in *Mills v. Foremost Ins. Co.*, instructed that the district court is to make the determination “at an early practicable time.”⁶⁶

7. This action meets the Rule 23(a) criteria of numerosity, commonality, typicality and adequate representation.

As described below, this action satisfies the Rule 23(a) criteria of numerosity, commonality, typicality, and adequate representation.

a. Numerosity.

There is no “magic minimum number” for a class according to the 2001 decision in *Russo v. CVS Pharmacy, Inc.*⁶⁷ But according to the Southern District of Florida’s 2010 ruling in *Seff v. Broward County*, 2010 U.S. Dist. LEXIS 141871 (S.D. Fla. Dec. 6, 2010) and the Eleventh Circuit’s 1986 ruling in *Cox v. Am. Cast Iron Pipe CO.*, 784 F.2d 1546, 1553 (11th Cir. 1986), this Circuit has generally held a “**class of less than 21 members is inadequate, and a class of more than 40 members is adequate.**”⁶⁸ See also Newberg & Conte, *Newberg on Class Actions*, § 3.45 (4th ed. 2009) (“[A]s few as 40 class members should raise a presumption that joinder is impracticable and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone”). This is because above that number, individual joinder of all members becomes “impracticable.”⁶⁹ The *Robidoux* Court said “impracticable” simply means “difficult or inconvenient”; it does not mean impossible. As said in *Russo*, the court may make “common sense assumptions” about numerosity: “Precise quantification” of the size of the class

⁶⁶ *Mills v. Foremost Ins. Co.*, 511 F.3d 1300 (11th Cir. Fla. 2008)

⁶⁷ 201 F.R.D. 291 (D. Conn. 2001)(quoting *Jones v. CCH-LIS Legal Information Servs.*, 1998 U.S. Dist. LEXIS 15189 (SDNY 1998).

⁶⁸ *Seff v. Broward County*, 2010 U.S. Dist. LEXIS 141871 at *6 (S.D. Fla. Dec. 6, 2010)

⁶⁹ 47 F.3d 473, 483 (2d Cir. 1995); 987 F.2d 931, 936 (2d Cir. 1993).

is especially not required when the class is obviously far in excess of the minimum number needed to make joinder impracticable.⁷⁰

In this instance, there should be no argument about numerosity. The Complaint alleges that the proposed class exceeds 450 members.⁷¹ A review of the 2005 – 2011 Personnel Reports for Miami-Dade shows how there is no argument to be made about numerosity.⁷² Consider that in 2006 there were a total of 794 custodial maintenance workers employed at Miami Dade College, and in 2011 there were 784 maintenance workers. Now consider that despite only 10 jobs being lost over those years, that 87 jobs held by black or African American's in 2006 were gone by 2011, an 11% decrease in blacks employed in that division. In other words, there are ten less custodial maintenance jobs today, yet somehow the college managed to cut 87 black custodial jobs and replace them with another race. To put it simply, there are more than 40 proposed class members (there are more than 87 in just in the maintenance division alone, 197 jobs lost by African Americans total,⁷³ and others who were discriminated against but did not lose their jobs), it would be "impractical" to join all of them and instead certification is the appropriate treatment.

A review Exhibit 5 of the 2005/06 – 2010/11 Personnel Reports shows the following pertinent data that more than 40 members would make up the class:

⁷⁰ See, e.g., *Russo*, supra, 201 F.R.D. at 295. See also *Vega*, 564 F.3d at 1267 (citing *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983)). (plaintiffs need not show the precise number of potential class members at the time of certification.)

⁷¹ See Docket No. 7, Complaint at ¶ 20 says, "The Class is so numerous that joined or all members is impractical. As of October 25, 2010, the Class consisted of an estimated 451 present and former black custodians at Miami-Dade College."

⁷² See Exhibit 5 - Miami Dade Employee Breakdown by Race and Working Division from 2005/06 School Year to 2010/11 School Year

⁷³ See Exhibit 5 - Miami Dade Employee Breakdown by Race and Working Division from 2005/06 School Year to 2010/11 School Year - where in 2006 there was a total of 1894 black employees, yet in by 2011 the college had slashed that number down to 1697. The College in total only reduced 156 jobs total over that same span. In other words, it replaced numerous black and African American jobs with those of other races.

Year	Total Maintenance Employees	Total black employees employed Maintenance Division	Percentage Black
2006	794	441	56%
2007	765	413	54%
2008	796	423	53%
2009	779	379	49%
2010	778	367	47%
2011	784	354	45%
Total Differences	10 less jobs from 2006 to 2011 (794-784).	87 black jobs lost since 2006 (441 – 354)	11% loss compared to other races

b. Commonality.

Litigation involving statutory requirements applicable to large groups of individuals is perfectly tailored for class action treatment because of the common legal issues. In 2009, the Eleventh Circuit held in *Vega v. T-Mobile USA, Inc.*, that “the commonality requirement demands only that there be questions of law *or* fact common to the class. This part of the rule does not require that all the questions of law and fact raised by the dispute be common.”⁷⁴ According to the Supreme Court in its 2011 decision, *Wal-Mart Stores, Inc., v. Dukes*, the commonality requirement is satisfied if even when one common question is presented; “[w]e quite agree that for purposes of Rule 23(a)(2) “[e]ven a single [common] question will do.”⁷⁵

When it comes to the rigorousness of this element, the Fifth Circuit in *Forbush v. J.C. Penny Co.* said “the threshold of commonality is not high.”⁷⁶ In 1994, the Third Circuit held in

⁷⁴ *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir. Fla. 2009) (emphasis added)

⁷⁵ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. --, 131 S. Ct. 2541, 180 L. Ed. 2d 374, 395 (2011) (“We quite agree that for purposes of Rule 23(a)(2) “[e]ven a single [common] question” will do”); *Powers v. Hamilton County Pub. Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) (“The commonality requirement is satisfied if there is a single factual or legal question common to the entire class.”).

⁷⁶ *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. Tex. 1993)

Baby Neal v. Casey: “[C]hallenges to . . . compliance with the mandates of . . . legislation” satisfy the commonality requirement “even where plaintiff beneficiaries are differently impacted by the violations.”⁷⁷ *Marisol A.* says where the “statutory provisions invoked” are “properly understood” as “setting standards of conduct” that have been “violated in a manner common to the plaintiff class,” class certification is appropriate.⁷⁸ According to the Southern District of Florida in *In re Amerifirst Sec.. Litigation*, even “individualized determinations of damages suffered will not defeat a finding of commonality”⁷⁹ nor will claims that “peculiar” or “unique” defenses “foreclose class certification.”⁸⁰

Applying these principles, there is no question that there is commonality of facts and issues in this case. The only issues that have been identified in this litigation are issues common to all class members. In the First Amended Complaint, the Plaintiffs set forth questions of law and fact common to the classes that remain true today, specifically:

- a. Whether MDC’s actions violate federal and/or state civil rights laws under Title VII and/or the Florida Civil Rights Act;
- b. Whether MDC maintains unwritten policies and/or practices for performing evaluations that discriminate against the Class on the basis of race;
- c. Whether there are statistically significant disparities between the termination, constructive discharge and/or “voluntary resignation” of black custodians and the termination, constructive discharge and/or “voluntary resignation” of similarly-situated Hispanic or Latino custodians, sufficient to permit an inference of intentional discrimination;
- d. Whether MDC maintains unwritten policies and/or practices for determining promotions that discriminate against the Class on the basis of race;
- e. If discrimination is found, whether injunctive relief, including changes to Company-wide written and unwritten policies and practices, is needed to adequately remedy past and present discrimination against the Class and prevent future discrimination against the Class;

⁷⁷ 43 F.3d 48, 56 (3d Cir. 1994).

⁷⁸ 126 F.3d at 377.

⁷⁹ *In re Amerifirst Sec. Litigation*, 139 F.R.D. 423, 428 (S.D. Fla. 1991)

⁸⁰ *In re Amerifirst Sec. Litigation*, 139 F.R.D. 423, 428 (S.D. Fla. 1991)

- f. Whether MDC's conduct constitutes a pattern and practice of discrimination against the Class justifying an award of lost wages, benefits or other similar relief to individual members of the Class;
- g. Whether MDC's conduct constitutes a pattern and practice of discrimination against the Class justifying an award of compensatory and punitive damages to individual members of the Class;

These common questions of law and fact remain; any one of which would be enough to meet the commonality element, but because the class is so narrowly tailored, all of these questions are common to the Class.

Simply stated, each member of the class will share the common legal questions of whether their civil rights were violated because of the color of their skin. Each member of the class will share questions of fact as to whether employment practices (written or unwritten) overseen by the Administrative Services Division were fostering or condoning racial discrimination.

The Plaintiffs claims are common because the question of whether black custodians were disciplined more frequently and more harshly than non-black custodians is at issue. They are common because the Class claims that when black custodians wrote explanations to write-ups they were not properly investigated or taken seriously. In other words, they claim there was no meaningful grievance procedure with the Defendant rubber stamping write-ups and adverse employment action. Each member has common questions as to whether retaliation kept other black custodians from coming forward with complaints. The Class claims are common because questions of why between the 2005/06 school year and the 2010/11 school year did 87 black custodial jobs disappear where non-black custodial jobs grew by about that number dominate. The Class has common questions because they allege that the work they were given, and in particular, the working conditions they were asked to work under, was less desirable than that of non-black custodians. The Class has common questions of whether the Defendant retaliated

against members for reporting acts of discrimination. The Class has common questions because they claim the Defendant did not promote black custodians at the same rate under similar circumstances as compared to non-black custodians. The Class has common questions because the College likely requires an appointment of a federal monitor to be imposed for the purpose of reviewing and assessing their compliance with federal discrimination laws and to implement policy changes the court may order. Testimony during one of the Plaintiffs depositions denotes why there are common questions of fact: “*from when Gloria Baez came about she started creating a paper trail on me, as well as the other black employees at the college.*”⁸¹ The practice of the Administrative Division as applied to get rid of black custodians was, according to the testimony of Mr. Shedrick a “*continuing reprimanding pattern.*”⁸²

c. Typicality.

As the Supreme Court in its 1982 ruling in *General Telephone Co. v. Falcon* said the commonality and typicality requirements tend to merge when the plaintiffs allege that a common policy has caused class wide harm, including harm to the plaintiffs.⁸³ According to *Marisol, A.* typicality is satisfied when “each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.”⁸⁴ In *Baby Neal*, when the same unlawful conduct affects both the named plaintiffs and the putative class, the Third Circuit said the case usually satisfies the typicality requirement.⁸⁵

For the plaintiffs’ claims to be typical, the Eleventh Circuit in 2009 opined in *Vega v. T-Mobile USA, Inc*, that “typicality measures whether a sufficient nexus exists between the claims

⁸¹ Exhibit 2 - Shedrick Deposition Pg. 74

⁸² Exhibit 2 - Shedrick Deposition Pg. 81

⁸³ 457 U.S. 147, 157 (1982)

⁸⁴ 126 F.3d at 376 (quoting *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 291 (2d Cir. 1992)).

⁸⁵ 43 F.3d at 58.

of the named representatives and those of the class at large.”⁸⁶ The Southern District of New York in *Caridad* found, the disputed issue of law or fact must “occupy essentially the same degree of centrality to the named plaintiffs’ claim as to that of other members of the proposed class.”⁸⁷ The same court in a 1991 decision in *Dura-Bilt Corp. v. Chase Manhattan Bank* expressed it another way, “the proper inquiry is whether other members of the class have the same or similar injury” and “whether the action is based on conduct not special or unique to the named plaintiffs.”⁸⁸

Still, typicality is not destroyed merely by factual variations between the named plaintiffs’ claims and the class they seek to represent. Named representatives do not have to be typical employees. As the Eleventh Circuit held in *Appleyard v. Wallace*, “the typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members.”⁸⁹ This is because “a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences.”⁹⁰

Here, the claims of the representative Plaintiffs are typical of those of the class. The Defendant fostered a racially divisive and discriminatory environment that similarly affected all black custodial employees at Miami-Dade College. Specifically, all of the class members were subject to Defendants' racist behavior including the racial comments, disparate treatment and even the segregation of black workers. Plaintiffs have suffered the same or similar damages as the class; their claims are identical to those of the class; and their claims and the claims of the class stem from the same conduct by Defendants. Therefore, Plaintiffs have met the typicality prerequisite.

⁸⁶ *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1275 (11th Cir. Fla. 2009)

⁸⁷ *supra*, 191 F.3d at 293 (quoting *Krueger v. New York Tel. Co.*, 163 FRD 433, 442 (SDNY 1995)).

⁸⁸ 89 F.R.D. 87, 99 (SDNY 1991). *See also*, *Pecere v. Empire Blue Cross*, 194 F.R.D. 66, 72 (EDNY 2000)(class certification denied because case would be “preoccupied with defenses unique” to the named plaintiffs’ physicians).

⁸⁹ *Appleyard v. Wallace*, 754 F. 2d 955, 958 (11th Cir. 1985).

⁹⁰ *Appleyard v. Wallace*, 754 F. 2d 955, 958 (11th Cir. 1985).

d. Adequate representation.

The representative party in a class action should fairly and adequately protect the interests of the class. In the *Drexel* and *General Telephone Co.* cases discussed above, the courts said the adequacy of representation inquiry has two components: (1) whether there is a potential conflict between the named plaintiff and absent class members, and (2) whether class counsel is generally able to conduct the litigation.⁹¹

To meet the lack of conflicts test, the named representatives must be part of the class and possess the same interest and suffer the same injury as the other class members, as the Supreme Court described in its 1977 decision in *East Texas Motor Freight, Inc. v. Rodriguez*.⁹²

As explained in the *Manual for Complex Litigation*, in addition to being free of conflicts, the named representatives should understand their responsibility to vigorously pursue the litigation in the interest of the class.⁹³ This does not require the plaintiffs to be steeped in the intricacies of the litigation. More than 30 years ago, in the Supreme Court case of *Surowitz v. Hilton Hotels*, Hilton Hotels challenged whether a named representative in a shareholder derivative action could “fairly and adequately represent the interests” of all shareholders because she was a Polish immigrant with limited knowledge of English who relied on her son-in-law for explanations.⁹⁴ The Supreme Court ruled that the named representative was interested in her investment and reasonably relied on the investigation of others.⁹⁵ By the same token, this District, in its 2000 ruling in *Macarz v. Transworld Systems*, where the named plaintiff was an

⁹¹ *Drexel*, *supra*, 960 F.2d at 291; *General Telephone*, 457 U.S. 147, 157-58.

⁹² 431 U.S. 395, 403 (1977).

⁹³ (3d ed. 1995), at 221.

⁹⁴ 383 U.S. 363 (1966).

⁹⁵ *Id.* at 371-73. *See also Koch v. Dwyer*, 2001 WL 289972, 2001 U.S. Dist. LEXIS 4085 (S.D.N.Y. March 23, 2001) (rejecting defense contention that plaintiff had an “alarming unfamiliarity with the facts”).

attorney, rejected arguments that named plaintiffs are unfit because they happen to be more sophisticated in some respects than the average class member.⁹⁶

Here, the proposed class representatives all worked for the Defendant for many years. They are committed to having the issues set forth in the complaint fully investigated, discovered, and ultimately decided on the merits. They are passionate about the topics in the case, as one might imagine any plaintiff in a suit about race. But even more importantly, their interests are not antagonistic to other class members, nor do they have conflicting interests. Like the members of the class, they are interested in a speedy, class wide resolution of these issues.

Plaintiffs have hired qualified counsel. They are represented by undersigned, Dale J. Morgado of Feldman, Fox & Morgado, PA, of Miami, Florida. The undersigned counsel has represented plaintiffs in a number of single and multi-party actions, including most recently an October 2011 successful certification of a national class of shift managers by Chief Judge Moody of the Middle District of Florida, in *Espanol et. al. v. Avis Budget*, Case No. 8:10-cv-944T30, along with litigating in *Richards v. Fleetboston*, Case No. 3:04-cv-01638 where a class of over 1000 was certified netting a settlement of nearly 100 million in a complex employee benefits issue; *Arviella v. Lucent*, Case No. 08-10398, taking a case of over 20 former employees to trial concerning the company's alleged breaches of fiduciary duties; *Thompson et. al. v. Linvatec Corporation*, Case No. 06-cv-404, class action concerning ERISA issues; *Elliott et. al. v. Stoneybrook*, Case No. 8:11-cv-02329, representing a group of servers in a collective action about tip pool credits and overtime. The undersigned is also the managing shareholder of the Miami office of his multi-lawyer, multi-office law firm where he has access to resources, additional lawyers, and a large staff that a solo or smaller firms would not have.

⁹⁶ 193 F.R.D. 46, 51 (D. Conn. 2000).

8. The class should be certified under Rule 23(b)(1), (b)(2), and (b)(3) however, the courts are clear that class certification under (b)(2) certification is the most appropriate in civil rights cases because the Defendant has acted on grounds generally applicable to the proposed class.

a. Rule 23(b)(2) is the most logical choice.

Certification under Rule 23(b)(2) is the most appropriate here. As the Supreme Court said in 1997, "Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) classes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 2245 (1997). Indeed, it is "often acknowledged, [that] (b)(2) was deliberately drafted to facilitate the vindication of civil rights through the class action device." *Barefield v. Chevron U.S.A., Inc.*, 48 F.E.P. Cases, 907, 910 1988 WL 188422 (N.D. Cal. 1988).

Here the Defendant has acted and refused to act on grounds generally applicable to the entire class. Plaintiffs have alleged that Defendant has acted in a discriminatory manner generally applicable to the Class, and Plaintiffs have sought declaratory and injunctive relief with respect to the class as a whole. Additionally, the Defendant's general practices have adversely affected all members of the class. For example, in the First Amended Complaint Prayer for Relief Sections, the Plaintiffs are asking, among other things, for "declaratory judgment that the Defendant's employment practices challenged herein are illegal and in violation of Title VII ... and permanently restraining Defendant from engaging in the aforementioned conduct."

In addition to substantial injunctive relief, plaintiffs seek back pay. Back pay awarded under Title VII, while monetary in nature, is a form of equitable relief. *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1152-55 (9th Cir. 1999). Plaintiffs seeking back pay have long secured certification under Rule 23(b)(2). *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776 (9th

Cir. 1986); *Salinas v. Roadway Express*, 735 F.2d 1574, 1576 (5th Cir. 1984); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998).⁹⁷

b. The Class Satisfies the Rule 23(b)(3) Requirements.

In the alternative, Plaintiffs' claims are also suitable for certification under Fed. R. Civ. P. 23(b)(3). In order to obtain certification under Rule 23(b)(3), plaintiffs must show that they meet the requirements of Rule 23(a) (as discussed above), and that "questions of law or fact common to the class members of the predominate," and "a class action is superior to other available methods."

There are many common issues in this case, as discussed above. The common questions all relate to whether the Defendant is liable for a pattern and practice of discrimination against black custodial employees and whether its policies and practices have had a disparate impact and effect on black employees as opposed to non-black employees. Here, Defendant's liability as a result of pattern and practice of discrimination is the *dominant* issue in the case. Moreover, the issue of whether Defendants' are liable for punitive damages is also a significant class-wide issue. Accordingly, the most substantial issues should be decided at the class-wide level, which would leave only discrete questions relating to the allocation of damages on an individual basis.

Here, class action treatment is favorable and superior to other available methods of litigation. The interest in members of the class in individually controlling the prosecution of separate actions is low as evidenced by the four plaintiffs joining together already. The Class definition is

⁹⁷ Plaintiffs also seek a class-wide award of punitive damages to punish Defendants for its reckless disregard of the rights of their African American employees, and to deter similar misconduct by Defendants in the future. An award of punitive damages to the class as a whole is appropriate here because the misconduct warranting punitive damages was perpetrated by Defendants and has adversely affected all African American employees in a similar fashion. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 536 (1991). In awarding punitive damages, Defendants' conduct, not the individual circumstances of class members, is at issue. *Kolstad*, 527 U.S. at 536; *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001). The circumstances of individual class members, therefore, do not preclude the class from seeking a collective award of punitive damages.

also so narrowly tailored that it creates no need for separate actions and is easier than most when it comes to class management. Finally, Plaintiffs can foresee no management difficulties that would preclude this action from being maintained as a class action and are confident that any potential management problems can be addressed and resolved by the parties or by this Court. For these reasons, the proposed Class satisfies the requirements of Rule 23(b)(3).

9. Conclusion and Requested Relief.

For all of the foregoing reasons, Plaintiffs requests that this Court certify the litigation as a class action under 23(b)(2), or alternatively (b)(3) or (b)(1), and further Order the Defendant to turn over the names and address of the members fitting the class description and to begin class wide discovery and present a plan to the Court concerning class wide discovery.

/s/ Dale J. Morgado

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Trial Counsel and Lead Attorney for Plaintiffs

Local Rule 3.01(g) Conferral

Pursuant to Local Rule 3.01(g), undersigned counsel has conferred with defense counsel in a good faith effort to resolve the issues addressed in this Motion. Defense counsel has stated that Defendant opposes the relief requested in the Motion

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on 1/6/11, I electronically filed the foregoing with the clerk of the Court by using the *CM/ECF* system which will send a notice of an electronic filing to all parties.

/s/ Dale J. Morgado
Dale J. Morgado