(2004)

DAVID COKELY, NATASHA PEREZ, SEAN HANNAH, JULIO TERAN, Individually and as Class Representatives on behalf of all others similarly situated, and DENNIS CROWLEY, ROBERT IADAROLA and DANIEL PERRELLA, Individually, Plaintiffs,
v.
THE NEW YORK CONVENTION CENTER OPERATING CORPORATION d/b/a/ JACOB K. JAVITS CONVENTION CENTER OF NEW YORK, RICHARD POWERS, GERALD MCQUEEN AND ALEXANDER TOMACZUK, Defendants.

No. 00 Civ. 4637 (CBM).

United States District Court, S.D. New York.

May 20, 2004.

OPINION

CONSTANCE MOTLEY, Senior District Judge.

By Memorandum Opinion and Order, this Court denied plaintiffs' Motion for Class Certification without prejudice, *Cokely v. New York Convention Ctr. Operating Corp.,* 2003 WL 1751738, at *6, (S.D.N.Y. Apr. 2, 2003) ("*Cokely Class Cert. I*"), on the ground that plaintiffs had failed to compile sufficient evidence for the court to undertake "a rigorous analysis" to determine whether "the pre-requisites of Rule 23(a) have been satisfied." *Id.* at *3 (citing *Gen. Tel. Co. v. Falcon,* 457 U.S. 147, 157 n.13 (1982)). The Court granted plaintiffs "leave to refile this motion as soon as they have gathered more evidence of commonality and typicality, either in the form of a statistical analysis, or in the form of affidavits from a number of plaintiffs, or both." *Id.* at *6. Plaintiffs have renewed their motion, and defendants have once again filed papers in opposition. For the reasons that follow, plaintiffs' motion is granted.

BACKGROUND[1]

Plaintiffs David Cokely, Natasha Perez, Sean Hannah and Julio Teran, on behalf of themselves and all other persons similarly situated, bring this putative class action, alleging racial discrimination and retaliation, against the New York Convention Center Operating Corporation ("NYCCOC"), the entity that runs the Jacob K. Javits Convention Center ("the Javits Center"), as well as three individuals, Richard Powers ("Powers"), Gerald McQueen ("McQueen") and Alexander Tomaczuk ("Tomaczuk") (collectively, "Individual Defendants"). The suit is brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*; the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1981 *et seq.*; the 1991 Civil Rights Act, as amended, 42 U.S.C. § 1981a *et seq.*; and 42 U.S.C. § 1983 *et seq..*

In their Second Amended Complaint, plaintiffs allege that the discrimination practiced by the white males who run the Javits Center is manifested in four different ways. First, plaintiffs complain that the job allocation and promotion system is manipulated to give white male employees preferences with respect to the type and amount of work assigned, and greater opportunities to obtain higher paying jobs at the Javits Center. Second, plaintiffs claim that management has created, and condones, a hostile work environment, rife with racist and misogynist epithets. Third, plaintiffs allege that they have been denied

various privileges of employment and singled out for reprimand because of their race. Finally, plaintiffs argue that they have suffered retaliation for complaining to management about this discrimination.

DISCUSSION

Plaintiffs' Renewed Motion for Class-Certification

In their renewed motion, plaintiffs offer two alternative schemes for certification:

Scheme A.

Plaintiffs move that the court certify "a class of all black and Hispanic persons who are or have been employed as freight handlers, carpenters or housekeepers at the Javits Center from July 1, 1995 to the present (`the Class')." Pls.' Mem. in Supp. of First Mot. for Class Certification at 2.[2] "The representative plaintiffs seek certification on behalf of the entire Class, including their claims for injunctive and equitable relief, backpay and compensatory and punitive damages under Rule 23(b)(2)." Id. at 2-3; or, alternatively,

Scheme B.

Plaintiffs move that the court "certify the Class's claims for injunctive and other equitable relief under Fed. R. Civ. P. 23(b)(2), and . . . certify the claims for the Class's compensatory and punitive damages under Fed. R. Civ. P. 23(b)(3), with three separate 23(b)(3) subclasses consisting of: (1) minority freight handlers; (2) minority carpenters; and (3) minority [part-time] housekeeping employees." *Id.* at 3.[3]

The court declined to certify this class the last time plaintiffs so moved, on the grounds that in "making a certification decision, a judge must look *somewhere between the pleading[s] and the fruits of discovery,*" and plaintiffs had provided only one affidavit of one named plaintiff beyond the pleadings already submitted. *Cokely Class Cert. I,* 2003 WL 1751738, at *3 (citing *In re Philip Morris, Inc.,* 214 F.3d 132, 135 (2d Cir. 2000)(emphasis and alteration in original).

Sufficiency of the Evidence Submitted

Plaintiffs have provided material beyond the pleadings in support of their renewed motion. They have provided sworn statements of seven minority freight handlers, four minority carpenters, and three minority housekeepers, who testify to discrimination within the "shaping" system[4] and the seniority and promotion system, unequal disciplinary measures, and a hostile work environment. Affirmation of Neil Fraser dated May 16, 2003 ("Fraser May Aff."), Exs. 3-9, 13-18. They have also provided the sworn statements of three Caucasian freight handlers who testify to pervasive and overt racism at the Javits Center, and who claim to have suffered retaliation for complaining about it. Fraser Aff., Exs. 10-12.[5]

In addition to the affidavits, plaintiffs have provided union grievance forms alleging racial discrimination and harassment at the Javits Center; letters detailing the same; verified complaints filed with the New York State Division of Human Rights ("NYSDHR"), detailing the same; probable cause determinations rendered by the NYSDHR with reference to the complaints; and complaints filed with the Equal Employment Opportunity Commission ("EEOC"), Fraser May Aff., Exs. 19-40, as well as a memo denying a union grievance and attached correspondence; a table of "Teamsters Calls" apparently demonstrating how often certain Javits Center employees are called for work and how much money they have earned; a letter in reference to an attached table of journeymen carpenters with racial background identified; and a decision issued by an impartial arbitrator in reference to a dispute between two members of the plaintiff class and two white employees of the Javits Center. Affirmation of Neil Fraser dated June 16, 2003 ("Fraser June Aff."), Exs. 1-4, respectively. Lastly, plaintiffs have submitted some statistics calculated by one of their attorneys purporting to demonstrate that plaintiffs are paid less than white employees. Fraser May Aff. at 2.

Defendants argue, as before, that plaintiffs have failed to provide sufficient evidence for the court to undertake an analysis of the typicality and commonality of the claims as required for certification under Rule 23. Specifically, they argue that the court provided a "road map" in Cokely Class Cert. I which plaintiffs failed to follow. NYCCOC Mem. in Supp. at 4; the statistics offered by plaintiffs are of no probative worth, *id.*; the Affidavits are from an insufficiently large sample of plaintiffs and flawed as to what they assert and how they assert it, *id.* at 9, 11-12; and the additional supporting materials are largely inadmissible and duplicative. *Id.* at 13.

We are not persuaded by defendants' argument that plaintiffs have failed to adhere to the court's instructions. The court would have preferred plaintiffs to have hired an expert to provide a statistical analysis of the employment data (and assumes that they will do so before trial). However, the court's instructions were not rigorous:[6] We asked that, "If plaintiffs are in possession of the materials to make *a statistical showing,* they should do so." (emphasis added). They have done so. We concluded the opinion by stating that plaintiffs were granted leave to file their certification motion "as soon as they have gathered *more evidence of commonality and typicality,* either in the form of a statistical analysis, or in the form of affidavits from a number of plaintiffs, or both." (emphasis added). They have done both.

The court limited its order in this way for three reasons. First, the Second Circuit has set a low standard regarding the amount of evidence which must be submitted. *See* *In re Philip Morris,* 214 F.3d at 135. Second, as it noted in the last Opinion, the court was already quite "familiar with the pleadings and the similarities of at least some of the allegations of the eighty-eight plaintiffs. . . ." *Cokely Class Cert. I,* 2003 WL 1751738, at *2.[7] Finally (again, as stated in the last Opinion),

Judges sitting and living in New York City can take judicial notice of the fact that discrimination based on race, nationality and gender have been endemic in the construction industry over the past several decades. *See* *Grant v. Martinez,* 973 F.2d 96 (2d Cir. 1992); *see also* *United States v. Wood, Wire and Metal Lathers Int'l Union, Local Union 46,* 328 F.Supp. 429 (S.D.N.Y. 1971); *Rios v. Enterprise Ass'n Steamfitters Local Union No. 638 of U.A.,* 326 F.Supp. 198 (S.D.N.Y. 1971).

Id. at *3 n.3.

Thus, in light of the court's familiarity with the facts of the case and its general awareness of discrimination in the construction industry in recent years, the affidavits are sufficient to allow this court to conclude that the evidentiary requirements established by our previous opinion have been satisfied.

Rule 23

To qualify for certification, a proposed class must meet the four requirements of Rule 23(a), as well as at least one of the requirements of Rule 23(b). "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 516, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (internal quotations omitted). In deciding a class certification motion, the court "must not consider or resolve the merits of the claims of the purported class." *Caridad v. Metro-North Commuter R.R.,* 191 F.3d 283, 293 (2d Cir. 1999). Rather, the court accepts the substantive allegations in plaintiffs' complaint as true. *Shelter Realty Corp. v. Allied Maint. Corp.,* 574 F.2d 656, 661 n. 15 (2d Cir. 1978).

Rule 23(a)

In order to be certified as a class, plaintiffs must show that:

(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.

Fed. R. Civ. P. 23(a). As regards the interrelation of these criteria, the Supreme Court has noted that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *Falcon,* 457 U.S. at 158 n. 13. Before certifying a class, the court must be persuaded, "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161.

As discussed below, plaintiffs have made the requisite showing.

(1) Numerosity

While there is no exact numerical threshold that plaintiffs must reach, *see Latino Officers Ass'n City of New York v. City of New York,* 209 F.R.D. 79, 88 (S.D.N.Y. 2002) (hereinafter "*Latino Officers*"), the Second Circuit has suggested that numerosity is presumed when there are more than forty class members. *See Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir. 1995) (citation omitted). Plaintiffs in the instant case number in the hundreds, both as an overall class and within each proposed subclass. Kuridza Aff. at 3;[8] Fraser May Aff. at 2.[9] This requirement is therefore satisfied.

(2) Commonality

"The commonality requirement is satisfied if plaintiffs' grievances share a common question of law or of fact." *Marisol A. v. Giuliani,* 126 F.3d 372, 376 (2d Cir. 1997). To satisfy the "commonality" requirement of Rule 23(a)(2), the named plaintiffs need show only a single question of fact or law common to the prospective class. *Robinson v. Metro-North Commuter R.R.,* 267 F.2d 147, 155 (2d Cir. 2001) (quoting *Marisol A.,* 126 F.3d at 376). Furthermore, class members need not allege that they all suffered the same injury to show commonality; "demonstrating that all class members are *subject* to the same harm will suffice." *Gulino v. Bd. of Educ. of City Sch. Dist. of New York,* 201 F.R.D. 326, 331 (S.D.N.Y. 2001) (quoting *Baby Neal ex rel. Kanter v. Casey,* 43 F.3d 48, 56-57 (3d Cir. 1994)) (emphasis in *Baby Neal*).

Plaintiffs argue that several issues at the core of this case — whether there exist at the Javits Center (1) a pattern and practice of discriminatory treatment in the form of a biased "shaping" and seniority system for freight handlers and carpenters or in the form of a refusal-to-promote policy with regard to housekeepers; (2) a disparate impact with regard to work assignments as a result of the work assignment systems; (3) a pattern and practice of disparate treatment with regard to the disciplining of minority employees; (4) a hostile work environment for all minority workers owing to racist graffiti and verbal slurs; and (5) retaliation for complaining about the same — are common at least within each proposed subclass.

For the subclasses of Freight Handlers and Carpenters, plaintiffs have demonstrated that there are common questions of fact regarding the work assignment and seniority systems (see Hannah ¶¶ 3, 4; Cokely ¶ 3; Dawson ¶ 1; Perez ¶¶ 3, 4; Coleman ¶¶ 3, 4, 5; Clara Ballard ¶ 2;[10] Charles Ballard ¶ 3; Todman ¶¶2, 3) as well as discrimination in disciplining employees. See Hannah ¶ 10; Cokely ¶ 18; Perez ¶ 5; Coleman ¶ 5; Dawson ¶ 11; Charles Ballard ¶¶ 12, 13. For the subclass of Housekeepers, plaintiffs have demonstrated that there are common questions of fact regarding a de facto refusal-to-promote policy. Albuja ¶ 3; Teran ¶ 3; del Pino ¶6. *See also* Second Am. Compl. ¶ 32 & n. 3 ("as of 1997, the most current data available to plaintiffs, every single one of the more than 200 housekeeping employees was a

member of a racial minority") (emphasis in original). For the class as a whole, there is sufficient evidence of a hostile work environment and management's failure to address it (*see* Hannah ¶ 9; Cokely ¶¶ 5-9; Dawson ¶ 6; Perez ¶¶ 6-9; Coleman ¶¶ 6, 7; Clara Ballard ¶¶ 4-7; Charles Ballard ¶¶ 2-10; Iadarola ¶ 3; Crowley ¶ 3; Perrella ¶¶ 2, 6; Armistead ¶¶ 3-6; Teran ¶¶ 4, 5; del Pino ¶¶ 4, 5), and retaliation against those employees who complain (*see* Cokely ¶¶ 4, 13, 14; Dawson ¶¶ 10, 11; Perez ¶¶ 10, 11; Charles Ballard ¶ 14; Armistead ¶ 6; Todman ¶ 8; Teran ¶ 5), to satisfy the commonality requirement.

(3) Typicality

Typicality requires that the claims of the class representatives be typical of those of the class, and "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." *Marisol A.,* 126 F.3d at 376 (quoting *In re Drexel Burnham Lambert,* 960 F.2d 285, 291 (2d Cir. 1992)). The typicality criterion "does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact `occupy essentially the same degree of centrality to the named plaintiff's claims as to that of other members of the proposed class.'" *Caridad,* 191 F.3d at 293 (quoting *Krueger v. New York Tel. Co.,* 163 F.R.D. 433, 442 (S.D.N.Y. 1995)). "The rule is satisfied . . . if the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members." *Marisol A. v. Giuliani,* 929 F.Supp. 662, 691 (S.D.N.Y. 1996), *aff'd,* 126 F.3d 372 (2d Cir. 1997).

The typicality requirement helps to protect the due process rights of absent class members. *Latino Officers,* 209 F.R.D. at 89. In that vein, "the primary criterion for determining typicality is the forthrightness and vigor with which the representative party can be expected to assert the interests of the members of the class." *Id.* at 89-90 (citation and internal quotation marks and brackets omitted); *see also In re NASDAQ Market-Makers Antitrust Litig.,* 169 F.R.D. 493, 510 (S.D.N.Y. 1996) (As long as the class representatives have "incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions," the representatives satisfy the typicality requirement).

Plaintiff Cokely, an African American freight handler, alleges racial discrimination in the assignment of work opportunities. Although he is on the 60-person "Seniority List,"[11] he claims that he is sometimes forced to participate in the allegedly discriminatory "shaping" system. He also alleges discriminatory discipline, retaliation, and a hostile work environment, including racist insults of the most offensive kind. His claims include an allegation of inaction by Richard Powers in response to his complaint regarding racist language addressed to him by Frank Cassano.

Plaintiff Hannah, an African American carpenter, alleges that the work assignment process is highly discriminatory in nature. He is a "leadman" with an Installation & Dismantle house ("I&D house"), which means that some of his work opportunities come from that house, rather than from the standard Javits Center system of allocating work assignments. However, it is often the case that he has no offer of work from his I&D house, and must rely on the regular system of work assignment, namely waiting for work calls, or taking part in the "shaping" system. He claims that his work calls have been disproportionately few, and that he has received little work through shaping. He also claims that he is subject to a racially hostile environment, and a discriminatory disciplinary system.

Plaintiff Perez, an African American freight handler, claims that she has been discriminated against on the basis of race and gender with respect to her work opportunities. She claims that she has received fewer work calls than similarly situated white co-workers and claims that the "shaping" system is discriminatory. She also claims that she has suffered from discrimination in the allocation of Hi/Lo operation assignments.[12] She also alleges a hostile work environment and retaliation.

Plaintiff Teran, a Hispanic housekeeper, alleges that McQueen, Powers and Tomaczuk "have refused to give permanent employment status to myself or other housekeeping employees because we are mostly

black and Hispanic." He also alleges that "[m]anagers and other white employees at the Javits Center treat housekeeping workers with contempt and hostility," for example by taunting and mocking the housekeeping employees as they dump garbage on the floor. He also alleges retaliation by Mr. Tomaczuk against him and the other housekeepers.

Like the plaintiffs in *Latino Officers,* plaintiffs in the instant case complain "of racial discrimination. They seek relief under legal theories applicable to the class as a whole." *Latino Officers,* 209 F.R.D. at 89.[13] With respect to the claims of a pattern or practice of disparate treatment in the work assignment and seniority systems, in refusing to promote housekeepers, in disciplining minority employees and in retaliating against those who complain, the nature of the discrimination and the legal relief sought are the same. We note that the factual backgrounds of the representative plaintiffs and the members of the class are not identical. The claims relating to work opportunities for minority employees, for example, are, in the case of the housekeepers, centered around their alleged inability to obtain "permanent" status, or to apply for more desirable jobs, while in the case of the show labor personnel, they are centered around the way in which work is assigned. However, this is no bar to certifying the class. Firstly, factual backgrounds need not be identical. *Caridad,* 191 F.3d at 293. Secondly, at the root of the claims of both the housekeepers and the show labor personnel is an allegation of pervasive subordination of minority employees. *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 597 (2d Cir. 1986) ("The *Falcon* Court did not hold that a plaintiff asserting one particular type of employment discrimination claim can never represent a class of employees asserting other types."). Thirdly, should it appear at a later stage that subclasses need to be created, the court retains the discretion to bring that about. *See Marisol A.,* 126 F.3d at 379. Thus, the court finds that plaintiffs have satisfied Rule 23(a)(3)'s typicality requirement.

(4) Adequacy of Representation

Generally, adequacy of representation is assessed according to whether: 1) plaintiffs' interests are antagonistic to the interests of other members of the class and 2) plaintiffs' attorneys are qualified, experienced and able to conduct the litigation. *Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.,* 222 F.3d 52, 60 (2d Cir. 2000). *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 625-26, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), *quoted in Robinson,* 267 F.3d at 171 ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (internal quotation marks omitted)) (alterations in the original).

The Second Circuit has noted that "not every potential disagreement between a representative and class members will stand in the way of a class suit." *In re Visa Check/Master Money Antitrust Litig.,* 280 F.3d 124, 145 (2d Cir. 2001) (quoting 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 3.26, at 3-143 (3d ed. 1992)). Rather, "[t]he conflict that will prevent a plaintiff from meeting the Rule 23(a)(4) prerequisite must be fundamental." *Id.* (quoting Newberg § 3.26, at 3-143 to 144). At the class certification stage, "speculative conflict should be disregarded." *Id.* (quoting Newberg § 3.25, at 3-136).

The court is satisfied that plaintiffs' counsel have sufficient experience in class action litigation to represent the interests of the class adequately and fairly, and, in any event, defendants do not contest that aspect of the adequacy requirement. Defendants do, however, challenge the adequacy of the proposed class representatives. They argue that the nature of the relief being sought will create conflicts between the named representatives and the class, as well as between the subclasses. For example, if Housekeepers succeed in ending the alleged refusal-to-promote policy and thus become eligible for work as freight handlers, Freight Handlers will have more competition for jobs. This argument fails for three reasons. First, it is speculative in nature. *See Visa Check,* 280 F.3d at 145. To the extent that Housekeepers succeed in becoming freight handlers, there is insufficient indication that there would be a meaningful impact on the job prospects of class members. Second, this argument would prevent any plaintiffs from seeking to enjoin discriminatory promotion policies, because that would inevitably lead to competition between class members. *See* Spriggs, Title VII Class Actions, § 26.07[1][c] ("Sometimes defendants argue that there is a `conflict of interest' if two or more class members compete for the same job. This is the kind of argument that should die of its own weight because, if given credence, it would

lead to an end of hiring and promotion class actions.") Third, plaintiffs' allegation is not simply that housekeepers cannot become freight handlers. The allegation is that minority housekeepers are barred from applying for any other job at the Javits Center. Second Am. Compl. ¶ 32. Consequently, any increase in competition between class members is less severe than defendants suggest.

We are persuaded by plaintiffs' arguments that the potential conflicts suggested by defendants are not "fundamental and actual rather than hypothetical and speculative." *Latino Officers,* 209 F.R.D. at 90. We note that we retain the discretion to revisit the question of the adequacy of the representation at a later stage, should that become necessary. *See* Fed.R.Civ.P. 23(d)(3), Advisory Committee Note (1966) ("Subdivision 23(d)(3) reflects the possibility of conditioning the maintenance of a class action . . . on the strengthening of the representation . . ."). At this stage, we find that plaintiffs have satisfied Rule 23(a)(4)'s adequacy of representation standard.

Rule 23(b)

Even when, as in this case, the Rule 23(a) requirements are satisfied, a class may be maintained only if it qualifies under at least one of the categories provided in Rule 23(b). Of plaintiffs' two proposed certification schemes, one would utilize Rule 23(b)(2) only, while the other would draw on both Rule 23(b)(2) and Rule 23(b)(3).

Rule 23(b)(2)

Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). The (b)(2) class action is "intended for cases where broad, class-wide injunctive or declaratory relief is necessary to redress a group-wide injury." *Robinson,* 267 F.3d at 162. Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples. *Amchem,* 521 U.S. at 614, 117 S.Ct. at 2245. A district court "may allow (b)(2) certification if it finds in its informed, sound judicial discretion that (1) the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed, and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy." *Robinson,* 267 F.3d 147 at 164 (internal quotations omitted). The court should, "at a minimum, satisfy itself of the following:

(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits." *Robinson,* 267 F.3d at 164.

Rule 23(b)(3)

Rule 23(b)(3) permits class certification "if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

Rule 23(b)(3) includes a nonexhaustive list of factors pertinent to the court's "close look" at the predominance and superiority criteria:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

It is often proper for a district court to view a class action liberally in the early stages of litigation, since the class can always be modified or subdivided as issues are refined for trial. *Woe v. Cuomo,* 729 F.2d 96, 107 (2d Cir. 1984). *See Marisol A.,* 126 F.3d at 379 ("Rule 23 gives the district court flexibility to certify subclasses as the case progresses and as the nature of the proof to be developed at trial becomes clear."). "The rule's inherent flexibility, and the district court's ability to manage the litigation as it develops, counsel against decertification." *Marisol A.,* 126 F.3d at 377. "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility . . ." *Sharif ex rel. Salahuddin v. New York State Educ. Dep't,* 127 F.R.D. 84, 87 (S.D.N.Y. 1989), quoted in *Marisol A.,* 126 F.3d at 377. *See Eisen,* 391 F.2d at 563.

The Second Circuit has referred to four alternatives utilized by courts in Rule 23(b)(2) class actions seeking injunctive relief coupled with individual damage claims:

(1) limit certification to certain issues; (2) certify the claims for injunctive relief under Rule 23(b)(2) and the damages claims under Rule 23(b)(3); (3) certify the entire class under Rule 23(b)(2) and reconsider the certification category if the class is successful at the liability stage; and (4) certify certain issues and treat other issues as incidental ones to be determined separately after liability to the class has been resolved. *Robinson,* 267 F.3d at 162 n.7 (citing 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 4.14, at 4-51 to 4-52 (3d ed. 1992)).

We find that the third option mentioned in *Robinson* is the most promising alternative at this stage, and we therefore certify the entire class under Rule 23(b)(2),[14] with the intention of reconsidering the certification category if the class is successful at the liability stage. Like our sister court in *Gelb,* we "subscribe to the approach of several commentators that . . . `If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2).'" *Gelb v. Am. Tel. & Tel. Co.,* 150 F.R.D. 76, 78 (S.D.N.Y. 1993) (quoting Charles A. Wright, et al., 7A Federal Practice and Procedure: Civil 2d, § 1775, at 470 (1986)). Under 23(b)(2), defendants are alleged to have acted on grounds applicable to the class as a whole. Those grounds are racist grounds. We find that the value to the plaintiffs of the injunctive relief sought predominates over the value of the monetary relief sought. Plaintiffs allege a work environment in which pervasive racism not only cripples earning potential, partly through dishonest manipulation of a supposedly random system of work assignment, and jeopardizes the jobs of those who are subjected to retaliation and/or discriminatory discipline, but also infects the work environment, manifesting itself in the form of vicious verbal slurs, physical attacks, and death threats. Were these allegations to prove true, reform would be urgent, and long overdue for those who allege that they have suffered ongoing retaliation in response to their complaints. We are thus satisfied that "even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought." *Robinson,* 267 F.3d at 164. We are also satisfied that the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits. *Robinson,* 267 F.3d at 164. Indeed, were plaintiffs to succeed on the merits, the risk of retaliation could reasonably be expected to be greater than ever, and thus injunctive relief restraining defendants from retaliation would be particularly urgent. While it may be that individualized damages issues would make it necessary to adopt an approach other than the single class, we are confident that a single class can be efficiently administered at the liability stage.

[1] Because this is a renewed motion, the court will quote liberally from *Cokely Class Cert. I.* The court presumes familiarity with that decision, which addressed several of defendants' arguments in opposition to the proposed class certification.

[2] Since there are two sets of briefing papers relating to this motion, the court will cite those relating to the first round explicitly. Those citations without the phrase "First Motion" refer to the papers submitted by the parties on the renewed Motion.

[3] Plaintiffs have conceded that they do not seek to represent all minority housekeepers at the Javits Center — only part-time housekeepers. Pls.' Reply at 15. The court may exercise its discretion "to construe the complaint or redefine the class to bring it within the scope of Rule 23, or it may allow plaintiff to amend in order to limit the class." 7A Charles Al Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ.2d § 1759 (2003) (citations omitted); Fed. R. Civ. P. 23(c)(1). This opinion will refer to part-time housekeepers simply as Housekeepers.

[4] The "shaping" system is the Javits Center method for assigning work to those carpenters and freight handlers who are not called ahead of time for a particular job, but rather show up on a daily basis hoping to find an opening on a work crew. Second Am. Compl. ¶ 27. It is held out as a lottery system, whereby the worker writes his or her name on a slip of paper and puts it in a box to be drawn out at random. Id. Plaintiffs allege that the system is not at all random and that minority workers receive fewer shaping assignments as a result. Id. ¶ 28.

[5] This Opinion will cite the affidavits attached to the Fraser Affirmation dated May 16, 2003, collectively as "the Affidavits" and individually by using the last name of the person swearing the affidavit followed by the paragraph (e.g. "Hannah ¶___"). The following is the order of the affidavits, for Fraser Aff. Exs. 3-18: Sean Hannah (Ex. 3); David Cokely (Ex. 4); Anthony Dawson (Ex. 5); Natasha Perez (Ex. 6); Marion Powell Coleman (Ex. 7); Clara Ballard (Ex. 8); Charles Ballard (Ex. 9); Robert Iadarola (Ex. 10); Dennis Crowley (Ex. 11); Daniel Perrella (Ex. 12); Swafiya Armistead (Ex. 13); Ulric Todman (Ex. 14); Hugo Albuja (Ex. 15); Julio Teran (Ex. 16); Jose del Pino (Ex. 17); Barry Harbison (Ex. 18).

[6] Defendant NYCCOC's statement that the court required that the statistics must be "in the form of an `analysis' prepared by an expert for the court's consideration," Memo in Opp. at 4, reveals a misunderstanding of our statement that in this case, unlike others heard in this Circuit, "there has been no statistical analysis prepared by an expert offered for the court's consideration." We meant by that statement to distinguish those other cases, rather than to issue an instruction to plaintiffs.

[7] Also, as noted in that decision, "[t]he court's familiarity derived from having scrutinized the first two complaints and having issued opinions with respect to the motions to dismiss filed after each." *Cokely Class Cert. I,* 2003 WL 1751738, at *2 n.1 (citations omitted).

[8] According to NYCCOC records, during the period from July 1995 to April 2003, NYCCOC employed a total of at least 521 housekeepers who are either black or Hispanic, at least 460 freight handlers who are either black or Hispanic, and at least 524 carpenters who are either black or Hispanic.

[9] Fraser's Affirmation states that "According to the information provided by the Javits Center, during the year 2000, the Javits Center employed at least 713 Class members, including: at least 244 African-American and Hispanic carpenters, 219 African-American and Hispanic Freight Handlers, and at least 250 African-American and Hispanic housekeepers."

[10] Clara Ballard began employment at the Javits Center as a freight handler in 1998, and became a carpenter in 1999. Clara Ballard ¶ 2.

[11] According to the Second Amended Complaint, the "Seniority List" consists of 60 freight-handlers who "receive first priority for job assignments, and who are essentially guaranteed work assignments on a daily basis." Second Am. Compl., ¶ 29. Those on the Seniority List are "exempt" from the "shaping" system. *Id.*

[12] A Hi/Lo is a piece of heavy equipment. Cokely ¶ 18. Hi/Lo operation is one of the "better paying jobs" at the Javits Center. Albuja ¶ 3.

[13] See Pls.' Mem. in Supp. at 13 ("[T]he Representative Plaintiffs and all Class members seek recovery under the same legal theories: disparate impact, disparate treatment, retaliation and hostile work environment.").

[14] Like our sister court in *Gelb v. Am. Tel. & Tel. Co.,* we "subscribe to the approach of several commentators that . . . `If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2).'" *Gelb v. Am. Tel. & Tel. Co.,* 150 F.R.D. 76, 78 (S.D.N.Y. 1993) (quoting Charles A. Wright, et al., 7A Federal Practice and Procedure: Civil 2d, § 1775, at 470 (1986)).