IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

QUINTON BROWN, RAMON ROANE, ALVIN SIMMONS, SHELDON SINGLETARY, GERALD WHITE, JASON GUY, and JACOB RAVENELL, individually and on behalf of the class they seek to represent,	)	Civil Action No.: 2:04-22005-CWH
Plaintiffs,	)	
vs.	)	**ORDER**
NUCOR CORPORATION and NUCOR STEEL-BERKELEY,	)	
Defendants.	)	

This Order marks the seventh time this Court has addressed the issue of class certification in this case.[1] The matter is before the Court on the defendants' motion for decertification of the hostile work environment class based on the United States Supreme Court's recent decision in Comcast Corp. v. Behrend, 569 U.S. ---, 133 S. Ct. 1426 (2013) ("motion to decertify") (ECF No. 428). On September 5, 2013, the Court heard oral argument on the motion. For the reasons set forth in this Order, the defendants' motion to decertify is denied.

[1] See ECF No. 224 (Order denying plaintiffs' motion for class certification); ECF No. 259 (Order denying plaintiffs' motion to reconsider denial of class certification); ECF No. 339 (Order denying defendants' motion to deny class certification and certifying a class under Rule 23(b)(3)); ECF No. 359 (Order denying defendants' motion to reconsider class certification, denying defendants' motion to stay, and denying in part and granting in part defendants' motion to modify the class); ECF No. 409 (Order granting the defendants' motion to decertify the class with respect to the disparate treatment and disparate impact claims and denying the defendants' motion to decertify the class with respect to the hostile work environment claim); ECF No. 426 (Order denying the plaintiffs' motion to reconsider the Court's class decertification with respect to the disparate treatment and disparate impact claims).

I. BACKGROUND

A. Facts

The Court assumes familiarity with the facts of this case, which are set forth in detail in the Court's Order of February 17, 2011 (ECF No. 339).

B. Procedural History

The following procedural history is relevant to the motion at hand. This case was originally filed in the Western District of Arkansas on December 8, 2003, as a nationwide class action alleging employment discrimination against Nucor Corporation and several of its subsidiaries. The action was severed into four separate cases on July 19, 2004, and each case was transferred to the judicial district in which the unlawful employment practices allegedly occurred. The named plaintiffs in this particular case are seven African-Americans who are or were employed at the Nucor Steel plant in Huger, South Carolina ("the Berkeley plant"). The plaintiffs allege that Nucor Steel-Berkeley and Nucor Corporation (collectively "the defendants") discriminated on the basis of race with respect to their promotions. The plaintiffs advance causes of action for disparate treatment, disparate impact, and a hostile work environment.

1. This Court Denies Class Certification

On May 7, 2007, the plaintiffs moved to certify the following class:

> All African-Americans who are or were employed at the Nucor Berkeley manufacturing plant in Huger, South Carolina at any time since December 2, 1999 in the beam mill, hot mill, cold mill, melting, maintenance and shipping departments (hereafter "production departments") or, in the alternative, for such separate classes or subclasses of such persons as may be appropriate under the Federal Rules of Civil Procedure.

(Mot. for Class Certification 1, ECF No. 184). On August 7, 2007, this Court denied the plaintiffs' motion for class certification, holding that the plaintiffs had failed to satisfy the

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requirements of Rule 23(a). (ECF No. 224). The plaintiffs moved for reconsideration (ECF No. 228), and the Court denied the motion (ECF No. 259).

2. The Fourth Circuit Reverses

Two years later, on August 7, 2009, a 2-1 panel of the Fourth Circuit Court of Appeals reversed. In its initial Order, the Fourth Circuit concluded that the plaintiffs had satisfied the requirements of Rule 23(a) and Rule 23(b)(3) and remanded the case to this Court "with instructions to certify the appellants' class action . . . ." Brown v. Nucor Corp., No. 08-1247, at 19 (4th Cir. Aug. 7, 2009), amended by Brown v. Nucor Corp., 576 F.3d 149, 160 (4th Cir. 2009). On October 8, 2009, the panel modified its opinion by deleting its lone reference to Rule 23(b)(3). The portion of the majority's opinion instructing this Court to certify the class remained unchanged. Brown, 576 F.3d at 160.

3. This Court Certifies a Class on Remand

On October 22, 2009, the defendants filed their motion for consideration of Federal Rule of Civil Procedure 23(b) and motion to deny class certification, urging this Court to analyze the putative class under Rule 23(b) and to deny class certification. (ECF No. 308). Although the Fourth Circuit remanded the case "with instructions to certify the appellants' class action," Brown, 576 F.3d at 160, the defendants insisted that the Fourth Circuit's opinion governed only the 23(a) analysis and that this Court could deny class certification if it found the plaintiffs had not satisfied Rule 23(b). In response, the plaintiffs argued that by instructing this Court to "certify the appellants' class action," the Fourth Circuit's opinion required this Court to certify a class under either Rule 23(b)(2) or a hybrid of 23(b)(2) and 23(b)(3) because those were the provisions pursuant to which the plaintiffs originally sought certification.

On February 17, 2011, this Court issued an Order (ECF No. 339) certifying a class under Rule 23(b)(3). The Court agreed with the plaintiffs that, in light of the Fourth Circuit's opinion, the Court was required to certify a class. Order Den. Defs.' Mot. to Den. Class Certification 11, Feb. 17, 2011, ECF No. 339 ("Order Granting Class Certification"). However, the Court also found that by removing its lone reference to Rule 23(b), the Fourth Circuit had given the Court discretion to conduct a Rule 23(b) analysis for the purpose of determining the type of class to certify. Id. at 13-15.[2] Accordingly, this Court considered the plaintiffs' class under the various provisions of Rule 23(b) and found that the monetary relief sought by the plaintiffs predominated over the injunctive relief requested, and, therefore, certification was not proper under Rule 23(b)(2). Id. at 23. This Court also declined to certify the class using a "(b)(2)/(b)(3) hybrid," noting that this approach was not well established within the Fourth Circuit. Id. at 24-25.

Finally, the Court considered the putative class under Rule 23(b)(3), noting that although it retained discretion as to the type of class to certify, its evaluation of the facts was significantly constrained by the Fourth Circuit's ruling. Id. at 27 ("[T]he Court of Appeals significantly altered the lens through which this Court must evaluate the facts relevant to an analysis under Rule 23(b)(3)."). Consequently, in considering whether the putative class satisfied Rule 23(b)(3), this Court could not revert to factual findings or assumptions that the Fourth Circuit explicitly rejected in reversing this Court's analysis of Rule 23(a). After examining the putative class in light of the Fourth Circuit's opinion and applying the relevant factors under Rule

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[2] Before conducting its analysis, this Court remarked, "the question of which provision the plaintiffs' class satisfies essentially requires the same analysis as the question of whether the plaintiffs have satisfied any of the requirements at all." Order Granting Class Certification 15, ECF No. 339. Thus, while the Fourth Circuit's opinion compelled a particular outcome (class certification in some form), the analysis required to reach that outcome was otherwise identical to the analysis the Court would have performed had the Fourth Circuit remanded the case with instructions to consider whether the appellants' class satisfied Rule 23(b).

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23(b)(3), this Court found that the putative class satisfied both the predominance and superiority requirements of Rule 23(b)(3) and certified the following class:

> All African-Americans who are or were employed at the Nucor Berkeley manufacturing plant in Huger, South Carolina at any time since December 2, 1999 in the beam mill, hot mill, cold mill, melting, maintenance, and shipping departments.

Order Granting Class Certification 30, ECF No. 339.

4. The Defendants' Motions to Reconsider/Stay/Narrow the Class

On March 7, 2011, the defendants filed a motion for reconsideration (ECF No. 346) and a motion to stay the case (ECF No. 347) until after the Supreme Court issued a decision in Wal-Mart Stores, Inc. v. Dukes. On April 6, 2011, this Court held a hearing to consider the defendants' motions. The Court declined to stay the case pending a ruling in Wal-Mart and instructed the defendants that if Wal-Mart were to require this Court to re-examine its certification decision, the defendants could move to decertify the class at that time. Order Den. Defs.' Mot. for Recons. & Mot. to Stay 14, Apr. 27, 2011, ECF No. 359.

The Court also declined to reconsider its Order certifying the class. Id. Noting that the Fourth Circuit had clearly ordered it to certify the plaintiffs' class, the Court rejected the defendants' claim that this Court had the authority to deny class certification altogether. Id. at 8 n.2.

In a footnote, this Court explained:

> The defendants contend that this Court should not have certified any class at all; however, to maintain this position they must completely ignore the Fourth Circuit's directive: "we remand the case to the district court with instructions to certify the appellants' class action . . . ." Brown, 576 F.3d at 160. Although the defendants may find it odd that the Fourth Circuit would dictate the general outcome to be reached (class certification) while leaving this Court to fill in the details, that appears to be precisely what the Fourth Circuit did. While the defendants may insist that the Fourth Circuit made an error, they did not prevail

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> on the Fourth Circuit or the Supreme Court to correct it. See Nucor Corp. v. Brown, 130 S. Ct. 1720 (Mar. 1, 2010) (denying certiorari).

Id.

The defendants also moved the Court to narrow the scope of the class. (ECF No. 346, at 2). The Court largely rejected the defendants' argument that the scope of the class should be narrowed. Order Den. Defs.' Mot. for Recons. & Mot. to Stay 11-13, ECF No. 359. The Court did, however, find that three modifications to the class were needed. Id. at 13. First, the Court agreed with the defendants that the class definition should indicate that it encompassed only those individuals who may have been discriminated against by the defendants. Id. Second, the Court granted the defendants' request that the class definition specify that it was limited to African-Americans who were employed by the defendants in one or more of the six enumerated departments at the Berkeley plant and did not encompass individuals who may have worked at the plant as independent contractors or in some other capacity. Id. Finally, the Court found that it was necessary to provide a cutoff date for inclusion in the class, which the Court determined would be the date of its Order. Id. Accordingly, the class was modified and defined as follows:

> All African-Americans who are, as of the date of this order [April 4, 2011], or were employed by Nucor Corporation or Nucor Steel Berkeley at the Nucor Berkeley manufacturing plant in Huger, South Carolina at any time between December 2, 1999, and the date of this order, in the beam mill, hot mill, cold mill, melting, maintenance, and shipping departments, and who may have been discriminated against because of Nucor's challenged practices.

Id. at 14.

5. This Court Decertifies the Class With Respect to the Disparate Treatment and Disparate Impact Claims but Declines to Decertify the Class With Respect to the Hostile Work Environment Claim

On July 15, 2011, the defendants filed a motion for decertification of the plaintiff class in light of Wal-Mart v. Dukes, 564 U.S. ---, 131 S. Ct. 2541 (2011), which they claimed upended

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the reasoning of the Fourth Circuit's opinion in this case. (ECF No. 381, at 8). After a hearing, the Court decertified the plaintiffs' class with respect to the disparate treatment and disparate impact claims but declined to decertify the plaintiffs' class with respect to the hostile work environment claim. Order Decertifying Disparate Treatment & Disparate Impact Claims, Sept. 11, 2012, ECF No. 409. With respect to the hostile work environment claim, the Court found that Wal-Mart presented no change in the law that would require it to reverse its previous decision certifying the class. Id. at 47.

On September 25, 2012, the plaintiffs moved for reconsideration with respect to the decertification of the disparate treatment and disparate impact claims (ECF No. 412), and the Court denied the motion (ECF No. 426).[3]

6. The Defendants' Motion Pending Before this Court

On April 8, 2013, the defendants filed their motion for decertification of the hostile work environment class based on Comcast Corp. v. Behrend, 569 U.S. ---, 133 S. Ct. 1426 (2013). (ECF No. 428). On April 26, 2013, the plaintiffs filed their response in opposition to class decertification.[4] (ECF No. 434). On May 6, 2013, the defendants filed their reply. (ECF No.

[3] On April 19, 2013, the plaintiffs petitioned for permission to appeal the Court's Order decertifying the class with respect to the disparate treatment and disparate impact claims pursuant to Federal Rule of Civil Procedure 23(f). On June 18, 2013, the Fourth Circuit granted the plaintiffs' petition. (ECF No. 440). Currently, this interlocutory appeal is pending before the Fourth Circuit.

[4] On May 21, 2013, the plaintiffs supplemented their response advising the Court that on May 20, 2013, the United States Supreme Court denied the defendants' petition for certiorari that sought to decertify the hostile work environment class. (ECF No. 438); see Nucor Corp. v. Brown, 133 S. Ct. 2393 (2013). The plaintiffs claim that if the Supreme Court thought Comcast should be applied, it likely would have indicated so by granting the defendants' petition for certiorari and remanding the case to the Fourth Circuit in light of Comcast. (ECF No. 438, at 2).

On May 23, 2013, the defendants filed their response to the plaintiffs' supplement. (ECF No. 439). First, the defendants contend that the Supreme Court's denial of the defendants' petition is not dispositive of any issue. (ECF No. 439, at 1); see Knight v. Florida, 528 U.S. 990, 990 (1999) (citation omitted) (emphasizing that "the denial of these petitions for certiorari does

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435). On May 21, 2013, the plaintiffs supplemented their response in opposition. (ECF No. 438). On May 23, 2013, the defendants responded to the plaintiffs' supplement. (ECF No. 439). On September 4, 2013, the plaintiffs filed a second supplement to their response. (ECF No. 451).

II. COMCAST CORP. V. BEHREND

On March 27, 2013, the Supreme Court decided Comcast Corp. v. Behrend, 569 U.S. ---, 133 S. Ct. 1426 (2013). Comcast involved the certification of a class that contained more than two million current and former Comcast subscribers across eighteen counties located in Pennsylvania, Delaware, and New Jersey; the parties referred to this region as the Philadelphia "cluster" or the Philadelphia "Designated Market Area." Id. at 1429-30. The petitioners, Comcast Corporation and its subsidiaries, engaged in a series of transactions described as "clustering"—a strategy that concentrates cable-television services in a particular region like the one noted above. Id. at 1430. Comcast pursued its clustering strategy by acquiring competitor service providers in a designated region and then swapping its own services in another region with that acquired competitor. Id. For example, Comcast acquired the Philadelphia cluster from cable service provider Adelphia Communications, and, in exchange, Comcast sold its holdings in Palm Beach, Florida and Los Angeles, California to Adelphia Communications. Id. From 1998 to 2007, Comcast entered into nine clustering transactions, increasing its market share in the Philadelphia cluster by 45.6%. Id.

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not constitute a ruling on the merits"). Next, the defendants argue that their petition was based on pre-Comcast law and did not address any of the issues raised in the pending motion to decertify. (ECF No. 439, at 2). Specifically, the defendants claim that their petition to the Supreme Court focused exclusively on Federal Rule of Civil Procedure 23(a)(2), whereas the gravamen of their pending motion to decertify concerns the effect of Comcast on the Federal Rule of Civil Procedure 23(b)(3) analysis with respect to individualized damages inquiries. (ECF No. 439, at 2).

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The respondents, subscribers within the Philadelphia cluster, claimed that Comcast's clustering strategy eliminated competition and held prices for cable services above competitive levels, which in turn created an adverse "antitrust impact." Id. In their class action antitrust suit against Comcast, the subscribers claimed that Comcast entered into unlawful swap agreements and monopolized or attempted to monopolize cable services in the Philadelphia cluster in violation of Sections 1 and 2 of the Sherman Act. Id. The subscribers sought to certify a class under Federal Rule of Civil Procedure 23(b)(3). Id.

In Comcast, the Supreme Court granted review of the following question: "'Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.'"[5] Id. at 1435 (Ginsburg and Breyer, JJ., dissenting) (quoting Comcast, 567 U.S. ---, 133 S. Ct. 24). The plaintiffs proposed four different theories of antitrust impact, but the district court determined that only one could be proven in a manner common to all class members. Id. at 1430-31. The plaintiffs' expert, however, failed to isolate the damages resulting from the single theory of antitrust accepted by the district court; instead, he calculated damages based on a model that included all four theories. Id. at 1431. In other words, the damages model was inconsistent with the plaintiffs' liability theory, and the model

[5] On petition, Comcast sought to certify a different question: "[W]hether a district court may certify a class action without resolving 'merits arguments' that bear on [Federal Rule of Civil Procedure] 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)." Comcast, 133 S. Ct. at 1435 (Ginsburg and Breyer, JJ., dissenting) (alterations in original) (citation omitted). Though the reformulated certified question sought to shift the issue from Rule 23(b)(3) to the admissibility of expert testimony set out in Federal Rule of Evidence 702, the majority's focus centers on aggregate damage calculation methodology and its fit with the accepted liability theory's ability to satisfy Rule 23(b)(3)'s predominance prong. Id. at 1432-35. The Comcast dissent notes that the certified question and the parties' corresponding briefings centered on admissibility, not on Rule 23(b)(3). Id. at 1435.

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did not prove that damages could be measured without complicated individual calculations for the two million class members. Nonetheless, the district court certified the class, finding that the damages related to the allowed theory could be determined on a classwide basis. Id. In a 5-4 opinion, the Supreme Court reversed. Id. at 1435. The Supreme Court held: "By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry." Id. at 1432-33.

"The majority in Comcast . . . conclude[d] that the case 'turn[ed] on the straightforward application of class certification principles,' . . . and the dissent concur[red] that 'the opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3).'" In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. v. Whirlpool Corp., 722 F.3d 838, 860 (6th Cir. 2013) (citing Comcast, 133 S. Ct. at 1433, 1436). The dissent also stated that the majority opinion "should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable on a class-wide basis." Comcast, 133 S. Ct. at 1436 (Ginsburg and Breyer, JJ., dissenting) (citation omitted) (internal quotation marks omitted); see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., --- F. Supp. 2d ---, No. 06-cv-1842 (NG)(JO), 2013 WL 4067116, at *13 (E.D.N.Y. Aug. 7, 2013) (stating "Comcast . . . does not create a heightened standard for satisfaction of Rule 23(b)(3) predominance, but rather 'turns on the straightforward application of class certification principles'") (quoting Comcast, 133 S. Ct at 1433); Manno v. Healthcare Revenue Recovery Grp., LLC, 289 F.R.D. 674, 694 (S.D. Fla. 2013) (citation omitted) (stating that Comcast does not "tread[] any new ground in class action law" and "therefore does not represent

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a change in law that would warrant reconsideration"); Harris v. comScore, Inc., --- F.R.D. ---, No. 11 C 5807, 2013 WL 1339262, at *10 n.9 (N.D. Ill. Apr. 2, 2013) (citation omitted) (The assumption that "damages must be measurable based on a common methodology applicable to the entire class in antitrust cases . . . even assuming it is applicable to privacy class actions in some way, is merely dicta and does not bind this court.").[6]

Nonetheless, the defendants claim that "Comcast is every bit the 'game-changer' for Rule 23(b)(3) damages analysis [that] Wal-Mart . . . was for Rule 23(a) analysis." (ECF No. 428, at 1). In their response, the plaintiffs contend that Title VII class actions can be bifurcated into separate liability and damages stages and that, unlike Comcast, individual damages calculations do not overwhelm questions common to the class. (ECF No. 434). Finally, the plaintiffs argue that "there is no legitimate basis for decertifying the class that the Fourth Circuit held must be certified in its mandate." (ECF No. 434, at 1).

The interpretation of the scope, effect, and application of Comcast is of first impression in this Court. Neither the Fourth Circuit nor this Court's sister district courts have issued a decision with respect to class certification since the issuance of Comcast. This Court finds that Comcast does not hold that every case must have a classwide model or formula approach;

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[6] The Fourth Circuit has yet to address class certification under Rule 23(b)(3) post-Comcast. At the time of this Order, the Sixth Circuit's In re Whirlpool, 722 F.3d 838, and the Seventh Circuit's Butler v. Sears, Roebuck and Co., --- F.3d ---, Nos. 11-8029, 12-8030, 2013 WL 4478200 (7th Cir. Aug. 22, 2013), are the only circuit court decisions issued after the Supreme Court vacated the circuit courts' judgments and remanded the cases to these circuit courts for further consideration in light of Comcast. In re Whirlpool is a consumer class action that bifurcated and certified the class on the common issue of manufacturer liability, reserving individual damage calculations for a later stage. 722 F.3d at 844. On remand, the Sixth Circuit upheld the district court's decision that the Rule 23(a) and (b)(3) requirements were satisfied. Id. at 861. In Butler, the Seventh Circuit reinstated its November 13, 2012 judgment, which found class certification appropriate because it would be more efficient to try the case in a single proceeding despite the presence of individualized damages. 2013 WL 4478200, at *6.

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instead, the Court holds that the straightforward principles of Rule 23(b)(3) apply. Therefore, the Court takes this opportunity to conduct another analysis of Rule 23(b)(3)'s requirements.

III. LEGAL STANDARD

Rule 23(c)(1)(C) authorizes a district court to alter or amend its certification of a class at any time prior to final judgment. The court has an ongoing duty to monitor a class and "considerable discretion" to decertify the class if the court determines class treatment is no longer appropriate. Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 433 (4th Cir. 2003). Furthermore, the burden remains on the plaintiff to demonstrate that certification remains appropriate. Stastny v. S. Bell Tel. & Tel. Co., 628 F.2d 267, 277-78 (4th Cir. 1980) (holding that the class representative has the burden of producing an adequate record establishing the continued propriety of maintaining a class action).

IV. ARGUMENTS OF THE PARTIES

The defendants claim that, in light of Comcast, the plaintiff class does not meet the Rule 23(b)(3) requirements because questions concerning the plaintiffs' damages will entail individualized inquiries that outweigh and predominate over those issues common to the class as a whole, and, as a result, the class action is an inferior means of adjudication. (ECF No. 428, at 6-10). In so arguing, the defendants rely on the Court's prior Orders which have found that individual questions of damages and affirmative defenses are present in this case. (ECF No. 428, at 5) (citing Order Granting Class Certification 26-27, 29, ECF No. 339 & Order Decertifying Disparate Treatment & Disparate Impact Claims 46-47, ECF No. 409). In their motion, the defendants composed a non-exhaustive list of the individual inquiries relevant to the calculation of damages:

> [T]he number of incidents each plaintiff experienced; the frequency of those incidents over a specific period of time; the severity of those incidents; the

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> amount of each plaintiff's pecuniary losses; the level of each plaintiff's emotional pain and suffering and whether each plaintiff sought treatment of it; the type and extremity of each plaintiff's mental anguish and loss of enjoyment of life, if any; whether each plaintiff suffered any other non-pecuniary losses . . . . In addition, Defendants will also be entitled to put on proof of any individualized defenses which could reduce or entirely negate damages, such as the Faragher-Ellerth defense, in response to most class members' claims.

(ECF No. 428, at 8).[7] The defendants claim that "[m]ini-trials will be required for each class member to calculate the precise amount of damages to which that individual is entitled based upon the numerous individualized factors listed above." (ECF No. 428, at 9).

In opposition, the plaintiffs respond that the defendants "grossly distort[] the Supreme Court's decision in Comcast . . . " and that Comcast "primarily determined that the particular evidence offered by the plaintiffs was not sufficiently geared to the lone anti-trust theory of liability that the lower courts had allowed." (ECF No. 434, at 1, 7). The plaintiffs claim that the list of individual inquiries above does not include any issue relevant to the Stage I pattern-or-practice determination and that it is hardly relevant to the Stage II determination of damages. (ECF No. 434, at 22). Even if these inquiries have minor relevance at Stage II, the plaintiffs contend that the "personally offensive" requirement is a minor element of proof that should not preclude class treatment of the dominant and common factual dispute in this case: the existence of a severe or pervasive hostile work environment, which was objectively offensive to a reasonable person and that injunctive, declaratory or other relief is appropriate. (ECF No. 434, at

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[7] The defendants reference the plaintiffs' prayer for compensatory damages; however, at the July 19, 2007 hearing, plaintiffs' counsel informed this Court that the plaintiffs had "waived their compensatory damage claim[s]." (Hr'g Tr. 24:24-25:1, July 19, 2007, ECF No. 225). At the September 5, 2013 hearing, plaintiffs' counsel clarified that the plaintiffs are, in fact, seeking compensatory damages, but had waived the class certification of compensatory damages on July 19, 2007, when they sought to certify the class under Rule 23(b)(2). Because the class is currently certified under Rule 23(b)(3), the plaintiffs plan to pursue compensatory damages. (Hr'g Tr. 10:17-18, Sept. 5, 2013).

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22). In addition, the plaintiffs note that the class members not personally offended by the pattern of racial hostility would not file claims at Stage II. (ECF No. 434, at 22).

V. DISCUSSION

"Class certification is appropriate if the court finds, after conducting a 'rigorous analysis,' that the requirements of Rule 23 have been met." In re Whirlpool, 722 F.3d at 851 (quoting Wal-Mart, 131 S. Ct. at 2551). Under Federal Rule of Civil Procedure 23, class certification requires two steps: (1) the class must satisfy all four of the Rule 23(a) prerequisites—numerosity, commonality, typicality, and adequacy of representation; and (2) the class must fall within one of the three categories in Rule 23(b). Fed. R. Civ. P. 23. The only class certification issues that remain in dispute are Rule 23(b)(3)'s predominance and superiority requirements.[8] Rule 23(b)(3) provides for class certification if "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." Fed. R. Civ. P. 23(b)(3). In short, Rule 23(b)(3) presents two central requirements: (1) predominance, which weighs class-wide versus individualized questions; and (2) superiority, which assesses whether the class action is the preferable means of adjudication. The following factors are relevant in determining whether these requirements are satisfied:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

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[8] In the Court's Order on September 11, 2012, the Court determined that the Rule 23(a) requirements—numerosity, commonality, typicality, and adequacy—were satisfied by the class. The defendants do not contest this determination; therefore, this Order addresses only whether the requirements of Rule 23(b)(3) are satisfied.

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Fed. R. Civ. P. 23(b)(3)(A)-(D).

A. PREDOMINANCE

The predominance requirement, which has a more demanding criterion than Rule 23(a), "'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" Butler, 2013 WL 4478200, at *4 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997)). Predominance is a question of efficiency. Amchem, 521 U.S. at 615. The Court must ask whether it is "more efficient, in terms of both economy of judicial resources and of the expense of litigation to the parties, to decide some issues on a class basis or all issues in separate trials[.]" Butler v. Sears, Roebuck & Co., 702 F.3d 359, 362 (7th Cir. 2012) (en banc), vacated, 133 S. Ct. 2768 (2013).[9] Class treatment is justified if "[a]n issue 'central to the validity of each one of the claims' . . . can be resolved 'in one stroke[]' . . . ." Butler, 2013 WL 4478200, at *4 (quoting Wal-Mart, 131 S. Ct. at 2551). However, "the requirement of predominance is not satisfied if 'individual questions . . . overwhelm questions common to the class[]' . . . ." Id. (alteration in original) (quoting Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. ---, 133 S. Ct. 1184, 1196 (2013).

Predominance involves a qualitative, not quantitative, assessment—"common issues need only predominate, not outnumber individual issues." Id. (citation omitted); see Stillmock v. Weis Mkts., Inc., 385 F. App'x 267, 273 (4th Cir. 2010) (stating "while courts have properly denied class certification where individual damages issues are especially complex or burdensome, . . . here, the qualitatively overarching issue by far is the liability issue . . .") (internal citation omitted); Gunnells, 348 F.3d at 429 (alteration in original) (quoting In re Honda

[9] In its opinion on August 22, 2013, the Seventh Circuit reinstated this judgment. Butler, 2013 WL 4478200, at *6.

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Motor Co., 979 F. Supp. 365, 367 (D. Md. 1997) ("'Quantitatively, almost by definition there will always be more individual damages issues than common liability issues . . . . Qualitatively, however, . . . liability issues' may 'far exceed in complexity the more mundane individual damages issues.'")); Healy v. Int'l Bhd. of Elec. Workers, Local Union, --- F.R.D. ---, No. 11-C-8892, 2013 WL 4494685, *7 (N.D. Ill. Aug. 22, 2013) (citations omitted) ("The issue for Rule 23(b)(3) purposes is not whether there are individual issues—there are some individual issues in virtually every situation in which class certification is sought—but rather whether common issues predominate over any individual issues.").

"[P]redominance requires not just the presence of common issues, but also that those common issues actually outweigh any individualized issues in the litigation." Manno, 289 F.R.D. at 689. In fact, "'[c]ommon issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief.'" Stillmock, 385 F. App'x at 273 (quoting Klay v. Humana, Inc., 382 F.3d 1241, 1255 (11th Cir. 2004)). In addition, "'[c]lass-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.'" Shady Grove, 2013 WL 4067116, at *11 (quoting Moore v. PaineWebber, Inc., 306 F.3d 1247, 1252 (2d Cir. 2002)); Manno, 289 F.R.D. at 689 (stating that "[t]o satisfy the predominance requirement, the named plaintiff must establish that the issues subject to generalized proof in the class action, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof") (citing Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1005 (11th Cir. 1997)). To determine whether common questions predominate, the Court

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must identify the substantive issues of the plaintiffs' claims and "then consider[] the proof necessary to establish each element of the claim or defense . . . ." Gaudin v. Saxon Mortg. Servs., Inc., --- F.R.D. ---, No. 11-cv-01663-JST, 2013 WL 4029043, at *7 (N.D. Cal. Aug. 5, 2013) (citation omitted); see also Manno, 289 F.R.D. at 689 ("'Considering whether questions of law or fact common to class members predominate begins, of course, with the elements of the underlying cause of action.'") (quoting Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. ---, 131 S. Ct. 2179, 2184 (2011)) (internal quotation marks omitted).

As to the plaintiffs' hostile work environment claim, the Court finds that common questions of law and fact predominate. To establish a hostile work environment claim, the plaintiffs must show that the harassment was "(1) unwelcome, (2) based on . . . race, (3) sufficiently severe or pervasive to alter the conditions of [the plaintiffs'] employment and create an abusive atmosphere, and (4) imputable to [the defendants]." EEOC v. Cent. Wholesalers, Inc., 573 F.3d 167, 175 (4th Cir. 2009) (citation omitted). As the Fourth Circuit has noted, "'the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination.'" Brown, 576 F.3d at 159 (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361-62 (1977)). "The class-wide liability phase of a pattern or practice hostile environment claim merely requires objective proof of a hostile work environment; claims based on individual experiences are resolved in the remedial phase of the trial." Newsome v. Up-To-Date Laundry, Inc., 219 F.R.D. 356, 361, n.2 (D. Md. 2004) (citation omitted). To satisfy the objective component, a plaintiff "must demonstrate that the conduct was such that 'a reasonable person in the plaintiff's position' would have found the environment objectively hostile or abusive." EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 315 (4th Cir. 2008) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81-82 (1998)).

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To satisfy the subjective component, a plaintiff must show that he actually viewed the environment as hostile. Id.

Although the Court will have to engage in individual inquiries with respect to the subjective component of this claim, the generalized proof of the defendants' liability will not be overshadowed by the individual determinations. See EEOC v. Mitsubishi Motor Mfg. of Am., Inc., 990 F. Supp. 1059, 1078 (C.D. Ill. 1998) ("The proof needed to establish a subjective perception of abuse in the typical individual case for hostile environment . . . is minimal, virtually a formality; the charging party must merely testify that she found the alleged conduct to be hostile or abusive at the time it occurred."); accord Markham v. White, No. 95-C-2065, 1999 WL 1072647, at *4 (N.D. Ill. Sept. 9, 1999) (citation omitted) ("[T]he subjective element of establishing hostile environment generally is not time consuming or difficult to establish.").

As stated above, the defendants claim that, in light of Comcast, the plaintiff class does not satisfy the predominance requirement because questions concerning the plaintiffs' damages will entail individualized inquiries that outweigh and predominate over those issues common to the class as a whole. "Courts have routinely rejected this argument, concluding . . . that the need for individualized proof of damages alone will not defeat class certification." Gunnells, 348 F.3d at 429 (citations omitted); see also Comcast, 133 S. Ct. at 1437 (Ginsburg and Breyer, JJ., dissenting) (citing Advisory Committee's 1966 Notes on Fed. R. Civ. P. 23, 28 U.S.C.App., p. 141) (stating "when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate"); 2 William B. Rubenstein & Alba Conte, Newberg on Class Actions § 4.54 (5th ed. 2013) ("Courts in every circuit have therefore uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized

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damage determinations."). Furthermore, decisions since Comcast have also held that "the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate and that class treatment is superior." Manno, 289 F.R.D. at 692 (citations omitted); see also In re Whirlpool Corp., 722 F.3d at 861 (quoting Comcast, 133 S. Ct. at 1437) (Ginsburg and Breyer, JJ., dissenting) ("'[I]t remains the "black letter rule" that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members.'"). In fact, the Supreme Court has stated that "individualized monetary claims belong in Rule 23(b)(3)." Wal-Mart, 131 S. Ct. at 2558. Indeed, "[r]ecognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal." Comcast, 133 S. Ct. at 1437 (Ginsburg and Breyer, JJ., dissenting) (emphasis omitted) (citation omitted).

Similar to the case at hand, the defendants in Healy claimed that Comcast dramatically changed the test for predominance, "and that as a result, the common questions . . . [cannot] predominate due to variations in damages among class members." 2013 WL 4494685, at *7. However, Judge Kennelly in the Northern District of Illinois found that "Comcast does not come close to saying . . . that a [Rule 23(b)(3)] class cannot be certified whenever there are variations among class members' damages." Id. In Healy, the court stated that Comcast does not stand for the proposition that a Rule 23(b)(3) case can be certified only if damages can be determined according to a single formula. Id. at *8. The court emphasized that the question whether common issues predominate over individual issues must be asked in every case and that "the answer can and will differ from case to case." Id. at *9. The court further stated:

> When the Supreme Court said that the plaintiffs in Comcast had failed to show that damages were "capable of measurement on a classwide basis" and that as a result, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class," the Court was making a Rule 23(b)(3)

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> predominance determination in a case involving a two million member class. The question of whether individual damages issue predominate over other common issues is necessarily dependent on (perhaps among other things) the size of the class and the nature of the damage calculation.

Id. at *8 (alteration in original) (internal citation omitted). The court acknowledged that "it is unlikely that damages can be determined on an overarching, class-wide basis or based on a single formula." Id. at 9. However, the court analyzed whether the individual issues predominated over the common issues. Unlike the two million member class in Comcast, the proposed class in Healy contained approximately forty members. Id. The court found this fact had a "significant bearing on the predominance issue," and that "it defie[d] credulity to contend . . . that calculation of individual damages will predominate over the common issues concerning liability." Id. Therefore, the court held that the predominance requirement was satisfied. Id.

In Butler, the Seventh Circuit found that "Comcast holds that a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the class-wide injury that the suit alleges." 2013 WL 4478200, at *3. The court further found that class certification in Comcast was precluded because the plaintiffs "fail[ed] to base all the damages they sought on the antitrust impact—the injury—of which the plaintiffs were complaining." Id. at *4. The Seventh Circuit distinguished Butler from Comcast by stating that "there is no possibility in [Butler] that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis; all members of the mold class attribute their damages to mold and all members of the control-unit class to a defect in the control unit." Id. at *3. The Seventh Circuit also noted that "the district court in [Butler], unlike Comcast, neither was asked to decide nor did decide whether to determine damages on a class-wide basis." Id. at *4. The Seventh Circuit ruled:

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> It would drive a stake through the heart of the class action device, in cases in which damages were sought . . . , to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification.

Id. at *5. In Butler, the court found that "a single, central, common issue of liability" existed—"whether the Sears washing machine was defective." Id. The court also found that the individual questions are the amount of damages owed to the washing machine owner. Butler, 702 F.3d at 361. The Seventh Circuit found and later reaffirmed that "[i]t is more efficient for the question whether the washing machines were defective—the question common to all class members—to be resolved in a single proceeding than for it to be litigated separately in hundreds of different trials . . . ." Id. at 363.

As stated above, "'Rule 23(b)(3) requires that common questions predominate, not that the action include only common questions.'" Shady Gove, 2013 WL 4067116, at *11 (quoting Brown v. Kelly, 609 F.3d 467, 484 (2d Cir. 2010)). Similar to Butler, the case at hand presents a "single, central, common issue of liability"—whether the plaintiffs were subjected to a hostile work environment at the Berkeley plant—and individual questions with respect to the subjective component of the claim and the amount of damages owed to the plaintiffs. Although the defendants claim they will assert individualized defenses, these defenses do not predominate over the common issues present in this case. See Shady Grove, 2013 WL 4067116, at *12 ("To the extent that Allstate argues that it may be able to assert individualized defenses . . . , I note that the existence of such defenses does not bar predominance where 'a sufficient constellation of common issues binds class members together.'") (quoting Kelly, 609 F.3d at 483). The Court previously noted that "the defendants will be afforded the opportunity to present affirmative

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defenses in the second stage" of the proceeding. Order Granting Class Certification 29, ECF No. 339.

Here, the Berkeley plant has been defined as a single site. See Brown, 576 F.3d at 158 ("[T]here is scant, if any, evidence that each of the departments is so autonomous as to justify classifying them as separate environments."). As a result, evidence demonstrating hostility to African-Americans at that single site is common to the class as a whole and predominates over any individualized questions that may arise at the remedial stage of proceedings. See Newsome, 219 F.R.D. at 361 n.2 (citation omitted) ("The class-wide liability phase of a pattern or practice hostile environment claim merely requires objective proof of a hostile work environment; claims based on individual experiences are resolved in the remedial phase of the trial."). Therefore, every incident of a discriminatory practice in any of the Berkeley plant's six departments within the applicable limitations period provides common evidence of a single, objective theory of liability that is susceptible to proof on a class-wide basis. Further, as in Healy, the plaintiff class in this case is composed of a drastically smaller amount of members than the two million member class in Comcast.[10] Similar to Healy, the Court finds that the small size of the proposed class has "significant bearing on the predominance issue."

In addition, it is more efficient for the Court to decide the hostile work environment claim on a classwide basis. The plaintiffs contend that if the class were decertified, then "all of the evidence of a hostile work environment would have to be repeated over and over in individual lawsuits . . . ." (ECF No. 434, at 16). In opposition, the defendants argue that several mini-trials will result if the class remains certified. (ECF No. 428, at 9). The Court finds that common issues of law and fact will directly impact every class member's effort to establish liability and

[10] At the September 5, 2013 hearing, plaintiffs' counsel stated the class will not include more than one hundred members. (Hr'g Tr. 13:13-14, Sept. 5, 2013).

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every class member's entitlement to injunctive and monetary relief. The elements of the hostile work environment claim can be satisfied through generalized proof; therefore, "in terms of both economy of judicial resources and of expense of litigation to the parties," it is more efficient to decide this action on a class basis. Therefore, this Court finds that the predominance inquiry is satisfied.

B. Superiority

The predominance analysis stated above "has a tremendous impact on the superiority analysis for the simple reason that, the more common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims . . . ." Manno, 289 F.R.D. at 690. This Court has previously determined that a class is superior to other methods when examined against the four factors set forth in Rule 23(b)(3)(A)-(D). Order Granting Class Certification 28-29, ECF No. 339. First, "[n]o member of the class has asserted an interest in individually controlling the prosecution or defense of separate actions." Id. at 29. Second, "[t]he named plaintiffs and their counsel have already invested substantial time in the development of this case, and efficiency favors allowing them to represent the class." Id. Third, "[t]he claims in this case were transferred to this Court because they arise out of allegations regarding a South Carolina plant, so the Court is confident that the claims are in the proper forum." Id. Fourth, the Court has noted that the remedial stage of this proceeding may increase the difficulty of managing this action due to its individualized damages issues and the defendants' opportunity to present affirmative defenses at that stage. Id. "However, the Court does not believe that the need for these individualized findings renders the class unmanageable, and the Court retains discretion to decertify the class should class adjudication prove unworkable." Id. (citing Brown, 576 F.3d at 159-60); see also Harris, 2013 WL 1339262,

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at *10 (citation omitted) ("[I]t is far more efficient to resolve all of the common issues in a single proceeding, and then to hold individual hearings on damages if necessary, than it would be to litigate all of the common issues repeatedly in individual trials."). In sum, the Court reaffirms its previous holding that "given the number of [current and former] employees potentially affected by the defendants' alleged conduct, the Court finds that a class action is superior to any other method that might be used to adjudicate [the hostile work environment claim]." Order Granting Class Certification 29, ECF No. 339.

VI. CONCLUSION

The defendants' assertion that the decision in Comcast warrants decertification of the hostile work environment class overstates the impact and applicability of Comcast with respect to the present matter. Though damages for the plaintiffs' hostile work environment claim may not be provable in the aggregate, the adjudication of a common question of liability will achieve economies of time and expense, and, therefore, Rule 23(b)(3)'s predominance standard is satisfied. The Rule's superiority standard likewise is satisfied because the class action will prove to be more efficient and fair than individual suits adjudicating issues of both liability and damages for each class member. Once the Court resolves the common question of liability with respect to the plaintiffs' hostile work environment claim, the Court will either enter judgment for the defendants or proceed to the question of plaintiffs' damages. See Brown, 576 F.3d at 159 (citations omitted) ("The district court can address [the] plaintiffs' claims for injunctive or other relief after liability and other common issues are determined.").

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For the reasons set forth in this Order, the defendants' motion to decertify the plaintiffs' class (ECF No. 428) is denied with respect to the plaintiffs' claim for a hostile work environment.

AND IT IS SO ORDERED.

C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

September 26, 2013
Charleston, South Carolina

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