IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CYNTHIA ALLEN, *individually and on behalf of other similarly situated,* and KRISTINE WEBB, Plaintiffs, v. AT&T MOBILITY SERVICES, LLC *a/k/a* AT&T Mobility LLC, Defendant.	CIVIL ACTION FILE NO. 1:18-cv-03730-WMR

ORDER

Before the Court is Plaintiffs Cynthia Allen and Kristine Webb's Motion for Class Certification [Doc. 85; Doc. 114] pursuant to Fed. R. Civ. P. 23. Plaintiffs have alleged that Defendant AT&T Mobility Services LCC ("AT&T"), their former employer, discriminated against them and other pregnant sales associates with how it designed and implemented its attendance policies and the related discipline system. Plaintiffs have filed this lawsuit seeking damages and injunction against these practices, not just for themselves, but also for other pregnant workers who have allegedly suffered because of this system. AT&T denies these allegations and, as one might expect, asserts that this lawsuit should not be certified as a class action. Upon review of the pleadings and with the benefit of oral argument, the Court agrees

that this lawsuit is not suitable for class certification; individualized inquiries are necessary to determine whether AT&T's policies caused harm and/or damaged any potential plaintiff, such that resolution of such claims on a class basis would be impractical. Accordingly, Plaintiffs Motion for Class Certification is hereby DENIED.

I. PLAINTIFFS' ALLEGATIONS

AT&T operates retail phone stores in locations across the United States, and in such stores, its employs non-managerial employees as Retail Sales Consultants and Sales Support Representatives. Plaintiffs Cynthia Allen and Kristine Webb formerly worked in such capacity. Ms. Allen was an employee in AT&T's stores in New York and Las Vegas from December 2012 through April 2017. Ms. Webb was an employee of AT&T at its retail store in Rapid City, South Dakota from September 2014 through July 2017.

During their employment terms, both Ms. Allen and Ms. Webb became pregnant and were, at times, unable to work due to the complications of their pregnancy. The Plaintiffs alleged that AT&T's Sales Attendance Guidelines ("SAG") policy, and the associated attendance and discipline policies and practices, violate Title VII of the Civil rights Act of 1964 ("Title VII"), as amended by the Pregnancy discrimination Act ("PDA"), 42 U.S.C. 2000e et seq. Ms. Allen was disciplined and eventually terminated after she returned from maternity leave due to

absences from work that she claims were pregnancy related, and Ms. Webb was terminated when she was seven months pregnant.

Plaintiffs allege that AT&T's point-based SAG policy, and associated attendance and discipline policies and practices, violate the PDA by treating pregnant workers' absences less favorably than those of their non-pregnant, similarly situated peers. Under this policy, unexcused absences garner points, and discipline follows from the imposition of those points. The SAG and associated discipline policies operate without discretion to ensure consistency in attendance and discipline practices in all AT&T retail stores nationwide.

Under the SAG policy, retail workers are assigned points for an attendance infraction such as an unexcused absence, tardiness, or early departure. After accruing three to four points, retail workers become subject to disciplinary action. These points will "roll off" a retail worker's personal record after 12 months; however, the clock pauses during a period of approved medical leave of absence. Not all absences accrue points. Leave under the Family and Medical Leave Act, military leave, and other approved or "excused" absences do not require a point against the retail worker's record.

Points for unexcused absences lead to discipline, the steps of which are specified under the Progressive Discipline policy incorporated into the SAG policy, which include (1) a counseling notice after four points, (2) a written warning after

five points, (3) a final written warning after seven points, and (4) termination.[1] Thus, disciplinary actions are more severe as an employee accumulates more points. As the policy is constructed, the Plaintiffs contend that a pregnant worker will can be subject to severe discipline due to normal complications and circumstances associated by her pregnancies which might cause her to be late or to have to miss work.

The SAG policy is administered by the AT&T Centralized Attendance Group ("CAG"), which is a computerized system that uses a series of daily, weekly, and monthly reports to ensure consistent application of the SAG in assessing points and discipline across AT&T's retail stores. This process includes AT&T's myWorkLife, MyCoach and LeaveLink "apps" and databases, which collect the data and generates reports for the CAG. This system permits AT&T to ensure that point totals and discipline levels are assigned on a daily basis by the CAG. Thus, AT&T has removed any managerial discretion for the assessment of points and the implementation of discipline to ensure consistent application of the policy.

[1] For serious fans of *The Office*, this policy calls to mind Dwight Schrute's decision to give co-worker (and his then supervisor) Jim Halpert a demerit for being late to work. Dwight explained that it was serious business. "Three demerits, and you will receive a citation . . . five citations and you're looking at a violation. Four of those, and you'll receive a verbal warning . . . Two of those, that will land you in a world of hurt, in the form of a disciplinary review, written up by me, and placed on the desk of my immediate superior." To which Jim retorted, "which would be me." In contrast to *The Office*, the situation at AT&T could lead to real consequences.

Pursuant to the policy, if an absence is not protected, it is subject to points or discipline. The SAG policy delineates 13 categories of absences that are "excused," such that they do not result in the imposition of points. The excused absences are as follows:

(1) Approved Leave of Absence
(2) Scheduled/Approved Vacation
(3) Jury Duty
(4) Qualified Bereavement
(5) Military Leave
(6) Company recognized Holidays (unless scheduled to work on a Holiday)
(7) Approved Short Term Disability
(8) Approved Job Accommodations
(9) Federal/State/municipal mandated Leaves (i.e., FMLA, ADAAA, etc.)
(10) Company initiated closings (i.e., inclement weather, etc.)
(11) Court Subpoena (excused to extent as outlined per Labor Agreement)
(12) Approved/Company Mandated time off, (i.e. EWP, vacation, disciplinary time, etc.)

Pursuant to AT&T's policy, retail employees must indicate their anticipated absence through the myWorkLife App at least one hour before the start of their shift. This app requires employees to select a reason for the absence from among several options: Illness, Family Illness, Protected Self, Protected Family, Protected "Dr.

Appt.", Funeral Pay/Bereavement, Jury Duty, Court Appearance, and Other non-illness. Pregnancy does not appear in the myWorkLife prompts.

Employees may request excused absences due to their pregnancy or pregnancy-related conditions under the Family and Medical Leave Act ("FMLA"), Short-Term Disability ("STD"), ADA or Approved Job Accommodations ("JA"). But, while FMLA includes incapacity due to pregnancy and prenatal care under its umbrella, it also requires employees to have worked for at least 1250 hours of service for the employer for one year for eligibility. Under AT&T's STD policy, employees are required to submit their claim, including medical evidence, to a third-party management company for consideration, and in any event, the STD does not protect medical conditions that do not rise to the level of a disability and does not provide for occasional intermittent leave, leave for seven or fewer days, or for a single absence. Thus, its usefulness for normal and ordinary pregnancy related absences, like "morning sickness" and prenatal visits, is questionable. The same can be said of JA leave, which is available only for conditions that rise to the level of disability under the ADA.

If applicable to their situation, pregnant workers seeking to secure an excused absence under FMLA, STD or JA must also separately use the LeaveLink Application, another digital platform. Yet, "pregnancy" does not appear as an option as an option in LeaveLink. The options offered are "Associate is sick or injured,"

"Bonding time with a newborn child," "Adoption of a child," "Placement of a foster child," "Leave related to military service," and "Other reason for leave."[2]

One of the Plaintiffs' primary complaints surrounds the paperwork or documentation that pregnancy workers must submit to obtain an excused absence, particularly when other categories of excused absences allegedly require minimal or no documentation. For example, Plaintiffs allege that excuses for jury duty, court appearances and bereavement have discretionary paperwork requirements, which (if submitted) are completed without the LeaveLink application, and that company-mandated time off, which includes suspension for misconduct, has no paperwork requirement. Employees seeking excused absences under FMLA, STD or JA under the SAG policy must submit an application and provide medical documentation through their LeaveLink application, and pregnant workers (unlike those with ongoing conditions under the ADA or even other FMLA qualifying occurrences) must submit new paperwork for each absence. Thus, the essence of the Plaintiffs' claims is that AT&T disproportionately burdens pregnant employees compared to other employees to establish the basis for an excused absence.[3]

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[2] In a newer version of LeaveLink, these options are "Departmental/Local Leave," "Disability Related Leave," "Personal Leave," and "Political Leave."

[3] Plaintiffs also complain that AT&T allegedly provides minimal guidance and training to employees seeking an excused absence due to their pregnancy or related medical condition, which is particularly problematic due to the design and difficulties in using the myWorkLife and LeaveLink apps..

II. LEGAL STANDARD

"The district court has broad discretion in determining whether to certify a class." *Monroe Cty. Emps.' Ret. Sys. v. S. Co.*, 332 F.R.D. 370, 377 (N.D. Ga. 2019) (quoting *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1569 (11th Cir. 1992)). Pursuant to Federal Rule of Civil Procedure 23, the Court may certify a class if the following prerequisites are met:

i. the class is so numerous that joinder of all members is impracticable;

ii. there are questions of law or fact common to the class;

iii. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

iv. the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

In addition, a proposed class must be "adequately defined such that its membership is capable of determination." *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1304 (11th Cir. 2021).

To certify a damages class under Federal Rule of Civil Procedure 23(b)(3), the Court must 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." Fed R. Civ. P. 23(b)(3). Rule 23 further sets forth "matters pertinent to these findings," including:

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

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

To determine whether to certify a class, the Court must conduct a "rigorous" analysis to ascertain whether each sub-part of Rule 23 is satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)); *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 981 (11th Cir. 2016); *Pizarro v. Home Depot, Inc.*, No. 1:18-CV-01566-WMR, 2020 WL 6939810, at *4 (N.D. Ga. Sept. 21, 2020) (Ray, J.). Although class certification requires demonstrating that the issues of central importance to the case are capable of class-wide resolution, the Court need not resolve the underlying merits of Plaintiffs' claims to certify the proposed class. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) ("Rule 23 grants courts no license to engage

in free- ranging merits inquiries at the certification stage").[4]

III. DISCUSSION

The Court believes that the Plaintiffs can satisfy the prerequisites of Rule 23(a). If that were the end of the analysis, the Court would grant the requested certification. But, it is not. The Court does not believe that this case would be manageable because of the individual circumstances that apply to any particular putative plaintiff, the differing defenses that might apply to the putative plaintiffs' claims, and the difficulty in assessing damages, if any, that such plaintiffs would be entitled to recover. Thus, as stated at the outset of this order, the Court will not certify this case as a class action. But, in any event, should the Court of Appeals disagree with this Court's conclusion that this will be an extraordinary and unwieldy case to manage should it proceed as a class, the Court will provide a full analysis of all the pertinent factors.

[4] While Plaintiffs have argued that the putative class is ascertainable (which AT&T did not dispute), the Eleventh Circuit recently clarified that it is unnecessary for the Court to rule on ascertainability as it was previously defined. Per the recent decisions in *Cherry v. Dometic Corp*. and *Rensel v. Central Tech, Inc.*, "the party seeking certification need not establish its ability to identify class members in a convenient or administratively feasible manner." *Rensel v. Centra Tech, Inc.*, 2 F.4th 1359, 1361 (11th Cir. 2021) (citing *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1304 (11th Cir. 2021)).

A. Rule 23(a) Prerequisites

1. Numerosity

Courts in the Eleventh Circuit have concluded that the numerosity requirement is satisfied when the class comprises 40 or more members. *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986); *see also Gen Tel. Co. of the Nw., Inc. v. E.E.O.C.*, 446 U.S. 318, 330 (1980) ("[t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations. Plaintiffs estimate, based on AT&T's data, that as of September 2019 the proposed class includes at least 2,168 women. (*See* Madden Report at 8, Ex. 23).

The numerosity requirement is satisfied.[5]

2. Commonality

Rule 23(a)(2) requires Plaintiffs to show there are questions of law or fact common to the class. The Court has no problem finding such to be the case here, as alleged.

In *Wal-Mart*, the Supreme Court held that, "[w]hat matters to class certification . . . is not the raising of common 'questions' – even in droves – but rather, the capacity of a class-wide proceeding to generate common answers apt to

[5] AT&T does not contest that this factor is satisfied.

drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350; *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1238 (11th Cir. 2016). Common questions "must be of such a nature that [they are] capable of class-wide resolution – which means that determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."*Carriuolo*, 823 F.3d at 984 (citing *Wal-Mart*, 564 U.S. at 350).

"The Pregnancy Discrimination Act makes clear that Title VII's prohibition against sex discrimination applies to discrimination based on pregnancy." *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 210 (2015). Thus, pursuant to Title VII, employers must treat "women affected by pregnancy, childbirth, or other related conditions . . . the same for all employment- related purposes...as other persons not so affected but similar in their ability or inability to work[.]" 42 U.S.C. § 2000e(k).

Plaintiffs allege that AT&T's failure to provide adequate accommodations to pregnant employees constitutes disparate treatment based on sex and that AT&T's SAG policy has a disparate impact on pregnant employees. Plaintiffs have established that there is a common policy at issue, reduced to writing and centrally administered – the SAG policy. Plaintiffs have identified common questions that are central to resolution of the case and that can be answered using evidence common to the class:

> (1) whether the SAG policy has a disparate impact on pregnant workers, in that it disproportionately imposes discipline and results in more denials of

> excused absences for them as compared to others similar in their ability or inability to work, and cannot be justified by business necessity; and
>
> (2) whether the SAG policy treats pregnant employees worse than others similar in their ability or inability to work, and AT&T cannot articulate a sufficiently strong reason to justify the burden on pregnant workers.

Because Plaintiffs assert claims under disparate impact and disparate treatment theories of liability, the Court discusses each in turn.

(a) Disparate Impact

A disparate impact claim satisfies the commonality requirement where"the plaintiffs identify *specific companywide employment practices* responsible for the disparate impact." *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 531 (N.D. Cal. 2012) (emphasis in original) (citing *Wal-Mart*, 564 U.S. at 354-55), *appeal dismissed*, 657 F.3d 970 (9th Cir. 2013)). Plaintiffs assert that the SAG policy has had a disparate impact on putative class members, as AT&T allegedly penalizes absences in all but a handful of enumerated circumstances, resulting in pregnant workers faring worse than non-pregnant workers granted excused absences under an enumerated exception in the policy. Under this facially neutral policy, AT&T omitted pregnancy and related medical conditions from its attendance scheme for excusing absences,while allegedly it covers similar absences for others similar in their ability or inability to work. Plaintiffs contend this nationwide attendance policy leads pregnant workers to have requests for excused absences denied more often and to face more discipline.

As previously discussed, it is undisputed that the SAG policy does not permit any discretion as to whether an absence is excusable. Moreover, the SAG policy requires the use of common and consistent criteria and is centrally administered by the CAG. The SAG is precisely the type of uniform, discretion-free company policy that supports a finding of commonality. *See Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 117 (4th Cir. 2013).

Plaintiffs also proffer Dr. Madden's analysis, which uses evidence common to the class to demonstrate that the effects of SAG policy can be evaluated class-wide. That analysis, if accepted by the jury, shows that the SAG has given rise to statistically significant disparities in the denial of excused absences and in the imposition of discipline highly adverse to pregnant workers.

AT&T contends that Plaintiffs have not satisfied the commonality requirement because of their emphasis on denials of requests for excused absences and discipline short of terminations, arguing that *only* terminations—and not the denial of requests for excused absences, imposition of points, and discipline—can be considered adverse employment actions. AT&T's argument misses the mark for two reasons. First, Plaintiffs' claims under the PDA ask whether the SAG disproportionately penalizes pregnant workers, as compared to others similar in their ability or inability to work, in seeking accommodations for pregnancy and pregnancy-related conditions. Second, such a standard would be inconsistent with

Supreme Court and Eleventh Circuit precedent recognizing that Title VII "does not require proof of direct economic consequences in all cases." *Holland v. Gee*, 677 F.3d 1047, 1057 (11th Cir. 2012) (quoting *Davis v. Town of Lake Park,* 245 F.3d 1232, 1246 (11thCir.2001)); *see also Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 64–65 (1986).

Plaintiffs correctly point out that discipline short of termination (such as restricting transfers and promotions—all of which Plaintiffs have alleged here) might constitute actionable adverse "terms, conditions, or privileges of employment" under Title VII. *See Mathis v. Leggett & Platt*, 263 Fed. Appx. 9, 13 (11th Cir. 2008) (suggesting that disparate imposition of attendance points would be meaningful for assessing discrimination). Furthermore, what constitutes an adverse employment action, and whether Plaintiffs must make such a showing under the PDA, are disputed issues that present common legal questions, proof of which is the same for all members of the class and is "apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350. These issues therefore do not defeat commonality for purposes of class certification.

A company-wide attendance policy that leaves no room for discretion—which Plaintiffs challenge here—is the type of "uniform corporate polic[y]" that supports a finding of commonality. *See Scott*, 733 F.3d at 117 (4th Cir. 2013); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 489 (7th

Cir. 2012) *cert. denied*, 568 U.S. 887 (2012) (certifying class where plaintiffs challenged two company-wide policies). Accordingly, the commonality requirement is satisfied with respect to Plaintiffs' disparate impact claim.

(b) Disparate Treatment

In pattern or practice disparate treatment cases, to satisfy the commonality requirement of Rule 23(a), *Wal-Mart* requires "significant proof that an employer operated under a general policy of discrimination[.]" 564 U.S. at 353 (quoting *Gen. Tel. Co. of the Sw.*, 457 U.S. at 159 n.15). A plaintiff can establish a prima facie case of pregnancy discriminationby showing, "[1] that she belongs to the protected class, [2] that she sought accommodation, [3] that the employer did not accommodate her, and [4] that the employer did accommodate others 'similar in their ability or inability to work.'" *Young*, 575 U.S. at 229.

Plaintiffs may establish liability for pattern or practice claims upon a showing that discrimination was the "regular rather than the unusual practice" through statistically significant disparities between the observed and expected results in the challenged personnel practices. *Wal-Mart*, 564 U.S. at 352 n.7; *see also Costco*, 285 F.R.D. at 518 (citing *Teamsters*, 431 U.S. at 336). At class certification, Plaintiffs must offer evidence sufficient to demonstrate common claims of disparate treatment among class members. In applying *Teamsters* and *Wal-Mart*,the Fourth Circuit summarized a plaintiff's disparate treatment claim as: "Under a disparate

treatment theory, the common contention is that Nucor engaged in a pattern or practice of unlawful discrimination against black workers in promotions decisions." *Brown v. Nucor Corp.*, 785 F.3d 895, 909 (4th Cir. 2015). At the liability stage, the Eleventh Circuit has made clear that disparate treatment may be established under the PDA if there is a showing that the employer treated pregnant workers differently than those similar in their ability or inability to work. *See Durham v. Rural/Metro Corp.*, 955 F.3d 1279, 1286-87 (11th Cir. 2020) (explaining that the plaintiff satisfied her burden for failure to accommodate claim under the PDA where her temporary lifting restriction based on her pregnancy was treated differently than her colleague's lifting restriction stemming from an on-the-job injury) (citing *Young*, 575 U.S. at 208 (holding that plaintiff may establish liability with "evidence that the employer's policies impose a *significant burden* on pregnant workers" (emphasis added))); *cf. Hodgkins v. Frontier Airlines, Inc.*, No. 1:19-CV-03469-RM-MEH, 2021 WL 2948810, at *13 (D. Colo. July 14, 2021) (holding that Plaintiffs adequately pled a disparate treatment claim under the PDA where "Plaintiffs accrue points for pregnancy-related absences, despite Frontier's stated policy of not assigning points for 'excused' absences, including certain recognized disability").

Here, Plaintiffs contend that AT&T has failed to extend a benefit of excusing absences to pregnant workers on the same terms as absences excused for other

workers under the SAG policy. Further, the Plaintiffs contend that the SAG policy itself, the apps and administrative system used to administer the SAG policy, and the Company's training, guidance, and policies underscore that – as a matter of policy – AT&T treats pregnant workers differently. Plaintiffs offer both statistical and record evidence in support of their argument that AT&T had a "general policy of discrimination," including, Dr. Madden's report showing highly statistically significant disparities adverse to pregnant workers; corporate testimony that the Company did not consider pregnancy in drafting the SAG policy and could not offer any reason why the policy did not list pregnancy, and evidence that the policy is nationwide.

AT&T contends that Plaintiffs have failed to identify the proper comparators. But, this does not rebut that the commonality requirement is met. Determining the correct universe of comparators under a nationwide policy is better settled at the merits stage using evidence common to the class. *Coleman v. Donahoe*, 667 F.3d 835, 846–47 (7th Cir. 2012) ("[W]hether a comparator is similarly situated is usually a question for the fact-finder[.]") (internal quotation marks omitted); *cf. Young*, 135 S. Ct. at 1354 (concluding that plaintiff had created a sufficient question of fact for trial based on UPS's policy of limiting "light duty" jobs to certain non-pregnant workers).

AT&T further argues that attendance-related discipline did not consistently and adversely affect pregnant employees. AT&T's argument relies on its criticisms of Dr. Madden's analysis. For the reasons stated in the Court's order on the parties' *Daubert* motions, the Court accepts Dr. Madden's analysis in support of class certification. AT&T's criticisms of Dr.Madden's analysis go to the weight, not the admissibility, of her opinion, and her report supports Plaintiffs' theory of commonality.

Plaintiffs have sufficiently demonstrated that their disparate treatment claims are capable of proof using common evidence.

3. Typicality

Rule 23(a)(3) requirements are met when the class representatives' claims and the class arise "from the same event or pattern or practice and are based on the same legal theory." *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012) (citation omitted). Typicality does not require identical claims; rather it requires "a sufficient nexus . . . between the legal claims of the named class representatives and those of individual class members to warrant class certification." *Id.* (citation omitted).

Here, the Named Plaintiffs' claims arise from the same course of conduct underlying the class claims – AT&T's attendance policy, pursuant to which pregnant workers are allegedly treated differently than others similar in their ability or

inability to work when seeking accommodations for absences, late arrivals, or early departures. Ms. Webb and Ms. Allen sought to obtain excused absences to avoid attendance points and discipline under the SAG policy during their pregnancies, and repeatedly, those requests were denied, resulting in accumulating points, mounting discipline, and (ultimately) their terminations.

AT&T argues that Ms. Webb and Ms. Allen are not typical of the class they seek to represent because they knew how to obtain excuses for a pregnancy-related absence under the SAG, but merely "failed to act on that knowledge." But, Plaintiffs' claims are that they were unable to successfully obtain excused absences and received discipline as a result of AT&T Mobility's *policy* – the policy's approach to pregnancy led to this challenge. Plaintiffs contend that their failures to succeed were a feature of the policy they now challenge as discriminatory. Ms. Webb and Ms. Allen proffer evidence that they were unable to secure excused absences despite repeated efforts, resulting in escalating discipline. These asserted experiences with the SAG policy are allegedly typical of the experiences of the pregnant retail employees they seek to represent.

AT&T further challenges the Named Plaintiffs' typicality because they did not experience every possible negative outcome as a result of the SAG policy such as a denial for promotion. As Plaintiffs note, however, this reads the typicality requirement too rigidly. The typicality inquiry is satisfied "even if factual

distinctions exist between the claims of the class representatives and the other class members." *Thompson v. Jackson*, No. 1:16-CV-04217, 2018 WL 5993867, at *8 (N.D. Ga. Nov.15, 2018). The test is whether other members have the same or similar injury, the injury is caused by the same course of conduct, and the injury stems from conduct not unique to the named plaintiffs. *See Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) ("The typicality requirement may be satisfied despite substantial factual differences, however, when there is a strong similarity of legal theories") (internal quotation marks omitted); *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985) ("[A] strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences"); *Kornberg v. Carnival CruiseLines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (typicality "does not require identical claims or defenses; factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class").

Here, Ms. Webb and Ms. Allen challenge the SAG policy based on a course of conduct that is common to the class. Allegedly, both were denied pregnancy-related excused absences and received more discipline (which is associated with adverse outcomes such as failure to promote), making their experiences sufficiently "typical" to represent the class. Their experiences are likewise consistent with Dr. Madden's analyses showing statistically significant disparities in denials of

requests for excused absences and discipline adverse to pregnant workers as compared to other workers at AT&T who sought excused absences under the SAG.

The typicality requirement has been satisfied.

4. Adequacy

Rule 23(a)(4) requires that the class representatives "will fairly and adequately protect the interests of the class" and is satisfied where (1) no "substantial conflicts of interest exist between the representatives and the class," and (2) "the representatives will adequately prosecute the action." *Dickens v. GC Servs. Ltd. P'ship*, 706 F. App'x 529, 535 (11th Cir. 2017) (Citation omitted). The Named Plaintiffs are former retail employees who were subject to the SAG policy and, therefore, share the interests of the class they seek to represent. In addition, the Named Plaintiffs have been actively involved in pursuing this case, including maintaining communication with class counsel and participating in discovery.

AT&T contends that Ms. Allen and Ms. Webb are not adequate class representatives because they were disciplined and terminated due to misconduct, rather than due to their pregnancies. However, both Ms. Allen and Ms. Webb have submitted evidence that support their contention that their unexcused absences were pregnancy related, and that is sufficient to meet their burden at the class certification stage. Furthermore, the PDA does not exclusively prohibit discriminatory terminations; rather, the standard is discriminatory *treatment*. Plaintiffs' class-

based claim is that the putative class face unexcused absences that resulted in discipline, despite AT&T's stated policy of not excusing absences for many other workers, including those with non-pregnancy related medical and health conditions. Ms. Allen and Ms. Webb are typical of other class members in this respect, which also makes them adequate representatives.

The Court also concludes that Plaintiffs' counsel—Cohen Milstein, Sellers & Toll, the ACLU Foundation of Georgia, and the ACLU Women's Rights Project—have significant expertise and have and would vigorously prosecute this action on behalf of the class. Defendant does not dispute the adequacy of class counsel. Accordingly, the Court would appoint them to represent the class. Fed.R. Civ. P. 23(g).

B. Rule 23(b)(3) Requirements

Under Rule 23(b)(3), the Court can permit class certification only if "the court finds 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." Fed. R. Civ. P. 23(b)(3); *Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279, 1282 (11th Cir. 2011).

As AT&T contends, Plaintiffs' claims include individualized issues that cannot be resolved on a class-wide basis. And, a class action proceeding is not

superior, even could or should the Court bifurcate the proceedings as suggested by the Plaintiffs. Accordingly, the Court declines the Plaintiffs' invitation to certify this case as a class action.

1. Predominance

Under Rule 23(b)(3), Plaintiffs must establish that questions of law or fact common to class members predominate over any questions affecting only individual members. Fed. R. Civ. P. 23(b)(3). "Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each member's underlying cause of action." *Rutstein v. Avis Rent-A-Car Sys*., 211 F.3d. 1228, 1234 (11th Cir. 200); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) ("The more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits) (citations omitted). "Where, after adjudication of the class-wide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individualized claims, such claims are not suitable for class certification under Rule 23(b)(3)." *Klay v. Humana*, 382 F.3d 1241, 1255 (11th Cir. 2004) (citation omitted). The predominance inquiry under Rule 23(b)(3) is "far more demanding" than Rule 23(a)'s commonality requirement and must be analyzed under its own separate inquiry. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997).

Individual issues predominate in this case because the Court will be required to engage in numerous individualized inquires, including whether a class member was absent from work, whether the absence was caused by an inability to come to work, whether that inability was pregnancy related, whether the employee informed or attempted to inform AT&T of that inability, and whether the employee sought an excuse for the absence. And, while the Court accepts for purposes of the Plaintiff's Motion for Class Certification that the assessment of points even without a termination is an adverse employment action because points may limit the availability of transfers or promotions for a class member, resolving this issue would necessarily require the Court to assess facts and circumstances unique to each individual in the class. For example, the Court would have to inquire whether each class member was interested in a transfer or promotion, whether there were opportunities for transfer or promotion during the period of discipline, and/or whether the employee was qualified for a transfer or promotion as compared to other candidates. These individualized questions would predominate this dispute, such that they cannot be resolved with class-wide proof. *See Reid v Lockheed Martin Aeronautics Co*., 205 F.R.D. 655, 684 (N.D. Ga. 2001) (denying class certification of Title VII disparate treatment and disparate impact claims where resolution of claims "will require the court to focus on the individual circumstances of each member of the plaintiff class . . . Claims of discrimination, in employment or

elsewhere, depend heavily on the specific circumstances and conditions in which the victim finds himself or herself"); *Jackson v. Motel 6 Multipurpose, Inc*. 130 F.3d 999, 1006 (11th Cir. 1997) (declining to certify putative class under Rule 23(b)(3) because plaintiffs' claims would have "require[d] distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination").

2. Superiority

Under Rule 23(b)(3), Plaintiffs must also establish that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). However, a class proceeding is not a superior method of adjudication where it "would be overly cumbersome and would result in litigation characterized by confusion and incoherency." *Reid*, 205 F.R.D. at 686-687. Where the resolution of an "overarching common issue breaks down into an unmanageable variety of individual legal faction issues," Rule 23(b)(3) cannot be satisfied. *Andrews v. American Tel. & Tel. Co*., 95 F.3d 1014, 1023 (11th Cir. 1996), abrogated in part on other grounds in *Bridge v. Phoenix Bond & Indem. Co*., 553 U.S. 639 (2008).

Adjudication of this dispute class-wide would not preserve the time, effort or resources of the Court. *See Klay*, 382 f.3d at 1270 (noting that substantial economies of time, effort, and expense for the litigants, as well as the Court, is one of the main reasons why it is desirable to litigate multiple parties' claims in a single action.) A

class proceeding is not superior because of the difficulty in managing the multitude of fact-specific inquires needed to resolve each putative class member's claims of discrimination, which will necessarily lead this Court to a series of individualized hearings.

Perhaps recognizing the challenging issues with its class-wide approach, Plaintiffs suggests that the Court that it could bifurcate adjudication of liability and remedies, with the Court first adjudicating common liability questions and the availability of punitive damages, and if the class established liability, then it would address injunctive relief and the amount of distribution of monetary damages during the second stage of the trial or trials, at which point AT&T could then raise any individual affirmative defenses it may have. This Court does not see how that approach will lead to any overall efficiency, only unmitigated confusion, and believes that it would vitiate the underlying policies of Rule 23(b)(3). *See Shuford v. Conway*, 326 F.R.D. 321, 339 (N.D. Ga. 2018).[6]

C. Rule 23(c)(4)

As an alternative approach, Plaintiff's suggest that this Court should, at a minimum, certify as a class action two issues:

[6] The Court also acknowledges AT&T's concerns of a possible Seventh Amendment violation to the extent that a bifurcated trial would have liability determined by one jury and then a second jury would decide the issues of damages as to any particular plaintiff.

1. Whether the SAG policy has a disparate impact on pregnant workers, in that it allegedly disproportionately imposes discipline and results in more denials of excused absences for them as compared to others similar in their ability or inability to work, and cannot be justified by business necessity; and
2. Whether the SAG policy treats pregnant employees worse than others similar in their ability or inability to work, and, if so, whether AT&T can articulate a sufficiently strong reason to justify the burden on pregnant workers.

Plaintiffs contend this more limited type of class action finds support within the text of Rule 23(c)(4), which states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Not surprisingly, the parties disagree as to whether this approach is advisable or even allowable. Plaintiffs point to decisions in other circuits that have approved this approach as being fair and allowable, particularly to resolve threshold liability issues where aspects of damages may require individual inquiry, *see, e.g., Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 411-13 (6th Cir. 2018), cert. denied, 139 S. Ct. 1319, 203 L. Ed. 2d 564 (2019) (citing cases), and to certify class claims for declaratory and injunctive relief in employment discrimination cases to efficiently narrow issues for adjudication, *see, e.g., McReynolds*, 672 F.3d. 482, 491-92 (7th

Cir. 2012); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 167-69 (2nd Cir. 2001). Apparently, the Eleventh Circuit has not spoken on this issue, as the parties have not cited to any authority in that regard, although AT&T points to a case from a District Judge on the Northern District of Georgia which is critical of this approach. *See In re Atlas Roofing Corp. Chalet Shingle Prod. Liab. Litig.*, 321 F.R.D. 430, 447 (N.D. Ga. 2017).

This Court agrees with AT&T that the certification of a class on the issue of liability for any damages (compensatory and/or punitive) would not be appropriate due to the individual issues which would predominate whether and to what extent AT&T would be liable to any particular putative plaintiff, as set forth above. Indeed, in any subsequent trial where any particular putative plaintiff's claim would be considered, a fair argument can be made that such plaintiff's jury would inherently have to reconsider the liability issue when evaluating and considering AT&T's claims and defenses as to that plaintiff. In no world would that be an efficient process or use of time.[7]

Thus, this Court does not believe that Rule 23(a)(4) should be employed under the circumstances of this case and declines the Plaintiffs' argument to use it to save their class-wide claims.

[7] And, a credible argument could be made that the Named Plaintiffs would not be an adequate representative of putative plaintiffs' rights when the Named Plaintiffs claims have a damages component, but any putative plaintiff's claim might not.

IV. CONCLUSION

For the above reasons, the Court finds that this lawsuit is not suitable for class certification. Accordingly, IT IS HEREBY ORDERED that Plaintiffs' Motion for Class Certification [Doc. 85; Doc. 114] is **DENIED**.

IT IS SO ORDERED, this 21st day of March, 2022.

William M. Ray II

WILLIAM M. RAY, II
UNITED STATES DISTRICT JUDGE