IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

SYLVESTER MCCLAIN, on his own behalf and on behalf of a class of similarly situated persons, et al.,	§	
Plaintiffs,	§	CIVIL ACTION NO. 9:97-CV-063
vs.	§	
	§	JUDGE CLARK
LUFKIN INDUSTRIES,	§	
Defendant.	§	

DEFENDANT LUFKIN'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Reversing Judge Cobb's finding that Sylvester McClain's charge of discrimination exhausted administrative remedies for the class,[1] the Fifth Circuit found that the class administrative remedy was first exhausted by the EEOC charge filed by Buford Thomas on February 24, 1998. Because Thomas' charge is now the operative charge, promotion claims occurring before April 2, 1996, 300 days before the Thomas charge was filed, are barred by limitations. 42 U.S.C. § 2000e-5(e)(i). As a matter of law, the change in the limitations period precludes a finding of disparate impact in salaried promotions because there is no time period from April 2, 1996 forward in which a significant statistical disparity in the number of African-American promotions to salaried positions exists. [2] *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) ("A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may

[1] *See McClain v. Lufkin Industries*, 519 F.3d 264, 274 (5th Cir. 2008) ("McClain's letter failed to identify any neutral employment policy" but Thomas's complaint "presents a close question of exhaustion directed at a discriminatory, albeit neutral, company policy authorizing subjective promotion decisions"). *See also* Thomas EEOC Charge, attached as Exhibit A.

[2] While Lufkin still disagrees with Plaintiffs' expert's approach, Lufkin respects that the Fifth Circuit found that Judge Cobb did not abuse his discretion in accepting this methodology and, therefore, Lufkin does not challenge this methodology with respect to the data introduced at trial.

constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences."); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 619 (2007).

While the impact on total back pay award is small – the parties have agreed that the lost pay attributed to salaried promotions for the period 1994-2002 is $237,923 – the absence of disparate impact in salaried promotions is important to the scope of injunctive relief. Therefore, Lufkin moves for summary judgment on Plaintiffs claims of disparate impact discrimination in salaried positions.

STATEMENT OF UNDISPUTED FACTS

In analyzing promotions into and within salaried positions for the original liability period of March 6, 1994 through 2002, Plaintiffs' statistical expert found:

> Blacks received 34 out of 386 promotions into salaried positions into salaried positions during the liability period, while they were expected to receive 42.85 promotions based on their availability. This shortfall of 8.85 promotions represents a loss of 20 % of the expected promotions. The Z-value for this disparity is -2.02, indicating a statistically significant shortfall of black promotions into salaried positions.

Plaintiff's Trial Exhibit 1 at 24, attached as Exhibit B without exhibits. Both the trial court and the Fifth Circuit held that this discrepancy was statistically significant. Amended Final Judgment at 29, DKT 552; 519 F.23d at 280 (5th Cir. 2008).

If Plaintiffs' expert had applied his same methodology to any period (including time periods to 2007) but excluded those salaried promotions barred by limitations, there would have been no statistically significant shortfall in African-American promotions to or within salaried

positions in any time period.[3] Applying the same methodology the Plaintiffs' expert applied on the 1994 through 2002 period, Lufkin's expert analyzed the time period that would be established by the Thomas charge and found no statistically significant discrepancy (at 1.62 standard deviations). *See* Second Declaration of Mary Baker, attached as Exhibit B ("Baker Declaration").

ARGUMENT

A. Without a Statistically Significant Disparity there can be no disparate impact discrimination.

As is required**,** the lynchpin of Plaintiffs proof was statistical evidence. Judge Cobb did not require the Plaintiffs to prove any individual case of discrimination so long as they had sufficient statistical proof to make out a case of disparate impact. Amended Final Judgment at 13, DKT 552 (Aug. 29, 2005). However, in addition to challenging Plaintiffs' statistical expert's methodology, Lufkin urged the trial court to be cautious in drawing inferences from 2.02 standard deviations on grounds that it was a borderline statistic.[4] *See, e.g., EEOC v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 651 (5th Cir. 1983) (rejecting standard deviation of 2.07), *rev'd on other grounds*, 467 U.S. 867 (1984). Finding that the district court did not abuse its discretion in accepting Plaintiffs' statistical methods or statistical significance at 2.02 standard deviations, the Fifth Circuit affirmed the finding of disparate impact.

Because the trial court erroneously found the class was defined by McClain's charge, it did not consider whether the statistical significance of the disparity was driven by promotions

[3] Although Lufkin does not believe the post 2002 period relevant to this case as no statistical evidence was taken with respect to that period at trial, new data shows whether one examines salaried promotions from 1996 to 2002 or 1996 to the present, or even 1994 to 2007, there is not a statistically significant disparity in salaried promotions. *See* Baker Declaration.

[4] As shown by new data, any inference drawn from the 1994-2002 data evaporates as there is no statistically significant disparity in salaried promotions in any time period from 1994 to 2007 except for the particular period 1994-2002. For example, the disparity from 1994-2007 is not significant (at 1.61 standard deviations), nor is the disparity from 1996-2007 (at 1.21 standard deviations). *See* Baker Declaration at Table 1.

outside of the limitations period established by the Thomas charge. In fact, no evidence was taken on this issue. Had such evidence been taken, Plaintiffs' statistical analysis would have concluded that there was no statistically significant adverse impact (at 1.62 standard deviations) during the period from 1996 through 2002; that is, any discrepancy between expected and observed number of salaried promotions may be nothing more than mere chance. *See*, e.g. *Castaneda v. Partida*, 430 U.S. 482, 496 n. 17 (1977), and *Hazelwood School District v. United States*, 433 U.S. 299, 309 (1977).

Disparate impact discrimination requires proof by "statistical evidence of a kind and degree sufficient to show the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 994 (1988). As a result of the Fifth Circuit's ruling on the McClain charge, the "practice in question" is whether Lufkin's excessive subjectivity during the period April 2, 1996 to 2002 created a statistically significant disparity in promotions awarded African-Americans.

The two-standard deviations test is roughly comparable to a 0.05 level of statistical significance, the conventional threshold of statistical significance in the social sciences which has been accepted by the courts.[5] REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (Fed. Judicial Center, 2d ed. 2000) at 380. Disparities of less than two-standard deviations, which may by the product of chance, cannot establish the requisite causation for disparate impact discrimination as they are consistent with the outcome of a race-neutral process. *See* Baker Declaration at ¶ 6.

In *Hazelwood*, the Supreme Court stated that statistics should be limited to the relevant time period. 433 U.S. at 309. Promotions outside of the relevant time period are not relevant.

[5] To be more precise, 0.05 level of statistical significance is equal to 1.96 standard deviations. *Palmer v. Shultz*, 815 F.2d 84, 92 (D.C. Cir. 1987).

Movement for Opportunity & Equality v. General Motors Corp., 622 F.2d 1235, 1245 (7th Cir. 1980) (employment decisions made more than 300 days before filing of EEOC charge should be excluded from statistical comparison); *Eubanks v. Pickens-Bond Constr. Co.*, 635 F.2d 1341, 1348 (8th Cir. 1980) (in promotion case, focus should not be on the percentage of African Americans in job in question, but on number of African Americans selected for promotion during the relevant time period); *Ste. Marie v. Easter R.R. Ass'n*, 650 F.2d 395, 401-02 (2d Cir. 1981) (statistics purporting to demonstrate discrimination in promotion must exclude those promotions prior to liability period). While courts have considered evidence predating the statute of limitations in cases involving "continuing violations," the Supreme Court's recent decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), precludes the application of the continuing violation theory to discrete acts such as promotions.

B. <u>This Court is Not Precluded by the Fifth Circuit's Mandate or the Law of the Case From Granting Summary Judgment on the Salaried Promotion Claims Because This Issue Was Not Considered by the Fifth Circuit</u>.

The law of the case doctrine does not prevent the trial court from granting partial summary judgment because the Court of Appeals has never addressed the issues presented in this motion for partial summary judgment. *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061 (5th Cir. 1981) ("[T]he law of the case established by a prior appeal does not extend to preclude consideration of issues not presented or decided…").

While Lufkin did argue on appeal that Sylvester McClain's charge did not properly exhaust administrative remedies, Lufkin did not challenge Thomas' charge because the trial court did not rely on it. Lufkin had no reason to anticipate that the Court of Appeals would rely on Thomas' charge and, therefore, Lufkin did not address the limitations period that would apply if Thomas' charge was the operative charge in its original briefing. Moreover, no evidence was

presented at trial regarding the statistical significance of the salaried promotion data after the limitations period established by Thomas' charge.

In its Petition for Panel Rehearing, Lufkin did argue that the case should have been remanded for a new finding on liability on both the hourly and salaried promotions, because Judge Cobb had predicated his findings on the liability period established by McClain's charge rather than Thomas's charge.[6] The Court of Appeals denied Lufkin's motion for rehearing, but that denial does not amount to an express decision on the merits of the arguments the motion presented. *See Alpha/Omega Ins. Servs, Inc.*, 272 F.3d 276, 281 (5th Cir. 2001). Therefore, since issues stemming from the finding on exhaustion that affect the promotion claims, with regard to both liability and damages, have not been decided by the Court of appeals, this Court free to do so.

CONCLUSION

Even applying Plaintiffs' statistician's methodology, Plaintiffs are not able to show a statistically significant disparity for African-American promotions into Lufkin's salaried jobs after April 2, 1996. Without a statistically significant disparity, there cannot be disparate impact discrimination. Accordingly, summary judgment should be granted on Plaintiffs' claims of promotion discrimination into salaried jobs.

[6] Defendant-Appellee and Cross-Appellant's Petition for Panel Rehearing, p. 7-15.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 17th day of April 2009, a copy of the foregoing document was filed electronically through the Court's CM/ECF System and was automatically copied to Plaintiffs through the Court's electronic filing system.

/s/
Attorney for Defendant