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

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| 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 INDUSTRIES, INC.'S MOTION TO QUASH DEPOSITIONS AND FOR PROTECTION FROM UNNECESSARY DISCOVERY**

Although the time for discovery has long since passed, this case has been tried and appealed, plaintiffs initiated "post-remand" discovery in this case without instruction from this Court. To avoid unnecessary controversy, Lufkin cooperated in such discovery voluntarily producing its electronic database which records all promotions and other personnel actions (updating its production before trial through May 2008), producing documents (985 pages in response to 22 separate requests) and presenting a corporate representative for deposition (with two attorneys present, plaintiffs deposed Lufkin's Manager for Human Resources for more than six hours). Now, plaintiffs demand that Lufkin present five additional witnesses for deposition of up to seven hours each and respond to an additional 22 requests for production and two interrogatories with a total of 27 subparts. These depositions, requests, and interrogatories are unnecessary for the Parties to craft their proposals for back pay and injunctive relief that this Court requested on June 5, 2008 and can serve only to unnecessarily increase the litigation costs in this case. Because plaintiffs' appetite for discovery seems insatiable, Lufkin moves for protection and the Court's supervision of further discovery, if such discovery is necessary.

## I. Background.

On June 5, 2008, this Court asked the Parties to submit proposals (not to exceed ten pages) for calculating back pay and for injunctive relief in accordance with the Fifth Circuit's decision in this case.[1] While Lufkin presumed that the Court did not intend for the Parties to engage in post-remand discovery at least until the Court had an opportunity to consider the Parties' proposals at the status conference currently scheduled for December 5, 2008, Lufkin agreed to allow Plaintiffs to engage in limited discovery on any changes that might have taken place since the trial. When Plaintiffs, however, served Lufkin with five separate notices for depositions under Rule 30(b) of the Federal Rules of Civil Procedure,[2] Lufkin responded that it was not willing to consent to these depositions unless Plaintiffs agreed to a two-hour limit for each deposition. Plaintiffs countered that they needed the full seven hours to take the deposition of the person most knowledgeable about Lufkin's human resources practices, but would consider limits to the remaining depositions after taking that first deposition. Therefore, on July 9, 2008, Lufkin presented John Havard, Lufkin's Human Resources Manager for a 30(b)(6) deposition to testify on several broad subjects, including any actions taken by Lufkin to implement Judge Cobb's Final Judgment.

As has often been Plaintiffs' practice throughout this litigation, two of Plaintiffs' counsel were present for the deposition, including counsel who flew in from Oakland, California for the deposition. Havard was questioned for over six hours. Much of the questioning had little to do with Judge Cobb's liability finding that Lufkin's subjective decision-making practices had a disparate impact on promotion discrimination, much less the issue of what injunctive relief might

[1] McClain v. Lufkin Industries, Inc., 519 F.3d 264, 283-84 (5th Cir. 2008) .
[2] These depositions were for the person most knowledgeable about the human resources department, the person most knowledgeable about the corporate department, and the persons most knowledgeable for Lufkin's three existing divisions. See notices of deposition attached as Exhibit A.

address any problem with those practices. Plaintiffs' counsel asked many questions that were outside the scope of their notice of deposition, including a long line of questions concerning a 2007 EEOC charge in which an employee had alleged racial harassment, an issue that clearly involved a disparate treatment (not impact) claim. Havard depo. at 202-211. Havard was also asked about Lufkin's paper and pencil tests and whether they had been validated, even though there was no finding by the trial court that those tests had a disparate impact on black employees, and Plaintiffs never challenged these tests during the original litigation. Havard depo. at 201.

Following Mr. Havard's deposition, Plaintiffs renewed their request to take an additional four depositions pursuant to Rule 30(b)(6), plus the deposition of Paul Perez, Lufkin's Vice President in charge of human resources. *See* Exhibit B. While Lufkin believed that further depositions were unnecessary for the Parties to craft their respective proposals for the Court and would only serve to unnecessarily increase each side's legal expenses, Lufkin advised Plaintiffs that it would agree to the remaining Rule 30(b)(6) depositions of the persons most knowledgeable of the foundry, oil field, and power transmission divisions if Plaintiffs agreed to a reasonable time limit for each deposition. Plaintiffs were unwilling to agree to any time limits or to forego the depositions of Paul Perez or the representative with knowledge of the corporate division. Plaintiffs also served Lufkin with 22 additional requests for documents and two interrogatories that contained 27 separate questions, about objective tests that Plaintiffs chose not to challenge during the trial of this case. *See* Plaintiffs First Post-Remand Set of Interrogatories, Plaintiffs' Second Post-Remand Request for Production of Documents; Plaintiffs' Third Post-Remand Request for Documents, attached as Exhibit C.

## ARGUMENT

There is no justification for Plaintiffs to take any more depositions, much less five more depositions that could last up to 35 hours. Addressing Judge Cobb's injunctive relief ruling, the Fifth Circuit took issue with the trial court's failure to identify "specific steps" that Lufkin needed to take in order to address the liability finding that Lufkin's promotion practices had a disparate impact on black employees. 519 F.3d 264, 284 (5th Cir. 2008) ("An order framed in these broad generalities fails to afford notice to Lufkin of its proscribed or required conduct and is therefore unenforceable.") While recognizing that it would "not be simple" to "craft an adequate remedial order that will eliminate discrimination without hobbling Lufkin's legitimate promotion polices," the Court of Appeals remanded the case to the district court for "reviewing afresh the propriety of the injunction, and if it is found necessary, of balancing plaintiffs' requests for stronger measures to ensure Lufkin's compliance with the imprecision of the liability finding." *Id*.

The scope of any prohibitory injunction should be limited to the specific conduct that Judge Cobb and the Fifth Circuit found to violate the law. *See, e.g., United States v. Criminal Sheriff*, 19 F.3d 238, 240-41 (5th Cir. 1994) (because there were only findings regarding discriminatory job assignments, court inappropriately entered an injunction against sex discrimination in hiring, promotion and recruitment); *Brady v. Thurston Motor Lines Corp.*, 726 F.2d 136, 146-47 (4th Cir. 1984) (injunction against initial job placement not appropriate when Plaintiffs failed to prove discriminating initial job placement).

There may be cases where a change in circumstances may be relevant to the issue of injunctive relief. *See, e.g., Spencer v. General Elect.*, 894 F.2d 651, 660-61 (4th Cir. 1990), (affirming denial of injunction against sexual harassment where harassing supervisor was no

longer employed and company had revamped its sexual harassment policy) overruled on other grounds by *Farrar v. Hobby*, 506 U.S. 103 (1992); *Dole v. Shenandoah Baptist Church,* 899 F.2d 1389, 1401 (4th Cir. 1990) (affirming denial of injunction where defendant had ceased practice of paying "head of household" salary supplement). In such cases, Lufkin would generally have the burden of showing that the changed circumstances militated against the injunctive relief that the Court was considering imposing. If Lufkin were to argue that a change of circumstances should be taken into account by this Court in crafting injunctive relief --- and Lufkin may do so in its proposal to the court --- some discovery into *those particular circumstances* might be warranted.[3] Until such time, there is no basis for any of the discovery, much less the far reaching and broad-based discovery that Plaintiffs have served on Lufkin.

During the litigation of this case, Plaintiffs took 21 depositions, most lasting a full day. In fact, plaintiffs post remand deposition was the fourth time that Havard had testified. He was deposed twice by plaintiffs (for a total of 9 hours 42 minutes) and testified at trial. The additional witnesses whom Plaintiffs seek to depose were also deposed before the trial of this case, some more than once, and all of them for at least a full day. Additionally, Plaintiffs had an opportunity to question these witnesses at trial.

Any order for injunctive relief should be based on the evidence that was presented to Judge Cobb during the trial of this case, because that is the evidence upon which Judge Cobb's liability finding was based. In the event that Lufkin does argue that there has been a change of circumstances that the Court should take into account in determining appropriate injunctive relief, some discovery might be merited if it has not already been addressed in the recent deposition of John Havard.

[3] One such circumstance, is Lufkin's recent closure of its trailer division. Clearly, it would not make sense for the court to enter an injunction with respect to that particular division.

For the most part, Havard's testimony provided the Plaintiffs with considerable detail about what Lufkin has done since the trial court entered its judgment. Havard described how Lufkin developed more consistent recordkeeping procedures across its divisions to keep track of every promotion decision. Havard depo. at 20-21, 43-44. Hence, in hourly promotions, whenever a more senior job bidder has lost out to a promotion to a less senior bidder, Lufkin can identify the specific factor or factors that resulted in the more senior job bidder losing out on the promotion, be it excessive absences, not having passed a required test for the job, being disqualified because the bidder was not seeking a higher ranked job (i.e., it would result in a demotion or a lateral move), or because the senior employee simply reconsidered and turned the job down. While Lufkin has always kept such data, the new recordkeeping procedures are clearer and more thorough, making it possible to conduct a disparate impact analysis of any specific rule in Lufkin's collective bargaining agreement that might have an effect on black bidders. Havard also described the new processes by which human resources monitors promotions. Havard depo. at 44. With respect to the trial court's concern that black employees might receive less on-the-job training, Havard explained that employees today would not receive training for a job classification that they did not hold. Havard depo. at 48-49. Havard also described the extensive diversity training that was conducted by an outside consultant in May 2005, for all supervisors and managers, as well as other training that has been provided on equal employment opportunity issues to Lufkin's human resources department and other employees. Havard depo. at 32, 36-44.

Along with the discovery that Plaintiffs conducted prior to trial, and the evidence presented at trial, Plaintiffs certainly have enough information to develop the proposal requested

by the Court[4] for injunctive relief that would address the court's finding that subjective decision-making processes had a disparate impact on Lufkin's promotions. In any event, their focus should be on the evidence presented at trial. There is no benefit to allowing Plaintiffs to conduct additional discovery at this time. It is already clear that Plaintiffs' attorneys' fees in this case will substantially exceed the total monetary relief obtained by the Plaintiffs. Allowing Plaintiffs to engage in full-scale post-judgment discovery will not aid the Court in determining appropriate injunctive relief and will provide no additional benefit to the individual Plaintiffs. For these reasons, Lufkin moves the Court to quash Plaintiffs' depositions and enter an Order precluding Plaintiffs from taking additional discovery at this time.

Respectfully submitted,

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[4] The ten-page memorandum is also supposed to address methods of calculating back wages.

**CERTIFICATE OF CONFERENCE**.

I, Christopher V. Bacon conferred with Timothy Garrigan regarding this Motion. Mr. Garrigan was unwilling to agree to withdraw his Notices of Deposition and is opposed to this Motion.

/s/
Christopher V. Bacon

**CERTIFICATE OF SERVICE**

I certify that on this 15th day of August 2008, a copy of the foregoing Defendant Lufkin Industries, Inc.'s Motion to Quash Depositions and for Protection from Unnecessary Discovery 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