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, INC.,	§ §	
Defendant.	§	

DEFENDANT LUFKIN'S POSITION ON DISPUTED ISSUES
FOR CALCULATION OF MONETARY RELIEF

Since their Final Report, the Parties have further narrowed the issues in dispute regarding the calculation of back wages to two issues: (1) which time periods should be included in an award, and (2) what rate of prejudgment interest should apply. Along with this Position Statement, Lufkin is filing a Motion for Partial Summary Judgment with respect to Plaintiffs' claim of disparate impact in salaried promotions on grounds that there is no evidence of a statistically significant disparity in promotions to salaried positions during any time period relevant to the Thomas charge of discrimination, which is now the operative charge since the Fifth Circuit found that Sylvester McClain failed to exhaust administrative remedies with respect to the class claims of promotion discrimination.

The Parties have agreed to stipulate to the calculation of back wages for each time period as follows:

Year	Hourly	Salaried
1994-1995	$483,340	$109,868
1996-2002	$1,901,417	$128,055
2003-2004	$487,756	$0
2004-2007	$159,412	$0

As set forth in the above chart, Plaintiffs seek $3,031,925 in back pay for hourly employees for 1994 through 2007 and $237,923 in back pay for salaried employees for 1994 to 2007.[1] While stipulating to the method of calculation for all time periods, Lufkin agrees only that the back wage award of $1,901,417 for hourly employees between 1996 and 2002 is appropriate. Lufkin objects to any back wages being awarded for promotions in 1994 and 1995, because they precede the statute of limitations.[2] Lufkin also objects to any back wages being awarded for salaried employees for 1996 through 2002 because there is no evidence of a statistical disparity for this time period, although this argument is briefed in the companion Motion for Partial Summary Judgment. Finally, Lufkin objects to back wages being awarded for the periods after 2002 because no evidence was heard with respect to this time period and that as a result of Lufkin's improved recordkeeping, if evidence were taken, Lufkin would establish that

[1] However, Plaintiffs concede that there are no back wages owed to salaried employees for the period following 2002, even employing the methodology used by their expert.

[2] The statute of limitations would also exclude any promotions between January 1, 1996 and April 2, 1996. However, it may be difficult to ascertain with complete accuracy which promotions occurred during that time period because Plaintiffs' expert grouped promotions on a year-to-year basis.

excessive subjectivity is not present in the process, which is almost entirely objective; that using an appropriate analysis there is no disparate impact on African Americans in promotions; and, to the extent any disparity exists, it is justified by legitimate business reasons.

ARGUMENTS

A. The Court should not include the 1994 through 1995 time period in the damages calculation.

In finding that Sylvester McClain's charge of discrimination was the operative charge of discrimination upon which the class' claims were based, Judge Cobb found that the statute of limitations extended back to March 6, 1994, 300 days before Sylvester McClain complained to the EEOC.[3] The Fifth Circuit, however, held that McClain failed to exhaust EEOC remedies with respect to any of the class claims, finding instead that the class claims of promotion discrimination were exhausted by the EEOC charge filed by Buford Thomas on February 24, 1998.[4] Because Thomas' charge is now the operative charge, the statute of limitations now extends back to only April 2, 1996, 300 days before it was filed.

Promotions occurring before 1996 cannot give rise to liability since they are time barred, and they should not be included in the damages calculation. *See Frank v. Xerox Corp.*, 347 F.3d 130, 136 (5th Cir. 2003) (finding that district court correctly determined date for timeliness was 300 days before charge was filed, and that any prior "bad conduct" is time barred). The Supreme Court has established that relief or compensation for time-barred conduct is prohibited. *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

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[3] Amended Final Judgment at 7-9, Dkt. 552.

[4] *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").

statute was passed"). As *Evans* instructs, any promotion disparities occurring before April 2, 1996, are without legal consequence, are not to be viewed as unlawful, and cannot support an award of damages.

While Title VII does allow courts to consider accrual of back pay to two years prior to the filing of a charge with the Commission, 42 U.S.C. § 2000e-5(g)(1), which in this case would be back to February 24, 1995, because the damages flowing from any promotion decision begin at the time the decision is made, not before, no damages accrue for promotion disparities not made the basis of a timely charge. Moreover, even if damages had accrued (and they have not), accrual would only apply to those class members who could have filed a claim or promotion discrimination within the 300-day statute of limitations period set by Thomas' charge. For example, class members whose employment terminated prior to April 2, 1996 would not have any promotion claim that could have been timely filed within the period of the Thomas charge and, thus, no damage. Similarly, Plaintiffs offer no proof that those class members who had timely promotion claims within the 300-day statute of limitations also lost promotions outside of the 300-day period but within the two years prior to the filing of the charge.[5] Plaintiffs cannot recover damages for promotions outside of the 300-day statute of limitations without a showing that the same class member who was denied a promotion during the 300-day period also suffered promotion losses within the two year period. To allow otherwise, would circumvent the statute of limitations because only those Lufkin employees who *could* have filed a timely charge when Thomas did are entitled to be members of the class. *Williams v. Owens-Ill., Inc.*, 665 F.2d 918, 923-24 (9th Cir. 1982), *cert. denied*, 459 U.S. 971 (1982) (noting that employees who were no longer employed during 300 day period could not have filed a claim).

[5] Plaintiffs no doubt recognized that it would not be appropriate to seek back wages beyond 300-days, when they only sought damages for promotions within 300 days before Sylvester McClain's charge at trial and took no appeal on this issue.

The continuing violation doctrine does not apply to discrete discriminatory actions, such as promotions, that are time barred, even if those acts are related to acts alleged as happening in the liability period. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002); *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 352 (5th Cir. 2001). In *Morgan*, the Supreme Court established that, "Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Id*. at 114.

In *Celestine*, more than two hundred African Americans alleged a pattern or practice of racial discrimination in promotions and training by their employer. *Id*. at 348. The court of appeals affirmed the district court's refusal to consider events occurring outside of the liability period. *Id*. at 351. The court of appeals denied the plaintiffs' attempt to introduce past incidents under the continuing violation doctrine, holding that plaintiffs' claims of racial discrimination for failure to promote and train were discrete events based on the conclusion that "[a]n employee who claims to be the victim of racially motivated failure to promote or train is put on notice that his rights have been violated at the time the adverse employment decision occurs, and must therefore bring the claim within 180 days of the adverse decision." *Id*. at 352 (*citing Huckabay v. Moore*, 142 F.3d 233 (5th Cir. 1998)). Thus, the Plaintiffs' class claim on disparate impact on promotions is not appropriate for the application of the continuing violation doctrine.

Plaintiffs may argue that the law of the case doctrine precludes the Court from considering this issue. *Conway v. Chemical Leaman Tank Lines, Inc*., 644 F.2d 1059, 1061 (5th Cir. 1981) (the doctrine "operates to preclude a reexamination of issues decided on appeal…"). However, "the law of the case established by a prior appeal does not extend to preclude consideration of issues not presented or decided…" by the court of appeals. *Id.* (internal quotations omitted).

On appeal Lufkin did ask the court of appeals to consider whether McClain's charge properly exhausted administrative remedies and whether that charge could support the class. Lufkin, however, never asked the court of appeals to establish Thomas's charge as the operative charge, and, lacking knowledge that the court of appeals would make that determination, Lufkin could not have presented an issue related to the modified limitations period. For whatever reason, the court of appeals did not address the finding's impact on the liability findings on promotions or the damages calculations. In fact, Plaintiffs conceded that the court of appeals left unresolved the consequences of its finding with respect to the calculation of damages for promotions.[6]

In Lufkin's petition for panel rehearing it argued that the court of appeals should have remanded the case to this Court for a new finding on liability, because Judge Cobb had predicated his findings on the liability period established by McClain's charge rather than Thomas's charge.[7] 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 Insurance Services, Inc.*, 272 F.3d 276, 281 (5th Cir. 2001) (stating, "Our denial of a motion for panel rehearing does not amount to a decision on the merits"). Because the court of appeals did not do so, this Court is free to address issues related to the affect the exhaustion finding has on the Plaintiffs' promotion claims, with specific regard to both predicating liability and awarding damages.

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[6] Plaintiffs-Appellants-Cross-Appellees' Petition for Panel Rehearing on a Single Issue, p. 2.

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

B. <u>There is No Evidence to Support an Award of Damages after 2002</u>.

The record on which Judge Cobb made his findings of liability did not contain any statistical evidence for the period following 2002. The record similarly lacks any anecdotal evidence of promotion discrimination after 2002. The shortfall 127 hourly promotions and 9 salaried promotions found by Judge Cobb all occurred prior to 2003. Given that there is no evidence in the record, it is not proper to award damages for this period. *See Payne v. Travenol Laboratories, Inc*., 673 F.2d 798, 824 (5th Cir. 1982) (trial court erred in awarding damages for 1971 to 1976 when the statistical evidence introduced at trial only covered time period from 1971 to 1974).

The only way that the court could justify awarding damages for the period after 2002 would be to reopen the evidence and allow another full-fledged trial on the period after 2002. Not only should Plaintiffs' expert justify his failure to use actual applicant data when such data was clearly available since 2002, but Plaintiffs should be required to provide evidence that the Lufkin's promotion practices continued to be influenced by unfettered subjective decision-making. If Lufkin can show that its decision-making processes were largely objective in the post 2002 period (and Lufkin believes that it can prove that), justice requires that Lufkin have an opportunity to make its case before damages are awarded. Moreover, in requesting that the Court reopen the evidence, Lufkin should have the opportunity to prove whether there is a statistically significant disparity in hourly or salaried promotions for the entire time period and use the actual applicant data as available for the post-2002 period.

At this juncture, there is no justification for reopening this case when this case has been fully tried. When the case ended in October 2004, Plaintiffs made no effort at that time to introduce evidence from 2003 or early 2004. When Judge Cobb entered his judgment in August

2005, he only considered the statistical evidence through 2002 because that is what Plaintiffs had offered. Similarly, in remanding this case to this court, there is nothing in the Fifth Circuit's mandate that suggests that it intended for this court to restart the trial and take evidence for the period after 2002. In fact, the Fifth Circuit made it clear that this court should only award damages with respect to those promotions that occurred prior to 2003:

> On remand, the district court will be dealing *solely* with damages attributable to approximately 127 lost promotions in hourly pay grades and nine lost salaried employment promotions.

519 F.3d 264, 281 (5th Cir. 2008).

Plaintiffs may argue that the court could reopen this case without conducting an evidentiary hearing. They may argue that the court could allow their statistical expert to analyze Lufkin's date for the period after 2002, by using the same methodology that he applied to the pre-2003 data. This assumes, however, the same methodology would be appropriate for this time period. Lufkin believes that it would not because Plaintiffs' expert failed to use the actual applicant pool data for each promotion even though such data was readily available for the post 2002 time period.[8]

The law is clear. Actual applicant flow data is superior to other data and should be used when available. *See Teamsters*, 431 U.S. at 342 n. 23; *Anderson*, 26 F.3d at 1286-87 n. 14 ("we agree with the district court that [the] actual applicant flow was the best measure of [the employer's] performance . . . ."); *Malave v. Potter*, 320 F.3d 321, 326-27 (2d Cir. 2003) (holding it permissible to use alternatives to the preferred methodology only if actual data "are 'difficult'

[8] For most jobs, Lufkin posts the job and selects from the bidders. The bid sheets define with certainty the percentage of black applicants for each promotion. Plaintiffs' expert ignored this data. EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 302 (7th Cir. 1991) (The identification of a relevant labor market – the key issue in a class-based Title VII case – means not only identifying qualified potential applicants for the job at issue but also identifying interested potential applicants) (emphasis added).

or 'impossible' to obtain"); *Stout v. Potter*, 276 F.3d 1118, 1123 (9th Cir. 2002) ("In the context of promotions, the appropriate comparison is between the composition of candidates seeking promotion and the composition of those actually promoted."); *Powers v. Alabama Dept. of Educ.*, 854 F.2d 1285, 1298 (11th Cir. 1988) ("[A]pplicant statistics were available, and the plaintiffs should have employed them."). A proper statistical analysis is based only on a "qualified applicant pool." *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 1369 (5th Cir. 1992); *see also Wards Cove*, 490 U.S. at 647-55 (requiring comparison with pool of qualified job applicants); *New York Transit Authority v. Beazer*, 440 U.S. 568, 584-587 (1979); *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1524 (5th Cir. 1993) ("The specific holding of *Wards Cove* was that statistical proof used by the court of appeals was an accurate measure of statistical disparity because it did not take into account the 'qualified' versus 'unqualified' workforce.").

Judge Cobb excused Plaintiffs' expert from using actual bid data in his analysis of the pre-2003 data only because Judge Cobb gave credence to the expert's claim that many of the bid sheets prior to 2003 were illegible. The Fifth Circuit deferred to Judge Cobb's finding. Judge Cobb, however, made no such finding with respect to the bid data since 2002, because those bid sheets were not in evidence. Because Lufkin took much more care with maintaining its bid sheet data after this lawsuit was filed, Lufkin believes that the Court would find that the bid data since 2002 is reliable and should be used. Moreover, Plaintiffs' statistical case was supported by anecdotal evidence of promotion discrimination that predated 2003. There is no such evidence for the more recent period. If Plaintiffs want to recover damages for this time period, then they must offer evidence that supports their claims that they were denied promotions because Lufkin those procedures were governed by excessive subjectivity. Conversely, Lufkin must have the opportunity to counter this evidence with testimony about the practices that Lufkin has implemented during this time period. In short, if damages are to be awarded for this period, Lufkin is entitled to a trial on the merits for this new time period. Obviously, this was not the intent of the Fifth Circuit when it remanded this case to this court to resolve discrete issues.

Because there is no evidence to support a finding of liability for the period beyond 2002 and because it would be unreasonable to conduct another full fledged trial on the 2002 through 2009 time period, no damages for this period should be awarded, except for the continuing losses for the shortfall promotions in the earlier periods which have already been taken into account in the 1996 through 2002 period.

C. The Court is free to Reconsider Judge Cobb's Award of 5% Prejudgment Interest.

Because the Fifth Circuit remanded the case for a redetermination of damages, the Court is free to reconsider the trial court's prior award of 5% prejudgment interest. *Adams v. Lindblad Travel, Inc.*, 730 F.2d 89, 93 (2d Cir. 1984) ("Despite the fact that Adams neglected at trial to ask the district court for an award of prejudgment interest, he is not precluded from doing so on remand. . . . Since we are remanding this case for a redetermination of damages, the parties have no legitimate expectation that the issues relating to the ultimate award have been finally decided."); *In re Department of Energy Stripper Well Exemption Litigation*, 821 F. Supp. 1432, 1434-37 (D. Kan. 1993) (party who fails to challenge rate of post judgment interest in previous appeal may raise issue for first time on remand; while party should have raised issue on appeal, law of the case does not preclude court from reconsidering issue on remand).

In determining the prejudgment interest rate that should apply, Lufkin would urge the Court to consider the treasury rates during the length of the case and award prejudgment interest at a rate that reflects the varying rates from the time the lawsuit was filed in February 1997 through the present. While the 5 percent awarded by Judge Cobb might have been reasonable for the first four years of this case, the treasury rate in the last 8 years has more often been under 5 percent and often it has been considerably below 5 percent. For example, between April 27, 2001 and September 30, 2005 and since October 26, 2007, the treasury rate has been below 4 percent. The purpose of awarding prejudgment interest is to make Plaintiffs whole not to give them a windfall to which they would ordinarily not be entitled.

In the event that the Court decides to use the Texas rate of interest, which appears to have been used by Judge Cobb,[9] Lufkin would urge the Court to order that it be computed as simple interest as required under Texas law. Tex. Fin. Code Ann. §304.104.

Respectfully submitted,

/s/

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[9] The Texas rate of postjudgment interest is five percent a year if the prime rate as published by the Board of Governors of the Federal Reserve is less than five percent. Tex. Fin. Code Ann. §304.004. Other provisions of the Texas Finance Code require the postjudgment rate of interest to be used for prejudgment interest in certain types of cases. Tex. Fin. Code Ann. §304.103. The prime rate was 3.88% at the time Judge Cobb entered his judgment.

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