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 REPLY TO PLAINTIFFS'RESPONSE TO LUFKIN'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

A. Other than the Statistical Evidence There was No Other Evidence in the Trial Record Supporting Plaintiffs' Claims of Discrimination in Salaried Promotions.

Plaintiffs argue that Judge Cobb found "other evidence" of discrimination in salaried promotions although they cite to no such evidence in the record. In fact, only one class member, Florine Thompson, testified that she had *once* been passed over for a salaried promotion in favor of a white employee, although Ms. Thompson offered no testimony as to when this occurred, or what position was involved, so it is not even clear whether this promotion would have fallen within the relevant time period[1] or whether it involved a position where there had been a shortfall in black employees. (Tr. (Day 1) 244).[2] At the same time, Ms. Thompson conceded that she had been selected for three salaried jobs. (Tr. (Day 1) 247).

Of the other four class members who testified at trial, none offered any evidence of having been denied a promotion during the relevant time period. Sylvester McClain, an hourly

[1] Given that Ms. Thompson worked for Lufkin for 19 years, it is quite possible this unspecified promotion occurred outside the limitations period.
[2] Cites to (Tr. (Day X) #) are to the xth day of the Trial at page #.

employee throughout the relevant time period, admitted that he never bid on any job (hourly or salaried) after 1996. Calvin Deason and Kelvin Pope, hourly employees who always worked in the foundry and trailer division respectively, offered no evidence that either had sought a salaried promotion. (Tr. (Day 1) 142, 187-249; Tr. (Day 2) 109-141). Vivian Crane, a salaried employee who had worked in various low-level salaried positions (insurance clerk, senior insurance clerk, accounting voucher clerk) and one supervisory position (employee benefits supervisor), offered no evidence that she had been denied a salaried promotion because of her race. (Tr. (Day 5) 250-290). In fact, Ms. Crane conceded that she had been promoted to multiple salaried jobs over white employees. (Tr. (Day 5) 267).

Not only did Plaintiffs fail to offer any evidence of Plaintiffs who had been denied promotions to salaried jobs during the relevant time period, but they did not offer any testimony from employees who held or had sought jobs in front-line supervisor, engineering, accounting, technician position, information technology position, or management positions, typical salaried positions at Lufkin. Def. Trial Exh. 24. The anecdotal evidence presented only concerned employees in bargaining unit or lower level clerical positions. Given that Plaintiffs offered anecdotal evidence of salaried discrimination, Plaintiffs would at least need to offer significant statistical evidence of salaried discrimination, which Plaintiffs failed to do.

B. <u>There is No Authority (Legal or Scientific) where a Statistical Discrepancy of 1.62 Standard Deviations would be Significant</u>.

The only evidence in the trial record of discrimination in salaried promotions, was Plaintiffs' expert testimony that there was a statistically significant discrepancy at 2.03 standard deviations, for salaried positions for the 1994 through 2002 time period. Once the data for salaried promotions from 1994 and 1995 is eliminated, it is undisputed that the discrepancy drops to 1.62 standard deviations.

Even though the Fifth Circuit may not have endorsed a "bright line" test of 1.96 standard deviations (or five percent significance level) test, Lufkin is unaware of any federal court decision where 1.62 standard deviations have been found to be statistically significant. In citing the Fifth Circuit's rejection of AT & T's claim that "there is a strict legal benchmark" for statistical proof in *Rendon v. AT & T Technologies*, 883 F.2d 388, 397 (5th Cir. 1989), Plaintiffs fail to point out that AT&T had claimed that "there is a strict legal benchmark *that requires three standard deviations to demonstrate that data has statistical significance*." (emphasis supplied). The Court found that 2.9 standard deviations could be significant and went on to hold that anything in excess of *two or three standard deviations* could be significant. At best, *Rendon* stands for the proposition that a disparity of less than 3 standard deviations may be statistically significant. A closer reading of the case makes it clear that the *Rendon* court found that 2 standard deviations was a minimum threshold for significance. Similarly, in *Vuyanich v. Republic National Bank of Dallas*, 505 F. Supp. 224, 351 (N.D. Tex. 1990), *vacated on other grounds*, 723 F.2d 1995 (5th Cir. 1984), the court ultimately concluded that the Defendant discriminated against blacks because there was a discrepancy that "exceeds 1.96 [standard deviations] in magnitude. While the *Vuyanich* court also noted that there was no bright line test because of a wide variety of statistical tests and different ways to gather a sample, the court recognized that "[i]t has become a convention in social science to accept as statistically significant values which have a probability of occurring by chance 5% of the time or less. *Id. at 272.*

Plaintiffs cite only one case, *United States v. Georgia Power Co.*, 474 F.2d 906, 915 (5th Cir. 1973), where the court accepted a 6 percent level of significance instead of a 5 percent

level.[3] Notably, the court in that case was not confronted with an analysis of promotion decisions but a validation of a job test that had been created by Georgia Power which had been challenged by the EEOC. Georgia Power had shown that there was positive correlation between its employment test and job performance at a 6 percent level of significance. Although the EEOC's validation guidelines required a positive correlation at the 5 percent level of significance, the court concluded that the test was preferable to a more subjective procedure alternative such as an interview, which had not been validated at all. In *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1187 n. 40 (5th Cir.), *cert denied*, 429 U.S. 861 (1976), the Fifth Circuit went on to state that a 10 percent level of significance, rather than the more conventional 5 percent level, "might be acceptable" in the context of the validity of job tests under Title VII. However, there is no authority for departing from the 5 percent level of significance in cases where plaintiffs are challenging promotion decisions.

The most recent edition of the key treatise on employment discrimination law states that "[i]t has become a convention in the social sciences to accept, as statistically significant, values that have a probability of occurring by chance of 5 percent or less **and to reject those that fail the 5 percent test**." B. Lindemann & P. Grossman, EMPLOYMENT DISCRIMINATION LAW (BNA) (4th ed. 2007) at 2341-42 (emphasis supplied).

Without supporting authority, Plaintiffs suggest that a looser standard might be acceptable when smaller samples are involved. If anything, it is the other way around.[4] Courts are *more* likely to reject statistical findings based on small samples unless the level of statistical significance is significantly higher or there is an abundance of anecdotal evidence supporting the

[3] Using a normal distribution, a 6 percent level of significance would be equivalent to approximately 1.88 standard deviations. *See* normal distribution table at http://www.math.unb.ca/~knight/utility/NormTble.htm. Hence, it is still significantly above the 1.62 standard deviations for salaried promotions at Lufkin between 1996 and 2002.

[4] Relatively speaking, the sample of 293 salaried promotions was small compared to the hourly promotions. Plaintiffs, however, have never argued that the sample of salaried promotions was too small to analyze on its own.

Plaintiff's case. *See, e.g., Pollis v. New Sch. For Social Research*, 132 F.2d 115 (2d. Cir. 1997) (rejecting statistical evidence because sample was too small); *Shutt v. Sandoz Crop Prot. Corp*., 944 F.2d 1431, 1432-34 (9th Cir. 1991) (same); *Tinker v. Sears, Roebuck & Co*., 127 F.3d 519, 524 (6th Cir. 1997); *Thomas v. Washington County Sch. Bd.,* 915 F.2d 922, 925-26 (4th Cir. 1990) (although sample size was small, plaintiff proved her case by showing 46 examples of nepotism).

Requiring either a higher level of significance for smaller samples or stronger anedoctal evidence that supports the claim of discrimination makes complete sense. After all, if 300 heads are obtained after tossing a coin 1000 times, a statistician could reasonably question the fairness of the coin, because of the large number of coin tosses. Additional evidence might not be necessary to reach the conclusion that the coin was not fair. On the other hand, if 3 heads were obtained after tossing a coin 10 times, no statistician (or layman) would question the coin's fairness, without additional evidence. So it is with employment discrimination. A shortfall of 6.35 promotions out of a total of 293 salaried promotions for the time period between 1996 and 2002, resulting in an overall statistical discrepancy of 1.62 standard deviations, is not sufficient to justify a finding of disparate impact discrimination in salaried promotions.

Even when Plaintiffs try to carve out 98 out of the 293 promotions (those promotions from hourly to salaried positions, but excluding those within salaried positions), the discrepancy fails to meet the 1.96 standard deviation test. Although the discrepancy for this smaller subset of salaried employees is closer to the 5 percent level of significance, given the smaller sample, as well as the fact that the statistical significance is still below the conventionally accepted threshold, Plaintiffs would need significant non-statistical evidence of promotion discrimination in salaried jobs during the relevant time period in order to support this finding. Given that the trial record contains testimony of one salaried promotion who was denied on account of the

employee's race, with no information regarding when the job was sought, what job was sought, or the skills and background of the person who was awarded the job instead of the class member, there is no basis to support a liability finding on the salaried promotions with this statistical finding. Moreover, in selecting a smaller sample, there is even more of a reason to apply a standard that is stricter than the 1.96 standard deviation test give the lack of any supporting anecdotal evidence.

C. **The Separate Analysis of Hourly and Salaried Promotions at Trial was Proper Because Lufkin's Hourly and Salaried Promotions are Handled in Very Different Ways.**

Because there is clearly no statistically significant disparity in salaried promotions for the relevant time period established by Buford Thomas' charge of discrimination, Plaintiffs now argue that the Court should simply combine the hourly and salaried promotions. This is the first time that Plaintiffs have suggested this. Throughout this litigation, Plaintiffs, Defendants, Judge Cobb and the Fifth Circuit analyzed hourly and salaried promotions separately. This was not done out of mere convenience but because hourly and salaried promotions at Lufkin Industries have always been handled in starkly different ways with different procedures. A statistical disparity in hourly promotions reveals nothing about salaried promotions and vice versa.

Hourly promotions at Lufkin are governed exclusively by the terms of the collective bargaining agreement. Def. Trial Exhs. 6, 7, 8. Typically, employees seeking promotions to hourly positions during the relevant time period (1996 through 2002) would sign a bid sheet for an available opening if they were interested in the job. Tr. (Day 6) 59-60, 106-08, 151-52, 186-87, 235-36. Under the bargaining agreement, the most senior eligible bidder was offered the promotion. Tr. (Day 6) 59-67, 106-118, 133, 151-161, 186-203, 235-44, 253-55. If the employee rejected the offer, the job was offered to the next most senior eligible bidder. *Id.*

Depending on the job or division, an employee would be deemed ineligible for an hourly promotion if he was bidding on a job that would not result in a promotion, if he was in the attendance program, if he had a plant rule violation, or failed a test. *Id.* The collective bargaining agreement also contained an "ability clause" to consider an employee's ability to do the job.[5] Def. Trial Ex. 7 (Article 22, p. 38).

In contrast to the bargaining unit jobs, the evidence at trial showed that Lufkin used job descriptions and interviews to select candidates for salaried positions. Def. Trial Exh. 24; Tr. (Day 7) 172. Persons were selected based on how well they fit those job descriptions. Tr. (Day 6) 75-76, 162-64, 205-06. There was little overlap between the criteria (either objective or subjective) used to determine hourly or salaried promotions. Salaried jobs at Lufkin included many jobs which require college degrees, jobs held by engineers, accountants, managers, and technicians. Def. Trial Exh. 24. The hourly jobs, in contrast, were largely blue collar jobs. Def. Trial Exh. 7 at 65-72.

The existence of a statistically significant disparity in hourly promotions does not prove that any of Lufkin's practices had a disparate impact on salaried promotions and would not justify injunctive relief with respect to salaried promotion procedures when there is no evidence that these practices have a disparate impact on black employees seeking promotions to salaried jobs. Nor should Lufkin have to pay back wages to salaried employees when there is no evidence of discrimination in salaried promotions. Plaintiffs' belated attempt to merge these two distinct and unrelated subclasses should not be allowed when there is no evidence (statistical or otherwise) that supports Plaintiffs' claims of discrimination in salaried promotions.

[5] Judge Cobb found that the "ability clause" often trumped seniority when hourly promotions were awarded. August 29, 2005, DKT. 552, Amended Final Judgment at 6.

D. **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 the Parties Did Not Have an Opportunity to Brief Issues Concerning Thomas' charge on Appeal.**

Lufkin appealed the findings that Judge Cobb made, not findings that Judge Cobb could have made. DKT. 557. Had Judge Cobb found in his Amended Final Judgment that Thomas' charge also exhausted the administrative remedies of the class, Lufkin would have been obligated to brief that issue. The issues of Thomas' charge, however, were not raised until the Fifth Circuit issued its decision, after the Parties had briefed the issues. Hence, Lufkin did not have an opportunity to brief those issues.

Buford Thomas did not testify at trial and nowhere in Judge Cobb's order was there any reference to Buford Thomas' charge of discrimination. McClain's charge was the basis of Judge Cobb's decision that Plaintiffs' had exhausted their administrative remedies. Nonetheless, Plaintiffs now contend that Lufkin should have fully responded to their passing reference [in a footnote] to Thomas' charge. Plaintiffs' footnote was hardly the alternative argument they now suggest. No reference to Thomas' charge was made in the text of Plaintiffs' arguments in any of their briefs and it is clear from all Parties' briefs that Judge Cobb's reliance on McClain's charge was the issue in dispute.

To suggest that they were not surprised by the Court's resolution of this matter is disingenuous. No reasonable litigant could have anticipated that the Fifth Circuit would have relied on Thomas' charge when Judge Cobb made no findings regarding Thomas'charge that could have been appealed. Accordingly, the law of the case does not preclude this court from addressing the issues raised in Lufkin's Motion for Partial Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 12th day of May 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/_Christopher V. Bacon
Attorney for Defendant