IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

Sylvester McClain, et al. Plaintiffs, v. Lufkin Industries, Inc. Defendant.	§ § § § § § § § § §	Civil Action No. 9:97 CV 063 (CLARK)

FINAL JOINT STATUS REPORT ON BACK PAY ISSUES

Plaintiffs, Sylvester McClain, *et al.* ("Plaintiffs"), and Defendant Lufkin Industries, Inc. ("Lufkin" or "Defendant"), submit this Joint Status Report on Back Pay Issues to summarize the status of the parties' discussions over the past three and a half months, the outcome of those discussions, and their recommendations for further proceedings on the back pay issues to be resolved by the Court.

I. WHAT THE PARTIES HAVE ACCOMPLISHED AND RESOLVED

Since the last Scheduling Conference on December 5, 2008, Plaintiffs and Defendant have been in frequent, almost continuous discussions of the class back pay issues remaining before the Court. These discussions have included numerous telephone conferences of counsel for the parties, exchanges of data and analyses of the data by the parties and their respective statistical analysts, direct communications between the experts as to technical matters, and settlement negotiations concerning all of the issues described below and other matters. Much has been accomplished, although it presently appears that unresolved issues will remain for the Court to decide.

Among the things accomplished or agreed upon by the parties are the following. (1) The respective experts have agreed on a single common electronic database of relevant Lufkin Human Resources and Payroll information which provides the basis for both sides' analyses and proposals on the back pay issues. (2) Each side has gained an understanding of the assumptions and methods used by the other side to analyze the data and formulate class back pay proposals. (3) The parties have resolved several relatively small but complex previously disputed issues relating to the method and accuracy of back pay calculations. (4) The parties agree on what issues of law and/or calculation method must be resolved by the Court, and after much consideration believe those issues can be framed clearly and simply for the Court's efficient consideration. (5) The parties have agreed upon a proposed procedure for the Court to receive their positions on the disputed issues and rule on the need for further proceedings.[1] (6) The

[1] Depending on how the Court rules, the Court may need to hear additional evidence.

parties are able, and in principle willing, to carry out in a mutually understood and agreed-upon fashion whatever decisions the Court makes on the disputed issues to be submitted to it. In other words, the Court need only decide the questions presented that will guide the ultimate class back pay calculations; it need not carry out the calculations itself. (7) While the parties have not agreed on a specific method of allocating a back pay award among members of the class, they have discussed and are in general agreement about the principles governing such distribution, and are confident that once the general award parameters are determined they will be able to agree on a specific distribution method or formula.

II. ISSUES REMAINING TO BE DETERMINED BY THE COURT.

The parties, of course, accept the directives of the Fifth Circuit, at pages 25-27 of its Slip Opinion, as governing the method for calculating back pay. However, the process of applying the Fifth Circuit's directives to the calculation of class back pay in this case has proved to be complicated and involves making many choices not clearly addressed in the Fifth Circuit's opinion.

Five issues currently remain to be determined by the Court.[2] Two (#s 1 and 5 listed below) involve legal and factual issues, and three (issues #2-4 below) are issues of calculation methodology. They are:

1. For what "liability period(s)" shall back pay be awarded? The parties are in agreement that the Fifth Circuit mandate applies to the period 1996-2002.[3]

[2] The parties continue to discuss these issues, particularly issue 3 below, and are hopeful that additional agreement may be forthcoming.

[3] Lufkin sets the start date for liability and damages at April 2, 1996, 300 days before the filing of Buford Thomas' EEOC charge. Plaintiffs both urge an earlier start date, March 6, 1994, and question whether the available data permits a back pay analysis that begins at a date other than the start or end of a calendar year, and therefore must start no later than January 1, 1996. The parties agree that the end date, for this period, is December 31, 2002.

(continued . . .)

Plaintiffs contend that back pay must also be awarded for 1994-1995 under the Fifth Circuit's order, 2003-2004, and 2005-2007, on rationales different for each of those periods. Defendant contends that back pay should not be awarded for any of these other periods, also for differing reasons. The parties agree that for any period in which back pay is owed, that pre-judgment interest on any amounts owed for that period will continue to accrue until the entry of judgment.

2. Whether damages should be adjusted based on comparisons involving employees who have left Lufkin's employment and later returned; and if so, by how much. This question has been termed the "attrition" issue by the parties, and will be so designated in this Report.

3. The proper method for comparisons of the annual compensation of promoted and non-promoted employees in the year when the promotion occurred. This question has been termed the "first year damages" issue by the parties, and will be so designated in this Report. The parties' experts are continuing to analyze the first year damages issues.

4. Whether to consider in calculating damages the compensation resulting from those promotions in which the comparisons show that African Americans were over-promoted (not under-promoted) for particular job and year comparisons. This question has been termed the "over-promotion compensation" issue by the parties, and will be so designated in this Report.

(continued …)
Whether Lufkin is liable for conduct in the 1994-early 1996 time period is essentially a legal issue. If events prior to April 2, 1996 are barred by limitations, Lufkin contends the Court may consider the effect of such limitations on its previous findings which may require taking additional evidence. Plaintiffs contend that the Fifth Circuit ordered back pay for 1994-1995 and that ruling is law of the case. The parties also differ as to the need for taking additional evidence regarding periods following December 21, 2002.

5. The appropriate pre-judgment interest rate to be applied to the class back pay award.[4]

III. THE PROPOSED METHOD FOR DECIDING THE DISPUTED ISSUES.

The parties also agree on the following recommendation to the Court as to how the disputed issues should be decided.

The parties are to exchange expert witness declarations which shall not exceed ten pages on April 10, 2009. The parties shall then submit their respective positions on the disputed issues, with supporting briefs not to exceed 15 pages, together with supporting expert witness declarations, by concurrent filing by April 17, 2009. There should be no reply briefs as each side would be fully familiar with the other's positions and grounds, and can address them in a single filing. The Court may hear argument or permit or require other proceedings, including taking additional evidence, as it deems appropriate. The parties suggest that, at a minimum, a conference or hearing to explain their positions more fully would be helpful.[5] The parties further request the Court to schedule such initial proceedings as it deems appropriate during the two week period beginning May 18, 2009, if convenient for the Court.

After the Court decides the issues submitted to it, as outlined above, the Court should permit and require the parties to translate its decisions into a specific class back pay award and formula for allocating the award among class members. The parties expect to be able to submit a judgment based on the Court's determinations, which judgment would be agreed at least as to form, without prejudice to either party's right to appeal. Moreover, the parties expect to be able to agree on the allocation of the class back pay award and a method of calculating and

[4] There is no dispute that pre-judgment interest should be awarded through the date of entry of judgment, and that interest thereafter should accrue at the rate specified in 28 U.S.C. § 1961(a).

[5] An in-chambers or other conference before or in addition to any hearing might provide an efficient way for the parties to explain their positions, particularly on technical or methodological issues.

distributing individual amounts, and will ask the Court to allow them a post-decision opportunity to discuss and, if they reach agreement as expected, jointly submit a proposed plan.

IV. CONCLUSION

The parties jointly request that the Court adopt the issue specification, decision-making method, and schedule jointly proposed above. If the Court does not respond to this proposal by April 17, the parties will nevertheless file their pleadings in the manner suggested above.

Dated: March 31, 2009

Respectfully submitted,

By: s/ Morris J. Baller

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CERTIFICATE OF SERVICE

I certify that on this 31st day of March, 2009, a copy of the foregoing Final Joint Status Report on Back Pay Issues was filed electronically through the Court's CM/ECF System and was automatically copied to Plaintiffs through the Court's electronic filing system.

/s Douglas E. Hamel
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