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

SYLVESTER MCCLAIN, et al., Plaintiffs,	§	
vs.	§	Case No. 9:97-CV-63
	§	Judge Howell Cobb
LUFKIN INDUSTRIES, Defendant.	§	

MEMORANDUM OPINION

Three unions move this Court, under Federal Rule of Civil Procedure 24(a)(2), to intervene of right as parties defendant. This motion is DENIED because it fails the timeliness requirement of Rule 24(a)(2).

I. BACKGROUND

The case before the Court is a Rule 23(b)(2) class action that alleges employment discrimination under the theory of disparate impact. This protracted and extremely adversarial action began over six years ago, on February 26, 1997. On that date, Plaintiffs Sylvester McClain and Buford Thomas filed their original complaint on their own behalf and on behalf of a class of similarly situated persons.[1] Plaintiffs brought their lawsuit under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. § 1981 against Lufkin Industries ("Lufkin"), alleging various forms of racial discrimination in employment by Lufkin. Plaintiffs sought relief that included a variety of damages and equitable relief. Because the course of this action, from its incipience to the present

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[1]The suit was originally assigned to the Honorable Thad Heartfield, sitting in the Lufkin Division of the Eastern District of Texas. The suit was reassigned to this Court on May 1, 1998.

day, is both lengthy in time and extensive in filings, this Court will only recite the most salient and pertinent aspects of the history of this case.

Following more than two years of discovery, two class certification hearings, and reassignment of the case, this Court certified a class of certain former and present African-American employees of Lufkin Industries as Plaintiffs on March 31, 1999. *See McClain v. Lufkin Indus., Inc.*, 187 F.R.D. 267 (E.D. Tex. 1999). Almost one year later, on March 7, 2000, one of the unions that has filed the present motion appeared before the Court for the first time. The Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC, and its affiliate, Local No. 429 ("GMP") moved to appear as amicus curiae. The GMP so moved "to protect its interest and the interest of its membership in preserving a collectively negotiated seniority system." GMP Memorandum of Law in Support of Motion to Appear as Amicus Curiae, at 1. This motion was denied by the Court on March 10, 2000.

Following the filing of myriad motions, the disposition of many of these motions, and another hearing before the Court, a motion to stay proceedings was granted on March 8, 2001, and the case was administratively closed pending mediation. Subsequently, the case was mediated for two years without successful resolution. As a result of the failure of mediation, this Court ordered the case reopened on March 14, 2003, with a bench trial set for April 21, 2003. On March 26, 2003, both parties agreed to continue this original trial setting to a date no earlier than September 1, 2003. The Court set trial for October, 2003. In retrospect, this trial date was overly optimistic.

The past eight months, as one party has accurately stated, have seen the parties engage in "hard fought, contentious discovery and trial preparations." Plaintiffs' Opposition to Intervention, at 8. Both the parties and the Court have expended significant resources moving the case ever closer

to trial. In this period, in a final effort at conciliation, the Court ordered the parties to mediate before the Honorable Magistrate Judge Wendell Radford. On September 4, 2003, a mediation conference was held before Judge Radford, again resulting in no resolution between the parties. The dispositive motion deadline passed on September 5, 2003. On September 30, 2003, both parties filed their Proposed Pre-Trial Findings of Fact and Conclusions of Law. Three weeks later, on October 20, 2003, in a telephone conference with the parties, the Court set trial for December 4, 2003. On October 27, 2003, the Court, after several considerations of a proposed notice to the class, entered a final order that a certain notice be published and sent to the class members. On October 30, 2003, the Court set a motion hearing for November 11, 2003, to hear all pending motions and to serve as a final pre-trial conference.

Finally, on Friday, October 31, 2003, a mere thirty-four days before the final trial setting and following the rigorous efforts by all parties that have only been partially chronicled above, three unions moved to intervene of right as parties defendant pursuant to Federal Rule of Civil Procedure 24(a)(2). These unions included the International Association of Machinists & Aerospace Workers, Local Lodge No. 1999, AFL-CIO/CLC ("IAM"); the Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local No. 429, AFL-CIO/CLC; and the International Association of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local No. 587, AFL-CIO/CLC ("Boilermakers"). These unions, affiliates of the AFL-CIO, collectively constitute the bargaining representatives of Lufkin's hourly-rated employees. Lufkin and these unions negotiate a collective bargaining agreement ("CBA") that governs certain working conditions of Lufkin's hourly-rated employees. Currently, a CBA exists between the unions and Lufkin that is in effect through October 2, 2005.

The unions seek to intervene "in order to protect their legal and contractual rights, and the rights of their members, in preserving a collectively bargained seniority system." Unions' Motion to Intervene, at 2. They contend that they only "recently became aware that the Court is considering granting injunctive and equitable remedies to the plaintiffs, if liability is established, that would have a substantial adverse impact on the seniority system." *Id.* They seek ten hours of participation at the liability stage of trial "in order to fulfill their legal duty to represent the interests of all members of the bargaining unit, to ensure proper application of the seniority provisions in their collective bargaining agreement with Lufkin, and to address the propriety of retroactive or constructive seniority as a remedy." *Id.*

The Plaintiffs promptly responded to the unions' motion, and they opposed intervention at this date that is so close to trial. In their opposition to intervention, the Plaintiffs assert that the unions' motion fails to meet the requirements of Federal Rule of Civil Procedure 24(a)(2). The Court set time to hear the motion during the pre-trial hearing of November 13, 2003. On this date, the Court heard both the unions' and the parties' arguments on this matter. For the reasons set forth below, this Court finds that the unions' motion to intervene fails the timeliness requirement of Rule 24(a)(2) and should thus be DENIED.

II. THE REQUIREMENTS FOR INTERVENTION OF RIGHT

A motion to intervene of right is governed by Federal Rule of Civil Procedure 24(a). The rule states that

> [u]pon *timely* application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by

existing parties. Fed. R. Civ. P. 24(a)(2)(emphasis added).[2]

The Fifth Circuit has established the following requirements that an applicant must meet in order to intervene of right: "'(1) the applicant must file a timely application, (2) the applicant must claim an interest in the subject matter of the action, (3) the applicant must show that disposition of the action may impair or impede the applicant's ability to protect that interest, and (4) the applicant's interest must not be adequately represented by existing parties to the litigation.'" *Heaton v. Monogram Credit Card Bank of Geor.*, 297 F.3d 416, 422 (5th Cir. 2002)(quoting *United States v. Franklin Parish Sch. Bd.*, 47 F.3d 755, 756 (5th Cir. 1995)). Failure to satisfy any one requirement will defeat a motion to intervene of right. *Edwards*, 78 F.3d at 999 (citations omitted). However, the inquiry under Rule 24(a)(2) is "'a flexible one, which focuses on the particular facts and circumstances surrounding each application.'" *Id.* (quoting *United States v. Texas E. Transmission Corp.*, 923 F.2d 410, 413 (5th Cir. 1991)). The application to intervene "'must be measured by a practical rather than technical yardstick.'" *Id.* The Fifth Circuit has reiterated that "'[f]ederal courts should allow intervention where no one would be hurt and the greater justice could be attained.'" *Heaton*, 297 F.3d at 422 (quoting *John Doe No. 1 v. Glickman*, 256 F.3d 371, 375 (5th Cir. 2001)).

Because the Court finds that the unions have failed to meet the timeliness requirement, the Court does not reach the other three requirements for intervention of right.

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[2]Rule 24(a)(2) is the applicable rule because the unions have not suggested that "a statute of the United States confers an unconditional right to intervene." *See* Fed. R. Civ. P. 24(a)(1). Section (a) of Rule 24 provides for mandatory intervention, while section (b) "affords a nonparty without an interest in the litigation sufficient to mandate intervention to join the proceeding through the exercise of the trial court's discretion." *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996). The unions have not sought permissive intervention under section (b).

III. THE REQUIREMENT OF TIMELINESS

Determining whether an applicant for intervention of right has met the timeliness requirement of Rule 24(a)(2) is largely within the discretion of the trial court. *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1289 (5th Cir. 1987). The Fifth Circuit has developed four factors to guide this determination of timeliness. *See Stallworth v. Monsanto Co.*, 558 F.2d 257, 264–66 (5th Cir. 1977). The *Stallworth* factors include:

(1) The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene;
(2) The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case;
(3) The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied; and
(4) The existence of unusual circumstances militating for or against a determination that the application is timely. *Id.*

The *Stallworth* factors are not intended to establish rigid parameters; rather they "merely comprise a framework for the analysis of this threshold consideration." *Edwards*, 78 F.3d at 1000 (citing *Corley v. Jackson Police Dep't*, 755 F.2d 1207, 1209 (5th Cir. 1985)). Therefore, "[t]here are no absolute measures of timeliness; it is to be determined from all the circumstances." *Heaton*, 297 F.3d at 423 (citations omitted).

With the *Stallworth* factors at the forefront of its analysis, this Court has determined that the unions' motion to intervene fails the timeliness requirement of Rule 24(a)(2). In making this determination, the Court is mindful that "[t]he requirment of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)(citing

McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1074 (5th Cir. 1970)).

IV. ANALYSIS

The first *Stallworth* factor focuses on the time lapse between when the applicant receives actual or constructive knowledge of his interest in the case and when he files the motion to intervene. *Edwards*, 78 F.3d at 1000. Thus, the "clock" begins ticking when the applicant for intervention knew or should have known of his interest in the case. *Id.* Relevant case law suggests that no magic amount of time lapse favors timeliness or lack of timeliness. *Compare Kneeland*, 806 F.2d at 1289 (district court did not abuse its discretion in finding that four month lapse of time favors untimeliness) *with Association of Professional Flight Attendants v. Gibbs*, 804 F.2d 318, 321 (lapse of five months did not result in a finding of untimeliness). Given the facts of this case, the Court finds that the first *Stallworth* factor weighs against a finding of timeliness for the unions' motion to intervene.

The unions argue that they first became aware that their interests may be affected in this litigation in April, 2003, following a March 31, 2003 letter by the Court to the parties that inquired about the propriety of reforming the departmental seniority provisions of the CBA as a remedy, if liability were established.[3] Plaintiffs' counsel responded to this letter by arguing that the Court could not reform the CBA, but could award retroactive or constructive seniority. The unions assert that these correspondences, which they received in April, 2003, first gave them notice that their interest

[3]For the purposes of the timeliness analysis, the Court will assume that the unions possess an interest in the subject matter of the action. However, the Court does not reach the finding of such an interest, the second requirement of intervention of right under Rule 24(a)(2). Such a finding is not necessary, as the unions' failure of the timeliness requirement disposes their motion. As may be seen, the unions have not clearly articulated their interest in the litigation and it has appeared to shift at times. This uncertainty has made the analysis of timeliness more difficult.

might be affected. However, at the hearing on the instant motion, the Court stated for the record that if liability were established, it could not and would not reform the CBA or award retroactive or constructive seniority. Nevertheless, the unions still pursued intervention, suggesting that their interest in the case was much broader than anything the Court had first suggested in its letter of March 31, 2003. If their interest is broader than any attempt by the Court to reform the CBA or interfere with seniority, the unions had notice of that interest for a long time. Yet, even if this was the first time that the unions became aware of their interest, a period of more than six months elapsed between notice and their application for intervention. The Court finds that this significant delay weighs against a finding of timeliness.

However, as indicated, the Court maintains serious doubts that April, 2003 was the first date when the unions knew or should have known of their interest in this action. The unions have admitted that they first became aware of this lawsuit around the time of the class certification proceeding, in August of 1998. *See* Transcript of Motions Hearing of November 13, 2003, at 5–6. If the unions were aware of the suit at this time, then certainly they had knowledge or constructive knowledge of the Plaintiffs' Original Complaint, filed February 26, 1997. In the Original Complaint's Prayer for Relief, Plaintiffs asked for, among other things, "retroactive seniority, promotions, [and] priority placements." Plaintiffs' Original Complaint, at 11. Based on what the unions have argued is their interest in this litigation, the Court finds that the unions should have been aware of this interest from their first knowledge of the case, in the late months of 1998. A delay of five years weighs against a finding of timeliness.

Furthermore, on February 11, 2000, the GMP filed a motion to appear as amicus curiae "in order to protect its interest and the interest of its membership in preserving a collectively negotiated

seniority system." GMP Memorandum of Law in Support of Motion to Appear as Amicus Curiae, at 1. In support of its motion, the GMP asserted that it "has a direct and substantial interest in the interpretation and application of the CBA." *Id.* at 4. The GMP further argued that "if the plaintiff class is ultimately successful in the underlying claims, any equitable or injunctive relief could affect seniority." *Id.* Finally, the GMP acknowledged that "[i]ndeed based on their interest in preserving the integrity of the CBA, the GMP could likely intervene as of right . . . ." *Id.* at 4–5, n.6. The unions' current arguments to the Court regarding what constitutes their interest in this case largely echo these statements made in February, 2000. Therefore, it appears to the Court that the unions had knowledge of their interest in this case almost four years before the instant motion to intervene of right.[4] A delay of four years weighs against a finding of timeliness.

While the exact interest of the unions in this litigation has not been made clear, whatever that interest is, there was substantial delay between the first knowledge of it and the filing of this motion to intervene. Thus, the first *Stallworth* factor weighs against a finding of timeliness based upon the facts before the Court.[5]

The second *Stallworth* factor focuses on any prejudice caused the existing parties by the applicant's failure to move for intervention as soon as possible after learning of its interest in the case. *Edwards*, 78 F.3d at 1002. "This factor is concerned only with the prejudice caused by the applicant's

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[4]If the IAM and the Boilermakers did not have actual knowledge at this point, they certainly had constructive knowledge.

[5]The Court is aware that the Fifth Circuit has suggested that a motion to intervene filed prior to judgment favors timeliness under the first *Stallworth* factor. *Edwards*, 78 F.3d at 1001. Nevertheless, the case law supports that some pre-trial motions may be found *untimely*. *See, e.g.*, *Kneeland*, 806 F.2d at 1289; *United States v. Louisiana*, 669 F.2d 314, 315 (5th Cir. 1982). Because of the excessive delay in filing this motion to intervene, the first *Stallworth* factor may weigh against a finding of timeliness.

delay, not that prejudice which may result if intervention is allowed." *Id.* The Court is aware that this second *Stallworth* factor is critical and may bear the most significance in the timeliness analysis. *See Jones v. Caddo Parish Sch. Bd.*, 735 F.2d 923, 946 (5th Cir. 1984)("Consideration of prejudice to existing parties if the intervention is allowed is critical."); *McDonald*, 430 F.2d at 1073 ("The most important consideration in determining timeliness is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay in moving to intervene."); 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1916 (2d ed. 1986).

In this case, the unions' *delay* in moving to intervene as soon as they knew about their interest in the case substantially prejudices the Plaintiffs. As the Plaintiffs accurately articulate in their brief opposing the motion to intervene, "[d]uring the past seven months, while the Unions remained silent, the parties and the Court have been engaged in hard fought, contentious discovery and trial preparations, including submission of a Joint Final Pre-Trial Order, resolution of numerous motions that further define the issues for trial and submission of proposed findings of fact and conclusions of law." Plaintiffs' Opposition to Intervention, at 7–8. Additionally, witness and exhibit lists have been exchanged, the final pre-trial conference has been held, and the final order on the conditions of the bench trial has been issued by the Court. Now, at this late hour, the unions seek ten hours of trial time and the ability to cross-examine witnesses.[6] The unions have provided no indication of what any of their positions will be at trial, what evidence they will introduce, or how they will defend the case. While the unions do not seek to conduct discovery, the Plaintiffs are entitled to and most likely would need to conduct discovery. With less than twenty days before trial of this complex case, it would be

[6]The Court has ordered that in the interests of efficiency and justice that both parties will be limited to twenty total hours of time at trial.

very difficult for Plaintiffs, in the midst of final trial preparations, to conduct discovery upon the unions. The Court believes that the most likely result would either be a significant delay in the trial setting in a case that has been pending for more than six years or, alternatively, "trial by ambush." *See Narragansett Indian Tribe v. Ribo, Inc.*, 868 F.2d 5, 8 (1st Cir. 1989). Either result would be manifestly unfair and prejudicial to the Plaintiffs.

Had the unions moved to intervene months earlier, prejudice would not have existed.[7] In such a case, Plaintiffs would have had the opportunity to conduct discovery and prepare for the unions' presence at trial. However, the unions did not take this course of action, and at this point in the litigation their delay significantly prejudices the Plaintiffs. Therefore, the second *Stallworth* factor weighs heavily against a finding that the unions' motion is timely.

The third *Stallworth* factor focuses on the prejudice caused the applicants if their motion for intervention is denied. *Edwards*, 78 F.3d at 1002. In considering this factor, the Fifth Circuit has emphasized "the legal rights associated with formal intervention, namely the briefing of issues, presentation of evidence, and ability to appeal." *Sierra Club*, 18 F.3d at 1207. In *Stallworth*, the Court noted, in recognizing this factor, that it "arose out of a concern that a section (a) intervenor 'may be seriously harmed if he is not permitted to intervene.'" *Stallworth*, 558 F.2d at 266.

Nevertheless, upon this consideration, the Court is of the opinion that denying the unions' intervention would not cause the unions substantial prejudice. Given that the Court intends neither to reform the CBA nor to overwrite the CBA in any fashion, any interest of the unions will not be adversely affected. Indeed, the pivotal event that finally inspired the unions to intervene, though six

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[7]Indeed, the Court welcomed intervention at an earlier time. At a status conference on March 27, 2003, the Court suggested that, because it was considering remedies that might affect seniority, the unions be notified so that they might intervene if they so desired.

months later, was the suggestion that the CBA might be amended or retroactive seniority granted. The Court has stated on the record that it will perform neither action. In light of these statements of the Court, the unions have not argued or shown any substantial prejudice that will result if their motion is denied. Furthermore, Plaintiffs' counsel has advised the unions that they will not oppose intervention in remedial proceedings if liability is established. *See* Plaintiffs' Oppostion to Intervention, at 12, n.15. Any prejudice that might be suffered by the unions would have to be very substantial in order to outweigh the prejudice to the Plaintiffs that the delay has caused.

The fourth *Stallworth* factor focuses on the existence of unusual circumstances militating either for or against a determination that the application is timely. *Stallworth*, 558 F.2d at 266. This factor appears to be a catch-all in the balancing of interests in the timeliness evaluation. The *Stallworth* Court provides an example: "if a would-be intervenor who had failed to apply for intervention promptly after he became aware of his interest in the case could advance a convincing justification for his tardiness, such as that for reasons other than lack of knowledge he was unable to intervene sooner, this would militate in favor of a finding that his petition was timely." *Id.*

The unions have failed to demonstrate the existence of unusual circumstances that support a determination of timeliness. The unions argue that the extensive mediations in this case led them to hold a reasonable expectation that the parties would negotiate a resolution of the dispute, until September 22, 2003. On this date, counsel for the unions was notified by Lufkin's counsel that mediation had failed. This Court does not find that the reasonable belief that a case will settle is the type of convincing justification for tardiness that *Stallworth* contemplates. *See Lelsz v. Kavanagh*, 710 F.2d 1040, 1044-45 (5th Cir. 1983)(rejecting a similar argument). The unions had the ability to intervene during this period and affirmatively chose not to do so. Furthermore, given the fact that the

parties mediated for two years without an agreement, the unions' firm belief in settlement appears more dubious.

Lastly, at the hearing before the Court, the unions suggested that their lack of financial resources may have played a role in their delay to file a motion to intervene in this case. While the Court is sympathetic of the unions' dilemma, the Court does not believe that the Plaintiffs should be penalized for the unions' financial situation. The unions could have intervened at a earlier time which would have both saved them costs and avoided prejudicing the Plaintiffs.

V. CONCLUSION

After careful consideration of the *Stallworth* factors, this Court, in its discretion, finds that the unions have failed the timeliness requirement of Rule 24(a)(2) in their effort to intervene of right. Ultimately, the Court finds that any prejudice caused to the unions in denying their motion is outweighed by the substantial prejudice to the Plaintiffs if the motion is granted. Given the length of delay between their knowledge of their interest and their filing of their motion, in addition to a lack of unusual circumstances pointing to a finding of timeliness, the Court finds that the *Stallworth* factors weigh strongly against a finding of timeliness. Consequently, the Court concludes that the unions have failed the timeliness requirement for intervention of right. Because failure to satisfy any of the requirements of Rule 24(a)(2) will cause a motion to intervene of right to fail, the unions' motion to intervene is hereby DENIED.

Signed on this eighteenth day of November, 2003.

HOWELL COBB
UNITED STATES DISTRICT JUDGE