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

SYLVESTER MCCLAIN, on his own and on behalf of a class of similarly situated persons, et al.,	§	
	§	Civil Action No. 9:97-CV-063
Plaintiffs,	§	
v.	§	JUDGE RON CLARK
LUFKIN INDUSTRIES, INC.	§	
Defendant.	§	

ORDER Re: DAMAGES

In this lengthy employment discrimination case, the late Honorable Howell Cobb, United States District Judge, found that Defendant Lufkin Industries, Inc. discriminated against Plaintiffs in promotions to both salaried and hourly positions. The Circuit Court affirmed these findings, and on remand directed this court to calculate damages for 127 lost hourly promotions and 9 lost salaried promotions. *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 281 (5th Cir. 2008).

The parties agree that damages should be awarded for the time period between 1996-2002 for lost hourly promotions in the amounts of $1,901,417 for hourly employees and $128,055 for salaried employees. Defendant contends that damages should not be awarded for: (1) lost hourly promotions from 1994-1995 and 2003-2007; or (2) salaried positions. Defendant also asserts that this court can, and should, reexamine Judge Cobb's assessment of pre-judgment interest at a rate of 5%, compounded annually.

None of the exceptions to the doctrine of the law of the case permit this court to reconsider whether discrimination occurred in the 1994-1995 period or whether damages should

be awarded for that time period. Judge Cobb previously found discrimination existed through 2004. Damages must therefore be awarded for the time period from 2003-2004. However, as Judge Cobb's ruling did not cover the time period between 2005 and 2007, this court must consider additional evidence before it determines whether damages for this time period are appropriate.

Finally, this court finds that Defendant waived its right to challenge the pre-judgment interest rate.

I. Background

February 26, 1997	Plaintiffs filed an employment discrimination suit alleging that Defendant Lufkin Industries, Inc. engaged in racial discrimination in violation of Title VII and 42 U.S.C. § 1981.
March 31, 1999	The court granted Plaintiffs' motion for class certification.
January 13, 2005	After a bench trial, Judge Cobb entered a Memorandum and Order finding that Defendant Lufkin Industries discriminated by unlawfully making initial assignment and promotion decisions that disparately impacted Plaintiffs. [Doc. #461]. The court ordered Lufkin Industries to pay class back pay pursuant to a formula and awarded injunctive relief. Judge Cobb entered final judgment a day later. [Doc. #462].
January 19, 2005	On Plaintiffs' motion, Judge Cobb ordered further proceedings "to determine the specific details of non-monetary remedial measures and to enter such supplemental remedial orders as may be necessary and appropriate." [Doc. #464].
August 29, 2005	The court entered an Amended Final Judgment, reiterating a finding of discrimination, ordered Lufkin Industries to pay back pay, entered an injunction, and awarded attorneys' fees and costs. [Doc. #552].
February 29, 2008	The Fifth Circuit vacated the injunctive order and remanded to this court to craft a more specific remedial order. The Fifth Circuit also reversed and remanded the portion of Judge Cobb's order awarding

damages and attorneys' fees indicating that additional analysis was necessary. *McClain v. Lufkin Industries, Inc.*, 519 F.3d 264 (5th Cir. 2008).

II. Applicable Law

The law of the case doctrine generally provides that a prior decision of the Circuit Court will not be reexamined either by the district court on remand, or by the appellate court on a subsequent appeal, "unless (I) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work a manifest injustice." *N. Miss. Commc'ns, Inc. v. Jones*, 951 F.2d 652, 656 (5th Cir.1992)). The law of the case "applies not only to issues decided explicitly, but also to everything decided 'by necessary implication.'" *In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001). The doctrine, applicable to criminal and civil cases, is not an inexorable command, but is "premised on the salutary and sound public policy that litigation should come to an end." *Pondexter v. Quarterman*, 537 F.3d 511, 523 (5th Cir. 2008) (quoting *Alpha/Omega Ins. Servs., Inc. v. Prudential Ins. Co. Of Am.*, 272 F.3d 276, 279 (5th Cir. 2001))

The same principles apply to the mandate rule, which is a specific application of the doctrine of law of the case. *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004). "Absent exceptional circumstances the mandate rule compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." *Id.*

III. Analysis

A. Hourly Promotions

1. 1994-95

Defendant objects to the inclusion of any damages during the time period from 1994-95 (Doc. #633 at p. 2) and filed a Motion for Partial Summary Judgment [Doc. #632] which further sets forth its argument. The parties stipulate that if damages are to be awarded for the 1994-95 time period that they are $483,340 in back pay for hourly employees and $109, 868 in back pay for salaried employees, totaling $593, 208.

For the reasons stated in the court's contemporaneously entered Order Re: Motion for Partial Summary Judgment, which are incorporated herein, no exception to the law of the case doctrine justifies reexamination of this issue. The Circuit Court considered Lufkin's arguments regarding the 1994-95 time period. The Court concluded that EEOC exhaustion was sufficient, rejected Lufkin's arguments concerning insufficient evidence on damages, and then clearly instructed this court to calculate damages for 127 lost hourly promotions and 9 lost salaried promotions. 519 F.3d at 275, 279-81. Lufkin points to no new evidence or evidence that it was precluded from offering previously. Defendant does not indicate, and the court is not aware of, any changes in controlling authority. Neither the decision of Judge Cobb nor the opinion and judgment of the Circuit Court were clearly erroneous or resulted in manifest injustice — there was ample evidence, in the form of both statistical and non-statistical evidence, for Judge Cobb to find unlawful discrimination had existed over a long period of time and for the Fifth Circuit to affirm the finding. Damages will be awarded for the 1994-1995 time period.

2. 2003-2004

Plaintiffs contend that Judge Cobb found discrimination through the end of trial in October 2004. Defendant alleges that Plaintiffs offered no statistical or anecdotal evidence of promotion discrimination after 2002, citing *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 824 (5th Cir. 1982) for the proposition that it is not proper to award damages for the period after 2002 because statistical evidence is lacking. However, in *Payne*, the Fifth Circuit held that the district court made no finding at all that discrimination occurred after the period covered by statistical evidence. *Id.* at 823.

Discrimination need not be proved using direct statistical evidence. *See Segar v. Smith*, 738 F.2d 1249, 1264 (D.C. Cir. 1984) (upholding the district court's finding of discrimination in promotions above the GS-12 level "even though the court did not credit plaintiffs' statistical evidence of discrimination at that level because the statistics had not achieved acceptable levels of statistical significance."). Judge Cobb based his finding of discrimination partially upon non-statistical evidence. [*See* Doc. #552, p. 5-7, 21-24].

In this case there was a good reason for Judge Cobb to examine non-statistical evidence. Lufkin only provided promotion data through March 9, 2003 and Dr. Drogin, Plaintiffs' expert, performed full-year analyses for comparison purposes, ending his analysis at the end of 2002. After completing the trial of this case in October 2004, Judge Cobb issued a Memorandum and Order on January 13, 2005 [Doc. #461] and an Amended Final Judgment [Doc. #552] on August 29, 2005, both finding discrimination by Lufkin against Plaintiffs. Specifically, Judge Cobb found: (1) Lufkin Industries maintained a subjective decision making system when promoting hourly and salaried employees and (2) Blacks were discouraged from applying for promotions

and denied equal training opportunities. *Id.* at 21-24. These findings were not limited to the time period in which statistical data was available.

Judge Cobb certainly did not find that Lufkin had ceased its discriminatory practices or remedied the effects of past discrimination by the time he issued his Amended Final Judgment on August 29, 2005. In fact, as part of that judgment he found it necessary to enjoin Lufkin from continuing in its illegal practices. The Circuit Court evidently did not disagree when the mandate was issued on April 14, 2008, because the injunctive relief was not vacated as moot or unnecessary. Rather, this court was ordered to "craft an adequate remedial order that *will* eliminate discrimination . . . ." 519 F.3d at 284 (emphasis added)

While the doctrine of the law of the case makes it improper to reexamine the finding that discrimination existed through the time of trial, this court may award damages for the time period between 2003 and 2004 because substantially different evidence now exists upon which damages may be quantified — specifically, statistical data or that time period upon which a monetary award can be based. *See N. Miss. Commc'ns, Inc. v. Jones*, 951 F.2d 652, 656 (5th Cir. 1992) (the law of the case does not control if the evidence at a subsequent trial is substantially different than evidence previously presented). The parties agree that if damages are awarded for the time period from 2003-2004 and the statistical data is used, then the appropriate amount is $487,756. Doc. #633 at p.2.

Defendant contends that it must be allowed to place additional evidence in the record if the court decides to award additional damages. Specifically, Defendant would like any damage analysis to include actual applicant flow date, which, Defendant asserts, was not previously used because Judge Cobb found many of the bid sheets prior to 2003 were illegible. Doc. #633 at p. 9.

While actual applicant flow data is preferred in some cases, as in *Anderson v. Douglas & Lomanson Co., Inc.*, 26 F.3d 1277, 1286-87 (5th Cir. 1994), it is not the most illustrative data of any discrimination by Defendant in this case. Judge Cobb found that Defendant discriminated against Black employees, in part, because Defendant discouraged Black employees from applying for promotions. Doc. #552 at p. 23. Actual applicant flow data would therefore under-represent the number of qualified Black employees and not be indicative of the full amount of discrimination that occurred. Thus, additional evidence of actual applicants would not aid this court in determining damages.

3. 2005-2007

Plaintiffs seek additional damages for the period after Judge Cobb entered his initial order. Plaintiffs allege that additional promotional shortfalls occurred during the period from 2005-2007 and that "additional proceedings are required, at a minimum, to entertain Plaintiffs' claims with respect to this period." Doc. #629 at p. 10.

The Supreme Court has stated that an award of back pay serves two purposes: (1) to create an incentive to shun discriminatory practices and (2) make persons whole for the injuries they have suffered. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18, 95 S.Ct. 2362 (1975). No injunction has been in effect as the Fifth Circuit remanded this case and directed this court to craft a more specific injunction. It is possible that discrimination was still occurring between 2005 and 2007, after Judge Cobb issued his judgment. The parties even agree that if damages are calculated using statistical data, the amount of damages for the time period from 2005 to 2007 is $159,412. Thus, it is appropriate to consider additional evidence offered by the parties

on whether discrimination occurred in hourly promotions during, and damages should be awarded for, the time period from 2005-2007.

B. Salaried Promotions

The only dispute between the parties concerning the promotions to salaried positions is whether the 1994-95 time period should be included for liability purposes. As discussed above, the law of the case doctrine bars this court from reexamining the issue as the Fifth Circuit already implicitly adjudicated the issue when it directed this court to calculate damages for nine lost salaried promotions. *See In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001) ("The law of the case doctrine applies not only to issues decided explicitly, but also to everything decided 'by necessary implication.'").

C. Pre-judgment Interest

Lufkin asserts that this court should reconsider Judge Cobb's award of prejudgment interest because the Fifth Circuit remanded this case for a redetermination of damages. Initially Judge Cobb stated that prejudgment interest of 10% per annum would be appropriate, explaining the basis for his conclusion in his Memorandum and Order of January 13, 2005. [Doc. # 461, p. 34]. In the Amended Final Judgment of August 29, 2005, this rate was lowered to 5%, compounded annually. [Doc. #552 p. 34.] Lufkin neither disputed the analysis underlying the original 10% rate, nor assigned as a point of error the lower 5% rate in the final judgment.

Although precedent is sparse, there seems little reason not to apply the law of the case doctrine to Lufkin's failure to challenge the prejudgment interest rate. *See Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071, 1102-03 (D.C. Cir. 1983) (applying the law of the case doctrine

and affirming the district court's holding that plaintiffs were entitled to prejudgment interest at six percent).

Alternatively, assuming that review of prejudgment interest is appropriate, the court starts from the proposition that prejudgment interest "is an item that *should be included* in back pay." *Sellers v. Delgado Comty. Coll.*, 839 F.2d 1132, 1140 (5th Cir. 1988) (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 263(5th Cir. 1974), *cert. denied,* 467 U.S. 1243, 104 S.Ct. 3515(1984)) (emphasis in original). The purpose of the prejudgment interest award is to make the injured worker whole. *Sellers*, 839 F.2d at 1140. While the postjudgment rate is set by 28 U.S.C. § 1961, the prejudgment interest rate is generally within the discretion of the trial court. *See Williams v. Trader Pub. Co.*, 218 F.3d 481, 488 (5th Cir. 2000). In setting the prejudgment rate, it is appropriate to consider other rates, including a composite rate over the time period in question. *Transcontinental Gas Pipe Line Corp. v. Societe D'Exploitation Du Solitaire SA*, 299 Fed. App'x. 347, 353 (5th Cir. 2008) (holding that the district court did not abuse its discretion when it used the average interest rate between date of accident and date of judgment, rather than interest rate on date of accident to calculate prejudgment interest); *see also Odom v. Frank*, 782 F. Supp. 50, 52 (N.D. Tex. 1991) (calculating interest in yearly increments because of the varying interest rate).

This is not a diversity case in which Texas law controls, but the court finds it instructive to examine prejudgment rates in Texas, where Lufkin operates and the discrimination occurred. In Texas, as in the federal system, prejudgment interest is intended to make the injured party whole — to compensate the injured party for the "lost use of his money." *Int'l Turbine Serv., Inc.*, 278 F.3d at 499.

Under Texas law, where prejudgment interest is not governed by a specific statute, general principles of equity and the common law permit application of the postjudgment rate. *Int'l Turbine Serv., Inc. v. VASP Brazilian Airlines*, 278 F.3d 494, 499-500 (5th Cir. 2002). At the present time the rate would be 5%. Tex. Fin. Code §304.003 (c)(2) (Vernon 2006). Lufkin Industries has been profiting for years from its policy of unlawful discrimination. At the same time, as Judge Cobb found, Lufkin's CEO was indulged with a corporate jet and pilot and, in 2002, a paycheck three times that of the President of the United States. Between 1995 and 2005 Lufkin Industries stock averaged returns of more than 11%. *See* http://quicktake.morningstar.com/Stock/stockperformance.asp?Country=USA&Symbol=LUFK&TimeFrame=AL#chartgrph. Yet Lufkin argues that it would be equitable for this court to exercise its discretion by deciding that the workers should be denied a modest rate of interest on the pay Lufkin illegally denied them for more than a decade.

Lufkin deprived these plaintiffs of lawful wages in Texas, where the statutory rate would have been 5%. This occurred during a time when interest rates frequently ranged above 5%, with a high of 7.24%. *See* http://www.federalreserve.gov/releases/h15/data.htm. In balancing the equities and determining which side should bear the burden of delay caused by lengthy litigation, the court notes that being "made whole" — compensated for lost use of money — can include more than the arithmetic time value of the money. The ability to use that money when Plaintiffs and their families were young may have been of benefit to them, which does not support an argument that a low interest rate based on the current economic downturn should be applied. Nothing in Title VII or its legislative history indicates that Congress intended that victims of discrimination should bear the lost time value of wages denied, caused by lengthy delays that

were not their fault. This court concludes that a prejudgment interest rate of 5% per annum is reasonable and fair under all of the circumstances of the case.

IT IS THEREFORE ORDERED that Plaintiffs Sylvester McClain et al. shall recover of, and from, Defendant Lufkin Industries, Inc. the following amounts:

(1) for lost hourly promotions, during the following time periods:

1994-95: $483,340;

1996-2002: $1,901,417; and

2003-2004: $487,756;

(2) and for lost salaried promotions, during the following time periods:

1994-95: $109,868; and

1996-2002: $128,055.

Prejudgment interest shall be calculated at the rate of 5% per annum. Prejudgment interest shall accrue, as agreed to by the parties, as follows:

(1) for damages attributable to discrimination occurring in 1994, interest shall begin to accrue on August 3, 1994; and

(2) for damages attributable to discrimination in 1995 and for each subsequent year, prejudgment interest shall begin to accrue on July 1st of that year.

IT IS FURTHER ORDERED that Plaintiffs Sylvester McClain et al. shall file, by July 9, 2009, a motion or brief, (limited to twenty pages) outlining its claim that Defendant Lufkin Industries, Inc. is liable to Plaintiffs for hourly promotion discrimination for the period from 2005-2007, with pinpoint citations to documents supporting that claim. (If a document is already electronically filed in the record, or already admitted as a numbered exhibit, it does not need to

be electronically filed again, but a copy should be attached to the paper courtesy copy provided to the court.) Defendant may then respond in kind by July 17, 2009. Counsel should notify the court if they believe a hearing will be necessary or helpful in making this determination.

So **ORDERED** and **SIGNED** this **19** day of **June, 2009.**

Ron Clark, United States District Judge