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: MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Lufkin Industries, Inc. moves for summary judgment on Plaintiffs' claims of discrimination in promoting employees from hourly positions to salaried positions and promoting employees within salaried positions [Doc. Nos. 630, 632]. Plaintiffs contend that Defendant's motion should be denied because the Fifth Circuit already ruled on this issue or, alternatively, the evidence supports a finding of discrimination [Doc. #637].

The late Honorable Howell Cobb, United States District Judge, found that Defendant discriminated against Black employees when deciding on promotions for salaried positions. On appeal the Circuit Court rejected Lufkin's arguments in this regard, and, on partial remand, specifically directed this court to consider damages attributable to 127 lost promotions in hourly pay grades and nine lost promotions to salaried positions. *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 281 (5th Cir. 2008). No exception to the doctrine of the law of the case applies. This court is not now going to find that Defendant did not discriminate when promoting employees to,

and within, salaried positions or that damages and injunctive relief are barred. Therefore, Defendant's motion, and amended motion, for partial summary judgment are denied.

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. Standard of Review for Summary Judgment

The party moving for summary judgment under Fed. R. Civ. P. 56 has the initial burden of demonstrating that there is no genuine issue as to any material fact and that it is entitled to

judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 2514 (1986). Movant may show that the undisputed material facts affirmatively establish a right to judgment. Alternatively, movant may establish that the other party has the burden of proof at trial, and has failed to "make a showing sufficient to establish the existence of an element essential to [its] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2522 (1986).

In order to avoid summary judgment, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S. Ct. 1348, 1335 (1986); *Anderson*, 477 U.S. at 257, 106 S. Ct. at 2514. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita,* 475 U.S. at 586, 106 S. Ct. at 1356. Fed. R. Civ. P. 56 requires the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. *Anderson,* 477 U.S. at 256, 106 S. Ct. at 2514.

Only a genuine dispute over a material fact (a fact which might affect the outcome of the suit under the governing substantive law) will preclude summary judgment. *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510. The dispute in this case is genuine if the evidence is such that a reasonable jury, properly instructed on the correct evidentiary standard, could return a verdict of non-infringement. *Anderson,* 477 U.S. at 255, 106 S. Ct. at 2514 ("determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case."). If the factual context renders a claim implausible (for example if the claim simply makes no economic sense) nonmovants "must come forward with

more persuasive evidence to support their claim than would otherwise be necessary." *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356.

Fed. R. Civ. P. 56(c) requires the court to look at the full record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits. All reasonable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, and any doubt must be resolved in its favor. *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356. The Supreme Court has stressed that the inferences be reasonable. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 468, 112 S. Ct. 2072, 2083 (1992).

III. Analysis

A. Defendant's Claim is Barred as the Fifth Circuit's Opinion Adjudicated the Issue of Disparate Impact Discrimination in Salaried Promotions

1. 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 nothing more than 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.*

2. Discussion

Defendant has moved for summary judgment on Plaintiff's claims of disparate impact discrimination in promoting Black employees to, and within, salaried positions. Defendant contends that the Thomas charge is the operative charge and any promotion claims occurring before April 2, 1996 — 300 days before the Thomas charge was filed — are barred pursuant to 42 U.S.C. § 2000e-5(e)(I).

The Circuit Court gave considerable attention to the issue of EEOC exhaustion and the 1994-95 salaried-promotion shortfall, finally stating: "We conclude however that exhaustion was sufficient. Significantly, Lufkin did not contend otherwise in the trial court." 519 F.3d at 275. The Court went on to direct this court to deal on remand with "127 lost promotions in hourly pay grades and nine lost salaried employment promotions." 519 F.3d at 264. The Judgment, issued as mandate on April 14, 2008, remanded the case "for further proceedings in accordance with the opinion of this Court." Doc. # 579 at p. 2. It would be arrogant of this court to ignore such clear direction without a strong showing that one of the exceptions to the law of the case doctrine applies.

Defendant's contentions do not fall into the first exception — new or different evidence. Ample evidence, in the form of both statistical and non-statistical evidence, existed for Judge Cobb to find discrimination. On appeal, Defendant argued that Plaintiffs "offered no evidence of disparate impact against blacks in the time period associated with Thomas' charge . . . [and] even if Thomas' charge would support the class promotions claim, it fails for want of proof."[1] *McClain et al. v. Lufkin Industries, Inc.*, No. 05-41417 (5th Cir. filed July 24, 2006). Lufkin does not point to new or different evidence it would now offer.

Thus, the Circuit Court has already considered all relevant evidence and arguments that this court could now consider, and adjudicated the issue of discrimination in salaried promotions for the time period up to 2002. This court is not going to revisit the issue pursuant to the first exception.

The other two exceptions also do not apply. Defendant does not indicate, and the court is not aware of, any changes in controlling authority. Further, the decision was not clearly erroneous and did not result in a manifest injustice. Defendant's claim is therefore barred.

B. Evidence Exists to Support a Finding of Discrimination In Promotions

Assuming *arguendo* that data from 1994-95 should have been excluded, statistical and other non-statistical evidence still supports a finding of discrimination in salaried promotions. For the period from 1996-2002, which excludes the 1994-95 time period which Defendant argues

[1]Plaintiffs quote this statement in their brief and provide the citation — "Br. of Plaintiffs-Appellant Lufkin Industries, Inc. at 23 n. 8." Plaintiffs neither attached the document as an exhibit, nor directed the court to an entry docketed by the Fifth Circuit. Luckily, the court was able to locate this quotation cited by Plaintiffs, in one of the numerous filings with the Circuit Court. The court verified that the quotation, as cited by Plaintiffs, was correct except for a typographical error. In the future, the court expects Plaintiffs to provide the court with a copy of such references or provide a pinpoint citation.

is barred by 42 U.S.C. § 2000e-5(e)(I), Dr. Mary Baker, Defendant's expert, found that black employees received 6.14 fewer promotions from hourly to salaried jobs for a disparity of -1.95 standard deviations. Second Declaration of Mary Baker, Ph.D., Ex C to Doc. #632. This is -0.01 standard deviations — a *de minimus* amount — from the -1.96 standard deviations that Defendant asserts is statistically significant. Thus, even excluding the 1994-1995 data, statistical evidence still supports a finding that Defendant discriminated against blacks when promoting employees to salaried promotions.

Evidence also supports a finding of discrimination for salaried promotions when viewing the 1996-2002 data for all salaried promotions — those promotions from hourly to salaried positions and promotions within salaried positions. Analyzing the data between 1996-2002 for all salaried promotions produces a -1.62 standard deviation between the promotion of blacks and the promotion of other employees. Doc. #632 at p. 4. This standard deviation is indicative of a 1 in 9 chance that the difference in promotions for salaried positions between blacks and all other salaried employees is pure chance. Thus, the statistical analysis indicates that there is an 89% probability that Defendant intentionally discriminated against black employees when determining promotions to, and within, salaried positions when analyzing only the data from 1996-2002. As Judge Cobb observed, "[t]he statistical significance [for salaried promotions] is not as robust [as for hourly promotions], but that is in part an artifact of the smaller sample size." Doc. #552 at p. 29. Further, Judge Cobb rejected the use of a -1.96 standard deviation threshold as indicative of statistical significance. Doc. #552 at p. 14. He found it to be an arbitrary standard that has been rejected by most courts. *Id.*

Judge Cobb based his finding partially on non-statistical evidence of discrimination in salaried promotions, which itself is sufficient to support a finding of discrimination also exists. *See Segar v. Smith*, 738 F.2d 1249, 1264 (D.C. Cir. 1984) (affirming the district court's Title VII liability finding even though plaintiffs did not offer statistical evidence that had achieved "acceptable levels of statistical significance."). Judge Cobb noted that anecdotal evidence, which brought the statistics to life, supported the finding of discrimination. Doc. #552 at p. 14. He also found that Defendant employed a subjective decision making system for promotions which allowed Defendant to discriminate. Doc. #552 at p. 5-7, 21-24.

IT IS THEREFORE ORDERED that Defendant Lufkin Industries, Inc.'s motion and amended motion for partial summary judgment [Doc. Nos. 630 and 632] are **DENIED**.

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

Ron Clark, United States District Judge