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)

PLAINTIFFS' COMMENTS ON THE REPORT OF THE COURT APPOINTED CONSULTANT MICHAEL CAMPION, Ph.D.

The Court, upon the joint recommendation of the parties, appointed Michael Campion, Ph.D., an industrial organizational psychologist, to "review Lufkin's promotion policies, procedures, and practices for hourly and salaried positions to determine if those policies, procedures, and practices address and remedy the Court's findings of unlawful subjectivity in promotions." Order entered Apr. 7, 2009 (Dkt. 626) at 1. The Court further directed that Dr. Campion submit a report of "his findings and recommendations" to the Court and the parties, and for the parties to provide their written comments on the report within twenty (20) days thereafter. Dr. Campion submitted his Report to the parties on July 23, 2009.[1] Plaintiffs provide their comments on Dr. Campion's Report below.

1. ***Preliminary Comments***

Before turning to the substantive provisions of Dr. Campion's report, Plaintiffs make the following preliminary comments and observations.

a. ***Adequacy of Lufkin's Remedial Efforts to Date***

Dr. Campion notes at the outset of his Report that since the Court issued its liability findings, Lufkin has taken "some actions" to address the "issues in the case." Report, Dkt. 654, at 6. He characterizes those actions as "fairly few and narrow in scope." *Id.* Although Dr. Campion declined to comment on "whether [Lufkin's] minor improvements are sufficient to address the subjectivity in promotions," the Court cannot avoid that obligation and it must conclude that they are not sufficient given the comprehensive extent of Dr. Campion's review of Lufkin's current practices, *see id.* at 8-11, the content of Dr. Campion's report and the extensive

[1] Dr. Campion's report (hereinafter "Report") was filed on July 27, 2009. Dkt. 654.

scope of recommendations for improvements in Lufkin's practices,[2] as well as the strong evidence in the record of continuing discrimination and the lack of meaningful voluntary or past remedial actions by Lufkin.[3] *See* Plaintiffs' Response in Opposition to Defendant's Motion to Quash, Dkt. 583, at 6-7.

b. ***Overall Assessment of Dr. Campion's Recommendations***

Plaintiffs provide specific comments on each of Dr. Campion's recommendations below. Overall, Plaintiffs find the recommendations are thorough, comprehensive and, for the most part, address the Court's liability findings. In Plaintiffs' view, Recommendations 1, 4,[4] 5, 7[5], 13, 14, 15, 17 and 18 are the most important recommendations to be adopted, as remedies for the

[2] Dr. Campion finds multiple sources of subjectivity in Lufkin's current promotion processes. *See* e.g., Report at 14-15. ("The complexity [in the promotion process in terms of 'career paths, promote pools, necessary training and experience, eligibility rules, and so on'] creates opportunities for subjectivity [and] it also results in a lack of full understanding, which leads to mistrust when the outcomes are discrepant between groups." "Although there may be a general understanding of the requirements for most jobs, there are no written or agreed-upon lists. Without such explicit information, there is a considerable opportunity for subjectivity not only in defining the KSAO [knowledge, skill, ability, and other] requirements of jobs, but also in evaluating the KSAOs of employees.") Dr. Campion also found that Lufkin does not have in place procedures to insure manager accountability or a means to monitor the promotion process and outcomes. *See* e.g., Report at 57 ("The company's yearly affirmative action plan will reflect changes in the racial diversity of each job group, but may not explicitly examine the results of the promotions in the last year in terms of potential adverse impact."); 61 ("[M]ost organizations conduct yearly updates for executives on EEO topics. The author's understanding is that such briefings are not currently conducted [by Lufkin].").

[3] In light of the limitation on the length of time and number of hours in which Dr. Campion was to have completed his report and recommendations, it would not have been a good use of his time to substantiate that conclusion in any detail. Dkt. 626 at 2. Dr. Campion's main focus was to make recommendations for future practices, not to analyze mechanisms of discrimination that the Court has already found. The same limitations may have resulted in Dr. Campion not fully appreciating Lufkin's recalcitrance during this case which, in turn, underscore the need for the additional measures proposed by Plaintiffs to strengthen Dr. Campion's recommendations and assure that they will assist in eliminating ongoing discrimination.

[4] Plaintiffs consider the second prong of this recommendation to be critical. *See* 9-10, *infra.*

[5] This recommendation does not go far enough to adequately address the problem of discretionary allocation of training opportunities found by Judge Cobb. *See* 11-12, *infra.*

discrimination found by this Court and the Fifth Circuit. These recommendations include professionally accepted and tested, and effective means to reduce unnecessary subjectivity and decision making based on implicit bias and stereotypes in the workplace.[6] The other recommendations made by Dr. Campion offer suggestions regarding human resources "best practices," which Lufkin would be wise to consider implementing to improve its personnel processes and which could, if properly implemented, contribute to the reduction or elimination of discriminatory decision-making.

c. ***Feasibility of the Recommendations***

Dr. Campion cautions that "not all the recommendations may be feasible or practical" and "[i]mportant considerations are the need for management flexibility and the amount of administrative burden created. Also important is the acceptance of the union and not violating the collective bargaining agreement." Report, Dkt. 654, at 14. While these are relevant considerations, they cannot excuse the Court from carrying out the mandate of the Fifth Circuit

[6] Attached hereto as Exhibit 1 is a report by the Diversity Task Force that was created under the consent decree that settled a race discrimination class action lawsuit against the Coca Cola Company in 2001. *Abdallah v. The Coca-Cola Company*, Case No. 1-98-CV-3679 (N.D. Ga.). The Task Force was charged with making recommendations regarding and monitoring the company's promotions, compensation, performance evaluations and other employment practices. The attached report is the Task Force's assessment of the most effective remedial measures implemented by the company. The Task Force's findings are consistent with the most critical of Dr. Campion's recommendations. For example, the Task Force found the following practices to be most effective in remedying the alleged discriminatory promotion and compensation practices in the *Abdallah* case: (1) collecting accurate information and analyzing it for adverse impact, *see* Exh. 1 at 4-5, Campion Recommendation 14; (2) job analysis, *see* Exh. 1 at 6-7, Campion Recommendations 1 and 13; (3) creating management incentives to promote diversity goals, *see* Exh. 1 at 10-11, Campion Recommendation 15; (4) mentoring and career development programs, *see* Exh. 1 at 12-17, Campion Recommendation 5; (5) communication and corporate commitment to diversity goals, *see* Exh. 1 at 20-22, Campion Recommendation 17. Additionally, the Task Force found that a "comprehensive problem resolution program" is critical. Exh. 1 at 18-19. This Court also has recognized the importance of such a program in its statement of intent to appoint an ombudsperson to receive and respond to complaints from class members. Transcript of Apr. 6, 2009 Status Conference at 10:21-11:15. The parties also jointly have agreed that "Development of a Complaint Mechanism" is an appropriate component of the Court's ultimate injunction. *See* Joint Report on Injunctive Relief, Dkt. 606 at 3.

to remedy the discrimination found by Judge Cobb and affirmed by the Court of Appeals, unless those considerations rise to the level of "business necessity" – which Plaintiffs submit they clearly do not. Likewise, the Court cannot allow Lufkin to hide behind those considerations as excuses to reject an important recommendation. Instead, Lufkin should bear a substantial burden of demonstrating why any particular recommendation is neither practical nor feasible to implement , particularly Recommendations 1, 4, 5, 7, 13, 14, 15, 17 and 18.

The Court's obligation to remedy discrimination must be discharged subject to what is feasible, of course, but that does not mean just what is inexpensive, convenient or easy or agreeable to Lufkin. Additionally, while Plaintiffs have been consistent in their representation that they seek no modification of the CBA, that is not the same as saying the unions get a veto over any proposed changes to Lufkin's personnel practices.[7] Lufkin's management retains considerable discretion under the CBA; it should not be necessary for Lufkin to have to modify the CBA to make the necessary changes to its promotion practices to address the Court's findings. Finally, in the past Lufkin has demonstrated a willingness to work with the unions to make certain changes to its human resources practices.[8] Now, Lufkin should demonstrate the same willingness to work with the unions in implementing other remedies ordered by the Court.

d. ***Proposed Procedure Regarding Dr. Campion's Recommendations***

As the Court is aware, the parties have been able to reach agreement on other aspects of injunctive relief, including the appointment of Dr. Campion, Dkt. 593; the identification of a proposed candidate for the ombudsperson position, Dkt. 634; and a number of other matters. *See* Joint Report on Injunctive Relief, Dkt. 606. By meeting and conferring on the terms of

[7] There is no reason to presume that the unions would oppose any remedial action that promotes fairness.

[8] *See* Appendix D to Dr. Campion's Report, an undated letter from Lufkin's Human Resources Manager John Havard to Dr. Campion stating that Lufkin implemented changes to its bid documentation process "in conformance with the collective bargaining agreement and/or with the approval of Lufkin's unions."

injunctive relief, the parties have been able to narrow the disputed issues, and to frame and present their respective positions on the disputed issues to assist the Court in its ultimate decision making on injunctive remedies. *See* Plaintiffs' Separate Report on Injunctive Relief, Dkt. 607, Lufkin's Status Report on Points of Disagreement on Injunctive Relief, Dkt. 609.[9]

Plaintiffs suggest that a similar procedure could lead to a similar result with respect to Dr. Campion's recommendations. Accordingly, Plaintiffs suggest that the Court direct the parties to meet and confer to determine whether they are able to reach agreement on which of Dr. Campion's recommendations Lufkin will implement and to submit a joint report identifying such recommendations on or before August 31, 2009. Plaintiffs propose that the parties also be permitted to simultaneously submit separate reports advising the Court of the recommendations on which they were not able to reach agreement and briefly summarize that party's position on the dispute (or a joint report in the event of full agreement).

2. Recommendation 1: Conduct a Job Analysis of the Hourly Jobs (Report, Dkt. 654, at 14-17)

This recommendation for a job analysis is a critical component of a remedy to address the Court's findings.[10] Together with Recommendation 13, for standardized job-related assessment

[9] The parties have followed a similar approach regarding the back pay calculations, and were able to resolve almost all issues leaving only a very few narrow questions for decision by the Court. *See* Dkts. 587, 605, 608, 617, 619, 620, 629, 631, and 633.

[10] Significantly, both Plaintiffs' and Lufkin's industrial organizational psychologist experts retained in this case agreed that a job analysis is a fundamental HR practice and plays "a key role in developing sound personnel policies, practices and procedures for making promotion decisions." *See* Sept. 9, 2003 Deposition of Richard Jeanneret, Ph.D. (Lufkin's industrial organizational psychologist expert) at 66:11-17 (attached hereto as Ex. 2) (Q: "Would you agree that research in human resource management and industrial and organizational psychology indicate that a job analysis would play a key role in developing sound personnel policies, practices and procedures for making promotional decisions?" A: "Yes."). Plaintiffs' industrial organizational psychologist and stereotyping expert Richard Martell, Ph.D. testified about the importance of job analysis in assuring objective, unbiased decision-making. Tr. Day 5 at 108:24-109:3 (attached hereto as Ex. 3) Additionally, the experience in other cases raising issues similar to those in this case has demonstrated that job analysis is an effective tool to remedy racial discrimination in promotions. *See* Ex. 1 at 7 ("Work analysis provides a knowledge base

procedures, these recommendations form necessary steps to minimize discretionary selections based on non-job-related criteria.[11]

Lufkin's managers have substantial opportunity to exercise subjective decision making in selection of employees for promotions within hourly positions. According to Appendix G of Dr. Campion's report, of the 169 hourly jobs in Lufkin's five seniority departments, 55 are not posted and 52 others are posted, but require the successful bidder to demonstrate proficiency and/or satisfactorily complete a training program before being awarded the job. Thus, 107 of the 169 hourly positions, or 63%, are filled in ways that allow managers to exercise discretion and subjectivity.[12] Therefore, the collection of accurate information regarding the KSAOs of the hourly positions is essential.

Dr. Campion notes that Lufkin has never conducted a job analysis of its hourly jobs and his "interviews with employees revealed that there was considerable ambiguity as to the KSAOs [knowledge, skill, ability, and other requirements] necessary for promotion into many jobs." Report, Dkt. 654, at 15. Dr. Campion does not recommend a job analysis for salaried jobs even though he does not find that there is any less ambiguity among employees regarding the KSAO's

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(continued …)

that the company and its employees can use to support efficient, fair and equitable employment decision-making."). In the face of the unanimous opinions of the HR experts in the case, there is no basis for Lufkin to continue to resist – or the Court to fail to order – comprehensive job analyses for hourly and salaried positions.

[11] Dr. Campion found that "[a]lthough there may be a general understanding of the requirements for most jobs, there are no written or agreed-upon lists. Without such explicit information, there is a considerable opportunity for subjectivity not only in defining the KSAO requirements of jobs, but also in evaluating the KSAOs of employees." Report at 15.

[12] Moreover, Judge Cobb found that "[e]ven positions awarded to the senior bidder regardless of qualification can be influenced when supervisors are discouraging blacks from applying. It is thus not surprising that blacks are hesitant to bid and may choose to withdraw their bids even if selected." Final Amended Judgment, Dkt. 552, at 23. Accordingly, Dr. Campion's statement that "most hourly promotions are made based on seniority solely without any considerations of the past job assignments or skills of employees," Report at 33, is contrary to the factual findings of this Court which were affirmed by the Fifth Circuit.

for salaried positions. Rather, Dr. Campion declines to recommend a job analysis for salaried jobs "because the job descriptions for the salaried jobs were recently updated." *Id.* at 15. Plaintiffs disagree with Dr. Campion's assessment. Plaintiffs recommend that Lufkin be directed to conduct job analyses for both its hourly and salaried jobs.

In declining to recommend job analyses for salaried positions, Dr. Campion may not have been aware of the July 2008 deposition testimony on this subject of Lufkin's Human Resources Manager John Havard.[13] Mr. Havard testified that: (1) Lufkin did not consult with any HR professionals in updating job descriptions for salaried jobs;[14] (2) it did not conduct a job analysis in updating the job descriptions[15]; (3) it did not conduct any validation studies of any of the updated job descriptions with internal sources;[16] and the only validation it did in conjunction with the job descriptions was with the managers responsible for the positions.[17] Dr. Campion proposes that in conducting the validation surveys for performing the job analysis for hourly jobs "[b]oth incumbents and supervisors should be surveyed to gain both perspectives, Report, Dkt. 654, at 17, something Lufkin did not do in updating its salaried job descriptions. Plaintiffs' expert Dr. Martell found no evidence that any of the employees within Lufkin's HR Department – the same employees who recently updated the salaried job descriptions – have the requisite skills, training and education to perform a formal job analysis. Ex. 3, Tr. Day 5 at 111:9-13. Dr. Campion's recommendations that Lufkin add another staff person to its HR Department who

[13] Dr. Campion did not identify this deposition transcript as one of the documents he reviewed in connection with his review of Lufkin's personnel practices. *See* Report at 8-10.

[14] July 9, 2008 Deposition of John Havard (attached hereto as Ex. 4) at 95:19-22.

[15] *Id.* at 95: 12-18.

[16] *Id.* at 95:23-96:2.

[17] *Id.* at 96:3-6. It is significant that those are the same managers whose exercise of discretion resulted in discriminatory impact.

"should be professionally trained in HR," Report, Dkt. 654, at 62, demonstrate his agreement with Dr. Martell's assessment.[18]

It is also critical that the job analysis be done properly. Dr. Campion suggests that a professional consultant be used to conduct the job analyses, but that Lufkin HR staff and supervisors might be used "to save costs." *Id.* at 17. Lufkin's current HR staff does not have the requisite skills, training and education to perform a formal job analysis. Lufkin should not be permitted to cut corners on this critical and essential task. Lufkin should be required to retain a qualified expert to conduct the job analyses. As a pragmatic suggestion, retaining Dr. Campion for this project would make sense and reduce costs in light of his recently acquired knowledge of the company's operations and jobs.

3. Recommendation 2: Audit and Continuously Improve the Revised Bidding Documentation Process (Report, Dkt. 654, at 17-24)

Adoption of this recommendation might be helpful but it will not alone solve the problem of bias in decision-making. This recommendation must be viewed in context and implemented together with other recommendations Dr. Campion makes that directly address the reduction of subjectivity in the promotion process.

Both in the past and with its recent "improved" bid documentation practices, Lufkin has resorted to documentation of results for defensive purposes (i.e., to create a paper trail)[19] rather than as a means to collect accurate and reliable information to analyze to ensure fair and

[18] Dr. Campion explains "The field of HR has a great number of technical methodologies and scientific findings that are typically not known by employees who have learned HR on the job. Formal education and professional experience are necessary to develop and implement innovative improvements in the HR systems." *Id.* at 62.

[19] Dr. Campion notes that "employees must also sign a form indicating the reasons for the turndown to document their decisions." Report, Dkt. 654, at 19. Given Judge Cobb's findings of manager discouragement of African Americans from bidding on or accepting promotions and the unequal relationship between employees and their managers, this practice is suspect and appears to be aimed at providing protection for the company and not preventing bias in the promotion process.

unbiased promotion practices.[20] Dr. Campion appears at least tacitly to share Plaintiffs' concerns. He identifies a number of additional steps he recommends Lufkin implement to further improve the bid documentation process. For example, Dr. Campion proposes that "[t]he reasons for turning down postings should be recorded." Report, Dkt. 654, at 23-24. He explains that "[c]ollecting information on reasons for turndowns may yield insight into the inhibitors (i.e., subjectivity, unconscious or conscious biases) of promotion opportunities and career development satisfaction. Report, Dkt. 654, at 23.

4. ***Recommendation 3: Create Career Development Guides for Both Hourly and Salaried Jobs (Report, Dkt. 654, at 24-26)***

Ostensibly, the CBA should provide this information to hourly employees. Dr. Campion reviewed the CBA, *id.* at 8, and talked with employees and union representatives. *Id.* at 10-11. His inclusion of this recommendation suggests that the CBA does not include the necessary information, is not understood by employees, and/or does not accurately describe the actual hourly promotion process. Career development guides for both hourly and salaried employees

[20] As an example, Plaintiffs are concerned that the codes and form Lufkin has developed to record reasons for selections/non-selections of hourly employees for promotions could be used as a menu of facially "objective" reasons from which managers could select to justify their "subjective" selections or non-selections. *See* Report, Dkt. 654, at Exhibit H. Additionally, many of the codes are vague, ambiguous and subject to different interpretations (e.g. "safety issues," "physical limitations," "communication barrier," "reading and/or writing skills"). *Id.* Additionally, several disposition codes allow manager discretion in removing a successful bidder from the position (i.e., "removed per the 10 day trial (company request)," "removed per the 30 day trial (company request)," "removed per the 90 probation/crane op. Foundry (company request)"). *Id.* Another disposition code "declined the position," also can be misleading. Other disposition codes may disguise managers' discouragement of employees remaining in their current positions and failing to progress to promoted positions for which they were the successful bidders (e.g. "removed per the 10 day trial (employee request)," "removed per the 30 day trial (employee request)"), "removed per the 90 probation/crane op. Foundry (employee request)"). *Id.* Thus, Lufkin's "bid documentation process" does little to address Judge Cobb's finding that "African-Americans are systematically discouraged from bidding on jobs, are discouraged from taking promotions awarded through the bid process," Amended Final Judgment, Dkt. 552, at 28.

could be very helpful if properly implemented in overcoming African American employees' reluctance to seek promotion or to accept offers (or to be dissuaded from accepting offers).[21]

5. ***Recommendation 4: Reexamine Pay Consequences of Hourly Promotions (Report, Dkt. 654, at 26-28)***

This recommendation is two-fold. First, Dr. Campion recommends that Lufkin "revisit" its current policy of temporarily reducing an employee's pay after he or she is promoted into a trainee position because it "discourages career exploration and interest in development."[22] Report, Dkt. 654, at 26-28. This recommendation might implicate the CBA, although Dr. Campion surmises, probably correctly, that "a positive decision would likely be met with acceptance by the union." *Id.* at 28. This prong of the recommendation makes sense as a "best practice" but it does not particularly address the subjectivity in the promotion process.

The second prong of this recommendation, however, warrants consideration and further study as Dr. Campion proposes. Dr. Campion reports that "some employees asserted that management uses discretion to give pay increases to some promoted employees more quickly than the union contract requires. They felt this was a form of favoritism and potential discrimination." Report, Dkt. 654, at 26. While Dr. Campion cautions that this might be "a misperception" or justified by legitimate business reasons, he rightly believes the issue warrants study to determine the truth of the matter. Given this recommendation and in light of the Court's findings regarding the excessive subjectivity Lufkin's managers exercise, the impact of these pay

[21] *See* Final Amended Judgment, Dkt. 552, at 28("African-Americans are systematically discouraged from bidding on jobs, are discouraged from taking promotions awarded through the bid process, and have difficulty getting assignments that will help them acquire the skills needed for further promotions.").

[22] Dr. Campion advises that "[r]eductions in pay following promotions are not common in other companies." Report at 26.

practices should be analyzed by Class Counsel or the ombudsperson to determine if injunctive remedies to address the pay practices are necessary.[23]

6. ***Recommendation 5: Provide Feedback to Employees on Unsuccessful Bids (Report, Dkt. 654, at 28-31)***

Providing feedback to rejected bidders is important not only as a way of helping class members successfully compete for promotions over time, but also as a control on the unfettered exercise of supervisory discretion and resulting bias; when supervisors are required to articulate reasons for their decision, this may guide them to using objective and plausibly justifiable factors in their decision-making.. It also is logical and consistent next step to Lufkin's practice of documenting the reasons for non-selection of bidders.[24]

7. ***Recommendation 6: Develop a Procedure for Asking Questions About Promotions and Career Opportunity Fairness Issues (Report, Dkt. 654, at 31-33)***

Dr. Campion's findings with regard to this and several other recommendations reveal a lack of communication between Lufkin's employees and management.[25] The question asking procedure Dr. Campion proposes is a good idea but the procedure as written is vague and needs to be fleshed out in more detail to be effective. The requirement for an explanation should be mandatory; in this form if could channel decision making toward objective and job-related

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[23] *See* Final Amended Judgment, Dkt. 552, at 29-30 ("Lufkin's discrimination in … promotions has concentrated blacks in lower-paying jobs." " The net result of Lufkin's discriminatory practices is a significant shortfall in income for black employees.")

[24] However, as noted earlier, Plaintiffs disagree with Lufkin's practice of requiring employees to sign a form acknowledging that they agree with the stated reason for their non-selection. *See* n. 18.

[25] *See* Report, Dkt. 654, at 15 ("the interviews with employees revealed that there was considerable ambiguity as to the KSAOs necessary for promotion into many jobs"); 21 (unsuccessful salaried promotion applicants are not notified in person that they did not get the position but by "an announcement in the company newsletter" that they did not get the job); 23-24 (employees are not asked the reason(s) why they turn down promotions); 24 ("the hourly promotion process is very complicated and is not fully understood by many employees"); 29 ("there is no process in place for getting feedback on unsuccessful bids"); 49 ("managers often find it uncomfortable to give feedback to employees").

factors and help reduce subjectivity and bias. The ombudsperson could play a role in the procedure by ensuring that questions are answered fully, fairly, and accurately, and thus also help reduce subjectivity and encourage unbiased advancement of employees.

8. ***Recommendation 7: Develop a Process for Making Job Assignment and Training Decisions to Reduce Opportunities for Discretion (Report, Dkt. 654, at 33-35)***

It is critical that Lufkin develop a process for making job assignment and training decisions to reduce opportunities for unguided and unreviewed exercises of discretion. While Dr. Campion refers to "perceptions of unfairness," Report, Dkt. 654, at 33, Judge Cobb made specific findings that African American employees received less training opportunities than white employees.[26] Dr. Campion's recommended action plan to "study the problem" is inadequate given the Court's findings. Moreover, Dr. Campion's assertion that "most hourly promotions are made based on seniority solely without any considerations of the past job assignments or skills of employees," Report, Dkt. 654, at 33, is contrary to the Court's findings and is contradicted by Appendix G to his report which reveals that 63% of all hourly are filled in ways that allow managers to exercise subjectivity.[27] Lufkin should be directed to develop and

[26] *See* Final Amended Judgment, Dkt. 552, at 21 ("[W]hite employees have a significant advantage in gaining the skills and abilities needed to qualify them for promotion. Because workers' day-to-day assignments are not governed by the CBA, supervisors have broad latitude to schedule workers as they see fit. No one checks or oversees that process and there is no right in the CBA to a specific position within a job classification. White employees can be, and are, selected and groomed for further advancement and managerial roles. Black employees are more likely to be placed in dead-end positions and left to seek training on their own, outside of regular work hours.).

[27] Judge Cobb also found that "Salaried jobs … can be filled by anyone deemed suitable by Lufkin management." Final Amended Judgment, Dkt. 552, at 6.

implement a fair and mandatory process for allocation of training opportunities with explicit components, including documentation, monitoring and analysis for adverse impact.[28]

9. ***Recommendation 8: Develop a Skills Inventory (Matrix) for Hourly Employees (Report, Dkt. 654, at 35-36)***

The listing proposed by Dr. Campion could be used to track the allocation of training opportunities to help ensure that such training is provided fairly and equally. Additionally, once the matrix or listing is created, managers' reference to it in making promotion decisions could encourage unbiased decision making. However, the "skill determinations" made in creating the matrix must be objective and accurate, and not done on the basis of managers' uninformed and subjective perceptions.

10. ***Recommendation 9: Develop a Cross-Training Program (Report, Dkt. 654, at 35-40)***

While this is an admirable "best practice," it is not necessarily remedial. However, in light of Judge Cobb's findings regarding Lufkin's unequal allocation of training to African American employees, Lufkin should be required to document any cross-training it provides to employees (including, but not limited to, temporary transfers of employees permitted under the CBA) so that such training can be monitored for adverse impact.

11. ***Recommendation 10: Consider a Pay-for-Skills Program Need and Potential Benefits (Report, Dkt. 654, at 40-44) and Recommendation 11: Institute a Technical Education Program With a Local College (Report, Dkt. 654, at 44-48)***

These also are "best practices" but they are not necessarily remedial.

[28] As Plaintiffs earlier reported to the Court, Lufkin represented to Judge Cobb that it, in fact, had developed and implemented an on-the-job training program and procedure to address Judge Cobb's findings and initial injunctive order. Plaintiffs subsequently discovered that Lufkin never implemented the program. *See* Plaintiffs' Response in Opposition to Defendant's Motion to Quash, Dkt. 583, at 6-7.

12. ***Recommendation 12: Conduct Hourly Performance Reviews, Including Career Counseling (Report, Dkt. 654, at 48-50)***

Performance reviews for hourly employees are a good idea for the reasons Dr. Campion discusses; however they are not directly remedial. It is more important for Lufkin to develop objective, job related selection criteria and procedures.

13. ***Recommendation 13: Develop Standardized and Job-Related Procedures for Assessments (Report, Dkt. 654, at 51-56)***

This is a critical recommendation. It is directly related to the Court's findings regarding excessive subjectivity in the promotion process. This recommendation must be implemented in tandem with Recommendation 1, *i.e.,* job analyses. Plaintiffs' comments regarding Recommendation 1 are equally applicable with regard to this recommendation. Lufkin will need qualified and experienced professional assistance in implementing this recommendation. Additionally, as Dr. Campion notes, once standardized and job-related assessment procedures are developed, Lufkin managers will have to be trained on the new procedures. Report, Dkt. 654, at 55-56. That training should be provided by an expert in the field. For reasons discussed in Plaintiffs' comments regarding Recommendation 1, it would make sense for Lufkin to retain Dr. Campion to assist it in the development and implementation of, and training on, standardized and job-related assessment procedures.

14. ***Recommendation 14: Conduct Yearly Adverse Impact analysis and Monitoring of Promotions (Report, Dkt. 654, at 56-57)***

This is a critical and usual component in an injunctive remedy in a case such as this one. Lufkin already has agreed to undertake periodic analyses of promotion data. *See* Joint Report on Proposal for Injunctive Relief, Dkt. 606 at 4-5. Plaintiffs believe that initially, Lufkin should be required to conduct such analyses more frequently than annually (*i.e.,* semi-annually) so that if the analyses show adverse patterns (as has continued with hourly promotions), the source(s) of the disparities can be identified and corrective action taken. In addition to promotions, Lufkin should also analyze other related personnel decisions – such as allocation of training opportunities. It is critical that Lufkin not just conduct adverse impact analyses, but that it also

take into account the results of the analyses in its evaluation of the performance, and in making decisions regarding the compensation, of its managers. The results of the analyses should be made available to the ombudsperson, Class Counsel, and the Court. Finally, Lufkin's implementation of this recommendation should not preclude the ombudsperson and Class Counsel from obtaining the underlying data and conducting their own analyses.

15. ***Recommendation 15: Include Employee Development and Equal Employment Opportunity in the Management Performance Reviews (Report, Dkt. 654,t at 57-59)***

This also is a critical and usual component in an injunctive remedy in a case such as this one. The decision makers also need to be held accountable – in terms of compensation and their own career advancement – for the achievement of diversity goals.[29]

16. ***Recommendation 16: Conduct Management Training (Report, Dkt. 654, at 59-61)***

Lufkin already has agreed that "training for all supervisors and managers on issues raised in the lawsuit is appropriate" and that the parties will "jointly attempt to select a consultant that Lufkin will retain to assist it in the development of the training." *See* Joint Report on Proposal for Injunctive Relief, Dkt. 606 at 4. The training consultant that is retained should review this recommendation, particularly with an eye toward making sure that the training includes training for managers on how to make decisions in an objective, unbiased manner based on job-related criteria.

17. ***Recommendation 17: Conduct Yearly Executive Updates on Equal Employment Opportunity (Report, Dkt. 654, at 61-62)***

Dr. Campion found that such briefings are not occurring at Lufkin. Report at 61. It is both telling and disturbing that, having been found liable for unlawful racial discrimination by

[29] *See* Exh. 1 at 11 ("The Coca-Cola Company developed an incentive program that encouraged managers not only to be accountable for their own diversity goals, but also to be accountable for those of their peers and those of the organization overall. Collective incentives can be especially effective in helping to transform the organization.").

this Court and the Fifth Circuit, Lufkin's upper management would not periodically review such data. Not only should Lufkin implement this recommendation, but the review should be rigorous and focus on Lufkin's progress toward eliminating discriminatory practices and outcomes. The participants in the review should include the CEO, senior management, and the person Lufkin designates as its internal monitor. *See* Joint Report on Proposal for Injunctive Relief, Dkt. 606 at 4-5.

18. ***Recommendation 18: Add Staff to the Human Resources Department (Report, Dkt. 654, at 62)***

This is a critical and necessary recommendation. The person selected should not only be "professionally trained in HR," Report, Dkt. 654, at 62, he or she must have some expertise and successful experience in diversity programs and the elimination of bias in decision making. Lufkin's current HR staff lacks any such competency.

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Respectfully submitted,

By: /S/

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CERTIFICATE OF SERVICE

I hereby certify that I have served all counsel of record in this case, including the following, with a true and correct copy of the foregoing by sending same via electronic filing to:

Douglas Hamel
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on this 14th day of August, 2009.

/S/
Teresa Demchak