ORIGINAL

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 (COBB)

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

269

I. INTRODUCTION

On September 23, 2003, Lufkin Industries, Inc. ("Lufkin") filed a motion for partial summary judgment on plaintiffs' initial assignment claims. Amazingly, Lufkin does not mention or refer to the standard for summary judgment in its motion even once,[1] and, not surprisingly, it fails to demonstrate that there is no genuine dispute of material fact and that it is entitled to judgment as a matter of law. For this reason, as well as those discussed below, Lufkin's motion for partial summary judgment should be denied.

II. LEGAL STANDARD

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. See id.; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Amoco Prod. Co. v. Horwell Energy, Inc., 969 F.2d 146, 148 (5th Cir. 1992). When considering a motion for summary judgment, the district court "must 'review the facts drawing all inferences most favorable to the party opposing the motion.'" Amoco, 969 F.2d at 148 (quoting Reid v. State Farm Mut. Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986)); Hertz v. Treasure Chest Casino, L.L.C., No. Civ.A.03-73, 2003 WL 21748686, *2 (E.D. La. July 25, 2003). A court that is ruling on a summary judgment motion may not resolve factual disputes or make credibility determinations. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291, 294 (5th Cir. 1987).

"If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific

[1] Nor did Lufkin mention the standard for summary judgment in its September 5, 2003 motion, which was rejected by the Court on September 11, 2003.

facts showing the existence of a genuine issue for trial." Engstrom v. First Nat'l Bank of Eagle Lake, 47 F.3d 1459, 1462 (5th Cir. 1995). However, "[u]ntil the movant has met its burden, the opponent of a summary judgment motion is under no obligation to present any evidence." Gray v. Greyhound Lines, East, 545 F.2d 169, 174 (D.C. Cir. 1976). Further, before summary judgment can be granted on the basis of an affirmative defense, the defendant must meet its ultimate burden of persuasion on its affirmative defense. See Crescent Towing & Salvage Co., Inc. v. M/V Anax, 40 F.3d 741, 744 (5th Cir. 1994); Rosales v. City of San Antonio, No. CIV.ASA-00-CA-0144NN, 2001 WL 674201, *2 (W.D. Tex. March 7, 2001); see also Liberty Lobby, 477 U.S. at 252 (holding that party bearing burden of persuasion must set forth sufficient factual material to support determination that burden of persuasion has been satisfied). "Merely invoking [an] affirmative defense[] is not enough." Rosales, 2001 WL 674201, at *2.

A court must find a "'[a] factual dispute . . . [to be] 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party . . . [and a] fact . . . [to be] 'material' if it might affect the outcome of the suit under the governing substantive law.'" Hertz, 2003 WL 21748686, at *2 (quoting Beck v. Somerset Techs., Inc., 882 F.2d 993, 996 (5th Cir. 1989). In other words, a factual dispute is genuine if it requires a trial to resolve competing reasonable factual contentions. See James WM. Moore, Moore's Federal Practice § 56.11[3] (3d ed. 2003) ("Moore's Federal Practice"); Amoco, 969 F.2d at 148. Judgment as a matter of law is permitted only if the facts and law will reasonably support only one conclusion. See Bricklayers, Masons and Plasterers Int'l Union of Am., Local Union No. 15 v. Stuart Plastering Co., Inc., 512 F.2d 1017, 1024 (5th Cir. 1975); Moore's Federal Practice §56.11[3].

III. ARGUMENT

A. Sylvester McClain's January 29, 1995 Memorandum Is The Relevant Document For Determining The Scope Of Mr. McClain's Claims As Submitted To The Equal Employment Opportunity Commission.

In arguing in its motion for partial summary judgment that plaintiffs' initial assignment claim falls outside the scope of the named plaintiffs' charges of discrimination ("EEOC charge")

filed with the Equal Employment Opportunity Commission ("EEOC"), Lufkin refers exclusively to the August 12, 1996 EEOC charge filed by named plaintiff Sylvester McClain and the February 24, 1997 EEOC charge filed by named plaintiff Buford Thomas. See Lufkin's Motion at 1-2. However, it is beyond dispute that this Court has already determined that Mr. McClain's January 29, 1995 memorandum, which was sent to the EEOC, constitutes his EEOC charge for purposes of this lawsuit.[2] Lufkin concedes this fact in its reply to plaintiffs' opposition to its motion for leave to file its partial summary judgment motion. See Lufkin's Reply at 1. Yet Lufkin never addresses the contents of the memorandum in its summary judgment motion.

On this basis alone, Lufkin's summary judgment motion should be denied. It is well settled that failure to exhaust administrative remedies is not jurisdictional but is in the nature of an affirmative defense. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982); Orloff v. Willoughby, 345 U.S. 83, 85 (1953). As such, in order to establish that there is no genuine issue of fact, Lufkin must meet its ultimate burden of persuasion on this affirmative defense. Query how Lufkin can meet its ultimate burden and demonstrate that there is no genuine issue with respect to the coverage of Mr. McClain's EEOC charge when it fails to even discuss the contents of the document that has been recognized by the Court as constituting that charge. In any event, Mr. McClain's January 29, 1995 is the proper document to consider when evaluating the appropriateness of the claims asserted in this lawsuit.

B. Lufkin's Contention That Plaintiffs Have Not Stated A Timely Initial Assignment Claim Has Either Already Been Rejected By The Court Or Is Untimely.

Lufkin places itself in a difficult position by basing its motion for partial summary judgment on its claim that plaintiffs have failed to exhaust their administrative remedies. On the one hand, Lufkin has argued repeatedly that neither Mr. McClain's nor Mr. Thomas' EEOC

[2] A copy of this memorandum is attached hereto as Exhibit A to the Declaration of Darci E. Burrell. While the Court has obviously seen the attached document, plaintiffs provide it here for the Court's convenience.

charge can support the class claims. See Defendant's Motion to Dismiss Class Action Claims, filed June 6, 1997, at 16 ("The complaints in [Mr. McClain's] EEOC charge fail to track the principal claims of the putative class, namely that Lufkin Industries discriminated in hiring and promoting black employees."); Defendant's Response to Plaintiffs' Motion for Class Certification, filed November 26, 1997, at 23 ("The complaints in [Mr. McClain's] EEOC charge fail to track the principal claims of the putative class, namely that Lufkin Industries discriminated in hiring, terminating and promoting black employees."); Defendant's Petition For Permission to Appeal Order Granting Class Certification, filed April 13, 1999, at 25 ("McClain's complaint [to the EEOC] focuses on one thing: the decision to eliminate the single quality assurance manager position in the trailer division. Hence, Mr. McClain's charge will not support the class which has been certified.")

This argument was implicitly, if not explicitly, rejected when the Court certified the class in this case. Consequently, because the Court's ruling with respect to these issues arises in the context of a single, on-going action, the Court's determination is subject to the "law of the case" doctrine. Under the "law of the case" doctrine, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation. See Knotts v. U.S., 893 F.2d 758, 761 (5th Cir. 1990); Thyssen Steel Co. v. M/V Kavo Yerakas, 911 F. Supp. 263, 268 (S.D. Tex. 1996). Issues decided either explicitly or by necessary inference constitute the law of the case. See Knotts, 893 F.2d at 761; Thyssen, 911 F. Supp. at 268. Under this doctrine, a previous decision on a factual or legal issue must be followed in all subsequent proceedings in the trial court unless the court is presented with substantially additional or different evidence, controlling authority has since made a contrary decision of the law applicable to the particular issue, or the prior decision was clearly erroneous and would work a manifest injustice. See Paul v. U.S., 734 F.2d 1064, 1065 (5th Cir. 1984). Since none of these factors are present in the instant matter, law of the case should prevent Lufkin from once again arguing that Mr. McClain's EEOC charge does not support the class claims.

On the other hand, if Lufkin chooses to argue that it has not previously raised its exhaustion argument, it should be prevented from doing so because to raise this argument now, for the first time in the approximately six years that this case has been filed and the four years since the class was certified, would be untimely.[3] The Fifth Circuit has adopted a rule that "[a]n affirmative defense may be raised on a motion for summary judgment only if that motion is the first pleading responsive to the substance of the allegations." United States v. Burzynski Cancer Research Inst., 819 F.2d 1301, 1307 (5th Cir. 1987); see also Funding Sys. Leasing Corp. v. Pugh, 530 F.2d 91, 96 (5th Cir. 1976). If Lufkin's contention that plaintiffs have not stated a timely initial assignment claim has not been previously raised and resolved, than Lufkin should not be permitted to raise, years after this case was first filed and the class certified, this particular affirmative defense. Compare Berry v. Pierce, 98 F.R.D. 237, 239 (E.D. Tex. 1983) ("Defendant has never argued at any point during the past four and a half years of litigation that Berry or Winker failed to timely exhaust their administrative remedies. At this stage, such an affirmative defense has been waived."). Under either of the above scenarios, Lufkin's summary judgment motion must fail.

C. Lufkin Has Not Demonstrated That There Is No Genuine Issue With Respect To Plaintiffs' Initial Assignment Claim.

Lufkin makes essentially two arguments in support of its motion for partial summary judgment on plaintiffs' initial assignment claim: (1) the scope of Mr. McClain's and Mr. Thomas' EEOC charges do not cover plaintiffs' initial assignment claim and (2) neither Mr. McClain or Mr. Thomas could have asserted a timely initial assignment claim at the time their charges were filed. As noted earlier, because exhaustion of administrative remedies is an

[3] Lufkin's attempt to raise this issue now is very similar to its attempt in 2000 to limit the temporal scope of the class. Just as Lufkin's motion was untimely in that instance, see the Court's July 31, 2002 Order denying Lufkin's motion to amend the temporal scope of the class, its present attempt to challenge plaintiffs' initial assignment claim on exhaustion grounds should similarly be found to be untimely.

affirmative defense, Lufkin must "adduce competent summary judgment evidence to support each element of its defense[] and demonstrate the lack of any genuine issue of material fact with regard to [it]." Rosales, 2001 WL 674201, at *2. It is not enough for Lufkin to simply invoke its affirmative defense by arguing the evidence; it must demonstrate that it is entitled to judgment as a matter of law. Notwithstanding this requirement, as discussed further below, Lufkin simply argues that its interpretation of the facts surrounding this issue is correct. It does not demonstrate that there is no genuine issue. As such, its motion for partial summary judgment should be denied.

1. The Scope of Mr. McClain's EEOC Charge is not an Appropriate Issue for Summary Judgment, and, in any Event, Plaintiffs' Initial Assignment Claims are Reasonably Related to the Claims in Mr. McClain's January 29, 1995 Memorandum.

Under Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970), the scope of a Title VII complaint is not limited by the charge of discrimination filed with the EEOC but by "the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Id. at 466. Consequently, the allegations in a judicial complaint "'may encompass any kind of discrimination like or related to allegations contained in the charge . . . .'" Id. (quoting King v. Georgia Power Co., 295 F. Supp. 943, 947 (N.D. Ga. 1968)); see also Danner v. Phillips Petroleum Co., 447 F.2d 159, 162 (5th Cir. 1971) (complaint may properly encompass any discrimination "like or reasonably related to" the allegations of the charge).[4] This holding is based on the general proposition that "'the scope of an EEOC complaint should not be strictly interpreted.'" Sanchez, 431 F.2d at 465, (quoting Baxter v.

[4] Lufkin's reference in its motion to the "single filing rule" is apropos of nothing in this case. As noted in Allen v. United States Steel Corp., 665 F.2d 689 (5th Cir. 1982), and as quoted by Lufkin, "[I] n a multiple-plaintiff, non-class action suit, if one plaintiff has filed a timely EEOC complaint as to that plaintiff's individual claim, then co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement." [emphasis added] Id. at 695. As this is a class action, the single-filing rule has no application here.

Savannah Sugar Refining Corp., 46 F.R.D. 56, 59 (S.D. Ga. 1968). This is so because "[i]t would falsify the [Civil Rights] Act's hopes and ambitions to require verbal precision and finesse from those to be protected, for we know that these endowments are often not theirs to employ." Id.; see also Fellows v. Universal Restaurants, Inc., 701 F.2d 447, 450-51 (5th Cir. 1983).

The reason behind the requirement that the allegations in a judicial complaint pursuant to Title VII fall within the scope of the complainant's EEOC charge is to give the EEOC "'an opportunity to settle disputes through conference, conciliation, and persuasion . . . .'" Taylor v. Western & Southern Life Ins. Co., 966 F.2d 1188, 1195 (7th Cir. 1992) (quoting Babrocky v. Jewel Food Co., 773 F.2d 857, 863 (7th Cir. 1985). However, the purpose of the charge under section 706 is only to initiate the EEOC investigation and to trigger the investigatory and conciliatory procedures of the EEOC, not to restrict the resulting investigation. See EEOC v. Optical Cable Corp., 169 F. Supp. 2d 539, (W.D. Va. 2001). Thus, "'[a] single charge may 'launch a full scale inquiry' into racial discrimination.'" Taylor, 966 F.2d at 1195 (quoting Motorola, Inc. v. McLain, 484 F.2d 1339, 1346 (7th Cir. 1973)). Further, it is well settled that an effort by the EEOC to conciliate is not required before a complainant may file a federal lawsuit. See Danner, 447 F.2d at 161.

Thus, the proper scope of Mr. McClain's January 29, 1995 memorandum "is determined by the allegations in the charge one would reasonably expect the agency to investigate." Rangel v. Ashcroft, No. 3:00-CV-2741-X, 2001 WL 1597858, *3 (N.D. Tex. December 11, 2001). Mr. McClain's memorandum, in addition to stating the facts surrounding his individual claim, also provides that, with respect to the discrimination he experienced at Lufkin, "It is a cultural problem that must be addressed to prevent discriminatory practices in Lufkin Trailer Division or any other part of Lufkin Industries, especially by those in supervision who are entrusted as leaders to carry out the policies of Lufkin Industries and to be good examples for all the men and women they have the responsibility to lead." Exhibit A at 3.

The question, therefore, is whether this statement is reasonably related to allegations of channeling in the Foundry division. It is apparent from this statement that Mr. McClain's

complaints were not limited to his personal situation or to the practices in the Trailer division. Despite Lufkin's contention that it is "beyond cavil" that Mr. McClain's charge would not reasonably be expected to initiate an investigation of hiring and initial assignment in the Foundry,[5] see Lufkin's Motion at 4, plaintiffs contend that this result would have been very likely, particularly in light of the fact that, around this same time, the Office of Federal Contract Compliance Programs ("OFCCP"), with which the EEOC shares overlapping enforcement activities, see 64 Fed. Reg. 17664 (1999), had determined that Lufkin had channeled African American entry-level hires into the Foundry. See January 31, 1995 letter from L. Jimmerson to D. Smith, attached as Exhibit C to Plaintiffs' Reply to Lufkin's Response to Plaintiffs' Motion to Compel the Production of Documents, filed on June 2, 2003. Moreover, courts have held that allegations of discrimination with respect to promotion, demotion and compensation would reasonably lead to an investigation of a defendant's hiring practices. See Arey v. Providence Hosp., 55 F.R.D. 62, 67 (D.D.C. 1972); Hoston v. United States Gypsum Co., 67 F.R.D. 650, 656 (E.D. La. 1975).

Equally as, if not more, important to the instant motion is the fact that this determination – whether plaintiffs' initial assignment claim is within the scope of Mr. McClain's EEOC charge – cannot be decided as a matter of law. It certainly cannot be said that the facts and law with respect to this issue will reasonably support only one conclusion. Moreover, Lufkin has not demonstrated that this is the case. Lufkin cannot achieve summary judgment on this issue by simply stating that it is "beyond cavil" that Mr. McClain's EEOC charge would not reasonably be expected to initiate an investigation of hiring and initial assignment in the Foundry. Rather, it is incumbent upon Lufkin to demonstrate that there are no genuine issues with respect to this issue. This Lufkin has not done. Furthermore, the existence of Mr. McClain's January 29, 1995

[5] Lufkin's contention, again, refers not to the contentions contained in Mr. McClain's January 29, 1995 memorandum but to the charge form, later written by someone at the EEOC, that Mr. McClain signed under protest due to the lack of detail it contained. See August 12, 1995 letter from S. McClain to T. Jackson, attached as Burrell Declaration Exhibit B.

memorandum and the OFCCP investigation and finding of discrimination against Lufkin create a genuine issue of material fact that must be decided at trial.

2. Both Mr. McClain and Mr. Thomas Had Standing to Assert an Initial Assignment Claim.

In arguing that neither Mr. McClain nor Mr. Thomas could have asserted a timely initial assignment claim, Lufkin also appears to be arguing that neither named plaintiff had standing to assert such a claim on their own behalf, and their charges therefore could not support a lawsuit alleging that claim. For the reasons discussed above, there is a genuine dispute, to the extent this issue has not already been resolved by the Court's class certification order, with respect to whether the allegations in Mr. McClain's January 29, 1995 letter were broad enough to lead to an investigation of Lufkin's hiring and initial assignment practices. Further, at best, it is clear that Mr. McClain and Mr. Thomas had standing to assert an initial assignment claim on behalf of the class, notwithstanding their ability to raise that claim individually. At worst, the issue of Mr. McClain's and Mr. Thomas' standing is a disputed issue that must be determined at trial.

A charge of discrimination may be filed with the EEOC by any person claiming to be aggrieved. See 42 U.S.C. § 2000e-5(b). "The requirements of being an 'aggrieved' person for the purpose of filing a charge have been liberally construed." Lex K. Larson Employment Discrimination § 70.02[1] (2d ed. 2003); see also Anjelino v. New York Times Co., 200 F.3d 73, 91 (3d Cir. 2000). For purposes of Title VII, "Congress has itself determined that standing should be granted to anyone who satisfies the constitutional requirements" for standing. Gray, 545 F.2d at 176. Article III standing rules require that a plaintiff must show an injury in fact – that an injury to him or herself is likely to be redressed by a favorable decision. See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976). Injuries to intangible interests, as well as those to economic interests, fulfill the constitutional requirement. See Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

Courts have repeatedly found that an individual has standing to assert claims based on discrimination to another individual or group as long as that discrimination results in some injury in fact to the complaining individual. An individual has a right to work in an environment that is free from racism and may assert an injury to that right, even when the discrimination is directed towards someone else. See EEOC v. Mississippi College, 626 F.2d 477, 483 (5th Cir. 1980). Thus, a white female had standing to file a charge asserting discrimination against blacks on the basis of race in recruitment and hiring by charging a violation of her own personal right to work in an environment unaffected by racial discrimination. See id. Similarly, an African American employee had standing to pursue discriminatory hiring claims, despite having suffered no injury from the challenged hiring practices, because he claimed that the improper restriction on the number of African American hired rendered African Americans who were employed vulnerable to arbitrary discipline, discriminatory treatment in assignment of routes and equipment, and inadequate representation by the union, and that he felt isolated as a result of being one of the favored blacks who had slipped through the allegedly discriminatory. See Gray, 545 F.2d at 173-75; see also EEOC v. T.I.M.E.-D.C. Freight, Inc., 659 F.2d 690, 692 n.2 (5th Cir. 1981) (white plaintiffs were "persons aggrieved" where, in part, each could claim a violation of his personal right to work in an environment unaffected by racial discrimination); Stewart v. Hannon, 675 F.2d 846, 850 (7th Cir. 1982) (white female was "person aggrieved" by racially discriminatory assistant principal examination because the exclusion of minority persons from a work environment can lead to the loss of important benefits from interracial associations).

Standing based on discrimination that is directed at others is particularly applicable where the individual alleges that the employer operates under a general policy of discrimination.[6] See Shipes v. Trinity Industries, No. TY-80-462-CA, 1981 WL 65, * 7 (E.D. Tex. October 10, 1985)

[6] The term "general policy of discrimination" is used here to refer to both disparate impact and disparate treatment cases. See, e.g., Shipes, 1981 WL 65, at *1 [emphasis added] ("The complaint charges defendant with maintaining and enforcing employment policies and practices which have the effect of discriminating on the basis of race.").

(A class representative has standing[7] "to represent a class including those who had suffered injuries different from his own, if the same 'entirely subjective decision-making processes' infected both types of claimed injuries."); Jackson v. Fort Worth Nat'l Bank, No. 4-77-276-K, 1983 WL 30332 (N.D. Tex. June 8, 1983) (plaintiffs could not make claims in their own behalf that exceed their EEOC charges and related investigations but had standing to make claims on behalf of other class members that they themselves could not make because plaintiffs alleged a concrete injury from an alleged general policy of discrimination); Karan v. Nabisco, Inc., 78 F.R.D. 388, 398-99 (W.D. Pa. 1978) (plaintiffs had standing to represent employees allegedly suffering from other practices which plaintiffs had not timely experienced and in facilities where they had not worked because plaintiffs alleged that they had suffered from a single permeating corporate policy of sex discrimination).

As noted above, Mr. McClain alleged in his January 29, 1995 memorandum that the discrimination from which he had suffered was part of a "cultural problem" at Lufkin that needed to be addressed to prevent discriminatory practices in every division of Lufkin. Mr. McClain's charge can reasonably be read as suggesting that the discrimination he experienced was part of a general policy of discrimination at Lufkin. Further, Mr. McClain testified during the class certification hearing that he did in fact intend to complain, not just about what had happened to him, but about the discriminatory environment at Lufkin. See Excerpt of Transcript of February 18, 1999 Class Certification Hearing at 215:3-18, attached as Burrell Declaration Exhibit C. In other words, Mr. McClain was alleging a specific and concrete injury resulting form Lufkin's general policy of discrimination, a policy which also led to the channeling of African Americans to the Foundry. Under theses circumstances, it is clear that

[7] Article III standing should be distinguished from Federal Rule of Civil Procedure 23's requirements for class actions. Whether an individual has standing to bring class claims is a separate question from whether those claims satisfy Rule 23's requirements. In other words, the discussion herein is limited to the threshold question of standing and is not an invitation to Lufkin to once again argue that Mr. McClain's and Mr. Thomas' claims are not typical of or common to the rest of the class.

Mr. McClain and Mr. Buford have standing to file a charge of discrimination alleging discriminatory initial assignment.

Based on the foregoing, plaintiffs contend that there is no question that Mr. McClain and Mr. Thomas had standing to assert an initial assignment claim on behalf of the class, assuming, of course, that this issue was not already resolved by the Court's class certification order. Nonetheless, it seems clear that, at worst, there are genuine issues of material fact with respect to this issue, and that Lufkin is not required to judgment as a matter of law. Mr. McClain's January 29, 1995 memorandum and his testimony during the class certification hearing create a genuine issue as to whether he and Mr. Thomas have standing to assert an initial assignment claim on behalf of the class. As such, Lufkin is not entitled to summary judgment on the initial assignment claim.

IV. CONCLUSION

Lufkin bears the burden of establishing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. While Lufkin attempts to argue the evidence, it fails entirely to demonstrate that there is no genuine dispute. Therefore, plaintiffs respectfully request that Lufkin's partial motion for summary judgment be denied.

Dated: October 2, 2003

Respectfully Submitted,

By: Darci E. Burrell

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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 (COBB)

DECLARATION OF DARCI E. BURRELL IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Darci E. Burrell, declare and state as follows:

1. The statements set forth in this declaration are made of my own personal knowledge and if called as a witness, I could and would testify competently to the matters stated below.

2. I am an attorney and a member of the Bar of the state of California. I am an associate with the law firm of Goldstein, Demchak, Baller, Borgen & Dardarian in Oakland, California, co-counsel for the named plaintiffs and the class in this action. I have been admitted pro hac vice to the United States District Court for the Eastern District of Texas for the purpose of appearing in this action.

3. Attached hereto as Exhibit A is a true and correct copy of a January 29, 1995 memorandum written by named plaintiff Sylvester McClain.

4. Attached hereto as Exhibit B is a true and correct copy of an August 12, 1995 letter written from Sylvester McClain to Tommie Jackson of the Equal Employment Opportunity Commission ("EEOC") protesting the lack of detail in the Charge of Discrimination authored by the EEOC on Mr. McClain's behalf.

5. Attached hereto as Exhibit C is a true and correct copy of an excerpt from the transcript of the February 18, 1998 Class Certification Hearing in this matter.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 2 day of October, 2003 at Oakland, California.

Darci E. Burrell

Darci E. Burrell

DATE: JAN. 29, 1995

RE: JOB PERFORMANCE REVIEW

Lufkin Industries employment policy states that Lufkin is an equal opportunity and affirmative action employer, pledged to equal treatment to each employee in all aspects of employment, without regard to race, color, religion, sex, age,handicap, national orgin, status as a disabled veteran or as a veteran of the Vietnam era. This policy assures equal opportunity in recruitment, advertising, or solicitation for employment; hiring, placement, upgrading, transfer and promotion; selection for and types of training; rates of pay, benefits and other forms of compensation. Since Arden Jinkins became my supervisor, I as a black manager have been the recipient of the most ruthless and vicious attacks upon my integrity and professionalism that I have ever suffered in my life. I have been subjected to a bias double standard of perfection requirements under almost impossible workload conditions and racial sterotyping by implications of inferior ability and achievements. Mr. Jinkins as my boss in 1988 prior to the Chief Inspector job posting, after I had filled in and performed the job satisfactory for several months tried to deny me equal opportunity when the job was posted and I applied. It took the intervention of Mr Frank Stevensen, the President and CEO to prevent a unjust act based upon prejudice against me as a black man designed to deny me equal opportunity through racial discrimination. In Jan. 1995, Mr. Jinkins took the unprecedented action of trying to have me demoted or fired because of unsatisfactory work performance by two of the nine inspectors that I supervise, of which I had no knowlege of and when I did I took appropiate corrective action to prevent it from happening again. I have had my honesty, trustworthiness, ability and achievements questioned and ridiculed beyond all reason before all that has cause me to suffer pain and anguish of which I would like no other human being to have to go through. It has been only my faith and trust in God that has sustained and carried me through this painful and agonizing ordeal of suffering I have been made to go through.

Since I have been in this position I have continually asked for more training and equipment(computer/printer) for recording of statistical quality data, a valuable tool that would help me and others in solving problems. All around me I see others getting all kind of new computers, printers and other equipment and training without cost being be a factor yet all I get are excuses, double standards, bias evaluations, racial stereotyping and lower pay, all of which contribute to the denial of equal opportunity. The used computer and printer I recieved several years ago was obsolete then and never had the processing or printing capablity needed. The recent denial of access to the

front office by use of key, where I need the use of the copy machines that have the sorting capability for multipile copies of reports that I distribute to personnel in the front office and the shop as well was for bias intentions, especially the note left for the gate guards by our safety coordinator stating that if Sylvester McClain came out during the p.m. or weekend hours that the front office doors were locked, that he was not to be given access to the front office without calling Earl Dover,the Production Superintendent to get his permission. Mr. Dover knew himself that was wrong and stated to me that he expressed that upper management must decide if I the Quality manager was trustworthy, which was absolutely ridiculous and a bias and sterotype attack upon my character and integrity as a man of god(minister), as a responsible black man who has worked for this company for 22 years and a leader in the community at large who for the last twelve years has stood and even risked his life for right. All the other personnel in the front office, managers, buyers and secretaries had keys and access to the offices, as well as the van production foreman of which made the implication that I was not trustworthy to be clearly based upon racial and sterotype reasons, all because of the prejudicial feeling and views toward me as a black man. Just prior to all this taking place Mr. Jinkins bought to my attention a memo dated back in 1991 that expressed concern about thefts in the front office which supposedly was coincidently was left in his incoming office in-mail box during this time and of which I questioned him, what did this have to with the dificulty of getting him to get me a key for access to the front office for which he did not have an answer. The increased workload assignment with a double standard of perfection imposed along with spot lighting any potential fault or error that is not required of any other supervisor or manger represented a deliberate attempt to create impossible conditions that would prevent me from being able to get the job done correctly. When I responded to this challenge by working 12 to 15 hour days and 6 to 7 days a week, to imply that the long hours of work represented a lack oforganization was simply an attempt at distortion and a refusal to give me credit for the dedication I have for getting the job done, seeing that I do not recieve over time pay. Last, but not least , to accuse me having a defensive attitude when I am just responding rightfully so to gross mistreatment for racial reasons is just an attempt to try to cover up the discriminatory treatment that I have been recieving for some time.

Therefore after much mind and soul searching I have decided that enough is enough and that more effort must be made to correct these unjust and unfair discriminatory acts against me by Mr. Jinkins, which includes the unjust and unfair disciplinary write up without my knowledge and without justification and with total disregard for company policy and due process which I entitled

to by the law and constitution. I will acknowledge that my new supervisor, as of March 1, Doug Williams seems to be totally opposite of what Mr. Jinkins stands for and I look forward to as a quality and warranty team working together for the good of all. Yet I must say that the damage to me personally and professionally has been done and the suffering of having to go through this painful ordeal continues even though Mr. Jinkins is going to retire March 1, especially since there were other participants who are guilty of helping commit these and other discriminatory acts against me as a black manager. It is a cultural problem that must be addressed to prevent discriminatory practices in Lufkin Trailer Division or any other part of Lufkin Industries, especially by those in supervision who are entrusted as leaders carry out the policies of Lufkin Industries and to be good examples for all the men and women they have the resposibility to lead. In conclusion I am requesting a full investigation of these discriminatory acts committed against me that have violated my civil rights and denied me equal opportunity and due process guaranteed by the law and constitution.

Respectfully,

Sylvester McClain

Sylvester McClain
Quality Manager

CC: DOUG SMITH / PRESIDENT & CEO
PAUL PEREZ / VICE PESIDENT-HUMAN RESOURCES
JIM BARBER / VICE PRESIDENT-TRAILER DIVISION

Date : August 12, 199

) : Equal Employment Opportunity Commission
Jonnie . Jackson / Investigative Assistant

Re : Employment Discrimination

Dear Mr. Jackson :

This is to acknowledge late receipt of the Charge of Discrimination papers needing my signature of which I am now giving as prompt attention as time would allow as well as the extreme stressful conditions under which I am working. This is also to inform you that there is much more depth of facts and information to be disclosed and investigated concerning the denial of equal opportunity, pay and treatment to me by Lufkin Trailer Division / Lufkin Industries Incorporated.

The discrimination complaint that I submitted to you Jan. 8, 1995 consisted of discriminatory actions of unequal pay, opportunity and treatment through vicious slanderous attacks upon my ability and integrityhased upon untruths with the deliberate intent to sterotype me as a black man. The Charge of Discrimination papers that I signed do address some of issues of employment discrimination practices by the managenent of Lufkin Trailer Division that I have suffered from as well as Coporate management of Lufkin Industries through their condoning and support of these discriminatory actions committed against me.

I am asking for a thorough investigation into these immoral, unjust and illegal conditions of employment discrimination that I have suffer- rough as well as my family, which has caused irreparable harm to me [redacted] my family. Although many might would have give up because of the anguish and mental fatigue of dealing with the unfair and unjust discriminatory practices and racial sterotyping in the work place daily, I refuse to even entertain the thought of giving up and I am determined to stand up for justice and equality and for all that are oppressed also.

If you have any questions or I can be of any further help please let me know.

Respectfully,
Sylvester McClain
Sylvester McClain

EXHIBIT B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

SYLVESTER MCCLAIN, ET AL] Docket No. 9:97CV63

v.] 10 AM, February 18, 1998

LUFKIN INDUSTRIES, INC.] Beaumont, Texas

VOLUME 1 OF 1, PAGES 1 THROUGH 263

TABLE OF CONTENTS - SEE PAGE 262

TRANSCRIPT OF HEARING ON CLASS CERTIFICATION

BEFORE THE HONORABLE THAD HEARTFIELD

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Timothy Borne Garrigan
Attorney at Law
Stuckey & Garrigan
Post Office Box 631902
Nacogdoches, Texas 75963

For the Defendant: John H. Smither
Christopher V. Bacon
Attorneys at Law
Vinson & Elkins
1001 Fannin, Suite 2300
Houston, Texas 77002

and women that have the responsibility to lead"? 04:54
A. Yes. 04:54
Q. When you made that complaint, were you 04:54
addressing just the discrimination that occurred 04:54
to you? 04:54
A. No. I was addressing the discrimination that I 04:54
had been standing up against all the way back to the 04:54
early '80s. It is widespread, it has consistently 04:54
happened, it's still happening, and this is the only 04:54
remedy. I'd like to address a grievance filed with 04:55
the union. I'm in the union. It's a farce. It's a 04:55
farce because if the stewards are white and if they 04:55
do not want to push the grievance, it's not going 04:55
anywhere. The only time that I know that a grievance 04:55
went anywhere without a steward signing off, I wrote 04:55
the grievance and filed it myself because I read the 04:55
contract book and I knew that I had the right to file 04:55
that grievance. 04:55
Q. Okay. So the union is not real cooperative on 04:55
discrimination issues? 04:55
A. No. 04:55
Q. After you sent that letter to the EEOC, did they 04:55
eventually send you a charge-of-discrimination form? 04:55
A. Yes. 04:55
Q. A two-paragraph form? 04:55

PROOF OF SERVICE

ORIGINAL

Case: Sylvester McClain, et al. v. Lufkin Industries, Inc.
Civil Action No. 9:97CV063

STATE OF CALIFORNIA)
) SS
COUNTY OF ALAMEDA)

I have an office in the county aforesaid. I am over the age of eighteen years and not a party to the within entitled action. My business address is 300 Lakeside Drive, Suite 1000, Oakland, California 94612.

I declare that on the date hereof I served a copy of

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

DECLARATION OF DARCI E. BURRELL IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

by causing a true copy thereof to be transmitted via facsimile and mailed by depositing the same in a sealed envelope in the U.S. mail with postage prepaid addressed to:

Douglas Hamel
Christopher V. Bacon
Michelle Mahony
Vinson & Elkins
2806 First City Tower
1001 Fannin Street
Houston, TX 77002-6760

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at Oakland, California on October 2, 2003.

LISA DUNGAN
Printed Name

Signature