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

Sylvester McClain, et al.	§	Civil Action No. 9:97 CV 063 (COBB)
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
Lufkin Industries, Inc.	§	
	§	
Defendant.	§	

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE OF IAM LOCAL 1999, GMP LOCAL 429 AND BOILERMAKERS LOCAL 587

I. INTRODUCTION

On October 31, 2003 – six and one half years after this case was filed, six months after being notified by plaintiffs' counsel of the Court's suggestion that the Unions might consider intervention, and a month before trial is to scheduled to begin – the International Association of Machinists & Aerospace Workers, Local Lodge No. 1999, AFL-CIO/CLC, ("Machinists") Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local No. 429, AFL-CIO/ CLC, ("GMP") and International Association of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local No. 587 AFL-CIO/CLC ("Boilermakers") (collectively the "Unions") filed a motion to intervene as parties defendant pursuant to Federal Rule of Civil Procedure 24(a)(2) (hereafter referred to as "Motion to Intervene"). The Unions contend their motion was prompted by the fact that they "recently became aware that the Court is considering granting injunctive and equitable remedies to plaintiffs, if liability is established, that would have a substantial adverse impact on the seniority system." Motion to Intervene at 2. The Unions became aware of the Court's comments in April 2003, however, the Unions were not prompted into action until a September 22, 2003 telephone call between counsel for one of the Unions and counsel for Lufkin. See p.7, *infra*. Moreover, the Unions seek to intervene "to ensure proper application of the seniority provisions in their collective bargaining agreement with Lufkin, and to address the propriety of retroactive or constructive seniority as a remedy." Id. However,

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these matters become relevant only if there is a liability finding against Lufkin. Therefore, clarification of the Court's bifurcation ruling to indicate that individual remedial matters will not be taken up in the liability trial will eliminate any argument that the Unions have a need to participate in the trial.

Plaintiffs oppose the Unions' eleventh hour motion. As will be shown below, the Unions have not and cannot demonstrate that they meet Rule 24(a)(2) requirements for intervention of right. Accordingly, the Court should deny the Unions' motion.

II. ARGUMENT

A. The Unions Do Not Meet the Requirements of Rule 24(a)(2)

To intervene of right under Rule 24(a) an applicant must meet the following requirements: (1) the application must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and (4) the applicant's interest must be inadequately represented by existing parties to the litigation.[1] See Edwards v. City of Houston, 78 F.3d 983, 999 (5th Cir. 1996)(en banc)(citations omitted). Failure to satisfy any one requirement precludes intervention of right. See id.; citing Sierra Club v. Espy, 18 F.3d 1202, 1205 (5th Cir. 1994); Kneeland v. National Collegiate Athletic Ass'n., 806 F.2d 1285, 1287 (5th Cir.) cert. denied, 484 U.S. 817 (1987) ("[i]f a party seeking to intervene fails to meet any one of those requirements, it cannot intervene as a matter of right."). The inquiry under Rule 24(a)(2) "focuses on the particular facts and circumstances surrounding each application." Edwards v. City of Houston, 78 F.3d at 999 (citations omitted).[2]

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[1] Rule 24(a)(2) provides that "[u]pon timely application anyone shall be permitted to intervene in an action: ... when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[2] As the Unions acknowledge, the Civil Right Act of 1991 did not alter the standards for intervention under Rule 24 of the Federal Rules of Civil Procedure." Edwards v. City of Houston, 78 F.3d at 997, citing H.R. Rep. part I at 59, reprinted in 1991 U.S.C.C.A.N. at 597. Plaintiffs address the Unions' §2000e-2(n) argument in §II.B., below.

1. The Unions' Motion is Untimely.

"Even where a party is entitled to intervene as a matter of right, Rule 24 requires that the application for intervention be timely." Wilson v. Southwest Airlines, 98 F.R.D. 725, 727 (N.D. Tex. 1983). The court considers four factors in determining whether a motion to intervene is timely: (1) the length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it sought to intervene; (2) the prejudice existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case; (3) the prejudice the would-be intervenor may suffer if intervention is denied; and (4) whether unusual circumstances militate for or against a determination that the application is timely. There are no absolute measures of timeliness; it is determined from all the circumstances. See Edwards v. City of Houston, 78 F.3d at 1000, citing Stallworth v. Monsanto, 558 F. 2d 257, 264-66 (5th Cir. 1977). Questions of timeliness are reviewed for abuse of discretion on appeal. See Stallworth v. Monsanto, 558 F. 2d at 263, citing NAACP v. New York, 413 U.S. 345, 367 (1973).[3] The Unions' motion is untimely when assessed against each of these factors.

a. The Unions Have Long Had Actual Knowledge Regarding Their Interest in the Case.

The Unions contend they "recently became aware that the Court is considering granting injunctive and equitable remedies to plaintiffs, if liability is established, that would have a substantial adverse impact on the seniority system." Motion to Intervene at 2. In so doing, the Unions refer to the Court's March 31, 2003 letter posing certain questions to the parties and plaintiffs' April 11, 2003 response to the Court's questions. See id. at 3-4. The Unions further contend they "had a reasonable expectation that the parties would negotiate a resolution of the dispute ... until September 22, 2003, when defense counsel informed a Union attorney that mediation had failed." Id. As is demonstrated below, the Unions are being less than candid with

[3] However, where the district court makes no finding regarding timeliness, the appellate court reviews this factor de novo. See Edwards v. City of Houston, 78 F.3d at 1000.

this Court.

To begin, it cannot be disputed that the Unions have been aware of this case and the issues it raises almost from the inception. While the Unions contend that they did not have "formal notice" of the class certification proceedings and therefore, "had no meaningful opportunity to seek intervention to be heard on any matters relating to the CBA in that proceeding," Motion to Intervene at 11, they fail to note that plaintiffs' counsel Timothy Garrigan, has communicated with the Unions and their counsel about the existence and subject matter of the lawsuit since very early in the litigation. See Declaration of Timothy B. Garrigan ("Garrigan Decl."), at ¶ 3. Mr. Garrigan also has provided the Unions non-privileged information about the case from time to time upon their request. See id. The Unions also fail to mention that after the Court issued its class certification ruling, the GMP sought to appear in the case as amicus curiae, "with regard to issues relevant to preservation of the collectively bargained for seniority provision." See GMP's Motion to Appear as Amicus Curiae, filed on February 11, 2000, at 2. The motion was denied by the Court. Furthermore, the Unions acknowledge – as they must – that they participated in two sessions of the parties' mediation with Reagan Burch. See Motion to Intervene at 13 n. 2. The Unions, however, fail to mention that they were invited to a third mediation session, and declined the invitation. See Garrigan Decl. at ¶ 5.

Focusing more particularly on the specific events which the Unions describe as the basis for their motion further impeaches the Unions' claim that they "recently" became aware of their interest in this matter. On March 27, 2003, the Court held a Status Conference in this matter, at which the Court indicated it may consider remedies that affect the departmental seniority provision of the CBA. See Garrigan Decl. at ¶ 6. The Court also questioned whether it had the authority to order such relief and stated it was going to pose this and other questions in writing to the parties. See id. The Court suggested the parties notify the Unions that the Court was considering the possibility of portable seniority as a remedy "so they could intervene if they wish." See id. Thereafter, on March 31, the Court propounded written questions on the parties. See Letter dated March 31, 2003 from Hon. Howell Cobb to Counsel for Parties. Among the

questions was whether "[i]f plaintiffs establish liability,... [the Court could] reform the [non-transferability] aspect" of the CBA to provide for some type of portable seniority from department to department. See id.

On April 4, 2003, Mr. Garrigan sent copies of the transcript of the March 27 Status Conference and the Court's March 31 letter to Rod Tanner, counsel for the Machinists. See Letter dated Apr. 4, 2004, from T. Garrigan to R. Tanner, attached as Exhibit 1 to Garrigan Decl.[4] In his cover letter, Mr. Garrigan advised Mr. Tanner of the Court's comments at the Status Conference regarding possible portable seniority relief and the Unions' possible intervention. See id. Mr. Garrigan also advised Mr. Tanner that the parties had submitted a proposed Docket Control Order that set May 1, 2003, as the date by which additional parties must be added to the litigation, and that "plaintiffs do not intend to join the union as defendants (or in any other capacity) in the case." See id. Mr. Garrigan further advised Mr. Tanner that the plaintiffs had concluded "the Court would not have the authority to order the Company or unions to implement companywide rather than departmental seniority and this [was] not a remedy plaintiffs are seeking," and plaintiffs intended to so advise the Court in their response to the Court's March 30 letter. See id. Mr. Garrigan also advised Mr. Tanner that the proposed Docket Control Order gave the parties until May 15, 2003, to complete the mediation or declare it unsuccessful. See id. Finally, Mr. Garrigan asked Mr. Tanner to call him after he reviewed the letter with counsel for the other two Unions and suggested that the three of them, and plaintiffs' co-counsel, Teresa Demchak, and Mr. Garrigan schedule a conference call to discuss these matters and answer any questions the unions might have. See id. Mr. Tanner did not respond to the letter. See id.

Subsequently, on April 24, 2003, Mr. Garrigan sent Mr. Tanner a copy of plaintiffs' April 11, 2003 letter to the Court, in which plaintiffs' responded to the Court's questions. See Letter dated Apr. 24, 2003, from T. Garrigan to R. Tanner, attached as Exhibit 2 to Garrigan Decl. In

[4] During the mediation, the attorneys for the three Unions had designated Mr. Tanner as liaison for any inquiries from the parties to the Unions. Garrigan Decl. at ¶ 5.

his transmittal letter, Mr. Garrigan again asked Mr. Tanner to call him to discuss "these matters." See id. Mr. Tanner contacted Mr. Garrigan approximately two weeks later asking only that Mr. Garrigan provide Mr. Tanner a copy of plaintiffs' April 29, 2003 letter to the Court.[5] See id. Mr. Garrigan did so, and again asked Mr. Tanner to call him when the Unions "want to talk" about these matters. See Letter dated May 7, 2003, from T. Garrigan to R. Tanner, attached as Exhibit 3 to Garrigan Decl.

The next time plaintiffs' counsel heard from the Unions was Friday, October 24, 2003, when Mr. Tanner faxed a letter to plaintiffs' and defendant's counsel advising them that "in the near future the Unions will file a motion to intervene as right as parties defendant pursuant to Fed. R. Civ. P. (24)(a)(2)," and asking for the parties' respective position on the motion. See Letter dated Oct. 24, 2003, from R. Tanner to Plaintiffs' and Defendant's Counsel, attached as Exhibit 4 to Garrigan Decl.

Upon receiving the letter, Mr. Garrigan telephoned Mr. Tanner and left a voicemail message asking that he return the call. Garrigan Decl. at ¶ 14. Mr. Tanner returned Mr. Garrigan's call on Monday, October 27, and faxed him two pages from the Unions' proposed motion which Mr. Tanner contended required the Unions to intervene now in order to protect their right to subsequently challenge any Order of the Court that affected the CBA's seniority provision.[6] See Garrigan Decl. at ¶ 15. Mr. Tanner suggested that he, Mimi Satter, counsel for the GMP, Ms. Demchak and Mr. Garrigan confer by telephone, which they did later that same day. See Garrigan Decl. at ¶ 15.

During that conference call, Mr. Tanner claimed that the Unions "had no idea" what had been happening in the case until September 22, when he called defendant, Lufkin Industries, Inc.'s ("Lufkin) counsel, Douglas Hamel, "on another matter," and Mr. Hamel informed him that the parties' mediation had not resulted in a settlement of the case and the case was proceeding to trial. See Garrigan Decl. at ¶ 16. Mr. Tanner made no mention of Mr. Garrigan's April 4, April

[5] In the April 29 letter, plaintiffs replied to Lufkin's responses to the Court's March 31 questions.

[6] Mr. Tanner faxed pages 9 and 10 of the Unions' motion. These pages relate to the Unions' 42 U.S.C. §2000e-2(n) argument. See §II.B, above.

29 or May 7, 2003 letters to him during the call. See id.

As the correspondence described above and attached to Mr. Garrigan's Declaration unequivocally reveals, the Unions knew as early as April 4, 2003, that the Court had re-opened the case, and of the Court's comments regarding possible seniority relief and intervention of the Unions made at the March 27 Status Conference. Furthermore, the Unions knew as early as April 4, 2003, that the deadline for the mediation to succeed or fail was May 15. In addition, the Unions knew as early as April 4, 2003, of plaintiffs' position on the Court's inquiry regarding portable seniority, and knew by April 29, 2003, of plaintiffs' specific response to the Court's question on this issue, including plaintiffs' position on the possible provision of retroactive or constructive seniority to individual class members. By their own admission, the Unions did nothing for six months – they made no effort to determine the outcome of the mediation or the status of the litigation, which they easily could have done by checking the Court's electronic docket or calling either of the parties.[7] Instead, the Unions ignored the information plaintiffs provided to them as well as plaintiffs' counsel's numerous attempts to contact the Unions' liaison counsel. Indeed, according to the Unions, the only thing that prompted them to act was a phone call Mr. Tanner made to Lufkin's counsel "on another matter." Under these specific facts and circumstances, the Unions' six month delay in filing their motion cannot be characterized as either "brief" or "reasonable."[8] See Motion to Intervene at 12.

b. Plaintiffs Would be Prejudiced by the Unions' Intervention at this Stage of the Proceedings.

"The prejudice to the original parties to the litigation that is relevant to the question of timeliness is only that prejudice which would result from the would-be intervenor's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action." Stallworth v. Monsanto, 558 F. 2d at 265. The Unions' long, inexplicable and unjustifiable delay in bringing their motion manifestly prejudices plaintiffs. During the past

[7] Plaintiffs can only confirm that the Unions did not contact plaintiffs' counsel between early May and late October. See Garrigan Decl. at ¶ 13.

[8] The Unions' long and intimate knowledge of the issues involved in the case also must factor into the unreasonableness of their delay in bringing their motion.

seven months, while the Unions remained silent, the parties and the Court have been engaged in hard fought, contentious discovery and trial preparations, including submission of a Joint Final Pre-Trial Order, resolution of numerous motions that further define the issues for trial and submission of proposed findings of fact and conclusions of law. Had the Unions brought their motion when they claim they first learned of their interest in the case, any discovery to be taken against the Unions – who seek to enter the case as defendants and "to participate ... with full rights as parties at trial and any related proceedings," Motion to Intervene at 2 – could have been conducted during that time.[9] While the Unions claim they "do not seek to conduct any discovery or take any other action that could delay trial," Motion to Intervene at 12, the Unions cannot seriously believe that plaintiffs have no need or interest in obtaining, or right to obtain, discovery from the putative defendant Unions, particularly when the Unions "request a total of ten hours at the liability stage of trial to present evidence and conduct cross-examination of witnesses ...." Id. at 2.[10] Moreover, the harm and prejudice the Unions' delay causes plaintiffs is further compounded by the unmistakable evidence of Lufkin's assistance to the Unions in bringing their motion, see below at § II.A.4, and the fact that, on the issue of Lufkin's liability to the class, the Unions' and Lufkin's interests are clearly and inextricably aligned, see id.[11] The Unions' motion

[9] As of April 29, 2003, the date Mr. Garrigan sent a copy of plaintiffs' April 11 letter responding to the Court's March 31 questions, triggering the Unions' awareness of their "interest" in the case, the parties had just begun discovery following the Court's March 19, 2003 trial setting Order and had not yet taken any depositions.

[10] Compare Edwards v. City of Houston, 78 F.3d at 1002, where the court found no prejudice in the intervenor's delay in bringing their motion where "from the time the proposed decree was submitted to the district court to the conclusion of the fairness hearing [during which time the intervenors filed their motion] the parties to this litigation did nothing except anticipate and prepare to address the possible objections that would be made to the decree."

[11] Because the Unions did not participate in pre-trial discovery and other trial preparation activities, plaintiffs have little idea of what evidence the Unions will introduce and positions the Unions will take in examining witnesses at trial, if they are permitted to intervene. Conversely, since the Unions believe their interests are closely aligned with those of Lufkin, and are evidently communicating with Lufkin's counsel, it is likely that the Unions intend to provide (if they have not already provided) Lufkin with information about the Unions' trial positions and evidence. To permit the Unions to intervene without allowing plaintiffs discovery would, therefore, invite trial by ambush. To permit the Unions to intervene while allowing plaintiffs discovery would be not much better, as it would at best interfere with and distract plaintiffs from their on-going trial preparations, and at worst require revision of their proposed pre-trial findings and conclusions, witness list and trial exhibits, and could easily result in a postponement of trial.

is prejudicially untimely.

c. Denial of the Unions' Motion at this Time Will Not Prejudice The Unions.

The third factor regarding timeliness "focuses on the prejudice caused the applicants if their petitions are denied." Edwards v. City of Houston, 78 F.3d at 1002. Denial of the Unions' motion will not prejudice them. The Unions contend their interest is in "preserving a collectively bargained seniority system." Motion to Intervene at 2. As a threshold matter, plaintiffs are not challenging the "collective bargained system," and, in any event, as the Unions undeniably are aware, plaintiffs have expressly waived "reformation of the CBA's departmental seniority provision as a remedy in this matter." See Letter dated Apr. 11, 2003, from T. Demchak, D. Burrell and T. Garrigan to Hon. Howell Cobb, attached as Exhibit 4 to Unions' Appendix to Motion to Intervene ("Unions' App.") at 3. "Plaintiffs' waiver eliminate[s] the possibility of their obtaining those remedies in this action." Donnelly v. Glickman, 159 F.2d 405, 410 (9th Cir. 1998).

The Unions also assert an interest in "address[ing] the propriety of retroactive or constructive seniority as a remedy." Motion to Intervene at 2.[12] However, the primary general factual issue to be decided initially is whether Lufkin's employment practices with regard to initial job assignments, training, promotion and compensation have had a disparate impact on the

[12] In their motion, the Unions mischaracterize plaintiffs' position, insisting that "plaintiffs are seeking an award of retroactive or constructive seniority for numerous individual class members for promotion purposes." See Motion to Intervene at 4, 14. First of all, at this stage of the proceedings, plaintiffs are not "seeking" any relief on behalf of individual class members, since such relief depends on a finding of liability against Lufkin. Moreover, the subject of "an award of retroactive or constructive seniority for individual class members," came up in a hypothetical discussion regarding the Court's authority to award seniority relief should the Court find Lufkin liable. In addition, as plaintiffs discussed in their April 11, 2003 letter to the Court and as they explained to the Unions' counsel in the October 27 conference call, the possible circumstances in which an award of retroactive or constructive seniority to individual class members would be appropriate or warranted in this case would be determined at remedial proceedings in which the Union could, if appropriate, seek to participate. Plaintiffs believe that such seniority relief would be limited and not necessary or appropriate for a class member seeking relief for discriminatory promotions only. See Garrigan Decl. at ¶ 17; Unions' App., Exh. 4 at 4. Nevertheless, the Unions consistently make reference to such relief "for promotion purposes" in their motion. Finally, the entire issue of retroactive or constructive seniority relief is premature in the absence of a liability finding and proceedings to determine the manner and method for awarding individual relief to class members. See id. at 7-10.

class. Until there is a liability finding against Lufkin, there is no legal predicate for the Court to award any relief, including to individual class members. The Court has indicated that it intends to have separate remedial proceedings, perhaps using a Special Master.[13]

In this respect therefore, the Unions' motion is premature because they have no protectable interest in the litigation in the absence of a liability finding and proceedings to determine the manner and method for awarding individual relief to class members, see below at §II.A.3, and the motion should be denied without prejudice to the Unions renewing the motion in the remedy proceedings should the Court find Lufkin liable for unlawful discrimination against the class and determine that remedial proceedings on each class member's individual entitlement to injunctive relief, including potential constructive or retroactive seniority rights, are appropriate and necessary.[14] See Donnelly v. Glickman, 159 F.2d at, 410 citing Churchill County v. Babbitt, 1072, 1083 (9th Cir. 1998) ("[T]he district court did not err by limiting intervention only to the remedial phase" when the applicant had no interest in the liability phase of the action.); Forest Conservation Council v. United States Forest Serv., 150 F.3d 1489, 1499 & n. 11 (9th Cir.1995) (The applicants "are entitled to intervene as of right under Fed. R. Civ. P. 24(a)(2) in the portion of the proceedings addressing the injunctive relief sought by plaintiffs ... [even though they] cannot claim any interest that relates to the issue of the [defendant's] liability."). Accordingly, under the facts and circumstances of this case, the Unions cannot demonstrate that denial of their Motion to Intervene will be prejudicial to them.

d. Unusual Circumstances Militate Against A Determination that the Unions' Motion is Timely And No Unusual Circumstances Militate in Favor of Such a Determination.

As demonstrated at length above in §II.A.1.a., the Unions' inexplicable and unwarranted decision to wait until the eve of trial, after discovery and trial preparations have nearly been completed, militates against a determination that their motion is timely.

[13] Additionally, plaintiffs' Motion for Clarification and/or Reconsideration of the Court's July 11, 2003 Ruling on Bifurcation currently is pending before the Court.

[14] As an alternative, the Court could determine only to award formulaic back pay relief to class members, which could be done without individualized "mini-trials" on each class member's specific claims. See Unions' App., Exh. 4 at 7-10.

Consistently, no unusual circumstances militate in favor of such a determination. See Stallworth v. Monsanto, 558 F. 2d at 266, where the court noted, as an example, that "if a would-be intervenor who had failed to apply for intervention promptly after he became aware of his interest in the case could advance a convincing justification for his tardiness, such as that for reasons other than lack of knowledge he was unable to intervene sooner, this would militate in favor of a finding that his petition was timely." In stark comparison, the Unions offer "no convincing justification for [their] tardiness." Instead, the Unions claim that because "[t]he parties were involved in extensive mediation proceedings for approximately three years before that settlement process obviously failed[,] [t]he Unions had a reasonable expectation that the parties would negotiate a resolution of the dispute ... until September 22, 2003, when defense counsel informed a Union attorney that mediation had failed." Motion to Intervene at 13. It is disingenuous for the Unions to make this assertion in light of plaintiffs' counsel's April and May letters to Mr. Tanner, and even if the Unions truly had that "expectation," their reliance on it without making any effort to find out what really happened, does not militate in favor of a determination that the Unions' motion is timely. For all of the reasons discussed in §§II.A.1 a-d, the Court should deny the Unions' motion on timeliness grounds.

2. The Unions Have No Legally Protected Right in Proceedings to Determine Whether Lufkin Industries' Subjective Employment Practices Have an Unlawful Disparate Impact on African American Employees Where Plaintiffs are Not Challenging the "Collectively Bargained System" Or Claiming that the Seniority System Has a Disparate Impact on the Class.

"To demonstrate an interest relating to the property or subject matter of the litigation sufficient to support intervention of right, the applicant must have a 'direct, substantial, legally protectable interest in the proceedings.'" Edwards v. City of Houston, 78 F.3d at 1004, quoting New Orleans Pub. Serv. Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir. 1984) (en banc). Accordingly, it is first necessary to identify what is the property or subject matter of the proceedings. See Taylor Communication Group, Inc. v. Southwestern Bell Telephone Company, 172 F.3d 385, 388 (5th Cir.), reh. den. (1999). In this case the threshold subject to be determined is whether Lufkin's employment practices have a disparate impact on African American employees. The Unions claim no interest in this issue. Indeed, the only possible protectable

interest the Unions have articulated is whether the Court "might" award constructive or retroactive seniority relief to individual class members upon a finding of liability against Lufkin and in the remedial phase of the litigation. Thus, in essence, the Unions seek to intervene in litigation that they necessarily must concede will have no impact on the departmental seniority system, and only "may" impact seniority rights of any of their individual members. The Unions' interest in the proceedings is speculative at best, and in any event, premature and does not support their intervention in the case at this time.

3. The Unions' Ability to Protect Their Interest Will Not Be Impaired by Denial of their Intervention at this Time.

Inasmuch as the Unions' interest, if any, in this case would arise only if the Court finds Lufkin liable and if the Court determines during remedial proceedings to award retroactive or constructive seniority to individual class members who might be eligible for such relief, denial of the Unions' motion at this time will not impair their ability to protect their interest at the appropriate time.[15]

4. The Unions' Interest is Adequately Protected by Lufkin Industries.

The fourth requirement for intervention of right is that the "would-be intervenor's interest not be adequately represented by existing parties." Edwards v. City of Houston, 78 F.3d at 1005. The burden of establishing inadequate representation is on the applicant for intervention. Id., citing Hopwood v. Texas, 21 F.3d 603, 605 (5th Cir. 1994); Sierra Club v. Espy, 18 F.3d at 1205.

A "presumption of adequate representation arises when the would-be intervenor has the same ultimate objective as a party to the lawsuit." Edwards v. City of Houston, 78 F.3d at 1005. In such a case, "the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption." Id. (citations omitted). The Unions claim that their "bargaining relationship" with Lufkin "is adversarial, and their interests and objectives are often divergent." Motion to Intervene at 15 (emphasis added). However, this is beside the point in determining whether the Unions' interests are being

[15] Plaintiffs' counsel have advised the Unions that plaintiffs would not oppose the Unions' intervention in such remedial proceedings. Garrigan Decl. ¶ at 17.

inadequately represented by Lufkin in these proceedings, and, in fact, the Unions cannot make such a showing.

Lufkin vehemently denies any liability for unlawful discrimination against its African American employees. See Joint Pre-Trial Order, filed Sept. 30, 2003 at 5 ¶ 2. Such liability, of course, is the predicate for the award of any kind of relief to the class, including retroactive or constructive seniority to individual class members, something both Lufkin and the Unions have an interest in preventing. Lufkin also maintains that it makes promotions of hourly employees based on seniority and consistent with the terms of CBA. See Defendant's Pre-Trial Proposed Findings of Fact and Conclusions of Law ("Lufkin Proposed Findings") at 10-11, ¶¶ 92-108. This is the same interest the Unions seek to represent in this case. Indeed, at this stage of the proceedings, the Unions' and Lufkin's interests are closely aligned. In fact, one need only look at the striking similarities between the "salient facts" outlined in the Unions' motion and Lufkin's proposed findings to ascertain how closely aligned their interests are. Specifically, ¶¶ 8-12, 14-19, 20-22, 24-26 in the Unions' motion are verbatim or nearly verbatim of Lufkin's proposed findings 1-6, 8, 11, 13-15, 18, 93-102, 104-105, 137-138.[16]

In sum, the Unions have presented no convincing explanation why their interests are not,

[16] Additionally, the Unions' motion and Lufkin's proposed findings contain nearly identical mischaracterizations of Plaintiffs' Response to Lufkin's Second Interrogatories, No. 10, which asked "Do Plaintiffs contend that Lufkin's black hourly employees are not adequately represented by the unions representing such employees in employment decisions? If so, state the facts supporting such contention." After stating their objections to the Interrogatory, Plaintiffs responded, "Lufkin, not the unions, is responsible for making employment decisions other than those prescribed by the Collective Bargaining Agreement (excluding, of course, those provisions of the Agreement which afford Lufkin discretion, such as the ability clause). To the extent Lufkin is asking whether plaintiffs contend that African American hourly employees are not adequately represented by the unions that represent such employees in employment disputes, plaintiffs do not contend that, as a class, African Americans are not adequately represented by the unions in this regard. Whether any individual class member has not been adequately represented by the unions in an employment dispute is beyond the reach of this lawsuit." Lufkin, in its proposed pre-trial findings, characterized plaintiffs' position as, "Plaintiffs concede that, as a class, African American hourly employees are adequately represented by the unions that represent such employees in employment disputes and all other issues covered by the Union Contract." Lufkin's Proposed Finding No. 17. In conspicuously similar language, the Unions state, "Plaintiffs have conceded ... that the Unions have adequately represented African American unit employees, as a class, in employment disputes and all other issues covered by the CBA." Motion to Intervene at 11-12.

being represented adequately by Lufkin in this case.[17] Instead, the Unions offer only the sweeping and non-specific statement that unless they are permitted to intervene, the Unions' "interest in ensuring that the CBA is interpreted correctly and in representing the rights of all unit employees will be undermined." This does not even meet the "minimal" showing, the Unions concede they are required to meet.

B. 42 U.S.C. § 2000e-2(n) Has No Bearing on The Unions' Motion to Intervene

The Unions, in some detail, explain the history and provisions of 42 U.S.C. §2000e-2(n), which Congress enacted in response to the Supreme Court's decision in Martin v. Wilks, 490 U.S. 755 (1989). Section 2000e-2(n), however, is irrelevant to the Unions' motion to intervene. Section 2000e-2(n) does not change the standards for intervention under Federal Rule of Civil Procedure 24. See Edwards v. City of Houston, 78 F.3d at 997 (citation omitted). Therefore, §2000e-2(n) provides no independent support for the Unions' motion. If anything, the Unions' concern with the preclusive impact §2000e-2(n) can have on collateral attacks or subsequent challenges to employment discrimination judgments in certain circumstances, makes the Unions' delay in bringing their motion all the more indefensible. In any event, by its terms §2000e-2(n) precludes collateral attacks or challenges of a "litigated or consent judgment or order that resolves a claim of employment discrimination." In this case, there is no "litigated or consent judgment or order" resolving a claim of discrimination. Therefore, §2000e-2(n) is immaterial to the issue of the Unions' intervention in this matter at this time.

III. CONCLUSION

For all of the reasons discussed above, the Unions' have not met their burden of demonstrating that their Motion to Intervene is timely, or otherwise meets the requirements of Rule 24(a)(2). Accordingly, the Court should deny the motion without prejudice to its renewal at

[17] The Unions claim federal law prohibits Lufkin from providing legal services for the Unions' benefit. See Motion to Intervene at 15. Of course, the fact that at least for now, the interests of the Unions and Lufkin are aligned does not mean that the two are in an attorney-client relationship. However, a review of the similarities between the Unions' "salient facts" and other statements in the Unions' motion, and Lufkin's proposed findings, certainly raises the question of whether, perhaps, the Unions have already taken advantage of Lufkin's "legal services for the Unions' benefit."

such time as they have a "direct, substantial, legally protectable interest in the proceedings."

Dated: November ___, 2003

Respectfully Submitted,

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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 FAX/hand delivery/United States mail, postage prepaid:

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