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' RESPONSE TO AND COMMENTS ON DEFENDANT LUFKIN INDUSTRIES, INC.'S REPORT TO THE COURT ON REMEDIAL MEASURES UNDERTAKEN TO DATE

INTRODUCTION

Plaintiffs submit these supplemental comments on and response to Defendant Lufkin Industries, Inc.'s ("Lufkin") report to the Court on the remedial measures it has undertaken to date to comply with the Court's January 13, 2005 Order.[1] Before addressing the substance of Lufkin's report, Plaintiffs note the timing of Lufkin's submission provided little time for the Court or Plaintiffs to adequately review the report and materials submitted with the report prior to the May 25, 2005 hearing on all pending motions, including Plaintiffs' motion for further proceedings regarding injunctive remedies. The Court set the hearing on May 5, 2005. See Order Setting Hearing (Dkt #533). Lufkin offered no explanation why it waited until the day before the hearing to submit its report, notwithstanding Plaintiffs' repeated requests for such information from Lufkin and Lufkin's commitment to provide such information to Plaintiffs "as it becomes available." Plaintiffs' Report to Court and Proposal for Injunctive Remedies, ("March 21, 2005 Report") filed March 21, 2005 (Dkt #507), at 4, and letters dated February 24, 2005 from T. Demchak to D. Hamel, id., Ex. 2, and February 28, 2005 from D. Hamel to T. Demchak, id., Ex. 3.

Lufkin's unilateral insistence on developing and implementing remedial measures in secret, and its expectation that Plaintiffs and the Court will be satisfied with after-the-fact cryptic and general descriptions, are unrealistic. Under the circumstances of this litigation, considerably more skepticism is warranted. Plaintiffs have proposed that specific remedies be designed with discussion or input from both parties.

Lufkin's consistent refusal to discuss or even provide information on its remedial efforts to the Court and Plaintiffs during the over four months since the Court found Lufkin liable for systemic classwide discrimination further demonstrates why the Court – either directly or by delegation to a Special Master – must provide more specific directives and oversight to Lufkin

[1] That report was in the form of a letter from Mr. Hamel, with five exhibits (Dkt.# 543).

regarding injunctive remedies it must implement to address and eliminate the effects of the longstanding discrimination found by the Court.[2] Absent such specific directives, Lufkin will act unilaterally – and, as it has to date, as discussed below, inadequately – to carry out orders that are the Court's responsibility.

A. Lufkin's EEO Training

As Plaintiffs commented at the May 25, 2005 hearing, Lufkin's decision to provide EEO training to its managers, as reported in the May 24 report, may be a positive first step. However, as reported by Lufkin, the EEO training it has already provided is apparently all of the training on the subject it intends to provide to its managers. Notably missing from the training outline is any indication that the Court's findings were disclosed to or reviewed with Lufkin's management personnel, including first line supervisors; or that the training specifically addressed any of the particular problems, or even types of problems, that the Court found exist at Lufkin.[3] On the contrary, from Lufkin's report it appears that the training was a non-specific, off-the-shelf general overview of EEO law and issues, like those that Lufkin claimed at trial its managers had

[2] A further indication of Lufkin's unwillingness to provide adequate information to the Court and Plaintiffs to enable a meaningful assessment of Lufkin's current practices is the statements made by Lufkin's counsel during the May 25 hearing, providing information on numbers of promotions of hourly and salaried Lufkin employees since January, but no information regarding the number of applicants for such positions. Without this information, it is impossible to credit counsel's assertion that the selections indicate steps toward compliance by Lufkin.

[3] This example illustrates why it is essential that Lufkin be required to submit any proposed remedial actions or programs to Plaintiffs for review and comment and the Court for approval, prior to implementation of the action or program. Without such oversight and left to its own devices, Lufkin has shown that it is unable to develop remedial measures that adequately and effectively address the discriminatory practices found by the Court.

been attending for years.[4] From Lufkin's Report, it is possible that the training was hastily arranged for the purpose of reporting that some "training" had been provided, instead of having been thoughtfully designed for remedial purposes in light of the Court's findings.

Furthermore, Lufkin has not reported that its managers have, in fact, reviewed the Court's findings. The Court will recall that evidence presented at trial showed that Lufkin managers consistently have not received information regarding the racial composition of their workforces or racial impact of their policies and procedures. For example, the evidence demonstrated that managers typically do not receive copies of Lufkin's Affirmative Action Plan that it is required to prepare and submit to the U.S. Department of Labor in order to be eligible to compete for federal contracts. See, Plaintiffs' Proposed Post-Trial Findings of Fact and Conclusions of Law ("Proposed Findings") ¶¶ 238-240. Similarly, the evidence showed that Lufkin's HR personnel did not share the fact that the Office of Federal Contract Compliance Programs ("OFFCP") twice found Lufkin in violation of the anti-discrimination provisions of federal law with the managers of the departments where the violations were found. Proposed Findings ¶ 209.

Moreover, Plaintiffs are informed by class members that the only notice of the Court's January 13, 2005 Memorandum and Order that Lufkin has provided to its employees is by posting on employee bulletin boards a copy of the press release Lufkin issued after the Court entered the Order. In the press release, Lufkin states that it disagrees with the Court's findings, that it intends to appeal the order, and is confident that it will prevail on its appeal. See copy of press release, attached hereto as Exhibit 1.

[4] Without additional information, and based on the timing of the training, it appears possible that the training was hastily arranged so that Lufkin could report to the Court that some "training" – not a training program thoughtfully designed for remedial purposes in light of the Court's orders – had occurred prior to the hearing. In any event, as Exhibits D and E to the report show, a substantial portion of the six hour training period was given over to topics such as the Equal Pay Act (a law addressing solely gender discrimination issues), sexual harassment issues, Americans With Disabilities Act (ADA) issues, and lengthy, apparently abstract discussions of statutes and legal principles unlikely to be of much use to most supervisors and managers.

It is difficult to understand how Lufkin can engage in good faith efforts to comply with the January 13 Order – which has not been stayed – if it does not explain to its management personnel and employees the findings of discrimination the Court made and how Lufkin intends to address those findings.[5]

Additionally, Lufkin's May 24 report to the Court also failed to discuss what if any other role the HR consultants Lufkin retained to provide EEO training to its management personnel will play. However, in Lufkin's opposition to Plaintiffs' Motion for Appointment of a Special Master, Lufkin stated that it had retained an HR consultant to review its personnel policies and procedures. Thus, the record is unclear on whether such a review has taken place, or will take place in the future, and what, if any, recommendations resulted from the review or are the objective of any future review.

B. Initial Assignment Procedures

Lufkin reports that the TWC now makes the decision of which applicants to refer to Lufkin for entry level positions. See May 24 Report at 2. This remedial effort sounds very much like the practice Lufkin claimed at trial that it had been operating under, a claim that was inconsistent with the evidence and rejected by the Court. Lufkin has provided no documentation or other evidence of the allegedly changed practices, nor any explanation for why the changes were not disclosed to Plaintiffs or the Court before they were implemented.

Lufkin contends that it has removed the subjectivity from the hiring and initial assignment process, and thus has essentially fixed the problem found by the Court that resulted in the disproportionate assignment of African Americans to the Foundry and under-selection of African Americans for other divisions. Lufkin has provided no evidence about its "new" procedures, only its attorney's characterization of them. Also, Lufkin does not report that it is monitoring the current system for adverse impact, or that it has provided any mechanism by

[5] Lufkin appears to be operating under the assumption that to acknowledge the findings will jeopardize its position on appeal.

which others could verify the changes or their implementation. However, monitoring is essential. Should the current system result in adverse impact of African Americans (either in over-assignment to the Foundry or under-assignment to other divisions), Lufkin cannot simply wash its hands of the problem and blame TWC. Lufkin cannot lawfully accommodate the disproportionate assignment of African Americans made by its agent. Lufkin must collect and analyze the results of its selection procedures as required by the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607. In the context of this litigation, the data gathering and analysis required by the Guidelines will also facilitate monitoring by Plaintiffs and the Court.

C. On-The-Job Training

Lufkin's written report of the steps it is taking with regard to on-the-job training differs from the oral report Lufkin's counsel, Mr. Hamel, provided at the May 25 hearing.[6] However, regardless of the slight variations in the description of the new "procedure," it is defective and inadequate for numerous reasons.

First, under the procedure the first line supervisor retains total discretion in allocating job assignments without any guidelines or criteria.[7] This is the same practice the Court has already found discriminates against African American employees. Second, the procedure limits on-the-

[6] Lufkin's written report states that "every six months" the first line supervisor "solicits from all employees reporting directly" to him those employees' interest in on-the-job training opportunities. See May 24 Report at 3. However, at the May 25 hearing Lufkin's counsel reported that Lufkin posts a notice requesting employees to identify training they would like to receive. Thus, this element of Lufkin's procedure is not clear. It also is not clear whether Lufkin actually has implemented this procedure. Plaintiffs are informed by class members that they are unaware of any postings for on-the-job training in any of Lufkin's production departments.

[7] At the hearing, Mr. Hamel stated that "preference" would be given to African Americans on the list. This is problematic. Plaintiffs are not seeking, and do not interpret the Court's order to require, that African Americans be given preferences. What Plaintiffs are seeking – and what the law requires – is that Lufkin have policies and procedures that are race neutral and fairly administered using objective, job-related and non-discriminatory selection criteria.

job training to only "those jobs under [the first line supervisor's] control."[8] Thus, the procedure provides no opportunity for employees to be trained for jobs outside their job classifications. Third, the procedure contains no provision for recordkeeping or monitoring to ensure that implementation of the procedure does not result in adverse impact. Fourth, the procedure contains no provision to educate all employees fairly about how particular on-the-job training, or temporary assignments, might impact future promotions. Additionally, Lufkin does not describe how, if at all, it will record the on-the-job training employees may receive under this new procedure in the employees' personnel files or elsewhere so that managers making selection decisions in which such training may be a relevant factor will be informed that the employee has received the training.

Finally, Lufkin provides no information regarding how it has or intends to inform employees of this new procedure to ensure that they are aware of it, understand it, and utilize it. This is a particularly important aspect of implementation of any remedial provision in a company where, as the Court has found, African American employees have been discouraged or deterred from bidding on jobs and requesting on-the-job training. See Mem. and Order at pp. 20-28. Against this historical backdrop, any remedial efforts by Lufkin must be introduced to employees in a way that will alleviate concerns – especially among African American employees – that the procedures are not "business as usual" and in a way to encourage employees' trust and participation in the procedure. Lufkin's "on-the-job training procedure" addresses none of these issues.

D. Formal Training

Plaintiffs' comments regarding on-the-job training are equally applicable to Lufkin's report regarding formal training. In light of the limited formal training Lufkin has recently

[8] As Mr. Hamel noted in his presentation at the hearing, the first line supervisors' areas of responsibility are narrow.

provided[9] and the need for full participation of all employees expressing interest in the training, Plaintiffs have no additional comments on Lufkin's proposal, except to say that Lufkin has not developed a policy or procedure on how it will ensure fairness and non-discrimination in any formal training it may provide for which participation may be limited to less than all those expressing an interest in the training.

E. Promotions

1. Hourly Promotions

Lufkin's description of its "improved recordkeeping system with respect to hourly employees subject to the collective bargaining agreement" ("CBA") does not address the basic problems found by the Court – that Lufkin and the CBA afford Lufkin management discretion (unguided by objective criteria) to make promotions to numerous bargaining unit positions, to bypass seniority and the bid list, or to decide whether to use an "objective" criteria other than seniority in selecting employees for promotion. See Mem. and Order at pp. 5-6.

Lufkin's proposal includes the provision that if an African American employee is disqualified for any reason related to a subjective determination of ability, Lufkin will review the disqualification with the employee and union, and if no agreement is reached, the employee will be advised of his right to file a grievance. This proposal does nothing to eliminate discretion, actually creates more opportunities for discretion to affect promotion decisions, is not remedial, and does not provide any opportunity for monitoring. The proposal ignores the findings of the Court, this Court's continuing jurisdiction to monitor and oversee Lufkin's compliance, and the class nature of this case. Lufkin must collect, analyze and report to the Court and Plaintiffs information regarding bargaining unit promotions to allow a determination of whether the promotions are discriminatory, not solely with respect to an individual class member, but as to the class as a whole. Moreover, Lufkin cannot allow the unions to usurp the Court's and the

[9] Foundry ESL classes and Trailer Division welding training. Report, pp. 3-4.

class representatives' roles in ensuring that Lufkin's promotion practices do not result in adverse impact against African American employees. Similarly, Lufkin cannot substitute the union grievance procedure for the Court's and the class representatives' roles in monitoring and ensuring Lufkin's compliance with the Court's orders.

Lufkin's representation that it has begun to negotiate with the unions regarding modifications of the CBA to comply with the Court's orders, see May 24, Report at 4, is especially troubling. Plaintiffs outlined our concerns regarding this issue in our March 3, 2005 letter to the Court to which we attached a letter dated February 18, 2005 from Lufkin's counsel to the unions' counsel.

Plaintiffs were also concerned to hear from both Lufkin's counsel and the unions' counsel, at the May 25, 2005 hearing, that a further negotiating session between the unions and Lufkin to discuss modifications of the CBA to comply with the remedial order is planned, and that Plaintiffs have not been asked to participate in the session. Plaintiffs must be involved in any discussions regarding Lufkin's compliance with the Court's orders. Furthermore, as Plaintiffs explain in our March 3, 2005 letter, no modifications of the CBA – and certainly no revisions to the seniority provision – are necessary to implement the Court's order.[10]

2. Salaried Promotions

Lufkin's proposal regarding salaried promotions does not address the Court's findings in a meaningful or effective way. Lufkin proposes to monitor such promotions up to three months after the fact, as opposed to at the time of the actual promotion. Lufkin proposes to review the promotions "based on the specific requirements of the job," but offers no promise that the "requirements of the job" are valid and job related and not, as the trial evidence demonstrated, subject to the discretion of individual managers. Lufkin provides no indication that it will collect or analyze salaried promotions data by race, to monitor for adverse impact. Instead, as with

[10] We find this all the more troubling in light of Lufkin's inaccurate assertion to the Unions at their February 2005 meeting that the Court's orders require use of racial quotas in promotions.

bargaining unit promotions, Lufkin, states that it will review promotions on an individual, but not class basis. Finally, Lufkin makes no provision for efficient monitoring by Plaintiffs and the Court.

CONCLUSION

Lufkin's May 24, 2005 report to the Court further demonstrates that it does not have the interest, commitment or ability to fashion remedies to effectively address the discriminatory practices found by the Court in the absence of specific direction and greater oversight by the Court – directly or by reference to a Special Master – and Plaintiffs.[11] For all of these reasons, Plaintiffs renew their request that the Court appoint a Special Master and enter further, more specific orders regarding injunctive remedies.

Dated: May 31, 2005

Respectfully submitted,

By: /S/

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[11] Plaintiffs believe that Lufkin's slow and half-hearted steps may be mere palliatives, designed to distract the Court from requiring more rigorous remedies while Lufkin pursues the appeal which it hopes will save it from having to make any reforms of real substance.

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:

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on this 31st day of May, 2005.

/S/
Morris J. Baller