IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

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

PLAINTIFFS' SEPARATE REPORT TO THE COURT PURSUANT TO THE DECEMBER 5, 2008 ORDER

I. INTRODUCTION

At the Status Conference on December 5, 2008, the Court ordered Plaintiffs and Defendant Lufkin Industries, Inc. ("Lufkin") to confer on a "methodology on injunction" and advise the Court of those issues on which they were in agreement and identify those issues on which they were not in agreement. The Parties are submitting a joint report ("Joint Report") to the Court in which they identify and discuss the substantial areas of injunctive relief on which they have reached agreement. Plaintiffs submit this separate report to identify those areas on which the Parties have not been able to reach agreement and to discuss Plaintiffs' position on each matter.

1. Duration of the Court's Jurisdiction

The Parties disagree on how long the Court should exercise continuing jurisdiction over Lufkin. Plaintiffs propose seven (7) years with a provision for extension of the Court's jurisdiction if Lufkin does not demonstrate that it has complied for the last three years of the retained jurisdiction period, as well as a provision that if Lufkin has demonstrated successful compliance for the first five (5) years of the retained jurisdiction period, it could petition the Court for early termination of the Court's jurisdiction.

Plaintiffs' position is that there has to be sufficient time for Dr. Campion – should the Court direct Lufkin to retain him as the Parties have recommended – to conduct his assessment, make his recommendations, Lufkin to implement the recommendations, and the Parties, the ombudsperson (*see* below) and the Court to determine whether the recommendations are effective in addressing the Court's liability findings and in ensuring that the discriminatory practices found by the Court do not recur. Moreover, under the circumstances of this case, the record evidence of pervasive discrimination found by the Court and Lufkin's history of

recalcitrance[1] and ignoring short-term orders or conciliation agreements to remedy similar discrimination in the past– or reverting to discriminatory practices once the orders or agreements expired[2] –the term should extend over a substantial period.[3]

2. Authority of the Ombudsperson With Regard to Analysis of Promotion Data and Complaint Investigation

As discussed in the Joint Report, the Parties have agreed that the Court should appoint an external ombudsperson who would have the authority to monitor Lufkin's compliance with the Court's remedial orders and injunction.[4]

a. The Parties propose that "[t]he ombudsperson should have the authority to review any documents maintained by Lufkin described in Paragraph 4 [of the Joint Report], audit

[1] Lufkin represented to Judge Cobb that it had implemented remedial measures which in fact it had not. Specifically, Lufkin advised the Court in May 2005, that it had implemented an on-the-job training program for hourly employees and had retained a consultant to review, and advise it on, its personnel practices. Post-remand discovery revealed otherwise. Both John Havard, Lufkin's Human Resources' manager, designated by Lufkin pursuant to Federal Rule of Civil Procedure 30(b)(6) regarding human relations and EEO issues, and Mr. Perez, Lufkin's Vice President and General Counsel, admitted in depositions that Lufkin had not implemented either of these actions.

[2] In the two years before this case was filed, the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") found on two separate occasions that Lufkin's initial assignment and promotion practices – the same practices at issue in this litigation – discriminated against minority employees, including African Americans. *See* Plaintiffs' Trial Exs. 60, 66. Although Lufkin entered into conciliation agreements with the OFCCP under which it agreed to take corrective actions, *see* Plaintiffs' Trial Exs. 61, 69, Judge Cobb, eight years later, after a bench trial, found that Lufkin had continued to discriminate by its unmonitored delegation of subjective decision making to its predominantly white managers resulting in unlawful disparate impact on African American employees in initial assignments and promotions.

[3] In fashioning appropriate injunctive relief a court may consider a defendant's past and post-judgment conduct. *EEOC v. Rogers Bros., Inc.*, 470 F.2d 965, 966 (5th Cir. 1972) ("The [defendant's] past conduct is a relevant factor to be considered" in the court's order of injunctive relief); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974) (underscoring the importance of considering post-verdict conduct in determining whether the district court ordered sufficient injunctive relief).

[4] The Parties also have agreed to a process and schedule to attempt to reach agreement on a candidate to propose to the Court. Joint Report at 2-3.

Lufkin's promotion procedures, practices and related decisions, and conduct an independent analysis of Lufkin's promotion-related data." Joint Report at 5-6.

"The Parties also agree that the ombudsperson should also provide the Court with reports on the promotion data that he receives from Lufkin." *Id.* The Parties disagree, however, on what the data must show for the ombudsperson to report to the Court that additional investigation is warranted. Lufkin's position is that the data must reveal "statistically significant discrepancies of promotions adverse to black employees."

Plaintiffs' position is that the data need show only "any significant discrepancies of promotions adverse to black employees." The reasons for Plaintiffs' position are that while "statistical significance" is required for a finding of "unlawful" disparate impact,[5] here there already has been a judicial finding of unlawful discrimination and where the ombudsperson finds that there are continuing patterns of disparities adverse to the class , which in his opinion, are "significant," this is a sufficient threshold for him to advise the Court that further investigation is warranted to determine the causes of the disparities and, if necessary, to propose further remedial measures. Under these circumstances discrepancies may be of importance but not "statistically significant" because of small sample size. Additionally, Plaintiffs believe that the ombudsperson, an external monitor with subject matter expertise, who will be overseeing implementation of a remedy for found unlawful discrimination should have flexibility in reviewing the data and determining on his own when the data reveal a pattern that suggests a need for further investigation and not be limited to a standard that must be met for a determination of unlawful discrimination.

The Parties also disagree on how often the ombudsperson should report his promotion analyses to the Parties and the Court. Plaintiffs' position is that the ombudsperson should make such reports at least semi-annually and, at his discretion, more frequently if warranted by the results of his analyses of the information he receives from Lufkin.

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[5] *See e.g., Castaneda v. Partida*, 430 U.S. 482 (1977).

b. The Parties further agree that the ombudsperson also will have authority to receive, investigate and attempt to resolve certain complaints from Lufkin employees. Joint Report at 3-4. The Parties agree that the ombudsperson's authority would extend to complaints from class members regarding alleged promotion-related discrimination, non-compliance and retaliation for bringing a promotion-related discrimination or compliance-related complaint to Lufkin, a union or the ombudsperson. *Id.*

The Parties disagree on whether an employee should be required to complain about promotion-related decisions initially to Lufkin's Human Resources ("HR") Department or – if the employee is a member of a labor union – to his or her union before complaining to the ombudsperson. It is Plaintiffs' position that, at least initially,[6] a class member wishing to complain about alleged race discrimination in the promotion process should be able to elect whether to complain to: (1) Lufkin's HR Department or the union, or (2) the ombudsperson.

The reasons for Plaintiffs' position are that: (1) Lufkin's HR Department and its unions have been ineffective in dealing with complaints of race discrimination and (2) many of the decisions Lufkin's managers make in their exercise of subjectivity that can affect an employee's ability to qualify for promotions are not covered by the Collective Bargaining Agreement ("CBA"). Plaintiffs' position is supported by Judge Cobb's findings. For example, Judge Cobb found that day to day work assignments are not governed by the CBA and that under the CBA, there is no right to a specific position within a job classification. The Court found that Lufkin's supervisors have broad latitude to schedule workers as they see fit and that no one checks or oversees that process. Final Amended Judgment at 21. The Court also found that "[t]he unions, which are supposed to act as watchdogs, are called in only when a worker is directly disadvantaged. When a white worker receives an unfair advantage that hurts no one else

[6] By "initially," Plaintiffs suggest that the optional procedure they propose remain in place at least for a year during which time the ombudsperson through his communications with Lufkin's internal monitor (*see* Joint Report at 4-5) can determine whether Lufkin has the resources and ability to competently receive, investigate and resolve such complaints.

specifically, such as an absence that is not marked or a chance to train on a new machine, the unions have no leverage."[7] *Id.* at 22-23. Judge Cobb also found that Lufkin's managers often discourage African Americans from bidding on jobs or not accepting jobs that they successfully bid on. *Id.* at 23. Such manager conduct is not grounds for a grievance under the CBA.

With respect to promotion-related matters that are covered by the CBA, there is no obligation that an employee use the internal grievance procedure. For example, an hourly employee who believes that he or she did not get a promotion on account of his or her race has the option of using the grievance procedure, filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), both, or neither. Accordingly, Plaintiffs believe these employees also should have the option of using the grievance procedure or making a complaint directly to the ombudsperson.

Additionally, at trial, Plaintiffs presented testimony from a number of class members who complained about racial discrimination to Lufkin's HR personnel to no avail.[8] In fact, Judge Cobb found that employees who did complain about racial discrimination to Lufkin's HR personnel – indeed even to its then-CEO – were subjected to retaliation.[9] *Id.* at 23. Testimony at

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[7] The evidence presented at trial demonstrated that Lufkin treats complaints of discrimination that are filed through the union grievance procedure in the same way it treats all other grievances and not with any heightened scrutiny despite Lufkin's obligations under both Title VII and the CBA not to engage in racial discrimination. Plaintiffs' Trial Exhibit ("PX") 115c. Moreover, under the grievance procedure, complaints of discrimination by hourly employees are investigated by Lufkin managers who are alleged to have engaged in the discrimination.

[8] *See* Plaintiffs' Proposed Post-Trial Findings of Fact and Conclusions of Law (Dkt. 451) ¶¶ 212-225. Class member Vivian Crain, testified at trial that she heard Viron Barbay, a current employee of Lufkin's Human Resources Department, using racially derogatory language and stereotypes when referring to racial minorities, including African Americans. Judge Cobb credited Ms. Crain's testimony. Final Amended Judgment at 20.

[9] Final Amended Judgment at 23 ("Florine Thompson and Sylvester McClain … had expressed discontent with aspects of Lufkin's race-related policies; both were demoted from salaried positions to hourly positions. Ms. Thompson has earned two associate degrees, but was demoted from her salaried position and now works as a security guard. She testified that her demotion occurred shortly after she raised concerns about a hostile working environment with Lufkin management.").

trial also revealed that none of the current HR Department personnel have any formal education or training in HR administration or management.[10] Plaintiffs' post-remand discovery revealed that there are no African American employees in Lufkin's HR department;[11] that Lufkin has not promulgated any written guidelines to individuals responsible for investigating discrimination complaints; that there are no written protocols for investigating such complaints; that complaints of employment discrimination are not recorded or tracked electronically and that Lufkin's HR manager has not reviewed internal complaint procedures from other companies.[12]

Plaintiffs hope that Lufkin will, in light of its obligation to provide equal and fair employment opportunities to all of its employees, take the opportunity to professionalize its HR Department and implement an effective internal employee complaint mechanism. To date, however, it has not done so and in the absence of such action, class members who believe they have been subjected to race discrimination in promotion-related matters should be able to complain directly to the ombudsperson.

c. The parties also disagree on what authority the ombudsperson would have should he receive complaints of alleged discrimination regarding non-promotion related employment practices. Plaintiffs' position is that these complaints should be referred back to the Company for investigation. However, these complaints, particularly if discerned by the ombudsperson to reflect a pattern of discriminatory conduct, could be relevant to whether Lufkin is complying with the Court's orders and the ombudsperson should have the authority to review

[10] Trial Transcript ("Tr.") Day 4 at 202:17-19; Tr. Day 4 at 14:18-25; PX 155 at L-15802.

[11] Transcript of Deposition of John Havard ("Havard Depo."), taken July 9, 2008, at 25:20-22.

[12] Havard Depo. at 199:15-200:23.

with the Company its resolution of the complaints and, where the ombudsperson finds evidence to suggest non-compliance with the Court's orders, take appropriate action.[13]

3. Manager Accountability Assessment Measures

The Parties disagree on whether Lufkin should be required to develop and implement procedures for assessing manager accountability for assuring the provision of equal employment opportunities and compliance with the Court's remedial orders. Lufkin currently does not evaluate the performance of its managers on their compliance with the fair employment laws or promotion of workforce fairness and diversity. Plaintiffs submit that formal mechanisms to hold managers accountable for compliance with the Court's orders are essential, especially in light of Judge Cobb's findings of discriminatory exercise of discretion by managers.[14] Such an assessment can and should be part of the managers' annual performance evaluation process, should be demonstrated by objective and statistical measures and can be something Dr. Campion can assist the company in developing and implementing. The results of the evaluations, with regard to the superiors' assuring career development opportunities for African American

[13] The Parties agree that in cases where employees complain to the ombudsperson that the terms of the injunction have not been followed, or where black employees complain about discriminatory promotion-related decisions, the ombudsperson should have authority to conduct additional fact finding which could include requesting documents, information and data from Lufkin and interviewing supervisors and employees. The ombudsperson should report quarterly to the Court on the number of non-compliance and promotion-related complaints that the ombudsperson has received and the ombudsperson's findings and on those complaints. Plaintiffs' counsel and Lufkin's counsel should be given a copy of these reports and an opportunity to respond. *See* Joint Report at 6.

[14] For example, Judge Cobb found that "[w]hite employees can be, and are, selected and groomed for further advancement and managerial roles. Black employees are more likely to be placed in dead-end positions and left to seek training on their own, outside of regular work hours." Amended Final Judgment at 21. Judge Cobb also found that "Because managers and supervisors at Lufkin give whites preferential treatment, blacks are less likely to gain the necessary skills. Even positions awarded to the senior bidder regardless of qualification can be influenced when supervisors are discouraging blacks from applying black advancement. It is thus not surprising that blacks are hesitant to bid and may choose to withdraw their bids even if selected." *Id.* at 23.

employees under their supervision, must be consequential in terms of the managers' own performance evaluation, career advancement and promotion, and compensation. The system of managerial accountability should be visibly supported, and consistently reinforced, by senior level executives who set the tone and provide the lead for corporate decision-making.

Dated: February 19, 2009

Respectfully submitted,

By: /S/

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CERTIFICATE OF SERVICE

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

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on this 19th day of February, 2009.

/S/
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