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' SURREPLY TO DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO AMEND THE CLASS CERTIFICATION ORDER

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In its reply to plaintiffs' opposition to Lufkin Industries, Inc.'s ("Lufkin") motion to amend the class certification order, Lufkin continues its practice of making arguments without regard to the matter at hand. Lufkin argues that Dr. Richard Drogin's supplemental analysis, which shoes disparities in the compensation and promotion of African American salaried employees, should be stricken, and that, if it is not stricken, the Court should refrain from giving notice to the class until Lufkin has an opportunity to depose Dr. Drogin regarding his supplemental analyses. Neither of these arguments, however, has anything to do with Lufkin's motion to amend the class certification order and, certainly, neither are well taken. The question with respect to Lufkin's motion is whether the elements for certification continue to be satisfied and whether facts exist to *justify modification of the certification ruling.*

A. Plaintiffs Have Met The Rule 23 Requirements For Maintaining A Class Action.

In determining whether class certification continues to be appropriate, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178 (1974). "Class certification is a procedural determination . . . ," McClain v. Lufkin Industries, Inc., 187 F.R.D. 267, 278 (E.D. Tex. 1999), and this does not change when the defendant seeks to amend the class certification order. See Kuenz v. The Goodyear Tire & Rubber Co., 1987 U.S. Dist. LEXIS 13198, *6 (N.D. Ohio 1987). Lufkin, however, attempts to argue the merits, claiming that plaintiffs do not have evidence to support a claim of discrimination against salaried workers. This is clearly an attempt to seek an end run around Lufkin's failed motion for summary judgment as opposed to a challenge to the Rule 23 requirements.[1] Nonetheless, plaintiffs came forward with evidence demonstrating that plaintiffs can establish a statistically significant disparity in the promotion and compensation of salaried workers. This showing is more than sufficient to defeat Lufkin's motion to amend the class certification order. Whether Dr. Drogin's supplemental analysis should be stricken is a separate question that is not relevant here.

[1] Lufkin's only arguments going to the question of certification have, as discussed fully in plaintiffs' response, already been considered and rejected by the Court.

Moreover, Lufkin fails to comprehend the legal significance on whether Lufkin has established that the class should be amended of its failure to preserve data and records it was required to maintain pursuant to EEOC regulations. Plaintiffs do not argue that the data and records Lufkin unlawfully destroyed or failed to maintain would support only the claims of salaried employees, but rather, that such evidence pertains to plaintiffs' claim that other employment processes, such as training, evaluations, job qualifications, and testing have a disparate impact on the class, and that, as a result, the Court may direct an inference that the missing records contained information that was unfavorable to Lufkin. Such an evidentiary inference would rebut Lufkin's contention that plaintiffs have not presented evidence that Lufkin's employment processes, other than initial assignment and promotions, are discriminatory and would sustain plaintiffs' burden with respect to class certification.[2]

Further, as Lufkin is clearly attempting to use a summary judgment standard to advance its motion to amend the class certification order, it is appropriate to take note of that standard. To defeat summary judgment, plaintiffs would only be required to come forward with evidence to show that there is a genuine dispute with respect to a material issue of fact. Plaintiffs would not be required to prove their case, and the Court would not be able to resolve factual disputes. Lufkin apparently believes that it would be entitled to judgment as a matter of law if plaintiffs could not demonstrate a disparity of more than three standard deviations. However, there is no bright line rule that a particular threshold is required for a finding of discrimination. See Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 (1988) ; Smith v. Xerox Corp., 196 F.3d 358, 366 (2d Cir. 1999); EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1277 n.14 (11th Cir. 2000). Thus, courts are left to decide on a case-by-case basis whether statistics that purport to show discrimination are in fact sufficient to the task. See Abbott v. Federal Forge, Inc., 912 F.2d 867,

[2] Lufkin also contends that the complaint does not raise issues regarding Lufkin's use of "objective tests." However, Lufkin asserts that it uses written or demonstrative tests to measure "ability." See, e.g., Lufkin's Proposed Findings of Fact and Conclusions of Law, filed September 30, 2003, ¶ 127-133. Plaintiffs, however, contend that Lufkin has never met its federal obligations to (1) collect data to determine whether its tests have an adverse impact on the class or (2) validate its tests. The absence of such evidence raises an inference adverse to Lufkin with respect to its affirmative "job relatedness" defense and is relevant to pretext.

873 (6th Cir. 1990). Statistical disparities falling just short of the traditional standard of 2 standard deviations may nonetheless be meaningful since consistent shortfalls in every category are probative of a pattern of discrimination, especially when other evidence confirms an allegation of discrimination. See Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527, 545-46 & n. 35 (5th Cir. 1980); EEOC v. American Nat'l Bank, 652 F.2d 1176, 1195 (4th Cir. 1981); see also Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 362, 363 (7th Cir. 2001)(test of two standard deviations is arbitrary; court must decide, based on the information before it whether a particular significance level is sufficient). If the Court was to apply a summary judgment standard here – which Lufkin clearly seeks[3] – plaintiffs have plainly demonstrated that a genuine dispute remains that must be resolved at trial. Thus, whether the Court applies the appropriate standard for modifying a class certification order or a summary judgment standard, Lufkin's motion must fail.

B. Dr. Drogin May Appropriately Submit A Supplemental Report.

As such arguments are clearly not relevant to the instant motion, plaintiffs will only briefly respond to Lufkin's contention that Dr. Drogin's supplemental analyses[4] should be stricken. Lufkin argues that Dr. Drogin should not be permitted to submit an additional expert report because, pursuant to the Docket Control Order, his report was due on June 16, 2003. Lufkin makes this argument despite the fact that, at the time Dr. Drogin's report was due, there were two months remaining in the discovery period and that Lufkin continues to produce crucial information even after the close of discovery.[5] The Docket Control Order is intended to serve as a case management tool. It is certainly not intended to be used as Lufkin is trying to use it – as a sword to prevent plaintiffs from making their prima facie case, from raising questions regarding the

[3] Lufkin certainly cannot be suggesting that the evidentiary standard for amending the class certification order is higher than that for summary judgment. If plaintiffs can defeat summary judgment, it is without question that they have produced enough evidence to defeat a motion to amend the class.

[4] Dr. Drogin is continuing to analyze the evidence and may have additional analyses which will be contained in his supplemental report.

[5] In fact, as discussed in plaintiffs' motion to compel, plaintiffs are still awaiting production of relevant information.

scientific reliability of Lufkin's experts' testimony,[6] or from seeking redress from Lufkin's discovery abuses.[7] In negotiating the Docket Control Order, plaintiffs attempted, to the best of their ability at that time, to provide a reasonable schedule by which certain tasks would be accomplished.[8] Just as Lufkin was not able to anticipate that an August 15, 2003 dispositive motion deadline would not be workable, plaintiffs could not anticipate the amount of information that plaintiffs would receive – and are still receiving – after Dr. Drogin's report was due that would be relevant to understanding Lufkin's practices and how the data should be analyzed.[9]

Even more importantly, Lufkin has not suggested that it will be prejudiced if Dr. Drogin submits a supplemental report. Notably, Lufkin's counsel reserved time to depose Dr. Drogin on his supplemental analysis, so Lufkin can hardly claim to be surprised that such a report is forthcoming.[10] There are still at least several weeks until trial and sufficient time for Lufkin to analyze and respond to Dr. Drogin's supplemental analyses.[11] Lufkin should not be able to assert that plaintiffs have no evidence to make a prima facie case with respect to salaried employees and then attempt to prevent plaintiffs from introducing such evidence.

C. Dr. Drogin's Supplemental Report Has No Bearing On The Notice To The Class.

Lufkin suggests that, should the Court refuse to strike Dr. Drogin's supplemental analyses, the Court should postpone sending notice to the class until Lufkin has an opportunity to depose Dr.

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[6] See Lufkin's opposition to plaintiffs' motion in limine to exclude the testimony of Lufkin's experts, filed October 13, 2003.

[7] See Lufkin's opposition to plaintiffs' motion to compel, filed October 14, 2003.

[8] Furthermore, Lufkin insisted that plaintiffs' statistical expert report should be concluded sufficiently early enough to allow Lufkin to analyze it before the dispositive motion deadline, which was originally the same date as the dispositive motion deadline.

[9] It is ironic that, after criticizing, however incorrectly, Dr. Drogin for failing to properly model Lufkin's practices in his statistical analysis, Lufkin suggests that it would have been sufficient for Dr. Drogin to analyze the bid data without plaintiffs having sufficient information to form an understanding of Lufkin's practices.

[10] Although Lufkin insists that it does not intend to do so, plaintiffs believe that it will actually be necessary for Dr. Baker to submit a supplemental report if she intends to testify regarding an analysis of the salaried bid database or any other analysis completed after she was deposed. Lufkin has stated that such analysis is only intended to assist it with cross-examination of Dr. Drogin, but, clearly, only Dr. Baker could provide testimony with respect to said analysis and such testimony would have to be set forth in a report pursuant to Federal Rule of Civil Procedure 26(a)(2)(B).

[11] Notably, Lufkin doesn't even argue that it will not have sufficient time to address Dr. Drogin's report.

Drogin "because the resolution of this issue will ultimately dictate the scope of the class." See Lufkin's Reply at 4. Lufkin, however, is incorrect in this assertion.[12] As stated earlier, whether the class certification order should be modified turns on whether the class continues to meet the requirements of Rule 23. Lufkin has provided no reason why further examination of Dr. Drogin should affect the Court's class certification order, other than to suggest that the 2.02 standard deviation Dr. Drogin found is not sufficient. As Lufkin itself notes, two standard deviations constitutes statistical significance. Whether 2.02 standard deviations is legally sufficient to establish a prima facie case of disparate impact with respect to salaried employees, when considered along with all of the other evidence plaintiffs intend to introduce at trial, is a merits issue which cannot be resolved by the Court before trial. It is certainly enough upon which to maintain a class action on behalf of salaried employees. As such, Lufkin's attempt to delay notice to the class must be rejected, and since Lufkin has failed to demonstrate that circumstances exist that would justify modifying the class definition, its motion to amend the class certification order should be denied as well.

Dated: October 20, 2003

Respectfully Submitted,

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[12] Plaintiffs, of course, do not dispute Lufkin's right to further depose Dr. Drogin.

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PROOF OF SERVICE

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' SURREPLY TO DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO AMEND THE CLASS CERTIFICATION ORDER

by causing a copy thereof to be transmitted via facsimile and by causing a true copy thereof to be mailed by depositing the same in a sealed envelope in the U.S. mail with postage prepaid and 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 20, 2003.

LISA DUNGAN
Printed Name

Signature