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

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I. INTRODUCTION

In its reply to plaintiffs' opposition to its motion for partial summary judgment on the initial assignment claim ("Lufkin's Reply"), Lufkin Industries, Inc. ("Lufkin") makes an effort to convince the Court that it will be committing reversible error if it does not grant Lufkin's motion.[1] In so doing, Lufkin makes a number of errors in its legal analysis and confuses what is really at issue here. As an initial matter, the instant motion is a motion for partial summary judgment. Thus, the question the Court must answer is whether Lufkin has demonstrated that there are no genuine issues of fact with respect to plaintiffs' initial assignment claim and whether Lufkin is entitled to judgment on this issue as a matter of law. Lufkin's suggestion that the Court could be committing reversible error, therefore, is an empty threat in light of the fact that Lufkin could not appeal the Court's denial of its motion for partial summary judgment in any event.

Further, the Supreme Court's decision in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982), is simply not relevant to the instant motion. Lufkin argues that Mr. McClain and Mr. Thomas do not have standing to file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") that raises initial assignment claims, relying, in part, on Falcon. Lufkin, however, confuses the difference between the standing necessary to file an EEOC charge with the requirements of Rule 23 of the Federal Rule of Civil Procedure. As discussed further below, Falcon addresses the prerequisites a class action must meet to satisfy Rule 23, an issue which is separate and distinct from whether a plaintiff had standing to file an EEOC charge. Lufkin's motion for summary judgment, as Lufkin itself acknowledges, addresses two issues: (1) whether an initial assignment claim falls within the scope of Mr. McClain's or Mr. Thomas' EEOC charges and (2) whether Mr. McClain or Mr. Thomas have standing to assert an initial assignment claim. See Lufkin's Reply at 1 n.2.

[1] Lufkin's habit of continuously threatening the Court with the specter of reversible error is distasteful. Rather than attempting to intimidate the Court, Lufkin's time might be better spent on paying attention to the applicable legal standards and engaging in sound legal analysis that is pertinent to the issue at hand.

Falcon has no bearing on either of these issues. For these reasons and those discussed below, Lufkin's motion for partial summary judgment should be denied.

II. ARGUMENT

In its reply, Lufkin states that the "real issue" here is whether Mr. McClain or Mr. Thomas can prosecute a class initial assignment claim "when they did not make such claim in their EEOC charges, and such claim by them was time-barred at the time they filed their EEOC charges, and neither have standing to make an initial assignment claim because neither was initially assigned to the Foundry division?" Lufkin's Reply at 1. This, in fact, is not the "real issue," much as Lufkin might prefer it to be. Lufkin has filed a motion for partial summary judgment. Thus, the real issue is whether Lufkin has established that there are no genuine issues of material fact with respect to plaintiffs' initial assignment claim and that it is entitled to judgment as a matter of law. In other words, has Lufkin established that the facts and law with respect to this issue 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).

As set forth in detail in plaintiffs' opposition to Lufkin's motion, Lufkin's factual propositions as set forth above are disputed by plaintiffs and can only be resolved if the Court resolves factual disputes, something which it cannot do in response to a summary judgment motion. 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). While, unlike in its partial summary judgment motion, Lufkin at least gives lip service to the summary judgment standard in its reply, it continues to argue that it is entitled to judgment based on its interpretation of the evidence, rather then by demonstrating that there can be no other interpretation. This is not enough to meet Lufkin's burden, and its motion should be denied.

A. Lufkin Has Not Demonstrated That It Is Entitled To Judgment As A Matter Of Law With Respect To The Scope Of Mr. McClain's EEOC Charge.

As stated earlier and as set forth fully in plaintiffs' opposition to the instant motion, whether the initial assignment claim is within the scope of Mr. McClain's January 29, 1995 memorandum requires a factual determination.[2] Summary judgment on this issue is not appropriate unless there are no competing reasonable factual contentions requiring resolution. See Amoco Prod. Co. v. Horwell Energy, Inc., 969 F.2d 146, 148 (5th Cir. 1992). It is not enough for Lufkin to simply state that, "as a matter of law," plaintiffs' initial assignment claims are outside the scope of the EEOC investigation that could reasonably be expected to grow out of Mr. McClain's EEOC charge. Lufkin bears the burden of establishing that this is the case, and it does not even attempt do this. It simply argues that, based on its interpretation of the facts, it is entitled to summary judgment. It does not come forward with any evidence to demonstrate that its view of the evidence is the only reasonable view. In that Mr. McClain's January 29, 1995 memorandum, his testimony at the class certification hearing and his August 12, 1995 letter all create a genuine issue of material fact that must be resolved at trial, Lufkin's motion must fail.[3]

The cases cited by Lufkin for the proposition that initial assignment claims are not within the scope of the named plaintiffs' charges of discrimination, see Lufkin's Reply at 4 n.9, do not change the fact that Lufkin is not entitled to summary judgment. As a threshold matter, all of these cases are easily distinguishable in that they involve narrow individual claims before the EEOC, which the parties attempted to expand substantially in their complaints or which were not

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[2] Lufkin attempts to cure that fact that it did not refer to Mr. McClain's January 29, 1995 memorandum in its summary judgment motion by pointing out the fact that this memorandum was attached to its motion. Lufkin, however, does not discuss the contents of or make any reference to this memorandum in arguing that Mr. McClain's charge of discrimination can not have given rise to an investigation of Lufkin's initial assignment practices. Whether it was attached to Lufkin's motion or not, Lufkin could not bear its burden of demonstrating that summary judgment is appropriate without even discussing this document.

[3] Moreover, since Lufkin has not met its burden, plaintiffs have no obligation to come forward with any evidence. See Gray v. Greyhound Lines, East, 545 F.2d 169, 174 (D.C. Cir. 1976).

in the scope of an actual EEOC investigation. Most importantly, the existence of these cases, even if they stood for the proposition for which Lufkin offers them, does not establish that Lufkin is entitled to judgment on this issue as a matter of law. These courts simply did that which this Court must do at trial – evaluate the evidence and the disputed facts to determine the appropriate scope of the EEOC charge at issue.

Additionally, as suggested in plaintiffs' opposition to Lufkin's motion, this issue has already been decided. In order to certify a class that included initial assignment claims, the Court necessarily decided that Mr. McClain and Mr. Thomas had exhausted their administrative remedies with respect to this claim. Further, also as noted in plaintiffs' opposition, Lufkin has repeatedly – and unsuccessfully – raised the issue of the scope of Mr. McClain's and Mr. Thomas' EEOC charges. Lufkin is incorrect in its assertion that the law of the case does not apply to a district court's own determinations within an ongoing case.[4] See Loumar, Inc. v. Smith, 698 F. Supp. 759, 762 (5th Cir. 1983); 18 James WM. Moore Moore's Federal Practice § 134.22 (3d ed. 2003). While the law of the case doctrine does not limit the district court's power to reconsider or change its decisions, a court generally should not do so 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). Lufkin has not demonstrated that any factors are present that would make it appropriate for the Court to change its earlier class certification determination. Further, while

[4] Lufkin's contention that it was not required to assert its defense that Mr. McClain and Mr. Thomas failed to exhaust their administrative remedies is equally incorrect. While exhaustion is a condition precedent to a Title VII lawsuit, it may be waived by the defendant. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982). Failure to raise the issue in a timely manner constitutes waiver. See Hernandez v. Hill Country Telephone Coop., 849 F.2d 139, 142 (5th Cir. 1988) (citing to Moore v. Tangipahoa Parish Sch. Bd., 594 F.2d 489 (5th Cir. 1979) (laches and limitations are affirmative defenses which must be specially pled under Fed.R.Civ.P 8(c)).

the Court could certainly revisit its class certification decision, the instant motion is a motion for partial summary judgment, not a motion to decertify the class or to amend the class definition. For purposes of Lufkin's partial summary judgment motion, the Court has already determined that the initial assignment claim is within the scope of Mr. McClain's or Mr. Thomas' EEOC charges.

B. Lufkin Has Not Demonstrated That, As A Matter Of Law, Mr. McClain And Mr. Thomas Do Not Have Standing To Assert An Initial Assignment Claim.

For all the reasons stated in plaintiffs' opposition to Lufkin's motion for partial summary judgment, Mr. McClain and Mr. Thomas have standing to file a charge the scope of which includes an initial assignment claim. 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), and the requirements of being an 'aggrieved' person for the purpose of filing a charge have been liberally construed. See 4 Lex K. Larson Employment Discrimination § 70.02[1] (2d ed. 2003) ("Employment Discrimination"); see also Anjelino v. New York Times Co., 200 F.3d 73, 91 (3d Cir. 2000). All that is necessary for Mr. McClain and Mr. Thomas to have standing is that they allege an injury in fact. See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976). As set forth fully in plaintiffs' opposition, 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. Thus, Mr. McClain was alleging a specific and concrete injury resulting from Lufkin's general policy of discrimination, a policy which also led to the channeling of African Americans to the Foundry. Compare Shipes v. Trinity Indus., No. TY-80-462-CA, 1981 WL 65, * 7 (E.D. Tex. October 10, 1985) (class representative has standing to represent a class including those who had suffered injuries different from his own, if the same allegedly discriminatory policy infected both types of claimed injuries).

In its reply to plaintiffs' opposition, Lufkin argues that because of Falcon, Mr. McClain and Mr. Thomas could not have standing to assert an injury from a general policy of

discrimination.[5] Falcon, however, is concerned with the requirements necessary to satisfy Rule 23. See Falcon, 457 U.S. at 158 ("We cannot disagree with the proposition underlying the across-the-board rule – that racial discrimination is by definition class discrimination. But the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified."); see also Fellows v. Universal Restaurants, Inc., 701 F.2d 447, 450 n.2 (5th Cir. 1983) ("In approving [the principle that racial discrimination is class discrimination] . . . the Court noted the distinguishable merit issues that relate to maintenance of a Title VII class action . . . ."). Whether a class representative has standing to assert particular class claims is a distinctly different question from whether that individual may properly represent a class of individuals under Rule 23. See Miller v. Hygrade Food Prods. Corp., 89 F. Supp. 2d 643, 647-654 (E.D. Pa. 2000) (recognizing and discussing distinction between an analysis of standing and the

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[5] Lufkin's suggestion that Falcon eliminated the use of across-the-board class certification is inaccurate. While Falcon limited the use of an across-the-board theory of class certification, the Supreme Court suggested that such a theory may be appropriate if discrimination manifests itself in different practices in the same general fashion. See Falcon, 457 U.S. at 159 n.15; see also Fleming v. Travenol Lab., Inc., 707 F.2d 829, 832 (5th Cir. 1983) (noting that Falcon limited the practice of certifying across-the-board class actions and that the approach may still be appropriate in some circumstances); Alvarez v. Widnall, No. CIVSA96CA1167FB, 1998 WL 1782553, *3 (W.D. Tex. March 4, 1998) (across-the-board attacks on discriminatory employment practices limited by Falcon); Young v. Pierce, 628 F. Supp. 1037, 1041-42 (E.D. Tex. 1985) (noting that Falcon did not rule out across-the-board class actions). While arguing that an across-the-board certification runs afoul of Falcon and post-Falcon Fifth Circuit precedent, Lufkin acknowledges, as it must, that an across-the-board class may be certified if the defendant has an entirely subjective decisionmaking process. Lufkin argues, however, that plaintiffs cannot benefit from this exception because Lufkin does not have an entirely subjective decisionmaking process. It should be noted, as an initial matter, that an entirely subjective decisionmaking process was just an example given by the Supreme Court of a promotion practice which manifests itself in different employment practices in the same general fashion; in the same discussion, the Court also refers to a "biased test" used to evaluate both applicants and incumbent employees. Further, whether or not Lufkin's employment practices are entirely subjective is a question of fact, and, even assuming this is an issue here, Lufkin has introduced no evidence to demonstrate that its employment practices are not entirely subjective. Lufkin cannot simply state that its practices are not entirely subjective; it bears the burden of demonstrating that there is no genuine issue of material fact.

requirements of typicality and commonality); see also 4 Employment Discrimination § 81.02[1], 81.02[2] ("Generally, the issue of constitutional standing is not affected by the class action nature of the litigation . . . . What is important here is that the existence of constitutional standing does not establish compliance with Rule 23 requirements. . . . [The] question . . . [of whether the named plaintiff is qualified to represent the class] is technically not one of standing at all; it is the separate question of whether the named plaintiff, with standing, has met the requirements of Fed. R. Civ. P. 23(a) entitling him or her to represent the class.").

Thus, Falcon has no bearing on whether Mr. McClain and Mr. Thomas have standing to file a charge which encompasses an initial assignment claim or whether Lufkin can establish as a matter of law that they have no such standing. Thus, all Mr. McClain and Mr. Thomas must do to satisfy standing requirements is allege that they have suffered some injury in fact, which, as discussed above and in plaintiffs' opposition to Lufkin's motion, they have done.[6] Lufkin has not demonstrated that the named plaintiffs are not "persons aggrieved" and, therefore, cannot demonstrate that, as a matter of law, Mr. McClain and Mr. Thomas do not have standing to file a charge which encompasses an initial assignment claim.

III. CONCLUSION

Lufkin has not demonstrated that there are no genuine issues of material fact with respect to plaintiffs' initial assignment claim nor has Lufkin demonstrated that it is entitled to judgment

[6] While, at the summary judgment stage, a plaintiff may be required to bring forth evidence demonstrating that he or she has suffered injury from a general policy of discrimination, see Miller, 89 F. Supp. 2d at 647, Lufkin does not argue in its motion for summary judgment that Mr. McClain and Mr. Thomas have not suffered an injury in fact from a general policy of discrimination and has presented no evidence to suggest that no genuine issue of fact remains in this regard. As such, plaintiffs have no obligation to come forward with any evidence demonstrating the contrary. Nonetheless, evidence of Lufkin's highly subjective decisionmaking practices, which constitute a general policy of discrimination and from which the named plaintiffs suffered injury in fact, is outlined in the report of plaintiffs' industrial/organizational psychology expert, Dr. Richard Martell, at Section IV, which includes a discussion of Lufkin's initial assignment practices at Section IV.A, attached as Exhibit A to Plaintiffs' Opposition to Lufkin's Motion For Leave to Serve Additional Interrogatories, filed July 28, 2003. This evidence creates a genuine issue of material fact that must be resolved at trial.

as a matter of law on this issue. As Lufkin has not met is burden, its motion for partial summary judgment on plaintiffs' initial assignment claims should be denied.

Dated: October 9, 2003

Respectfully Submitted,
By: Darci E. Burrell

Teresa Demchak
Morris J. Baller
Darci E. Burrell
Joshua G. Konecky
Goldstein, Demchak, Baller, Borgen & Dardarian
300 Lakeside Drive, Suite 1000
Oakland, CA 94612-3534
(510) 763-9800

Timothy Garrigan
Stuckey, Garrigan & Castetter Law Offices
2803 North Street
Nacogdoches, TX 75963-1902
(936) 560-6020

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

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 9, 2003.

LISA DUNGAN
Printed Name

Signature