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

SYLVESTER MCCLAIN, on his own behalf and on behalf of a class of similarly situated persons, et al.,	§	
Plaintiffs,	§	**CIVIL ACTION NO. 9:97-CV-063**
vs.	§	
	§	**JUDGE COBB**
LUFKIN INDUSTRIES,	§	
Defendant.	§	

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

Plaintiffs' Response attempts to lead the court into committing error subject to reversal in the court of appeals by arguing pre-*Falcon*[1] cases and muddling distinct issues.[2] The real issue is simple: "Can Sylvester McClain or Buford Thomas prosecute a class initial assignment claim, when they did not make such a claim in their EEOC charges,[3] any such claim by them was time-barred at the time they filed their EEOC charges,[4] and neither have standing to make an initial assignment claim because neither was initially assigned to the Foundry division?"

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[1] *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147 (1982).

[2] Those issues being: 1) Whether the EEOC charges allege classwide discrimination; 2) Whether initial assignment claims fall within the scope of McClain's and Thomas' EEOC charges; and 3) Whether McClain or Thomas may bring initial assignment claims. Issues 2 and 3 are the subject of Lufkin's motion.

[3] Contrary to the assertions in Plaintiffs' Response, Lufkin did not fail to take McClain's January 29, 1995 memorandum into account in its arguments. In fact, the memorandum was attached to Lufkin's Motion for Partial Summary Judgment at Exhibit 1. Lufkin's argument is unaffected by whether the EEOC charge is considered the *formal signed charge in the EEOC's files dated August 12, 1996, or the January 29, 1995 memorandum from* Sylvester McClain to Lufkin managers that the Court has previously held would be treated as an effective charge.

[4] "[A] [T]itle VII plaintiff must file a charge of discrimination with the EEOC within 300 days after learning of the conduct alleged." *Huckabay v. Moore*, 142 F.3d 233, 238 (5th Cir. 1998). McClain's and Thomas' EEOC charges were filed over 20 years and 15 years, respectively, from the dates of their initial assignment. (*See* Defendant's Motion for Partial Summary Judgment, Ex. 1 & Ex. 2).

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I. After *Falcon*, As a Matter of Law, Class Claims are Limited to Claims that McClain or Thomas Can Raise.

The treatment of employment discrimination class actions changed dramatically[5] in 1982 with the Supreme Court's decision in *General Telephone Company of the Southwest v. Falcon* that courts could not certify "across the board" class actions without carefully examining the named plaintiff's claims and ensuring that he is a proper representative under Rule 23. 457 U.S. 147 (1982). Thus, it is simply not enough for Sylvester McClain to complain about a "cultural program" at Lufkin Industries:

> Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.

Id. at 159 n.15 (emphasis in original).

Moreover, since 1984, the Fifth Circuit has confined class claims to those within the scope of the original injuries to the plaintiffs who filed charges with the EEOC. *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1201 (5th Cir. 1984). The Court specifically noted that "the named plaintiffs 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Id.* at 1200. The Court further held that "extension of the litigation to claims the named plaintiffs could not raise ... violates rudimentary principles of typicality, commonality, and standing." *Id.* at 1201. Thus, because the two *Vuyanich* plaintiffs only suffered injuries from hiring and termination practices, the Court held that they lacked

[5] *See Falcon v. Gen. Tel. Co.*, 815 F.2d 317, 319 (5th Cir. 1987) ("In a landmark decision significantly altering employment discrimination law in the arena of class actions, the [*Falcon*] Court decided to do away with the 'across-the-board' class definition").

standing to assert class claims arising from the bank's other employment practices – compensation, promotion, placement, and maternity practices. *Id.* at 1200-01.[6]

By citing pre-*Falcon* authority, Plaintiffs would have the Court apply dated and inaccurate law. Plaintiffs base their entire argument that McClain and Thomas may prosecute initial assignment claims on cases from the 1970s and early 1980s that have been superseded by *Falcon* and its progeny, and are inconsistent with the statutory requirement that a timely charge of discrimination have been filed. Based on both *Falcon* and *Vuyanich*, McClain and Thomas do not have standing to "exten[d] ... the litigation to claims" that they themselves could not raise. *Vuyanich*, 723 F.2d at 1201. McClain and Thomas may not raise claims based on initial assignment as neither of them suffered injury from initial assignment (*i.e.*, neither was initially assigned to the entry level position of General Foundryman, the initial assignment practice which the class challenges), and, independently, because they did not assert such claims in their EEOC charges and were time-barred from doing so. *Id.* at 1200-01.

A. As a Matter of Law, Initial Assignment Claims are Outside the Scope of the EEOC Investigations Reasonably Expected to Grow Out of McClain's and Thomas' EEOC Charges.

The reasonable expectation rule articulated in *Sanchez v. Standard Brand, Inc.*, which addresses the scope of judicial complaints brought by an individual who filed a timely EEOC charge, limits a complaint to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge. 431 F.2d 455, 466 (5th Cir. 1970).[7] Plaintiffs cite only two cases for their proposition that "courts have held that allegations of discrimination with respect to promotion, demotion and compensation would reasonably lead to an investigation of a

[6] *See also Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 550-51 (5th Cir. 1988) (holding that "class representatives must 'possess the same interest and suffer the same injury' as the class members," and "a plaintiff lacks standing to litigate injurious conduct to which he was not subjected.").

[7] The allegations made in a judicial complaint must be "like or related" to allegations made in the EEOC charge. 431 F.2d at 466.

defendant's hiring practices." (*See* Plaintiffs Response at 8).[8] Not surprisingly, both of these cases are from the 1970s, before the *Falcon* decision. Post-*Falcon* case law[9] holds that as a matter of law, initial assignment claims are not within the scope of the allegations made by McClain and Thomas.

The "reasonable expectation" rule cannot save Plaintiffs, especially in light of *Vuyanich*, which held that the intervention of class representatives "cannot bootstrap the court's jurisdiction to encompass claims regarding practices broader than the ... claims properly assertable by the named plaintiffs." 723 F.2d at 1201. As the other class representatives and class members did not file EEOC charges, they must proceed "within the periphery of the issues which [McClain and Thomas] could assert." *Id.* (citing *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir.1968)). Because McClain and Thomas did not, and could not, file a timely charge asserting an initial assignment claim, they do not have standing to raise this claim so neither can the class. *Id.*

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[8] *Arey v. Providence Hosp.*, 55 F.R.D. 62, 67 (D.D.C. 1972); *Hoston v. United States Gypsum Co.*, 67 F.R.D. 650, 656 (E.D. La. 1975).

[9] *See Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 929 (11th Cir. 1983) (holding that district court did not err in denying class certification on initial job assignment/hiring claims because EEOC charge only alleged discrimination in promotions, unspecified terms and conditions of employment, harassment, and union representation); *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995) (affirming district court's dismissal of hiring claim as a matter of law because EEOC charge only alleged "disparate disciplinary treatment"); *Plaisance v. Travelers Ins. Co.*, 880 F. Supp. 798, 805-07 (N.D. Ga. 1994) (dismissing job assignment claim as a matter of law because EEOC charge only alleged failure-to-promote and retaliation), *aff'd*, 56 F.3d 1391 (11th Cir. 1995), *cert. denied*, 516 U.S. 931 (1996); *Gustafson, Inc. v. Bunch*, No. 3:97-CV-2102-D, 83 Fair Empl. Prac. Cas. (BNA) 375, 1999 U.S. Dist. LEXIS 7107, at **21-22 (N.D. Tex. May 7, 1999) (dismissing as a matter of law claim that employer "unlawfully discriminated by failing to hire [the plaintiff] for other jobs" because EEOC charges alleged only "discrimination arising from Gustafson's decision not to hire him for the Northeast Territory TSR position" and retaliation); *Hyatt v. CNG Producing Co.*, No. 91-4654 §G, 1992 U.S. Dist. LEXIS 17017, at **12-13 (E.D. La. Oct. 28, 1992) (dismissing as a matter of law discriminatory job assignment claim because EEOC charge alleged only discriminatory discharge); *Simmons v. Iberville Operating Co.*, No. 89-3483, 1990 U.S. Dist. LEXIS 1336, at **10-12 (E.D. La. Feb. 2, 1990) (dismissing as a matter of law claims regarding "discrimination resulting from allegedly segregated job classifications, job assignments, [and] refusals to hire" because EEOC charges only alleged discriminatory demotion, harassment, suspension, and retaliatory discharge); *Combs v. C.A.R.E., Inc.*, 617 F. Supp. 1011, 1011-13 (E.D. Ark. 1985) (dismissing as a matter of law hiring and placement claims because EEOC charge only alleged discriminatory discharge). *Cf. Thomas v. Capital Sec. Servs.*, 836 F.2d 866, 884 (5th Cir. 1988) (discussing possible Rule 11 sanctions based on plaintiffs' counsel's "expansion of the judicial complaint beyond the EEOC complaint," in that the EEOC charges alleged discriminatory layoff but the complaint included "shotgun allegations" such as hiring, promotion, and on-the-job treatment claims).

B. Plaintiffs are not Entitled to an Across-the-Board Attack on Lufkin's Alleged "General Policy of Discrimination" Under *Falcon*'s Footnote 15.

Even if Plaintiffs could satisfy the EEOC charge requirement, Plaintiffs' argument that McClain's reference to a "cultural problem" at Lufkin somehow provides McClain with standing to make an across-the-board attack on Lufkin's employment practices, including claims about initial assignment practices, ignores the major precedents of the past 20 years in class action litigation. *See Vuyanich*, 723 F.2d at 1201 ("[E]xtension of the litigation to claims the named plaintiffs could not raise ... violates rudimentary principles of ... standing."). Plaintiffs' use of pre-*Falcon* cases to establish that across-the-board attacks are allowed without regard to the underlying EEOC charge and doctrines of standing is designed to lead the Court into reversible error based on superseded law.

For Plaintiffs' argument that across-the-board attacks continue to be viable, the only post-*Falcon* case they cited that actually took into account *Falcon*'s invalidation of across-the-board attacks[10] is *Shipes v. Trinity Industries*, No. TY-80-462-CA, 1981 WL 65, *7 (E.D. Tex. Oct. 10, 1985). The *Shipes* court relied upon footnote 15 in *Falcon* to allow an across-the-board attack:

> Significant proof that an employer operated under a general policy of discrimination *conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.*

1981 WL 65 at *7 (citing 457 U.S. at 159 n.15) (emphasis added).

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[10] Plaintiff's other post-*Falcon* case, *Jackson v. Fort Worth Nat'l Bank*, No. 4-77-276-K, 1983 WL 30332, 1983 U.S. Dist. LEXIS 16404, *15 (N.D. Tex. June 8, 1983), was decided under the court's mistaken impression that *Falcon* did not invalidate across-the-board attacks, so the court allowed an across-the board attack without requiring the class to prove that the employer operated under entirely subjective decisionmaking processes. This is clearly wrong when viewed against subsequent post-*Falcon* Fifth Circuit case law. *Compare Jackson*, 1983 U.S. Dist. LEXIS 16404, at *15 ("Although the defendants submit that Falcon prohibits 'across the board' attacks on discriminatory practices, this court does not read the opinion as so doing.") *with Young v. Pierce*, 822 F.2d 1368, 1370 (5th Cir. 1987) (stating that *Falcon* "invalidat[ed] 'across-the-board' Title VII class action certifications"); *Falcon v. Gen. Tel. Co.*, 815 F.2d 317, 319 (5th Cir. 1987) ("In a landmark decision significantly altering employment discrimination law in the arena of class actions, the [*Falcon*] Court decided to do away with the 'across-the-board' class definition").

What Plaintiffs fail to mention is that this "entirely subjective" exception in *Falcon*'s footnote 15 is inapplicable to employers, like Lufkin, whose decisionmaking processes are governed in part by collective bargaining agreements. *See Page v. U.S. Indus., Inc.*, 726 F.2d 1038, 1053-55 (5th Cir. 1984) (holding that decisionmaking processes were not wholly subjective because the employer's "supervisory personnel, although permitted wide discretion in ... decisions, were required to make those decisions in accordance with the standards set out in the union contract" and "qualifications required by collective bargaining agreements provide valid criteria which inject an element of objectivity into the promotion process."); *Internat'l Union, United Auto., etc. v. LTV Aerospace & Defense Co.*, 136 F.R.D. 113, 122 (N.D. Tex. 1991) (holding that *Falcon*'s "entirely subjective" exception did not apply because "the existence, throughout the period pertinent to this suit, of a collective bargaining agreement governing many of the decisionmaking processes at issue establishes that the process was not entirely subjective.").[11]

As Footnote 15's "entirely subjective" exception cannot apply here, McClain and Thomas can only assert claims for which they have standing. *Id.* at 1200-01. Therefore, because McClain and Thomas did not suffer an injury from initial assignment to the entry-level position of General Foundryman, they do not have standing to assert these claims on behalf of the class.

II. Filing a Timely EEOC Charge is a Condition Precedent to be Proved by the Title VII Plaintiffs, Not an Affirmative Defense.

As for Plaintiffs' "affirmative defense" argument with regard to timely filing of an EEOC charge, the Supreme Court case[12] cited by the Plaintiffs held only that "filing a timely charge of

[11] *See also Hamilton v. Gen. Motors Corp.*, 606 F.2d 576, 580 (5th Cir. 1979) ("In the instant case ... there is a valid objective criterion, the qualification required by the collective bargaining agreements."), *cert. denied*, 447 U.S. 907 (1980).

[12] It is puzzling why Plaintiffs cited the other Supreme Court case, *Orloff v. Willoughby*, 345 U.S. 83, 85 (1953), for their affirmative defense argument. This is a 1953 case concerning the Universal Military Training and Service Act,

discrimination with the EEOC is ... a requirement that ... is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982). Contrary to Plaintiffs' assertion, *Zipes* does not decide which party has the burden of proof on the timely filing issue and does not hold that the issue is an affirmative defense to be established by the defendant (who is not in the evidentiary position to establish whether the plaintiff timely filed). *Id.* Rather, timely filing of an EEOC charge is a **condition precedent** for the plaintiff to establish in order to state a claim under Title VII. *See Price v. S.W. Bell Tel. Co.*, 687 F.2d 74, 79 n.6 (5th Cir. 1982) (citing *Zipes* and holding that "the 180-day limitation period ... constitutes a condition precedent to suit"); *Galvan v. Bexar County*, 785 F.2d 1298, 1307 n.13 (5th Cir. 1986) ("[Plaintiff] satisfied the condition precedent of filing a timely charge of discrimination with the EEOC."). The plaintiff has the burden of proof to plead and prove that conditions precedent have been satisfied, and the defendant has no duty specifically to deny in the form of an affirmative defense that a plaintiff has not met any conditions precedent. *Garcia v. Sunbelt Rentals*, 310 F.3d 403, 404 n.4 (5th Cir. 2002).[13] As McClain and Thomas have not met their burdens of establishing that they filed timely EEOC charges with respect to initial assignment claims or that the EEOC filing deadlines are subject to estoppel, tolling, or waiver,[14] Plaintiffs have not established the condition precedent of timely filing and thus fail to state an initial assignment cause of action.

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and was decided 11 years before Title VII even existed. It seems this is yet another attempt by the Plaintiffs to lead the Court into error with dated and absolutely irrelevant case law.

[13] *See also Thornton v. South Cent. Bell Tel. Co.*, 906 F. Supp. 1110, 1116 (S.D. Miss. 1995) ("When a defendant contends that a plaintiff has failed to file [an EEOC charge] timely under Title VII, the burden rests with the plaintiff to prove this condition precedent by showing either that the [EEOC charge] in fact, was filed timely or that the deadline should be subject to the equitable doctrines of estoppel, tolling, or waiver.") (citing *Blumberg v. HCA Mgmt. Co.*, 848 F.2d 642, 644 (5th Cir. 1988)).

[14] Lufkin has not waived its objection to Plaintiffs' failure to plead and prove this condition precedent, because Lufkin's Answer and Amended Answer both pointed out Plaintiffs' failure to exhaust their administrative remedies. (*See* Defendant's Original Answer, filed 3/19/97, at 6 and Defendant's Amended Answer, filed 4/7/03, at 14).

III. The "Law of the Case" Doctrine is Inapplicable, Both Because it Does Not Bar the Court from Reconsidering its Own Decisions and Because the Court Has Never Decided the Timely EEOC Charge Filing Issue.

As for Plaintiffs' "law of the case" argument, even if the doctrine required this Court to abide by its previous decisions – which it does not[15] – the Court has never decided the issue of whether McClain has satisfied his burden of proving that he satisfied the condition precedent of filing a timely EEOC charge regarding initial assignment claims. Although Plaintiffs claim that the issue was "implicitly, if not explicitly rejected when the court certified the class," (Plaintiffs' Response at 4), the class certification hearing only determined whether Plaintiffs met the Rule 23 requirements and did not decide the merits of the claims. Decisions about whether Plaintiffs' claims were within the purview of Rule 23,[16] although related, are independent of the issue of whether McClain or Thomas, on the merits, have failed to state a claim. As noted above, it is incumbent upon Plaintiffs to prove that they have satisfied the condition precedent of timely filing an EEOC charge which encompasses the asserted claims.[17] Plaintiffs here have never even attempted to prove this. Thus, even if the "law of the case" doctrine applied to bar the Court

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[15] Plaintiffs err in their interpretation of the law-of-the-case doctrine, which the Fifth Circuit applies when decisions from one court (e.g., the trial court) are subsequently viewed by another court (e.g., the appellate court). *See Pegues v. Morehouse Parish Sch. Bd.*, 706 F.2d 735, 738 (5th Cir. 1983) (the doctrine "operates to foreclose re-examination of decided issues either on remand or on a subsequent appeal"); *Paul v. U.S.*, 734 F.2d 1064, 1066 (5th Cir. 1984) ("While the 'law of the case' doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial"). Thus, a judge is not bound by his or her own previous rulings in the same case. *Knotts v. U.S.*, 893 F.2d 758, 761 (5th Cir. 1990) (holding that the appellate court is not required to apply its own prior decisions to the same case in subsequent proceedings); *U.S. v. Palmer*, 122 F.3d 215, 220 (5th Cir. 1997) ("The law-of-the-case doctrine does not ... set a trial court's prior rulings in stone, especially if revisiting those rulings will prevent error.").

[16] Moreover, certification decisions are often reexamined. *See* Fed. R. Civ. Proc. 23(c)(1). Courts frequently revisit certification decisions or redefine the class that they certified. *See Coopers & Lybrand v Livesay*, 437 U.S. 463, 469 (1978) (holding that because Rule 23(c)(1) provides that order involving class status may be "altered or amended before decision on merits," "a district court's order denying or granting class status is inherently tentative."); *Elster v Alexander*, 608 F.2d 196, 197 (5th Cir. 1979) ("The district court has a continuing power under Fed.R.Civ.P. 23(c)(1). Its certification decision 'is not irreversible and may be altered or amended at a later date.'"); *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 679 (5th Cir. 1982) (affirming district court's decision to decertify class).

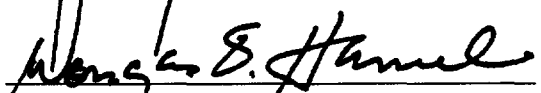
[17] *Garcia*, 310 F.3d at 404 n.4; *Thornton*, 906 F. Supp. at 1116; *Price*, 687 F.2d at 79 n.6; *Galvan*, 785 F.2d at 1307 n.13.

from reconsidering its own previous decisions, it would not apply here because the Court has not yet decided this issue.

CONCLUSION

Under *Falcon* and its Fifth Circuit progeny, across-the-board attacks are prohibited and class claims are limited to claims that McClain or Thomas can raise. Neither McClain nor Thomas suffered from the alleged discriminatory initial assignment. Nor have either filed a timely EEOC charge raising initial assignment claims, and thus they have not satisfied a condition precedent to assert such claims. The papers McClain and Thomas put before the EEOC establish, without dispute, that neither McClain nor Thomas charged that Lufkin discriminates in initial assignments. As a matter of law, as the law has been consistently applied by the Fifth Circuit since *Falcon*, Lufkin is entitled to dismissal of the class initial assignment claims.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 6th day of October, 2003, a copy of the foregoing Defendant Lufkin Industries' Reply to Plaintiffs' Response to Defendant's Motion for Partial Summary Judgment was forwarded to Plaintiffs by facsimile transmission (without attachments) and by Federal Express as follows: Timothy B. Garrigan, 2803 North Street, Nacogdoches, TX 75963-1902, (936) 560-9578, and Teresa Demchak, Goldstein, Demchak, Baller, Borgen & Dardarian, 300 Lakeside Drive, Suite 1000, Oakland, CA 94612, (510) 835-1417.

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