

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

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U.S. DISTRICT COURT
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SYLVESTER MCCLAIN, on his own
behalf and on behalf of a class of similarly
situated persons, et al.,

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Plaintiffs,

vs.

CIVIL ACTION NO. 9:97-CV-063

LUFKIN INDUSTRIES,

Defendant.

**DEFENDANT'S RESPONSE TO
PLAINTIFFS' MOTION TO RECONSIDER ORDER
DISMISSING DISPARATE TREATMENT CLASS CLAIMS**

Plaintiffs motion for reconsideration directly contradicts the position that they took four years ago before the Fifth Circuit. There, Plaintiffs stated that they were seeking only to certify a disparate impact class and argued that this was precisely what this Court had done:

Lufkin Industries' Petition cites Allison v. Citgo, *supra*, for the proposition that the initial named plaintiffs' (McClain and Thomas') disparate treatment jury claims for compensatory and punitive damages are somehow inconsistent with class disparate impact claims for equitable relief. Petition at pp. 29-30. The district court explicitly considered, and rejected, this argument. *See* Memorandum Opinion at p. 23. **In making this argument, Lufkin Industries ignores the primary obvious difference between this case and *Allison v. Citgo*; here the class has only disparate impact claims for equitable relief (triable only to the bench) while in *Allison v. Citgo* the proposed class also had parallel disparate treatment claims for compensatory and punitive damages, not present here, triable to a jury (or juries).**

Plaintiffs' Answer to Petition for Permission to Appeal Order Granting Class Certification at 22-23 (emphasis added), attached as Exhibit A.

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Ignoring “[t]he doctrine of judicial estoppel [that] prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding,” *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996), Plaintiffs now claim that they always intended to seek certification of a disparate treatment class and that they never interpreted the District Court’s Order as being limited to the certification of a disparate impact class. In order to maintain the integrity of these proceedings, Plaintiffs should not be allowed to change their legal position in mid-stream. *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 303 (5th Cir. 1998) (“Judicial estoppel applies to protect the integrity of the courts—preventing a litigant from contradicting its previous, inconsistent position when a court has adopted and relied on it”).

A. Based on the testimony of the class certification hearing, the Court’s decision not to certify a disparate treatment class was well within its inherent power to manage and control litigation.

Four years ago, after reviewing the pleadings and hearing three days of testimony from numerous putative class members, this Court properly determined that Plaintiffs’ pattern and practice disparate treatment claims were not suitable for class certification. Although the Court’s decision not to certify a disparate treatment class was based, in part, on the concerns raised by the Fifth Circuit in *Allison v. Citgo*, 151 F.3d 402 (5th Cir. 1998,) the Court’s decision not to certify an across-the-board disparate treatment class was clearly consistent with *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982), where the Supreme Court warned against certification of across-the-board disparate treatment claims, such as Plaintiffs’ claims, which broadly challenge a wide range of employment practice and fail to articulate any coherent pattern of disparate treatment.

Although Plaintiffs now disingenuously suggest that the “Court’s Rule 23(a) analysis with respect to plaintiffs’ disparate impact claim would apply equally to plaintiffs’ disparate treatment claim,” the Court recognized the difference between the two theories.¹ As Plaintiffs have stated in their recent supplemental responses to Lufkin’s interrogatories, their case-in-chief for their disparate impact class is principally based on the testimony of its two expert witnesses. In contrast, their pattern-and-practice case would require testimony from up to sixty-three witnesses, mostly concerning the individualized claims of the class members involving different supervisors, time periods, facilities, job practices, and adverse actions. Moreover, the consideration of each employee’s individual disparate treatment claims must take into consideration that employee’s seniority, attendance, job history, and educational background. *See Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 905 (5th Cir. 1987) (denial of class certification was proper because the employees’ seniority and job skills required individualized proof). Thus, even before the Civil Rights Act of 1991, the Court’s decision not to certify a disparate treatment class would have been justified.

B. Under current Fifth Circuit law, it would have been improper and an abuse of discretion to certify Plaintiffs’ disparate treatment claims as a class action.

While the Court properly exercised its discretion to deny certification of Plaintiffs’ disparate treatment claims under authority existing prior to the enactment of the Civil Rights Act of 1991, that decision was compelled by the changes to Title VII brought by that amendment. It would be plainly wrong for the Court to certify such a class today. While courts may have routinely (as Plaintiffs put it) certified cases prior to the enactment of the Civil Rights Act of

¹ While disparate impact cases, as a general matter, are better suited for class certification, Lufkin still takes the position that the Court improperly certified a disparate impact class in this particular case and will revisit this issue in a future motion. Here, Lufkin only addresses the unsuitability of Plaintiffs’ disparate treatment claims for class certification.

1991, in the thirteen years since the Civil Rights Act of 1991 provided for compensatory and punitive damages, the Fifth Circuit has not upheld the certification of a single disparate treatment class action. While Plaintiffs are correct that *Allison* does not absolutely preclude the certification of disparate treatment classes, in the Fifth Circuit, *as a general rule*, disparate treatment classes should only be certified in cases where the questions of law or fact common to the members of the class predominate over questions affecting individual members, and where Plaintiffs are able to show that a class action would be superior to other methods of adjudicating the controversy. *Smith v. Texaco, Inc.*, 263 F.3d 394, 408-09 (5th Cir. 2001) (holding that because compensatory and punitive damages predominate over injunctive relief, plaintiffs must meet 23(b)(3) requirements), *vacated by*, 281 F.3d 477 (5th Cir. 2002) (withdrawing earlier opinion because court dismissed, with prejudice, all claims in the underlying action); *Allison v. Citgo*, 151 F.3d at 416-22 (holding that trial court properly denied certification under 23(b)(2) because of the availability of monetary damages and properly denied certification under 23(b)(3) because individual issues predominated over issues common to the class).

Many class actions based on a pattern-or-practice disparate treatment theory that would have been certified before the Civil Rights Act of 1991 are no longer certifiable due to the availability of compensatory and punitive damages. Nor is this dependent entirely on Plaintiffs' prayer for relief. With the availability of substantial monetary damages (up to \$300,000 in compensatory and punitive damages for each class member), whether asked for or not, in most cases monetary relief is not purely incidental to injunctive relief. Accordingly, plaintiffs who wish to bring disparate treatment class actions under Title VII or Section 1981 today must be able to satisfy Rule 23(b)(3)'s predominance requirement and show that the class action is a superior device for resolving that particular dispute, before a disparate treatment class is

certified, whereas in the past, a disparate treatment class might have been certified under the less stringent requirements of Rule 23(b)(2). Compare *Smith* and *Allison*, *supra*, with *Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1260 (5th Cir.1977) (reversing district court's certification under (b)(3), because the court should have certified case under 23(b)(2)), *cert. denied*, 434 U.S. 822 (1977).

In *Smith v. Texaco*, the Fifth Circuit gave a good example of a disparate treatment claim that properly may be brought as a class action:

A supervisor announces to the workforce that at 5:00 that evening, each white employee will be laid off. This act is singular, and it can be assumed that the defendant acted with the same level of intent as to each white employee.

263 F.3d at 412. In the *Smith* hypothetical, there would be little need for an individualized assessment of punitive damages because it would be the same for all employees. While compensatory damages would still require proof on an individual basis (some employees may react more sensitively to the news of their termination), “questions of law or fact common to the members of the class” would still “predominate over any questions common to questions affecting individual members.” The above hypothetical also satisfies the second requirement of Rule 23(b)(3) that the “class action is superior to other available methods for the fair and efficient adjudication of the controversy.” It would certainly make more sense to have one jury consider these facts as opposed to having separate juries consider the same allegations for each employee who was affected by the termination announcement.

One only needs to read the separate 102 paragraphs in the Second Amended Supplemental Complaint detailing the claims of disparate treatment discrimination alleged as to 13 named representatives to understand how far the present case is from the hypothetical posited

in *Smith*. See Second Amended Supplemental Complaint, ¶¶ 21-123. Here, the representative plaintiffs' claims of intentional discrimination are all over the board, involving different supervisors, time periods, facilities, and job practices. The alleged harm suffered by the different representatives varies enormously. Some (such as Clarence Owens and Mary Williams) have trouble recalling any incidents of discrimination. See, e.g., Deposition of Clarence Owens² at 45-48, 54-56, 61-67, 147-49, 156-57 (testifying that he had not been subjected to race discrimination in the 31 years that he had been at Lufkin and that none of his supervisors had discriminated against him); Deposition of Mary Williams³ at 45-56, 76-77, 87-88, 92-93, 96-97, 104, 116, 121, 130, 147-48, 164-168, 172, 174, 185, 203 (testifying that her only real complaint with Lufkin was that she was not rehired sooner after she was laid off from the trailer division in 1996, and that it may have been a result of her race although she concedes that the layoff itself was done according to the terms of the collective bargaining agreement and was not discriminatory). Others, like Roald Mark (whose retaliation claims were rejected by a jury earlier this year) complain of repeated incidents of discrimination. See Second Supplemental Complaint ¶¶ 106-110,

Sylvester McClain complains primarily that he was demoted during a layoff at the trailer division in 1996 and not given sufficient support as a Quality Manager, while Buford Thomas complains that he was not promoted to certain jobs prior to 1988 and was constructively discharged in 1994 from his job in the power transmission division. Deposition of Sylvester McClain at 172-197; Class Certification Hearing at 298-304, 340; Second Amended

² Excerpts of the May 29, 2003 deposition of Clarence Owens are attached as Exhibit B.

³ Excerpts of the June 2, 2003 deposition of Mary Williams are attached as Exhibit C.

Supplemental Complaint ¶ 44.⁴ Leroy Garner complains about a promotion that he was denied 15 years before the class certification hearing, while Earl Potts complains that he once heard a fellow employee use a racial epithet. Class Certification Hearing at 44, 259-60. Patrick Ross, an employee who worked for Lufkin for two weeks, complains that he was assigned to an unpleasant job in the foundry and was mistreated by his *black* supervisors. Class Certification Hearing at 379-80.

One class representative, Sherry Calloway Swint, complains about an incident that was presumably settled. Ms. Swint was allegedly passed over for a promotion in the foundry for a buyer position in 1994. Deposition of Sherry Calloway Swint at 97-103.⁵ Plaintiffs' pleadings fail to point out that Ms. Swint complained about this to the OFCCP and that Lufkin resolved Ms. Swint's complaint in a conciliation agreement between Lufkin and the OFCCP. *Id.* at 108-12; *see also* Conciliation Agreement Between Lufkin Industries and the OFCCP, attached as Exhibit G. While Lufkin denied any wrongdoing, it nonetheless settled Ms. Swint's complaint by agreeing to pay her back pay, paying her the wage that she would have earned had she received the promotion she wanted, and promising to promote Ms. Swint to the first available buyer position. *Id.* All of this poses the question: how could Ms. Swint's individual complaint be handled in the class context when the matter was the subject of an earlier settlement agreement?

The 13 representatives are conceivably the tip of the iceberg. Otherwise, Plaintiffs have failed to meet the numerosity requirement of Rule 23(a). Hence, a trial of disparate treatment claims may include various and sundry allegations from absent class members that could involve

⁴ Excerpts to the July 8, 2003 deposition of Sylvester McClain are attached as Exhibit D; Excerpts to the August 1998 Class Certification Hearing are attached as Exhibit E.

⁵ Excerpts from the June 16, 2003 deposition of Sherry Calloway Swint are attached as Exhibit F.

possibly other time periods, supervisors, divisions, practices, adverse actions and alleged harms. In contrast to the hypothetical in *Smith v. Texaco*, where all of the class members were complaining about a single act, Plaintiffs' alleged "systemic" disparate treatment claims are nothing more than dozens (or potentially hundreds) of individual lawsuits linked together as one. As the Court recognized, the advantages and economies of a class action in such circumstances are non-existent. Unlike a trial on a disparate impact claim that would focus on practices that allegedly affected a large group of people in a similar way, a disparate treatment class action could take weeks to try because it would require the parties to focus on each class member's individualized claims.

Moreover, the potential availability of substantial compensatory and punitive damages further undermines the usefulness of the class device. Not only are the representative class members' individual claims all over the place, but their potential claims for damages would have to be assessed on a case-by-case basis.

Plaintiffs argue that that *Allison* should not apply when class counsel does not assert claims for compensatory and punitive damages. Conspicuously missing from Plaintiffs' argument, however, is any mention of *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230 244 (W.D. Tex 1999), a case where class counsel affirmatively dismissed all claims for compensatory and punitive damages on behalf of the individual class members in order to get around the problem identified by *Allison*. While the *Zachery* counsel may have resolved the problem of having to meet the requirements of 23(b)(3), by explicitly renouncing the entire class' right to compensatory and punitive damages, the court recognized that this solution created

another problem, namely how class counsel could adequately represent all members of the class when they had renounced every member's right to seek compensatory or punitive damages.⁶

It is not clear how Plaintiffs distinguish this case from *Zachery*, other than to claim that only two of the representative plaintiffs, Sylvester McClain and Buford Thomas, have affirmatively disavowed their intent to seek compensatory and punitive damages.⁷ While it is all well and good that McClain and Thomas are willing to forego their claims for compensatory and punitive damages, as plaintiffs recognize (in their request for notice permitting class members to opt out) it is presumptuous to assume that each member of the class would (or should) make the same decision. Moreover, if class counsel were to argue that punitive and compensatory damages in this case were incidental and did not predominate over other types of relief, they would be undermining the thrust of their disparate treatment claim, namely that Lufkin engages in widespread intentional discrimination in many employment practices and that many of its black employees have suffered serious harm because of Lufkin's actions.

Even assuming that class counsel is not seeking compensatory and punitive damages for any members of the class, and never intended to, certification of a disparate treatment class presents serious problems because it will either undermine a class member's right to seek full relief in the future or compromise Lufkin's Seventh Amendment right to a jury trial, if a class member were to bring such a claim at a later date. Plaintiffs suggestion that a disparate treatment

⁶This Court has also recognized the problem of renouncing compensatory and punitive damages on behalf of an entire class in *Smith v. Texaco*, 88 F. Supp. 2d 663, 679 (E.D. Tex. 2000), where it stated that it would have been "more concerned if plaintiffs' counsel did not request compensatory and punitive damages."

⁷ If anything, class counsel have left the door open to seek such relief for other members by asking for "any and all other additional relief to which Plaintiffs appear to be entitled" in their "Prayer for Relief." Plaintiffs have not allowed Lufkin to ask any of the other class members whether they intend to seek compensatory and punitive damages. In fact, when Lufkin took the deposition of Walter Butler (the first of the 11 representatives to be deposed), Plaintiffs' counsel would not allow Butler to answer any questions on this subject. Deposition of Walter Butler at 255-260.⁷ After counsel called the discovery hotline, the Court sustained Plaintiffs' counsel's objections to this line of questioning. *Id*

class be certified and that Plaintiffs be allowed to opt-out does not solve the problem either, because the claims of the disparate treatment class would clearly overlap with those of the opt-outs, and each of the individual opt-out cases would have to be tried before the class action. *See Beacon Theatres Inc. v. Westover*, 359 U.S. 500 (1959). Not only would the court still have to hear a class action case that is nothing more than many individual trials tied together, but the individuals who opted-out could come back to testify in the pattern and practice case even though they would not be entitled to any additional monetary relief. The principal value of the class action is that it is more efficient than having a series of individual trials. In this case, however, there would be no such advantage. In contrast, there would be far less duplication between the individual opt-out trials on disparate treatment claims and a trial of a disparate impact class action case.⁸

Quite simply, abandoning potential claims for compensatory and punitive damages is not a viable solution. One cannot adequately represent a class of individuals unless one seeks the full panoply of relief to which each individual might be entitled. Accordingly, the only other way to obtain certification of a disparate treatment class is to meet the requirements of Rule 23(b)(3). Even though the second *Allison* opinion may have been more restrained than the earlier withdrawn decision, there is no doubt that *Allison* signaled a dramatic change in how disparate treatment class certification decisions will be analyzed in the years to come. Plaintiffs' suggestion to the contrary is naïve. Moreover, the Court's decision in *Smith v. Texaco* leaves no doubt that *Allison* was not an aberration. While disparate treatment class actions may still be certified in some rare cases, as a general practice disparate treatment cases will have to be

⁸ Lufkin would still argue that the individual trials should be tried first, as there is likely some overlap between the factual issues.

brought individually. While Lufkin continues to disagree with the Court's certification of a disparate impact class, the Court's decision not to certify a disparate treatment class in 1999 was entirely consistent with Fifth Circuit law.

C. While front pay is an equitable remedy and could be awarded in a class disparate impact case, the Court correctly recognized that front pay is unlikely to be an appropriate remedy for Plaintiffs' alleged disparate impact claims.

In its July 11, 2003 Order, the Court stated that class members would only be entitled to damages that are available under disparate impact claims. While compensatory and punitive damages are not available for disparate impact claims, *see* 42 U.S.C. § 1981a, successful plaintiffs in disparate impact cases are entitled to equitable relief including, **in appropriate cases**, back pay and front pay. 42 U.S.C. § 2000e-5(g)(1).

Although the Court did not specifically address front pay in its written order, at the hearing on July 11, 2003, the Court indicated that it did not intend to award front pay to members in the class who did not opt out. There was no question, however, that the Court recognized that front pay was an equitable remedy and that the Court would not necessarily be precluded by *Allison* from awarding it.

In any event, Plaintiffs' concerns about front pay in this disparate impact case are largely academic, because front pay is unlikely to be a necessary remedy, even if Plaintiffs succeed in proving a disparate impact case.⁹ Front pay is typically awarded in termination cases where reinstatement would not be feasible. However, it is never a preferred remedy and should be used as a last resort, such as in the case where the employee was subject to serious harassment or where

⁹Before the Court considers any remedies, Plaintiffs will have to prove that there is a specific employment practice at Lufkin that has a disparate impact on some black employees. To date, Plaintiffs have yet to identify a specific practice, much less prove that it has a disparate impact on black employees.

there was considerable hostility between the supervisor and the employee prior to the employee being terminated. *See Weaver v. Amoco Prod. Co.*, 66 F.3d 85, 88 (5th Cir. 1995) (“This Circuit continues to recognize the decided preference to award reinstatement instead of front pay for a discriminatory discharge...”). Although Plaintiffs have not yet identified any specific facially neutral employment practices at Lufkin that have a disparate impact on black employees, Lufkin has seen no evidence so far that would suggest that Plaintiffs’ disparate impact class case will focus on terminations. Plaintiffs’ statistical expert’s report contains no statistical evidence showing that terminations at Lufkin are handled in a discriminatory manner, and only one of the named representatives, Roald Mark, has complained about being terminated because of his race, and his termination claim has already been considered and rejected by a jury.¹⁰

While front pay could be awarded in a promotion case, such as the case where there is no vacancy to which a plaintiff could be promoted immediately, it is hardly the only remedy available in such cases. The Court could also order an employer to pay an employee the rate that the employee would earn in the position that the employee was supposed to have, until the desired position became available. This was the remedy that Lufkin agreed to in its conciliation agreement with the OFCCP regarding Sherry Calloway Swint. While such a remedy would not be called “front pay,” it is essentially the same. The advantage of such a remedy is that it is considerably less speculative than awarding a lump sum based on some estimate of how long it will take the employee to reach the desired promotion or how long the employee will remain with the company. *See Williams v. Pharmacia, Inc.*, 137 F.3d 944, 954 (7th Cir. 1998) (holding that front-pay award must be limited in duration and that Plaintiff must demonstrate with

¹⁰ Others have been laid off during reductions-in-force but recognized that their lack of seniority and not their race resulted in their lay off. *See, e.g.*, Deposition of Mary Thomas at 205.

reasonable degree of certainty how long plaintiff would have expected to work for defendant). Calculating front pay would be especially difficult and subject to a very individualized analysis, where employees are frequently laid off for non-discriminatory reasons when business is slow, and rehired when it picks up. Thus, the Court's reluctance to award front pay to people who do not opt out is reasonable and would not be an abuse of discretion.

D. By requiring notice, allowing class members to opt-out, and tolling the statute of limitations, the Court has established procedural safeguards to ensure that any class member who desires to seek relief for any claim of intentional discrimination may do so.

Plaintiffs argue that the Court ignored "required procedural safeguards" when it granted Lufkin's Motion to Dismiss Disparate Treatment Claims by disingenuously suggesting that Lufkin's Motion was more akin to a Rule 12 or Rule 56 motion.¹¹ It was not. It was nothing more than a motion seeking clarification of the Court's consideration of the Plaintiffs' Rule 23 motion. While there was no question that the Court had only certified a disparate impact class (and Plaintiffs had conceded as much in the Fifth Circuit), Lufkin wanted the Court to explicitly state that it had not certified a disparate treatment class. Otherwise, there was a danger (obviously recognized by the Court in its recent Order) that class members would be lulled into thinking that the statute of limitations would remain tolled for any individual disparate treatment claims.

In its Order, the Court has gone out of its way to protect the interests of the absent class members, first by making it abundantly clear that it has not dismissed any class member's individual disparate treatment claims. The Court has also sought to toll the statute of limitations on any individual disparate treatment claims until the Court has had an opportunity to provide

¹¹ Nor has Lufkin moved to dismiss Plaintiffs' individual disparate treatment claims. Any decision to seek summary judgment on claims brought by class members who opt out will be made on a case-by-case basis, depending on the substance of their allegations and whether there is a disputed issue of fact pertaining to those allegations.

notice to all class members that they have a right to opt out of the class and bring their disparate treatment individual claims for which they might be able to recover compensatory or punitive damages.

Plaintiffs' alternative request that the Court certify its Order for an interlocutory appeal and stay the proceedings pending such appeal should also be denied.¹² Plaintiffs knew full well, four years ago, that the Court had not certified a disparate treatment class, and yet they chose not to file a cross appeal when Lufkin filed its Petition for Discretionary Review. Now, three months before trial, they want to return to the Fifth Circuit in order to make an argument that is directly contrary to the argument that they made in 1999. Moreover, even if the Plaintiffs had been genuinely confused by the Court's earlier Order, there would be no justification for an interlocutory appeal in this case. Plaintiffs have an even weaker case for certification of a disparate treatment class than the Plaintiffs in *Smith v. Texaco* did. Based on *Allison*, there is no mystery as to how the Fifth Circuit might consider the Court's decision not to certify a disparate treatment class. Thus, because this case does not "involve a controlling question of law as to which there is substantial ground for difference of opinion," the Court should not certify this case for an interlocutory appeal. 28 U.S.C. § 1292(b).

¹² In the event that the Court decides to certify its Order for an interlocutory appeal (and Lufkin would urge the Court not to do so), Lufkin would ask that the Court certify the original class certification order as well, in order to give Lufkin the opportunity to again ask the Fifth Circuit to review the certification of the disparate impact claim class as well. In short, if the Fifth Circuit is going to review the Court's decision not to certify a disparate treatment class, it might as well review the decision to certify a disparate impact class.

A

NO. 99-33

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SYLVESTER McCLAIN and BUFORD THOMAS, on their own behalf and representing a certified class of African American employees, and PATRICK ROSS, MARY THOMAS, EDDIE K. MASK, LEROY GARNER, SHERRY CALLOWAY SWINT, JOHN DOE a/k/a "A", JOHN DOE II a/k/a "B", JOHN DOE III a/k/a "C", CLIFFORD R. DUIRDEN, EARL POTTS, and ROALD MARK, representing a certified class of African American employees,

Plaintiffs-Respondents

v.

LUFKIN INDUSTRIES, INC.,

Defendant-Petitioner

On Appeal from the United States District Court
For the Eastern District of Texas
Lufkin Division

**ANSWER TO PETITION FOR PERMISSION TO APPEAL
ORDER GRANTING CLASS CERTIFICATION**

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I.

FACTS NECESSARY TO UNDERSTAND THE QUESTION PRESENTED

On March 31, 1999 the Honorable Howell Cobb, United States District Judge for the Eastern District of Texas, filed a Memorandum Opinion and Order certifying a plaintiff class of African American employees in this employment discrimination case. On the same date the district court also filed an Order Designating Class Representatives, designating 11 class representatives in addition to the two initial named plaintiffs. Copies of these documents are included in Exhibit A to Petitioner Lufkin Industries, Inc.'s ("Lufkin Industries") Petition for Permission to Appeal Order Granting Class Certification ("Petition"). On April 16, 1999 the undersigned counsel for the Plaintiffs-Respondents received the Petition and now submits this Answer opposing the Petition.¹ In its Petition Lufkin Industries describes only selected facts and its own disputed assertions. To better reflect the actual circumstances of this case, the Plaintiffs-Respondents Class provides the following additional information:

A. Prior Proceedings

In January of 1995 Plaintiff McClain sent a letter to the EEOC complaining not only about the race discrimination he personally suffered, but also that race discrimination "is a cultural problem that must be addressed to prevent discriminatory practices in

¹ On April 21, 1999 this Court granted an opposed motion for an extension of time up to and including April 29, 1999 to file this Answer.

Lufkin Trailer Division or any other part of Lufkin Industries ...". A copy of the McClain letter of January 29, 1995 was submitted to the district court with Plaintiffs' Response in Opposition to Defendant's Motion to Dismiss Class Action Claims, filed on June 23, 1997. The January 29, 1995 letter is a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of, constituting a charge of discrimination pursuant to 29 CFR § 1601.12(b).²

This lawsuit was subsequently filed on February 26, 1997. After depositions of the parties were conducted, Lufkin Industries filed a Motion to Dismiss Class Action Claims, seeking dismissal of all class claims without permitting plaintiffs any discovery regarding class certification issues. That motion was denied on October 22, 1997. Pursuant to court order the parties filed a Discovery Plan Relating to the Question of Class Certification on November 3, 1997. The Discovery Plan included provisions requiring Lufkin Industries to describe and provide certain limited relevant information and to produce its Vice President of Human Resources, Paul Perez, for deposition as well as one other deposition pursuant to Rule 30(b)(6), Fed.R.Civ.Pro. Although Lufkin Industries agreed

² Petitioner Lufkin Industries would have the Court rely on a later, and more limited, charge of discrimination prepared for plaintiff McClain by the EEOC. In doing so, Lufkin Industries fails to mention that the formal charge of discrimination was signed under protest by plaintiff McClain only because the EEOC threatened to dismiss his claims if he did not sign. See EEOC letter of August 6, 1996 and McClain letter of August 12, 1996, Exhibits 1 and 2, respectively, in Respondents' Appendix.

to the Discovery Plan, it resisted producing much of the relevant information (including its personnel databases reflecting work force and applicant flow statistics) and refused to appear for the Rule 30(b)(6) deposition, thereby preventing refinement of statistical analyses. See Order of November 26, 1997 and pp. 3-5 of the August 18, 1998 transcript in Petitioner's Appendix (hereinafter, "PA ____").

On November 11, 1997 Plaintiffs filed their Motion for Class Certification. Lufkin Industries filed its Response to Plaintiff's Motion for Class Certification on or about December 1, 1997 urging the district court to accept an analysis comparing the Lufkin Industries work force to census data in a nine-county recruiting area reflecting only 14 percent African Americans. In fact, Lufkin Industries' applicant flow data (which Lufkin Industries initially denied the existence of) reflects the relevant applicant pool to be 32 percent African American. McCune Report at p. 3, Exhibit E to the Petition. This Court has rejected general population comparisons, such as that previously urged by Lufkin Industries, in favor of more relevant applicant flow comparisons. EEOC v. Olson's Dairy Queen, 989 F.2d 165, 169 (5th Cir. 1993).

This case was initially assigned to the Honorable Thad Heartfield, United States District Judge for the Eastern District of Texas, who presided over a class certification hearing on February 18, 1998. A copy of the transcript of the February 18, 1998 hearing is included as *Exhibit 3* in Respondents' Appendix. References to the hearing before Judge Heartfield will be "H ____".

Without a ruling on class certification, the case was transferred to Judge Cobb, who has indicated that he considered a transcript of the hearing before Judge Heartfield. Judge Cobb also required Lufkin Industries to produce a considerable volume of organizational charts, employee manuals, written personnel policies, and personnel databases. See Order for Production of Evidence and Witnesses filed June 30, 1998. Judge Cobb held a second class certification hearing from August 18 through August 20, 1998, a transcript of which is included in Petitioner's Appendix. Judge Cobb also spent several hours inspecting Lufkin Industries' facilities in Lufkin, Texas.

B. Lufkin Industries

Lufkin Industries' Petition provides very little information about its racial composition or its decision making processes. While it is inappropriate for the courts to inquire about, or consider, the merits of claims while considering class certification, many courts have recognized the usefulness of considering both statistical and anecdotal evidence relevant to class certification. See Lindemann and Grossman, Employment Discrimination Law, 3rd Ed., (BNA 1996) at pp. 1621-26.

Lufkin Industries has one Human Resources office and has the same personnel policies throughout its Lufkin, Texas operations regarding hiring, demotions, training and compensation. H 196-97. Lufkin Industries exaggerates the effectiveness of the collective bargaining agreement it is party to. Petition at p. 2, for example. As explicitly recognized by the district court, the

seniority provisions of the collective bargaining agreement are obliterated by Lufkin Industries' use of exceptions for skilled employees. See Memorandum Opinion at p. 6.³ The district court also concluded that "the union grievance procedure has traditionally been ineffective." *Ibid.* at p. 7.

Despite any distinction between hourly (Union) and salaried employees, Lufkin Industries concedes that it exercises subjective discretion in all hiring, promotion, termination, discipline and demotion decisions, and that any disparate impact on African Americans is a result of this discretionary decision making. PA 464, 467-68. Lufkin Industries' Vice President for Human Resources also conceded that the disparities are possibly due to racially prejudiced decision makers at moderate and lower levels, that racial prejudice is possibly imbedded throughout the Lufkin Industries organization, and that there is a racial imbalance increasingly evident as you go higher up the Lufkin Industries "pyramid." PA 563, 573-75.

Lufkin Industries has an all-white, all-male Board of Directors. H 184. Of its approximately 2,200 employees none of the 37 who benefit from a bonus program are African American. H

³ The exception reads:

...in the case of promotions, demotions, transfers, layoffs, and recalling to work ... departmental seniority shall govern if their ability to perform the work is approximately equal." ... The determination of an employee's ability to perform the work is a function of management.

See page 38 of the collective bargaining agreement, attached to the Petition at Exhibit B.

198. None of the 70 employees who benefit from a stock option program are African American. H 199. Lufkin Industries' personnel databases reflect 116 employees with a base pay above \$4,000 per month, none of whom are African American. H 199-200; and McCune Report at p. 8.

Lufkin Industries has four objective hiring criteria (no termination within two years, six months of continuous recent employment, no problems with absenteeism, and broadly construed industrial experience), none of which explain racial disparities. PA 459-61.⁴ The applicant flow data from 1994 to 1997⁵ reflected that 32 percent of the relevant applicants for employment at Lufkin Industries were African American⁶, nonetheless, less than 19 percent of the relevant work force is African American. McCune Report at p. 2. A qualified African American applicant has a 36 percent chance of being hired by Lufkin Industries while a similarly qualified white applicant has a 49 percent chance of

⁴ Perez did testify that there were only a few jobs, "[a] very small percentage of the hires," that have any educational requirement. H 189; PA 461. Lufkin Industries has not presented any evidence of these few positions' education requirements. If these requirements do exist it is possible that they would account for disparities in only a few positions.

⁵ Perez initially falsely denied the existence of applicant flow data. H 184. Eventually applicant flow data for only 1994-1997 was produced.

⁶ Relevant applicants include only whites and African Americans. All of Dr. McCune's relevant work force comparisons are to African Americans and whites, eliminating other minorities who might also be subject to discrimination and whose inclusion would dilute results.

being hired, a statistically significant disparity. McCune Report at p. 5.

African Americans hired by Lufkin Industries are assigned to divisions and other organizational units that appear to be segregated. The district court recognized this as channeling African Americans into less desirable positions. See Memorandum Order at pp. 5-6. Lufkin Industries has six divisions with more than 30 employees. African Americans are over-represented in the Foundry Division (where working conditions can be very harsh) to a statistically significantly level and are under-represented in the remaining divisions to a statistically significant level.⁷ McCune Report at pp. 3-4. Less than seven percent of the promotions from hourly to salaried positions are awarded to African Americans even though the hourly work force from which the promotions are made is over 24 percent African American, another statistically significant disparity. McCune Report at p. 6.

Lufkin Industries' personnel databases reflect 19 numbered departments, 13 of which have less than 10 percent African American employees, including eight departments with no African American employees. PA 67-68. Seventy-one percent of the African American employees are concentrated into only two departments. *Ibid.* These

⁷ Depending on whether the racial composition of the departments is compared to applicant flow (32 percent African Americans) or to the overall composition of Lufkin Industries' work force (19 percent), African Americans may not be seen as under-represented in the Trailer Division, where conditions are also harsh.

figures suggest that Lufkin Industries, as it organizes itself into departments, is largely segregated by race.

Lufkin Industries' personnel databases also reflect organization by Chart of Account numbers, of which there are 31. Twenty-five of the Chart of Account categories have less than 10 percent African American employees, including 19 Charts of Account with no African Americans at all. PA 69. Eighty percent of the African American employees are concentrated into only three of the Chart of Account categories. These figures also suggest that Lufkin Industries, as it organizes itself into Charts of Account, is still largely segregated.

Despite higher average seniority, Lufkin Industries' African American employees are significantly over-represented in positions paying less than \$12 per hour and significantly under-represented in hourly positions paying greater than \$12 per hour. McCune Report at pp. 7-8. Less than five percent of Lufkin Industries' salaried work force is African American and among the salaried ranks African Americans are significantly over-represented in positions paying less than \$2,000 and are entirely (and significantly) excluded from 116 positions paying \$4,000 or more per month. McCune Report at p. 8.

African Americans are discharged for cause at roughly twice the rate one would expect based on their representation in Lufkin Industries' work force, another statistically significant disparity. McCune Report at p. 10. African Americans are also

disproportionately affected by layoffs to a statistically significant degree. McCune Report at p. 11.

Even Lufkin Industries' statistician conceded that Lufkin Industries' hiring practices for the period 1994 through 1997 significantly disadvantaged African Americans, as did the hiring practices for the years 1994, 1995 and 1997 analyzed separately. PA 644-47. Only in 1996, a year in which an unusually high number of employees were hired into the Foundry, did the applicant flow analysis fail to reveal statistically significant disparities. *Ibid.*

C. Class Representatives

All of the class representatives are African Americans who are subject to Lufkin Industries' discriminatory subjective decision making, which discourages African Americans from pursuing advancement. See Memorandum Opinion at p. 7. Class representative Sylvester McClain has worked for Lufkin Industries for approximately 27 years in salaried and hourly positions and is currently a Bargaining Unit member. Class representative Buford Thomas worked for approximately 17 years as a low level salaried employee. Contrary to Lufkin Industries' representations, two of the class representatives hold salaried, non-Bargaining Unit positions. See Affidavit of Mary Thomas in Support of Class Certification and Affidavit of "A" in Support of Class Certification.⁸ Another class representative is a former employee

⁸ The Affidavits in Support of Class Certification are attached to Plaintiffs' Brief Explaining How Evidence Relates to Each Class Certification Criterion, filed on January 21, 1998.

the bid sheets involved and could not say that the small sample, selected by Lufkin Industries, fairly represents all of the promotions to salaried positions. PA 618; H 155-59. Dr. Chorush's analysis assumed that the applicant pool consisted of the employees who signed the bid sheet even though he was aware that some of the openings were awarded to persons not on the bid sheets and that the actual applicant pool included others. PA 621-23. He conceded that his analysis did not account for the fact that supervisors encouraged, and discouraged, employees to sign bid sheets. PA 623. Dr. Chorush conceded that his analysis did not take into account openings that were not posted for bid and knew that there were a couple hundred promotions not included in his analysis. PA 627-28. Dr. Chorush conceded that there were many personnel actions resulting in higher pay that he did not consider to be promotions. PA 631. Dr. Chorush also conceded that he added at least one successful African American to his analysis who should have been excluded, skewing the results in favor of Lufkin Industries. PA 629. He also left out at least one unsuccessful African American, again skewing the results in favor of Lufkin Industries. PA 632. Finally, Dr. Chorush also admitted that his statistical analysis did not take into account the fact that many of the promotion decisions he was looking at were interdependent, further skewing the results of the analysis.⁹ PA 639. Dr. Chorush plainly

⁹ This criticism is true of all of Dr. Corush's analyses where he disaggregated the data down to the level of each individual position. Of course, this Court has long recognized the impropriety of disaggregating data as a defensive tactic. Capaci v. Katz and Besthoff, Inc., 711 F.2d 647, 654-57 (5th Cir.

admitted that his analysis had two weaknesses that would impact the result, his assumption regarding the applicant pool and the failure to account for co-variance or interdependence. PA 639.

Dr. Chorush performed a second promotion analysis for Lufkin Industries in which he compared successful promotion applicants to a proxy applicant pool defined as employees with the same job title as the person selected. H 163. Dr. Chorush conceded that his analysis irrationally assumed that everyone with a particular job title was equally qualified for promotion regardless of their prior experience. H 163. Dr. Chorush admitted that this definition of the applicant was arbitrary. H 164. He also conceded that his proxy applicant pool excluded employees who may have been equally qualified with the successful applicant. H 164-65. Finally, it is obvious that this definition of the applicant pool is almost designed to hide the effects of Lufkin Industries assigning African Americans into dead-end jobs from which promotions are unlikely.

Given the admitted weaknesses, the district court was more than justified in not relying on Dr. Chorush's analyses.

Lufkin Industries' Petition stresses Dr. Chorush's criticisms of some of the analyses conducted by Plaintiff's statistician, Dr. McCune. See also Chorush's criticisms attached to the Petition at Exhibit G. Almost all of Dr. Chorush's criticisms are hypothetical or theoretical (i.e., a different sample or consideration of factors for which there was no evidence such as skill, experience, education, performance, *might* have made a difference) or involve

1983).

disaggregating data down to the level of the individual job, or date, or some smaller sample. Both categories of criticism have been rejected by this Court. Capaci, *supra*, 711 F.2d at 654-56.

Lufkin Industries' Petition first criticizes Dr. McCune's layoff analysis, arguing that hourly and salaried layoffs should be disaggregated. Petition at pp. 8-9. However, nowhere does Lufkin Industries, or Dr. Chorush, explain why hourly and salaried employees would be affected differently in layoffs. Dr. Chorush's criticism and counter-analysis actually disaggregates the data not only by hourly/salary status, but by job and date. See Chorush criticisms at p. 9 and its Exhibit 6. Nowhere is there an explanation for this excessive disaggregation of the data resorted to by Dr. Chorush in order to come up with insignificant results. At the very least, Dr. McCune's analysis demonstrates that African Americans are significantly more likely to be assigned to positions affected by layoffs.

Lufkin Industries' Petition criticizes Dr. McCune's analysis of promotion from hourly to salaried positions. Petition at pp. 9-10 and 21-22. As explained, Dr. McCune's analysis of promotions from hourly to salaried positions was based on reasonable assumptions given the impossibility of in defining "promotion" without Lufkin Industries providing a witness pursuant to Rule 30(b)(6), as anticipated by the agreed discovery plan, to provide additional information about descriptions in Lufkin Industries' personnel database. PA 3-5, 73-82. As Dr. McCune also explained, the bid sheets produced by Lufkin Industries reflected that the

actual applicants included employees from throughout the hourly work force. PA 127. Contrary to Lufkin Industries's Petition, Dr. McCune never said that all blacks were equally likely to receive a promotion to a salary job. *Ibid.* As Lufkin Industries' Petition fails to mention, Dr. McCune adopted as much of Dr. Chorush's criticism as appropriate, and still found significant discrepancies in promotions. PA 73-82. Again without explanation, Dr. Chorush's criticism includes an unreasonable disaggregation down to the level of the individual job. See Chorush criticism at p. 5, and its Exhibit 3.

Lufkin Industries' Petition makes hypothetical criticisms of Dr. McCune's assumption that the racial composition of different divisions should be roughly the same without providing any information or explanation for the statistically significant under-representations and over-representations of African Americans in the various divisions. Petition at p. 10. Instead, Lufkin Industries incorrectly credits Dr. McCune with some unlikely assumptions and implies that the discrepancies could have been explained because there may have been fewer African American applicants for engineering positions. *Ibid.* First, as noted before, Lufkin Industries conceded that there were very few positions, such as engineers, with educational requirements. See fn. 2, *supra*. Second, such hypothetical criticisms are ineffective. Capaci, *supra*, 711 F.2d at 653-54. Lufkin Industries has made no showing that any legitimate explanation exists for the

disproportionate distribution of African Americans throughout its organizational divisions, departments, and Charts of Account.

Lufkin Industries' Petition argues that the over-representation of African Americans in lower paying positions and the under-representation of African Americans in higher paying positions is acceptable as long as employees are being paid the same wages for the same work. Petition at p. 11. Lufkin Industries is essentially arguing that it should be free to channel African American employees, or some other disfavored minority, into lower paying and less desirable jobs as long as they do not involve African Americans doing precisely the same work as that being done by higher paid whites.

Lufkin Industries' Petition also criticizes Dr. McCune's comparison of applicant flow data to work force composition because the work force reflects 40 years of hiring practices. This criticism ignores Dr. McCune's unassailed analysis demonstrating statistically significant disparities in the rates of selection/rejection during the same period of the applicant flow data. McCune Report at p. 5. Also, Lufkin Industries has not described any reason to believe that their applicant flow composition has changed, nor have they demonstrated that a comparison to 40 years of applicant flow data would affect the analysis. Hypothetical and theoretical criticisms are insufficient; Lufkin Industries must demonstrate a real effect of the alleged errors. Capaci, supra, 711 F.2d at 653-54. Indeed, Dr. Chorush's criticisms are saturated with suggestions that

various statistical flaws might exist or that education, experience, skills, performance or job histories, might make a difference. See, for instance, the hypothetical description of Simpson's Paradox and comments regarding compensation disparities in Dr. Chorush's criticisms at pp. 2-3 and 6, respectively. Similarly, in its Argument, Lufkin Industries implies that the number of entry level jobs, skill requirements and the number of openings will explain the disparities in the racial composition of its various divisions; however, Lufkin Industries has made no such showing and has not even produced information necessary to test its arguments.

II.

SUMMARY OF REASONS WHY THE PETITION AND STAY SHOULD BE DENIED

The district court thoroughly reviewed a great deal of the evidence, held two class certification hearings, inspected Lufkin Industries' work place, and correctly applied the controlling law in certifying the plaintiff class pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, as this Court recently approved in Allison v. Citgo, 151 F.3d 402, 415-16 (5th Cir. 1998). Simply put, the district court has expended considerable effort before thoughtfully exercising its discretion to certify a class pursuant to the controlling law and it would serve no purpose for this Court to revisit the issue.

Traditionally, courts of appeals do not consider permissive interlocutory appeals absent exceptional circumstances. Coopers & Lybrand v. Livesey, 437 U.S. 463, 474-75 (1978). Here, the

Petitioner has demonstrated no exceptional circumstances, or any other persuasive rationale, for this Court to revisit the district court's well-reasoned class certification determination or to stay proceedings in the district court. Instead, Petitioner merely urges this Court to reconsider arguments that have been considered and rejected by the district court based on well-settled law that the Petitioner entirely ignores.

III.

ARGUMENT

Much of Lufkin Industries' Petition, including its arguments about statistical evidence and the circumstances underlying the individual claims of McClain and Thomas, consists of arguments explicitly rejected by the district court and thinly veiled attempts to goad this Court into making a premature prohibited inquiry or determination of the merits of the class or individual claims. Lufkin Industries' strategy must fail for at least three reasons. First, the district court's determination to certify the plaintiff class is well reasoned. Second, even the limited statistical evidence available at this stage strongly supports the class claims. See Section I-B, *supra*. Third, the Supreme Court long ago recognized the inappropriateness of a preliminary inquiry into the merits before or during class certification. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974) ("[T]he 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.") See also Redditt v. Mississippi Extended Care Centers, 718 F.2d 1381 (5th Cir. 1983).

A. The trial court considered the controlling law and appropriate evidence in certifying the plaintiff class.

As described in the Memorandum Opinion, the district court properly considered controlling law in concluding that plaintiffs have demonstrated a *prima facie* disparate impact case and met the requirements of Rule 23(a) and (b)(2). It would serve little purpose to repeat the district court's cogent and thorough analysis here. Also, as this Court has recently indicated, the district court maintains substantial discretion in determining whether to certify a class action, a decision reviewed only for abuse. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 408 (5th Cir. 1998).¹⁰ It is also worthy of note that Lufkin Industries' Petition does not even acknowledge most of the law controlling the issue of class certification, including: footnote 15 in General Telephone Co. of Southwest v. Falcon, 102 S.Ct. 2364, 2371 fn. 15 (1982), indicating that certification of a broad class is appropriate if discrimination manifested itself through entirely subjective decision making processes; this Court's holdings in Shipes v. Trinity Industries, 987 F.2d 311, 316 (5th Cir. 1993); and/or Carpenter v. Stephen F. Austin State University, 706 F.2d 608, 617 (5th Cir. 1983), that allegations of subjective personnel processes that operate to discriminate satisfy the commonality and typicality

¹⁰ From Lufkin Industries' Petition it does not appear that the class certification decision is being challenged for application of an incorrect legal standard.

of Rule 23(a), or that Title VII specifically permits a decision making process to be analyzed as one employment practice if it cannot be separated into elements for purposes of analysis. 42 U.S.C. § 2000e-2(k)(1)(B)(i).

Lufkin Industries' reliance on Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988), is entirely misplaced. Watson holds that

[I]f an employer's undisciplined system of subjective decision making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply. ... We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.

Watson, 108 S.Ct. at 2787.

Lufkin Industries also argues that because "only four of the 13 representatives ever worked in the foundry" that the numerosity requirement of Rule 23(a) is somehow not met. See Petition at p. 17. Of course, there is no authority for the proposition that the numerosity requirement of Rule 23(a) depends on the number of class representatives in any particular category. Rule 23(a) refers to the number of class members, not class representatives.

Lufkin Industries acknowledges that several witnesses testified to their observation that African Americans tended to be disproportionately channelled into the Foundry Division, where working conditions are harsh. Petition at p. 17. Lufkin Industries then argues these observations were merely subjective beliefs that cannot constitute evidence of discrimination. *Ibid*. In making this argument Lufkin Industries ignores substantial

statistical information, based on its own personnel databases, indicating that African Americans are disproportionately hired into, and represented in, the Foundry Division. See Section I B., *supra*, and the Memorandum Opinion at pp. 5-6.

B. Certification of a broad class is appropriate where the exercise of subjective and discriminatory decision making affects many employment practices.

As noted above and in the Memorandum Opinion below, recent changes to Title VII; fn. 15 in *Falcon*, *supra*, 102 S.Ct. at 2371, and this Court in *Shipes*, *supra*, 387 F.2d at 316; and *Carpenter*, *supra*, 706 F.2d at 617, all provide for certification of broad classes based on allegations of subjective personnel decisions that operate to discriminate in a broad array of decisions such as hiring and promotion.

Without describing any rationale, Lufkin Industries' Petition argues that a class cannot include both hourly bargaining unit members and salaried employees. Petition at p. 22. The cases cited by Lufkin Industries involved circumstances where district courts exercised their discretion to avoid certifying classes because the only plaintiff was not a member of the proposed class or where there was an actual conflict between subsets of a proposed class. See *Wells v. Ramsay, Scarlett & Co.*, 506 F.2d 436 (5th Cir. 1975); *Wagner v. Taylor*, 836 F.2d 578, 595-96 (D.C. Cir. 1987), respectively. *Vuyanich v. Republic Nat'l Bank of Dallas*, 723 F.2d 1195, 1199 (5th Cir. 1984), explicitly distinguishes itself from the instant case in which the class is affected by a general policy of discrimination.

In one other case a district court found that the provisions of an effective collective bargaining agreement introduced "valid objective criterion" inconsistent with the plaintiffs' allegation of a discriminatory subjective decision making process. Int'l Union, UAW AFL-CIO v. LTV Aerospace and Defense Co., 136 F.R.D. 113, 121 (N.D. Tex. 1991). Contrary to the rationale of that case, here the district court found that the collective bargaining agreement is a mere formality because an exception for skilled employees all but obliterates the seniority provisions of the collective bargaining agreement, and the grievance procedure has been traditionally ineffective. See Memorandum Opinion at pp. 6-7.

In rejecting Lufkin Industries' argument, the district court recognized that there is no conflict apparent in the diverse class certified and that "there is no foundation to infer adversity from diversity." See Memorandum Opinion at p. 23.

C. The class is adequately represented and the individual claims of two class representatives does not preclude class certification.

As at least one other jurisdiction has recognized, it is ironic that an employer being sued for employment discrimination would purport to be concerned about whether the representative plaintiffs will fairly and adequately protect the interests of the plaintiff class; it is "a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house." Eggleston v. Chicago Journeyman Plumbers Local No. 130, 657 F.2d 890, 895 (7th Cir. 1981). So, ironically by not surprisingly, Lufkin Industries claims to be concerned with whether the

representative parties will fairly and adequately protect the plaintiff class.

First, the court below has certified a total of 13 class representatives, from different divisions, different bargaining units, and salaried positions. Lufkin Industries' Petition continues its energetic effort to report picayune differences between the experiences of different class members, an argument that the district court has considered and rejected. See Memorandum Opinion at p. 23. However, Lufkin Industries has never found an actual conflict between any class representative and members of the class. Furthermore, the district court has indicated a willingness to reconsider certification, consider modifying the class, consider decertifying the class, or to appoint additional class representatives if it becomes appropriate. See Memorandum Opinion at pp. 15 and 24. Lufkin Industries' Petition all but ignores that the class is represented by current and former employees from almost every conceivable classification and area of the company.

Lufkin Industries' Petition cites Allison v. Citgo, *supra*, for the proposition that the initial named plaintiffs' (McClain's and Thomas') disparate treatment jury claims for compensatory and punitive damages are somehow inconsistent with class disparate impact claims for equitable relief. Petition at pp. 29-30. The district court explicitly considered, and rejected, this argument. See Memorandum Opinion at p. 23. In making this argument, Lufkin Industries ignores the primary obvious difference between this case

and Allison v. Citgo; here, the class has only disparate impact claims for equitable relief (triable only to the bench) while in Allison v. Citgo the proposed class also had parallel disparate treatment claims for compensatory and punitive damages, not present here, triable to a jury (or juries). Allison v. Citgo implicated problems with the Seventh Amendment right to a jury because the class disparate impact and class disparate treatment claims involved a substantial overlap of issues that would require possibly conflicting determinations by both the bench and a jury or juries. *Ibid.*, 151 F.3d at 423-25. Here, the only issues triable to a jury are the individual claims of McClain and Thomas, which the district court has severed.

It should also be noted that class representatives' individual claims are often present and, absent an actual conflict, do not interfere with class certification. See Senter v. General Motors, Inc., 532 F.2d 511 (6th Cir. 1976). Otherwise, an employer would be able to preclude a class action by retaliating against, or committing some other individual tort against, the class representative. *Ibid.*, 532 F.2d at 525 fn. 32.

D. McClain's January 1995 letter is adequate to constitute an EEOC charge.

As the district court correctly noted, class members may "piggy back" on McClain's exhaustion of administrative remedies before the EEOC. See fn. 1 in Memorandum Opinion, citing Albemarle Paper Co. v. Moody, 95 S.Ct. 2362, 2370 (1975); see also Oatis v. Crown Zellerbach Corporation, 398 F.2d 496, 499 (5th Cir. 1968). As indicated by Lufkin Industries, the district court relied on

plaintiff McClain's January 29, 1995 letter to constitute a charge of discrimination. See Petition at p. 23, fn. 16.

In this jurisdiction charges of discrimination, especially those prepared by lay people, are interpreted with the utmost liberality. Tillman v. City of Boaz, 548 F.2d 592 (5th Cir. 1977); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970). Furthermore, this Court has long recognized that an EEOC charge consists of a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of, pursuant to 29 CFR § 1601.12(b), and that any deficiencies in such a charge can be remedied by subsequent amendment. Price v. Southwestern Bell Telephone Co., 687 F.2d 74, 77 (5th Cir. 1982).

Therefore, it is plainly not an abuse of discretion for the district court to consider that McClain's letter of January 29, 1995 describing race discrimination at Lufkin Industries as a "cultural problem that must be addressed to prevent discriminatory practices in Lufkin Trailer Division or any other part of Lufkin Industries" as sufficient to constitute a charge of discrimination that could reasonably have triggered an investigation into the discriminatory employment actions addressed in this class action. The evidence is uncontradicted that McClain sent this letter to the EEOC in January of 1995. H 214. Certainly, the plaintiff class should not be punished if the EEOC mishandled the initial letter.

E. Plaintiffs' statistical analysis is not akin to that in *Wards Cove*.

Lufkin Industries tries to argue that Dr. McCune's comparison of hourly African American and white employees who are promoted into salaried jobs is somehow similar to the analysis rejected by the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115, 2121 (1989), where the Ninth Circuit relied solely on a comparison of the racial compositions of the employer's cannery work force with its non-cannery work force. This is a straw man argument: the plaintiff class has never suggested, and the district court never accepted, such an analysis. Instead, as the district court explicitly recognized, Dr. McCune compares the racial composition of the relevant portions of the hourly work force with the racial composition of the hourly work force that has been promoted to salaried positions. See Memorandum Opinion at p. 11, McCune Report at p. 6, and testimony at PA 85-86.

The district court concluded that Dr. McCune's analyses compared similarly situated groups of employees, that the data underlying her report was of sufficient reliability to support her conclusions, and that appropriate data sets were analyzed. Memorandum Opinion at p. 12. Curiously, Judge Cobb also indicates that an analysis of similarly situated groups "do not require a close inquiry into the relevance of the underlying data." Memorandum Opinion at p. 12. In light of the thoroughness of the Memorandum Opinion, this appears to be simply a reference to the district court's willingness to revisit relevance to the merits during the liability phase of litigation after the parties have had

an opportunity to further refine the statistics. For instance, Lufkin Industries still has the opportunity to produce information concerning education, skills, performance, job histories in an effort to explain statistical disparities and such data might be relevant to liability. Throughout the Memorandum Opinion the district court is careful to state that it is reviewing evidence only for the purposes of determining class certification and whether plaintiffs have made a *prima facie* case; it would of course be inappropriate for the district court to make inquiry, or conclusions, concerning the merits of the case or even the relevance of evidence on the merits. Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 177 (1974).

IV.

CONCLUSION

FOR THE REASONS EXPLAINED ABOVE, the Respondent-Plaintiff class respectfully requests that Lufkin Industries' Petition, and request for a stay, be DENIED.

Respectfully submitted,

By:



Timothy B. Garrigan
Texas Bar Card No. 07703600
Attorney, Plaintiffs-Appellees

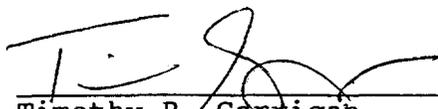
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CERTIFICATE OF SERVICE

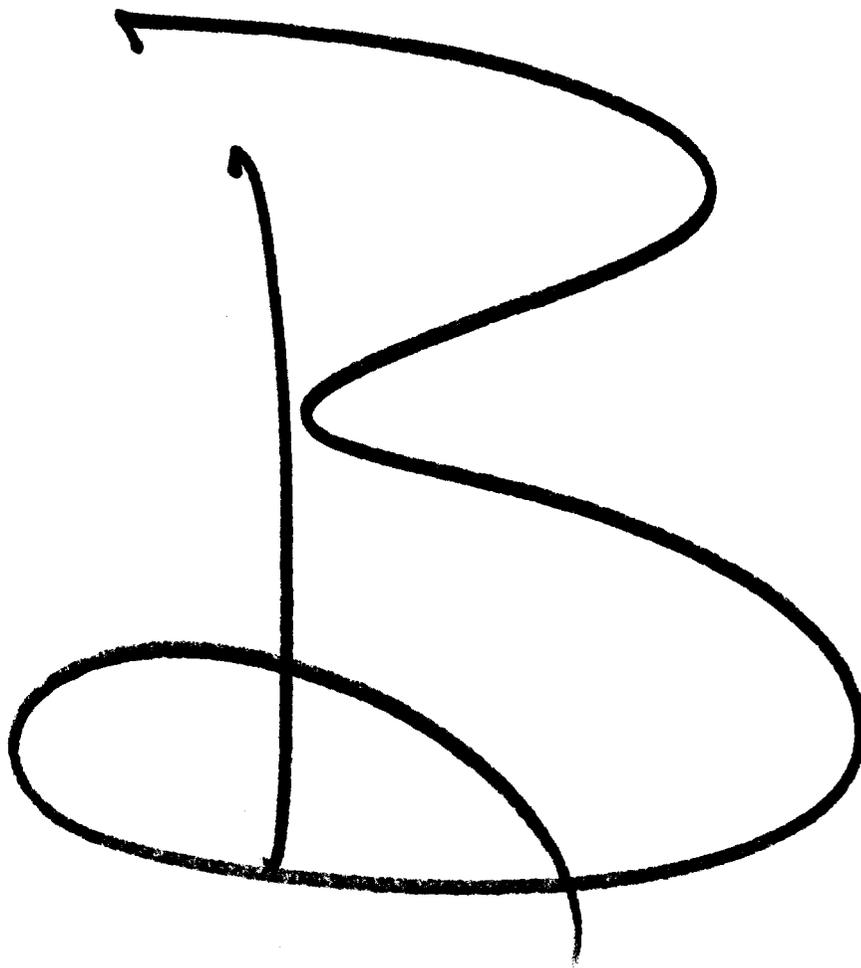
I hereby certify that I have served all counsel of record in this case, including the following, with a true and correct copy of the foregoing Plaintiffs-Respondents' Answer to Petition for Permission to Appeal Order Granting Class Certification by sending same via United States mail, postage prepaid:

John H. Smither/Christopher Bacon
Vinson & Elkins
2806 First City Tower
1001 Fannin
Houston TX 77002-6760

on this 28th day of April, 1999.



Timothy B. Garrigan



1 A. I don't know the answer to that.

2 Q. But you think he was here about three years
3 ago?

4 A. Yes, ma'am.

5 Q. Power Transmission -- that's a pretty good
6 department to work in?

7 MR. KONECKY: Objection, form.

8 A. I would think so.

9 Q. (BY MS. MAHONY) You're currently employed in
10 the Power Transmission department, aren't you?

11 A. I am now.

12 Q. How long have you been employed in the Power
13 Transmission department?

14 A. Thirty-two years.

15 Q. You've been in Power Transmission for
16 32 years?

17 A. Yes, ma'am.

18 Q. Were you ever in the Oilfield Division?

19 A. Yes, ma'am, I was.

20 Q. When was that?

21 A. It's been about two, maybe three years now.

22 Q. Were you working for both divisions at one
23 point in time?

24 A. I really don't know the answer to that. They
25 was --

1 A. No, ma'am.

2 Q. When did you get the classification hot gear
3 welder?

4 A. Three years, two years maybe; two, three
5 years, something like that.

6 Q. Now, hot gear welder is the highest welder
7 classification, isn't it?

8 MR. KONECKY: Objection, form.

9 A. Yes.

10 Q. (BY MS. MAHONY) And it's the highest paid
11 welding job in the fabrication department, isn't it?

12 MR. KONECKY: Objection, form.

13 A. Hourly it is.

14 Q. (BY MS. MAHONY) What is your salary per hour?

15 Around 15?

16 A. Can I go back to that?

17 Q. Sure.

18 A. I really don't know right now.

19 Q. You don't know what your salary --

20 A. No.

21 Q. But you know that you're the highest paid
22 welder --

23 A. I know, but I just --

24 Q. What's the welding classification below hot
25 gear welder?

1 Is that Hot Gear Welder A -- Gear
2 Welder A?

3 MR. KONECKY: Objection, form.

4 Q. (BY MS. MAHONY) What about Welder Class A?

5 A. Welder Class A.

6 Q. You make more money than a Welder Class A.

7 Correct?

8 A. True.

9 Q. Do you know how much more money you make than
10 a Welder Class A?

11 A. I think about a dollar and a half, \$2.

12 Q. If I were to guess that you make about \$16 an
13 hour, does that sound right?

14 A. That's about right.

15 Q. Are you at the top of your wage
16 classification?

17 A. For hourly, I am.

18 Q. How long have you been at the top of your
19 classification in terms of wages for hourly?

20 As long as you've been welding hot gears?

21 MR. KONECKY: Objection, form.

22 A. It's kind of a tricky question because I don't
23 know -- I don't quite understand the question fully --

24 Q. (BY MS. MAHONY) Okay.

25 A. -- because there's two sides to the question

1 A. Correct.

2 Q. Okay. After the split, who was your
3 supervisor?

4 A. Bobby Allen.

5 Q. Is Bobby Allen your supervisor today?

6 A. Yes, he is.

7 Q. Do you get along with Bobby Allen?

8 MR. KONECKY: Objection, form.

9 A. Yes, ma'am.

10 Q. (BY MS. MAHONY) Ever have any trouble with
11 Bobby Allen?

12 MR. KONECKY: Objection, form.

13 A. No, ma'am.

14 Q. (BY MS. MAHONY) So Bobby Allen's been a good
15 boss?

16 MR. KONECKY: Objection, form.

17 A. Yes.

18 Q. (BY MS. MAHONY) How would you describe your
19 relationship with Bobby Allen?

20 A. He's a fair -- pretty fair man, pretty good.

21 Q. Pretty good. Any hesitations?

22 A. What do you mean?

23 Q. Well, you said "pretty good." Any problems
24 you're referring to?

25 A. Oh. No, ma'am.

1 Q. Is Bobby Allen someone you can trust?

2 MR. KONECKY: Objection, form.

3 A. As far as I know.

4 Q. (BY MS. MAHONY) If you had a personal
5 problem, could you go to Bobby Allen and talk to him?

6 MR. KONECKY: Objection, form.

7 A. I would say "yes."

8 Q. (BY MS. MAHONY) Do you believe Bobby Allen
9 has ever discriminated against you because of your race?

10 MR. KONECKY: Objection, form.

11 A. Not as I know of.

12 Q. (BY MS. MAHONY) Do you believe Bobby Allen
13 has discriminated against anyone else because of their
14 race?

15 MR. KONECKY: Objection, form.

16 A. Not as I know of.

17 Q. (BY MS. MAHONY) You're not aware of any
18 situation where you think Bobby Allen made an employment
19 decision because of someone's race?

20 MR. KONECKY: Objection, form.

21 A. Not that I'm aware of.

22 Q. (BY MS. MAHONY) Do you think Mr. Allen's ever
23 treated you differently because of your race?

24 A. No, ma'am.

25 Q. Who are the other supervisors in the PT fab

1 department right now?

2 A. Dale Staten.

3 Q. Do you know what his job title is?

4 Is it foreman?

5 A. Yeah, foreman; floor foreman.

6 Q. How long have you worked with Mr. Staten?

7 A. Three, four years.

8 Q. Do you get along with Mr. Staten?

9 MR. KONECKY: Objection, form.

10 A. Yes, ma'am, I do.

11 Q. (BY MS. MAHONY) You testified that you

12 thought Mr. Allen was a fair man. Do you think

13 Mr. Staten is a fair man?

14 MR. KONECKY: Objection, form.

15 A. Yes, ma'am.

16 Q. (BY MS. MAHONY) Do you believe that

17 Mr. Staten has ever discriminated against you because of

18 your race?

19 MR. KONECKY: Objection, form.

20 A. No, ma'am.

21 Q. (BY MS. MAHONY) Do you think he's treated you

22 unfairly because of your race?

23 MR. KONECKY: Objection, form.

24 A. Would you repeat that?

25 Q. (BY MS. MAHONY) Has Mr. Staten ever treated

1 you unfairly?

2 MR. KONECKY: Objection, form.

3 A. No, ma'am.

4 Q. (BY MS. MAHONY) Do you think Mr. Staten has
5 treated other employees in the PT fabrication department
6 unfairly?

7 MR. KONECKY: Objection, form.

8 A. No, ma'am.

9 Q. (BY MS. MAHONY) Do you think Mr. Allen has
10 treated any other employee that you're aware of
11 unfairly?

12 A. Not that I'm aware of.

13 Q. Has anyone ever complained to you about
14 Mr. Staten or Mr. Allen?

15 A. No, ma'am.

16 Q. Has anyone ever come to you and said, "I think
17 Mr. Allen and Mr. Staten have discriminated against me
18 because of my race"?

19 A. No, ma'am.

20 Q. Has anyone in the PT fabrication department --
21 and I'm talking since the split -- ever come to you and
22 complained about race discrimination?

23 A. Yes, ma'am.

24 Q. Who was that?

25 A. Charles Lee.

1 shops split in the PT fabrication department?

2 A. Are there any more I've worked with?

3 Q. Right, that have supervised you.

4 A. Other than Don when I go to Buck Creek from
5 time to time.

6 Q. Okay. Let's talk about Mr. Baker.

7 Don Baker was your supervisor for a
8 number of years. Correct?

9 A. Correct.

10 Q. This was before the split in the shops?

11 A. Correct.

12 Q. Would you say he was your supervisor for
13 ten years?

14 A. Comfortably speaking, I'd say that, yeah. It
15 may have been longer.

16 Q. Do you get along with Mr. Baker?

17 A. Yes, ma'am.

18 Q. Did Mr. Baker ever treat you unfairly?

19 MR. KONECKY: Objection, form.

20 A. No, ma'am.

21 Q. (BY MS. MAHONY) Are you aware of any
22 situation where you thought Mr. Baker treated another
23 employee unfairly?

24 A. No, ma'am.

25 Q. How would you describe Mr. Baker?

1 A. Fair.

2 Q. Does he make employment decisions on the basis
3 of race?

4 MR. KONECKY: Objection, form.

5 A. Make what?

6 Q. (BY MS. MAHONY) Are you aware -- has
7 Mr. Baker ever made any employment decision on the basis
8 of someone's race?

9 MR. KONECKY: Objection, form.

10 A. Not as I know of.

11 Q. (BY MS. MAHONY) During the ten or so years
12 that Mr. Baker supervised you, do you believe that he
13 subjected you to racial discrimination?

14 MR. KONECKY: Objection, form.

15 A. No.

16 Q. (BY MS. MAHONY) Do you believe he made any
17 decisions about your employment on the basis of your
18 race?

19 MR. KONECKY: Objection, form.

20 A. No.

21 Q. (BY MS. MAHONY) Do you have an opinion if
22 Mr. Baker subjected any other employee in the
23 fabrication department to racial discrimination?

24 MR. KONECKY: Objection, form.

25 A. Not as I know of.

1 Q. (BY MS. MAHONY) Did anyone ever complain to
2 you about Mr. Baker, saying that he made a decision on
3 the basis of race?

4 A. No.

5 Q. Is there any situation in the ten years that
6 you worked with Mr. Baker where you think race played a
7 role in a decision he made?

8 MR. KONECKY: Objection, form.

9 A. None that I can think of now.

10 Q. (BY MS. MAHONY) What about Mr. Allen? Same
11 question.

12 A. None that I can think of.

13 Q. What about Mr. Staten?

14 A. None that I can think of.

15 Q. You're a member of the boilermakers union?

16 A. Yes, ma'am.

17 Q. When did you join the union?

18 A. Thirty years ago.

19 Q. Have you ever been a union steward?

20 A. No, ma'am.

21 Q. Have you ever wanted to be a union steward?

22 A. No, ma'am.

23 Q. Who's your union steward right now?

24 A. David Richards.

25 Q. Does Mr. Richards work in the fabrication

1 A. Yes.

2 Q. (BY MS. MAHONY) Are you happy with the
3 boilermakers union?

4 MR. KONECKY: Objection, form.

5 A. Pretty much, yes.

6 Q. (BY MS. MAHONY) Pretty much?

7 Any problems?

8 A. Well, I guess it could be more; but that's
9 what we got.

10 Q. Have you welded any hot gears this year?

11 A. No, I haven't.

12 Q. But you're still paid as a hot gear welder?

13 A. Yes, ma'am.

14 Q. How many other hot gear welders are there?

15 A. There's one more.

16 Q. What's his name?

17 A. Ricky Sowell.

18 Q. What's Ricky Sowell's race?

19 What's his race?

20 A. White.

21 Q. Do you get along with Ricky Sowell?

22 A. Yes, ma'am.

23 Q. You currently work the day shift. Correct?

24 A. We both do.

25 Q. Both do?

1 A. No, ma'am.

2 Q. (BY MS. MAHONY) Have you helped train other
3 people?

4 A. Yes, ma'am, I have.

5 Q. And what have you trained them on? Welding?

6 A. On welding.

7 Q. How many other people would you say that
8 you've trained?

9 A. The numbers go up pretty high.

10 Q. How many people work on the day shift right
11 now --

12 MR. KONECKY: Objection, form.

13 Q. (BY MS. MAHONY) -- in the PT fab department?

14 A. I'd say about 35.

15 Q. Do you get along with most of your co-workers?

16 MR. KONECKY: Objection, form.

17 A. I get along with all of them.

18 Q. (BY MS. MAHONY) Ever had any problems with
19 them?

20 A. No, ma'am.

21 Q. Do you think they trust you?

22 MR. KONECKY: Objection, form.

23 A. I really can't see in their heads to tell you
24 that.

25 Q. (BY MS. MAHONY) Okay. I think it's fair to

1 say you've been with the company a long time.

2 A. Yes, ma'am.

3 Q. You're a very experienced welder. Correct?

4 MR. KONECKY: Objection, form.

5 A. Correct.

6 Q. (BY MS. MAHONY) You have the highest paid job
7 in the PT fab department of the hourly employees.

8 MR. KONECKY: Objection, form.

9 Q. (BY MS. MAHONY) Correct?

10 A. Correct.

11 Q. You're probably respected by your co-workers.
12 Correct?

13 MR. KONECKY: Objection, form.

14 A. True.

15 Q. (BY MS. MAHONY) And you're respected by your
16 supervisors. Correct?

17 MR. KONECKY: Objection, form.

18 A. True.

19 Q. (BY MS. MAHONY) Do they respect your opinion
20 on welding issues?

21 If you say, "This needs to be done this
22 way," do they listen to you?

23 MR. KONECKY: Objection, form.

24 A. Sometimes.

25 Q. (BY MS. MAHONY) Sometimes they don't?

1 A. Sometimes they don't.

2 Q. Do you have a lot of friends at Lufkin?

3 MR. KONECKY: Objection, form.

4 A. Lufkin Industries?

5 Q. (BY MS. MAHONY) Lufkin Industries, yes.

6 A. I would think so.

7 Q. Do you consider Don Baker a friend?

8 MR. KONECKY: Objection, form.

9 A. Yes, I do.

10 Q. (BY MS. MAHONY) Bobby Allen?

11 MR. KONECKY: Same objection.

12 A. Yes, I do.

13 Q. (BY MS. MAHONY) Dale Staten?

14 MR. KONECKY: Objection, form.

15 A. Yes, I do.

16 Q. (BY MS. MAHONY) Ricky Sowell?

17 MR. KONECKY: Objection, form.

18 Q. (BY MS. MAHONY) Do you consider him a friend?

19 A. Yes, I do.

20 Q. Do you think if your co-workers had concerns
21 about their job or their supervisor or someone else,
22 they would come to you and talk to you --

23 MR. KONECKY: Objection, form.

24 Q. (BY MS. MAHONY) -- about those concerns?

25 A. I can't really get into their heads.

1 On some issues, maybe, yes.

2 Q. Mr. Owens, have you ever complained to anyone
3 at Lufkin Industries about race discrimination?

4 MR. KONECKY: Objection, form.

5 A. No.

6 Q. (BY MS. MAHONY) In the 31 years that you've
7 worked here, do you feel that you've ever been subjected
8 to racial discrimination by anyone at Lufkin Industries?

9 MR. KONECKY: Objection, form.

10 A. No.

11 Q. (BY MS. MAHONY) Let me back up. I want to
12 make sure --

13 You've never complained to anyone at the
14 company about race discrimination. Is that correct?

15 A. No, that's not correct.

16 Q. Okay. Who have you complained about
17 discrimination to?

18 A. Oh, it's just been a few things that happened,
19 you know --

20 Q. Okay.

21 A. -- things that we discussed, you know; people
22 that told me about things, you know. I wasn't telling
23 them; they were telling me.

24 Q. So you don't feel like you've been a victim of
25 discrimination while you've been employed -- or been

1 subjected to discrimination while you've been employed
2 at Lufkin Industries?

3 MR. KONECKY: Objection, form.

4 A. I can't get inside everybody's head.

5 Q. (BY MS. MAHONY) Is there any situation or the
6 circumstances of any situation, a promotion or any kind
7 of employment decision, where the circumstances led you
8 to think that you were being treated differently because
9 of your race?

10 A. Well, I don't know what they -- how they make
11 decisions, but -- you know, as far as I know, maybe not.

12 Q. When you say "don't know how they make
13 decisions," who are you referring to? Who is "they"?

14 A. I'd say supervisors and salaried personnel.

15 Q. Who makes decisions in the PT fab
16 department --

17 MR. KONECKY: Objection, form.

18 Q. (BY MS. MAHONY) -- for hourly employees?

19 Say, for promotions, do you know who
20 makes decisions?

21 MR. KONECKY: Objection, form.

22 A. It's one of two people.

23 Q. (BY MS. MAHONY) And that would be?

24 A. David Jinkins --

25 Q. Okay.

1 A. Yes, ma'am, I do.

2 Q. Mr. Owens, do you have any reason to believe
3 that black employees would be less likely to get a
4 supervisor or foreman job in Oilfield than white
5 employees?

6 MR. KONECKY: Objection, form.

7 A. I can't answer that one.

8 Q. (BY MS. MAHONY) Do you know any
9 African-American employees employed by Lufkin Industries
10 above the level of foreman?

11 A. Not -- I don't know any. There might be some
12 there, but I don't know if they're there.

13 Q. Do you know if any black African-American
14 employees have applied for a job above foreman, let's
15 say in the PT fab department?

16 A. Not as I know of. I can't think of nobody.

17 MR. KONECKY: Whenever you get to a
18 point where you want to take a break --

19 MS. MAHONY: Just a few more questions,
20 if you don't mind.

21 Q. (BY MS. MAHONY) Is that okay with you?

22 A. Okay.

23 Q. I think we've established that you've received
24 several promotions while employed at Lufkin Industries.
25 Correct?

1 A. Correct.

2 Q. You've never been laid off, meaning your job
3 was terminated, while you were employed at Lufkin
4 Industries?

5 A. No, ma'am.

6 Q. Have you been demoted while employed at Lufkin
7 Industries?

8 A. No, I haven't.

9 Q. What would you consider to be the worst job in
10 the PT fab department?

11 MR. KONECKY: Objection, form.

12 A. That -- are you talking about just the
13 department I'm working in or are you talking about the
14 whole PT fab as a whole?

15 Q. (BY MS. MAHONY) Just the department you're
16 working in.

17 A. Just the department I'm working in? Hot
18 gears.

19 Q. But it's also the most highly compensated
20 welding job among hourly employees -- correct -- in your
21 department.

22 A. Say that again.

23 Q. It pays the most money.

24 A. Yes, it do.

25 There is a reason for that, too.

1 Q. And the reason being?

2 A. The rest of the welders just drop their hood
3 and make a weld; but on that hot gear job, you have to
4 sit in about 6- or 700-degree heat for 12, 14, 18 hours
5 a day.

6 That's why the money's better.

7 Q. Did you want to be a hot gear welder?

8 A. Not really.

9 It's bad on your health.

10 Q. But you're happy with the money you make as a
11 hot gear welder?

12 MR. KONECKY: Objection, form.

13 A. I try to be happy.

14 Q. (BY MS. MAHONY) Have you ever asked to be
15 transferred to another job other than hot gear welder?

16 A. Well, when my health starts deteriorating real
17 bad, I will move.

18 MS. MAHONY: If you want to take a quick
19 break, we can. I'm going to mark this and go over the
20 affidavit. Or we can go ahead.

21 MR. KONECKY: Why don't we take a break.

22 (Recess from 2:58 p.m. to 3:05 p.m.)

23 (Exhibit Nos. 15 and 16 marked)

24 MS. MAHONY: Okay. We're going back on
25 the record.

1 know of?

2 A. Not as I can think of right now.

3 Q. Other than Mr. Hyde, have you observed any
4 other white employees being promoted over black
5 African-American employees who have more seniority?

6 MR. KONECKY: Objection as to form.

7 A. No. I can't think of nobody.

8 Q. (BY MS. MAHONY) Is Mr. Hyde still a foreman
9 in the Oilfield Division?

10 A. I don't -- I think he got cut back.

11 Q. He was busted back?

12 A. I think he was. I'm not sure.

13 Q. The next paragraph, first sentence, "I have
14 observed that white employees have more opportunities
15 for promotions than black African-American employees" --
16 what have you observed?

17 A. I guess most of your blacks don't -- they
18 don't want to step up and take the responsibility
19 because they're scared of -- once they get out from
20 under the bargaining unit, they're scared of discipline,
21 whatever -- you can get treated any kind of way, so most
22 blacks don't want to take the job.

23 Q. Do you know any black employee who has been
24 discouraged from taking a salaried job?

25 MR. KONECKY: Objection, form.

1 A. None that I can think of right now.

2 Q. (BY MS. MAHONY) Would you agree with me that
3 if you don't apply for a promotion, you're not going to
4 get a promotion to a salaried position?

5 MR. KONECKY: Objection, form.

6 A. It's not exactly the fact that you apply for a
7 salary job. If I'm not mistaken, the way they do that
8 is: They mainly just kind of go by, I guess, job
9 ability or something and just choose who they want.

10 Q. (BY MS. MAHONY) So it's your opinion that you
11 haven't seen black African-American employees in
12 salaried positions because the black African-American
13 employees you've observed haven't wanted to be in those
14 positions?

15 A. They just haven't been chosen --

16 MR. KONECKY: Objection, form.

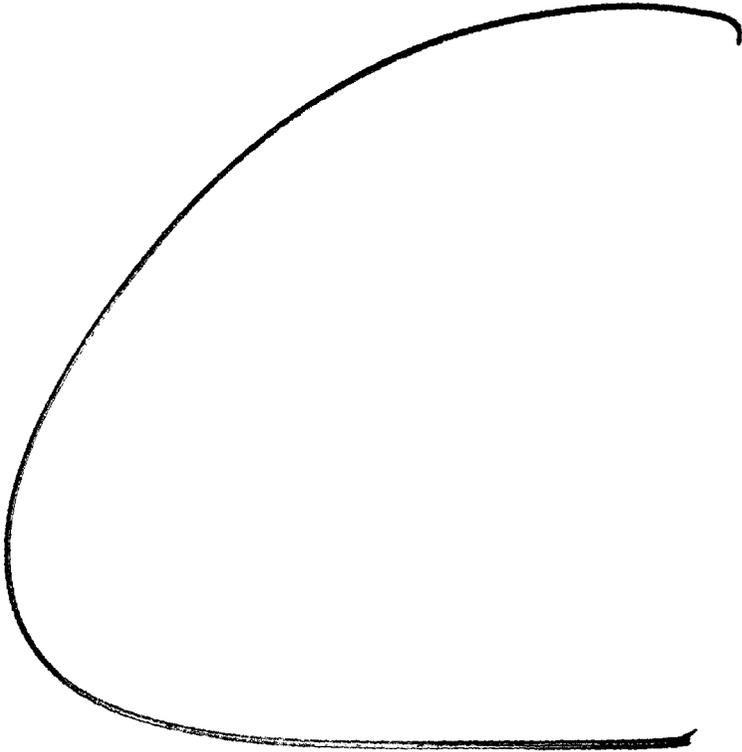
17 Q. (BY MS. MAHONY) Pardon?

18 A. They just haven't been chosen for those
19 positions.

20 Q. The next sentence says "The highest level
21 black African-American employee in the Oil Field
22 Division is a Foreman, and there is only one black
23 African-American Foreman."

24 Who are you referring to?

25 A. I think that would have to be Curtis Thomas.



1 Q. Did you report the incident to anyone?

2 A. Yes. I told Paul Perez about it.

3 Q. Do you know what Mr. Perez did?

4 A. No, I don't.

5 Q. How many times did you talk to Mr. Perez about
6 the incident?

7 A. I only told him once.

8 Q. Did he follow up with you about the incident?

9 A. No.

10 Q. Did you have any other run-ins with Homer
11 Eubanks while you were employed as a security officer?

12 A. No.

13 Q. How long were you employed as a security
14 officer? From April of 1997 through --

15 A. ...June of 2000.

16 Q. Just for the record, in June of 2000, you
17 became a cycle counter?

18 A. Yes.

19 Q. Did you get along with Mr. Ray?

20 A. Yes.

21 Q. Did Mr. Ray ever discriminate against you
22 because of your race?

23 MS. BURRELL: Objection.

24 MS. MAHONY: Basis for your objection?

25 MS. BURRELL: You can ask her, based on

1 her personal knowledge, whether she knows if he did or
2 not.

3 MS. MAHONY: I assume she's testifying
4 from her personal knowledge.

5 MS. BURRELL: Well, I'm just clarifying.

6 Q. (BY MS. MAHONY) Based on your personal
7 knowledge, did Mr. Ray ever discriminate against you
8 because of your race?

9 A. Well, it's like this -- I'm not sure, because
10 you could be talking to people every day and they're
11 discriminating against you and you'll never even know --

12 Q. And how is that?

13 A. -- until you're just gone.

14 Q. And how is that?

15 A. With Lufkin Industries.

16 Q. You haven't understood some of my questions.
17 I don't understand your answers. What do you mean they
18 could be discriminating against you, you don't know,
19 it's Lufkin Industries?

20 A. I have been around people that will smile in
21 your face and laugh on you -- behind your back or
22 whatever, you know, or write stuff down about you that's
23 wrong and tell you you're all right in your face.

24 Q. Who at Lufkin Industries has told you you're
25 all right to your face and said something different

1 behind your back?

2 A. I don't have any --

3 THE WITNESS: I don't have to answer
4 that, do I?

5 MS. BURRELL: Yeah.

6 A. Okay.

7 Q. (BY MS. MAHONY) Ms. Williams, please answer
8 the question.

9 A. Repeat it for me, please.

10 Q. Ms. Williams, who at Lufkin Industries has
11 said one thing to your face and something else behind
12 your back?

13 Ms. Williams, please answer the
14 question.

15 MS. MAHONY: Let's go off the record.

16 (Discussion off the record from
17 10:50 a.m. to 10:51 a.m.)

18 MS. MAHONY: Okay. Let's go back on the
19 record.

20 Q. (BY MS. MAHONY) Ms. Williams, you've
21 testified that you think people at Lufkin Industries
22 might have discriminated against you because of your
23 race. I asked you to provide me examples, and you said
24 because some people will say one thing to your face and
25 tell you something else behind your back.

1 MS. BURRELL: Objection, form.

2 MS. MAHONY: Basis?

3 MS. BURRELL: You're misstating her
4 testimony.

5 Q. (BY MS. MAHONY) Is it your testimony that
6 Lufkin Industries has discriminated against you because
7 of your race?

8 MS. BURRELL: Objection.

9 Today? Are you talking about what she
10 just testified to? Are you talking about generally?

11 MS. MAHONY: I'm talking about generally.

12 Q. (BY MS. MAHONY) At any time that you've
13 worked at Lufkin Industries, do you believe that you
14 have been subjected to discrimination because of your
15 race?

16 A. Yes.

17 Q. When?

18 A. Like when I was laid off the first time, it's
19 like some white people that I worked with -- I would see
20 them out in the stores and stuff and they would tell me
21 that they had been called back to work maybe two weeks
22 or whatever after we had been laid off, and I was never
23 called back.

24 Q. Anything else?

25 A. That's about it.

1 Q. So other than not being called back from a
2 layoff, in your personal opinion, you have not been
3 discriminated against by Lufkin Industries because of
4 your race?

5 A. It's something else, but I just can't think of
6 it right now.

7 Q. Now, earlier you testified that you think
8 people at Lufkin Industries discriminate because they'll
9 tell you one thing to your face and something else
10 behind your back.

11 MS. BURRELL: Objection.

12 Q. (BY MS. MAHONY) Is that your testimony?

13 A. Could I just --

14 Q. Sure.

15 A. That's what I was just talking about. It's
16 like, "You're all right, but we're not calling you
17 back." That's what --

18 Q. So someone has told you to your face --

19 A. Uh-huh.

20 Q. -- "You're all right"?

21 A. Yes.

22 Q. What have they told you behind your back?

23 MS. BURRELL: Objection.

24 Q. (BY MS. MAHONY) What did they say behind your
25 back?

1 A. Well, it's what they have showed me.

2 Q. And what have they showed you?

3 A. That they didn't want me back.

4 Q. Isn't it correct that after you were laid off
5 the first time, you were rehired by Lufkin Industries?

6 A. Yeah, into another division -- I mean --

7 THE WITNESS: What do you call it? Like,
8 you know, you have your hourly; and then --

9 MR. BAKER: Department.

10 THE WITNESS: Huh?

11 MR. BAKER: Division, department; same
12 thing.

13 THE WITNESS: Yeah.

14 Q. (BY MS. MAHONY) But you didn't like working
15 in the Trailer Division, did you?

16 MS. BURRELL: Objection.

17 You can answer, if you understand the
18 question.

19 THE WITNESS: Okay.

20 A. No.

21 Q. (BY MS. MAHONY) Did you want to go back and
22 work in the Trailer Division?

23 A. No.

24 Q. So you believe that you were discriminated
25 against because you were not recalled into another

1 division?

2 MS. BURRELL: Objection.

3 MS. MAHONY: Basis?

4 MS. BURRELL: That's not what she said.

5 Q. (BY MS. MAHONY) You were upset that you
6 weren't called back to work after your first layoff.

7 Correct?

8 A. Right.

9 Q. To your knowledge, if you had been called
10 back, would you have been called back to the Trailer
11 Division?

12 A. I probably would have been, but it didn't
13 happen.

14 Q. If you had been called back to the Trailer
15 Division, would you have taken the job?

16 A. Yes.

17 Q. Even though you didn't like the Trailer
18 Division?

19 A. Right.

20 Q. Other than not being called back from the
21 first layoff, do you believe that you have been
22 subjected to discrimination because of your race by
23 anyone at Lufkin Industries at any other time during
24 your entire employment with Lufkin Industries?

25 A. Yes.

1 Q. When was that?

2 A. I wouldn't know the exact dates.

3 Q. Okay. What are you referring to, then?

4 A. The trailer plant --

5 Q. Uh-huh.

6 A. -- where they were -- would train some people
7 for certain jobs and other people couldn't have those
8 jobs or whatever.

9 Q. What jobs?

10 A. I couldn't name them because I didn't work
11 there long enough to learn everything.

12 Q. Did you ever apply for any training and your
13 request was denied?

14 A. I had thought about signing up for their
15 welding class, but it was too late for that. I didn't
16 get in it on time.

17 Q. So you didn't sign up for the class?

18 A. I was told it was full or something of that
19 nature or something; it wasn't even happening or
20 something.

21 Q. Who told you that?

22 A. Whoever was in the -- I don't remember all
23 those people. I'm sorry.

24 Q. Did you want to be a welder?

25 A. Yes. I had thought about that at one time.

1 Q. Did you ever go to your supervisor and express
2 any interest in welding?

3 A. That's why I was saying that, because I had
4 tried; but it wasn't, you know --

5 Q. Who was your supervisor at the time?

6 A. It was either Kenneth White or Bob Adams.

7 Q. Did either Mr. White -- did Mr. White conduct
8 the welding training?

9 A. I'm not sure who conducted what or how they
10 did it. It's just that I was interested in it.

11 Q. Did you tell Mr. White you were interested in
12 welding?

13 A. Yes.

14 Q. And what did he say?

15 A. That's the only time I mentioned it, when I
16 was trying to get into the class; and that was about it.

17 Q. Do you remember what he said to you when you
18 said you were interested?

19 A. Just like I said, it was -- either it was full
20 or it didn't -- I would have to wait until another time
21 or something like that. I can't remember exactly.

22 Q. Did you ever express an interest in any other
23 training class?

24 A. I can't think of any right now.

25 Q. Did you ever sign a bid sheet for a welding

1 job?

2 A. No.

3 Q. Has anyone else ever complained to you that
4 they were denied training that they had requested?

5 A. No.

6 Q. Do you know of anyone who requested training
7 and the request was denied?

8 A. I was only there for Mary. I didn't know what
9 anybody else was doing.

10 Q. Are you aware of any situation -- you
11 testified this was in Trailer -- where you believe a
12 Trailer Division employee was denied training because of
13 their race?

14 A. Say that again.

15 Q. Are you aware of any situation where you
16 believe a Trailer Division employee was denied training
17 because of their race?

18 A. No. I can't think of any.

19 Q. Any reason to believe that you were not
20 allowed to take the welding class because of your race?

21 A. Say that again.

22 Q. The welding class that we just talked about --
23 any reason to believe that you were not allowed to take
24 that class because of your race?

25 A. I'm not sure, but the only ones I saw becoming

1 welders were white guys.

2 Q. Do you know Clarence Owens?

3 A. Uh-huh.

4 Q. Is he a welder?

5 A. I don't know what Clarence is.

6 Q. Do you know any black employees who are
7 welders?

8 A. I knew some. I don't know if they're still
9 working.

10 Q. So you knew some black employees who were
11 welders. Correct?

12 A. Yes.

13 Q. And you knew some white employees who were
14 welders. Correct?

15 A. Yes.

16 Q. So what's the basis of your opinion that most
17 the people you saw who were welders were white?

18 A. ...that got into the class were white.

19 Q. Any black employees get into the class that
20 you're aware of?

21 A. No. I don't -- I didn't know.

22 Q. But you didn't sign the sheet. Correct?

23 A. I don't even remember if it was a sheet.

24 Q. Okay. Any other reason to believe that you
25 were discriminated against while you were employed at

1 Lufkin Industries other than the layoff that we've
2 talked about, the welding class and people saying one
3 thing to your face and another behind your back?

4 Anything else?

5 A. No. I can't think of anything right now.

6 Q. You also testified earlier that you thought
7 people had discriminated against you because they would
8 say one thing to your face and write something else
9 down. Are you referring to any specific situation?

10 A. Mainly in the part where I didn't get called
11 back, and that's about it.

12 Q. Do you have any friends working for Lufkin
13 Industries right now?

14 A. No.

15 Q. Any friends who previously worked for Lufkin
16 Industries?

17 A. No.

18 Q. Any family members who worked at Lufkin
19 Industries?

20 A. What are you talking about? Immediate family?

21 Q. I think you testified earlier that none of
22 your children have ever worked for Lufkin Industries.
23 Have any of your spouses ever worked for Lufkin
24 Industries?

25 A. I can't remember.

1 Q. You don't remember their names?

2 A. No, I don't.

3 Q. Do you remember their race?

4 A. Yes. They were some older black guys and --

5 Q. Any white employees?

6 A. One white girl and one white boy. I don't
7 know their names, but they had handicaps or something.

8 Q. Who was your supervisor when you were a helper
9 in the Trailer -- when you were first hired?

10 A. Dennis Rice.

11 Q. Did you get along with Dennis Rice?

12 A. I guess so.

13 Q. Do you believe Dennis Rice ever discriminated
14 against you in any employment decision because of your
15 race?

16 A. I can't think of any right now.

17 Q. Did anyone else ever complain to you that they
18 thought Dennis Rice had discriminated against them
19 because of their race?

20 A. I wouldn't know what someone else was
21 thinking.

22 Q. I guess my question was: Did anyone else ever
23 complain to you that Dennis Rice discriminated against
24 them?

25 A. It's like -- I wasn't -- like I said, I didn't

1 socialize that much on any job.

2 Q. Okay. Did Dennis Rice ever treat you
3 unfairly?

4 A. How would you mean "unfairly"?

5 Q. Well, do you think that he took some
6 employment action against you that you didn't deserve?

7 A. I wouldn't know.

8 Q. Are you aware of any employment decision
9 Dennis Rice made on the basis of race?

10 A. No. I can't think of any right now.

11 Q. Okay. Who was the head of the Trailer
12 Division when you were hired?

13 A. I think his name was Bill Dern. I'm not sure
14 who it was.

15 Q. When you hired in as a helper, did you join
16 the union?

17 A. Yes.

18 Q. And that's the boilermakers union?

19 A. Yes.

20 Q. Were you a member of the boilermakers union
21 for the entire time you were in the Trailer Division?

22 A. Yes.

23 Q. Were you ever an officer in --

24 A. No.

25 Q. Did you ever want to be an officer?

1 A. That's the one I was supposed to complain to,
2 I thought.

3 Q. But you didn't complain to your supervisor?

4 A. Yes.

5 Q. Who did you complain to?

6 A. It was Dennis Rice.

7 Q. What did Dennis Rice say?

8 A. I can't remember.

9 Q. Do you think you were placed on the carpenters
10 dock because of your race?

11 A. Maybe.

12 Q. What's your basis for that belief?

13 A. I feel like if you went out there and looked
14 and you saw it yourself, you would know.

15 Q. What would I see, and how would I know?

16 A. If you had to work there, you would know.

17 Q. What is it about working on the carpenters
18 dock that would let me know that you were assigned to
19 the carpenters dock because of your race?

20 A. Okay. Everybody is over five feet tall and
21 I'm not even five feet tall, and then they had to start
22 fixing a special table for me to just get into the van
23 to get up and drill a rivet or -- what is that thing --
24 to drill a bit into the wall.

25 Q. Does it have to do with your race or your size

1 that you think that you were --

2 A. Both.

3 Q. Is there anyone else that had to have a
4 special table to help load the vans who worked on the
5 carpenters dock?

6 A. I can't remember, but I don't think so.

7 Q. But Lufkin worked with you so that you could
8 accomplish that task. Correct?

9 A. Yeah. They put that up there after I was put
10 somewhere else. It didn't help me.

11 Q. So you didn't have a table to work with while
12 you were on the carpenters dock?

13 A. They had tables, but it's like they didn't
14 help me.

15 Q. Who is "they"?

16 A. The dock had those kind of little tables that
17 you could -- or a little stool or something that you
18 could stand on, but it didn't really help me at all.

19 Q. Okay. I want you to turn to the next page of
20 Exhibit 1 that you have in front of you after the
21 application. It's Document L 15296.

22 I just want to confirm some things on
23 here, that this is accurate to your knowledge.

24 These aren't in numerical order. I
25 apologize for that.

1 Q. You just found out when you got your paycheck?

2 A. Right.

3 Q. Did you generally get raises the entire time
4 you were employed in the Trailer Division?

5 A. Yes.

6 Q. You got raises pretty regularly?

7 A. This is probably a raise after I had made my
8 90 days or something. That's all that is.

9 Q. Did you get other raises in the Trailer
10 Division that you recall?

11 A. Yes.

12 Q. Any belief that you were ever denied a raise
13 to which you were entitled?

14 A. I can't remember.

15 Q. Did you ever complain to anyone that you
16 deserved a raise?

17 A. No.

18 Q. Did anyone ever complain to you that they were
19 denied a raise?

20 A. No.

21 I would be the wrong person to complain
22 to.

23 Q. Are you aware of any situation where you
24 believe an employee in the Trailer Division was denied a
25 raise because of their race?

1 A. I can't remember that.

2 Q. You can't remember or you don't know?

3 A. Both.

4 Q. So you're not aware of any situation
5 personally?

6 MS. BURRELL: Objection.

7 Q. (BY MS. MAHONY) You're not aware of any
8 situation as we sit here today where an employee was
9 denied a raise in the Trailer Division because of their
10 race?

11 A. I wouldn't know.

12 Q. You keep saying you wouldn't know. You
13 wouldn't know --

14 A. I don't know about --

15 Q. You know about your own employment experience.
16 Right?

17 A. I just know something about me. I wasn't
18 trying to know about everybody else.

19 Q. Okay. If you want to turn to the next page,
20 it's Document L 15311. Its effective date, I think, is
21 November 14, 1994; although that's kind of hard to read.

22 A. There it is.

23 Q. Okay. You moved from first to second. Do you
24 recall moving back to second shift at some point?

25 A. Yes.

1 house?

2 A. In one of those jobs -- it was on days that I
3 worked --

4 This is wrong.

5 I stayed over there like a month as a
6 helper, wrapping the vans, sanding those -- whatever
7 they were making, they had to be sanded. I was a helper
8 over there.

9 Q. Who was your supervisor when you were over
10 there?

11 A. The first one was named -- I think it was Joe
12 Jumper, but he quit before -- I think a week after I
13 started over there.

14 Q. And then who did you work for?

15 A. I can't remember their name.

16 Q. Did you get along with your supervisors in the
17 paint house generally?

18 A. Yes.

19 Q. Do you feel like they ever discriminated
20 against you because of your race in the paint house?

21 A. No.

22 Q. Okay. I'm going to ask you to turn to the
23 next page.

24 A. What's the number on it?

25 Q. L 15309.

1 Do you know a Kenneth Rich?

2 A. Yes.

3 Q. Who is Kenneth Rich?

4 A. He was a supervisor.

5 Q. In any particular area?

6 A. Yeah. I think he took over the brad line or
7 something like that.

8 Q. Did you get along with Kenneth Rich?

9 A. Yes.

10 Q. Do you ever feel like Kenneth Rich
11 discriminated against you because of your race?

12 A. No.

13 Q. Who's Bob Westbrook?

14 A. I have no idea.

15 Wait a minute. I know who that is.

16 I guess he's a -- somebody -- I don't
17 know what he was, but I remember his name.

18 Q. Okay. Let's turn to the next page.

19 MS. MAHONY: If you'll let me get through
20 this, it might be a good time to break --

21 MS. BURRELL: Okay.

22 MS. MAHONY: -- in about ten minutes.

23 MS. BURRELL: That's the right page.

24 She'll identify the page.

25 Q. (BY MS. MAHONY) It's Page No. L 15308.

1 A. It probably was a few months before I got laid
2 off.

3 Q. Were you a Trailer Builder Class A when you
4 were working for Steve Jayroe?

5 A. Yes.

6 Q. Did you get along with Steve Jayroe?

7 A. Yes.

8 Q. Do you have any reason to believe Steve Jayroe
9 discriminated against you because of your race?

10 A. No.

11 Q. Any reason to believe Steve Jayroe
12 discriminated against anyone else because of their race?

13 A. I wouldn't know.

14 (Exhibit No. 3 marked)

15 Q. (BY MS. MAHONY) Okay. I'm going to hand you
16 what's been marked as Exhibit 3.

17 MS. MAHONY: It's about 12:23. If we can
18 go till 12:30, about seven more minutes, is that okay?

19 MS. BURRELL: That's fine.

20 Q. (BY MS. MAHONY) Is that okay with you,
21 Ms. Williams?

22 A. Yes.

23 Q. Okay. Is this your signature at the bottom of
24 Exhibit 3?

25 A. Yes, it is.

1 A. I can't think of their names right now, but
2 there are some.

3 Q. Do you know what they've been disciplined for?

4 A. No. I couldn't tell you.

5 Q. Do you know what race they are?

6 A. Blacks.

7 Q. Do you know any whites that have been
8 disciplined?

9 A. No, I didn't.

10 Q. You don't know any whites that have been
11 disciplined for attendance?

12 A. I'm sure they have, but I don't know about it.

13 Q. Do you have any reason to believe that black
14 employees are disciplined differently than white
15 employees in the Trailer Division?

16 A. Well, I wouldn't know because I don't go that
17 route. I mean, I try not to get into that area myself.

18 Q. Has anyone complained to you that they were
19 unfairly disciplined?

20 A. I can't remember.

21 Q. Do you think that could have happened?

22 MS. BURRELL: Objection.

23 MS. MAHONY: What's the basis of your
24 objection?

25 MS. BURRELL: When you say, "Do you

1 A. Yes, from the Trailer Division.

2 Q. Do you know how it was determined who would be
3 laid off?

4 A. No, I didn't know how they determined it.

5 Q. Were the layoffs done by seniority?

6 A. I'm not sure how they did it.

7 Q. Do you believe you were laid off because of
8 your race?

9 A. All I know is: They told me that their
10 business had went down.

11 Q. Do you have any reason to dispute that?

12 A. No, I don't.

13 Q. Had business gone down before the layoff?

14 A. I don't know.

15 Q. Were you less busy before the layoff than you
16 had been at other times?

17 A. Not really, no.

18 Q. Were you busy for your entire shift every day
19 before the layoff?

20 A. Yes.

21 Q. On this layoff, there were white employees
22 that were laid off. Correct?

23 A. Yes.

24 Q. And during the March 1996 layoffs, there were
25 black employees that were laid off. Correct?

1 Division, would that change your testimony that you
2 believe recalls in the Trailer Division are conducted on
3 the basis of race?

4 A. No.

5 Q. So you believe recalls in the Trailer Division
6 are conducted on the basis of race because you weren't
7 recalled. Is that correct?

8 A. Say that again.

9 Q. I just want to get all of the reasons that you
10 believe recalls in the Trailer Division are conducted on
11 the basis of race.

12 A. No, it's not just race.

13 Q. Okay. Do you believe recalls in the Trailer
14 Division are conducted on the basis of race?

15 A. Maybe in some cases and maybe not in others.

16 Q. Do you believe that you weren't recalled
17 because of your race?

18 A. Maybe.

19 Q. How many times did you talk to John Havard
20 between the time you were laid off and rehired about
21 coming back to work at Lufkin Industries?

22 A. I started calling the next week I was off.

23 Q. How often did you call?

24 A. Like every week.

25 Or even -- I went by there.

1 you testified in this lawsuit as after you testified in
2 this lawsuit.

3 A. Right.

4 Q. You weren't demoted --

5 A. Being a security officer is demoted.

6 Q. Let me finish my question.

7 You weren't demoted when you came back
8 from going to court testifying in this lawsuit.

9 A. What -- could I say something?

10 Q. Uh-huh.

11 A. What could they demote me to?

12 Q. Did anything else happen to you after you
13 testified in this lawsuit other than Barney and Jared
14 Satterwhite came to Gate 13 and asked you about court?

15 A. No, nothing else happened after that.

16 Q. Your job just continued the same as it did
17 before you testified. It continued the same after you
18 testified. Correct?

19 A. Yes.

20 Q. Did you generally get along with Jared
21 Satterwhite?

22 A. Yes.

23 Q. Do you feel like Jared Satterwhite ever
24 discriminated against you because of your race?

25 A. No.

1 Q. Now during the time that you were a security
2 guard -- do you feel like you were subjected to race
3 discrimination by anyone during this period of time?

4 A. No.

5 Q. Now, at some point, you moved from security
6 guard to cycle counter. Correct?

7 A. Yes.

8 Q. How did you hear about the cycle counter job?

9 A. It was on a board.

10 Q. Do you remember where the board was?

11 A. It was on a wall on the backside of the
12 foundry.

13 Q. Where was the cycle counter job?

14 Was that an Oilfield job?

15 A. Yes, it was.

16 Q. At Buck Creek?

17 A. Yes.

18 Q. Did you sign the board?

19 A. Yes.

20 Q. Were you asked to interview?

21 A. Yes.

22 Q. Do you know anyone else who signed the board?

23 A. It was some other people that had signed for
24 it, too.

25 Q. The other people -- were they white employees?

1 A. A month.

2 Q. (BY MS. MAHONY) Who was your supervisor when
3 you were a Parts Finisher Class B?

4 A. Don.

5 MR. BAKER: Yeah, I was most the time.

6 Q. (BY MS. MAHONY) Has Don Baker ever
7 discriminated against you because of your race?

8 A. No.

9 Q. Did you get along with Don Baker?

10 A. Yes.

11 Q. Moving to the Machine Operator
12 Structural II -- was there a raise involved in that?

13 A. Yes.

14 Q. Do you know how promotion decisions are made
15 in the Oilfield Division in the hourly jobs?

16 A. I can't remember.

17 Q. Do you have any reason to believe that they're
18 based on anything but seniority?

19 A. That's about it, I think, in that department.

20 Q. Did you ever sign a bid sheet while you were
21 in the Oilfield Division?

22 A. I may have.

23 Q. Do you ever believe you were unfairly denied a
24 promotion while you were employed in the Oilfield
25 Division?

1 A. I feel like I was -- Larry Long had job
2 openings all over the place, and he stuck me in that
3 nasty place when he had other openings and he could have
4 placed me somewhere else.

5 Q. What other openings did he have?

6 A. I don't know the openings that -- it was some
7 open, but I don't know the names of them.

8 And I feel like he placed me in that
9 place to make me go on and quit.

10 Q. You feel like he placed you in the parts
11 finisher job because of your race?

12 A. Yes.

13 Q. Were there any other white employees who were
14 parts finishers?

15 A. Donnie Gorton is white.

16 Q. Did Larry Long object to you moving out of the
17 parts finisher job?

18 A. He didn't say anything to me about it.

19 Q. Did you talk to Don Baker about moving out of
20 the parts finisher job to something else?

21 A. Don -- I feel like Don just took me out of it.

22 MR. BAKER: Can I just --

23 MS. MAHONY: No.

24 MR. BAKER: Okay.

25 Q. (BY MS. MAHONY) Did you ever complain to

1 Larry Long about him placing you in the parts finisher
2 position?

3 A. I didn't have to complain because they saw
4 that I couldn't handle some of that material that had to
5 be put on the belts.

6 Q. Did you ask to go back to being a cycle
7 counter?

8 A. No. I wouldn't.

9 Q. And you wouldn't because?

10 A. That's just as terrible.

11 Q. The person who replaced you as a cycle
12 counter -- were they white or black?

13 A. White.

14 And he used to do that, he told me.

15 Q. When you were in the Oilfield Division, did
16 anyone ever discourage you from signing a bid sheet?

17 A. No.

18 Q. Have you ever heard of any black employee who
19 was discouraged from signing a bid sheet in the Oilfield
20 Division?

21 A. No.

22 Q. Within the hourly jobs, are you personally
23 aware of any situation where the most senior employee
24 signed a bid sheet and did not get the job?

25 A. I can't remember.

1 Q. You can't remember or you don't know of any
2 situation --

3 A. Well, I don't know.

4 Q. Do you know any black employee who signed a
5 bid sheet and was the most senior and did not get the
6 job in the Oilfield Division?

7 A. I don't know.

8 Q. Were you ever disciplined while you were in
9 the Oilfield Division?

10 A. No.

11 Q. Do you know any other employees who were
12 disciplined in the Oilfield Division?

13 A. No, I don't.

14 Q. Did you have any problems with Don Baker while
15 you were in the Oilfield Division?

16 A. No.

17 Q. Did you have any problems running the radial
18 drill while you were in the Oilfield Division?

19 A. No.

20 Q. Let's just assume on Exhibit 5 that L 15277 is
21 correct, that you were moved to Machine Operator
22 Structural II on January 15, 2001. Does that still not
23 sound right to you?

24 A. No, it doesn't.

25 Q. You think it was earlier than that?

1 A. Yes, it was.

2 Q. How long did you work on the radial drill? Do
3 you know?

4 More than a year, less than a year?

5 A. A little over a year.

6 Q. During that year period, do you feel like you
7 were ever subjected to discrimination?

8 A. No.

9 Q. Do you ever feel like you were treated
10 unfairly by anyone?

11 A. No.

12 Q. Let me go back.

13 While you were a parts finisher, do you
14 believe that you were treated unfairly by anyone?

15 A. The job itself was unfair for me.

16 Q. Okay. Same thing with the cycle counter
17 position.

18 A. Nobody else wanted it.

19 Q. And you bring up a -- I mean, you didn't have
20 to take the cycle counter job, did you?

21 A. I just wanted -- I'm used to moving around. I
22 didn't like sitting in one spot not making no money; and
23 when you sit there and don't have nothing to do but
24 think about who you owe and you're not making any money,
25 it hurts.

1 A. Yes.

2 Q. Did you get the job where you used him as a
3 reference?

4 A. No.

5 Q. Do you know if they ever called Don Baker?

6 A. I'm not sure.

7 Q. What else did Don Baker say during that
8 meeting?

9 A. He said he liked the way all of us worked. I
10 think that's what he said.

11 I can't remember everything he said.

12 Q. Do you have any reason to believe he was
13 unhappy with your work?

14 A. No.

15 Q. Did he tell you you were doing a good job?

16 A. Yes.

17 Q. Were people who had been at the company longer
18 than you laid off with you in January 2002?

19 A. Most of them there had been there longer than
20 me.

21 Q. Any reason to believe you were laid off in
22 January 2002 because of your race?

23 A. No.

24 Q. When we started the day this morning, you made
25 a statement --

1 A. I wouldn't know.

2 Q. Do you know Cedric Williams?

3 A. Yes.

4 Q. Was Cedric Williams laid off with you?

5 A. I can't remember.

6 Q. Cedric Williams is African-American. Correct?

7 A. Yes.

8 Q. Did you know Randall Duponte?

9 A. I can't remember most of those people.

10 Q. What about Jason Keely?

11 A. I can't -- I'm sorry. I can't remember most
12 of them.

13 Q. That's okay.

14 Are you complaining about your layoff in
15 January of 2002 in this lawsuit?

16 A. Am I complaining?

17 Q. Are you alleging that your layoff in January
18 of 2002 was because of your race in this lawsuit?

19 A. No, because I could see the business was going
20 down when I was working there.

21 Q. And you haven't reapplied for employment with
22 Lufkin Industries since January 2002. Correct?

23 A. I'm always told they're not hiring.

24 Q. Who's always telling you this?

25 A. The last -- the lady at the employment office,

1 MS. MAHONY: Basis?

2 MS. BURRELL: You're talking about two
3 different things. There's the cycle counter job --
4 she's already testified as to what she did with respect
5 to the parts finisher job. So when you say "these two
6 things," you're asking two separate questions.

7 Q. (BY MS. MAHONY) I just want to ascertain if
8 you ever complained to anyone about Bobby Ward not
9 letting you work the computer.

10 A. Yes.

11 Q. To whom?

12 A. Larry Caples.

13 Q. When was this?

14 A. I can't remember, but he was -- he worked
15 there, too; so -- that was the man that showed me and
16 introduced me to Bobby.

17 Q. What did you tell Larry?

18 A. That I wasn't learning anything on the
19 computer.

20 Q. What did Larry say back in response?

21 A. And so -- it's like I was not happy with that
22 job, and so I was placed somewhere else.

23 Q. You were happy to move out of cycle counting?

24 A. Yes.

25 Q. Did you ever complain to anyone about being

1 position, you had no seniority in the bargaining unit.

2 Correct?

3 A. Right.

4 Q. What jobs were you eligible to apply for in
5 the bargaining unit?

6 A. None.

7 Q. What other employment opportunities do you
8 believe you were denied because of your race as alleged
9 in Paragraph 58 of Exhibit 6?

10 A. I can't think of any right now.

11 Q. Paragraph 59 says "Defendant Lufkin
12 Industries laid off Plaintiff Class Representative
13 Mary Thomas in 1996 and passed her over for recall
14 because of her race."

15 Do you contend that you were laid off in
16 1996 because of your race?

17 A. I feel like I was left out of the recall
18 because of my race.

19 Q. But you don't have any complaints about being
20 laid off because of your race?

21 A. No.

22 Q. I think you testified earlier --

23 MS. MAHONY: Correct me if I'm wrong,
24 Counsel.

25 Q. (BY MS. MAHONY) -- that you believe you were

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IN THE UNITED STATES DISTRICT
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)
VS.) C.A. NO. 9:97-CV-063
LUFKIN INDUSTRIES)

ORAL DEPOSITION OF
SYLVESTER McCLAIN
July 8th, 2003
Volume 1 of 1

CERTIFIED COPY

ORAL DEPOSITION OF SYLVESTER McCLAIN, produced as a
witness at the instance of the DEFENDANT, and duly sworn,
was taken in the above-styled and numbered cause on the
8th of July, 2003, from 9:09 a.m. to 4:48 p.m., before
Dana R. Smelley, CSR in and for the State of Texas, RMR,
CRR, reported by machine shorthand, at the Days Inn of
Lufkin, 2130 South First Street, Lufkin, Texas, pursuant
to the Federal Rules of Civil Procedure and the
provisions stated on the record or attached hereto.

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1 A. That's the basis I have.

2 Q. You are the named plaintiff.

3 A. That's the basis I have.

4 Q. Can you name a single person who is black who
5 did not get rehired when they should have by Lufkin
6 Industries?

7 A. Anytime?

8 Q. Since January 1, 1994 to the present.

9 A. I don't, I don't know.

10 Q. Can you name anybody who is a class
11 representative who has not been rehired?

12 A. I just don't recall right now.

13 Q. What is the basis for believing that black
14 employees other than yourself are discriminated against
15 in termination because of their race by Lufkin Industries
16 from January 1, 1994 to the present?

17 A. You know, since '94, there is a factor that has
18 probably limited what I do know, and that is we've had
19 different periods of upturning, downturning business, and
20 about the only era that I do have it is, based on the
21 classification, is on the recalls, but like I say, I
22 don't recall right now.

23 Q. Okay, sir. Now, in terms of your own
24 situation, you do not allege that you've been
25 discriminated against in termination because, in fact,

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1 you've not been terminated, have you?

2 A. No, sir.

3 Q. You don't allege that you've been discriminated
4 against in rehiring, do you?

5 A. No, sir.

6 Q. You don't allege that you've been discriminated
7 against in recall, do you?

8 A. No, sir.

9 Q. You don't allege that you have been
10 discriminated against because of -- in layoff, do you?

11 A. No, sir.

12 Q. You don't allege that you have been
13 discriminated against in discipline, do you?

14 A. Yes, sir, I do.

15 Q. When have you been disciplined that you thought
16 that that was discrimination?

17 A. The CDR that Arden Jenkins did on me, that was
18 discipline, and when I was demoted. That's a form of
19 discipline.

20 Q. So it is your demotion and the low --

21 A. CDR.

22 Q. CDR?

23 A. What does CDR stand for.

24 A. Career development something.

25 Q. Any other situation which you think you have

1 been discriminated against in discipline other than those
2 two instances?

3 A. Yes. A lack of discipline. For instance, I
4 was on my way to a safety awards dinner. I was quality
5 manager, and a gentleman sat at the table, supervisor,
6 that the company had numerous complaints, not only had a
7 racist attitude towards blacks but towards women, also
8 made the comment that, "Mmm, here comes a nigger fixing
9 to sit down beside us." Earl Dover, a supervisor, was
10 sitting at the table who claimed he didn't hear it, but I
11 did, I did attempt to ask him outside, and I told him I
12 wanted something done. He tried to talk me out of it
13 saying, "You know, you know how he is." I said, I know
14 that he is racist and I know that I will not tolerate
15 being called that kind of name. And so basically he
16 didn't do anything. I didn't see him laid off. He might
17 have talked to him, but a lot of good that did because he
18 didn't change.

19 Q. When was, when was this?

20 A. I really don't know. It was before he left. I
21 don't even know when he was -- whether he resigned or
22 they forced him to resign or what. I don't know.

23 Q. Who is "He"?

24 A. Carter Olds. Carter Olds. And he is deceased
25 now.

1 Q. Carlos?

2 A. Carter Olds.

3 MR. HAMEL: Claude?

4 THE WITNESS: No, Carter.

5 Q. O-A-T-E-S?

6 A. Carter Olds.

7 Q. Oh, Olds?

8 A. Carter Olds. And the supervisor's name is Earl
9 Dover.

10 Q. Now, what position did Mr. Olds have?

11 A. He was a supervisor at the paint house. And I
12 wasn't the only one complaining about his racist
13 comments. There were many, many complaints, and there
14 was nothing ever done.

15 Q. Did you hear anyone other than Mr. Olds ever
16 make any racist comments?

17 A. Yes. What was his name? Bob Adams. Let me
18 make sure. Yes. And the same person, supervisor, Earl
19 Dover. I was in the time-out area and he used the same
20 terminology, "Here comes Earl Dover and that nigger."
21 And that's a very degrading word. The definition is less
22 than trash, and I don't want that said about myself,
23 either.

24 Q. Anyone else?

25 A. That's all that I can think of this time, but

1 there were numerous instances where there was racial
2 name-calling or racial stereotyping and people complained
3 about it. I just can't recall right now what they were.
4 And this type of behavior was tolerated by management,
5 being that they didn't do anything. If they did
6 anything, it was a slap on the wrist because nothing
7 concrete was ever seen. They wasn't laid off, they
8 wasn't fired, they wasn't written up or anything like
9 that.

10 Q. Who is Mr. -- what was Mr. Adams' first name?

11 A. Bob Adams.

12 Q. Now, you complained to Mr. Dover about the
13 comment by Mr. Olds?

14 A. Yes.

15 Q. Did you complain to anyone else in --

16 A. Yes, that --

17 Q. -- Lufkin management?

18 A. Yes. That is part of one of my written
19 complaints to management. I don't know which one, but
20 you have it in your paperwork.

21 Q. And did you complain to anyone about the
22 comment you claim that was made by Bob Adams?

23 A. Yes. It's in writing, in a memo. You have a
24 copy of that, I believe.

25 Q. Now, other -- do you have personal knowledge,

1 meaning that you heard what was said, of any other racial
2 comments made about black employees?

3 A. I can't recall at this time except to say that
4 it has been an ongoing process, and it has been part of a
5 culture that Lufkin has tolerated to exist.

6 Q. When is the last time that you heard any racial
7 comment made at Lufkin Industries?

8 A. Personally?

9 Q. Yes, sir.

10 A. I don't remember, and I do -- but I do remember
11 recently -- I say recently. I know since 1994, I've got
12 some complaints, and I don't remember exactly who they
13 were from or what they said.

14 Q. Mr. McClain, I'm asking you about what you have
15 heard.

16 A. Oh.

17 Q. Have you heard any racial comments?

18 A. I don't recall. I don't recall.

19 Q. And you don't recall when the last one you
20 heard?

21 A. No. I mean --

22 Q. Would it be more than ten years ago?

23 A. I don't recall. I just don't recall.

24 Q. Now, when you heard the comment from -- by
25 Mr. Olds, what was your position at that time?

1 A. Quality manager.

2 Q. And do you recall how long you had been the
3 quality manager?

4 A. No, I do not, not unless I've got it dated on
5 the document. Actually documentation would probably show
6 because I dated all my documentation.

7 Q. And in this documentation did you specifically
8 say that Carter Olds made this comment about you?

9 A. Yes.

10 Q. Or in your hearing?

11 A. Yes.

12 Q. And what position did you hold when Mr. Adams
13 is supposed to have made his comment?

14 A. I was a Trailer Body Builder A, either that or
15 an inspector. I don't remember which. One of the two.

16 Q. Well, would it have been prior to the time that
17 you became chief inspector?

18 A. Yeah, it would be before that.

19 Q. All right. Now, as to people telling you about
20 this, who has told you that there are racial comments
21 made at Lufkin?

22 A. I mean, there have been numerous individuals.
23 Right off the top of my head, I can't think of anyone.
24 Let me think. I just can't think of anyone right now.
25 But if I think of someone, with your permission I'll

1 bring it back up and I'll give you a name.

2 Q. Are you aware of any segregated facilities at
3 Lufkin?

4 A. At this time?

5 Q. At this time or at any time in the past.

6 A. I believe it was the -- I don't know if it was
7 the machine shop or if it was the foundry. I believe I
8 remember seeing these, but mostly I heard the class
9 members testify. I may not have seen that because I
10 don't recollect, but I've certainly -- class members
11 testified after segregation was outlawed, there was
12 still -- the signs were taken down but there was still
13 separate drinking fountains and toilet facilities for
14 black and white.

15 Q. Okay. And have you -- can you recall ever
16 seeing such a thing?

17 A. I don't recall that.

18 Q. Do you -- can you say from personal knowledge
19 since your employment in 1969 that you have observed any
20 segregated facilities at Lufkin Industries?

21 A. I don't recall because I don't even recall how
22 it was when I first hired in. I don't recall how that
23 was, how that was arranged for water and the bathrooms.

24 Q. Have you heard anybody say that there have been
25 any segregated facilities at Lufkin in the past

1 twenty-five years?

2 A. Yes.

3 Q. Okay.

4 A. Some of the class litigants.

5 Q. Who is that?

6 A. I don't remember their name, but it's
7 part -- well, it's part, it's written down somewhere, but
8 some of the class litigants did testify. I think they
9 testified at the hearings. I think that's part of your
10 documentation. I think they testified at the hearing
11 that either in the machine shop -- I believe it was the
12 machine shop, that there were -- the signs were taken
13 down, but there was separate drinking fountains and
14 possibly bathrooms for black and white.

15 Q. Do you have any knowledge that Lufkin
16 Industries permitted this to occur?

17 A. I mean, you got a supervisor in the area. They
18 had to admit it.

19 Q. For example, do you know of any black employee
20 who was disciplined because he used a drinking fountain
21 that you believe he was not supposed to use?

22 A. No, sir, I don't.

23 Q. Did you ever hear of any black employee who got
24 disciplined or counseled or anything said to them about
25 using a bathroom facility?

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1 A. The only thing I know is that they testified
2 about the separate facilities. That's all.

3 Q. What I'm asking you is, do you know of any
4 situation in which a black employee has ever told you
5 that they have not been able to have the full enjoyment
6 of whatever facilities Lufkin provides to employees?

7 A. Well, again, I only have the testimony of the
8 class litigants that there were separate facilities, one
9 for blacks, especially drinking water fountains, and one
10 for white and that they -- and I don't know if they were
11 disciplined because of drinking out of them or if they
12 knew not to drink out of them.

13 Q. They knew not to drink out of them?

14 A. Yes.

15 Q. What did they tell you about knowing not to
16 drink out of them?

17 A. Well, they just had separate facilities. I
18 mean, if there's something going on in the shop, you know
19 it, okay? Now, whether there was -- whether they found
20 out by word of mouth, I don't know.

21 Q. Certainly in as far as your personal
22 experience, you have never encountered any segregated
23 facilities of any type at Lufkin?

24 MR. GARRIGAN: Objection, form.

25 THE WITNESS: Not that I remember.

1 Q. (BY MR. HAMEL) Mr. McClain, you were the
2 president of the NAACP chapter at Lufkin, Texas.

3 A. Yes, sir.

4 Q. Do you think you would have forgotten if you
5 had encountered segregated facilities at Lufkin
6 Industries?

7 A. Well, if you are counting before I became, I
8 hired in in '72. I encountered a lot of things and a lot
9 of -- one of the reasons I got involved in NAACP, in
10 civil rights, was because of the frustrating moments I
11 encountered when I hired on at Lufkin Industries. It
12 wasn't just at Lufkin. It was other places also. But so
13 I'm saying that it's possible I could have encountered
14 it. I just don't remember.

15 Q. Now, sir, why do you think that you have been
16 discriminated against -- before we get to that, can you
17 name a single black person who will -- who has knowledge
18 of any segregated facilities at Lufkin Industries?

19 A. Say that again.

20 Q. Yes, sir. Can you name for me a single black
21 person who has any knowledge of segregated facilities at
22 Lufkin Industries?

23 A. You mean ever or --

24 Q. Well, since 1965.

25 A. I can't name, but there are class litigants

1 that can testify that there were segregated facilities,
2 yes.

3 Q. And other than Mr. Adams and Mr. Olds, can you
4 name a single person who you believe used racial slurs or
5 comments about black employees?

6 A. I heard about it, but I don't know of it
7 personally.

8 Q. As I understand your testimony, I want to be
9 absolutely clear about this, you have heard that there
10 were comments?

11 A. Yes.

12 Q. But you don't know who told you that?

13 A. No, because that's been -- I mean, it's been,
14 like -- there's been time periods between where we've
15 talked about it. I've talked to a lot of people. I just
16 don't remember except the specific instance I gave you.

17 Q. And you don't know who told you?

18 A. Right.

19 Q. You don't know the black employee who was in
20 the vicinity when it happened, right?

21 A. Well, even if I think I know, I'm not going to
22 call their name because I'm not sure.

23 Q. Well, you tell me who you think may be there.

24 A. I'm not going to do that.

25 Q. Well, you don't have a choice.

1 A. Well, if I tell you that I think somebody said
2 this, I'm not -- and they didn't say it, then I'm telling
3 you a lie, am I not?

4 Q. No. If you genuinely think somebody said it,
5 then tell me who it is.

6 A. Well, I'm low on memory. I'm just saying
7 I'm --

8 Q. That's fine.

9 A. There's a possibility some told, but I'm not
10 sure.

11 Q. Then tell me who you think --

12 A. I'm just --

13 Q. -- may be possible who said it.

14 A. I'm just not sure. I'm not sure.

15 Q. Who do you think it is possible may have said
16 that?

17 A. Well, I'll just give you one name. Clifford
18 Duirden. I believe I've had a discussion with him
19 concerning either some stereotyping in the warehouse,
20 racial stereotyping or name-calling, and I believe that
21 we had that conversation, but I'm not sure.

22 Q. Am I correct that you can't call any names of
23 people who were supposed to have made these comments
24 other than Mr. Olds and Mr. Adams?

25 A. That's right.

1 Q. And you have, you have a belief that perhaps
2 you talked to Clifford Duirden. How many times have you
3 heard, in your best estimate, that there has been some
4 incident of name-calling or racial comment at Lufkin?

5 A. I can't recall, but off and on I've heard it.
6 I can't --

7 Q. Fewer than a dozen?

8 A. I can't recall.

9 Q. Fewer than two dozen?

10 A. You are talking about -- you are talking from
11 about '72 to now. There is no way I can recall.

12 Q. Well, can you recall from March of '94 to the
13 present?

14 A. I can't recall.

15 Q. Give me an order of magnitude.

16 A. I can't recall.

17 Q. You can't tell me whether it's one or two or
18 five or ten?

19 A. I just can't recall. I just can't recall.

20 Q. Or twelve?

21 A. I just can't recall.

22 Q. Can you recall that it's fewer than fifty?

23 A. I can't recall. I don't want to give you a
24 number that I'm not sure of.

25 Q. Can you give me a number that you are confident

1 it is not greater than?

2 A. I just, I would feel uncomfortable giving you a
3 number. If I say I don't know, I mean, it just means I
4 don't remember or I don't know.

5 Q. Well, sir, this is a lawsuit that you have
6 filed.

7 A. I understand that.

8 Q. And in this lawsuit, you complain that race
9 discrimination at Lufkin Industries is pervasive.

10 A. Yes.

11 Q. And you understand what "pervasive" means?

12 A. It means it's widespread.

13 Q. All right.

14 A. And it's cultural.

15 Q. And do you believe that name-calling of blacks
16 is pervasive at Lufkin Industries?

17 A. It has happened. How much has it happened on a
18 percentage basis, I mean, I haven't -- I'm not an expert
19 on saying it's 30 percent, 10 percent. All I know is
20 it's happened. It's happened to me and it's happened to
21 others.

22 Q. Okay.

23 A. But I just can't give you the names of those
24 people that has come to me and said, hey, this individual
25 said this or that.

1 Q. I'm asking not for the names. We've been over
2 that.

3 A. Right.

4 Q. I'm asking if you can tell me how many
5 incidents in which there was supposed to have been
6 name-calling that you believe have been reported to you?

7 A. I just, I don't remember. Numerous, but I
8 don't remember how many.

9 Q. Well, when you say "Numerous," what do you
10 mean?

11 A. More than, more than one.

12 Q. Okay. Can -- are you confident it's less than
13 ten?

14 A. I don't know. All I know is numerous, okay?

15 Q. And when you say "Numerous," you mean more than
16 one?

17 A. Yes.

18 Q. How do you believe that you have been
19 discriminated against since January 1, 1994?

20 A. Take it chronologically. First of all, I was
21 treated different than other, other white managers or
22 white supervisors. So it was in treatment. That was one
23 area.

24 Q. Yes? Please tell me how you've been
25 discriminated against. Let's just go through them one by

1 one and then we'll go back over them.

2 A. And when I say "Treatment," they made a
3 difference how they treated me as a supervisor and they
4 treated them. Treated --

5 Q. I understand. I'm going to go over them in a
6 moment.

7 A. Okay, okay. Treatment, okay.

8 Q. I want you to list how you've been treated
9 differently.

10 A. Okay, okay. Treatment, paid, support, lack of
11 resources, lack of training. I think that pretty well
12 covers it.

13 Q. Well, I don't want to -- I don't want to
14 mislead you in any way, but I thought I had heard earlier
15 in your testimony that you also believed that you were
16 demoted?

17 A. Well, yes. Yes.

18 Q. Any other than those six?

19 A. Anything doing with equal opportunity, equal
20 pay, equal treatment. Those three areas primarily is
21 where I've been discriminated against.

22 Q. All right. Now, you say that you were treated
23 differently than other white managers and supervisors.

24 A. Right.

25 Q. Tell me specifically how you have been treated

1 differently than other white managers and supervisors.

2 A. Whichever you want first.

3 Q. You just -- why don't you do it chronologically
4 from January 1, 1994.

5 A. I mean, which area you want? Treatment,
6 opportunity? Pick which one you want.

7 Q. You have said that you believe you had
8 different -- that there has been different treatment of
9 you than other white managers and supervisors.

10 A. Right.

11 Q. Would you please tell me how you have been
12 treated differently.

13 A. Okay.

14 Q. Item by item.

15 A. Okay. One, I did not have the same -- did not
16 have the authority that would go with my position. An
17 instance of that is, I wrote two men up for clearly not
18 following my orders and doing their job properly, and my
19 supervisor rescinded those write-ups. He threw them
20 away. As a manager, when I would go out into the shop, I
21 did not have the same authority that other managers have,
22 being sales, being purchasing, production superintendent.

23 When they come out to the shop, we knew,
24 the men and women knew who they were, and they
25 were -- they had the authority to go with their position

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1 and therefore, they were respected for what position they
2 was in. For instance, if I would go out on the line and
3 as a quality manager I was supposed to have the authority
4 to close down any process that was producing defects that
5 needed to be -- that needed to be corrected. On numerous
6 occasions I thought I had that authority, but I didn't
7 because I was overruled by Arden Jenkins, one, and other
8 supervisors, and I don't remember exactly. I had -- I
9 think I had eight, seven or eight supervisors over a
10 seven- or eight-year period. But clearly I was supposed
11 to have that authority, but I didn't.

12 So it really kind of made me look bad. I
13 come out and find that defective welding is going on and
14 the reason it's going on is because machines have not
15 been maintained and the workers have been told to do the
16 welding, to get the work out. That's catastrophic as a
17 manager. That completely undermines the total purpose of
18 a quality manager. His job is to ensure and maintain the
19 quality of those trailers that are produced, from
20 beginning to end. Okay?

21 Q. Any other situations in which you were treated
22 differently?

23 A. Okay. I'm trying to make sure I stay within
24 the same category. As quality manager, I had to have
25 access to the corporate office in the trailer plant,

1 trailer division, to do serial plates, and we had -- they
2 eventually moved that to my office to process, and
3 process means getting copies of documents, distributing
4 the copies of those documents to the various department
5 heads and supervisors that needed to have those. Also,
6 there were documents that I needed to create and process
7 on the weekend when I -- because I didn't have time
8 during the week. I was denied -- I came to work one
9 Saturday, and I was denied access to the corporate
10 office. I was using the gate guard's key at the time,
11 and when I came by to get the key -- the reason I was
12 using his key, because I wasn't given one, and he told
13 me, said, I was told not to give it to you. So I --

14 Q. Who is that?

15 A. I don't know who the gate guard was but --

16 Q. Who told you that?

17 A. The gate guard told me.

18 Q. Who?

19 A. I don't remember who he -- what his name was.

20 But he called Earl Dover. Earl Dover was my boss at that
21 time, and Earl Dover told him to give me the key. And so
22 I'm assuming that it came from Arden Jenkins, because he
23 was -- Earl Dover -- Arden Jenkins was my boss, but Earl
24 Dover was over production, van production. So -- and he
25 might have been production superintendent at the time

1 because he's been production superintendent twice. But
2 anyway, so when I came in Monday, I went to Arden
3 Jenkins, and I asked him about it, and somehow there was
4 a document on file on top of his desk that made reference
5 to some stuff being stolen from the office, and I believe
6 that was way back in the Eighties. So I asked him, what
7 does that have to do with me? I said, Earl Dover raised
8 the question. He said, they are going to have to decide
9 if you, the quality manager, are you trustworthy enough
10 to have a key to the corporate office, which I thought
11 was strictly ludicrous.

12 So to make a long story short, basically
13 Earl Dover told the guard to give me the key. So he must
14 have been production superintendent at that time. Billy
15 Durham, who had made a lateral move from chief inspector,
16 still had his same key, and all these secretaries up
17 there had keys to the corporate office, along with
18 managers. So I was treated -- I'll tell you, that -- I
19 felt terribly. I felt real bad. I mean, I was
20 devastated. Had no idea why I was having to get -- I
21 just knew they hadn't give me the key, but I had no idea
22 why I was having -- I'm a manager and I'm having to
23 solicit a key from the gate guard to get into the office.
24 During the week I didn't have a problem because someone
25 would be there.

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1 Q. Was this when you were chief inspector?

2 A. Either chief inspector or quality manager, one
3 of the two.

4 Q. And I'm assuming if it was when you were
5 quality manager, it was early in your time as quality
6 manager?

7 A. I don't remember the exact time. I'm thinking
8 it was in the early Nineties, but it's in the
9 documentation. I'll -- in fact, it was in the complaint,
10 the memo that I sent on, the complaint that I filed to
11 the EEOC. It was in there.

12 Q. Mr. McClain, you were promoted to quality
13 manager in 1990, --

14 A. Yes.

15 Q. -- were you not?

16 A. Yes.

17 Q. And surely it didn't take you four years to
18 discover that you didn't have a key?

19 A. I don't know how long it took me to discover.
20 The reason I hadn't discovered it -- oh, I mean, I found
21 out I didn't have a key. I just didn't ask why.

22 Q. What --

23 A. I couldn't change everything at one time. I
24 just, I just went along with it because I had access to
25 the office and until they told me I couldn't get the key.

1 Q. When is it in your time as quality manager that
2 you asked the question as to why you did not have a key?

3 A. I'm not sure I understand your question. Well,
4 if I have the documentation, I'm sure I was quality
5 manager when this happened, and if I had the
6 documentation that has the complaint that I filed, it
7 will tell you exactly when.

8 Q. And this is the complaint you filed with who?

9 A. With EEOC.

10 Q. All right.

11 A. Also with upper management.

12 Q. Now --

13 A. Including Mr. Perez and Mr. Smith.

14 Q. Now, sir, did this occur in the first two years
15 that you were quality manager?

16 A. I don't know. I don't know. Again, if you
17 get --

18 Q. Is it likely -- more likely than not it
19 occurred the first two years?

20 A. I would rather not guess. If you get the
21 documentation, I can be more decided. I have a two and a
22 half page complaint, and that's part of the complaint.

23 Q. Any other situations in which you feel that you
24 were treated differently than white managers or
25 supervisors?

1 A. One more, and I think I -- that's probably
2 about all I can remember right now other than
3 the -- well, the -- in 1993 all of the salaried received
4 a \$200 pay raise. Since I was an internal auditor and at
5 some point I had audited hourly up to Grade 10, I had
6 seen salary structures for salaried. So when I got the
7 \$200 raise, I already felt they were going to pay me. I
8 didn't know how much. Pay me low. They know they were
9 underpaying me, I mean. But -- so I asked a friend of
10 mine to fax me the salary structure for Grade 11, I think
11 it was Grade 11 through 15, 18, whatever. So when he
12 faxed me that, I found out that I didn't get a \$200
13 raise. I got a \$40 raise. I was making -- I was being
14 paid \$160 lower than the bottom of my scale as quality
15 manager, and I had been a manager since 1990 and had been
16 chief inspector since 1987, and I thought that was
17 ludicrous.

18 Q. Mr. McClain, who is it that you asked to do
19 this? Who is your friend?

20 A. Gene McGallion. He was the quality manager at
21 fabrication. He is now over maintenance.

22 Q. Any other situations in which you thought you
23 were treated differently?

24 A. Well, the pay, treatment, training. I
25 continually asked for training that was needed for the

1 job that I was doing as a manager other than the internal
2 schools which was used to enhance workers' job skills. I
3 asked to be sent to school to learn statistical process
4 control, statistical data control, resource management,
5 time management, production process control, and
6 statistical sampling. None of those things that were
7 offered that I knew of that was offered by AC, and it was
8 not something that I should not have to pay for myself
9 since Lufkin was -- they had people, I think they were
10 sending to -- they sent Wayne Ashby to Texas A&M for
11 management training for thirty days at full pay. He's
12 white, he was a production manager, and they sent Doug
13 Williams for thirty full days, management pay.

14 So this wasn't the only instance where
15 training was. So I asked specific, I was specific for
16 training that I needed. I wasn't given it and yet, I was
17 still criticized. The other instance -- and I'll stop
18 here. The other instance --

19 Q. No, no. You don't stop. You tell me all
20 instances, all right?

21 A. This is all I can think of right now. And
22 the other instance was the promotion. All of the CDRs
23 prior to the one I had gotten from Arden Jenkins were
24 good. He gave me the bad CDR, which is grounds for
25 demotion or termination. The only thing he complimented

1 me for was working long hours, and that was because I
2 didn't get the support, the training, or equipment I
3 needed to do my job. And so when he gave me that bad
4 CDR, his intention was to fire me. He didn't fire me
5 because I made it known that I would do whatever
6 necessary to overcome the situation.

7 That's, that's part of it, but that's all
8 I can remember right now. Pay, the training, resources.
9 I asked for computers. I went to the college on my own
10 initiative; I got training. I even knew how to program
11 computers, and the only thing I got was an old,
12 out-of-date Macintosh, and the only thing I could do on
13 that was produce documents, memos, and basic documents,
14 basic column where I tried to create my own graphs. The
15 graphs I did create I had to create on someone else's
16 computer. So that's -- I'm sure that's not all, but
17 that's all I remember right now.

18 Q. All right. Let's take a break.

19 (Recess taken from 3:19 p.m. to 3:31 p.m.)

20 Q. (BY MR. HAMEL) Mr. McClain, with respect to
21 the documents that have been produced in Lufkin today
22 which are Bates stamped PTFS 236 through 605, you
23 testified that many of these documents were maintained at
24 Lufkin where you worked?

25 A. Yes, inspector.



HEARING ON CLASS CERTIFICATION

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

SYLVESTER MCCLAIN, ET AL,	*	Docket No. 9:97CV63
	*	
Plaintiffs,	*	
	*	
vs.	*	10:30 a.m., August 18, 1998
	*	
LUFKIN INDUSTRIES, INC.,	*	
	*	
Defendant.	*	Lufkin, Texas

VOLUME 1 OF 3 VOLUMES, PAGES 1 THROUGH 213
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 TRANSCRIPT OF HEARING ON CLASS CERTIFICATION
 BEFORE THE HONORABLE HOWELL COBB
 UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Stuckey & Garrigan
 BY: TIMOTHY BORNE GARRIGAN, ESQ.
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 Nacogdoches, Texas 75963-1902

For the Defendants: Vinson & Elkins
 BY: JOHN H. SMITHER, ESQ., AND
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Court Reporter: Whitney Durham Garza, CPR, RPR
 Excel Reporting & Associates
 P. O. Box 151601
 Lufkin, Texas 75901-1601
 (409) 632-2442

Proceedings recorded by mechanical stenography,
 transcript produced by computer.

Garner - Cross

- 1 Q. Now, if you were going to move up to another
2 position beyond a Machine Class Operator A, it's my
3 understanding that the next level was the position known
4 as a machinist; is that right?
- 5 A. Machinist, right.
- 6 Q. And then I think there's another position that's
7 even above that known as a certified machinist?
- 8 A. Certified.
- 9 Q. You never put your name on any bid list for a
10 machinist position, did you?
- 11 A. Yes, at one time.
- 12 Q. Do you recall when?
- 13 A. I guess I had been there about 15 years.
- 14 Q. All right. Did someone have more seniority than you
15 at that time?
- 16 A. No. I had -- I had the seniority at that time.
- 17 Q. Your supervisor at the time you retired was Mr.
18 Flowers?
- 19 A. Yes.
- 20 Q. And Mr. Flowers and you had both -- he was a white
21 man; is that right?
- 22 A. Right.
- 23 Q. Mr. Flowers and you had both at one point in time
24 been Machine Class Operator A?
- 25 A. Right.

Mark - Direct

1 town he came from.

2 Q. Okay. Now, you -- have you yourself experienced any
3 discrimination?

4 A. Well, I don't know if you would call it
5 discrimination or what; but the last year, when I was in
6 my normal work area, which is DIF, we had a slow --

7 THE COURT: What's DIF?

8 THE WITNESS: Yeah. DIF, that's -- it's
9 another part of the foundry.

10 THE COURT: I thought maybe those initials
11 stood for something.

12 THE WITNESS: Delta something furnace.

13 THE COURT: Okay.

14 THE WITNESS: I never got around to learning
15 it.

16 THE COURT: All right.

17 A. But -- but, anyway, I was a cleaning machine
18 operator classified over there. Me, another guy who was
19 Hispanic, and another guy who was white was over there
20 working; and our supervisor who was white named Langford,
21 Jeff Langford, told us that that department was slowing
22 down and he would have to move people around. So, he
23 told us that we possibly would have to go to the cleaning
24 room and around -- the cleaning room, like, that's the
25 hardest job out there. I mean, you know, everybody out

Mark - Direct

1 foreman --

2 A. Uh-huh.

3 Q. -- have you ever heard him use racial slurs or
4 anything?

5 A. Well, yes. We was standing around -- around January
6 or December of '96 or early part of '97; and my foreman,
7 Ned Heismann, and another supervisor who was Jeff
8 Langford was standing there talking about basketball.
9 And Ned Heismann has a son that plays basketball at
10 Hudson. And he was telling him about his son's opponent
11 at the game that night before. He said that nigger was
12 giving his son problems. And I looked at him, you know,
13 kind of funny; and he said, "Oh, Roy, don't worry about.
14 It's just a joke. It's nothing personal." But I was,
15 like, you know, it is personal because I'm black.

16 Q. Okay. Did anybody else hear that conversation?

17 A. Yes. It was me -- a guy named Harold Walker was
18 standing there, too.

19 Q. What's his classification?

20 A. He's a molder Class A.

21 Q. Okay. But nobody did anything about it?

22 A. No.

23 Q. Have you witnessed any other sorts of
24 discrimination?

25 A. Well, when I was first hired in in '95, it was a guy

Potts - Direct

1 African-American gets isn't going to enhance his
2 promotion?

3 A. Yes.

4 Q. Between African-Americans and whites, who gets the
5 easier, cleaner job assignments?

6 A. The whites get the easier ones.

7 Q. Who has to work harder?

8 A. Has to work harder?

9 Q. Yeah.

10 A. The blacks work harder.

11 Q. And have you ever heard any of the white supervisors
12 use racially-derogatory terms or be present when other
13 whites use them?

14 A. Yes, I have.

15 Q. Would you tell us about that?

16 A. Well, at lunchtime we always sit over at the corner;
17 and we may play a hand of dominoes or so during our lunch
18 break. And we'll be playing and they'll always -- it's
19 sometimes a joke that I heard one of them say and at that
20 particular day, my foreman was sitting right there
21 playing with us and when he said it, I kind of looked
22 over there at him and he looked -- I looked over there at
23 my foreman and he just kind of turned his head like that
24 (indicating) and didn't say nothing.

25 Q. What was the offensive thing you heard said?

Potts - Direct

1 A. He said -- let me see. It was some kind of a joke.
2 Let me see if I can remember it. When they -- I don't
3 know if you're familiar with dominoes. We were playing
4 42, and a guy played a domino. He wasn't supposed to be
5 playing it. One guy said, "He reneged." And the other
6 white guy said, "No. He niggered." And I looked, you
7 know. I turned around at my foreman. He kind of just
8 turned his head and didn't say a thing. He kind of
9 grinned and turned his head this way. I figured, Well, I
10 can see he ain't going to do nothing, and left it at that
11 and stopped playing.

12 THE COURT: You stopped playing?

13 THE WITNESS: Yes, sir.

14 BY MR. GARRIGAN:

15 Q. Now, the discrimination that you've observed and
16 experienced, do you think that's isolated stuff or is it
17 common and typical in the company?

18 A. It's common and typical.

19 Q. Okay. Do you know either Mr. Buford or Mr. McClain?

20 A. I know Mr. Buford pretty well, and I have spoke with
21 Mr. McClain on one occasion.

22 Q. Okay. Do you have confidence in them to represent a
23 class of African-Americans at Lufkin Industries who are
24 subject to discrimination?

25 A. Yes, I do.

Thomas - Direct

1 college; and it was by the president Frank Stevenson.

2 Q. Was he president then?

3 A. Yes, he was.

4 Q. Okay. Just briefly, if you would, tell the Court
5 what positions you've held since you worked there --
6 during the time you were a full-time employee.

7 A. During the time in which I was a full-time employee
8 of Lufkin Industries, I worked in the sales department
9 for Lufkin who -- I trained for about a year and a half
10 prior to placement in Oklahoma City as a salesman for the
11 company in oil field equipment in which I worked there as
12 also a service man, as well, who would actually go out to
13 the job and work on the oil field equipment. After my
14 tenure spent there in the oil field, I had to decline. I
15 was transferred back to Lufkin Industries.

16 BY THE COURT:

17 Q. How long were you in Oklahoma City?

18 A. For four years, three and a half years, roughly.

19 Q. What was your position there?

20 A. In Oklahoma City I was a salesperson.

21 Q. How large -- how large a sales office did they have
22 in Oklahoma City?

23 A. It was an office of roughly five people.

24 Q. All right. Did that include service people, as well
25 as sales people?

Thomas - Direct

1 A. We were combined of both, sales and service.

2 Q. What was your degree from Lamar University?

3 A. I had some hours in business, and also I obtained an
4 associate's degree in real estate from Lamar University.

5 BY MR. GARRIGAN:

6 Q. Okay. And then after you came back from -- well,
7 when you were in Oklahoma, did you have any supervisory
8 duties over other employees?

9 A. Yes, I did. I was on a trainee sales program in
10 which the other sales parties, who were all white there,
11 worked right alongside me; and I actually did a lot of
12 training in-house with the guys that they did have
13 working at the sales office there in Oklahoma City.

14 Q. And so you trained others?

15 A. Yes, I did.

16 Q. As far as you know, were you the first
17 African-American salesperson?

18 A. To my knowledge, I was the only.

19 Q. Okay. And then you said you were transferred back
20 to Lufkin?

21 A. Yes.

22 Q. What was your position when you were transferred
23 back?

24 A. When I was transferred back to Lufkin, I moved into
25 the data base coordinating job position in the machine

Thomas - Direct

1 shop.

2 Q. Okay. They didn't offer you another sales position?

3 A. No, they didn't.

4 Q. Were there any African-Americans in sales positions?

5 A. No, there weren't, to my knowledge. I was the only
6 one.

7 Q. And so when you came back, they put you on a
8 computer?

9 A. Basically what they did -- yes, they did. I was
10 working in the computer-integrated manufacturing division
11 of the company which actually did the programming for the
12 component parts of the company's operation and which I
13 have scheduled and maintained the operations thereof for
14 manufacturing purposes.

15 Q. All right. And how long did you do that?

16 A. I did that approximately for -- until 1984 which I
17 was then assigned a job in the quality assurance
18 department of the power transmission, at that time the
19 oil field manufacturing division, which was headed by, I
20 believe it was, Mike Penn.

21 Q. Okay. Can you tell us how many months or years it
22 was that you were the data base coordinator?

23 A. I would say it was roughly -- well, from '83 is when
24 I transferred back to Lufkin and then from '83 to 1984 is
25 when I was transferred into the computer-integrated

Thomas - Direct

1 manufacturing department. During -- from '84 until, I
2 would say, approximately the latter part of '85, 1985, I
3 was transferred into the quality assurance department.

4 Q. Okay. And what did you do in the quality assurance
5 department?

6 A. Prior to my going into that department, I was asked
7 to assist the department, because of my training and
8 sales background, to accommodate that department to
9 handle outside customers as well as do documentation,
10 inspecting requirements, and also governmental
11 documentation, reading and specifications, to coordinate
12 my training with that department to assist in any way
13 possible; and I volunteered to go at that particular
14 time. I was asked by Mike Penn.

15 Q. Okay. And so now you were dealing with equipment
16 that had been sold and was being delivered?

17 A. Yes, I was. And at that particular time there was a
18 gentleman that was doing a particular job there in the QA
19 department who was transferred from another department to
20 do some work in the structural departments, as a matter
21 of fact. One of my entail duties was to assume his
22 duties, also, which I was not familiar with. I had to
23 just learn a whole new system all over again. That part
24 of that entity was called the ASME code pressure vessel
25 requirements for manufacturing the oil field air balance

Thomas - Direct

1 pumping unit which required outside coordination with the
2 inspectors and welding specifications and a whole host of
3 other technical requirements.

4 THE COURT: A -- ASME, is that American society
5 of --

6 THE WITNESS: American Society of Manufacturing
7 Engineering.

8 THE COURT: Manufacturing Engineering?

9 THE WITNESS: Yes.

10 BY MR. GARRIGAN:

11 Q. Okay. And then how long did you work in quality
12 assurance, then?

13 A. I worked in the QA department from 1984 to 1988, I
14 believe it was.

15 Q. And then what happened in 1988?

16 A. Well, during my time period working in the QA
17 department doing the various different duties that I had
18 assumed by appointment, I had begun to observe the
19 different job opportunities throughout the company to
20 advance, to get more income; and I attempted to apply for
21 these various different job opportunities and, thus, to
22 no avail. So, I had signed a job posting for a job
23 position as a sales and service manager for the company
24 in the oil field division, of an area which I just
25 previously worked before in Oklahoma City. So, I signed

Thomas - Direct

1 this job posting after numerous attempts to enhance my
2 position in the company as far as advancement; and I got
3 the job. It was not through your normal channels, I
4 admit; but I did get the job.

5 Q. What do you mean --

6 A. Position.

7 Q. -- it wasn't through normal channels?

8 A. One of the requirements of this particular job,
9 whenever you sign a job posting, was you have to submit a
10 job change application. Part of that job application had
11 to be signed and verified through your supervisors, your
12 current immediate supervisor, for approval. Then it
13 would be coordinated to the personnel department who
14 would give you a recommendation of whether or not you
15 will be applying for this job as far as an interview. I
16 did not have to go through the interview process after
17 signing that job posting.

18 Q. They just gave it to you?

19 A. I got the job. It was given.

20 Q. Was there any explanation for that?

21 A. None to my knowledge, other than the fact that I had
22 previously had some time spent there in Oklahoma City;
23 and I assumed that my abilities and performance did
24 justify the job.

25 Q. All right. And so you went back to Oklahoma?

Thomas Direct

1 A. Yes, I did. I went back to Oklahoma and -- as a
2 service center manager to replace a gentleman that was in
3 the process of transferring back here to Lufkin.

4 Q. All right. How long did you stay in Oklahoma that
5 time?

6 A. Roughly six months.

7 Q. And then what happened after six months?

8 A. After a six-month period there at Oklahoma City, I
9 was given instruction by my supervisor there that my
10 services were no longer needed there in Oklahoma City and
11 I would be needed immediately to return back to Lufkin.

12 Q. And did -- was there some problem with your
13 performance in Oklahoma?

14 A. I questioned my performance with the immediate
15 supervisor, and his statement was that it was nothing
16 about your performance. It's just that your services are
17 needed there at Lufkin Industries in the machine shop
18 division. Mr. Mike Penn requests you return; and, thus,
19 I returned to Lufkin.

20 Q. Okay. And what did you do when you got back to
21 Lufkin?

22 A. Upon my immediate return to Lufkin, I was very
23 disgruntled, the fact of the immediate return, and so I
24 questioned Mr. Penn, as well as Mr. Stevenson concerning
25 this immediate transfer and they assured me that it was

Thomas - Cross

1 A. Going back in time, the only -- when I was
2 transferred back to Lufkin from Oklahoma City, that was
3 my last stent at an attempt to do anything else other
4 than talk to management and approach management about my
5 concerns personally, as well as throughout the plant.

6 Q. So, your attempts occurred really prior to going to
7 Oklahoma and then you were --

8 A. Yes.

9 Q. -- discouraged because of Oklahoma and you never
10 again applied?

11 A. Yes.

12 Q. Did you believe that you had been brought back from
13 Oklahoma the second time because of your race?

14 A. I had no idea of knowing. I didn't know the
15 company's intention. I wasn't informed, you know. I was
16 told to come back home. I did. The company didn't give
17 me an explanation. I questioned. I still didn't get
18 one. Race could have been an issue. I had no knowledge,
19 but with me it had to have been because of the way I
20 perceived it.

21 Q. Okay. So, at the time you thought it was race, you
22 just didn't have any support for that?

23 A. I didn't know what the issue was. Like I said, at
24 that particular time when I was transferred back, there
25 were two elements involved, me being a black man and,

Ross - Cross

1 MR. GARRIGAN: Okay. Pass the witness.

2 CROSS-EXAMINATION

3 BY MR. BACON:

4 Q. This Perry Bill, was he a manager?

5 A. He was a black supervisor.

6 Q. He was your supervisor?

7 A. Yes.

8 Q. And he was black?

9 A. Black.

10 Q. And his supervisor -- do you know who his supervisor
11 was?

12 A. Gerald Coutee. I think Gerald was over the whole
13 department.

14 Q. Okay. And Gerald was black, as well?

15 A. He's black, as well.

16 Q. Was this your first job graduating from high school?

17 A. Yeah. I just graduated from high school.

18 Q. Had you had some other jobs before that?

19 A. No, sir.

20 Q. Had you worked anywhere before Lufkin Industries?
21 For example, in the summer?

22 A. No, sir.

23 Q. All right. When you say that -- I think you've
24 submitted an affidavit. Do you remember submitting an
25 affidavit previously in this case?

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

SYLVESTER MCCLAIN, et al. *
*
Plaintiffs, *
* CIVIL ACTION NO. 9:97CV063
v. *
*
LUFKIN INDUSTRIES, *
*
Defendant. *

ORAL DEPOSITION OF

SHERRY LYNN CALLOWAY SWINT

JUNE 16, 2003

THE ORAL DEPOSITION OF SHERRY LYNN CALLOWAY SWINT, duly
sworn, produced as a witness at the instance of the
Defendant, Lufkin Industries, was taken in the
above-styled and numbered cause on the 16th day of June,
2003, from 9:03 a.m. to 3:30 p.m., before Lisa Reyes,
CSR, in and for the State of Texas, reported by machine
shorthand, at the Offices of Lufkin Industries Career
Development Center, Douglas at Ellis, Lufkin, Texas,
pursuant to the Federal Rules of Civil Procedure and the
provisions stated on the record or attached therein.

1 your resignation?

2 A. Yes, sir.

3 Q. And again I'm just trying to establish a
4 chronology here. You believe that you probably worked
5 in the new building as a technical secretary -- I mean,
6 new, it was a different building -- for maybe six, seven
7 months?

8 A. Yeah. Depending on whenever the move was, I
9 moved into the new location as a technical secretary.

10 Q. Okay. And it was -- I'm sorry.

11 A. And the foundry material supervisor position
12 came after that.

13 Q. Now, and again I don't want to confuse you.
14 I'm just trying to get a clear record here.

15 A. Okay.

16 Q. While you are -- in that six and seven months
17 where you're in the new building, which I would say
18 second half of 1994, you applied for a job -- is it the
19 materials -- what is the job that you -- the buyer's
20 position.

21 A. The buyer's --

22 MR. KONECKY: Slow down.

23 Objection, form.

24 Q. (BY MR. BACON) Is that correct? You applied
25 for the buyer's position while -- after you moved to the

1 new building but before you were assigned the job you
2 didn't want.

3 A. I believe that I applied for the buyer's
4 position sometime in '94. Now, if it's the last six
5 months, the first six months, I believe it was sometime
6 in 1994.

7 Q. And you could have conceivably applied for the
8 buyer's position before you guys moved to the new
9 building?

10 MR. KONECKY: Objection, form.

11 A. I honestly don't remember the exact dates.

12 Q. (BY MR. BACON) Well, here is my next question:
13 After you applied for the buyer's position, which you
14 didn't get, was there any other position that you
15 applied for that you did not get that you wanted? And I
16 know you said you've applied for several positions or
17 quite a few positions. I'm just trying to determine the
18 timing. Was there any position that you sought after
19 you sought the buyer's position in 1994?

20 MR. KONECKY: Objection to form.

21 A. I don't remember the time frame. I don't
22 remember the time frame. I do know that I applied for
23 the buyer's position. Whether that was the last
24 position I applied for and didn't get, I can't answer
25 that. I don't remember because I have applied for so

1 many positions at Lufkin Industry. I don't remember
2 that.

3 Q. (BY MR. BACON) Was the buyer's position
4 posted?

5 A. Yes, it was.

6 Q. Did you put your name on a posting?

7 A. Yes, I did.

8 Q. Do you know who else put their name on that
9 posting?

10 A. Linda Schanfish was one.

11 Q. Were there other people who put their name on
12 that posting?

13 A. I believe that there were other people.

14 Q. Linda --

15 A. I don't remember.

16 Q. I'm sorry.

17 A. I don't remember who they were.

18 Q. Okay. Linda Schanfish was the person who got
19 the job.

20 A. Yes.

21 Q. All right. Were you interviewed for the
22 buyer's position?

23 A. Yes, I was.

24 Q. Who interviewed you?

25 A. I believe it was Dewayne Howell.

1 Q. And who is Dewayne Howell?

2 A. He was the project manager for that phase of
3 the government contract.

4 Q. Was this buyer position a part of the
5 government project?

6 A. Yes. Yes, I believe it was.

7 Q. Did Mr. Brewer encourage you to apply for this
8 job?

9 A. I don't recall Mr. Brewer encouraging me to
10 apply for it, but he may have. I don't remember.

11 Q. Did anybody encourage you to apply for it?

12 A. I don't remember anyone encouraging me to apply
13 for the position.

14 Q. How did you find out that Linda Schanfish had
15 been awarded that job?

16 A. Well, it was -- it was either announced. She
17 was either introduced. I trained her for the position
18 and I did not know that that was the position that I was
19 training her for.

20 Q. Do you know what the buyer position did?

21 A. To my recollection, the buyer position, that
22 individual was -- duties involved buying materials,
23 machinery, buying production items that was needed to
24 produce the contract that we were awarded through the
25 government.

1 Q. What experience did you have doing that kind of
2 a job?

3 MR. KONECKY: Objection to form.

4 A. The experience I had with doing that kind of
5 job was the four years of experience I already had
6 incurred through working with the government contract.

7 Q. (BY MR. BACON) Had you bought materials?

8 A. I had allocated cost of materials through that
9 position of technical secretary.

10 Q. Had you bought materials?

11 A. No.

12 MR. KONECKY: Objection, form.

13 A. I had not bought materials, no, sir.

14 Q. (BY MR. BACON) Okay. When you did not get the
15 job, did you complain to anybody about not getting the
16 job?

17 A. Yes, I did.

18 Q. Who did you complain to?

19 A. I complained to Trent Williams.

20 Q. Anybody besides Trent Williams?

21 A. I believe I complained to Thomas Brewer as
22 well.

23 Q. What did Thomas Brewer tell you?

24 A. I don't recall what Thomas told me, if he told
25 me anything. I don't know what he -- I don't remember

1 what he told me.

2 Q. What do you recall -- when you complained to
3 Thomas Brewer, what did you tell him? What was the
4 nature of your complaint?

5 A. I remember complaining about applying for all
6 of the positions that I applied for and not receiving
7 them and I was beginning to conclude that there was a
8 reason I wasn't receiving those other than my ability to
9 perform the job that I applied for.

10 Q. Did Thomas Brewer suggest to you that it would
11 be a good idea if you got more education?

12 A. At that time, no, sir, I don't believe he did.

13 Q. Did he -- you don't recall what he told you at
14 the time?

15 A. I remember us discussing it. I remember us
16 discussing it. And I don't know what advice or
17 information he gave me.

18 Q. Did you suggest to Thomas Brewer that you
19 thought you were being discriminated on the basis of
20 your race?

21 MR. KONECKY: Objection, form.

22 A. I don't recall if I actually said that I did
23 not get -- or I was being discriminated based on my race
24 with Mr. Brewer, but I know I was -- I did communicate
25 that with others.

1 Q. (BY MR. BACON) Okay. You don't recall ever
2 telling Mr. Brewer that you thought you were being
3 discriminated on the basis of your race?

4 A. I don't remember that I did.

5 Q. Would you have felt comfortable sharing that
6 with Mr. Brewer?

7 MR. KONECKY: Objection, form.

8 A. Mr. Brewer and I had a good working
9 relationship and I do believe that I could have gone to
10 him with issues that I may have been going through
11 there, but I believe if I would share with him about
12 being discriminated at Lufkin Industries and he as a
13 manager over me and if he's questioned by other managers
14 over him, that it would put him in a very compromisable
15 position. And I wouldn't want to do that.

16 Q. (BY MR. BACON) Mr. Brewer is black?

17 A. Yes, he is.

18 Q. Okay. So you don't recall ever talking to
19 Mr. Brewer about your concerns that you might be a
20 victim of race discrimination?

21 A. I do remember us discussing it. All of the
22 details of the discussion I don't remember.

23 Q. Do you recall what he told you if you suggested
24 that to him?

25 A. No, I do not recall what he told me to do.

1 Q. Did he tell you that Lufkin was going to have
2 to move you to a different position?

3 A. He told me that Lufkin would have to place me
4 in a buyer's position or in a equivalent position with
5 the same --

6 Q. With the same?

7 A. I don't know if he said an equivalent position,
8 but he did say that they had to place me in a buyer's
9 position when one became available or a similar
10 position. That's what I believe he -- is what he told
11 me.

12 (Swint Exhibit No. 11 was marked.)

13 Q. I'm handing you what is marked as Exhibit 11.
14 And this is a conciliation agreement between the
15 Department of Labor and Lufkin Industries. And I don't
16 need you to read the whole thing. I just want to know
17 if you've ever seen this document before I ask you
18 questions about it.

19 A. I don't recall if I've seen this document or
20 not.

21 Q. Did Mr. Williams ever send you any
22 documentation from the OFCCP?

23 A. I want to believe that he did, but for a
24 certainty I can't say at this time.

25 Q. When you were moved to the position of working

1 foreman, were you given a raise?

2 A. The foundry material supervisor position?

3 Q. Yeah.

4 A. Yes, I was.

5 Q. Do you recall that your salary was raised at
6 one point to 1,783?

7 A. That -- that amount sound familiar.

8 Q. Do you recall having a meeting with Paul Perez
9 where he explained to you that Lufkin had entered into a
10 conciliation agreement with respect to your employment?

11 A. Yes, I do remember meeting with Paul Perez.

12 Whether or not it was a -- if -- he may have said
13 conciliation agreement at that time. I don't remember
14 what he called -- what it was called.

15 Q. I'd like you -- take a look at page 3 of this
16 agreement and there's an entire section here that deals
17 with you and where -- you see where the word "remedy" at
18 the top is?

19 A. Yes, sir.

20 Q. Right below there. These are things that this
21 document said Lufkin was supposed to do. I'm going to
22 go through them and ask you if these things happened.

23 No. 1, it says, "On February 20, 1995, Sherry
24 Calloway's salary will be increased to \$1,783."

25 Did that happen?

1 A. I do believe that happened.

2 Q. Okay. "B," it says, "On February 20, 1995,
3 Sherry Calloway's position of Working Foreman Warehouse
4 will be converted to an exempt salaried employee
5 position."

6 Did that happen?

7 A. As I said before, I was under the impression
8 that the position I had was foundry material supervisor.

9 Q. Do you know if it was converted to an exempt
10 salaried position, the one you had, the position that
11 you had?

12 A. I'm not sure. I'm not sure.

13 Q. All right.

14 A. Let me say this: I do remember that whereas
15 before I was -- yeah, I was salary nonexempt. It did
16 become salary exempt. Yes, it did.

17 Q. Okay.

18 A. Yes, it did.

19 Q. "C" was award Ms. Calloway \$318 in back pay.

20 Were you ever given \$318 in back pay?

21 A. Yes, sir, I was.

22 Q. Okay. Were you told that you would be
23 considered for upcoming buyer positions for which you
24 qualified?

25 A. I don't remember that I was told that.

1 Q. All right. Did you know that you would be
2 considered for -- I mean, did anybody -- because I think
3 you testified a moment ago that Mr. Williams told you
4 that.

5 A. Mr. Williams --

6 MR. KONECKY: Wait.

7 Q. Did --

8 MR. KONECKY: Objection, form.

9 Q. -- Mr. Williams tell you that?

10 A. Did he tell me that I would be --

11 Q. -- considered for a buyer position if one
12 became available.

13 A. He did say I would be considered for a buyer's
14 position or a position similar to that.

15 Q. Okay.

16 A. So that's the same.

17 Q. Do you know if there were any buyer positions
18 that came open between this time and the time you left
19 Lufkin Industries?

20 A. I don't recall any that became available.

21 Q. Okay. "E" says award retroactive seniority and
22 all other fringe benefits, including, but not limited to
23 salary adjustments, vacation accruals, profit-sharing,
24 insurance, retirement, overtime.

25 Were you not paid any of these benefits that I

1 just described that you were supposed to get?

2 MR. KONECKY: Objection, form.

3 A. I received \$318.

4 Q. (BY MR. BACON) Okay. Now, I think your
5 testimony was -- was this -- this agreement was not
6 acceptable to you, is that what you're telling me?

7 MR. KONECKY: Objection, form.

8 A. At this time I don't remember all of these
9 details with this agreement. I do remember that the
10 OFCCP found Lufkin guilty. I do remember Mr. Williams
11 telling me that there would be remedies and that they
12 would have to consider me or offer me a buyer's
13 position. That, I do remember. All the others that's
14 listed here at this time I'm not remembering. I know
15 number "E," I did not receive any of that. Only thing I
16 received during my meeting with Mr. Perez was the \$318.

17 (Swint Exhibit No. 12 was marked.)

18 Q. Okay. I'm handing you what has been marked as
19 Exhibit 12.

20 A. Okay.

21 Q. Is this your handwriting?

22 A. It looks like my handwriting.

23 Q. All right. It appears to be a memorandum that
24 you sent to Paul Perez --

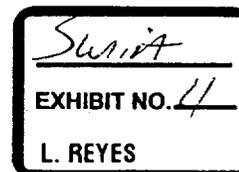
25 A. Uh-huh.

G

Conciliation Agreement
Between the U.S. Department of Labor
Office of Federal Contract Compliance Programs
and
Lufkin Industries, Inc.
P. O. Box 849
Lufkin, TX 75902

~~Part I.~~ GENERAL PROVISIONS:

1. This Agreement is between the Office of Federal Contract Compliance Programs (hereinafter OFCCP) and Lufkin Industries, Inc. (hereinafter Lufkin).
2. The violations identified in this Agreement were found during a compliance review of Lufkin which began on October 3, 1994 and they were specified in a Notice of Violations issued January 31, 1995. OFCCP alleges that Lufkin has violated Executive Order 11246, as amended, and implementing regulations at 41 CFR Chapter 60 due to specific violations cited in Part II below.
3. This Agreement does not constitute an admission by Lufkin of any violation of Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, and/or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 and implementing regulations.
4. The provisions of this Agreement will become part of Lufkin's AAP. Subject to the performance by Lufkin of all promises and representations contained herein and in its AAP, all named violations in regard to the compliance of Lufkin with all OFCCP programs will be deemed resolved. However, Lufkin is advised that the commitments contained in this Agreement do not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.
5. Lufkin agrees that OFCCP may review compliance with this Agreement. As part of such review, OFCCP may require written reports, inspect the premises, interview witnesses, and examine and copy documents, as may be relevant to the matter under investigation and pertinent to Lufkin's compliance. Lufkin shall permit access to its premises during normal business hours for these purposes.



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6. Nothing herein is intended to relieve Lufkin from the obligation to comply with the requirements of Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 and implementing regulations, or any other equal employment statute or executive order or its implementing regulations.
7. Lufkin agrees that there will be no retaliation of any kind against any beneficiary of this Agreement or against any person who has provided information or assistance, or who files a complaint, or who participates in any manner in any proceedings under Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, and/or, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212.
8. This Agreement will be deemed to have been accepted by the Government on the date of signature by the District Director for OFCCP, unless the Regional Director or the Director, OFCCP indicates otherwise within 45 days of the District Director's signature of this Agreement.
9. If at any time in the future, OFCCP believes that Lufkin has violated any portion of this Agreement during the term of this Agreement, Lufkin will be promptly notified of that fact in writing. This notification will include a statement of the facts and circumstances relied upon in forming that belief. In addition, the notification will provide Lufkin with 15 days from receipt of the notification to respond in writing, except where OFCCP alleges that such a delay would result in irreparable injury.

Enforcement proceedings for violation of this Agreement may be initiated at any time after the 15-day period has elapsed (or sooner, if irreparable injury is alleged) without issuing a Show Cause Notice.

Where OFCCP believes that Lufkin has violated this Conciliation Agreement, evidence regarding the entire scope of Lufkin's alleged noncompliance which gave rise to the Notice of Violations from which this Conciliation Agreement resulted, in addition to the evidence regarding Lufkin's alleged violation of the Conciliation Agreement, may be introduced at enforcement proceedings.

Liability for violation of this Agreement may subject Lufkin to sanctions set forth in Section 209 of the Executive Order, 41 CFR 60-250.28 and/or 41 CFR 60-741.28 and/or other appropriate relief.

Part II. SPECIFIC PROVISIONS:

1. Violation: Lufkin's selection practices with regard to promotion resulted in the disparate treatment of a minority female. This is in violation of 41 CFR 60-1.4(a).

Remedy: At minimum:

- (a) On February 20, 1995 Sherry Calloway's salary will be increased to \$1,783.00.
- (b) On February 20, 1995 Sherry Calloway's position of Working Foreman Warehouse will be converted to an exempt salaried employee position.
- (c) Award Ms. Calloway \$318.00 in back pay. Disbursement of funds will be in accordance with the instructions outlined in Part III of this Agreement.
- (d) Lufkin will consider Sherry Calloway for upcoming Buyer positions for which she qualifies.
- (e) Award retroactive seniority and all other fringe benefits including, but not limited to salary adjustments, vacation accruals, profit sharing, insurance, retirement, overtime, etc. as applicable.
- (f) On February 20, 1995 Lufkin developed a plan of action with time frames to insure the elimination of elements which caused the disparate treatment.

2. Violation: Lufkin's placement practices has resulted in minorities being relegated to jobs with less desirable working conditions than non-minorities with similar experience and qualifications. This is in violation of 41 CFR 60-1.4(a).

Remedy: At a minimum:

- (a) Lufkin will recruit minorities into all departments within the facility at a rate not less than availability.

(b) On February 20, 1995 Lufkin developed a plan of action with time frames to ensure the elimination of elements which caused the disparate treatment.

3. Violation: Lufkin failed to adequately develop and execute action-oriented programs designed to eliminate specific problems, as required by 41 CFR 60-2.13 (f).

Remedy: On February 20, 1995 Lufkin developed and is now executing action-oriented programs to eliminate specific problems using 41 CFR 60-2.23 as a guide. Action programs include:

- (a) a specific plan of action to increase the representation of minorities and females in the workforce.
- (b) contact with minority and female recruitment sources and community organizations verbally and in writing in an effort to remedy areas of underutilization.
- (c) careful selection and EEO/affirmative action training for managers responsible for employment related processes.

Lufkin will make every good faith effort to preclude violations 1-3 from recurring.

Part III. REPORTING:

No disbursement of funds covered by this Agreement will be made until forty-five (45) days from the date the District Director signs this Agreement. All disbursement of funds shall be less standard legal deductions. In accordance with this Agreement, funds will be disbursed not later than fifteen (15) days after notification that the 45-day period has elapsed. Such notification will be transmitted by certified mail, return receipt requested. *Apr. 10 + 15 days*

Lufkin will furnish the OFCCP, 2320 LaBranch, Room 1103, Houston, TX 77004 with reports as outlined below:

A. Within thirty (30) days after the notification that the above referenced 45-day period has elapsed, Lufkin will submit:

MAY 10

- 1. A photocopy of the back pay check tendered pursuant to Part II of this Agreement.

- Done* 2. A copy of the personnel action form adjusting Ms. Calloway's salary and position status in accordance with Remedy 1 (a) and (b). Documentation will include the effective date of the adjustment, status (i.e. exempt or nonexempt) and current salary.
- Done* 3. Proof of other retroactive benefits tendered to include description of benefit(s), amount(s) and/or date(s) as appropriate.
- Done* 4. Copies of front pay checks tendered, if applicable. These will be compiled each calendar quarter and will be submitted, if required fifteen (15) days after the end of each quarter. Copies will be due in the Houston District Office, OFCCP no later than April 15, 1995, July 15, 1995 and October 15, 1995 and will continue until Ms. Calloway has attained her rightful place.

B. By July 15, 1995:

A narrative report on good faith efforts undertaken to correct the problem identified in Violation #2 to include:

1. Workforce profile as of June 1, 1995 by the job title within department, indicating the total number of employees and the total number of minorities by ethnic group.
2. Identification of minorities by ethnic group transferred, hired or otherwise placed to increase the representation of minorities in underrepresented departments.

C. By January 15, 1996:

1. A narrative report to address good faith efforts undertaken to correct the problem identified in Violation #2 to include:
 - a. Workforce profile as of January 1, 1996 by job title within department, indicating the total number of employees and the total number of minorities by ethnic group.
 - b. Identification of minorities by ethnic group transferred, hired or otherwise placed to increase the representation of minorities in underrepresented departments.
2. All recruitment efforts undertaken during the period January 1, 1995 - December 31, 1995 to include:

- a. recruitment sources, community organizations, and other referral sources contacted;
 - b. contact persons and telephone numbers;
 - c. dates of contact;
3. A report to address good faith efforts undertaken during the period January 1, 1995 - December 31, 1995 to include the following:
- a. A list of job groups where goals were set for minorities and females during the 1995 AAP year.
 - b. The actual percentage goals which were set for females.
 - c. A workforce profile by job group for January 1, 1995 and December 31, 1995 to include total employees, total minorities and total females.
 - d. Summary of support data to include applicant flow (a listing of each applicant to include the following information: name, sex, date of application; vacancy; if rejected, reasons for rejection; if hired, date of hire and position); if promoted, name, sex, date of promotion, job promoted from, job promoted to indicating total employees, total males and total females for the covered period January 1, 1995 - December 31, 1995.
 - e. A narrative explanation of good faith efforts undertaken for job groups where goals were not attained.

Retain all records pertinent to the violations resolved by this Conciliation Agreement and to the reports submitted under it (including the underlying data/information on which this report is based) until the expiration date of the Conciliation Agreement or consistent with regulatory requirements, whichever is later.

This Agreement will remain in full force and in effect until the final progress report has been approved by the District Director.

Part IV: SIGNATURES:

The Conciliation Agreement is hereby executed by and between the Office of Federal Contract Compliance Programs and Lufkin Industries, Inc., Lufkin, TX 75902.

Feb. 20, 1995
Date


DOUGLAS SMITH, President & CEO
Lufkin Industries, Inc.
Lufkin, TX 75902

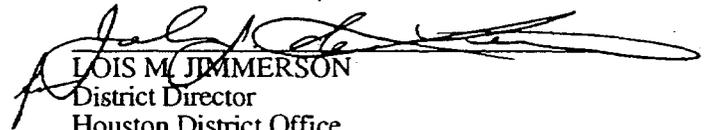
Feb. 23, 1995
Date


TRENT WILLIAMS
Compliance Officer
Houston District Office
Houston, TX

2-24-95
Date


PATRICIA BYRD
Assistant District Director
Houston District Office
Houston, TX

APPROVED:


LOIS M. JIMMERSON
District Director
Houston District Office
Houston, TX

2-24-95
Date

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

SYLVESTER MCCLAIN, et al.,)
)
Plaintiffs,)
)
VS.) C.A. NO. 9:97CV063
)
LUFKIN INDUSTRIES,)
)
Defendant.)

ORAL DEPOSITION OF
WALTER BUTLER
MAY 27, 2003

ORAL DEPOSITION of WALTER BUTLER, produced as a witness
at the instance of the Defendant, and duly sworn, was
taken in the above-styled and numbered cause on May 27,
2003, from 9:08 a.m. to 5:09 p.m., before Lorri Lucas,
CSR in and for the State of Texas, reported by machine
shorthand, at the offices of Lufkin Industries, 409
Ellis Street, Lufkin, Texas, pursuant to the Federal
Rules of Civil Procedure and the provisions stated on
the record or attached hereto.

1 A. Yes. I'm supposed to do that.

2 Q. Do you believe that you should be getting,
3 then, the maximum recovery that they would be allowed by
4 law?

5 MR. GARRIGAN: Objection, privilege. You
6 don't have to answer that.

7 MR. HAMEL: I'm not asking him about
8 privileged conversation. I'm asking him what he
9 believes as a named class representative.

10 Q. Do you believe that the employees should get
11 the maximum recovery that they are allowed by law?

12 MR. GARRIGAN: If you want to discuss
13 settlement, Doug, you can come talk to me about it.
14 Okay?

15 MR. HAMEL: Are you instructing him not
16 to answer?

17 MR. GARRIGAN: Yes.

18 MR. HAMEL: Then let's call the hot line.

19 (Recess from 4:49 to 5:00)

20 MR. HAMEL: In an off-the-record
21 telephone conversation with Judge Cobb, Judge Cobb has
22 ruled that the witness need not answer the question: Do
23 you believe that the employees should get the maximum
24 recovery that they are allowed by law? And Judge Cobb
25 has invited us to certify that question for his review

1 and we would so certify the question.

2 Q. Mr. Butler, I want to ask you some more
3 questions along that line. I believe your counsel is
4 probably going to instruct you not to answer but he can
5 do so with respect to the individual questions.

6 Did you or have you ever had a meeting
7 with all the named class representatives?

8 A. I believe I have. I don't know whether all of
9 them was there or not, though. I had -- I've been to
10 about, I guess, three or four meetings is all.

11 Q. And in the three or four meetings that you've
12 had, how many people were present?

13 A. I didn't count them, so I couldn't tell you.

14 Q. Can you give me an estimate?

15 A. Oh. I wouldn't -- I'd be scared to say. I
16 know sometimes it would be quite a few, though.

17 Q. Were the lawyers present at these meetings?

18 A. Yes.

19 Q. At all of them?

20 A. Every one I've been to they were at.

21 Q. All right.

22 A. I don't know of --

23 Q. Now, sir, are you aware that in this complaint
24 that you are asserting that you are asserting a cause of
25 action which includes that blacks have been

1 intentionally discriminated against at Lufkin
2 Industries?

3 A. Come back with that again, now.

4 Q. Yes. Are you aware, in the complaint that you
5 have made, that it includes a complaint that blacks have
6 been intentionally discriminated against at Lufkin
7 Industries?

8 A. I don't know whether they --

9 MR. GARRIGAN: Objection, form. Go
10 ahead.

11 A. I don't know whether the discrimination's on
12 the part of the company but there's some of the people
13 that's in the company that do things that's undesirable
14 that you think -- you know, the company, all they're
15 looking at is the bottom line or the bottom dollar. But
16 some of the peoples you've got representing the company
17 might have discriminatory action there but you don't --

18 Q. Okay. You don't think the company, as a
19 whole, discriminates against blacks; do you?

20 A. I don't think the company as a whole, no. No.

21 Q. You think it is possible that some few
22 supervisors or managers may?

23 A. Some supervisors but the company's still
24 responsible because they put them in that position.

25 Q. I understand -- I understand that. But, for

1 example, do you think that there are any vice presidents
2 of the company that discriminate against blacks?

3 MR. GARRIGAN: Objection, form.

4 A. I -- you know, I can't speak about the vice
5 presidents. You have some, you have some good vice
6 presidents and you have some that is not so good of vice
7 president, so, you know --

8 Q. Who do you think is not so good of vice
9 president?

10 A. Well, you know, to me, they all treated me
11 well, you know. All I can speak is for myself. But
12 judging from the -- what some of them think they -- a
13 lot of them think Mr. Barber wasn't a good shop
14 superintendent. But Mr. Barber, he was the type that
15 you couldn't blow smoke up under. He can walk out there
16 and he can -- he can spot a soft place in a minute. You
17 know, he's been around trailers. You can't -- you can't
18 fool that man. And, you know, they didn't like him for
19 his attitude and the way he do -- he might walk by you
20 and not speak, wouldn't say a word or walk by and look
21 at you like you're dirt and keep going, you know.

22 Q. Did he do that with everybody?

23 A. Well, mostly everybody. Some of them he
24 stopped and talked to.

25 Q. Did he do it with blacks and whites alike?

1 A. Well, yeah. He'd pass a bunch of whites, too,
2 but there's some whites he talked to.

3 Q. About how many supervisors or managers do you
4 think engage in any discrimination against blacks --

5 A. Well --

6 Q. -- as a percentage of the total?

7 A. Well, back there, I'd say they had five or
8 six.

9 Q. Five or six total?

10 A. Yeah.

11 Q. Out of all the supervisors and managers?

12 A. I mean, in the Trailer Division that I can,
13 you know, think of.

14 Q. And who are those people?

15 A. I think Earl Dover was -- I think he was
16 trying to pull some shenanigans around.

17 Q. Who else?

18 A. Let's see. Earl Dover. A.C. Warren, Carter
19 Olds, Ed Root, Gary Lawson. That's all I can think of
20 right now. I'll think of some of them other ones later.

21 Q. Did you ever participate in a decision that,
22 as named class representatives, you would not seek the
23 maximum recovery possible for class members?

24 MR. GARRIGAN: Objection, privilege. You
25 don't have to answer that.

1 Q. Are you aware that the present complaint for
2 which you are named as a class representative does not
3 seek the maximum damages that may be payable under law
4 to the class?

5 MR. GARRIGAN: Objection, privilege. You
6 don't have to answer that.

7 Q. Did you ever give your permission not to seek
8 the maximum damages allowable under law?

9 MR. GARRIGAN: Objection, privilege. You
10 don't have to answer that.

11 MR. HAMEL: That's all the questions we
12 have at this time.

13 MR. GARRIGAN: I just have a couple of
14 questions to try to clarify something.

15 EXAMINATION

16 BY MR. GARRIGAN:

17 Q. Mr. Butler, you testified earlier about
18 initially being hired into Lufkin Industries.

19 A. Um-hmm.

20 Q. Do you recall that?

21 A. Laborer?

22 Q. Yes.

23 A. Um-hmm.

24 Q. What was your initial position?

25 A. A laborer.