

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

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

Plaintiffs,

vs.

LUFKIN INDUSTRIES,

Defendant.

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CIVIL ACTION NO. 9:97-CV-063

JUDGE CLARK

JOINT REPORT ON PROPOSAL FOR INJUNCTIVE RELIEF

At the Status Conference on December 5, 2008, the Court ordered the Parties to confer on a “methodology on injunction” and advise the Court on those issues on which they were in agreement and identify those issues on which they were not in agreement. The Parties will discuss their positions on disputed issues in separate submissions.

As the Parties previously advised the Court, the Parties have agreed that Industrial Organizational Psychologist Dr. Michael Campion be appointed to review Lufkin’s promotion policies, procedures, and practices for hourly and salaried positions to determine if those policies, procedures, and practices will address and remedy the Court’s findings of unlawful subjectivity in promotions. If Dr. Campion determines that change to Lufkin’s current selection and related practices is needed to address and remedy the Court’s findings, Dr. Campion will make recommendations regarding the development, implementation and monitoring of remedial measures. Dr. Campion will inform Lufkin, Class Counsel, and the Court in writing of his findings and recommendations. The Parties propose that Dr. Campion be given 90 days to

complete his report once he has been appointed, subject to his request for additional time, if needed. Following his report to the Court, the Parties would request 20 days to respond before the Court enters any order on Dr. Campion's report. The Parties also agree that in addition to his review of Lufkin's current selection and related practices, Dr. Campion should review such portions of the Court's record as he deems necessary, including at his discretion, the Court's findings with respect to hourly and salaried promotion in the Amended Final Judgment, the trial record (trial exhibits, expert witness reports and testimony), the Fifth Circuit Court of Appeals' panel decision of February 29, 2008, this Joint Report, the Court's injunction and any subsequent remedial Orders, and the Parties' briefing. In order to conduct his review, Dr. Campion shall have the authority to (a) obtain documents and data from Lufkin and plaintiffs; (b) interview Lufkin's managers and employees and Defendant's Counsel; (c) interview plaintiffs and Class Counsel; and (d) contact Lufkin's unions and their representatives.

Notwithstanding Dr. Campion's recommendations, and subject to the Parties' reservation of rights set forth immediately before counsel's signatures, the Parties have also agreed to the following:

1. **The Appointment of Outside Ombudsperson.** The Parties have agreed that the Court should appoint an outside ombudsperson, whose fees and expenses would be paid by Lufkin, to monitor compliance with any injunction entered by the Court and to hear complaints from class members regarding the matters described in paragraph 2. As with Dr. Campion, the Parties will attempt to reach an agreement on the person who would serve in that role, no later than February 27, 2009. If the Parties are not able to agree on an ombudsperson, no later than March 6, 2009, each Party will propose three candidates for the Court to consider. Additionally, the Parties will be allowed to rank order the choices of the other Party and file any specific

objections and/or arguments that they might have to the other Party's proposals. Such proposals and rankings would be for the Court's information only and not binding on it and the Court may conduct any other or additional proceedings deemed appropriate to select and appoint an ombudsperson.

2. **The Development of a Complaint Mechanism**. The Parties have agreed that the ombudsman would have authority to receive, investigate, provisionally determine and recommend measures to resolve complaints from Lufkin employees regarding Lufkin's non-compliance with Court-ordered relief and from black employees regarding promotion and promotion related discrimination. All Lufkin employees should be provided with a toll free number and other contact information for the ombudsperson. The ombudsperson may also address complaints of retaliation to the ombudsman, at least to the extent that an employee alleges that he has been retaliated against for making a complaint regarding non-compliance with a specific mandate of the court's injunction or a promotion-related matter to the ombudsperson, Lufkin or the union.

In order to investigate any complaint, the ombudsperson may request documents or other information from Lufkin and interview employees, supervisors or other Lufkin personnel. The ombudsperson shall also have the authority to take such actions as appropriate to assist the resolution of the complaint, including recommending appropriate corrective action to Lufkin. If the ombudsperson concludes after investigation that Lufkin has not complied with the injunction or has engaged in promotion related discrimination or retaliation, the ombudsperson shall request Lufkin take recommended remedial action and in the absence of such action report to the Court and Class Counsel.

The Parties are in disagreement as to whether an employee should be required to first complain about promotion decisions to human resources or the employee's union before complaining to the ombudsperson. It is Lufkin's position that the employee should first make his or her complaint to the union or to Lufkin's Human Resources Department. It is Plaintiffs' position that, at least initially, a class member wishing to complain about race discrimination in the promotion process should be able to elect whether to pursue a union grievance or complaint to the Human Resources Department, or complain to the ombudsman. The Parties also disagree on the ombudsperson's authority to receive complaints of alleged discrimination regarding some employment practices unrelated to promotions.

3. **Training.** Training for all supervisors and managers on issues raised in the lawsuit is appropriate. Training provided to each supervisor and manager will depend on the level of their involvement in decisions affecting promotions. The Parties are also in agreement that some training will be necessary on processes affected by any Court-ordered relief.

The Parties agree to jointly attempt select a consultant that Lufkin will retain to assist it in the development of the training, including but not limited to, advising Lufkin on the appropriate content, written materials to provide to trainees, length, format and frequency of such training and who will provide the training.

4. **Internal Monitoring and Recordkeeping.** The Parties agree that Lufkin should designate an individual within Lufkin to monitor Lufkin's compliance with any injunction. This individual will be responsible for coordination with the Court-appointed industrial organizational consultant; monitoring the establishment, implementation, revision and execution of Lufkin's procedures for promotion and other promotion-related employment practices as may be recommended by the consultant and ordered by the Court; communication with, and provision of

information as requested by, the ombudsman; preparation of reports regarding Lufkin's implementation of, and compliance with, the Court's remedial orders for the ombudsman; and reviewing promotion decisions and periodically analyzing promotion data to determine if there are any statistically significant shortfalls in promotions of black employees, and reporting to Lufkin's CEO and senior management staff regarding Lufkin's implementation of, and compliance with, the Court's remedial orders.

The Parties also agree that Lufkin should maintain any paper and data records that reflect any promotion-related decisions including bid sheets, postings and other written communications reflecting employee interest in promotions, forms documenting decisions, structured interview questions and responses, data analyses, paper and pencil tests, records of skill tests, job descriptions for salaried jobs, formal training, and all documentation pertaining to any internal employee complaints, including but not limited to, union grievances, arising from promotion-related decisions and the investigation and resolution of such complaints.

5. **External Monitoring.** The ombudsperson identified in Paragraph 1 should be responsible for monitoring Lufkin's compliance with the Court's remedial orders. The ombudsperson should have the authority to review any documents maintained by Lufkin described in Paragraph 4, audit Lufkin's promotion procedures, practices and related decisions, and conduct an independent analysis of Lufkin's promotion- related data.

In cases where employees complain to the ombudsperson that the terms of the injunction have not been followed, or where black employees complain about discriminatory promotion-related decisions, the ombudsperson should have authority to conduct additional fact finding which may include requesting documents, information and data from Lufkin, and interviewing

supervisors and employees. The ombudsperson should report quarterly to the Court on the number of non-compliance, promotion-related and retaliation complaints that the ombudsperson has received and the ombudsperson's findings and on those complaints. Plaintiffs' counsel and Lufkin's counsel should be given a copy of these reports and an opportunity to respond.

The Parties also agree that the ombudsperson should also provide the Court with reports on the promotion data that he receives from Lufkin. The ombudsman should have the authority to conduct an independent assessment of the data he receives from Lufkin and to request additional information and data from Lufkin to assist him in his independent analysis. Plaintiffs' counsel and Lufkin's counsel should be given a copy of the ombudsman's reports to the Court, and an opportunity to confer and respond at least five days prior to filing with the Court. The Parties disagree on the frequency of these reports and the trigger or indicator that would require the ombudsman to report to the Court that further investigation is warranted.

6. **Dissemination of the Court's Liability Findings, the Fifth Circuit's Order and the Court's Remedial Orders to Lufkin's Employees.** The Parties agree that Lufkin will provide a copy of the Court's ultimate injunction and any subsequent remedial orders to all supervisors and managers. The Parties also agree that Lufkin will provide to all employees a written communication that would be subject to the Parties' agreement, which would summarize the terms of the injunctive relief in easy-to-understand language, and identify the ombudsperson, explain his role, and provide a phone number and other contact information for him.

7. **Areas of Disagreement.** In addition to the areas of disagreement identified above, the Parties have been unable to reach agreement on the issues of (1) procedures for manager accountability for compliance with the Court's remedial orders and the fair employment laws as related to the issues that were the subject of the Court's liability findings; and (2)

adequate duration of continuing court jurisdiction. Simultaneously with this submission, the Parties submit separate position statements on these issues as well as the areas of difference identified above.

8. **The Parties submit this Joint Proposal without Prejudice to Their Rights to Challenge the Court's Judgment.**

Defendant Lufkin's agreement is without waiver of or without prejudice to its reservation of right to challenge the Court's underlying liability findings and need for injunctive relief based on the Fifth Circuit's decision that Sylvester McClain did not exhaust administrative remedies and that changed circumstances make injunctive relief as to salaried promotions unnecessary.

Plaintiffs do not concede that the Fifth Circuit's decision regarding the initial assignment claim has any bearing on the scope of the relief as reflected in the above agreements. Plaintiffs also reserve the right to challenge Lufkin's contention that "changed circumstances" clearly and convincingly make injunctive relief as to salaried promotions unnecessary.

Respectfully submitted,

/s/

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