IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT COURT OF TEXAS

LUFKIN DIVISION

Sylvester McClain, et al.	§	Civil Action No. 9:97 CV 063 (COBB)
Plaintiffs,	§	
v.	§	
Lufkin Industries, Inc.	§	
Defendant.	§	

PLAINITFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S JULY 11, 2003 ORDER DISMISSING PLAINTIFFS' SYSTEMIC DISPARATE TREATMENT CLAIM AND CLASS CLAIM FOR FRONT PAY

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I. INTRODUCTION

It is clear from the plain language of Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998), that the Fifth Circuit did not intend to end over twenty-five years of precedent providing for class treatment of systemic disparate treatment claims. Lufkin attempts to evade this result by confusing the difference between resolution of individual intentional discrimination claims and that of systemic disparate treatment claims and arguing that a disparate treatment class action "would require the parties to focus on each class member's individualized claims."[1] Defendant's Response to Plaintiffs' Motion to Reconsider Order Dismissing Disparate Treatment Class Claims ("Response") at 8. This contention is wrong as a matter of law. Both the Supreme Court and the Fifth Circuit have approved the use of the class action device to litigate systemic disparate treatment claims and have devised a method of trying those cases which clearly does not require that each class member's individual claim be litigated.

Based on the above, plaintiffs respectfully request the Court to reverse its Order dismissing plaintiffs' systemic disparate treatment claim and class claims for front pay. Although plaintiffs originally requested the Court to certify these issues for appeal, in the event it affirms its Order, plaintiffs do not believe the interests of the class will be served by the additional delay that will be caused by appeal to the Fifth Circuit. Therefore, plaintiffs are willing to proceed to trial on their disparate impact claim alone, reserving appeal of the Court's Order until the trial is concluded.

II. SYSTEMIC DISPARATE TREATMENT CLAIMS DO NOT REQUIRE THE RESOLUTION OF INDIVIDUAL ISSUES

Ignoring both Supreme Court and Fifth Circuit precedent providing that systemic disparate treatment claims are suitable for class treatment, as well as the order of proof normally followed by courts in such cases, Lufkin continues to argue that resolution of plaintiffs' systemic

[1] Lufkin also argues that the claims of the named plaintiffs and class representatives are not typical or common of those of the rest of the class. This is neither relevant nor appropriate at this time and should be raised in the motion to decertify the class that Lufkin clearly intends to file. Plaintiffs will respond to such arguments at that time.

disparate treatment claim[2] requires the resolution of each class member's individualized claim. See Response at 8, 10. The Fifth Circuit Court of Appeals has, "routinely upheld certification of class actions to resolve Title VII cases involving . . . pattern or practice claims of discrimination." Allison, 151 F.3d at 409 [emphasis added]. The approach the courts have adopted to resolve such claims was established by International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), in which the Supreme Court held that in the "initial, 'liability' stage of a pattern-or-practice suit," the plaintiff bears the burden of demonstrating that unlawful discrimination has been a regular procedure or policy followed by an employer. Id. at 360. "If successful, individual class members benefit from a presumption of back pay, their entitlement to which is determined at the second or 'remedial stage.'" Allison, 151 F.3d at 409. At the remedial stage, "class members need only prove that they were denied employment opportunities and the extent of their loss, while the burden then shifts to the employer to demonstrate that those class members were denied employment opportunities for legitimate reasons." Id.

For the nearly thirty years since the Teamsters decision, courts, including the Fifth Circuit, have certified systemic disparate treatment claims and have handled such claims in the manner set forth above.[3] At the liability stage, plaintiffs' systemic disparate treatment claims and disparate impact claims present similar issues and require similar proof. "The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used. . . .

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[2] After years of briefing and debate on this issue, Lufkin argues for the first time that plaintiffs should be judicially estopped from arguing that the Court certified a disparate treatment claim. This is clearly prejudicial to plaintiffs, in light of the fact that plaintiffs have only five pages in which to reply to Lufkin's response. If the Court intends to entertain this argument it should permit plaintiffs to respond separately, since the five-page reply limit does not adequately allow plaintiffs to do so. Further, aside from being untimely, this argument is also unpersuasive. Plaintiffs' statement as quoted by Lufkin – made in the context of a brief that argued that the Court's order certifying plaintiffs' Title VII and 42 U.S.C. § 1981 claims did not run afoul of Allison – is not inconsistent with the position plaintiffs have taken since Lufkin first sought to have plaintiffs' systemic disparate treatment claims dismissed.

[3] Trevino v. Holly Sugar Corp., 811 F.2d 896 (5th Cir. 1987) does not, as Lufkin claims, stand for the proposition that systemic disparate treatment claims cannot be certified as class actions because individualized proof is required. Rather, the Fifth Circuit affirmed the district court's determination that the plaintiffs failed to establish that the named plaintiff had been subjected to intentional discrimination. Id. at 905. As such, the named plaintiff no longer had a nexus with the membership of the purported class, and on that basis, the appeals court affirmed the district court's denial of class certification. Id. at 906.

Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 987 (1988) [citation omitted]. Thus, Lufkin's efforts to draw a significant distinction between the proof to be submitted with respect to plaintiffs' disparate impact and systemic disparate treatment claims must be rejected.[4]

Resolution of plaintiffs' systemic disparate treatment claim does not require "consideration of each employee's individual disparate treatment claim[]." Response at 3. To be clear, plaintiffs do not intend – nor are they required – to prove all or any of the class members' individual disparate treatment claims. Unlike in an individual case of intentional discrimination, the plaintiff in a systemic disparate treatment case is not required to produce direct or comparative evidence of discrimination pertaining to each member of the class for whom relief is sought. See 1 Barbara Lindemann and Paul Grossman, Employment Discrimination Law at 45 (3d ed. 1996). "Instead, the plaintiff generally relies upon statistical evidence to create an inference of classwide discrimination." Id. Thus, a trial of plaintiffs' disparate treatment claim would, in fact, focus on "practices that allegedly affected a large group of people in a similar way," Response at 8, just as the disparate impact claim would.

To the extent resolution of class members' equitable monetary relief claims – under either a disparate impact or disparate treatment theory – requires individualized determinations at the remedial stage, courts have adopted "techniques such as the use of a special master to

[4] Lufkin's contention that plaintiffs' disparate impact case-in-chief will principally be based on the testimony of its expert witnesses, whereas their disparate treatment claim would require testimony from up to 63 witnesses is inaccurate. While plaintiffs' systemic disparate treatment claim may very well require additional anecdotal testimony from class member witnesses, the difference is not as drastic as Lufkin suggests. Plaintiffs' preliminary witness list actually consists of only 21 non-representative class member witnesses who plaintiffs might call to testify at trial, excluding class member managers and supervisors whom plaintiffs do not intend to call as part of their case-in-chief. It is likely that only a fraction of these 21 individuals would be called to testify at trial. More importantly, the issue to be litigated at the liability stage of plaintiffs' systemic disparate treatment claim would not be each witnesses' individual disparate treatment claim, but Lufkin's broad employment practices.

streamline the process." Allison, 151 F.3d at 409 (quoting Newberg & Conte, Newberg on Class Actions §§ 24.119-24.121 (3d ed. 1992)). As the Allison court noted, in Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), the Fifth Circuit held that equitable monetary relief can be sought in a Federal Rule of Civil Procedure 23(b)(2) class action "because, as an equitable remedy similar to other forms of affirmative injunctive relief permitted in (b)(2) class actions, it [is] an integral component of Title VII's 'make whole' remedial scheme."[5] Allison, 151 F.3d at 415. Inasmuch as plaintiffs seek only equitable relief on behalf of the class, resolution of the class members' remedial claims is no different under plaintiffs' systemic disparate treatment theory than it is under their disparate impact theory. Since plaintiffs' case "involve[s] only claims for equitable monetary relief, Pettway [] control[s]," id. at 416, and plaintiffs' systemic disparate treatment claims may be properly certified under Rule 23(b)(2).

The mere availability of compensatory and punitive damages under Title VII changes none of the above analysis. The plain language of Allison makes clear that whether or not a systemic disparate treatment claim can be certified as a class action turns on the actual relief sought and that, had the Allison plaintiffs sought only equitable monetary relief, Pettway would have controlled the outcome, permitting the plaintiffs' claims to be certified as a Rule 23(b)(2) class action. Id. at 415-16. Lufkin ignores this language and states that "as a general rule, disparate treatment classes should only be certified in cases where the questions of law or fact common to the class predominate. Lufkin, however, provides no authority whatsoever for this assertion, from Allison or elsewhere.

The only difference between a systemic disparate treatment case seeking equitable relief

[5] Conceding that front pay is an equitable remedy like back pay and should be treated as such for remedial purposes, Lufkin argues that front pay is "unlikely to be an appropriate remedy for Plaintiffs' alleged disparate impact claims." Lufkin's Response at 11. Whether or not such relief is "likely" to be appropriate is something that should be determined at the remedial stage, and it is inappropriate to bar class members from having access to an remedy that may be necessary to achieve "make whole" relief. Further, Lufkin acknowledges that 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." Response at 12. This remedy Lufkin describes is, in fact, front pay, and is one of the potential remedies plaintiffs could see constituting "make whole relief" under the appropriate circumstances.

brought now and one brought before the Civil Rights Act of 1991 is the potential conflict between the class representatives and the unnamed class members who might wish to seek compensatory and punitive damages. Lufkin asserts that "[o]ne cannot adequately represent a class of individuals unless one seeks the full panoply of relief to which each individual might be entitled." Response at 10. It again cites no authority for this position, which is in direct conflict with the plain language of both Allison and Smith v. Texaco, 263 F.3d 394 (5th Cir. 2001), which: (1) questions whether any such conflict is created and (2) notes that such concerns can be addressed through a notice and opt-out procedure under Rule 23(d). In Zachary v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230, 244 (W.D. Tex.), the court did not consider its discretionary powers under Rule 23(d), stating only that there is no clear cut right to opt out of a Rule 23(b)(2) class action. It did, however, note that "the danger [of prejudice to absent class members] would be greatly lessened if there was" such a right. Id. In Smith, which was decided after Zachery, the Fifth Circuit explicitly approved the use of an opt-out and notice procedure to cure any potential conflict that might be created by a named plaintiff's inability to seek compensatory and punitive damages on behalf of the class. Thus, Lufkin's arguments must fail.

III. CONCLUSION

Based on the foregoing and the arguments in plaintiffs' motion, plaintiffs respectfully request the Court to reconsider its July 11, 2003 Order dismissing plaintiffs' systemic disparate treatment claim. As plaintiffs seek only equitable relief on behalf of the class, this claim can be handled in the traditional, orderly manner that has been established by the Supreme Court and the Fifth Circuit. While plaintiffs urge the Court to reverse its previous ruling, in the event the Court does not choose to do so, plaintiffs are prepared to proceed on their disparate impact claim alone and reserve appeal of this issue until the end of the trial on that claim.

Dated: August 1, 2003

Respectfully Submitted,

By: Darci E. Burrell

Teresa Demchak
Darci E. Burrell
Joshua G. Konecky
Goldstein, Demchak, Baller, Borgen & Dardarian
300 Lakeside Drive, Suite 1000

Oakland, CA 94612-3534
(510) 763-9800

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

PROOF OF SERVICE

Case: Sylvester McClain, et al. v. Lufkin Industries, Inc.
Civil Action No. 9:97CV063

STATE OF CALIFORNIA)
) SS
COUNTY OF ALAMEDA)

I have an office in the county aforesaid. I am over the age of eighteen years and not a party to the within entitled action. My business address is 300 Lakeside Drive, Suite 1000, Oakland, California 94612.

I declare that on the date hereof I served a copy of

PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S JULY 11, 2003 ORDER DISMISSING PLAINTIFFS' SYSTEMIC DISPARATE TREATMENT CLAIM AND CLASS CLAIM FOR FRONT PAY

by causing a copy thereof to be mailed by depositing the same in a sealed envelope in the U.S. mail with postage prepaid and addressed to:

Douglas Hamel
Christopher V. Bacon
Michelle Mahony
Vinson & Elkins
2806 First City Tower
1001 Fannin Street
Houston, TX 77002-6760

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at Oakland, California on August 1, 2003.

LISA DUNGAN
Printed Name

Signature