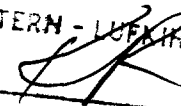


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

FILED - CLERK
U.S. DISTRICT COURT
NOV 12 AM 11:31
TX EASTERN - LUFKIN
BY 

SYLVESTER MCCLAIN, et al.

Plaintiffs,

vs.

LUFKIN INDUSTRIES, INC.

Defendant.

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CIVIL ACTION NO. 9:97CV063
(JUDGE COBB)

**DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S
MOTION FOR RECONSIDERATION AND MOTION TO STRIKE**

Lufkin has produced all of the documents Plaintiffs seek to compel. The only conclusion Lufkin can draw from the content and tone of Plaintiffs' response, which contains only one paragraph that actually addresses Lufkin's motions, is that Plaintiffs are using this as an opportunity to perpetuate additional misstatements about the discovery process and Lufkin's discharge of its discovery obligations.

A. Lufkin's Motion to Strike Should Be Granted.

On October 3, 2003, six weeks after the discovery deadline, Plaintiffs requested Lufkin to produce "application forms, records reflecting education, and performance evaluations" from 33 personnel files. On October 10, 2003, Plaintiffs requested the same documents plus "disciplinary records" from all 185 personnel files Mr. Garrigan inspected on September 25 and intended to inspect on October 8. Plaintiffs never requested any of these documents during discovery (formally or informally). Because Plaintiffs' motion to compel is a blatant attempt to obtain additional discovery after the discovery deadline, it should be stricken as untimely.

Plaintiffs' Motion to Compel should be stricken for the additional reason that it exceeds the page limitation. Contrary to the claim in Plaintiffs' response, Lufkin's Motion to Strike

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Plaintiffs' 86-page motion to compel (filed less than two weeks after Plaintiffs' 208-page motion to compel) is not based on the page limitations set forth in Local Rule CV-7(a)(2), which Lufkin agrees is exclusive of attachments, but the rules that the Court announced would apply in this case. In this case, the Court has directed counsel for Lufkin that the page limitations that appear in the Local Rules would be enforced, inclusive of attachments. Plaintiffs' motion to compel is 86 pages, inclusive of attachments. This is well beyond the 15 pages allowed.

B. Lufkin's Motion for Reconsideration Should Be Granted.

The Court set Lufkin's Motion for Reconsideration for hearing on November 13, 2003. Lufkin appreciates the opportunity to be heard on its motion, however, the Court's failure to act on Lufkin's contemporaneous motion to stay left Lufkin with no choice but to comply with the Court's Order, or risk a motion for sanctions, which Plaintiffs stated they intended to file (and surmised the Court would grant) if immediate compliance did not occur.

As of November 5, 2003, all of the documents had been produced. Thus with the exception of reconsideration of the Court's open-ended requirement that Lufkin permit Plaintiffs continued access to all personnel files, Lufkin has been deprived in practical terms of any of the relief it originally sought. In any event, Lufkin continues to believe, for all the reasons set forth in its response to Plaintiffs' motion to compel, that Plaintiffs' motion to compel is unfounded and nothing more than an attempt to conduct discovery after the discovery deadline. The Court denied Lufkin that opportunity and should have denied the same request by Plaintiffs.

Lufkin will respond briefly to Plaintiffs' misstatements about the prior discovery and inspection process. Any alleged hindrance in Mr. Garrigan's inspection of training materials on September 25 (which have nothing to do with Lufkin's motion to strike or Plaintiffs' motions to compel and have already been produce) was solely the result of Mr. Garrigan's own actions.

Had Mr. Garrigan recognized Ms. Mahony's claim of privilege as to any handwritten notes, Ms. Mahony could have quickly reviewed the handwritten notes (while Mr. Garrigan inspected other training manuals) to determine if the notes were privileged. (Attachment A, Mahony Declaration). Instead, Mr. Garrigan debated the issue while he continued to read the handwritten notes. Then, to frustrate the process further, he demanded that Ms. Mahony put her assertion of privilege in writing, two different times, and then amend, initial, date, and time-stamp the writing before he would turn over the handwritten notes. (*Id.*) Given the events of September 25, Lufkin is not willing to require one of its employees, not familiar with the law or rules of procedure, to supervise Mr. Garrigan.

During the September 25 inspection, Mr. Garrigan also picked up a copy of Lufkin's Company newspaper and began reading it without permission. (*Id.*) The "Lufkin Connection" clearly states on the front page that it is intended for Lufkin employees and their families. (*Id.*) Mr. Garrigan is neither. Second, the "Lufkin Connection" is not a document that is publicly disseminated or available. (*Id.*) Indeed, Plaintiffs formally requested copies of the Company newspaper in a request for production. (*Id.*)

Lastly, on August 6, 2003, Mr. Garrigan came to Lufkin's offices to pick up some personnel requisition forms. Despite being told by counsel to wait in the lobby, Mr. Garrigan proceeded directly to the Human Resources suite. (*Id.*) The non-managerial Human Resources employee he approached was surprised by his unannounced appearance and unsure how to respond. (*Id.*) Lufkin does not believe there was anything malicious in Mr. Garrigan's actions, however, his disregard of counsel's instructions and unannounced appearance in the Human Resources suite validates Lufkin's continuing belief that Mr. Garrigan's presence in Lufkin's

offices must take place under the supervision of counsel, knowledgeable of the law and the rules of procedure. (*Id.*)

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 11th day of November, 2003, a copy of the foregoing was forwarded to Plaintiffs by facsimile transmission (without attachments) and by Federal Express as follows: Timothy B. Garrigan, 2803 North Street, Nacogdoches, TX 75963-1902, (936) 560-9578, and Teresa Demchak, Morris Baller, Darci Burrell, and Joshua Konecky, *Goldstein, Demchak, Baller, Borgen & Dardarian*, 300 Lakeside Drive, Suite 1000, Oakland, CA 94612, (510) 835-1417.



Attorney for Defendant

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**CIVIL ACTION NO. 9:97CV063
(JUDGE COBB)**

DECLARATION OF MARY MICHELLE MAHONY

I, Mary Michelle Mahony, am of sound mind and over the age of twenty-one, am competent to make this Declaration, and have personal knowledge of the truth of its contents. I make the following declaration under penalty of perjury:

“1. I am an attorney licensed to practice law in the State of Texas and before the United States District Court for the Eastern District of Texas. I am an associate attorney with the law firm of Vinson & Elkins, LLP.

2. I represent Lufkin Industries, Inc. (“Lufkin”) in this action-styled action.

3. I traveled to Lufkin Industries on September 25, 2003 to meet Mr. Garrigan at 10:00 a.m. so that he could inspect training materials and personnel files. During the inspection, I asked Mr. Garrigan why he had not reviewed the training materials or personnel files earlier before the discovery deadline and he told me that he had been busy.

4. I arranged for the inspection to take place in a conference room, approximately 25 yards from the Human Resources suite, in order to minimize disruption to workplace.

5. When Mr. Garrigan arrived, I showed him the two boxes of training materials. Before giving the materials to Mr. Garrigan, I noticed that some of the training manuals contained unrelated, privileged materials in the front pockets and between some pages, including certain portions of Lufkin’s affirmative action plan which the Court has ruled are privileged. I reviewed and removed this material.

6. There were also some handwritten notes in some of the training manuals, including an affirmative action manual Mr. Garrigan was reviewing. I had never seen the notes before September 25, did not know who wrote the notes, or the context in which they were written. I asked Mr. Garrigan several times to return the manual and to review another training manual so that I could review the content of the notes. Mr. Garrigan refused.

7. I then specifically advised Mr. Garrigan that I was asserting privilege with respect to the handwritten notes until I had the opportunity to review them. Again, Mr. Garrigan refused and continued to review the material. After several more assertions of privilege, Mr. Garrigan told me to put it in writing.

8. While I did not think this was necessary, I hurriedly wrote out my assertion of privilege. Mr. Garrigan looked at it, said it was illegible, and continued to refuse to return the affirmative action plan manual.

9. I then wrote out a second assertion of privilege with respect to the handwritten notes (in print) and gave it to Mr. Garrigan. Mr. Garrigan told me this too was insufficient and that I would have to delete the reference to the handwritten notes.

10. I complied with Mr. Garrigan's request and struck through the reference to the handwritten notes. Mr. Garrigan then demanded that I initial the strikethrough and time and date stamp the writing. A copy of both writings are attached to Mr. Garrigan's Declaration.

11. After I did all of these things, Mr. Garrigan gave me the training manual. I reviewed the handwritten notes while Mr. Garrigan inspected other materials. When I determined that the handwritten notes were not privileged, I so advised Mr. Garrigan and gave the book back to him to complete his inspection.

12. During the inspection, I asked Mr. Garrigan no less than a dozen times for a copy of the written assertion of privilege that I gave him, offering to copy it myself in his presence or to allow him to use the copy machine in Lufkin's Human Resources office. For no apparent reason, Mr. Garrigan refused and did not produce the pages until October 3, 2003.

13. During the September 25 inspection while I was pulling personnel files and without my knowledge, Mr. Garrigan picked up a copy of the Lufkin employee newspaper. When I saw Mr. Garrigan reading it, I asked him to put it down. The newspaper is not publicly available and states on the front page that it is for Lufkin employees and their families. Plaintiffs previously requested copies of the "Lufkin Connection" in formal discovery. When I saw Mr. Garrigan reading the paper, I asked him to return the document to me, which he did.

14. On August 6, 2003, I arranged with Mr. Garrigan to meet me at Lufkin Industries so that he could review and copy certain personnel requisition forms Plaintiffs had requested. I asked Mr. Garrigan to wait for me in the lobby of the building and I would come meet him. Mr. Garrigan did not do as I requested and proceeded to the Human Resources suite, where he approached a non-managerial Human Resources employee looking for counsel. The employee was surprised by Mr. Garrigan's unannounced appearance. While I do not think there was anything malicious in Mr. Garrigan's actions, I was concerned that he did not follow my instructions to wait in the lobby.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."


MARY MICHELLE MAHONY

11/10/03
DATE