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

FILED - CLERK
U.S. DISTRICT COURT
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TX EASTERN-BEAUMONT

SYLVESTER MCCLAIN, et. al.,
Plaintiffs,

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vs.

Case No. 9:97-CV-63
Judge Howell Cobb

BY DIT

LUFKIN INDUSTRIES,
Defendant.

ORDER

Before the court is Plaintiffs' Motion for Reconsideration of the Court's Ruling and Order of July 11, 2003 Dismissing Plaintiffs' Systemic Disparate Treatment Claims (dkt #210). In this case, originally filed February 26, 1997, this court certified a class of African-American plaintiffs on a disparate impact claim March 31, 1999. Lufkin Industries' ("Lufkin") petition for permission to appeal was denied by the Fifth Circuit June 23, 1999.

The Plaintiffs, through counsel, seek the inclusion of a class systemic disparate treatment claim. This is improper for several reasons. To maintain an action for disparate treatment, the plaintiffs must show there is intent, or deliberateness to discriminate. *Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir. 2000). After the Civil Rights Act of 1991, plaintiffs alleging disparate treatment and pattern or practice claims are permitted to recover compensatory and punitive damages for unlawful intentional discrimination. 42 U.S.C. §1981 a(a)(1). As stated in the certification opinion, a Rule 23(b)(2) class action is appropriate when the final injunctive relief or corresponding declaratory relief may be granted with respect to the class as a whole, and claims for injunctive or equitable relief predominate. *McClain v. Lufkin Industries*, 187 F.R.D. 267, 282 (E.D. Tex. 1999); Federal Rules of Civil Procedure, 2003. In this case, if a disparate treatment claim were allowed, individual claims for monetary relief would predominate and it would no longer be appropriate as a Rule

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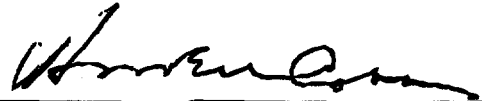
23(b)(2) class. Plaintiffs attempt to allege a claim, that should factually be a Rule 23(b)(3) claim, under Rule 23(b)(2) by only seeking equitable and injunctive relief under systemic disparate treatment. However, such a disavowal of certain damages available under a disparate treatment claim may create a problem of a lack of adequate representation of the class by the class representatives. *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 244 (W.D. Tex. 1999). Finally, Plaintiffs are asking the court to reconsider the order “dismissing plaintiffs’ systemic disparate treatment claims.” The primary reason the court is denying the motion is that a disparate treatment claim has not been “dismissed” because a disparate treatment claim was never certified. Rather, in an effort to preserve any disparate treatment claims individuals in the class may have, the court is providing mechanisms whereby those individuals may seek to have their individual disparate treatment claims severed out of the present action.¹ Based upon the facts of this case, this is the most efficient use of judicial resources.

There is no difference in the damages currently available to the plaintiffs and those under the claim they seek to add. Admittedly, there are different elements and forms of evidence which may be submitted under the different claims. However, while some anecdotal evidence could possibly be relevant, and even admissible at trial (this is not an open invitation to such evidence), an open-ended ruling allowing a disparate treatment claim may well result in a de-certification of the present class and require hundreds of cases to be tried separately. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). Accordingly, the motion for reconsideration is DENIED and OVERRULED.

¹Indeed, if a disparate treatment claim were certified by this court and only injunctive and declaratory relief were sought, it could preclude individuals from later bringing individual disparate treatment claims for compensatory and punitive damages.

The Plaintiffs' attorneys have sought an interlocutory appeal of the court's refusal to permit the theory of disparate treatment to the United States Court of Appeals for the Fifth Circuit. That too is DENIED.

Signed this 1st day of August, 2003.



HOWELL COBB
UNITED STATES DISTRICT JUDGE