

EOD 10-22-97

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

FILED-CLERK
U.S. DISTRICT COURT
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LUFKIN DIVISION

TX EASTERN-BEAUMONT
BY Detona Bell

SYLVESTER MCCLAIN and	§
BUFORD THOMAS, on behalf	§
of themselves and on behalf	§
of a class of similarly situated persons,	§
	§
Plaintiffs	§
	§ 9: 97 CV 63 (TH)
v.	§
	§
LUFKIN INDUSTRIES,	§
	§
Defendant	§

ORDER

Defendant seeks dismissal of plaintiffs' class claims.¹ It argues that plaintiffs provide no evidence beyond conclusory allegations in their complaint to support their class claims.

Plaintiffs respond that defendant's refusal to allow discovery on class issues should result in the motion being denied.

Plaintiffs' position possesses merit. A plaintiff alleging employment discrimination generally should receive an opportunity to conduct discovery of the defendant as to facts going to the

¹ Defendant's motion to dismiss is construed as motion to deny class certification brought under Federal Rule of Civil Procedure 23(c)(1). Compare Def.'s Reply to Pls.' Resp. in Opp'n to Def.'s Mot. To Dismiss Class Action Claims at 4 [hereinafter Reply] with 2 Herbert Newberg & Alba Conte, Newberg on Class Actions § 7.06 (3d ed. 1992) (reporting that a motion for initial class determination often appears in the guise of a defense request to deny the class) and 7B Charles Alan Wright et al., Federal Practice and Procedure § 1798 (2d ed. 1986) ("a party wishing to challenge the validity of maintaining the action under Rule 23 should move for determination under Rule 23(c)(1) that a class action is unwarranted"). Although viewed as going to the original complaint, which remained plaintiffs' live pleading until this date, the motion's arguments also appear relevant as to the first supplemental complaint.

maintainability of his or her class claims when the defendant exclusively controls the information pertaining to those facts. See, e.g., 5 Newberg & Conte, supra § 24.80. In this case, no discovery on class claims ever has been sanctioned. Compare Docket Control Order, entered June 19, 1997 (placing this case on a discovery track 3) with E.D. Tex. R. CV-26(b) (describing the discovery available under each discovery track).² This situation presumably explains defendant's rejection of plaintiffs' request for voluntary disclosure of information relating to class claims. See Pls.' Supplemental Resp. in Opp'n to Def.'s Mot. to Dismiss Class Action Claims (Pl.'s Ex. 2).

The character of the evidence presented provides an additional reason for rejecting defendant's motion to dismiss. See Manual for Complex Litigation Third § 30.11 (1995) [hereinafter Manual] ("The court's principal concern should be to develop a record adequate to enable it to decide whether the prerequisites of Rule 23 have been met."); cf. 2 Newberg & Conte, supra § 7.09 ("If the court feels that information over and above affidavits and counter-affidavits of the parties with respect to the disputed class issues would be essential or helpful for an initial class determination, it may hold an evidentiary hearing limited to facts relevant to class issues."). Only one proffering, Paul G. Perez's first affidavit, directly goes to central charge of defendant's discrimination being across-the-board.³ Cf. General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 158 & n.15, 102 S. Ct. 2364, 2371 & n.15, 72 L. Ed. 2d 740, ___ & n.15 (1982).

² In a separate order, this case has been reassigned to discovery track five (5).

³ The lack of evidence impedes assessment of defendant's attacks on plaintiffs' EEOC charges. For example, would a finding of evidence sufficient to support certification of a class based on the across-the-board theory of discrimination make moot any defects in the timing or substance of plaintiff Buford Thomas' EEOC charge?

Compare Def.'s Mot. to Dismiss Class Action Claims (Ex. A) with 5 Newberg & Conte, supra § 24.13.

These two circumstances lead the court to DENY defendant's motion to dismiss class claims [9]. The parties must file a discovery plan relating to the question of class certification by November 3, 1997. The plan must *specify* the kinds of information that discovery will seek to uncover. See Manual § 30.12; cf. Fed. R. Civ. P. 26(f). See generally 5 Newberg & Conte, supra §§ 24.07-.15 (discussing Falcon and its legacy). Plaintiffs must file their motion for class certification by November 14, 1997. Defendant must respond to the motion by November 28, 1997. A hearing on the motion will be held at 1:00 p.m. on December 15, 1997, in Beaumont, Texas.

Signed this 27 day of October, 1997.



THAD HEARTFIELD
UNITED STATES DISTRICT JUDGE