

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

Sylvester McClain, et al.

Plaintiffs,

v.

Lufkin Industries, Inc.

Defendant.

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Civil Action No. 9:97 CV 063 (CLARK)

**PLAINTIFFS’ COMMENTS ON DEFENDANT LUFKIN’S
PROPOSED OMBUDSPERSON CANDIDATES**

A. INTRODUCTION

Defendant Lufkin Industries, Inc. (“Defendant” or “Lufkin”) has submitted the names and other information regarding three individuals it proposes as candidates for the Court’s consideration to serve as a Court-appointed ombudsperson in this case. Specifically, Lufkin has recommended Retired Major General Michael Taylor, Vicki Birenbaum and Joe M. Deason. *See* Dkt. 615 and 618. Pursuant to the Parties’ Joint Report on Proposal for Injunctive Relief, Dkt. 606, Plaintiffs rank Lufkin’s three candidates and offer the following comments regarding each of them. Plaintiffs view the responsibilities of the ombudsperson to be potentially critical to the Court-ordered relief in this long and hard fought discrimination case. An ombudsperson who does not fulfill the responsibilities because of inexperience or a lack of independence could undermine the Court-ordered relief. Finally, Plaintiffs offer additional comments regarding Plaintiffs’ ombudsperson candidates.

B. PLAINTIFFS’ RANKING OF LUFKIN’S CANDIDATES

Plaintiffs’ counsel have conferred with each of Lufkin’s candidates and reviewed the written materials Lufkin provided with regard to each of them. Based on this and other information Plaintiffs have gathered as well as the parties’ description of the duties and

responsibilities of the ombudsperson as set forth in the Joint Report on Proposal for Injunctive Relief, Plaintiffs rank Lufkin's three candidates in order of preference, from least to most preferred, as follows:

- Mr. Deason and Ret. Maj. Gen. Taylor (tie)
- Ms. Birenbaum

1. Mr. Deason

Mr. Deason is a resident of Lufkin, Texas and currently is employed as Director of Recruitment and Retention for the Lufkin Independent School District ("LISD"). Dkt. 618, Ex. A. Although his resume does not reflect it, Mr. Deason reported to Plaintiffs' counsel that he currently has a two-year contract with Lufkin Independent School District, requiring him to work about 20 hours a week recruiting and retaining employees. Declaration of Timothy B. Garrigan ("Garrigan Decl.") ¶ 3. With the exception of a six-year period during which Mr. Deason was a Division Manager for World Book-Childcraft International, Inc., Mr. Deason's entire 41-year professional career has been in public education. Dkt. 618, Exh. A. There is no indication on Mr. Deason's resume that he has any experience working in the field of corporate human resources or overseeing the implementation of court-ordered injunctive relief in either a private or public employment setting. *Id.* Mr. Deason advised Plaintiffs' counsel that during the first approximately 10 years of his career with LISD (until the "early nineties"), the school district remained under an injunction dating back to the early seventies from a desegregation case. Garrigan Decl. ¶ 4. Mr. Deason was not directly responsible for implementing the injunction, but did report to the Superintendent on issues of increasing diversity among the teaching staff. *Id.*

Mr. Deason knows Lufkin's Vice President for Human Resources Paul Perez and its Human Resources Manager John Havard socially and professionally. *Id.* ¶ 5. He has served on community boards of directors with Mr. Perez. *Id.* He also describes former Lufkin CEO and current Lufkin board chairman, Douglas Smith, as an "acquaintance." *Id.*

Several of the class representatives know and respect Mr. Deason but expressed reservations about his appointment as the ombudsperson. *Id.* ¶ 6. They and Plaintiffs' counsel concur that someone with more independence and relevant experience is required for the position.

2. Ret. Maj. Gen. Taylor

Ret. Maj. Gen. Taylor had a 36 year career in the military and a simultaneous 31 year career in human resources roles in three different companies in Lufkin, Texas. Dkt. 615, Ex. B. He retired in 2005. *Id.* He is a resident of Lufkin, Texas. *Id.* In an interview with Plaintiffs' counsel, Ret. Maj. Gen. Taylor acknowledged that he knows Mr. Perez and Mr. Havard and other Lufkin managers from spending most of his life in Lufkin, Texas. Garrigan Decl. ¶ 7. Ret. Maj. Gen. Taylor considered Mr. Havard one of his peers at various meetings involving human resources in the community when Ret. Maj. Gen. Taylor was working at St. Regis Paper Company, Republic Bank and Memorial Health System. *Id.* Ret. Maj. Gen. Taylor continues to have contact with Mr. Perez, Mr. Havard and other Lufkin managers at community social events, and library, museum and Chamber of Commerce events. *Id.* Ret. Maj. Gen. Taylor currently serves on the Board of the Stubblefield Learning Center; of which Mr. Perez also has been a member but with which Mr. Perez now works in an advisory capacity. *Id.*

Ret. Maj. Gen. Taylor has not been responsible for implementing new EEO/diversity policies and practices. *Id.* ¶ 8. He has never been involved in any class action litigation. *Id.* He also has no current access to an office environment or support staff that would help him process or prepare documents he would be required to prepare as the ombudsperson. *Id.*

While Ret. Maj. Gen. Taylor has a number of years of corporate human resources experience, like Mr. Deason, his social ties to and peer level relationship with Lufkin's HR personnel and other management raise concern about his independence in the ombudsperson position. Moreover, Ret. Maj. Gen. Taylor's lack of experience or familiarity with class action litigation or the implementation of new EEO/diversity remedial measures also raises concern.

3. Ms. Birenbaum

Ms. Birenbaum is a retired labor and employment litigator from a large Houston law firm. Dkt. 615, Ex. A. A review of the docket of the U.S. District Court for the Southern District of Texas revealed that Ms. Birenbaum has appeared in approximately 80 cases in that court, of which many were individual employment discrimination cases. Declaration of Teresa Demchak (“Demchak Decl.”) ¶ 3. Ms. Birenbaum appeared in several class actions, including several ERISA and FLSA cases, but no employment discrimination class actions. *Id.* In one of the ERISA cases, Ms. Birenbaum represented one defendant and Lufkin’s counsel Douglas Hamel represented a second defendant; in another ERISA case, Ms. Birenbaum represented one defendant and Lufkin’s counsel Mr. Hamel and Christopher V. Bacon represented a second defendant. *Id.* For the last three years, Ms. Birenbaum has done pro bono work for a non-profit organization in Houston, the Neighborhood Center, Inc. According to Ms. Birenbaum, she and Mr. Bacon are the organization’s “HR Committee” and meet once a month. *Id.* ¶ 6.

Ms. Birenbaum appears to possess the some of the knowledge and experience Plaintiffs believe are necessary for the ombudsperson. However, Ms. Birenbaum’s lack of employment discrimination class action litigation experience and experience in working with a client to implement injunctive relief under such circumstances are drawbacks. Additionally, her ties to Lufkin’s outside counsel, who it appears will have a continuing role in representing Lufkin in this litigation and whose advice the ombudsperson may be called upon to question or disagree with, also raise concern about her independence.

4. Overall Assessment of Lufkin’s Nominees.

While each of Lufkin’s nominees for the ombudsperson position has aspects of his or her background, experience, and relationships that make them, in Plaintiffs’ view, less suitable than any of Plaintiffs’ nominees (*see* below), only Ms. Birenbaum has any of the knowledge and experience necessary to be considered seriously for the position. Although Ms. Birenbaum may have some independence from “home town” pressures of critically considering Lufkin Industries’ employment practices while working in the community in which Lufkin is the largest

private employer, her connections with Lufkin's outside counsel raise concern regarding her independence.

Significantly, when Plaintiffs' counsel contacted each of Lufkin's candidates about the ombudsperson position for which they had been nominated, none of them knew anything about the history or procedural posture of this case or what their duties and responsibilities in the ombudsperson position might be, even though the parties had filed a report with the Court in which they set forth their agreement regarding the role of the ombudsperson. Garrigan Decl. at ¶ 9; Demchak Decl. at ¶ 4. None of Lufkin's nominees had been given or had reviewed the Final Amended Judgment, the Fifth Circuit's Order or the Parties' Joint Report on Proposal for Injunctive Relief, the latter of which, as noted, set forth the parties' agreement regarding the role and responsibilities of the ombudsperson. Garrigan Decl. at ¶ 9; Demchak Decl. at ¶ 4. This apparent lack of curiosity about a position for which they agreed to be nominated raises, in Plaintiffs' view, additional concerns about each of the candidates.

C. PLAINTIFFS' PROPOSED OMBUDSPERSON CANDIDATES

For reasons discussed in their Report on Plaintiffs' Proposed Ombudsperson Candidates, Dkt. 614, Plaintiffs reiterate their belief that each of the three candidates they have proposed is ideally suited for the ombudsperson role in this case. All have the independence, skill and, importantly, actual experience in overseeing implementation of and compliance with injunctive relief in employment discrimination class action litigation. Lufkin's only objections to date to Plaintiffs' proposed candidates: that they are "high priced" lawyers from "out-of-state," *see* Dkt. 615 at 2, do not address their qualifications for the position. Moreover, Lufkin's concern with the cost to implement injunctive relief is ironic in view of the rates it has paid its attorneys and the total litigation costs it has amassed to defend itself in this case. Demchak Decl. Ex. 1. Moreover, Lufkin's candidate Ms. Birenbaum's billing rate of \$450 an hour is not appreciably less than the rates Plaintiffs' candidates – each of whom has directly relevant experience – would bill for their work on this assignment. As for the fact that all of Plaintiffs' proposed candidates are from out of state, Plaintiffs suggest that Lufkin could benefit greatly from having someone

