IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KIMBERLY L. CAMBRA	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
v.	**:**	**NO. 04-2688**
	:	
THE RESTAURANT SCHOOL	**:**	
Defendant.	**:**	

ORDER AND MEMORANDUM

O R D E R

AND NOW, this 1st day of November, 2005, upon consideration of defendant's Motion *in Limine* to Preclude Testimony and Other Evidence From the Equal Employment Opportunity Commission and Fact Finder Kurt Jung (Document No. 29, filed August 4, 2005), and plaintiff's Response to Defendant's Motion *in Limine* (Document No. 31, filed September 15, 2005), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that defendant's Motion *in Limine* to Preclude Testimony and Other Evidence from the Equal Employment Opportunity Commission and Fact Finder Kurt Jung is **GRANTED**.

MEMORANDUM

Plaintiff, Kimberly Cambra, filed suit against defendant, The Restaurant School, on June 18, 2004, alleging gender discrimination and sexual harassment under Title VII, 42 U.S.C. § 2000e-2(a)(1)–(2), and the Pennsylvania Human Relations Act ("PHRA"), Pa. Stat. Ann. Tit. 43, § 955(a). Before instituting suit plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), which issued a Letter of Determination ("the Letter ") in which it concluded that defendant violated Title VII. Presently before the Court is defendant's

Motion *in Limine* to preclude plaintiff from introducing in evidence at trial the Letter of Determination or testimony of the EEOC investigator, Kurt Jung. For the reasons that follow, defendant's motion is granted. **I. BACKGROUND**

Plaintiff was employed by defendant between January 2000 and July 2002. Compl. ¶ 11. While so employed, plaintiff claims she was subjected to harassing and discriminatory remarks about women by her direct supervisor, the Executive Vice President. Id. ¶¶ 15-18. In July 2002, plaintiff was terminated and was allegedly told that her position as Marketing Director was being eliminated by defendant. Id. ¶ 26. Thereafter, in March 2003, plaintiff alleges defendant sought to fill her former position by advertising it in the newspaper and on the internet. Id. ¶ 27.

Plaintiff first filed a complaint with the EEOC, which issued the Letter in which it determined that a violation of Title VII had occurred. Plaintiff then filed this lawsuit, alleging unlawful termination on the basis of gender and sexual harassment under both Title VII and the PHRA.

The Letter at issue in the Motion *in Limine* is a four-page document with the bulk of the relevant material on pages two and three. The Letter begins by reciting the facts of the case, including the nature of plaintiff's position, the events which preceded her termination, and the termination itself. The Letter concludes that defendant's proffered reason for terminating plaintiff – because her position was being eliminated – was pretextual and that defendant violated Title VII by terminating plaintiff on the basis of her gender.

II. DISCUSSION

A. Admissibility of the Letter Under the Federal Rules of Evidence

The Third Circuit standard for admissibility of EEOC Letters of Determination is set forth

in Coleman v. Home Depot, Inc., 306 F.3d 1333 (3d Cir. 2002).[1] Since such EEOC evidence typically consists of out-of-court statements offered for the truth of the matter asserted, it is hearsay. Fed.R.Evid. 801(c). Therefore, the first step in the analysis is to determine whether the evidence may be received under one of the exceptions to the hearsay rule. If the evidence is deemed to be admissible under an exception to the hearsay rule, the court must decide whether the evidence should be excluded on grounds of prejudice, confusion or waste of time under Fed.R.Evid. 403.

The exception to the hearsay rule applicable to admissibility of EEOC reports is Fed.R.Evid. 803(8). Rule 803(8)(C) provides at follows: "in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law [are admissible], unless the sources of information or other circumstances indicate lack of trustworthiness." Fed.R.Evid. 403 provides as follows: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

1. Fed.R.Evid. 803(8)(c)

The plaintiff in Coleman sued Home Depot, her former employer, and alleged termination on the basis of gender and racial discrimination. Id. at 1338. Prior to instituting suit in district court, plaintiff filed a charge with the EEOC, which issued a Letter of Determination

[1] The Coleman opinion expanded on an earlier Third Circuit decision, Walton v. Eaton Corp., 563 F.2d 66, 75 (3d Cir. 1977), which held that the district court in the case did not abuse its discretion in refusing to admit EEOC factual findings and legal determinations. Coleman v. Home Depot, Inc., 306 F.3d 1333, 1345 (3d Cir. 2002) (affirming Walton).

(the "Coleman Letter") in which it concluded there was reasonable cause to believe that Home Depot had discriminated against plaintiff on the basis of gender and race. Id. The district court first determined that the Coleman Letter met the requirements of Fed.R.Evid. 803(8)(C). It then precluded plaintiff from offering the Letter in evidence under Fed.R.Evid. 403 on the ground that it would be unfairly prejudicial or confusing. Id. at 1339. The decision of the district court was affirmed by the Third Circuit. The Third Circuit expanded on the district court's 803(8)(C) analysis, listing four factors for determining trustworthiness under the Rule: (1) the timeliness of the investigation; (2) the special skill or experience of the official; (3) whether a hearing was held and the level at which conducted; and (4) possible motivation problems. Id. at 1341-42. Because none of these factors were raised by either party, the Third Circuit assumed that the Coleman Letter was trustworthy, and turned to the decision of the district court to exclude the Coleman Letter under Fed.R.Evid. 403. Id. at 1343. On that issue the Court of Appeals affirmed the decision of the district court to exclude the Coleman Letter under Rule 403, but on the different grounds - the Court of Appeals found "the argument that the evidence would have created the potential risk of undue delay and waste of time to be stronger." Id. at 1347; see infra Section II(B).

Under the Coleman factors for trustworthiness, the Court concludes that the Letter at issue in this case is trustworthy. Plaintiff was terminated from her position on July 20, 2002, and the position was advertised in March 2003. The record does not establish when plaintiff first brought her claim to the EEOC, but since the Letter was issued on September 29, 2003, the investigation must have been commenced within a reasonable time after plaintiff's termination. This fact makes the investigation timely, weighing in favor of trustworthiness. The record before

the Court does not establish whether the investigator, Kurt Jung, has special expertise; therefore, this factor is neutral. Defendant was interviewed during Mr. Jung's factfinding process and had the opportunity to present witnesses and other evidence, weighing in favor of the letter's trustworthiness. Finally, defendant argues that Mr. Jung's "bias" pervades all of his communications. Because defendants have presented no evidence of any bias the Court disregards this allegation and treats this factor as neutral. Finding that two of the four Coleman factors weigh in favor of the letter's trustworthiness, and finding that the other two factors are neutral, the Court concludes on the present state of the record that the Letter is trustworthy under Fed.R.Evid. 803(8)(C).

Some courts analyzing the trustworthiness of public records under Rule 803(8)(C) have found them untrustworthy because the records contained hearsay statements creating a hearsay within hearsay problem. See, e.g., Miller v. Field, 35 F.3d 1088, 1091-92 (6th Cir. 1994) ("While a court may presume that a preparer of a report, under a duty to relate information, will perform the task required and formulate justified conclusions . . . no such presumption arises when the preparer relies on potentially untrustworthy hearsay evidence from another individual under no duty to provide unbiased information."); McKinnon v. Skil Corp., 638 F.2d 270, 278 (1st Cir. 1981) (excluding Consumer Product Safety Commission Report as untrustworthy because it contained hearsay within hearsay). The Court need not address that issue in this case in view of its determination that the letter is inadmissible under Fed.R.Evid. 403.

2. Fed.R.Evid. 403

Once an EEOC Letter of Determination has been found trustworthy under Rule 803(8)(c), a court must determine whether the probative value of the Letter is substantially outweighed by

the danger of unfair prejudice or is otherwise inadmissible under Fed.R.Evid. 403. See Coleman, 306 F.3d at 1345. "[T]he assessment of the probative value under Rule 403 should take into consideration the proof value of the particular report as and when offered at trial." Id. In Coleman, the Court noted, the proof value was low, given that the Coleman Letter would have been introduced after the jury heard all of the evidence, some of which contradicted the Letter, and the Coleman Letter was more conclusory than factual. Id.

Reflecting the discretion given by Coleman and its predecessor, Walton v. Eaton Corp., 563 F.2d 66, 75 (3d Cir. 1977), district courts in the Third Circuit have varied in their willingness to admit EEOC determinations. In earlier cases EEOC Letters of Determination and similar evidence were readily admitted, as courts declared their findings to be highly probative.[2] See, e.g., Abrams v. Lightolier, Inc., 702 F. Supp. 509, 512 (D.N.J. 1988) (admitting Letter of Determination in jury trial because "the probative nature of an EEOC determination generally outweighs its prejudicial effect"); Maskin v. Chromalloy American Corp., 1986 WL 4481, at *13 (E.D. Pa. Apr. 14, 1986) (admitting EEOC Determination that no discrimination occurred because "[t]he EEOC has special expertise in investigating charges of discrimination, and its expertise should not be ignored"). In recent years, however, district courts in the Third Circuit have examined EEOC Letters of Determination more closely and have been more reluctant to admit them. See, e.g., Rizzo v. PPL Service Corp., 2005 WL 913091, at *12 (E.D. Pa. Apr. 19, 2005) (refusing to admit EEOC Determination because it was not supported by factual record

[2] The analysis for admitting reports by state agencies that investigate discrimination claims is the same as the analysis for admitting EEOC reports or Letters of Determination. Paolitto v. John Brown E&C, Inc., 151 F.3d 60, 64 (2d Cir. 1998); Spruill v. Winner Ford of Dover, Ltd., 175 F.R.D. 194, 197 (D. Del. 1997).

before the court); Waters v. Genesis Health Ventures, 2005 WL 61450, at *2-3 (E.D. Pa. Jan. 10, 2005) (denying admission of EEOC Determination because it focused on discrimination claims that differed from those in court case). Although this Court finds the Letter in this case to be trustworthy under Rule 803(8)(C), it concludes that the Letter should be excluded under Fed.R.Evid. 403 for three related reasons.

First, based on the filings before the Court, the information in the EEOC Letter repeats many of the facts that both parties will attempt to prove at trial. As the Eighth Circuit stated in the oft-cited case of Johnson v. Yellow Freight Systems, 734 F.2d 1304 (8th Cir. 1984), "[b]ecause substantial evidence was presented to the jury on all matters summarized in the [EEOC] report, there is little probative value in the EEOC's conclusory statements regarding the same effect." Id. at 1309;see also Young v. James Green Management, 327 F.3d 616, 624 (7th Cir. 2003) (upholding the exclusion of an EEOC Letter of Determination where the evidence available to the EEOC was also presented at trial); Paolitto v. John Brown E&C, Inc., 151 F.3d 60, 65 (2d Cir. 1998) (upholding exclusion of state agency discrimination report because proponent of the report had full opportunity to present the same evidence to the jury); Spruill v. Winner Ford of Dover, Ltd., 175 F.R.D. 194, 197 (D. Del. 1997) (denying admission of Delaware Department of Labor report on discrimination because factual findings were admitted by defendant, making the report "cumulative and [of] limited relevance"). Based on this authority, this Court concludes that the Letter has little probative value and is largely cumulative.

Second, this case will be tried before a jury that may give undue weight to a letter written by a government agency. Other circuits have noted that the difference between a bench and a jury trial may affect the probative/prejudice balance under Rule 403. See Barfield v. Orange

County, 911 F.2d 644, 651 (11th Cir. 1990). A jury may not be aware of "the limits and vagaries of administrative determinations" and thus be unable to give the Letter its proper weight and no more. Id. "A strong argument can be made that a jury would attach undue weight to this type of agency determination, viewing it as a finding of discrimination." Williams v. Nashville Network, 132 F.3d 1123, 1129 (6th Cir. 1997). The Court agrees with this reasoning, particularly since the Letter comes to the categorical conclusion that the defendant violated Title VII, and excludes the Letter because the probative value is substantially outweighed by its potential to confuse the issues and mislead the jury.

Finally, the nature of the Letter itself - the fact that it determined defendant violated Title VII - makes the document substantially more prejudicial than probative. In determining whether to admit evidence from the EEOC, courts have distinguished between Letters of Probable Cause, which conclude that there is probable cause to believe a Title VII violation has occurred, and Letters of Determination, which offer a legal conclusion that a violation has occurred. Williams, 132 F.3d at 1129; Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1500 (9th Cir. 1986). The difference between the former, which is "more tentative in its conclusions," and the latter, which "states the categorical legal conclusion that a violation has taken place," is "significant." Equal Employment Opportunity Commission v. Manville Sales Corp., 27 F.3d 1089, 1095 (5th Cir. 1994).

The potential for prejudice is apparent from the Letter at issue. Large portions of the Letter consist of facts that the parties will attempt to prove or disprove at trial. The remaining portions of the Letter are legal conclusions made by the EEOC. For example, page two of the Letter states that "the Executive Vice President's testimony is not credible and his reason for the

termination of [plaintiff's] employment is pretextual." As a result of that conclusion, the EEOC determined that defendant violated Title VII. Whether the Executive Vice President's testimony is credible is a determination that falls within the province of the jury. Presenting the jury with evidence that another fact-finder found his testimony not credible would unfairly influence the jury in this determination. "To admit the report under these circumstances would amount to admitting the opinion of an expert witness as to what conclusions the jury should draw, even though the jury had the opportunity and the ability to draw its own conclusions from the evidence presented." Johnson, 734 F.2d at 1309. For that reason, this Court determines that the probative value of the Letter is substantially outweighed by the danger of unfair prejudice.

The foregoing analysis makes clear that the probative value of the letter is minimal in view of the fact that the parties will be required to present at trial the same evidence that was received by the EEOC. Because the Letter draws categorical legal conclusions that are at the heart of this case, its minimal probative value is substantially outweighed by the danger of unfair prejudice. Moreover, the Letter is cumulative and it has the potential to confuse the issues and mislead the jury. For all of those reasons, the Letter is inadmissible under Fed.R.Evid. 403.[3]

B. Admissibility of Mr. Jung's Testimony under Rule 403

Like the decision of whether to admit an EEOC Letter of Determination, the Court has the discretion to exclude the testimony of Kurt Jung, the EEOC investigator for plaintiff's claim, under Fed.R.Evid. 403. Dickerson v. Metropolitan Dade County, 659 F.2d 574, 579 (5th Cir.

[3] At least one district court in the Third Circuit has admitted an EEOC Letter of Determination with a limiting instruction to the jury. Oliver v. Bell Atlantic Corp., 1992 WL 535594, at *2 (E.D. Pa. Oct. 5, 1992). Given the problems posed by admitting the Letter in this case, the Court does not believe a limiting instruction would cure the prejudice generated by the letter and the testimony of Mr. Jung.

Oct. 1981) (upholding trial court's decision to exclude testimony on facts already in evidence). Mr. Jung's testimony would be based on his investigation of plaintiff's EEOC claim. For the same reasons set forth in analyzing the admissibility of the Letter under Fed.R.Evid. 403, the Court concludes that Mr. Jung's testimony is inadmissible. See Jimenez v. Paw-Paw's Camper City, Inc., 2001 WL 1445027, at *1 (E.D. La. Nov. 14, 2001) (excluding testimony of EEOC investigator on the basis that it was cumulative).

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.