

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

VIRGINIA SEENEY, : CIVIL ACTION
Plaintiff, :
 :
v. :
 :
COMMUNITY ACTION AGENCY OF :
DELAWARE COUNTY, INC., et al. :
Defendants. : NO. 94-CV-1649

MEMORANDUM & ORDER

J.M. KELLY, J.

JUNE , 1998

Presently before the Court is the Motion in Limine of Defendants in this action, seeking to exclude from evidence a report of the Pennsylvania Bureau of Affirmative Action and Contract Compliance (PBAACC). An evidentiary hearing was held in this matter on June 3, 1998.

BACKGROUND

Plaintiff, Virginia Seeney (Seeney), was employed by Defendant Community Action Agency of Delaware County (CAADC). Seeney's employment was terminated by CAADC on March 10, 1992. As a condition of CAADC's contracts with the Commonwealth of Pennsylvania, CAADC has agreed not discriminate in order to remain eligible to receive state funds. PBAACC investigated Seeney's allegations of discrimination and issued a report finding probable cause that Seeney was retaliated against and was discriminated against because of her race. Defendants challenge the admissibility of the PBAACC report.

DISCUSSION

Seeney presents the PBAACC report as an official report of a public agency, "setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law," which is presumed admissible. Fed. R. Evid. 803(8)(C). The defendants opposing the admissibility of the report have the burden to show that "the sources of information or other circumstances indicate a lack of trustworthiness." Fed. R. Evid. 803(8).

Initially, Defendants contend that the PBAACC report does not qualify as a report under Fed. R. Evid. 803(8)(C) because it contains opinions concerning probable cause to believe Seeney's allegations of racial discrimination and retaliation. This position, taken in some earlier cases, has been rejected. Conclusions and opinions in the report are admissible as long as the report is based upon factual investigation and the report is sufficiently trustworthy. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 167 (1988); Complaint of Nautilus Motor Tanker Co., 85 F.3d 105, 112 (3rd Cir. 1996). Defendants also argue that as a report of a state agency, the PBAACC report would be considered reliable by a jury and greatly prejudice Defendants. Defendants' argument states the reason that the PBAACC report is presumed admissible. Rule 803(8) is drafted to recognize a policy of affording a presumption of reliability to government reports.

As the report is presumed admissible, the burden is upon Defendants to show negative factors to convince the Court that the report should not be admitted. Beech Aircraft, 488 U.S. at

167; Nautilus Motor Tanker, 85 F.3d at 113. Review of the trustworthiness of a report includes, but is not limited to, factors such as: "1) timeliness of the investigation; 2) the investigator's skill and experience; 3) whether a hearing was held and 4) possible bias when reports are prepared with a view to possible litigation." Beech Aircraft, 488 U.S. at 168; Nautilus Motor Tanker, 85 F.3d at 112.

In support of the Motion in Limine, Defendants presented the testimony of Grant V. Freeman, Jr. (Freeman). Freeman was employed by PBAACC in 1994 and was requested to investigate Seeney's complaint by his supervisor, Richard James (James). Freeman was assisted in his investigation by Stanley Walker (Walker), an affirmative action officer assigned to the Pennsylvania Department of Public Welfare. In the course of their investigation, Freeman and Walker interviewed Seeney and eighteen employees of CAADC. Their investigation took four to five months.

Before Freeman and Walker could prepare a report, James asked Freeman for preliminary findings of the investigation of Seeney's complaint. Freeman indicated to James that the report would find no probable cause to believe that Seeney had been subject to discriminated against at CAADC. Freeman and Walker were removed from the Seeney investigation and a new investigative team was appointed by James. Freeman was instructed to have no contact with the new team. He was told that he had been removed from the Seeney investigation because

his prior work experience gave him a pro-management bias in conducting the investigation. The PBAACC report was subsequently prepared and included conclusions that there was probable cause to believe that Seeney had been retaliated against and discriminated against because of her race. Based upon his experience at PBAACC, this was the only instance Freeman remembered where a second investigation was conducted on a discrimination complaint.

Defendants presented no other witnesses at the hearing, but several documents have been appended to the Motion in Limine. Seeney presented no evidence to support the PBAACC report. As a result, Freeman's testimony, particularly concerning James's actions, is uncontradicted in the record before the Court.

ANALYSIS

Defendants contend that James was personally interested in furthering the career of Seeney and that he was unusually personally involved in the PBAACC investigation of her complaint. To the extent that Defendants have presented documents that they argue indicate that James took a personal interest in Seeney's career, the Court credits Freeman's testimony that James took a personal interest in the careers of many people. It appears from the uncontradicted evidence, however, that James took a greater personal interest in the PBAACC investigation of Seeney's complaint than he did with most complaints presented to that office. This factor detracts from the presumed reliability of the report.

It also appears that the report took fourteen months to complete, four to five of which were lost when James ordered the initial investigation terminated. The lack of timeliness of the report, coupled with the loss of the freshest information, reflects negatively upon the reliability of the report. Further, there was no hearing associated with PBAACC's investigation, therefore CAADC had no opportunity to present evidence or cross-examine witnesses.

Finally, the factors surrounding the PBAACC investigation indicate that there may have been bias in the preparation of the report. While this bias is not the self-interested bias of a report prepared by an agency in anticipation of its participation in litigation as enumerated in Beech Aircraft, by definition the Beech Aircraft factors are not exclusive. The personal bias evidenced here is as damaging to the trustworthiness of the report as pre-litigation bias. The uncontradicted testimony offered to the Court supports Defendants' contention that the report reflected PBAACC's bias to conclude that CAADC discriminated against Seeney.

Based upon the evidence presented to the court that the conclusions in PBAACC's report were a fait accompli, as well as the lack of a hearing and the time that it took to complete the report, the Court concludes that there are sufficient negative factors to cause the Court to question the trustworthiness of the report. Based upon this lack of trustworthiness, the Court finds that the PBAACC report is not entitled to a presumption of

trustworthiness and will not be admissible at the trial of this matter.

While the report itself is not admissible, the investigation conducted by PBAACC may be relevant to this matter and if the actual investigators were presented at trial, they would be subject to cross-examination. Since the admissibility of the testimony of the PBAACC investigators is not presently before the Court, I shall not rule at this time upon the admissibility of the testimony of those investigators. The Court does note, however, that Seeney's Pretrial Memorandum is to be filed on or before June 15, 1998. If there are discovery issues raised as a result of this Memorandum and Order that counsel are not able to resolve themselves, they are to be addressed to the Court before noon on June 22, 1998. Other pretrial deadlines shall be extended according to the Court's Order.

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O R D E R

AND NOW, this 8th day of June, 1998, in consideration of the Motion of Community Action Agency of Delaware County to Exclude from Evidence the Report of the Pennsylvania Bureau of Affirmative Action and Contract Compliance (Document No. 63), Plaintiff's Response thereto, and a hearing held in this matter on June 3, 1998, it is ORDERED:

1. The Motion of Community Action Agency of Delaware County to Exclude from Evidence the Report of the Pennsylvania Bureau of Affirmative Action and Contract Compliance is GRANTED. Plaintiff may not offer this Report into evidence during the trial of this matter.

2. Any discovery issues raised by this Memorandum and Order that counsel are not able to resolve among themselves are to be addressed to the Court before noon on June 22, 1998.

3. Plaintiff shall file a Pretrial Memorandum on or before June 25, 1998.

4. Defendants shall file a Pretrial Memorandum on or before July 9, 1998.

5. This matter shall be placed in the trial pool of July 23, 1998.

6. A final pretrial conference will be held on the day the matter is called to trial.

BY THE COURT:

JAMES MCGIRR KELLY, J.