

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

ELIZABETH CLARK, : CIVIL ACTION  
Plaintiff, :  
 :  
vs. :  
 :  
PENNSYLVANIA POWER AND LIGHT :  
CO., INC., :  
Defendant. : NO. 98-3017

ORDER AND MEMORANDUM

ORDER

AND NOW, to wit, this 14th day of April, 1999, upon consideration of Plaintiff's Motion to Compel Production (Document No. 12, filed February 24, 1999), Plaintiff's Brief in Support (Document No. 13, filed February 24, 1999), Defendant's Memorandum in Opposition (Document No. 16, filed March 17, 1999), and the Joint Certification of the parties regarding Plaintiff's Motion to Compel (Document No. 15, filed March 10, 1999), in which Joint Certification the parties narrowed the documents sought in Plaintiff's Motion to Compel to the following:

1. All affirmative action plans developed or followed by Pennsylvania Power and Light Co., Inc. ("PP&L") any time since 1988 (Plaintiff's First Request for Production of Documents - Request No. 5);

2. All reports regarding the implementation of the Equal Employment Opportunity Policies and/or Plans sent to or distributed to the PP&L Board of Directors from 1988 to present

(Plaintiff's Second Request for Production of Documents - Request No. 3); and,

3. All letters of commitment and conciliation agreements entered into by PP&L and the Office of Federal Contract Compliance Programs ("OFCCP") or any other entities from 1988 to present (Plaintiff's Second Request for Production of Documents - Request No. 16),

**IT IS ORDERED** that Plaintiff's Motion to Compel Production of the three categories of Documents identified above and in the Joint Certification of the Parties is **GRANTED** in part and **DENIED** in part, as follows:

1. Defendant shall produce those portions of the affirmative action plans containing factual information (as distinguished from evaluative or analytical information) covering the period from 1990 to the present.

2. Defendant shall produce those portions of the Equal Employment Opportunity Policies and/or Plans which contain factual information (as distinguished from evaluative or analytical information) covering the period from 1990 to the present.

3. In all other respects, Plaintiff's Motion to Compel Production is **DENIED**.

## MEMORANDUM

### A. Background

PP&L is an electric utility headquartered in Allentown, Pennsylvania that generates and delivers electricity in parts of Pennsylvania and markets wholesale power in the United States and Canada. Plaintiff began her employment at PP&L in 1981 as an Engineer Level I working in the company's nuclear power plant located in Berwick, Pennsylvania. In 1988, after having received several promotions, plaintiff became a Senior Project Engineer; plaintiff was subsequently promoted to the position of Supervisor of Planning and Cost Services of the nuclear department.

In 1994, plaintiff accepted a position in the PP&L Human Resources and Development department located in Allentown, Pennsylvania, and in 1995 she was promoted to the position of project manager of the "SIGHT Project," the largest capital project in the company at the time. In June 1996, however, plaintiff was removed from the "SIGHT project" by PP&L Chief Operating Officer Frank Long for performance related issues, a decision plaintiff did not oppose. Plaintiff was then reassigned as a Project Manager of the Leadership Academy Project, a position she held until her resignation from PP&L in April, 1997.

In her Complaint, plaintiff alleges that PP&L discriminated against her on the basis of her gender "by refusing to offer her promotional opportunities because of her gender, and

by refusing to reassign her to meaningful work once she was removed from a position." Plaintiff's Complaint at ¶10.

Plaintiff also alleges that "PP&L has a practice of keeping women from the highest ranks of authority." Plaintiff's Complaint at ¶8.

Plaintiff has served the defendant with three sets of document requests and two sets of interrogatories. Defendant has served plaintiff with responses to her first two sets of document requests and to her first set of interrogatories, and those responses are the subject of plaintiff's motion to compel. In a Joint Certification Regarding Plaintiff's Motion to Compel Production of Documents and Responses to Interrogatories, the parties reported that they resolved their dispute concerning all discovery requests with the exception of three categories of documents identified in the Joint Certification.

## B. Discussion

1. Affirmative Action Plans developed or followed by PP&L any time since 1988. (Plaintiff's First Request for Production of Documents - Request No. 5)

Generally, affirmative action plans are not discoverable in employment discrimination cases on the grounds that the plans are not relevant to the subject matter of the suit or constitute confidential, privileged information. See Clarke

v. Mellon Bank, 1993 WL 170950 at \*4 (E.D. Pa. May 11, 1993); McClain v. Mack Trucks, Inc., 85 F.R.D. 53, 58 (E.D. Pa. 1979). Cases in this District have held that disclosure would discourage voluntary compliance by employers and that the public policy against disclosure outweighed the plaintiff's need for such materials. McClain, 85 F.R.D. at 58; Dickerson v. United States Steel Corp., 1976 WL 596 (E.D. Pa. July 16, 1976).

The privilege at issue, the critical self-analysis privilege, generally requires that:

1. The materials must have been prepared for mandatory government reports, or for a self-critical analysis undertaken by the party seeking protection;

2. The privilege extends only to subjective, evaluative materials, but not to objective data in the reports; and

3. The policy favoring exclusion must clearly outweigh plaintiff's need for the documents.

See, e.g., Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 425-26 (9th Cir. 1992); Troupin v. Metropolitan Life Insurance Company, 169 F.R.D. 546, 548-49 (S.D.N.Y. 1996); Culinary Foods, Inc. v. Raychem Corp., 151 F.R.D. 297, 304 (N.D. Ill. 1993); Webb v. Westinghouse Electric Corporation, 81 F.R.D. 431, 433-34 (E.D. Pa. 1978).

In the instant case, the affirmative action plans at

issue were prepared pursuant to the regulations of the OFCCP, an agency of the federal government. The affirmative action plans contain numerous subjective components mandated by the candid self-evaluation process. Aff. of Cynthia Wukitsch at ¶¶ 4-6. Plaintiff has failed to show a compelling need for the production of these affirmative action plans.

Defendant must disclose only those portions of the affirmative action plans containing factual information to which plaintiff is entitled pursuant to the normal discovery process. Defendant will not be compelled to produce any other portions of the materials sought, including evaluative or analytical portions.

Plaintiff has requested all such documents from 1988 to present, while defendant has produced information relating only to the period of 1992 to the present. Because a five-year period prior to the 1995 reorganization of defendant is a reasonable time frame for discovery of materials relating to the alleged discrimination, the defendant shall produce all material covered by the preceding paragraph for the period 1990 to the present.

2. Reports Regarding Implementation of the Equal Employment Opportunity Policy and/or Plan sent to or distributed to PP&L Board of Directors from 1988 to present. (Plaintiff's Second Request for Production of Documents - Request No. 3)

The self-critical analysis privilege applies equally to Equal Employment Opportunity ("EEO") reports and other studies prepared with the intention and understanding that the report would be kept strictly confidential, and that circulation of the report would be limited to senior officials and others with a "need to know." See Troupin, 169 F.R.D. at 549; Webb, 81 F.R.D. at 433.

In the instant case, the EEO reports at issue were prepared as part of a confidential self-evaluation process, to be distributed solely to certain members of the PP&L Board of Directors. The reports contain numerous subjective components mandated by the candid self-evaluation process. Aff. of Cynthia Wukitsch at ¶¶ 7-9. Plaintiff has failed to show a compelling need for the production of these reports.

Defendant must disclose only those portions of the reports containing factual information to which plaintiff is entitled pursuant to the normal discovery process. Defendant will not be compelled to produce any other portions of the materials sought, including evaluative or analytical portions.

Plaintiff has requested all such documents from 1988 to present, while defendant has produced information relating only to the period of 1992 to the present. Because a five-year period prior to the 1995 reorganization of defendant is a reasonable time frame for discovery of materials relating to the alleged

discrimination, the defendant shall produce all material covered by the preceding paragraph for the period 1990 to the present.

3. Letters of Commitment and Conciliation Agreements entered into by PP&L and the OFCCP or any other entities from 1988 to present. (Plaintiff's Second Request for Production of Documents - Request No. 16)

The Court reviewed in camera a Letter of Commitment entered into between the OFCCP and defendant's Susquehanna Nuclear Plant dated September 1988, and a Conciliation Agreement between defendant and the OFCCP dated February 1988. Defendant reported that there were no other documents covered by this request - Request No. 16 - Plaintiff's Second Request for Production of Documents.

The Letter of Commitment concerns the defendant's compliance with a provision of the Vietnam Era Veterans Readjustment Assistance Act of 1974 requiring the posting of certain job openings with the local State Employment Service office; the Conciliation Agreement concerns parking space accommodations for disabled employees and applicants, and the utilization and hiring of minority employees in defendant's Northern Division.

The Court concludes that the documents in question are not relevant to plaintiff's claim of gender discrimination, nor

is information contained within them reasonably likely to lead to the discovery of admissible evidence. See Fed. R. Civ. P. 26(b)(1). Defendant will not be compelled to produce copies of the Letter of Commitment or Conciliation Agreement which were provided to the Court for in camera review.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**