

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DONALD ZARDA,

Plaintiff,

-against-

**ALTITUDE EXPRESS, INC.,
dba Skydive Long Island, and RAY MAYNARD,**

Defendants.

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**MEMORANDUM IN
SUPPORT OF ADMISSION
OF EXPERT TESTIMONY
AND PAYMENT OF
PREPARATION FEES OWED
BY DEFENDANT
PREPARATION**

10-cv-04334-JFB

PRELIMINARY STATEMENT

The facts of this lawsuit are set forth in the report of Kenji Yoshino, which is attached as “Exhibit A” to his sworn declaration. Basically, plaintiff, a skydive instructor, told a customer, Orellana, that he is gay; there was also evidence that he told her that he had gotten out of a relationship with a man. Orellana, who did not want to complain, told this to her boyfriend, and also mentioned that she felt uncomfortable at the hips during the fall. The boyfriend complained to Maynard, who suspended, then fired plaintiff. In discovery we have learned that (1) it is proper and safe for skydive instructors to touch passengers at the hips; (2) that defendant’s chief instructor occasionally mentions to passengers that he has a wife and children; and (3) that Maynard did nothing to investigate the passenger’s allegations. Plaintiff does not remember telling any customer about a former boyfriend, but admits he told the passenger that he is gay when another instructor made fun of the closeness between him and Orellana.

Plaintiff proffer’s Professor Yoshino’s expert report and testimony on (a) the connection between forced “covering” – the denial of the right to state that one is gay –

and discrimination; and (b) defendants' gender stereotyping of Donald Zarda. These opinions are reliable, based upon sound methodology and scholarship; they are also clearly relevant, going to the heart of issues before the court. Ultimately, the report and Yoshino's opinion are admissible.

ARGUMENT

I. PROFESSOR YOSHINO'S ANALYSIS IS RELEVANT AND NECESSARY

In determining whether to admit expert testimony, a District Court's function is not to assess the weight of the evidence, Aventis Env'tl. Sci. USA LP v. Scotts Co., 383 F. Supp. 2d 488, 513-514 (S.D.N.Y. 2003), but to serve as a gate keeper "to ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). In determining whether the proffered testimony is sufficiently reliable, the trial court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho, 526 U.S. at 152. The trial court's inquiry on the testimony's reliability is fluid, and varies from case to case. See Amorgianos v. Nat'l RR Passenger Corp., 303 F.3d 256, 266 (2d Cir. 2002); Campbell v. Metropolitan Prop. and Cas. Ins. Co., 239 F.3d 179, 184 (2d Cir. 2001). "Relevant evidence" means "evidence having *any* tendency to make the existence of *any* fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401 (emphases added). "The Rule's basic standard of relevance thus is a liberal one." Daubert, 509 U.S. at 587. "The rejection of expert testimony is the

exception rather than the rule.” Fed. R. Evid. 702 Advisory Committee’s Notes at 424; U.S. Info. Sys. v. IBEW Local Union No. 3, 313 F. Supp. 2d 213, 226 (S.D.N.Y. 2004). One Southern District Court summed it up by holding, in allowing social scientist to testify about gender stereotypes, that doubts about the usefulness of expert testimony should be resolved in favor of admissibility, given the liberal thrust of the rules of evidence and the presumption of admissibility of expert testimony. EEOC v. Morgan Stanley & Co., Inc., 2004 U.S. Dist. LEXIS 12724 *6-7 (S.D.N.Y. 2004).

Although we discussed it only briefly at the last court appearance, defendant has made no substantive attack against Professor Yoshino’s testimony. However, off the cuff, Mr. Zabell noted that Yoshino’s report “read like an amicus brief by some eminent law professor.” He also quibbled about the field that Yoshino works in. Professor Yoshino deals with those attacks in his declaration. Professor Yoshino explains, for example, that citing a *single opinion* from Second Circuit does not turn his expert report into an amicus brief. While such citation may or may not be appropriate for a jury to see – the report can certainly be modestly amended as appropriate. The rest of the report, however, deals with social framework evidence in the context of gender and sexuality studies – a new, but by now, firmly established field. Mr. Zabell’s making fun of the field at the last conference has no basis in social science and verges on intellectual close-mindedness.

Furthermore, the fact that Mr. Yoshino is a law professor makes does not make him less more qualified than other experts in the field of gender and sexual studies. As he points out, he knows more – why penalize him for that. Ultimately, while it may be that experts such as Yoshino are not usually tendered in employment discrimination cases that does not mean as a rule that they can or should not be. In fact, they are, on multiple

occasions, especially cases involving gender stereotyping, Stereotyping is a cognizable theory of discrimination that may be simple for lawyers to understand, but not jurors; that is why courts have again and again allowed expert testimony. Furthermore, plaintiff in this case brings two causes of action that are less than run of the mill: First, he claims he was gender stereotyped under Title VII; and, second, that he is the victim of sexual-orientation discrimination in being terminated by doing no more than announcing his membership in a protected class. Professor Yoshino explains these theories succinctly in his expert report. His analysis – and thus plaintiff’s – gives victims of gay discrimination an expert’s support in explaining how the visibility of gay people is one of the core means for their equality in the workplace. Defendant may not believe that plaintiff is in that category, but that is for the jury to decide after hearing all of the evidence, including Yoshino’s. So as not to repeat arguments for the Court – though there will be some overlap - Professor Yoshino and I have agreed that he is best qualified to explain his theories to the Court, and he has done so in his declaration; I will concentrate on sex stereotyping, which has routinely been deemed worthy of expert testimony. Simply put, it is hard to see how a jury can understand sex stereotyping without expert evidence. See Harriet M. Antczak, 19 Buffalo J. Gender Law & Soc. Policy 33 (2010/2011) (“Fact-finders cannot make truly informed or accurate decisions unless they are exposed to expert testimony that educates them as to the ways that sex discrimination and sexual harassment operate in the workplace[.]” See also, International Healthcare Exchange, Inc. v. Global Healthcare Exchange, LLC, et al, 470 F.Supp.2d 345, 355 (S.D.N.Y.2007) (rejecting motion to strike report because of the defendant’s allegation that “the notion of gender stereotyping is not an arcane one[.]”) The seminal case that held sex stereotyping

to be a cognizable theory of discrimination, Price Waterhouse v. Hopkins, rejected the defendant's claim that the expert testimony was "gossamer evidence." Price Waterhouse v. Hopkins, 490 U.S. 228, 255-56 (1989). Indeed, in that case, the district court, sitting as a trier of fact, relied on the expert testimony of Dr. Susan Fiske, a social psychologist. Id. at 235¹. On remand this Judge, the distinguished Gerhart Gesell, made clear that gender stereotyping is far from self-evident, and that an expert like Professor Yoshino provides the finder-of-fact vital assistance in understanding the evidence:

The subtle influence of sex upon a person's perceptions may vary with each observer and play both an unconscious and conscious role in influencing actions taken. Any judge, male or female, deciding the issue presented on remand based on mere advocacy without benefit of expert guidance or even opportunity to examine the [Price Waterhouse] partners suspected of bias would be subject to serious criticism. Proof, not merely an invitation to guesswork, was required.

Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C. 1990). In this case, plaintiff has to explain how he – a person Mr. Zabell referred to at his deposition as a "musclehead" Zarda Dep. at 369 – was discriminated against for not conforming to male stereotypes. Professor Yoshino – an admittedly eminent law professor who has his reputation to worry about – believes strongly that Mr. Zarda was stereotyped and plaintiff deserves to have his expertise heard by the jury.

II. PROFESSOR YOSHINO'S EXPERT REPORT AND TESTIMONIAL OPINION ARE ADMISSIBLE

There is no doubt that Mr. Yoshino is qualified to testify as an expert. Among other qualifications, including a Rhodes Scholarship, he held a prestigious editorship on the Law Review at Yale Law School; a prestigious clerkship on the Second Circuit; and

¹ Price Waterhouse predated Daubert, but most of the same judges who decided Daubert decided the plurality opinion in Price Waterhouse, and it has by now, as set forth in all of these cases cited, part of the cannon of discrimination case law that will take another Supreme Court decision to overrule.

he has held an endowed professorship on the NYU School of Law since 2008, where he teaches, among other things, discrimination law. He is amply published in this area, and specifically for which his testimony is proposed. His book, Covering, is considered a groundbreaking work on gay rights, and plaintiff has the right for the jury to hear how punishing plaintiff for saying he is gay is discrimination, even if it is based on a third (or in this case fourth) party complaint.

The title of his book, as Professor Yoshino points out in his accompanying declaration, comes from a work by the Canadian sociologist, Erving Goffman (1922-1982), a man without a household name who is nevertheless ranked among the sixth most cited authors in the humanities.² Dr. Goffman, in his seminal 1963 work, Stigma: Notes on the Management of Spoiled Identity, wrote that,

It is a fact that persons who are ready to admit possession of a stigma (in many cases because it is known about or immediately apparent) may nonetheless make a great effort to keep the stigma from looming large. . . This process will be referred to as *covering*.³

Interestingly, Goffman wrote little in his book about homosexuality – I found only two references to that word in the entire work. In a sense, therefore, Yoshino has picked up where Goffman left off. I could cite the plethora of good reviews and prizes that Covering received, however, this is a Daubert analysis, and the only question for the Court is whether Professor Yoshino’s opinions, as expressed in his report passes that analysis. It clearly does.

First, we do not propose to thrill the jury with an “eminent” law professor to tell the jury what the law is. The only law that the jury will hear are the Court’s instructions.

² Times Higher Education Review, <http://tinyurl.com/y8tndry>

³ As quoted By Yoshino, vii. Stigma is available, in part on Google books, <http://tinyurl.com/cja3n5p>

What the jury is entitled to know from Yoshino, however, is plaintiff's theories of the case: (a) how people with a stigmatizing condition - as homosexuality is considered by some - may choose to reveal that condition as an act of expressing their rights; (b) how people who revolt in response to learning about such revelations may be acting in a discriminatory manner; (c) how the expectation that a man conform to certain male stereotypes may be an act of sex discrimination; and (d) how an employer's relying on sex stereotypes in order to justify an employee's termination may too be an act sex discrimination. The jury need not accept Professor Yoshino's opinion as valid and may reject it; but then again they might find it persuasive. Neither is not a reason to reject it: "[t]he fact that a piece of evidence hurts [the opposing] party's chances does not mean it should automatically be excluded. If that were true, there would be precious little left in the way of probative evidence in any case." Freeman v. Package Machinery Co., 865 F.2d 1331 (1st Cir. 1988) (finding it was proper to admit plaintiff's expert in employment discrimination case, because it was not unfairly prejudicial to have introduced statistical evidence in support of age discrimination). The Supreme Court in Daubert, specifically cautioned against the "wholesale exclusion" of expert testimony, even when based on novel theories. 509 U.S. at 596. Rather, "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means" of challenging admissible evidence. Id. at 595.

Second, Professor Yoshino's report rests on a reliable foundation. He uses a social-framework analysis, and the reliability of that method, and of stereotyping experts in discrimination cases, have been widely accepted by the courts. For example, in Flavel v. Svedala Indus. Inc., 875 F. Supp. 550, 558 (E.D. Wis. 1994), the Court admitted

plaintiff's expert testimony relating to unconscious age stereotyping, and noted that the area of study is recognized throughout the scientific community and by courts in discrimination cases. In EEOC v. Morgan Stanley, 324 F. Supp. 2d 451 (S.D.N.Y. 2004), aff'd in relevant part, 2004 U.S. Dist. LEXIS 12724 (S.D.N.Y. 2004) the court found that the gender bias expert's testimony was reliable and relevant. See also Beck v. The Boeing Co., No. C00-0301P (W.D. Wash. May 14, 2004) (denying motion to exclude expert's testimony on gender bias); Madison v. IBP, Inc., 149 F. Supp. 2d 730 (S.D. Ia. 1999) (same); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn.1993) (same, though limiting some of the testimony); Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 301, 327 (N.D. Calif. 1992) (finding gender and work expert reliable and persuasive, and noting that the expert testimony was consistent with evidence accepted by other courts); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1505 (M.D. Fla. 1991) (finding that Dr. Fiske of Price Waterhouse fame provided a "sound, credible theoretical framework" for thinking about sex stereotyping).

III. THE PARTY TAKING THE DEPOSITION OF AN EXPERT MUST PAY FOR HIS TIME. THIS INCLUDES PREPARATION TIME.

The facts concerning Zabell's noticing a deposition for Professor Yoshino cannot be in doubt. First, it seemed less than a week after I Fedexed Mr. Zabell the Yoshino report, on May 18, 2012, he emailed a letter and a subpoena to me, and indicated it would be served on Professor Yoshino in less that week. I shortly thereafter forwarded it to Yoshino. The subpoena was noticed for June 11. Antollino Dec, Exhibit 1. On or about the next or same day I asked for one day's adjournment. The request was rejected a week later, on May 24. See Antollino Dec. Exhibit 2. After discussing it with Professor Yoshino, we decided we could make the deposition to go forward because it would

otherwise be worse for our schedules. On June 4 in the PM, four business days from the date, I sent Zabell an email requesting that we take a break during the deposition so that I could take a tele-conference. Antollino Dec., Exhibit 3. The next day, three business days away from the deposition, Zabell indicated he did not want to take the deposition.

Antollino Dec. Exhibit 4. I immediately notified Professor Yoshino, but Zabell had by then wasted his time, at a busy time for him professionally.

Mr. Zabell is liable for that prep time. The federal rules and the case law supporting it require that he has to pay for that expert's time, including his preparation. FRCP 26(b)(4)(E). Every district court that has encountered the question in this Circuit has found as much. Bridges v. Eastman Kodak Co., 1996 WL 47304, at *15 (S.D.N.Y. Feb. 6, 1996), *aff'd*, 102 F.3d 56 (2d Cir. 1996); Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 646 (E.D.N.Y. 1997); McNerney v. Archer Daniels Midland Co., 164 F.R.D. 584, 587 (W.D.N.Y. 1995); McHale v. Westcott, 893 F. Supp. 143, 151 (N.D.N.Y. 1995); Lancaster v. Lord, 1993 WL 97258, at *2 (S.D.N.Y. Mar. 31, 1993); Am. Steel Prod. Corp. v. Pa. Cent. Corp., 110 F.R.D. 151 (S.D.N.Y. 1986). Courts in other Circuits agree. See Borel v. Chevron U.S.A. Inc., 2010 U.S. Dist. LEXIS 24379 (E.D. La. Feb. 24, 2010); Collins v. Village of Woodridge, 197 F.R.D. 354 (N.D. Ill. 1999); McNerney v. Archer Daniels Midland, 164 F.R.D. 584 (W.D.N.Y. 1995); Hose v. Chicago & N.W. Transp. Co., 154 F.R.D. 222 (S.D. Iowa 1994); Hurst v. United States, 123 F.R.D. 319 (D.S.D. 1988). There are a minority of district court cases from the Eighth and Tenth Circuits that only compensate preparation time in complex cases, as cited in dicta by Judge Orenstein in Magee, 172 F.R.D. at 646. But why would the Court follow those cases when the Second Circuit affirmed in Bridges, even though it did not discuss the

issue in detail? Furthermore, this case has perhaps by now entered the realm of complex.

Since the overwhelming authority in this part of the country call for compensation of experts, the question is how much should Kenji get. First, his hourly rate of \$400 is reasonable. “Recent opinions issued by courts within the [EDNY] have found reasonable hourly rates to be approximately \$300-\$450 for partners[.]” Pall Corp. v. 3M Purification Inc., 2012 U.S. Dist. LEXIS 76755 (E.D.N.Y. June 1, 2012) (citing multiple cases). Here, Mr. Yoshino’s resume is lacking in no manner, and he is entitled to the highest rate of \$400. Second, the amount of time he prepared, 8.75 hours, is reasonable, insofar as preparing for more than 30 hours per deposition is not considered unreasonable. Manzo v. Sovereign Motor Cars, Ltd., 2010 U.S. Dist. LEXIS 46036, at *32-33 (E.D.N.Y. May 11, 2010). Therefore, Mr. Yoshino should be compensated in the amount of \$3,500, payable immediately by the defendant. The defendant is presumably paying Mr. Zabell a similar fee, with no holds barred, every issue disputed. A few hours paid to an expert who Zabell noticed will not be an injustice or hardship.

CONCLUSION

For the foregoing reasons, Professor Yoshino’s expert testimony and report should be deemed admissible, and he should be compensated in the amount of \$3,500 for preparing for the deposition that Mr. Zabell noticed for June.

Dated: New York, New York
July 19, 2012

/s/
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