

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

DONALD ZARDA,

Plaintiff,

- against -

**ALTITUDE EXPRESS, INC. d/b/a SKYDIVE
LONG ISLAND, and RAY MAYNARD,**

Defendants.

CASE NO.: 10-CV-4334(JFB)(ARL)

**DEFENDANTS' MEMORANDUM OF LAW
SUBMITTED IN OPPOSITION OF PLAINTIFF'S
REQUEST FOR THE ADMISSION OF EXPERT TESTIMONY
AND PAYMENT OF PREPARATION FEES OWED
BY DEFENDANT PREPARATION [SIC]**

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PRELIMINARY STATEMENT

In an attempt to bolster what appears to be a set of allegations not supported by testimony, plaintiff proffers the testimony of Professor Kenji Yoshino, a professor of constitutional law at New York University, to testify as to the purported impact of defendants' alleged discrimination upon plaintiff.¹ Professor Yoshino's expert report is entirely inadmissible. First, Professor Yoshino asserts a series of legal conclusions all of which are inadmissible under both Federal Rule of Evidence 702 and Second Circuit case law. See Fed. R. Evid. § 702; Hygh v. Jacobs, 961 F.2d 359, 364 (2d Cir. 1992). Second, Professor Yoshino's report is inadmissible under the legal standard articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-94 (1993), as it is both irrelevant and unreliable. Thus, defendants respectfully request this Court refuse to certify Professor Yoshino as an "expert" under the Federal Rules of Evidence and order Professor Yoshino's expert report inadmissible for use at trial.

ARGUMENT

A. PROFESSOR YOSHINO'S EXPERT REPORT IS AN INADMISSIBLE LEGAL OPINION

It is well established that the role of an expert witness is a limited one; he "provides the groundwork in the form of an opinion to enable the jury to make its own informed determination." United States v. Duncan, 42 F.3d 97, 101 (2d Cir. 1994); see also In re Initial Pub. Offering Sec. Litig., 174 F.Supp.2d 61, 68 (S.D.N.Y. 2001) ("As Rule 702's plain language shows, the opinion of an expert is *only* admissible if it assists the trier of fact in understanding the evidence or determining a disputed fact.") (emphasis in original). The expert is tasked with "guiding the trier of fact through a complicated morass of obscure terms and concepts. Because

¹ Discrimination on the basis of sexual orientation is not contemplated within the scope of Title VII. Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) ("The law is well-settled in this circuit . . . [that] Title VII does not prohibit harassment or discrimination because of sexual orientation.").

of [the expert witness's] specialized knowledge, [his or her] testimony can be extremely valuable and probative." *Id.* When an expert testifies to "conclusory condemnations . . . [which] merely [tell] the jury what result to reach," however, the testimony no longer *aids* the jury, but rather attempts to substitute the expert's judgment for the jury's. *Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992). When this occurs, the expert exceeds the confines of his limited role of providing groundwork in the form of an opinion and his testimony is therefore inadmissible.

"Limitations on the Rules of Evidence on expert opinion testimony are strictly enforced in the Second Circuit." *GST Telecommunications, Inc. v. Irwin*, 192 F.R.D. 109, 110 (S.D.N.Y. 2000). Generally, the use of expert testimony is not permitted if it will "usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying the law to the facts before it." *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991); accord *United States v. Scop*, 846 F.2d 135, 140 (2d Cir. 1988), *rev'd in part on reh'g on other grounds*, 856 F.2d 5 (2d Cir. 1988); *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 510-11 (2d Cir. 1977), cert. denied, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977). Therefore, "this Court *requires* the exclusion of testimony which states a legal conclusion." *Duncan*, 42 F.3d at 101 (citing *Hygh*, 961 F.2d at 363; *Bilzerian*, 926 F.2d at 1294; *Scop*, 846 F.2d at 140) (emphasis added).

Contrary to the arguments of plaintiff's counsel, Professor Yoshino's expert report does not merely espouse plaintiff's theories of the case. Instead, Professor Yoshino's report is permeated with impermissible legal conclusions. Plaintiff's counsel claims that a jury "is entitled" to know:

"(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 [*sic*] sex discrimination."

(See Plaintiff's Memorandum in Support of Admission of Expert Testimony) (emphasis added). Yoshino's report, however, does not actually abide by that criterion. Instead, Yoshino states he is "of the opinion that the [*sic*] Raymond Maynard's termination of Zarda *was based on both sex stereotyping and disparate treatment on the basis of sexual orientation.*" (See Exhibit A) (emphasis added). He further claims that "[Zarda] was subject[] to disparate treatment because of his sexual orientation." (See Exhibit A). Yoshino thus not only states a legal conclusion (that defendants' are guilty of sex stereotyping and discrimination on the basis of sexual orientation), but also interprets a legal term (that defendants' behavior constituted "disparate treatment"). Such opining is not an appropriate "groundwork in the form of an opinion," but rather an inadmissible "conclusory condemnation[]" of defendants' guilt. See Hygh, 961 F.2d at 364. Further, testimony of this type has routinely been held inadmissible by courts in this Circuit. See Marx & Co., Inc., 550 F.2d at 509-10; see also Roundout Valley Cent. School Dist. v. Coneco Corp., 321 F.Supp.2d 469, 480 (N.D.N.Y. 2004) ("[I]t is axiomatic that an expert is not permitted to provide legal opinions, legal conclusions, or interpret legal terms . . ."); TC Sys. Inc. v. Town of Colonie, N.Y., 213 F.Supp.2d 171 (N.D.N.Y. 2002) ("It is well established within this Circuit that expert testimony cannot 'usurp the role of the trial judge in instructing the [factfinder] as to the applicable law' . . . [and] may not give testimony stating ultimate legal conclusions based upon the facts.") (internal citations omitted). Yoshino's report is similarly disavowed by the Advisory Committee's Notes for Rule 704, which state "[This provision] stand[s] ready to exclude opinions phrased in terms of *inadequately explored legal criteria.*" See Fed. R. Evid. § 704 advisory comm. nn. (West 2000) (emphasis added).

Moreover, Professor Yoshino's conclusion is analogous to Second Circuit case law which forbids the use of similar expert testimony. For example, in United States v. Scop, the Second Circuit held an expert exceeded the permissible scope of expert testimony when he made repeated statements that the defendants' conduct established a manipulative and fraudulent scheme within the meaning of securities laws. 846 F.2d 135 at 139 (2d Cir. 1988). Yoshino draws similar conclusory allegations here, where he does not define sex stereotyping or explain the effects of sex stereotyping on homosexuals, but rather, states conclusively that plaintiff was fired *because* defendants are *guilty* of such behavior. (See Exhibit A). While plaintiff's counsel endeavors to contort Yoshino's report into a factual analysis devoid of legal conclusions, Yoshino clearly states that plaintiff was given "less latitude to speak about [his] identity" than straight employees, namely Richard Winstock, amounting to "*discrimination on the basis of sexual orientation.*" (See Exhibit A). By opining that defendants' actions amounted to disparate treatment on the basis of sexual orientation, Yoshino "compete[s] with the judge in the function of instructing the jury." Hygh, 961 F.2d at 364. Accordingly, Professor Yoshino's expert opinion must be deemed inadmissible and Yoshino should be forbidden from testifying should this case proceed to trial.

**B. PROFESSOR YOSHINO'S EXPERT TESTIMONY DOES NOT SATISFY
THE DAUBERT TEST**

Even in the unlikely event this Court was to find Professor Yoshino's expert report was not based upon inadmissible and inappropriate legal conclusions, Yoshino's testimony remains inadmissible as it is both unreliable and irrelevant.

The Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., the seminal case on expert testimony, enumerated trial courts' "gatekeeping" function under Rule 702; trial courts are charged "with the task of ensuring that an expert's testimony both rests on reliable

foundation and is relevant to the task at hand.” 509 U.S. 579, 593-94 (1993). The Supreme Court has held that Daubert analysis applies to all expert testimony, not just to scientific experts. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147-49 (1999) (“We conclude that Daubert’s general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, establishes a standard of evidentiary reliability.”) (internal citations omitted).

1. YOSHINO’S TESIMONY IS IRRELEVANT

“In fulfilling this gatekeeping role, the trial court should look to the standards of Rule 401 in analyzing whether the proffered expert testimony is relevant, i.e. whether it “ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence.” Amorgianos v. National R.R. Passenger Corp., 303 F.3d 256, 265 (2d Cir. 2002) (quoting Fed. R. Evid. § 401) (alteration in original).

Professor Yoshino’s report and anticipated testimony will not make the existence of any fact of consequence to this case more probable or less probable than it would be absent Yoshino’s involvement. First, plaintiff’s reliance on the decision in Price Waterhouse v. Hopkins is unwarranted. The defendants in Price Waterhouse did not question either Dr. Fiske’s expertise or the legitimacy of her discipline. 490 U.S. 228, 255 (1989). Second, Dr. Fiske could not, and did not, determine “the precise effect stereotyping had on the decision [to terminate plaintiff].” Hopkins v. Price Waterhouse, 737 F.Supp. 1202, 1206 (D.D.C. 1990). That is a far cry from Yoshino, who claims “Raymond Maynard’s termination of Zarda was based on both sex stereotyping and disparate treatment on the basis of sexual orientation.” (See Exhibit A). Lastly, the facts of this case are clear cut. A customer complained that plaintiff acted in a manner that made Rosana Orellana and David Kengle uncomfortable and plaintiff was subsequently

terminated. This is not a case of hidden or latent discrimination. As such, an expert's testimony is unwarranted and therefore irrelevant under Rule 401. See Price Waterhouse v. Hopkins, 490 U.S. 228 at 255 (Stating expert testimony was "merely icing on [plaintiff's] cake," as "it takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring a course at charm school.").

2. YOSHINO'S TESTIMONY IS UNRELIABLE

The district court must similarly determine "whether the proffered testimony has a sufficiently 'reliable foundation' to permit it to be considered." Campbell ex. rel. Campbell v. Metropolitan Property and Cas. Ins. Co., 239 F.3d. 179, 184 (2d Cir. 2001) (quoting Daubert, 509 U.S. at 597). In doing so, the district court "should consider the indicia of reliability identified in Rule 702, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony 'is the product of reliable principles and methods'; and (3) that 'the witness has applied the principles and methods reliable to the facts of the case.'" Amorgianos, 303 F.3d at 265 (quoting Fed. R. Evid. § 702). The Supreme Court has enumerated several factors bearing on reliability that district courts are to consider, including: (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subject to peer review; (3) the technique's known or potential rate of error; and (3) the existence of standards controlling the technique's operation. Daubert, 509 U.S. at 593-94. While these factors are not a "definitive checklist or test," they are generally indicative of whether or not an expert's testimony is reliable. Id.

In the instant case, neither Professor Yoshino nor plaintiff's counsel indicates the theory or technique upon which Professor Yoshino relies. Plaintiff's counsel summarily decrees it is a "social-framework" analysis, but Yoshino never states what methodology, factors, indicia, or

techniques he uses to evaluate defendants' behavior. In fact, by Yoshino's own admission, his expert report was not based on delineated methodology or research. (See Exhibit A). Instead, the only materials upon which Yoshino relied on to prepare his report were: the video record of Rosana Orellana's skydiving jump; the audio recording of plaintiff's termination; and the deposition transcripts of Orellana, David Kengle, Richard Winstock, and Ray Maynard. (See Exhibit A). Absent an affirmative identification of what theory or technique Yoshino employs, it cannot be determined whether it has been tested, whether it has been subject to peer review, what its known or potential rate of error is, or what, if any, standards exist to control the theory or technique's operation. As such, a Daubert analysis is extremely limited and Yoshino's testimony cannot be proven reliable as required by Rule 702.

Further, Yoshino's "reliable foundation" is entirely inapposite from that utilized by the social scientist 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 only case in this Circuit plaintiff cites to as the foundation for Yoshino's "social-framework analysis." In Morgan Stanley, the E.E.O.C. proffered "Dr. Bielby, a social scientist with a Ph.D. in Sociology, [to] 'assist the Court and Jury in understanding the findings from social science research about factors that create and minimize workplace gender bias, including how gender stereotypes affect personnel decisions, organization policies and practices that create barriers to career advancement for women, and the kind of policies and procedures that effectively minimize gender bias, particularly in male-dominated environments.'" Id. at 460. In determining the expert to be reliable, the court stated "Bielby's background and his reports [demonstrate] acceptable research and application." Id. at 461. Here, plaintiff's expert does not possess a Ph.D. in Sociology; he has failed to demonstrate he possesses sufficient credentials to advance a "social

frame-work analysis.” More egregiously, Yoshino’s report contains no such acceptable research. Yoshino does not cite to a *single* element of research as the basis of the opinion contained within his report. While he does cite to “academic and popular literature on gay identity,” Professor Yoshino does not apply any of this literature’s hypotheses or conclusions to the instant case. He similarly cites to a Second Circuit decision, but only for the contention that “the assumption that all men will be sexually attracted to women, and prone to sexually harassing them, is a sex stereotype.” (See Exhibit A). Yoshino’s contentions that defendants engaged in discrimination on the basis of sexual orientation are, therefore, entirely baseless. Accordingly, they are inadmissible under Daubert.

It should be noted that the court in Morgan Stanley specifically ruled that Bielby could only testify “regarding whether policies and practices relating to gender bias *might affect* employees’ utilization of an equal employment opportunity program, but *may not seek to show that alleged deficiencies in such a program are evidence of discrimination.*” Id. at 462 (emphasis added). As Yoshino makes specific findings of discrimination, it appears plaintiff’s proffered case requires the exclusion of his testimony.

Lastly, Professor Yoshino states an opinion on disputed facts to which he cannot reasonably claim expertise. Yoshino states that Zarda was “professionally justified” in touching Orellana’s hips and placing Zarda’s head on her shoulder. (See Exhibit A). He similarly says “[t]he video record of the jump also shows no impropriety on Zarda’s part.” (See Exhibit A). Professor Yoshino is not an expert in skydiving. His report does not indicate that he is a licensed skydiving instructor, that he has researched the technical and physical requirements of skydiving, or that he has ever even been skydiving. As such, Yoshino is entirely unqualified to testify or render an opinion as to what is or is not professionally justified. Accordingly, any testimony

where Yoshino relies on his opinions on the rigors or norms of skydiving must be deemed inadmissible. See Fed. R. Evid. § 702 (requiring an expert be qualified by “*knowledge, skill, experience, training, or education.*”) (emphasis added).

C. PROFESSOR YOSHINO’S FEES ARE INHERENTLY UNREASONABLE AND THEREFORE DEFENDANT SHOULD NOT BE ORDERED TO PAY THEM

First, defendants never noticed Professor Yoshino for deposition. While defendants did send plaintiff’s counsel a copy of a subpoena defendants *intended* to serve, such subpoena was never actually served and, therefore, Yoshino was never noticed. (See Exhibit B). Absent a notification of deposition, defendants are not bound by Federal Rule of Civil Procedure 26(b)(4)(E). (“Unless manifest injustice would result, the court must require that the party seeking discovery pay the expert a reasonable fee *for time spent in responding to discovery*”). Regardless, even if plaintiff’s expert was noticed, which we deny he was, defendants gave more than ample notification of their decision not to depose Yoshino. As such, defendants have no obligation under the Federal Rules of Civil Procedure to reimburse plaintiff for Yoshino’s supposed expenses.

Further, even in the unlikely event plaintiff was entitled to reasonable costs, plaintiff’s requested \$3,500 fee is unconscionable. While Rule 26 does provide that a party seeking discovery pay the expert a fee for time spent in responding to discovery, the fee must be *reasonable*. Plaintiff has the burden of proving reasonableness and, absent evidence to support plaintiff’s interpretation of a reasonable rate, the court should use its discretion to determine a reasonable fee. Reit v. Post Properties, Inc., 09 CIV. 5455 RMB KNF, 2010 WL 4537044 (S.D.N.Y. Nov. 4, 2010) (citing New York v. Solvent Chem Co., 210 F.R.D. 462, 468 (W.D.N.Y. 2002)). In determining whether an expert fee request is “reasonable,” courts consider:

1) the expert's area of expertise; 2) the education and training that is required to provide the expert insight that is sought; 3) the prevailing rates for other comparably respected available experts; 4) the nature, quality and complexity of the discovery responses provided; 5) the cost of living in the particular geographic area; 6) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26 (see, e.g., Mathis v. NYNEX, 165 F.R.D. 23, 24 (E.D.N.Y.1996); Goldwater v. Postmaster Gen'l of the United States, 136 F.R.D. 337, 340 (D.Conn.1991)); 7) the fee being charged by the expert to the party who retained him; and 8) fees traditionally charged by the expert in similar matters. See Mathis, 165 F.R.D. at 25.

Grdinich v. Bradlees, 187 F.R.D. 77, 82-83 (S.D.N.Y. 1999). "Courts must keep in mind that 'the underlying purpose of Rule 26(b)(4)(C) is to compensate experts for their time spent participating in litigation and to prevent one party from unfairly obtaining the benefit of the opposing party's expert work free from cost.'" Reit v. Post Properties, Inc., 09 CIV. 5455 RMB KNF, 2010 WL 4537044 (S.D.N.Y. Nov. 4, 2010) (internal citations omitted).

Professor Yoshino's request to be reimbursed for eight and three-quarters (8.75) hours of deposition time far exceeds the "nature, quality and complexity" of his expert opinion. See Grdinich, 187 F.R.D. at 82 (finding a half an hour of deposition preparation reasonable); see also Mannarino v. United States, 218 F.R.D. 372, 375 (E.D.N.Y. 2003) (finding eight (8) hours preparation time unreasonable when the issues in the case were not complex and the expert in preparing for the deposition did not review any materials he had not reviewed for purposes of putting together his report); Magee v. Paul Revere Life Ins. Co., 17 F.R.D. 627, 647 (E.D.N.Y. 1997) (holding a request for one (1) hour of preparation time reasonable); E.E.O.C. v. Johnson & Higgins, 1999 WL 32909 at *2 (S.D.N.Y. 1999) (holding thirteen (13) hours of deposition preparation unreasonable); Flaherty v. Connecticut, 2006 WL 4475013 (D. Conn. 2006) (finding twenty four (24) hours of preparation unreasonable, even when expert needed to review two (2) ten-year-old documents that were 2.25" thick); McCulloch v. Hartford Life & Acc. Ins. Co.,

2004 WL 2601134 (D.Conn. 2004) (reducing twenty (20) hours of preparation for an eight (8) hour deposition to two (2) hours, despite review of 12,000 pages of documents and fourteen (14) deposition transcripts). If Professor Yoshino prepared at all for his anticipated deposition, which has not been proven, it would not, or should not, have taken eight and three-quarters (8.75) hours. Such claims are a transparent attempt by plaintiff's counsel to exorbitantly increase the charge. First, Professor Yoshino drafted his report a mere two (2) weeks before his deposition was supposedly to take place. (See Exhibit A). Not only had he *very* recently reviewed the pertinent facts of this case, but his expert report was only six and a half (6.5) pages; Yoshino did not have to review a voluminous or complex report. See Mannarino, 218 F.R.D. at 375 (finding an expert preparing his expert report "only a few months" prior to the deposition relevant for purposes of reducing the fee requested). Second, as argued in greater detail above, Professor Yoshino's report lacked any significant research, and therefore he had no need to spend time reviewing extensive or intricate material. As plaintiff is not entitled to fees for the time Yoshino spent preparing documents for plaintiff or plaintiff's counsel, plaintiff's request is untenable. Magee, 172 F.R.D. at 647 ("The Court holds that Rule 26[] encompasses a reasonable fee for time spent by an expert preparing for deposition, but not for the time the expert spent preparing the attorney who retained him.").

Moreover, Professor Yoshino's hourly rate of \$400 far exceeds any level of reasonableness. Plaintiff's reliance on the decision in Pall Corp. v. 3M Purification Inc., 2012 U.S. Dist. LEXIS 76755 (E.D.N.Y. June 1, 2012) is misplaced, as Yoshino is a professor and not a partner in a law firm. Further, plaintiff must offer more than a mere assertion that Yoshino's rate is \$400 per hour. See Reit, 2010 WL 4537044 at *5 (holding "mere assertions" of an expert's rate, without more, "does not suffice to support the reasonableness of the fees charged").

Plaintiff has not submitted the rate Yoshino charges plaintiff, nor has plaintiff submitted fees charged by similar experts in Yoshino's field. Absent such evidence, Yoshino's fee cannot be deemed reasonable and defendants should not be forced to recompense plaintiff for such excessiveness.

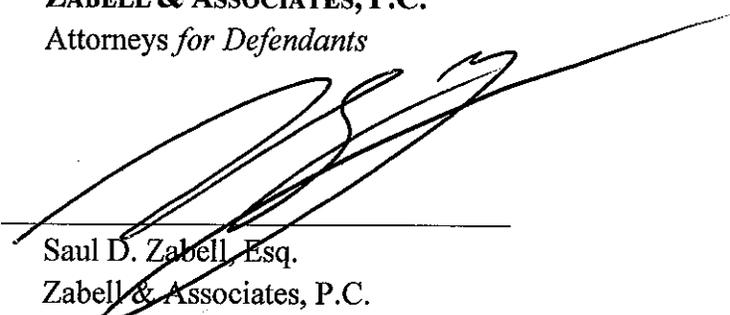
CONCLUSION

For all the foregoing reasons, and any reasons defendants may raise at oral arguments for this matter, plaintiff's Request for Admission of Expert Testimony and Payment of Preparation Fees Owed by Defendant Preparation [*sic*] should be denied in its entirety, and defendants should be awarded costs and legal fees incurred for having to make the instant motion.

Dated: Bohemia, New York
August 3, 2012

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