

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

Case No. 17-cv-264

v.

STATE OF WISCONSIN DEPARTMENT
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE
NO. 5 TO EXCLUDE CERTAIN TESTIMONY OF DR. SCHECHTER**

Plaintiffs, Alina Boyden and Shannon Andrews (collectively "Plaintiffs"), through their undersigned counsel, respectfully submit the following brief in opposition to Defendants' Motion *in Limine* No. 5, which seeks to exclude certain testimony offered by Plaintiffs' medical expert, Dr. Loren Schechter.

ARGUMENT

Defendants have requested that this Court exclude testimony and opinions offered by Plaintiffs' medical expert, Dr. Loren Schechter, regarding the medical efficacy of surgical treatment for gender dysphoria. (Dkt. # 178 at 1). Defendants argue that Dr. Schechter lacks sufficient expertise to opine on this topic because he is not a mental health specialist and his opinion relies on both his personal examination of patients, as well as on studies that he did not author himself and that lack control groups. Defendants fail to raise any legitimate critique of Dr. Schechter's

expertise regarding the efficacy of surgical treatment of gender dysphoria, given his broad experience related to the treatment of gender dysphoria through surgery; therefore, his testimony should not be excluded.

A. Dr. Schechter's Broad Experience in Treating Gender Dysphoria, Including His Expertise as a Surgeon Who Performs Gender Confirmation Surgeries, Qualify Him to Opine on the Efficacy of Gender Confirmation Surgeries.

Defendants assert that Dr. Schechter's expertise performing gender confirmation surgeries does not qualify him to "opine that gender confirming surgical treatments are effective in treating gender dysphoria – a mental health condition." (Dkt. # 178 at 11). Defendants dismiss Dr. Schechter's expertise as "nothing more than performing plastic surgeries. He is not a psychiatrist, psychologist, or counselor of any kind." (Dkt. # 178 at 12). On the contrary, Dr. Schechter, who has devoted a substantial part of his career over the past 18 years to studying, performing and teaching about the clinical treatment of gender dysphoria, including through surgical treatment, is highly qualified to opine on the efficacy of gender confirmation surgeries in treating gender dysphoria. (Dkt. # 106 at 2).

Defendants seek to diminish Dr. Schechter's nearly two decades of clinical experience treating gender dysphoria through gender confirmation surgery, as well as his extensive training and qualifications. Dr. Schechter began training to treat gender dysphoria as a medical student at the University of Chicago, Pritzker School of Medicine (Dkt. # 159 at 9:15-10:6) and has become recognized as a leading expert in treating gender dysphoria. Dr. Schechter's current practice is primarily centered on treating gender dysphoria – more than 85% of his clinical patients are transgender

people seeking surgery as treatment for gender dysphoria – and he has performed over 500 gender confirmation surgeries. Dr. Schechter has also been invited to give dozens of lectures and presentations related to treatment of gender dysphoria, beyond the mere mechanical techniques for performing gender confirmation surgeries. Dr. Schechter has also given a series of lectures for the World Professional Association for Transgender Health’s (“WPATH”) certified training course “Transgender Health: Best Practices in Medical and Mental Health Care.” His lecture topics included “Surgical Treatment Options,” “Case Studies: The Multidisciplinary Team,” and “Post-Operative Care,” which discussed issues surrounding treatment of gender dysphoria well beyond the specific techniques for performing gender confirmation surgeries.

In reducing Dr. Schechter’s surgical expertise to that of a technician, Defendants fail to recognize the ways in which the physical body is intertwined with gender dysphoria. As defined by the Diagnostic and Statistical Manual of Mental Disorders (DMS-V) and International Classification of Diseases (ICD-10), gender dysphoria is a medical diagnosis for the distress caused by an incongruence between one’s gender identity and one’s sex assigned at birth. Under the WPATH standards, medical treatment of gender dysphoria involves treatments, such as surgery, that align individuals’ bodies with their gender identity. That is, the goal of surgically modifying a person’s body is to eliminate gender dysphoria by correcting the incongruence between the person’s body and gender identity. Accordingly, Defendants’ assertion that Dr. Schechter does “nothing more than perform[] plastic

surgeries” mischaracterizes the role that surgery plays in the amelioration of gender dysphoria.

Furthermore, the WPATH *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* (“WPATH SOC”) directly contradict Defendants’ assertion that Dr. Schechter is not qualified to assess the efficacy of gender confirmation surgeries because he is not a mental health specialist. WPATH SOC describes the role of a surgeon as integral to the collaborative treatment team:

The role of a surgeon in the treatment of gender dysphoria is not that of a mere technician. Rather, conscientious surgeons will have insight into each patient’s history and the rationale that led to the referral for surgery. To that end, surgeons must talk at length with their patients and have close working relationships with other health professionals who have been actively involved in their clinical care.

(WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE*⁵⁶ (7th ed. 2011)) (emphasis added). Indeed, Dr. Schechter has testified that he meets with each of his patients prior to operation to evaluate whether surgery is appropriate treatment for the patient’s individualized case of gender dysphoria:

I require evaluation of all patients prior to surgery. As far as what goes into my decision making [] to proceed with surgery involves not only my meeting with that patient and performing a history and physical exam but also the referral information from the health care professional. The decision, of course, then to proceed with surgery is a [] mutual decision between myself and the patient after discussion of risks and benefits and so on.

(Dkt. # 159 at 36:7-21). Dr. Schechter complies with the WPATH SOC and is intimately involved in the evaluation of his patients, as well as in the assessment of

the appropriateness of surgery – a discussion that goes far beyond the physical or mechanical aspect of the surgery.

Further, Defendants argue that Dr. Schechter has “no specialized education or training in the field of mental health disorders, let alone gender dysphoria” and “does not even diagnose gender dysphoria in his practice.” (Dkt. # 178 at 12-13). As an initial matter, Dr. Schechter has an unrestricted license to practice medicine, which allows him to diagnose patients with gender dysphoria, though he generally relies on referrals from mental health professionals with whom he collaborates. (Dkt. # 159 at 33:10-20). More importantly, however, Dr. Schechter has extensive experience treating patients with gender dysphoria, which involves personally consulting with his patients to determine whether gender confirmation surgery will effectively ameliorate their symptoms of gender dysphoria. Dr. Schechter also collaborates with an interdisciplinary team including mental health professionals to treat patients with gender dysphoria (*Id.* at 33:16-20), which is in accordance with the WPATH SOC protocol described above. Furthermore, the WPATH SOC expressly allows health professionals other than “qualified mental health professionals” to assess gender dysphoria, particularly where the assessment occurs as part of a “multidisciplinary team”:

Mental health professionals . . . are best prepared to conduct this assessment of gender dysphoria. However, this task may instead be conducted by another type of health professional who has appropriate training in behavioral health and is competent in the assessment of gender dysphoria, particularly when functioning as part of a multidisciplinary specialty team that provides access to feminizing/masculinizing hormone therapy. This professional may be the prescribing hormone therapy provider or a member of that provider’s health care team.

Id. at 24.

Defendants' dismiss Dr. Schechter's ability to assess the effects of gender confirmation surgery, asserting that "follow-up merely consists of speaking with and examining" his patients. However, Fed. R. Evid. 703 expressly acknowledges that "an expert may base an opinion on facts or data in the case that the expert has . . . personally observed." The Advisory Committee Notes further explain that the facts or data underlying an expert's opinion may be derived from firsthand observation, offering "a treating physician" as the primary example of this. FED. R. EVID. 703 advisory committee's note. Indeed, Dr. Schechter's treatment of gender dysphoria includes preoperative assessments and postoperative follow-up for each patient. Although Dr. Schechter recognizes challenges associated with following-up with postoperative patients, he has testified that he assesses the effectiveness of each procedure by talking to patients and examining them. (Dkt. # 159 at 64:3-21). Dr. Schechter also routinely performs multiple gender confirmation surgeries on the same patient, which allows him to assess the reduction of gender dysphoria with treatments over time. (Dkt. # 159 at 77:3-78-22). Apart from Dr. Schechter's firsthand observation of the efficacy of gender confirmation surgery, he also testified at his deposition that he designed a currently-ongoing study involving preoperative and postoperative surveys of patients receiving gender confirmation surgeries. (Dkt. # 159 at 42:8-43:13).

B. Dr. Schechter's Testimony Should Not Be Excluded on the Basis that He Relies on Studies and Articles Authored by Other Experts in the Field.

Defendants further argue that Dr. Schechter's opinions and testimony on the efficacy of gender confirmation surgeries should be excluded because the "basis for his opinion are merely references to peer-reviewed articles of studies that he did not author." (Dkt. # 178 at 11). However, expert witnesses are not required to limit their opinion to articles or studies that they authored themselves. Indeed, Fed. R. Evid. 703 states the opposite:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Defendants do not claim that Dr. Schechter based his opinion on studies or articles that experts in his field would not reasonably rely upon. Defendants' only critique is that Dr. Schechter cites to a wide volume of literature that he did not author himself, which is not a legitimate reason for his testimony to be excluded.

Defendants cite to *Gopalratnam v. Hewlett-Packard Co.*, 877 F. 3d 711, 789 (7th Cir. 2017), as support for the absurd assertion that expert witnesses may not base their opinion on articles or studies written by other experts in the field. Nevertheless, *Gopalratnam* makes clear that experts may "of course" rely on the work of other experts in the field, as Fed. R. Evid 703 expressly states, provided that the underlying facts or data are reliable.

Of course, as a general matter, there is nothing objectionable about an expert relying upon the work of a colleague. *See Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002) (“[I]t is common in technical fields for an expert to base an opinion in part on what a different expert believes on the basis of expert knowledge not possessed by the first expert...”); *see also Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, 807 F.3d 1283, 1303 (Fed. Cir. 2015) (“For areas outside her expertise ... the district court properly concluded that [the expert] could, indeed must, rely upon ... other experts having such industry-specific experience.”). Such a scenario is explicitly contemplated by the Rules of Evidence.

Id. at 789. Further, the circumstances in *Gopalratnam* are entirely distinct to the facts at hand. Unlike Dr. Schechter, who bases his opinion on peer-reviewed articles and studies (in addition to his own clinical training and expertise treating gender dysphoria), the expert in *Gopalratnam* was excluded because he admitted he was not an expert in the subject matter on which he opined, instead basing his opinion entirely on a discussion with another expert who the court had excluded as unreliable. *Id.* at 788-89.

Defendants further assert that Dr. Schechter’s opinion should be excluded because one of the (dozens of) studies he cites “based its outcomes on the Body Uneasiness Test, a test which Dr. Schechter has no personal knowledge.” Defendants mischaracterize Dr. Schechter’s testimony. He testified that he was, in fact, familiar with the Body Uneasiness Test. (Dkt. # 159 at 41:16-24).

C. Dr. Schechter’s Testimony Should Not Be Excluded on the Basis That He Does Not Cite Studies with a Patient Control Group.

Defendants assert that Dr. Schechter’s testimony should be excluded because he does not cite to studies that “to his knowledge, were administered with a patient control group – a reason *he* used in criticizing Defendants’ expert witness’ opinion.”

(Dkt. # 178 at 11-12). As an initial matter, Dr. Schechter is clear that he does not view the existence of a control group as necessary for a study to have any scientific value. Rather, he testifies that the existence and adequacy of a control group merely affects how he would evaluate the quality of a study:

There may be studies that consider themselves to be control groups. Whether they are actually good control groups may be a critique or limitation of a particular study.

(Dkt. # 159 at 82:2-6). Dr. Schechter further explains that clinical studies with a control group denying medically necessary care raise serious ethical concerns, indicating that he would not consider such a control group to be necessary for a study to be scientifically sound:

Some of the challenges in . . . clinical studies would be basically denying an individual necessary care [] for the sole purpose of serving as a control group. In other words, I don't think it would necessarily be an ethical study to deny a group of people access to medical care simply to look at the natural progression of the condition.

(Dkt. # 159 at 82:2-13).

Furthermore, in the portion of Dr. Schechter's deposition cited by Defendants, Dr. Schechter does not criticize Dr. Mayer for failing to cite to studies with patient control groups. Rather, Dr. Schechter criticizes Dr. Mayer for citing to a flawed study comparing suicide rates for transgender people who received gender confirmation surgery to rates of suicide for the general population. (Dkt. # 104 at p. 16 n.31). More specifically, Dr. Schechter criticizes Dr. Mayer for suggesting that this study supports a finding that gender confirmation surgery may increase suicide rates among transgender people with gender dysphoria. (Dkt. # 104 at p. 16 n.31). Simply put, Dr.

Schechter does not opine that the study underlying Dr. Mayer's opinion is unreliable because it lacks a control group – rather, Dr. Schechter's critique is that the study has limited probative value because the "control group" is the general population rather than transgender people with gender dysphoria who did not have gender confirmation surgery. (Dkt. # 159 at 54:22).

CONCLUSION

Defendants have not provided a legitimate basis to exclude any portion of Dr. Schechter's testimony or opinion. For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to exclude the identified testimony of Dr. Schechter.

Dated this 14th day of September, 2018.

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