Sherman v. Fountain Valley Police Department, Case No. 17-2217 JVS (DFMx)

Tentative Minute Order re Motions *in Limine*

Plaintiff Jennifer Sherman ("Sherman) and City of Fountain Valley, *et al.* (collectively "City Defendants") move the Court for relief by way of Motions *in Limine.* The Court now enters its rulings.

I. Sherman's Motion *in Limine.*

Sherman seeks an order to exclude the City Defendants' expert Catherine A. Bain ("Bain").[1] (Docket No. 64.) Bain opines on whether statements made by individuals involved in the promotion process reflected gender bias. The City Defendants have filed an opposition (Docket No. 65), and Sherman has replied (Docket No. 82).

A. Legal Standard.

Federal Rule of Evidence 702 permits expert testimony from "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education," if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

(Fed. R. Evid. 702.)

On this challenge, the Court is called to exercise its "gatekeeper" function 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,

[1]The Court accepts Sherman's explanation for truncated compliance with Local Rule 7-3. (Choi Decl., ¶¶ 2-3.)

Inc., 509 U.S. 579, 597 (1993). A trial court's "gatekeeping" obligation to admit only expert testimony that is both reliable and relevant is especially important "considering the aura of authority experts often exude." Mukhtar v. Cal. State Univ., 299 F.3d 1053, 1063-64 (9th Cir. 2002). Nevertheless, "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010). Importantly, the Court's gatekeeper role under Daubert is "not intended to supplant the adversary system or the role of the [trier of fact]." Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1341 (11th Cir. 2003) (internal quotation marks and citation omitted). In other words, at this stage, the Court is not supposed "to make ultimate conclusions as to the persuasiveness of the proffered evidence." (Id.) As the Ninth Circuit summed up in Alaska Rent-A-Car, Inc. v. Avis, 738 F.3d 960, 969-70 (9th Cir. 2013):

> Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable. The district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury.

The requirement that expert testimony "help the trier of fact to understand the evidence or to determine a fact in issue" goes primarily to relevance. Primiano, 598 F.3d at 564.

The Rule 702(c) and (d) reliability indicators are subject to a more flexible analysis. According to the Ninth Circuit,

> [i]n Daubert, the Supreme Court gave a non-exhaustive list of factors for determining whether scientific testimony is sufficiently reliable to be admitted into evidence, including: (1) whether the scientific theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential error rate; and (4) whether the theory or technique is generally accepted in the relevant scientific

community.

Domingo ex rel. Domingo v. T.K., 289 F.3d 600, 605 (9th Cir. 2002).

The trial court has "broad latitude" in deciding how to determine the reliability of an expert's testimony and whether the testimony is in fact reliable. Mukhtar, 299 F.3d at 1064; see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). The "test of reliability is 'flexible,' and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case." Kumho Tire, 526 U.S. at 141.

With these standards in mind, the Court considers the Motion to Exclude.

B. Discussion.

The Court finds that Bain's testimony must be excluded for three reasons.

First, the Court finds that her testimony would not be helpful to the trier of fact. (Fed. R. Evid. 702.) The jury is capable of assessing the content of statements made during the promotion process. Moreover, she merely opines that some comments are "more likely than not, not indicative of bias." (Bain Report, p. 2; pagination per report.) Further, "if the comments are parsed, it is apparent that alleged gender bias is not the only (or even likely) basis for them being made." (Id.) This is a far cry from the typical expert's practice of testifying to reasonable certainty in the specific filed; *i.e.*, to a reasonable medical certainty.

Second, Bain has no qualifications for opining that certain statements reflect the departmental hierarchy rather than gender bias. (E.g., id., p. 3.) There is nothing in her resume to suggest that she has expertise in police organizations or any other quasi-miliary organization. It appears that her real expertise is in determining how to conduct workplace investigations, which is not the focus of this case. (Id., Resume, first and second pages.) Here the Court cannot say "that the expert testimony both rests on a reliable foundation and is relevant to the task at hand." City of City of Pomona v. SQM North America Corp., 750 F.3d 1036, 1043 (9th Cir. 2014) (internal quotation marks deleted).

Third, Bain's opinions with regard to gender bias content are unreliable. She points to no standard for assessing the statements of the participants in the promotion process. Domingo ex rel. Domino, 289 F.3d at 605.

Although only going the weight of her opinions, the Court notes that Bain reviewed only about half of the promotion evaluation forms. (See Bain Report, p. 5.)

The Motion is granted.

II. City Defendants's Motions *in Limine.*

The City Defendants' Motions were filed before the Court entered its summary judgment ruling, reducing the number of claims in issue. (Docket No. 76.) The Court granted summary judgment on Sherman's failure to promote claims for 2010, 2011, and 2013 (id., p. 9), Sherman's retaliation claim in the second and sixth causes of action (id., p. 10), and her failure to promote claims under the first and fourth causes of action (id., p. 13). The Court denied summary judgment on her hostile environment claim, her failure to prevent discrimination claim, and her federal claim under Section 1983, 42 U.S.C. § 1983. (Docket No. 76, pp. 14-16.) This moots portions of the relief which the City Defendants seek.

A. Motion *in Limine* No. 1: Matt L. Huffman

City Defendants seek an order to exclude Sherman's expert Matt L. Huffman ("Huffman"). (Docket No. 59.) Huffman opines as to whether statements made during the promotion process reflect gender bias. Sherman has filed an opposition (Docket No. 68), and the City Defendants have replied (Docket No. 77).

The Court considered in detail the merits of Huff's opinion under Daubert and Rule 702 in ruling on the City Defendants' Motion for Summary Judgment. (Docket No. 76, pp. 4-5.) For the reasons set forth previously, the Court grants the Motion, and excludes Huff's testimony.

The Court notes that the opinions of both parties' gender bias experts reflect the same short comings. (See Section I, supra.)

B. Motion *in Limine* No. 2: Evidence re Emotional Harm.

City Defendants seeks an order to exclude evidence concerning Sherman's emotional harm and related damages. (Docket No. 60.) Sherman has filed an opposition (Docket No. 70), and the City Defendants have replied (Docket No. 78).

1. Legal Standards.

Rule 37(c)(1) of the Federal Rules of Civil Procedure establishes a self-executing sanction for failing to make required disclosures: "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); Yetti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1105-06 (9th Cir. 2001). Rule 26(e) specifically encompassed the obligation to supplement discovery responses. The Rule also provides for alternate sanctions:

> In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
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> > (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
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> > (B) may inform the jury of the party's failure; and
> >
> > (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(Id.)

2. Discussion.

It is evident that Sherman's emotional harm and related damages have always been part of the case. The Court sees no basis to impose a wholesale exclusion of such evidence to the extent disclosed.

However, to the extent that Sherman has failed to disclose evidence of harm or damages, the Court will exclude such evidence. On the present record, the Court cannot determine precisely what evidence should be excluded, and will rely upon objections by the City Defendants to make further rulings. At a minimum, the Court would exclude any medical records not previously produced and reference to any provider or treatment not previously disclosed.[2] The failure to disclose such evidence cannot be characterized as harmless, and indeed the City Defendants would be prejudiced by introduction of such evidence at this late date.[3] (Fed. Civ. P. 37(c)(1).)

To the extent that Sherman's deposition testimony contradicts her responses to written discovery, the City Defendant are free to impeach her on the basis of her responses. (See Motion, p. 5.)

The Motion is granted in part.

C. Motion *in Limine* No. 3: Sexual Harassment/Hostile Work Environment.

City Defendants seeks an order to exclude evidence of sexual harassment and/or hostile work environment. (Docket No. 61.) Sherman has filed an opposition (Docket No. 71), and the City Defendants have replied (Docket No. 79).

As noted above, the Court denied the City Defendants' motion for summary judgment on Sherman's hostile work environment claim. The City Defendants' acknowledge that Sherman asserts a separate claim for hostile work environment. (Motion, p.4.) However, they assert that she failed to offer an evidence at her deposition.

The City Defendants failed to defeat this claim on summary

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[2]The Court would also likely bar any effort to repeat the statements of Sherman's provided whether or not previously disclosed. Bulthuis v. Rexall Corp., 789 F.2d 1315, 1216 (9th Cir. 1985).

[3]The Court further finds that such evidence would be unduly prejudicial and properly excluded under Federal Rule of Evidence 403.

judgment, and the Court declines to entertain the present motion as a stealth summary judgment motion. (See Docket No. 32, Order for Jury Trial, p. 4.)

The Motion is denied.

D. Motion *in Limine* No. 4: Evidence Prior to April 21, 2016

City Defendants seeks an order to exclude generally evidence of incidents prior to April 21, 2016. (Docket No. 62.) Sherman has filed an opposition (Docket No. 72), and the City Defendants have replied (Docket No. 80). The theory is that such evidence would be barred by the one-year statute of limitation under FEHA, Cal. Gov't Code § 12960(d), or the 300-day statute under Title VII, 42 U.S.C. § 2000e-5(e)(1).

The City Defendants ignore that evidence may be presented to show a pattern. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805-06 (1973); Neufeld v. Searle Laboratories, 884 F.2d 335, 340 (8th Cir. 1989); see Fed. R. Evid. 404(b). This is so even if the conduct is not itself actionable because of a time bar. Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527, 540 (5th Cir. 1980): "If . . . prior practices were considered relevant to show independently actionable conduct occurring within the statutory period, the district court did not err in taking the evidence into account." The hiring decisions made between 2010 and 2016 are relevant even if not actionable.

Maridon v. Comcast Cable Communications Management, LLC, 2013 WL 1786592 at *11 (N.D. Cal. Apr. 25, 2013), is on no benefit to the City Defendants. While the case holds that each promotion decision stand independently, it simply does not address the issue here of relevant evidence.

The Court intends to instruct the jury that the City Defendants' actions prior to April 21, 2016 are not actionable, but they may be considered for the limited purpose of determining whether the City Defendants' decisions after that date were discriminatory.

The Motion is denied.

E. Motion *in Limine* No. 5: Retaliation Evidence.

City Defendants seeks an order to exclude evidence of retaliation. (Docket No. 63.) Sherman has filed an opposition (Docket No. 69), and the City Defendants have replied (Docket No. 81).

As noted above, the Court granted summary judgment on Sherman's retaliation claim. For that reason, retaliation evidence is no longer relevant. (Fed. R. Evid. 402.) To the extent that Sherman asserts that such evidence is relevant to her failure to promote claims (Opposition, pp. 1-2), those claims too have been dismissed.

The Motion is granted.

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Counsel are ordered to advise the parties and all witnesses of the Court's rulings so that there are no inadvertent violations of this Order.