IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

NATIONAL FEDERATION OF THE BLIND, *et al.*,

Plaintiffs,

v. Case No. 3:23cv127

VIRGINIA DEPARTMENT OF CORRECTIONS,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE THE EXPERT TESTIMONY OF JENNIFER KENNEDY

The Virginia Department of Corrections ("VDOC" or "Defendant") by counsel, submits the following Memorandum in support of its Motion *In Limine* to Exclude the Expert Testimony of Jennifer Kennedy. In support of its Motion, VDOC submits the Expert Report of Kennedy as Exhibit 1 ("Kennedy Report").

PLAINTIFFS' CLAIMS

This case has been brought by four VDOC inmates, two former inmates,[1] and one non-profit organization, regarding various accommodations that the incarcerated Plaintiffs allege that they were denied for their various vision impairments while they were housed at Deerfield Correctional Center ("Deerfield") and Greensville Correctional Center ("Greensville"). This action currently proceeds on the Plaintiffs' Amended Complaint. (*See* Am. Compl., ECF No. 136.) In their Amended Complaint, the Plaintiffs bring claims under the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("RA") against VDOC as a state agency.

[1] As of the date of this filing, Plaintiff Nacarlo Courtney and Plaintiff Kevin Shabazz have been released from VDOC custody.

(Amend. Compl. ps. 23-27.)

This case is currently set for a jury trial to begin on May 20, 2024. In support of their case, the Plaintiffs intend to present the testimony of Jennifer Kennedy, and four (4) other experts, at trial. For the reasons explained herein, Defendants submit that Kennedy's testimony should be excluded, or limited, pursuant to this Court's Scheduling Order and Federal Rule of Evidence 702.

KENNEDY'S PROPOSED TESTIMONY

Kennedy is expected to testify regarding mobility and orientation for blind individuals. As summarized in her report, Kennedy is expected to opine:

> (1) Based on [Kennedy's] education and experience, proper orientation and mobility training is essential to ensure that blind and low vision prisoners can function productively and independently in prison and engage in daily activities without having to depend on sighted individuals;
>
> (2) Based on [Kennedy's] education and experience, VDOC fails to provide adequate O&M training to blind and low vision prisoners and the human guides who may assist them; and
>
> (3) Based on [Kennedy's] education and experience, VDOC must implement a robust orientation and mobility assessment and training process for blind and low vision prisoners so that they can function productively and independently in prison and engage in daily activities without having to depend on sighted individuals.

(Kennedy Report 4.)

NON-SCIENTIFIC EXPERT WITNESS STANDARD

Rule 702 of the Federal Rules of Evidence and the line of cases flowing from the Supreme Court's decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc*., 509 U.S. 579, 589–93 (1993) govern VDOC's challenge to the admissibility of Kennedy's testimony. Rule 702 provides that an expert may testify in the form of an opinion if the expert's scientific, technical, or other specialized knowledge will help the jury understand the evidence or determine a basic fact in issue; the testimony is based on sufficient facts or data; is the product of reliable principles and methods;

and the expert has reliably applied the principles and methods to the facts of the case. Application of Rule 702 involves two primary inquiries: (1) whether the proposed testimony is reliable; and (2) whether it is relevant. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999); *United States v. Forrest*, 429 F.3d 73, 80 (4th Cir. 2005). Before allowing a jury to hear disputed expert testimony, a court must make these inquiries and exercise its gatekeeping function. *Nease v. Ford Motor Co.*, 848 F.3d 219, 230–31 (4th Cir. 2017). As noted by the Fourth Circuit, although "Rule 702 was intended to liberalize the introduction of relevant expert evidence," the potentially powerful and persuasive nature of such evidence requires its exclusion when there exists "a greater potential to mislead than to enlighten." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999).

A court assessing the relevance of an expert's testimony reviews "whether . . . [it] is sufficiently tied to the facts of the case . . . [and] will aid the jury in resolving a factual dispute." *Daubert*, 509 U.S. at 591 (citation omitted). Expert testimony about matters coming within a jury's knowledge and experience is not helpful and is barred by Rule 702. *Persinger v. Norfolk & W. Ry. Co.*, 920 F.2d 1185, 1188 (4th Cir. 1990). For expert testimony to satisfy the "fit" requirement of Rule 702, "[t]here must be a valid connection between the expertise in question and the inquiry being made in the case." *United States v. Velasquez*, 64 F.3d 844, 850 (3d Cir. 1995) (citation omitted).

As the Fourth Circuit noted in *Nease*, the Supreme Court's decision in "*Kumho Tire* [made clear] that *Daubert* was not limited to the testimony of scientists." 848 F.3d at 230. A non-scientist expert, whose opinions arise from his experience, must explain "how his experience leads to the conclusion reached, why [his] experience is a sufficient basis for the opinion, and how [his] experience is reliably applied to the facts." *Peters-Martin v. Navistar Int'l Transp. Corp.*, 410 F.

App'x 612, 618 (4th Cir. 2011). Accordingly, an "expert report should be written in a manner that reflects the testimony the expert witness is expected to give at trial." *Sharpe v. United States*, 230 F.R.D. 452, 458 (E.D. Va. 2005). "Expert reports must include how and why the expert reached a particular result, not merely the expert's conclusory opinions." *Washington v. McKee*, No. 4:06cv6, 2006 WL 2252064, at *2 (E.D. Va. Aug. 3, 2006) (internal quotations omitted) (citing *Salgado v. Gen. Motors Corp*., 150 F. 3d 735, 742 (7th Cir. 1998)). A non-scientific expert "cannot ask a court simply to take his or her word for it; rather, he or she must explain how that experience leads to the conclusion reached . . . and how that experience is reliably applied to the facts." *Thomas v. City of Chattanooga*, 398 F.3d 426, 4312 (6th Cir. 2005) (quoting Fed. R. Evid. 702 adv. comm. note). The proponent of expert testimony bears the burden of establishing, by a preponderance of the evidence, that the testimony is admissible in accordance with these principles. *Cooper v. Smith & Nephew, Inc*., 259 F.3d 194, 199 (4th Cir. 2001) (citation omitted). Finally, "throughout the admissibility determination, a judge must be mindful of other evidentiary rules, such as FRE 403, which permits the exclusion of relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *United States v. Dorsey*, 45 F.3d 809, 813 (4th Cir. 1995), *cert. denied*, 515 U.S. 1168 (1995) (quoting *Daubert*, 509 U.S. at 595).

ARGUMENT

As an initial matter, the Court's Scheduling Order in this case states that "[e]ach party may call only one expert per discipline." (ECF No. 74-1, at 4.) Despite this limitation, the Plaintiffs intend to introduce no less than five experts at trial related to accommodation issues affecting blind and low vision inmates generally.[2] In many areas, the Plaintiffs' experts' testimony overlap with

[2] On this day, VDOC submits five separate Motions *In Limine* to exclude the expert opinions of each of the Plaintiffs' experts' testimony.

one another. For example, as relevant here, Kennedy's opinion overlaps with the Plaintiffs' expert Richard Wells on the issue of housing blind inmates in dormitory style units and VDOC's intake and orientation processes.[3] For this reason alone, the Plaintiffs' overlapping expert testimony violates the Court's Scheduling Order and some testimony must be excluded.

Further, VDOC requests that the Court exclude Kennedy's testimony in its entirety because this is simply not the type of case that requires expertise at all. As an initial matter, there is not any allegation in this case that VDOC fails to provide orientation and mobility training for blind and low vision inmates. The evidence in the record is that VDOC offers mobility and orientation training through Virginia's Department for the Blind and Vision Impaired, and there is no allegation that this training is insufficient. The relevant inquiry for the jury in this case is whether VDOC has failed to provide reasonable accomodations for the individual incarcerated Plaintiffs for their various levels of vision impairment while incarcerated at Deerfield and Greensville. Kennedy's testimony that "blind and low vision" people require mobility and orientation training will not help the jury with its inquiry.

Second, Kennedy's testimony is irrelevant. Kennedy does not explain why each of the individual Plaintiffs in this case—with their unique vision impairments—require mobility and orientation training at their respective facilities which they have been living at for many years, and she does not even consider that such training is available to them. In fact, Kennedy acknowledges that at least two of the Plaintiffs, Mr. McCann and Mr. Shabazz, have had extensive mobility and orientation training in the past. Kennedy nonetheless opines that VDOC's intake and orientation processes should include mobility and orientation training for new blind. But the Plaintiffs in this case are not new to VDOC or their facilities. Kennedy's testimony does not "fit" the facts of this

[3] Wells' Report and Supplemental Report have likewise been filed on the docket on this day as Exhibits to VDOC's Motions *In Limine* to Exclude his testimony.

case and is therefore irrelevant.

Kennedy's opinions are also unreliable as Kennedy has no experience in prison administration and her Report therefore lacks appropriate context. For example, Kennedy opines that in dormitory style prisons like Deerfield, inmates should be placed in bunks on the outer limits of the dorm's cluster, and that in prisons like Greensville with cells, blind inmates should be housed with or near their caregivers. Kennedy appears to have no appreciation of the safety, security, and administrative considerations that are at play when considering an inmate's housing status, among other correctional issues. Kennedy's opinions are unreliable and allowing presentation of her testimony will only lengthen trial because VDOC will be required to put on rebuttal evidence explaining the realities of prison administration.

Finally, much of Kennedy's proposed testimony is largely a recitation of the Plaintiffs' allegations in this case. In her Report, Kennedy merely repeats what the Plaintiffs themselves have alleged throughout this lawsuit. This information should come directly from the Plaintiffs and individuals witnesses themselves at trial. Kennedy's testimony should therefore be excluded.

For all of these reasons, and as detailed herein, VDOC respectfully requests that the Court grant its Motion *In Limine* to Exclude the Expert Testimony of Jennifer Kennedy.

I. Kennedy's testimony overlaps with the Plaintiffs' other experts' testimony.

As stated, the Court's Scheduling Order in this case limits the Parties to one expert per discipline. (ECF No. 74-1, at 4.) However, here, the Plaintiffs seek to introduce five experts with overlapping testimony. As relevant, Kennedy's opinions overlap with the Plaintiffs' expert Richard Wells on the issue of housing blind and low vision inmates. Wells opines in his Report that Deerfield's housing for "blind and low vision inmates" is inadequate because it is dormitory style; Wells also opines that VDOC staff must be prepared in an emergency to assist blind and low

vision inmates. (Wells Report 58-59.) In Kennedy's Report, she likewise opines that Deerfield's dormitory style housing is concerning for blind inmates and that VDOC staff must be prepared in emergency situations to assist blind inmates. (Kennedy Report 9-11; 18.) Likewise, Kennedy's opinion that VDOC's intake process for "blind prisoners" overlaps with Wells' testimony that VDOC's intake and orientation processes are inadequate. (Wells Report 49-57; Kennedy Report 16-17.) Further still, Kennedy's testimony that VDOC's policies and procedures for ADA accommodation requests are inadequate overlaps with Wells' testimony on this issue. (Kennedy Report 14-15; Wells Report 65.)

The Plaintiffs' duplicative expert testimony violates the Court's Scheduling Order and must be limited. In order to comply with the Scheduling Order's limitation of one expert witness per discipline, and to streamline the presentation of expert testimony at trial, Plaintiffs should be limited to the testimony of a single expert.

II. Kennedy's testimony should be excluded because this case does not require expertise at all.

Even putting aside the fact that the Plaintiffs' numerous experts violate the Court's Scheduling Order, VDOC requests that the Court exclude Kennedy's testimony entirely because this is simply not the type of case that requires Kennedy's expertise at all. This case is not a scientific, technical, or complex case. The inquiry in this case is simply whether VDOC provided the individual Plaintiffs with reasonable accomodations for their various levels of vision impairment in prison. Although Kennedy intends to explain the importance of mobility and orientation training for blind individuals, and that inmates should be provided such training at intake and orientation and (Kennedy Report 1-10), any jury empaneled by this Court is more than capable of understanding these issues without expert commentary. This is particularly true as Kennedy does not even opine on the adequacy of the mobility and orientation training that is

provided by VDOC. The record in this case is that VDOC offers mobility and orientation training through Virginia's Department of the Blind and Visually Impaired ("DBVI"). (Shaw Dep. 96:11-22, 97:1-5; ECF No. 210-25). Instead of reviewing this training and opining on its adequacy, Kennedy simply explains that mobility and orientation training is necessary for blind individuals. (*See* Kennedy Report 1-20.)

Kennedy's testimony does not address a relevant issue in dispute in this case and is therefore not necessary. Any jury empaneled by this Court is perfectly capable of understanding that mobility and orientation training may be necessary for some blind or low vision individuals in prison. Kennedy's testimony on this issue—without even addressing the training provided by VDOC through DBVI—will not aid the jury in understanding how the individual Plaintiffs, specifically, require and/or were denied accommodations. *Velasquez*, 64 F.3d at 850. Kennedy's testimony should therefore be excluded on this basis alone. *See Wilson v. Muckala*, 303 F.3d 1207, 1219 (10th Cir. 2002) (affirming district court's exclusion of human resources expert in gender based discrimination case where expert was to testify about defendants' response plan in cases of sexual harassment and the reasonableness of the defendants' response to the Plaintiff's claim because the issues "were not so impenetrable as to require expert testimony.")

III. Kennedy's testimony is irrelevant.

Kennedy's testimony is also irrelevant. As stated, Kennedy does not opine about the mobility and orientation training that is offered by VDOC through DBVI. Nonetheless, in the final pages of her Report, Kennedy appears to acknowledge that VDOC such training. (*See* Kennedy Report 19.) But the bulk of Kennedy's Report is simply an explanation that blind individuals, including new prisoners, require mobility and orientation training and that this training is particularly important in prison. (*Id*. at 3-19.) In fact, in her Report, Kennedy opines that

"Deerfield and Greensville Must Commit resources to O&M Training" (*id*. at 17), without even considering that DBVI *does* offer those services at these facilities. Because Kennedy does not at all consider or opine about the mobility and orientation training actually provided by VDOC through DBVI, her testimony is irrelevant and should be excluded. *See Faulkner v. Lucile Packard Salter Children's Hosp*., No. 21-CV-00780-SI, 2023 WL 375686, at *4 (N.D. Cal. Jan. 24, 2023) (explaining that because human resources expert report "fails to draw any connection between human resources policies/practices and defendant's conduct in this case, [the] expert opinion is of no use to the jury.").

Likewise, Kennedy's opinions about VDOC's intake and orientation processes for "new prisoners" is irrelevant because none of the Plaintiffs in this case are new prisoners. As explained in the Plaintiffs' Amended Complaint, Mr. McCann arrived at Deerfield in 2017, Mr. Shabazz arrived at Deerfield in 2015, Mr. Shaw arrived at Deerfield in 2010, Mr. Courtney arrived at Greenville in 2021, and Mr. Hajacos arrived at Greensville in 2018. (Amend. Compl., ECF No. 136 ¶¶ 9-11, 13-15.) Although Kennedy opines that "the current new prisoner intake process does not adequately evaluate the immediate orientation and mobility needs of new blind prisoners." (*Id*. at 16), the Plaintiffs in this case have been housed at Deerfield and Greensville for several years. Kenndy's opinions on the necessity of mobility and orientation for new VDOC inmates does not "fit" the facts of this case and are irrelevant as applied to the Plaintiffs.[4] *Velasquez*, 64 F.3d at 850.

Finally, Kennedy's opinions about the different types of mobility and training available to

[4] In fact, Kennedy acknowledges that two of the Plaintiffs, Mr. McCann and Mr. Shabazz, have had extensive mobility and orientation training in the past. (Kennedy Report 6.) And, although Kennedy states that Mr. Shaw "could not recall" if he had received mobility and orientation training, Kennedy does not explain that Mr. Shaw has ever sought mobility and orientation training from DBVI, as offered by VDOC, or whether he has been denied that training. (*See id*.)

non-incarcerated individuals are irrelevant in this case. For example, Kennedy opines that after some blind individuals master the use of their cane, they may "choose to switch to the dog guide. Dog guide training is done by a specific school, and dog trainers receive additional instruction that falls outside the traditional skillset of O&M professionals." (*Id*. at 4-5.) Blind and low vision inmates within VDOC custody are not permitted the use of personal canines. Kennedy's explanations as to the various types of training and options for non-incarcerated individuals does not fit the facts of this case and should be excluded.

IV. Kennedy's testimony is unreliable.

Kennedy's opinions are also unreliable. As clear from her Report, Kennedy has no experience in prison administration. (*See* Kennedy Report 1-20.) This is particularly glaring as Kennedy makes numerous recommendations without appreciating the issues affecting prison management. For example, Kennedy opines that in dormitory style prisons like Deerfield, inmates should be placed in bunks on the outer limits of the dorm's cluster, and that in prisons like Greensville with cells, blind inmates should be housed with or near their caregivers. (Kennedy Report 11.) Kennedy fails to appreciate the many safety, security, and administrative considerations that are at play when considering an inmate's housing status. Kennedy's opinions without any relevant experience in prison administration are unreliable and will unnecessarily slow trial in this case if presented because VDOC will be required to put on evidence in rebuttal to Kennedy's opinions explaining the realities of prison administration. Because Kennedy does not have any experience in prison administration, her theories regarding what is appropriate for blind and low vision inmates in prison are speculative, at best, and should be excluded. *See Tyger Constr. Co. v. Pensacola Constr. Co.*, 29 F.3d 137, 142 (4th Cir. 1994) (explaining that "[a]n expert's opinion should be excluded when it is based on assumptions that are speculative and are not

supported by the record.").

V. Kennedy's testimony about the Plaintiffs' allegations should be excluded.

Throughout her Report, Kennedy simply relays information that she has heard from the individual Plaintiffs. For example, Kennedy explains that Mr. Shaw has explained to her that he uses a caregiver to locate openings in the bathroom and that Mr. McCann has informed her that the floor markings in his housing unit have become dull. (Kennedy Report 17, 19.) To the extent that Kennedy seeks to provide testimony that simply repeats information from the Plaintiffs or other witnesses, this testimony should be excluded. "[E]xpert testimony which merely regurgitates factual information that is better presented directly to the jury rather than through the testimony of an expert witness is properly excluded." *In re C.R. Bard, Inc.*, 948 F. Supp. 2d 589, 608 (S.D.W. Va. 2013) (citation omitted), *on reconsideration in part* (June 14, 2013). Accordingly, to the extent that Kennedy seeks to recite information that is best presented directly from the individual Plaintiffs or other witnesses, this testimony should be excluded. *Id*. (excluding experts' testimony that "merely state[s] what the plaintiffs told" the experts).

CONCLUSION

For these reasons, the Court should exclude the testimony of Jennifer Kennedy.

Respectfully submitted,

VDOC.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record for the Plaintiff.

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