

**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 MICHAEL BULLIS**

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 Michael Bullis. In support of its Motion, VDOC submits the Expert Report of Bullis as Exhibit 1 (“Bullis 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 Nacarolo 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 Miachel Bullis, and four other experts, at trial. For the reasons explained herein, Defendants submit that Bullis' testimony should be excluded, or limited, pursuant to this Court's Scheduling Order and Federal Rule of Evidence 702.

BULLIS' PROPOSED TESTIMONY

Bullis is expected to testify about blindness skills. As summarized in his report, Bullis is expected to opine:

- (1) Based on [Bullis'] experience, blind skills training is essential for most blind individuals, including blind prisoners;
- (2) Based on [Bullis'] experience, in order to determine what accommodations and training blind inmates need, the Virginia Department of Corrections ("VDOC") must perform an initial assessment of all blind inmates' blindness skills;
- (3) Based on [Bullis'] experience, VDOC does not provide the training and resources necessary to provide blind inmates with equal access to inmate activities, including work placements, and to written or printed materials that are available to sighted inmates;
- (4) Based on [Bullis'] experience, blind inmates can perform most of the jobs and Career and Technical Education programs available at Deerfield and Greensville, with or without accommodations;
- (5) Based on [Bullis'] experience, VDOC does not provide its staff with necessary training on accommodations for blindness and blindness skills; and
- (6) Based on [Bullis'] experience, VDOC lacks necessary staff that is knowledgeable on blindness skills training, including Activities of Daily Living ("ADLs"), computer skills, Braille, and cane travel.

(Bullis Report 2-3.)

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 Bullis' 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 one another. For example, as relevant here, Bullis' testimony on VDOC staff training and VDOC's paper-based processes overlaps with the Plaintiffs' expert Richard Wells on these issues, and Bullis' testimony about assistive technology overlaps with Plaintiffs' experts Richard Subia and Curtis Chong on this issue.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 Bullis' testimony in its entirety because this is simply not the type of case that requires expertise at all. Bullis seeks to opine about the importance of blindness skills for blind individuals. But the relevant inquiry for the jury in this case is whether VDOC has failed to provide reasonable accommodations for the individual Plaintiffs for their various levels of vision impairment while incarcerated at Deerfield and Greenville. Bullis' testimony about the importance of blindness skills will not aid the jury with its inquiry.

Bullis' testimony is also unreliable and irrelevant. Only once in his Report does Bullis even mention any of the Plaintiffs at all. Instead, Bullis explains that blindness skills are important for blind individuals, that non-incarcerated blind individuals receive blindness skills at Orientation and Adjustment Centers, and theorizes that VDOC can offer the same services and skills training

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

³ Wells' Report and Supplemental Report, Subia's Report, and Chong's Report have likewise been filed on the docket on this day as Exhibits to VDOC's Motion(s) *in Limine* to Exclude their testimony.

as those Centers. Bullis' testimony is irrelevant because he does not explain how any of the individual Plaintiffs require any type of specific blindness skills and his opinions are unreliable because he only speculates that prisons can function like Orientation and Adjustment Centers. Bullis' testimony should be excluded.

Finally, as stated, Bullis only mentions one Plaintiff—Plaintiff McCann—in his Report. And, even as to this single reference, Bullis just recites what McCann has told Bullis. To the extent that Bullis seeks to merely repeat what McCann or any of the other Plaintiffs have alleged throughout this lawsuit, this testimony should come directly from the Plaintiffs and individual witnesses themselves.

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 Michael Bullis.

I. Bullis' 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 here, Bullis' testimony on VDOC staff training and VDOC's paper-based processes overlaps with the Plaintiffs' expert Richard Wells on these issues. (Bulls Report 9-10, 14-15; Wells Report 27-36). Likewise, Bullis' testimony about assistive technology such as screen-reader technology and technology needed to access VDOC's allegedly paper-based processes overlaps with Plaintiffs' experts Richard Subia and Curtis Chong on these issues. (Bullis Report 5, 9-10; Subia 10-20; Chong 6-10.)

The Plaintiffs' duplicative expert testimony violates the Court's Scheduling Order and must be limited. The Plaintiffs' experts' proffered testimony substantially overlaps with respect to numerous issues. 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. Bullis' 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 Bullis' testimony entirely because this is simply not the type of case that requires Bullis' expertise at all. This case is not a scientific or technical case. The inquiry in this case is simply whether VDOC provided the individual Plaintiffs with reasonable accommodations for their various levels of vision impairment in prison. Although Bullis intends to explain the importance of blindness skills and how those skills are provided to non-incarcerated individuals at Adjustment and Orientation Centers (Bullis Report 3-6), any jury empaneled by this Court is more than capable of understanding that blind individuals may require some skills training for certain tasks. What is particularly striking in Bullis' Report is that he does not even opine that any of the Plaintiffs require any specific blindness skills training at all. (*See* Bullis Report 1-16.) Instead of identifying which Plaintiffs require what skills to partake in what VDOC services or programs, Bullis seeks to opine on the importance of blindness skills generally. Bullis' testimony will not aid the jury in understanding how the individual Plaintiffs, specifically, require and/or were denied accommodations. *Velasquez*, 64 F.3d at 850. Bullis' 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. Bullis' testimony is irrelevant.

Aside from Bullis' testimony being not necessary in this case, his testimony is also irrelevant. As stated, Bullis does not opine about any specific blindness skills that any of the Plaintiffs require, or have been denied, at Deerfield or Greenville. (*See* Bullis Report 1-15.) In fact, in his entire Report, Bullis only references one of the Plaintiffs at all—McCann. (Bullis Report 11-12.) And, a bit ironically, Bullis cites McCann to demonstrate that McCann has already received blindness skills through the Virginia Department for the Blind and Vision Impaired, but nonetheless, McCann has been denied jobs at Deerfield. (*See id.*) Bullis then states that McCann “briefly held a position in which he was required to fill the hot water pot in his pod, he was not permitted to do this job because the lieutenant in his pod told him that it was dangerous for him to do it because he is blind. However, this is a job Mr. McCann can do with proper blind skills training.” (Bullis 12.) Bullis does not explain, however, what “proper blind skills training” would be appropriate for McCann and how VDOC has ever denied him that training. (*See id.*) And, based on the blindness skills that are detailed in Bullis' Report—orientation and mobility, developing finger sensitivity, reading Braille or large print, using computers with Braille or speech, and using a numeric keypad (Bullis Report 3-4)—it is unclear what blindness skills would enable McCann to safely fill the hot water pot in his pod. Bullis does not explain this.

Nowhere in his Report does Bullis detail that any of the Plaintiffs require specific blindness skills or that VDOC has denied them these skills. Bullis' testimony about the necessity of blindness skills for blind people, generally, is irrelevant in this case. *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.”).

IV. Bullis’s testimony is unreliable.

Bullis’ opinions are also unreliable. As clear from his Report, Bullis has no experience in prison administration. (*See* Bullis Report 1-16.) This is particularly evident as Bullis makes numerous recommendations throughout his Report without appreciating the issues affecting prison management. In his Report, Bullis explains that blindness skills are important for blind individuals, explains that non-incarcerated blind individuals receive blindness skills at Orientation and Adjustment Centers, and theorizes that VDOC can offer the same services and skills training as those Centers. (*Id.* at 3-6.) For example, without any supporting evidence, Bullis theorizes that

a blindness training program at VDOC would look much like that provided in blindness training centers outside the prison environment with two differences. Blind inmates would not be able to practice city street travel until close to reentry and would be limited in their ability to learn cooking in a home kitchen environment. Otherwise one to two hours of computer and technology training, one to two hours of travel practice and one to two hours of Braille daily would be recommended.

(Bullis Report 7-8.) Bullis appears to assume that VDOC can offer “street travel” training and that VDOC can dedicate enough staff and resources for up to six hours a day to teach blind and low vision inmates various blindness skills. Bullis’ theories are unreliable as he does not appear to consider the realities of prison life. *See, e.g., Richardson v. Clarke*, 52 F.4th 614, 621, 2022 WL 16729415 (4th Cir. 2022) (explaining that in ADA prison cases, “our context is a prison. [The Court] view[s] the reasonableness of accommodations through the lens of operating a prison.”). Because Bullis does not have any experience in prison administration and cites no authority in support of his theory that VDOC can offer the same services and/or training as Orientation and Adjustment Centers, his opinions 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

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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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