

**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.

**RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE
DEFENDANT'S PROPOSED EXPERT DR. JEFFREY BEARD**

The Virginia Department of Corrections (“VDOC” or “Defendant”), by counsel, submits the following Response in Opposition to the Plaintiffs’ Motion to Exclude Defendant’s Proposed Expert Dr. Jeffrey Beard (“Motion to Exclude”). In support of its Response in Opposition to the Plaintiffs’ Motion to Exclude, VDOC submits the complete deposition transcript of Dr. Jeffrey Beard as Exhibit 1 (“Beard Dep.”).

BACKGROUND

This case has been brought by four current 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 vision impairments while they were housed at Deerfield Correctional Center (“Deerfield”) and Greensville Correctional Center (“Greensville”). The Plaintiffs bring Americans with Disabilities Act (“ADA”) and Section 504 Rehabilitation Act (“RA”) claims against VDOC. Accordingly, the relevant inquiry in this case is whether VDOC

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

has provided reasonable accommodations for the individual Plaintiffs in prison. As a defense at trial, and under the ADA, VDOC is entitled to argue that any accommodation would fundamentally alter the nature of VDOC's programs, or cause an undue financial or administrative burden. *Pathways Psychosocial v. Town of Leonardtown*, 133 F. Supp. 2d 772, 789 (D. Md. 2001); *see also* 28 C.F.R. § 35.150(a)(3). And, as explained by the Fourth Circuit, in ADA cases such as this one, "our context is a prison. [The Court] view[s] the reasonableness of accommodations through the lens of operating a prison." *Richardson v. Clarke*, 52 F.4th 614, 621, 2022 WL 16729415 (4th Cir. 2022).

As an initial matter, it is VDOC's position that, as explained in each of its Motions *In Limine* and Memorandums in Support to exclude all five of the Plaintiffs' experts (*see* ECF Nos. 280 through 288), expert testimony is generally not necessary at trial in this case. Any jury empaneled by this Court will be able to understand what accommodations are necessary for the Plaintiffs' vision impairments and whether those accommodations are reasonable in prison from the lay witnesses that will be presented. This is not a scientific or technical case that requires voluminous expert testimony. *See United States v. Jiau*, 734 F.3d 147, 154 (2d Cir. 2013) (explaining that "expert testimony that seeks to address 'lay matters which [the trier of fact] is capable of understanding and deciding without the expert's help' is not relevant and is therefore inadmissible.")

However, to the extent that any expert testimony is appropriate in this case, the most fitting type of expert testimony is testimony that explains the prison context which governs whether ADA accommodations are reasonable or not in that setting. *Richardson*, 52 F.4th 614, at 621. For example, because lay jurors may be unfamiliar with the security considerations that should be weighed when any object, whether it is an ADA accommodation or not, enters a prison, expert

testimony explaining those various considerations is appropriate.

Accordingly, Dr. Beard has been retained by VDOC as an expert in corrections and prison administration, and the Plaintiffs concede that he has over forty years of such experience. Dr. Beard is more than qualified to opine about the security and safety risks surrounding any item provided to an inmate in prison, including accommodations for disabilities. Likewise, Dr. Beard's knowledge about what the Department of Justice requires for the Federal Bureau of Prisons' staff in its ADA training qualifies him to speak on the extent of what ADA training is necessary for VDOC's staff. Similarly, Dr. Beard's experience and knowledge about the appropriate use of inmate caregivers is special knowledge that will aid the jury in this case in determining whether VDOC has appropriately assigned inmate caregivers to the incarcerated Plaintiffs. Finally, because Dr. Beard has decades of experience partaking in audits conducted by the American Correctional Association ("ACA")—the relevant body that sets performance standards in the corrections industry—Dr. Beard is qualified to speak about the audits and VDOC's passage of those standards as they relate to the ADA. The Plaintiffs will have the opportunity to put on admissible rebuttal evidence at trial in response to Dr. Beard's opinions. But in light of his qualifications as a corrections expert and his experience and knowledge regarding prison risk assessments, the DOJ's ADA training for the Bureau of Prisons, inmate caregivers, and ACA Audits, his testimony should be admitted at trial.

ARGUMENT

I. Dr. Beard is offered as a corrections expert, not an ADA expert.

The Plaintiffs first argue the Court should strike Dr. Beard as VDOC's expert witness because Dr. Beard is not qualified to testify as an expert on accommodations for prisoners with disabilities or staff training under the ADA. (ECF No. 274, at 9.) Plaintiffs concede, however,

that Dr. Beard “has experience in corrections.” (*Id.* at 10.) As explained by Dr. Beard in his Report and deposition, he has over 40 years of prison administration experience, including as the former Secretary of Corrections of both the State of California and the Commonwealth of Pennsylvania. (ECF No. 290-3, at 2, 13-14.) During his long career, Dr. Beard has held a variety of prison positions in which he gained experience and knowledge in prison administration, management, security analysis, inmate behavior, and other corrections issues. (ECF No. 290-3, at 2, 13-14; Beard Dep. pp. 28-60). He has been accepted by courts as a corrections expert. *See, e.g., Coleman v. Brown*, 922 F. Supp. 2d 1004, 1009 (E.D. Cal. 2013); *Wharton v. Vaughn*, E.D. Pa. No. 01-CV-6049, 2022 WL 1488038, at *9 (E.D. Pa. May 11, 2022), *aff’d sub nom. Wharton v. Superintendent Graterford SCI*, 95 F.4th 113 (3d Cir. 2024). There is no reason that he does not qualify as a corrections expert in this case.

Nonetheless, should the Court determine that Dr. Beard is not qualified to opine on corrections issues, including security risk assessments and his knowledge about the DOJ’s ADA training and how it compares to VDOC’s training, then the Plaintiffs’ corrections experts on these issues, Richard Wells and Richard Subia, should likewise be excluded as experts on these topics. Dr. Beard, Mr. Wells, and Mr. Subia all bring the same area of expertise to the table in this case: corrections. Dr. Beard has over forty years of experience in prison administration, including as the former Secretary of Corrections of both the State of California and the Commonwealth of Pennsylvania. (ECF No. 290-3, at 2, 13-14.) Similarly, Mr. Wells has roughly thirty-five years of corrections experience and Mr. Subia has approximately thirty-seven years of such experience. (ECF No. 281-1, at 4; ECF No. 282-1, at 1.) Dr. Beard, Mr. Wells, and Mr. Subia all have extensive experience in corrections, and allowing Mr. Wells and Mr. Subia to qualify and testify as experts in this realm while disallowing Dr. Beard to do so would be unfairly prejudicial to

VDOC. Dr. Beard is more than qualified to opine about issues affecting prison administration, and his testimony should therefore be included at trial.

II. Dr. Beard's opinions on security issues are based on sufficient data, a reliable methodology, and have been applied to VDOC.

As an initial matter, the Plaintiffs take issue with Dr. Beard's testimony that requests for ADA accommodations and other items must be evaluated on a case-by-case basis. (ECF No. 274, at 14.). But Plaintiffs' own corrections experts, Richard Wells and Richard Subia, have likewise opined that accommodations decisions need to be made on a case-by-case basis. (ECF No. 280-1, at 66; 282-1, at 10.) The Plaintiffs do not explain why Dr. Beard's opinion that inmate requests for accommodations should be an individualized decision is unreliable, as their own corrections experts agree with this assessment.

Nonetheless, as detailed in his Report, Dr. Beard explains that, in his experience, there are multiple considerations for prison officials to weigh "[w]hen evaluating a device or item for approval to be used within the secure perimeter of a facility[.]" (ECF No. 290-3, at 4.) Dr. Beard details that these considerations include: (1) the capability of the item to be altered for use as a weapon; (2) the security level of the inmate; (3) the inmate's institutional disciplinary history; (4) the inmate's housing arrangements; (5) whether the item has Wi-Fi or Bluetooth connectivity; (6) whether the device has video or audio recording capabilities; (7) theft; and, (8) deliberate damage to the item. (*Id.* at 4-7.) Dr. Beard points to several personal experiences in his forty-year career to exemplify why these considerations are relevant in the prison context and references several VDOC Security Bulletins demonstrating that VDOC has likewise encountered significant safety and security issues when it comes to allowing the use of seemingly innocuous items into VDOC facilities. (*See id.*) For example, as explained by Dr. Beard in his Report, "VDOC's Security Bulletin dated August 2021 demonstrates that at Red Onion, VDOC's maximum security facility,

an inmate's watch was intentionally destroyed so that its parts could be utilized to remove fence ties. It would be reasonable, then, for Red Onion staff to limit the availability of watches after this incident, particularly to that individual inmate. However, as testified to by VDOC's ADA Coordinator, watches are available at Deerfield and Greensville." (*Id.* at 5.)

Despite Dr. Beard specifically identifying the criteria by which any item should be evaluated for use by inmates in prison and relating these criteria to VDOC's experiences, the Plaintiffs nonetheless argue that Dr. Beard's opinions about these security considerations for ADA accommodations items should be excluded. (ECF No. 274, at 14-19.) They contend that because Dr. Beard is not opining about specific ADA accommodations, assistive devices, or auxiliary aids, his opinions are not reliable. (*See id.*) But Plaintiffs' arguments seem to misunderstand Dr. Beard's testimony. Dr. Beard's testimony about the various safety considerations for prison and VDOC officials is relevant to *any item that an inmate seeks to possess or bring into a prison*. Simply because an item is deemed an ADA accommodation does not remove it from being considered a safety or security risk, and Dr. Beard's testimony about what considerations prisons should weigh when allowing the use of any item by an inmate is relevant to whether VDOC should allow any of the individual Plaintiffs a specific device or accommodation in prison.

Under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), expert testimony must be "reliable" and "relevant," and this determination "depend[s] upon the unique circumstances of the expert testimony involved." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 260-61 (4th Cir.1999) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999)). Courts "need not determine that the proffered expert testimony is irrefutable or certainly correct," because "expert testimony is subject to testing by '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *United States v. Moreland*, 437 F.3d 424, 431

(4th Cir. 2006) (citing *Daubert*, 509 U.S. at 596).

Here, the Plaintiffs may disagree with Dr. Beard’s testimony about the security risks facing prisons, and VDOC specifically, when considering *any* item for inmate use or possession in prison. However, that does not make his testimony inadmissible. Dr. Beard’s opinions need only be relevant and reliable. And they are. As detailed in Dr. Beard’s Report and throughout his deposition, Dr. Beard identifies pervasive security considerations at play in the prison context when it comes to allowing any item—not just ADA accommodations—into a facility. The Plaintiffs can attempt to put on evidence that Dr. Beard’s opinions are incorrect or overexaggerated, but his opinions about prison security risks are both relevant and reliable in this case.

Likewise, Dr. Beard’s knowledge about VDOC’s ADA training for its staff and how that relates to what the DOJ requires of its Bureau of Prison employees, his knowledge of ACA audits, and his knowledge of the appropriate use of inmate caregivers are all special knowledge that Dr. Beard possesses and will aid the jury in considering whether VDOC meets its ADA and RA obligations in this case. As explained by the Fourth Circuit, an expert is “one who has acquired special knowledge of the subject matter about which he is to testify, either by study of the recognized authorities or by practical experience and who can assist and guide the jury in solving a problem which the jury is not able to solve because its knowledge is inadequate.” *Boleski v. Am. Exp. Lines, Inc.*, 385 F.2d 69, 71–72 (4th Cir. 1967) (citation omitted). “[E]xpert testimony is admissible if it reasonably tends to aid the trier in the resolution of the decisive issue, and is not a mere guess or conjecture.” *Id.* at 72.

In his Report, and in rebuttal to the Plaintiffs’ expert Richard Wells, Dr. Beard explains that he reviewed the depositions of VDOC’s employees, who explained that their ADA training

was conducted annually and online. He testified that, like VDOC, the DOJ requires online and annual ADA training for its Bureau of Prisons staff. (Beard Report, ECF No. 290-3, at 11.) Dr. Beard's knowledge about DOJ's ADA training is special knowledge that a lay jury is not likely to have and which will assist the jury in determining whether VDOC meets its training obligations under the ADA and RA, to the extent that this issue is even relevant to the jury's inquiry.²

Although the Plaintiffs take issue with the materials Dr. Beard reviewed in forming his opinion regarding VDOC's staff training under the ADA, this does not make his opinions unreliable or irrelevant.³ *See In re E.I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, 348 F. Supp. 3d 698, 720 (S.D. Ohio 2016) (citation omitted) (explaining that “[c]hallenges to the accuracy or import of the evidence relied upon by an expert go to the accuracy of the expert's conclusions, not to their reliability, and bear on the weight of the evidence rather than on its admissibility”) The Plaintiffs can cross-examine Dr. Beard at trial on what materials he reviewed to form his opinions, but Dr. Beard's testimony on VDOC's staff training, and how it compares to the DOJ's, should be admitted in rebuttal to Plaintiffs' expert, Richard Wells, on the issue of whether VDOC adequately trains its staff as to their ADA obligations.

² As explained in VDOC's Motion *In Limine* to Exclude the Expert Testimony of Richard Wells, it is VDOC's position that ADA training for VDOC staff is not relevant to the jury's inquiry in this case as to whether the individual Plaintiffs received reasonable accommodations in prison. (See ECF Nos. 279, 280.) Nonetheless, should the Court determine that this is a relevant issue for the jury, VDOC is entitled to rebut the Plaintiffs' expert on this issue, and Dr. Beard's special knowledge about what DOJ's ADA training consists of should be admitted.

³ In fact, if Dr. Beard's testimony about VDOC's staff training is unreliable, as the Plaintiffs argue, then the Plaintiffs' own expert, Richard Wells' testimony is likewise unreliable on this topic because he appears to have reviewed the same materials that Dr. Beard did in forming his opinions. (See ECF No. 280-1, at 33.) Although the Plaintiffs argue that because Dr. Beard has reviewed only an outline of the ADA training that VDOC offers its staff his opinion is unreliable (ECF No. 274, at 22), their expert, Mr. Wells, also reviewed that outline and bases his opinions about VDOC's training on it. (ECF No. 280-1, at 33.) If Dr. Beard's opinions on VDOC's ADA training are unreliable, then Mr. Wells' opinions are too.

Similarly, Dr. Beard's special knowledge about ACA audits, as well as his testimony that Deerfield and Greensville have passed their most recent ACA audits with respect to disability accommodations, will assist a jury in considering whether VDOC systemically discriminates against blind and low vision inmates, as the Plaintiffs allege. As an initial matter, it does not appear that the Plaintiffs ask the Court to exclude this testimony at all, as they have not substantively addressed Dr. Beard's testimony regarding the ACA audits and how the two relevant facilities in this case have passed all those audits with respect to disability accommodations. At most, the Plaintiffs refer to these audits in passing in a footnote. (*See* ECF No. 274, at 16 n.7.) However, to the extent that the Plaintiffs are requesting that the Court exclude Dr. Beard's testimony about ACA audits and how Deerfield and Greensville have passed the standards of the audits relating to the ADA, that request should be denied. As explained in Dr. Beard's Report, the ACA is "the national organization that establishes standards for correctional facilities and sends teams of trained staff to review compliance with those standards" (Beard Report, ECF No. 290-3, at 8.) Expert testimony on the issue of industry standards is entirely appropriate under Rule 702, and Dr. Beard's testimony on the ACA audits and how Deerfield and Greensville have passed the ACA standards related to the ADA should be admitted. *See, e.g., Kovari v. Brevard Extraditions, LLC*, 461 F. Supp. 3d 353, 372 (W.D. Va. 2020) (admitting expert's testimony about ACA standards in prisoner transportation case).

Finally, Dr. Beard's testimony about inmate caregivers and their appropriate use in prison is also special knowledge which Dr. Beard possesses that will assist the jury in determining whether VDOC has appropriately accommodated any of the Plaintiffs by providing them with an inmate caregiver. The Plaintiffs argue that Dr. Beard's testimony as it relates to inmate caregivers lacks a sufficient factual basis and is unreliable. (ECF No. 274, at 19.) Plaintiffs argue that Dr.

Beard should have reviewed additional documents before forming his opinion and that he even “acknowledged during his deposition that the basis for his opinion that VDOC Caregivers are instructed on what they can and cannot do are the depositions he reviewed.” (*Id.* at 20.) Again, to the extent that the Plaintiffs take issue with the strength of the evidence that Dr. Beard reviewed in forming his opinions about inmate caregivers and that VDOC is properly providing them, this simply goes to the weight of the evidence for the jury to consider, and does not make Dr. Beard’s opinions unreliable *per se*. *In re E.I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, 348 F. Supp. 3d at 720.

Finally, throughout the Plaintiffs’ Motion to Exclude, the Plaintiffs attempt to discredit Dr. Beard and his opinions by pointing to evidence in the record that they believe demonstrates that Dr. Beard’s opinions are incorrect or unreliable. (*See, e.g.*, ECF No. 274, at 16 (arguing that Dr. Beard reviewed the “bare minimum of facts”); *id.* at 17 (arguing that “there is evidence to the contrary” to Dr. Beard’s opinion)). The Plaintiffs can argue at trial that Dr. Beard has not reviewed the correct evidence before forming his opinions, but their attempts to argue that this makes Dr. Beard’s opinions unreliable as an expert are misplaced.⁴ *In re E.I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, 348 F. Supp. 3d at 720.

III. Dr. Beard offers testimony that does not invade the province of the jury.

The Plaintiffs next argue that Dr. Beard’s conclusions improperly invade the province of the jury because he opines that VDOC is accommodating blind inmates, among other conclusions.

⁴ The Plaintiffs cite to *Marria v. Broaddus*, 200 F. Supp. 2d 280, 290 (S.D.N.Y. 2002) to argue that “Dr. Beard performed a one-sided review of minimal evidence that renders his opinion unreliable.” (ECF No. 274, at 17.) But *Marria* does not support the Plaintiffs’ position. *Marria* addressed an expert who was offered a statistical opinion but whose opinion was unreliable because he failed to “account for how his results might be skewed based on the failure of over half of those [that he] surveyed to respond.” Dr. Beard reviewed the relevant depositions and documents in this case and did not fail to account for any statistical shortcoming when forming his opinions.

(See ECF No. 274, at 24.) But Dr. Beard has not opined on the ultimate issue in this case: whether the individual Plaintiffs have received reasonable accommodations in prison for their unique vision impairments. (See Dr. Beard Report, ECF No. 290-3, at 2-12.) Rather, Dr. Beard's testimony provides the context which the Fourth Circuit has deemed appropriate for prison ADA cases. *Richardson*, 52 F.4th at 621. If expertise is necessary at all in this case, it is to explain the nuances of prison which a lay juror may not initially comprehend without such testimony. Dr. Beard's testimony does not invade the province of the jury and should be admitted at trial.

IV. Dr. Beard's opinions are admissible under Federal Rule of Evidence 403

As explained herein, Dr. Beard's opinions about the numerous security considerations for any item entering a secure prison facility, his knowledge about the DOJ's ADA training for the federal Bureau of Prisons, his knowledge about the appropriate use of inmate caregivers, and his knowledge about ACA audits are offered in rebuttal to the Plaintiffs' experts on these topics, and are relevant to the issue of whether specific ADA "accommodations are reasonable in the prison context." *Richardson*, 52 F.4th at 621. Nonetheless, the Plaintiffs argue that Dr. Beard's opinions should be excluded under Federal Rule of Evidence 403 because his "testimony would mislead the jury into thinking that VDOC properly manages and accommodates individuals with disabilities." (ECF No. 274, at 25). According to the Plaintiffs, if Dr. Beard is allowed to testify, a jury might agree with him and find in VDOC's favor. Plaintiffs essentially ask this Court to prohibit evidence from VDOC in rebuttal to their numerous experts' testimony and to allow their experts only to testify in this case.

Any jury empaneled by this Court will not be misled on the relevant inquiry of whether VDOC has reasonably accommodated the individual Plaintiffs, and Dr. Beard does not opine on this issue. However, as part of the jury's inquiry, VDOC is entitled to put on evidence about

whether the accommodations requested by the Plaintiffs are reasonable in the prison context. *Richardson*, 52 F.4th at 621. Dr. Beard's opinions are directly relevant to this inquiry and are not, as the Plaintiffs contend, misleading.

CONCLUSION

For these reasons, VDOC respectfully requests that the Court deny the Plaintiff's Motion to Exclude Defendant's Proposed Expert Dr. Jeffrey Beard.

Respectfully submitted,

VIRGINIA DEPARTMENT OF CORRECTIONS.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th 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.

/s/ Timothy E. Davis

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