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

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

Plaintiffs,

Case No. 3:23-cv-127-HEH

v.

VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO EXCLUDE DEFENDANT'S PROPOSED EXPERT DR. JEFFREY BEARD

Plaintiffs, by and through their undersigned attorneys, respectfully submit this Reply in support of their Motion to Exclude Defendant's Proposed Expert Dr. Jeffrey Beard. ECF No. 273.

INTRODUCTION

In its Opposition to Plaintiffs' Motion to Exclude Defendant's Proposed Expert Dr. Jeffrey Beard, Defendant Virginia Department of Corrections' ("VDOC") attempts to improperly narrow the scope of this case to only the accommodations of the Individual Plaintiffs. VDOC also erroneously maintains that because its purported expert is only being offered as an expert in corrections generally, that he can opine on whether an Individual Plaintiff's accommodation is reasonable and whether it presents a fundamental alteration of VDOC's programs and services. Even if this were true, Dr. Beard offers no such opinions in his report. Nowhere does he state that any of the Individual Plaintiffs' requested accommodations are unreasonable or presents a fundamental alteration[1] to VDOC's programs, services, or activities. Nor could he offer such an opinion because he has no experience with the ADA generally or in the prison context and he lacks a sufficient factual basis. Accordingly, this Court should reject VDOC's attempts to render Dr. Beard's proffered testimony relevant and reliable and preclude him from testifying in this case.

[1] Fundamental alteration is an affirmative defense under the Americans with Disabilities Act ("ADA") on which VDOC bears the burden of proof. 28 C.F.R. §§ 35.130(b)(7)(i) & 35.164. But the decision regarding whether a reasonable modification is a fundamental alteration "must be *made by the head of the public entity* or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion." *Innes v. Bd. of Regents of the Univ. Sys. of Md.*, No. DKC-3-2800, 2015 WL 1210484, at *7 (D. Md. Mar. 16, 2015) (emphasis added) (quoting 28 C.F.R. § 35.164). VDOC has offered no such written statement or evidence of fundamental alteration. Further, even if Dr. Beard offered an opinion on whether Plaintiffs' requested auxiliary aids and services constituted a fundamental alteration, his testimony would be irrelevant and unnecessary because it is the head of VDOC or his designee that must make this determination, not an expert.

I. Dr. Beard Is Not Qualified To Be An Expert in This Case.

Dr. Beard fails to qualify as an expert in this disability rights action. Rather than dispute Plaintiffs' evidence (and Dr. Beard's own testimony) that Dr. Beard lacks any experience with the Americans with Disabilities Act ("ADA") or disability-related issues in the correctional setting, Defendant argues that Dr. Beard is only being offered as a "corrections expert." Def.'s Opp'n to Pls.' Mot. to Exclude Def.'s Purported Expert ("Def.'s Opp'n") at 3–4, ECF No. 294. But Dr. Beard is not merely opining on how correctional facilities function. Dr. Beard instead purports to draw conclusions about what are "appropriate" and "adequate" accommodations for prisoners with visual disabilities. *See* Pls.' Mem. In Suppl. Mot. to Exclude ("Pls.' Mot.") at 9 (quoting Beard Rep. at 2–3), ECF No. 274. Merely labeling Dr. Beard as a "corrections expert" does nothing to change that his conclusions relate directly to the accommodation of disabled prisoners, an area in which he is not qualified and in which the experience he advances is not relevant. *See Rapp v. NaphCare, Inc.*, No. 3:21-CV-05800-DGE, 2023 WL 3983662, at *12–13 (W.D. Wash. June 13, 2023) (excluding proposed expert's testimony on medical questions because "[t]hough [the expert] is eminently qualified to testify as an expert on corrections and correctional policies, [the expert] is not a medical expert. He never completed medical records when he worked for the Department of Corrections nor was he involved in the maintenance of such records." (citations omitted)).

VDOC also argues that "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." Def.'s Opp'n at 4–5. The Court should reject this argument for two reasons. First, it is not just the length of experience that matters—it is the type of experience. Here, Rick Mr. Wells and Rich Mr. Subia not only have extensive experience in corrections, but specific experience in effectively accommodating prisoners in that setting. As Plaintiffs addressed in their Motion, although Dr.

Beard has experience in corrections, he has *no experience* in managing prisoners with disabilities, including blind prisoners. This fact alone renders him unqualified to offer an opinion in this case. Second, there is no "tit-for-tat" rule under Federal Rule of Evidence 702.[2] VDOC has no independent right to have an expert testify at trial; rather, the burden is on VDOC to persuade this Court that Dr. Beard is sufficiently qualified as an expert to make his testimony appropriate. *See Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001). Because VDOC has failed to do so, and the proper remedy is to exclude Dr. Beard, regardless of the Court's rulings on Plaintiffs' proposed experts.

II. Dr. Beard's Opinions Are Not Admissible under FRE 702 and *Daubert*.

Even if the Court finds that Dr. Beard meets the threshold qualifications to be an expert in this case, the specific opinions that Dr. Beard expresses are not admissible under FRE 702 and *Daubert*. Defendant's Opposition fails to explain how Dr. Beard's experience (or any methodology derived from that experience) justifies his opinions.

A. Dr. Beard's security opinions are not admissible and should be excluded.

In its Opposition, VDOC does not offer any methodology or additional explanation of how Dr. Beard's experience led to the security opinions in his report. Notably, VDOC does not even

[2] VDOC's argument, which is unsupported by the Federal Rules of Evidence and case law, also runs contrary to its contention that no expert testimony is necessary in this case because "[a]ny jury empaneled by this Court will be able to understand what accomodations [sic] are necessary for the Plaintiffs' vision impairments and whether those accomodations [sic] are reasonable in prison from the lay witnesses that will be presented" and that this is not a complex case that "requires voluminous expert testimony." Def.'s Opp'n at 2. VDOC mischaracterizes this case and disregards the need for expert testimony in areas in which the jury has no experience or expertise. This case is not about Individual Plaintiffs' discrete accommodations; rather, this case is about systemic issues with VDOC's repeated failures to make necessary (and reasonable) modifications to its programs, services, and activities and to communicate in an equally effective manner with blind prisoners. Plaintiffs' expert witnesses identify deficiencies that lead to VDOC's failures and offer proposed solutions based on their expertise in discrete areas of disability- and blindness-related issues.

mention or attempt to defend Dr. Beard's second opinion that "[t]here is no evidence in Plaintiffs' expert reports or inmate grievances and accommodation requests that the VDOC does not have adequate devices for accommodating blind and visually impaired inmates." *See generally* Defs.' Opp'n. Plaintiffs extensively detailed the evidence that Dr. Beard had no methodology or relevant experience in determining whether or not VDOC has appropriately accommodated blind and visually-impaired inmates. *See* Pls.' Mot. at 12–15. VDOC attempts to characterize this as an argument that "Dr. Beard has not reviewed the correct evidence before forming his opinions" and argues that Plaintiffs should make this argument at trial. Def.'s Opp'n. at 10 & n.4. However, this mischaracterizes Plaintiffs' argument and ignores the district court's duty to "require an experiential witness to 'explain how [the expert's] experience leads to the conclusion reached, why [the expert's] experience is a sufficient basis for the opinion, and how [the expert's] experience is reliably applied to the facts.'" *United States v. Wilson*, 484 F.3d 267, 274 (4th Cir. 2007) (quoting Fed. R. Evid. 702 Advisory Note to the 1972 Amendments). Here, Plaintiffs contend that Dr. Beard did not review enough evidence to support his opinion, he does not have the experience to offer the opinions he proposes to offer, and, even if he had such experience, he has not articulated a reliable methodology that he applied to the facts to reach his opinions. Pls.' Mot. at 9–18. VDOC has failed to satisfy these requirements with regard to Dr. Beard's testimony.

By failing to meet its burden to demonstrate that Dr. Beard is a reliable expert on this point, VDOC has effectively conceded that this opinion should be excluded. Admitting such testimony before the jury rather than excluding it is reversible error. *See Nease v. Ford Motor Co.*, 848 F.3d 219, 230–31 (4th Cir. 2017) (reversing and remanding for new trial because "[f]or the district court to conclude that [the expert's] reliability arguments simply 'go to the weight the jury should afford

[the expert's] testimony' is to delegate the court's gatekeeping responsibility to the jury" and thus "the district court did not perform its gatekeeping duties").

Defendant also recasts Dr. Beard's first opinion in his report to be, effectively, that all items that are brought into a prison represent a potential security threat. Def.'s Opp'n. at 5–6. First, the record shows that VDOC has lists of pre-approved devices, undercutting Dr. Beard's claimed need for an individualized security determination for each item. Pls.' Mem. In Supp. Mot. for Part. Summ. J. Ex. 1 at 2–3 (listing SARA scanners, Braille, and audio books as "approved accommodations" for visually impaired prisoners; also listing relay speakers, TTY, and closed captioning as approved accommodations for hearing impaired prisoners), ECF No. 235-1. However, even if this opinion were taken as VDOC claims it was intended, this claim is irrelevant to the present case. If an individualized determination would establish—as Dr. Beard indicates in his report—that the items in question would likely have been approved by VDOC, *see* Beard Rep. at 7, ECF No. 290-4, then this opinion could serve only to confuse a jury as to whether the items requested by Plaintiffs are, themselves, security threats. Such confusion would justify excluding this opinion under FRE 403 as well as FRE 702 as laid out in Plaintiffs' Motion to Exclude.

B. Dr. Beard's caregiver opinions are not admissible and should be excluded.

Plaintiffs pointed out in their Motion that Dr. Beard fails to justify his opinions on caregivers, including that it is "appropriate" for them to be barred from "get[ting] involved in other inmates' confidential matters," with any coherent methodology or personal experience. Pls.' Mot. at 15–18. VDOC does not dispute that Dr. Beard has no experience with caregivers outside of the wheelchair context and that he has no experience with caregivers involved in other prisoners' confidential matters. VDOC once again attempts to characterize Plaintiffs' argument as taking issue "with the strength of the evidence Dr. Beard reviewed in forming his opinions about inmate

caregivers and that VDOC is properly providing them." Def.'s Opp'n. at 10. But this is not the case. Plaintiffs correctly argue that VDOC has failed to satisfy its burden under FRE 702 and *Daubert* to "explain how [the expert's] experience leads to the conclusion reached, why [the expert's] experience is a sufficient basis for the opinion, and how [the expert's] experience is reliably applied to the facts." *United States v. Wilson*, 484 F.3d at 274 (quoting Fed. R. Evid. 702 Advisory Note to the 1972 Amendments). This Court should reject VDOC's attempts to deflect from its burden and exclude Dr. Beard's testimony on Caregivers.

C. Dr. Beard's VDOC opinions on VDOC's ADA training are not admissible and should be excluded.

As Plaintiffs pointed out in their Motion, Dr. Beard testified to the adequacy of VDOC's training without even reviewing the contents of that training and he testified that he does not have any experience with training both generally and on the ADA specifically. Pls.' Mot. at 18–20. VDOC responds by arguing that, because Dr. Beard reviewed deposition testimony in which VDOC staff testify about receiving annual, online ADA training and the Federal Bureau of Prisons ("BOP") has an annual, online ADA training, Dr. Beard should be permitted to offer an opinion that VDOC's ADA training is adequate. Def.'s Opp'n at 8. Extending VDOC's reasoning here, one could reach the absurd result that *any* training labeled as an ADA training would be adequate, regardless of its contents, as long as it were online and offered once a year. This cannot be the case. Invoking FRE 702, VDOC also asserts that Dr. Beard's "knowledge about DOJ's ADA training is special knowledge," (Def.'s Opp'n at 8), but such "specialized knowledge" must be acquired "either by study of the recognized authorities or by practical experience." *Boleski v. Am. Exp. Lines, Inc.*, 385 F.2d 69, 71–72 (4th Cir. 1967). Dr. Beard did not study the BOP's ADA training—he read an article stating that it is one hour long and offered online—and he testified that he has *no experience* with training correctional staff. Dr. Beard has not actually worked for the

Federal Bureau of Prisons and claims no "special knowledge of its contents."[3] Even if Dr. Beard *did* have specialized knowledge of the contents of BOP's ADA training, he could not use it in evaluating VDOC's ADA training because, as mentioned, he has not reviewed the contents of VDOC's training. In short, VDOC attempts to "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Cooper*, 259 F.3d at 203 (quoting *Kumho Tire Co., Ltd v. Carmichael*, 526 U.S. 137, 157 (1999)). But, in this case, Dr. Beard has not even reviewed the data. Accordingly, this Court should preclude Dr. Beard from offering opinions on VDOC's ADA training.

D. Dr. Beard's purported opinion on VDOC's compliance with ACA standards should be excluded because it is irrelevant and unreliable.

Any opinion Dr. Beard wishes to offer on VDOC's purported compliance with ACA standards is irrelevant to the issues in this case and may even confuse the jury. Dr. Beard admitted during his deposition that compliance with ACA standards does not mean that a prison is compliant with the ADA. Pls.' Mot. Ex. 4, Beard Dep. 264:7–11 (Q: "And if a prison facility is accredited by the American Correctional Association, does that mean that the facility fully complies with the ADA?" A: "Not necessarily, no."). Thus, whether VDOC facilities comply with the ACA is not relevant to whether they comply with the ADA. In addition, permitting Dr. Beard to testify about ACA standards and VDOC's compliance with such standards may mislead the jury into thinking that VDOC is complying with the ADA.

---

[3] In a footnote, VDOC argues that Mr. Wells' opinion on VDOC's ADA training should be excluded because he reviewed the same materials as Dr. Beard. Def.'s Opp'n at 8 n.3. VDOC mischaracterizes the materials that Mr. Wells reviewed and misunderstands the standard for the admissibility of expert testimony. First, Mr. Wells reviewed testimony from the depositions of VDOC staff about the training they received, the online training outline, and the substance of ADA training materials offered at an in-person ADA training. *See* Wells Rep. Ex. 2, ECF No. 290-1. Second, Mr. Wells has extensive experience creating, developing, and administering ADA trainings in a correctional setting. *Id.* Ex. 1 (Wells' CV).

Dr. Beard's purported opinion on VDOC's compliance with ACA's standards is also unreliable. Although Dr. Beard may be familiar with the ACA's standards, the only basis for his opinion that VDOC is compliant with them is his review of the ACA's audits of Deerfield and Greensville. Beard Rep. at 7–8. Dr. Beard did not conduct his own audit of these facilities applying the ACA's standards—he simply read the ACA's audit reports stating that they were in compliance. This is another instance of VDOC attempting to "admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert" that this Court should reject. *Cooper*, 259 F.3d at 203 (quoting *Kumho*, 526 U.S. at 157). Accordingly, this Court should exercise its gatekeeping role and preclude Dr. Beard from offering testimony on the ACA. *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021) (alteration in original) (quoting *Nease,* 848 F.3d at 229–30).

III. Dr. Beard's Opinions Invade the Province of the Jury.

Dr. Beard's opinions also invade the province of the jury. VDOC erroneously contends that because Dr. Beard has not opined on the "ultimate issue" in the case, that he has not invaded the province of the jury. Def.'s Opp'n. at 11 ("Dr. Beard has not opined on the ultimate issue in the case: whether the individual Plaintiffs have received reasonable **accommodations** in prison for their unique vision impairments.") (emphasis added)). However, as Plaintiffs noted in their Motion, Dr. Beard offers an "opinion" that "[t]here is no evidence in Plaintiffs' expert reports or inmate grievances and accommodation requests that the VDOC does not have adequate devices for **accommodating** blind and visually impaired inmates" Pls. Mot. at 20 (emphasis added). By drawing conclusions about whether or not VDOC is "adequate[ly]" "accommodating" blind prisoners, Dr. Beard is impermissibly usurping the jury's role in deciding whether or not Plaintiffs have received a "reasonable accommodation." *See Frobe v. UPMC St. Margaret*, No. 2:20-CV-

00957-CCW, 2023 WL 3740782, at *3 (W.D. Pa. May 31, 2023) ("[T]he Court will exclude [the expert's] opinions to the extent that he opines that an accommodation is a 'reasonable accommodation' because such an opinion effectively tells the jury how to decide this case." (citation omitted)).

In their Motion, Plaintiffs argue that Dr. Beard's "opinions" that "there is no evidence" that "VDOC does not provide adequate ADA training for all correctional staff and ADA specific employees" and that "blind and visually impaired inmates are not receiving staff assistance if required" also invade the province of the jury. Pls.' Mot. at 20 (quoting Beard Rep. at 2–3). Expert conclusions on factual or legal issues are impermissible and must be barred by the court. *S.E.C. v. Tourre*, 950 F. Supp. 2d 666, 681 (S.D.N.Y. 2013) (noting that an expert witness "cannot be a conduit for a factual narrative" and that "[h]e also may not invade the province of the jury by 'finding facts' that are in contention in this case"). It is for the jury to consider the evidence presented by all parties and resolve disputed facts. Accordingly, the Court should exclude these three "opinions" that invade the province of the jury and preclude Dr. Beard from offering conclusory testimony regarding the absence of evidence.

IV. Dr. Beard's opinions are inadmissible under FRE 403.

Dr. Beard's testimony should also be excluded for the independent reason that its admission would violate FRE 403. As noted above, Dr. Beard opines on what is "appropriate" and "adequate" for prisons in accommodating disabilities. VDOC does not seek to qualify Dr. Beard as a disability expert (nor would his experience justify such a qualification) and he does not offer any opinions on the reasonableness of Plaintiffs' proposed modifications to VDOC's programs, activities, and services. But if this Court were to qualify him as an expert in prison administration generally, there is a high risk that a jury would interpret his opinions as reaching these issues.

Accordingly, the Court should exclude Dr. Beard's testimony as unfairly prejudicial because it is likely to mislead the jury.[4]

CONCLUSION

For the foregoing reasons, this Court should exclude the report and testimony of VDOC's proposed expert Dr. Jeffrey Beard.

[4] Defendant's citations to *Richardson v. Clarke* in sections III and IV of their Opposition are irrelevant, since *Richardson* did not deal with the admissibility of expert testimony and referred only in a general way to a deference to prison officials. *See, generally Richardson v. Clarke*, 52 F.4th 614 (4th Cir. 2022). *Richardson* is silent on when expert testimony is properly admitted or invades the province of the jury.

Dated: April 29, 2024

Respectfully submitted,

/s/ Samantha Westrum
Samantha Westrum (VSB No. 98453)
Vishal Agraharkar (VSB No. 93265)
American Civil Liberties Union of Virginia
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
(804) 519-5366
swestrum@acluva.org
vagraharkar@acluva.org

Eve L. Hill (VSB No. 96799)
Monica R. Basche (*pro hac vice*)
Evan Monod (*pro hac vice*)
Jamie Strawbridge (*pro hac vice)*
Jessica P. Weber (*pro hac vice*)
Brown, Goldstein & Levy, LLP
120 E. Baltimore Street, Suite 2500
Baltimore, Maryland 21202
(410) 962-1030
ehill@browngold.com
mbasche@browngold.com
emonod@browngold.com
jstrawbridge@browngold.com
jweber@browngold.com

Rebecca Herbig (VSB No. 65548)
disAbility Law Center of Virginia
1512 Willow Lawn Drive, Suite 100
Richmond, Virginia 23230
(204) 255-2042
Rebecca.Herbig@dlcv.org

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April 2024, I filed the foregoing electronically with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing ("NEF") to the following:

Ann-Marie C. White Rene (VSB No. 91166)
Timothy E. Davis (VSB No. 87448)
Andrew R. Page (VSB No. 80776)
Assistant Attorneys General
Office of the Virginia Attorney General
202 North 9th Street
Richmond, VA 23219
Telephone: (804) 786-0030
arene@oag.state.va.us
tdavis@oag.state.va.us
arpage@oag.state.va.us

Counsel for Defendant Virginia Department of Corrections

I hereby certify that I will mail the foregoing document by U.S. Mail and electronic mail to the following non-filing user:

Armor Correctional Health Inc.
c/o Registered Agent
CT CORPORATION SYSTEM
4701 Cox Rd Ste 285
Glen Allen, VA 23060-6808

Pro Se Defendant

/s/ Samantha Westrum
Samantha Westrum (VSB No. 98453)