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United States District Court,
E.D. Washington.

Elias SAMAHA, Plaintiff,
v.
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, John Morris, Ralph Robertson, and Chad Simonson, Defendants.

No. CV–10–175–RMP.
|
Signed Jan. 3, 2012.

Named Expert: Dr. Anthony G. Greenwald, Ph.D.

Attorneys and Law Firms

Michael C. Subit, Frank Freed Subit & Thomas LLP, Seattle, WA, Richard C. Eymann, Eymann Allison Fennessy Hunter & Jones PS, Spokane, WA, for Plaintiff.

Carl Perry Warring, Attorney General of Washington, Spokane, WA, for Defendants.

ORDER DENYING DEFENDANTS' MOTION TO EXCLUDE TESTIMONY

ROSANNA MALOUF PETERSON, Chief Judge.

***1** THIS MATTER comes before the Court on a motion to exclude expert testimony, ECF No. 37, by Defendants Washington State Defendants ("WSDOT"), John Morris, Ralph Robertson, and Chad Simonson (collectively, "Defendants"). The Court has reviewed the filings related to this motion, ECF Nos. 37, 39, 40, 42, and 43, and is fully informed.

BACKGROUND

Plaintiff Elias Samaha ("Mr.Samaha"), who is of Arab descent, ECF No. 2–1 at 1, asserts claims of race-based employment discrimination arising under 42 U.S.C. § 1981 (racial/national origin discrimination), 42 U.S.C. § 1983 (equal protection), 42 U.S.C. § 1985(3) (conspiracy to violate equal protection) and RCW 49 .60 (race/national origin discrimination). ECF No. 2–1 at 1. Specifically, Mr. Samaha alleges that Defendants treated him differently from other employees by holding him to a standard higher than non-Arab employees. ECF No. 2–1. He alleges this disparate treatment was particularly apparent in his job performance evaluations. ECF No. 2–1.

Defendants bring this motion in limine to exclude expert testimony of Dr. Anthony **Greenwald** ("Dr.Greenwald"). ECF No. 37. Dr. **Greenwald** is a tenured faculty member at the University of Washington. ECF No. 40–1. Plaintiff intends to offer Dr. **Greenwald's** testimony at trial on the subject of **implicit bias**. ECF No. 42 at 7. According to Dr. **Greenwald's** expert witness declaration, his research findings "provide a framework that can aid a judge or jury in evaluating the facts of this case to better understand the evidence as it relates to discriminatory intent, to counteract common misconceptions concerning the character of discriminatory intent, and to determine whether the plaintiff's race, color, and/or ethnic origin substantially motivated the defendant actions outlined in the complaint." ECF No. 40–1 at 5.

Dr. **Greenwald's** findings include the following, as outlined in his declaration: (1) seventy percent of Americans "hold implicit prejudiced views" based on race, color, national origin and ethnicity; (2) **implicit bias** is prevalent in the employment context; (3) job performance evaluations conducted by personnel using subjective criterion permit **implicit biases** to affect the outcome; (4) "significant majorities of Americans prefer lighter skin tone over darker and European–American relative to Arab ethnicity"; (5) awareness of potential or actual **implicit biases** helps diminish the effect of these biases; and (6) members of a decision-maker's in-groupthose people who share common demographic characteristicsare more likely than those in the out-group to receive more favorable treatment. ECF No. 40–1 at 8–10. Dr. **Greenwald's** findings are based on his "own research as well as on [his] knowledge of published works of others who have conducted research relevant to the conditions of this case." ECF No. 40–1 at 5. Dr. **Greenwald** reviewed only Plaintiff's complaint to acquaint himself with the alleged circumstances in this matter and was not asked by Plaintiff to review any other case materials. ECF No. 40–1 at 5.

***2** Defendants move to exclude Dr. **Greenwald's** testimony on the basis that it is not relevant, is unfairly prejudicial, and fails to "appl[y] the principles and methods reliably to the facts of the case." ECF No. 43 at 3–4 (quoting Fed.R.Evid. 702). Specifically, Defendants argue that Dr. **Greenwald** has not identified any particular bias that relates to Mr. Samaha's race, color, national origin or ethnicity and has not determined whether **implicit bias** played any role in any particular employment decision made by the Defendants. ECF No. 43 at 3.

Plaintiff responds that Dr. **Greenwald's** testimony about **implicit bias** is relevant to the fact of intentional discrimination and helpful to the jury to understand how **implicit bias** functions in the employment setting. ECF No. 42 at 5:13–23. Plaintiff argues that Dr. **Greenwald's** testimony will be helpful to the jury by providing background about one of several factors that comprise discriminatory intent, without arguing that **implicit bias** is the only factor that comprises discriminatory intent. ECF No. 42 at 6–7. Finally, Plaintiff contends that Dr. **Greenwald** has sufficiently applied his research to the facts of this case by concluding that "there are a number of research findings regarding **implicit bias** that bear on this case," ECF No. 40–1 at 8, and by discussing in detail those research findings while leaving the decision to the jury as to whether the Defendants in this case discriminated against Mr. Samaha. *Id.*

ANALYSIS

The Federal Rules of Evidence allow testimony by a qualified expert who will assist a trier of fact in understanding the evidence or in determining a fact in issue, so long as "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case ." Fed.R.Evid. 702.

It is the trial judge's responsibility to act as a "gatekeeper" by ensuring "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (*"Daubert I"*). The court's gatekeeping function exists to ensure that an expert witness "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). The gatekeeping role extends to all expert witnesses, whether the expert relies on "scientific" knowledge or "technical" or "other specialized" knowledge. *Kumho Tire*, 526 U.S. at 147–48. The inquiry is flexible and case-specific, however, and must leave the task of weighing the facts or the expert's credibility to the factfinder. *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir.2010).

For an expert opinion to have evidentiary relevance under Fed.R.Evid. 702, the opinion must assist the trier of fact to determine a fact at issue in the case. *Daubert I*, 509 U.S. at 589. Relevant expert testimony "logically advances a material aspect of the proposing party's case." *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1315 (9th Cir.1995) (*"Daubert II"*).

***3** An expert's testimony must assist the trier of fact and relate to, or "fit," the underlying facts of the case. *Daubert II*, 43 F.3d. at 1320. This requirement of "fit" or "helpfulness" demands "a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Daubert II*, 43 F.3d at 1317–18 (*quoting Daubert I*, 509 U.S. at 592); *see also* Fed.R.Evid. 702.

Defendants do not contest Dr. **Greenwald's** qualifications as an expert. Rather, Defendants challenge the reliability and relevance of Dr. **Greenwald's** opinions and the admissibility of his likely expert testimony on the basis that Dr. **Greenwald** does not offer a conclusion as to whether the circumstances as alleged by Plaintiff are consistent with **implicit bias**.

Reliability

Defendants do not directly challenge the validity of **implicit bias** theory. ECF No. 40 at 2. Rather, Defendants argue that the Implicit Association Test ("IAT") on which Dr. **Greenwald** bases his testimony amounts to mere "statistical generalizations about segments of the population." ECF No. 39 at 3.

Dr. Greenwald specializes in "implicit social cognition." ECF No. 40–1 at 6. He has published articles in multiple peer-reviewed journals and has received many awards recognizing his lifetime career research achievements. ECF No. 40–1 at 5–6. Mr. Greenwald's research in the area of unconscious cognition and subliminal perception focuses on the Implicit Association Test ("IAT"), a test Mr. Greenwald helped to invent and develop. ECF No. 40–1 at 7.

The IAT test measures implicit group-trait associations that underlie attitudes and stereotypes. ECF No. 40–1 at 7. This research includes **implicit** **bias** relating to Arabs and other persons of color. ECF No. 40–1 at 7. According to Dr. **Greenwald**, and unchallenged by Defendants, researchers have validated this test by evaluating thousands of participants in laboratory research studies. ECF No. 40–1 at 7. Variations of IAT have been taken online more than 12 million times. ECF No. 40–1 at 7. This test has been subject to repeated empirical testing and peer review. ECF No. 7 at 7. Dr. **Greenwald** bases his expert opinion on his own knowledge and research as well as the published research of other professionals in the field. ECF No 40–1 at 8. The Court, therefore, is satisfied that Dr. **Greenwald's** opinions are sufficiently "ground [ed] in the methods and procedures of science." *Daubert I*, 509 U.S. at 590.

Helpfulness and Fit

Defendants argue that Dr. **Greenwald's** testimony is neither relevant nor helpful to the jury because the testimony does not explain how specific conduct is consistent with any bias or stereotyping based on any identified stereotype. ECF No. 43 at 1, 8. Defendants further argue that Dr. **Greenwald** neither applies the principles of **implicit** **bias** to the case nor opines to any degree whether **implicit** **bias** played any role in any employment decision made by the Defendants. ECF No. 32 at 8. Mr. Samaha, on the other hand, argues that Dr. **Greenwald's** testimony is relevant and helpful to the jury because it will provide a framework for the jury to understand the presence of **implicit** **bias** in the employment setting in addition to counteracting the jury's own potential bias. ECF No. 42 at 5.

***4** Testimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (recognizing the relevance of unconscious stereotyping in the workplace where "an employer acts on a basis of belief" and that basis amounts to nothing more than an improper stereotype); *see also Lynn v. Regents of the Univ. of California*, 656 F.2d 1337, 1343 n. 5 (9th Cir.1981) (explaining that an employer must not make decisions motivated by a "discriminatory attitude[ ] relating to race ... or [that] are rooted in concepts which reflect such discriminatory attitudes"); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58–60 (1 st Cir.1999) (stating that the ultimate question is whether an employer acted "because of" an employee's protected class, "regardless of whether the employer consciously intended to base the evaluation on race, or simply did so because of unthinking stereotypes or bias").

Here, Dr. **Greenwald** concludes that his "research findings regarding **implicit** **bias** ... bear on this case" even though he does not provide a conclusion as to whether his findings are consistent with the alleged actions of Defendants. ECF No. 40–1 at 8.

The Advisory Committee Notes to the 2000 Amendments to Fed R. Evid. 702 contemplated just such an expert opinion:

> Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or blood clotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles.

The Advisory Committee Notes for the 2000 Amendments to Rule 702 further provide a four-step test to determine the admissibility of expert testimony that does not apply the principles and methods to the facts of the case:

> Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

All of these factors are satisfied here. Dr. Greenwald is qualified. His opinions are based on reliable methodologies and consist of relevant subject matter. Finally, Dr. Greenwald's testimony is likely to provide the jury with information that it will be able to use to draw its own conclusions. Therefore, the Court finds that, provided sufficient foundation is laid at trial, Dr. Greenwald's expert

testimony is helpful enough to survive the admissibility threshold. *See United State v. Baskin,* 886 F.2d 383, 387 (D.C.Cir.), *certiorari denied* 494 U.S. 1089, 110 S.Ct. 1831, 108 L.Ed.2d 960 (1989) ("Whether or not one qualifies as an expert depends not on knowledge of facts of a particular case but on one's past experience with regard to the subject matter on which one will opine."); *see also Rolls–Royce Corp. v. Heros,* Inc., 3:07–CV–0739–D, 2010 WL 184313, at *1, *3 (N.D.Tex.2010) (finding expert testimony regarding the parts manufacture approval industry process admissible "to teach the jury background information to understand the case").

***5** Accordingly, **IT IS ORDERED THAT** Defendants' motion, **ECF No. 37,** is **DENIED.**

The District Court Executive is hereby directed to enter this Order and provide copies to counsel.

All Citations

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