

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jan 08, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KELLY O’KELL,

Plaintiff,

v.

DAVID BERNHARDT, in his official

capacity as Secretary of the United States

Department of the Interior,

Defendant.

NO. 2:18-CV-00279-SAB

**ORDER DENYING MOTION TO  
EXCLUDE**

Before the Court is Defendant’s Motion to Exclude Testimony of Deborah Diamond under Federal Rule of Evidence 702, ECF No. 20. Defendant requests the Court exclude Plaintiff’s expert witness Deborah Diamond, an HR expert with years of experience in the industry. Defendant argues Ms. Diamond’s testimony is unhelpful and irrelevant due to its allegedly inadequate methodology, Ms. Diamond’s lack of peer-reviewed publications, Ms. Diamond’s use of published agency guidance regarding impartiality in investigations issued after the relevant investigations were conducted in this case, and her failure to account for an explanation regarding what Ms. Diamond opined was the lack of timeliness of the investigations. For the reasons described herein, the Court denies the motion.

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1 Fed. R. Evid. 702 governs the admission of expert testimony. It states:

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3 A witness who is qualified as an expert by knowledge, skill, experience,  
training, or education may testify in the form of an opinion or otherwise if:

4 (a) the expert’s scientific, technical, or other specialized knowledge will help  
5 the trier of fact to understand the evidence or to determine a fact in issue;

6 (b) the testimony is based on sufficient facts or data;

7 (c) the testimony is the product of reliable principles and methods; and

8 (d) the expert has reliably applied the principles and methods to the facts of  
the case.

9 ER 702.

10 Although Rule 702 should be applied with a “liberal thrust” favoring  
admission, *Daubert v. Merrell Down Pharm., Inc.*, 509 U.S. 579, 588 (1993), it  
11 requires that expert testimony be both relevant and reliable. *Primiano v. Cook*, 598  
12 F.3d 558, 564 (9th Cir. 2010). “Expert opinion testimony is relevant if the  
13 knowledge underlying it has a valid connection to the pertinent inquiry. And it is  
14 reliable if the knowledge underlying it has a reliable basis in the knowledge and  
15 experience of the relevant discipline.” *Id.* at 565. The inquiry should focus on the  
16 soundness of the methodology, not the correctness of the expert’s conclusions.  
17 *Primiano*, 598 F.3d at 564-65.

18 In evaluating whether the testimony should be admitted, the trial court acts  
19 as “a gatekeeper, not a fact finder.” *Id.* at 565. To aid courts in exercising this role,  
20 the Supreme Court has suggested a non-exclusive and flexible list of factors that it  
21 may consider when determining the reliability of expert testimony, including: (1)  
22 whether the theory or technique employed by the expert is generally accepted in  
23 the scientific community; (2) whether it’s been subjected to peer review and  
24 publication; (3) whether it can be and has been tested; and (4) whether the known  
25 or potential rate of error is acceptable. *Daubert v. Merrell Down Pharm., Inc.*, 509  
26 U.S. at 593-95. The court should also consider whether experts are testifying  
27 “about matters growing naturally” out of their own independent research, or if  
28 “they have developed their opinions expressly for purposes of testifying.” *Wendell*

1 *v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) (citing *Daubert v.*  
2 *Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (1995)).

3 “Shaky, but admissible evidence is to be attacked by cross examination,  
4 contrary evidence, and attention to the burden of proof, not exclusion.” *Primiano*,  
5 598 F.3d at 564. An opinion is not excludable merely because it is impeachable.  
6 *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir.  
7 2013) “After an expert establishes admissibility to the judge’s satisfaction,  
8 challenges that go to the weight of the evidence are within the province of a fact  
9 finder, not a trial court judge. A district court should not make credibility  
10 determinations that are reserved for the jury.” *Pyramid Technologies, Inc. v.*  
11 *Hartford Cas. Ins. Co.*, 752 F.3d. 807, 814 (9th Cir. 2014). “Basically, the judge is  
12 supposed to screen the jury from unreliable nonsense opinions, but not exclude  
13 opinions merely because they are impeachable. The district court is not tasked with  
14 deciding whether the expert is right or wrong, just whether his testimony has  
15 substance such that it would be helpful to the jury.” *Alaska Rent-A-Car, Inc.*, 738  
16 F.3d at 969-70.

17 Defendant’s arguments primarily go to the weight of Ms. Diamond’s  
18 testimony, not her expertise or the relevance of the testimony to this case.  
19 Notwithstanding Ms. Diamond’s lack of peer-reviewed articles, in the field of her  
20 expertise, her years of experience render he qualified to testify as to industry  
21 standards in conducting investigations of alleged discrimination. The Court finds  
22 that Ms. Diamond’s methodology, applying her years of expertise to the facts of  
23 the case after reviewing to form her opinion, adequate. Likewise, her use of the  
24 2018 guidance does not taint the entirety of Ms. Diamond’s testimony, though it  
25 may be used as impeachment at trial. Nor does her failure to account for one  
26 possible explanation for the investigations’ alleged untimeliness render her opinion  
27 that the investigations were untimely so unreliable as to be inadmissible.

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1 As this is a bench trial, there is substantially less danger in admitting such  
2 allegedly shaky testimony at this stage of the proceedings, because a trial court is  
3 less likely to be “unduly impressed by the expert’s testimony or opinion” than a  
4 jury. *F.T.C. v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014).

5 Accordingly, **IT IS ORDERED:**

6 1. Defendant’s Motion to Exclude Testimony of Deborah Diamond under  
7 Federal Rule of Evidence 702, ECF No. 20, is **DENIED**.

8 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
9 this Order and to provide copies to counsel.

10 **DATED** this 8th day of January 2020.



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A handwritten signature in blue ink that reads "Stanley A. Bastian".

16 Stanley A. Bastian  
17 United States District Judge  
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