2007 WL 5830967
Only the Westlaw citation is currently available.
United States District Court,
W.D. Michigan,
Southern Division.

COMMUNITIES FOR EQUITY, et al., Plaintiffs,
v.
MICHIGAN HIGH SCHOOL, ATHLETIC ASSOCIATION, et al., Defendants.

No. 1:98-CV-479.
|
May 2, 2007.

Attorneys and Law Firms

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OPINION

RICHARD ALAN ENSLEN, Chief Judge.

***1** This matter is before the Court on Defendants' Motion *in Limine* to Exclude the Testimony by Plaintiffs' Expert Witnesses Donna Lopiano, Christine Grant, Virgil Hooe, and Mary Witchger. Defendants generally argue that these witnesses cannot qualify as experts, and their purported testimony is unreliable. The Court grants in part and denies in part Defendants' Motion.

RELEVANT LAW

1. Standard of Review

This Court has wide discretion on whether to admit the testimony of an expert witness. *See United States v. Tocco,* 200 F.3d 401, 418 (6th Cir.2000). Expert testimony need not be "necessary" to be admissible; rather, it must reasonably assist the trier of fact in understanding the evidence or determining a matter in issue. *See U.S. v. Browner,* 173 F.3d 966, 969-70 (6th Cir.1999). The task of the trial judge under this Rule is to ensure that the expert's testimony rests on both a reliable foundation and is relevant to the task at hand. *See Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

The Sixth Circuit has adopted a four-factor test to uphold the admission of expert testimony: (1) a qualified expert; (2) testifying on a proper subject; (3) which is in conformity to a generally accepted explanatory theory; and (4) the probative value of which outweighs its prejudicial effect. *See U.S. v. Moses,* 137 F.3d 894, 899 (6th Cir.1998). The qualification of a witness to testify is a preliminary question of law. *See id.*

2. Applicable Federal Rules of Evidence

Federal Rule of Evidence 702 states that a witness qualified as an expert by "knowledge, skill, experience, training, or education, may testify ... in the form of an opinion or otherwise" if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702.

Federal Rule of Evidence 703 allows an expert's testimony to be based on facts or data perceived by the expert or made known to the expert at or before the hearing. Fed.R.Evid. 703. In addition, if the facts relied upon by the expert are of a type reasonably relied upon by experts in the particular field when forming opinions, the facts need not be admissible in evidence. *Id.*

Furthermore, Federal Rule of Evidence 704 allows an expert, with an exception pertaining to criminal cases, to testify in the form of an opinion that "embraces the ultimate issue to be decided by the trier of fact." Fed.R.Evid. 704.

APPLICATION

1. Donna Lopiano

Dr. Lopiano testified in deposition that she has been the executive director for the Women's Sports Foundation ("WSF") since 1992. Prior to that, Dr. Lopiano served as an in-house gender equity advisor for the Texas University Interscholastic League. Dr. Lopiano testified that a nexus and interrelationship exists between WSF and

the National Women's Law Center ("Center"), which represents Plaintiffs in the present action. The WSF refers potential legal clients to the Center, and the Center serves as an affiliate member and advisory board member of WSF. WSF works with one of Plaintiffs' attorneys "on a daily basis." Dr. Lopiano also testified.that she has trained investigators from the Office of Civil Rights of the U.S. Department of Education ("OCR"), and she served as a special advisor to OCR during the 1970s to help write and apply OCR's 1979 Policy Interpretation and 1980 Investigators' Manual. Dr. Lopiano has previously testified in Title DC cases, including landmark athletic cases, and she said that she has always found gender discrimination against the defendants in those cases.

***2** Dr. Lopiano further testified that she had not previously reviewed Title DC or other gender equity issues pertaining to high school athletics in Michigan. She stated that she has not published any articles relating to Michigan athletics, nor has she attempted contact with Michigan residents. Dr. Lopiano stated that one of Plaintiffs' attorneys asked her to serve as an expert witness and give her opinion on the following issues: (1) whether equitable participation opportunities exist for high school girls participating in Michigan High School Athletic Association ("MHSAA")-sponsored tournaments in Michigan; (2) whether the playing seasons and contest rules discriminatorily impact high school girls; (3) whether facilities used for MHSAA girls' tournaments are comparable to those used for MHSAA boys' tournaments; and (4) whether MHSAA tournament publicity and promotion are comparable for Michigan boys and girls.

Dr. Lopiano testified that Title DC requires that participation opportunity be calculated by participation slot rather than by team and based this opinion on a document summary purporting to represent the number of Michigan girls and boys in state high school championship sports participating in MHSAA tournaments over an eight-year period. Dr. Lopiano received this summary from one of Plaintiffs' counsel. Dr. Lopiano also based her opinions on a 50-state summary document of the playing seasons, which had been given to her by Plaintiffs' counsel.

Dr. Lopiano stated that she had not reviewed the MHSAA Handbook or other MHSAA publications but had relied on Plaintiffs' counsel's responses to her own inquiries into contest rules and other statements contained in MHSAA publications. Regarding, the alleged disparity in facilities used for boys and girls, Dr. Lopiano stated that her sole source of information underlying this opinion had come from Plaintiffs' counsel. Similarly, Dr. Lopiano based her opinion on the disparity in scheduling between boys and girls on Plaintiffs' counsel's statements.

Defendants argue that Dr. Lopiano's expert testimony must be excluded because her opinions (1) are colored by bias, (2) lack reliability, (3) are not characterized by the employment of intellectual rigor, and (4) impermissibly reach legal conclusions regarding Defendants' alleged liability under Title IX.

The Court has studied Dr. Lopiano's resume and finds that she may testify as an expert witness. Dr. Lopiano holds three degrees in Physical Education, including Doctor of Philosophy ("Ph.D."). She has worked in various roles within athletics, including Director of Intercollegiate Athletics for Women at the University of Texas at Austin. Furthermore, she has received various honors within her field, and she has also published numerous articles. In addition, Dr. Lopiano has provided written or oral testimony in numerous Title IX cases.[1]

Defendants argue that Dr. Lopiano should not be able to testify because her opinions are unreliable, and they are not the result of "intellectual vigor." The Court notes that much of the data on which Dr. Lopiano relies was supplied by Defendants to Plaintiffs, who then passed it on to Dr. Lopiano. Furthermore, as noted by Federal Rule of Evidence 703, an expert's opinion may be based on facts known to the expert or on facts made known to the expert before or at a hearing. In addition, these facts need not be admissible if they are of a type normally relied upon by experts in the relevant field. Fed.R.Evid. 703. Thus, Defendants' arguments hold no merit.

***3** As for Defendants' claim of bias, this may or may not be true. This, however, goes to the weight of the evidence and not its admissibility. *See Evans v. Brigano*, 1995 WL12286 at *3 (6th Cir. Jan. 12, 1995) (quoting *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). Defendants are free to question Dr. Lopiano about her perceived bias. Indeed, Defendants are free to question Dr. Lopiano about all of the arguments they have presented in their Motion.

Dr. Lopiano's expert opinion may assist the trier of fact in determining whether the MHSAA discriminates against its female athletes and their participation opportunities. Dr. Lopiano may also provide assistance on an appropriate remedy, if necessary. The Court does not know of, and neither does the law provide, a reason to exclude Dr. Lopiano as an expert witness.

2. Christine Grant

Dr. Grant was deposed in June 1999. Dr. Grant worked as director of women's athletics for the University of Iowa

for nearly 30 years until her recent retirement. Dr. Grant has also served as special advisor to the OCR during the late 1970s and helped write OCR's 1979 Policy Interpretation. In addition, Dr. Grant has testified in cases where a defendant is accused of discriminating against female athletes. Her testimony in such cases has always been in support of the plaintiffs and has always involved athletics at the collegiate level.

Dr. Grant testified that the MHSAA determines when sports are played and serves as an agent for its member schools, but Dr. Grant also testified that she knew of no facts to substantiate these statements. Everything Dr. Grant knows about interscholastic athletics in Michigan she derived from reading Plaintiffs' Amended Complaint, which she relied upon as truthful. Dr. Grant further testified that she based her opinions regarding intentional discrimination upon the Amended Complaint and her sense that it "seem[ed] a little unusual that [new] sports have not been added" since 1982 or 1983.

Dr. Grant has testified in other cases where those plaintiffs were represented by some of the same attorneys representing Plaintiffs in this case. Dr. Grant stated that she has based her opinions on statements made to her by these attorneys. Although Dr. Grant stated that she feared Michigan girls were missing out on competition at the conference tournaments that cross state lines, she had no facts with which to support her opinion.

Defendants raise the same arguments against Dr. Grant testifying as they do against Dr. Lopiano. Mainly, Defendants argue that Dr. Grant lacks the qualifications to render expert testimony as to *interscholastic* athletics.

The Court has studied Dr. Grant's resume and finds that she, too, may testify as an expert witness. Dr. Grant has obtained her Ph.D. in Administration and Physical Education. She has served on various committees relating to sports, has given presentations regarding gender and sports, has published numerous articles in the area of sports, has acted as a consultant for many colleges, and has given expert testimony in court and before various commissions. Although Dr. Grant's expertise is widely in the area of intercollegiate athletics, this does not preclude her from testifying as an expert witness in this case. Rather, Defendants may cross-examine Dr. Grant in effort to show her weaknesses, if any, in dealing with interscholastic athletics. That is, Defendants' arguments go to the weight to be given Dr. Grant's testimony and not its admissibility.

***4** Moreover, Dr. Grant may assist the trier of fact in understanding how a high school's athletic program can affect a girl's opportunity to play at the collegiate level. Dr. Grant may also help the trier of fact understand the concept of "emerging sports" as it relates to girls' athletics. In addition, Dr. Grant's knowledge of the OCR's Policy Interpretation may assist the trier of fact in assessing whether Defendants discriminate in violation of Title IX.

Again, Dr. Grant's basis for her opinion may rest upon information given to her in preparation for this case. This does not necessarily mean that this data or information is not the type normally relied upon by experts exploring Title DC violations in high school athletics. Defendants may cross-examine Dr. Grant to determine this or reveal any other weaknesses in her testimony. Therefore, the Court will allow Dr. Grant to testify as an expert witness.

3. Virgil Hooe

Mr. Hooe, a high school volleyball coach in Anchorage, Alaska, was deposed in July 1999. He has never served as an expert witness in another case, nor has he published in the area of volleyball or reviewed documents pertaining to this case.

Plaintiffs retained Mr. Hooe to testify regarding the change in volleyball seasons in Alaska and how this has affected interscholastic volleyball in Alaska and the availability of collegiate scholarships. Mr. Hooe stated that the change in the volleyball season had not resulted in increased college volleyball scholarships being offered, although he remained hopeful that this would happen in the future.

The Court has examined Mr. Hooe's resume and finds it to be lacking of the credentials normally possessed by an expert. Although Mr. Hooe has vast coaching experience, he does not have the same type of education, publications, or previous experience in gender equity and Title DC cases as the Drs. Lopiano and Grant Nothing indicates that Mr. Hooe has special skills, knowledge, or training sufficient to render him an expert in this case. The Court cannot find and does not find that Mr. Hooe is qualified to testify as an expert witness. *See U.S. v. Moses*, 137 F.3d 894, 899 (6th Cir.1998) (the qualification of a witness to testify is a preliminary question of law).

Mary Witchger

Ms. Witchger was deposed in July 1999. Ms. Witchger was instrumental in convincing the Minnesota High School League to sanction a girls' ice hockey tournament. Plaintiffs expect Ms. Witchger to testify that this action "legitimized" girls' ice hockey and led to an "explosion of

opportunity and participation."

Ms. Witchger has no knowledge regarding how the MHSAA is set up and has not reviewed any documents relating to this case. Ms. Witchger stated that she intended to give the following opinions: (1) the interest in girls' ice hockey amongst Michigan high school girls has grown; and (2) Michigan high schools have an obligation to provide girls with an equal opportunity to compete in ice hockey. Ms. Witchger stated that within the two weeks preceding her deposition, she spoke with a number of individuals and young girls who play ice hockey in Michigan, and this constitutes the basis of her knowledge of girls' ice hockey in Michigan.

***5** Ms. Witchger was dissatisfied with the reason offered by high school athletic directors when explaining why schools do not field girls' ice hockey teams. Ms. Witchger, however, did not know of any Michigan high school athletic directors who has articulated these reasons to her. Similarly, Ms. Witchger knew of no high school athletes or their parents who expressed frustration over these high school athletic directors' "unwillingness" to sponsor high school girls' ice hockey teams. Furthermore, Ms. Witchger could not name one Michigan athlete who has expressly stated that she has been denied an athletic opportunity.

Ms. Witchger testified about Minnesota's high schools and their girls' ice hockey tournament. She stated that Minnesota has recorded a noticeable growth in girls' ice hockey since the Minnesota high school athletic association began sponsoring a post-season tournament. Ms. Witchger also stated that she believed that Michigan would experience similar growth.

The Court has found nothing within the record indicating that Ms. Witchger should be considered an expert witness. Plaintiffs make much of the fact that Ms. Witchger convinced Minnesota's MHSAA equivalent to sanction a girls' ice hockey tournament. This alone, however, does not qualify Ms. Witchger as an expert. Nothing indicates that the task she undertook was of the type normally done by those widely considered experts. Furthermore, nothing indicates that Ms. Witchger now serves in some sort of administrative role through which she would consistently see the interaction between gender, discrimination, and sports. Although not necessary to be considered an expert, Ms. Witchger has not published in this area, consulted in this area, nor has she obtained any formal education in this area. This, in coordination with her limited experience, precludes the Court from considering her an expert witness.

CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part Defendants' Motion in Limine.

An Order consistent with this Opinion will follow.

ORDER

In accordance with an Opinion filed this day;

IT IS HEREBY ORDERED that Defendants' Motion *in Limine* to Exclude the Testimony by Plaintiffs' Expert Witnesses Donna Lopiano, Christine Grant, Virgil Hooe, and Mary Witchger (Dkt. No. 315) is **GRANTED IN PART** and **DENIED IN PART.**

IT IS FURTHER ORDERED that Donna Lopiano and Christine Grant will be permitted to testify as expert witnesses, and Virgil Hooe and Mary Witchger will not be permitted to testify as expert witnesses.

OPINION

This matter is before the Court on Defendants' Motion *in Limine* to Exclude Application of [the Office of the Civil Rights] Inter-Collegiate Athletic Policy Interpretation (Policy Interpretation). Defendants claim that the Office of Civil Rights' ("OCR") Policy Interpretation[2] (1) does not apply to interscholastic athletics, (2) is unconstitutional as it violates the equal protection clause, and (3) is not effective because it was not signed by the President. The Court denies the Motion.

***6** The Court is unsure as to why Defendants have filed this as a Motion *in Limine* because they fail to make any argument for exclusion based on the Federal Rules of Evidence. This Court has previously stated that motions *in limine* allow the Court to make preliminary rulings as to the admissibility of evidence. *See Donnelly Corp. v. Gentex Corp.*, 918 F.Supp. 1126, 1130 (W.D.Mich.1996). The Court does not interpret Defendants' Motion as one seeking resolution of an evidentiary matter. Rather, the Motion seems to be requesting the Court indicate what law it will apply to this case. This alone warrants dismissal of the Motion. Given the tortured history of this case, however, the Court will address Defendants' claims briefly but will not indicate what law it will apply.

1. Does the Policy Interpretation Apply to Interscholastic Athletics?

Defendants argue that the Policy Interpretation does not apply to interscholastic athletics because the Policy Interpretation makes specific references indicating it is to apply to intercollegiate athletics. While it is true that the Policy Interpretation is meant to apply to intercollegiate athletics, the Policy Interpretation specifically states that its principles "will often apply to club, intramural, and interscholastic athletic programs," which are also covered by regulation. 44 Fed.Reg. at 71,413. Thus, the Policy Interpretation explicitly states that it may apply to interscholastic athletics. Moreover, the Sixth Circuit has held that the Policy Interpretation applies to interscholastic athletics. *Horner v. Kentucky High Sch. Athletic Ass'n,* 43 F.3d 265, 273 (6th Cir.1994) (citing *Williams v. Sch. Dist. of Bethlehem, PA.,* 998 F.2d 168, 171 (3rd Cir.1993)).

Defendants' reliance on footnote one of the Policy Interpretation is misplaced. The language on which Defendants rely states that "club teams will not be considered to be intercollegiate teams ..." 44 Fed.Reg. at 71, 413-14 n.1. Defendants argue that this language makes the Policy inapplicable to interscholastic athletics. The Court disagrees. The footnote does not mention interscholastic athletics and appears to be differentiating between intercollegiate club and varsity teams.

Based on this, Defendants' argument that the Policy Interpretation should be excluded because it does not apply to interscholastic athletics must fail.

2. Is the Policy Interpretation Unconstitutional?

Defendants argue that the Policy Interpretation is unconstitutional because it violates the equal protection clause. To support their argument, Defendants rely on the dissenting opinion in *Cohen v. Brown,* 101 F.3d 155, 188 (1st Cir.1996). In the dissent, Chief Judge Torruella concludes that the three-prong test the Policy Interpretation advocates for determining compliance with participation opportunities under Title DC is quota-based and contrary to the equal protection clause. *See id.,* at 195 (citing *Adarand v. Pena,* 515 U.S. 200, 209-10, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)).

***7** The Court again disagrees with Defendants' argument and reliance on *Cohen.* Various Circuit Courts of Appeal have upheld the validity of the Policy Interpretation and have applied it when determining Title DC athletic claims. *See Pederson v. Louisiana State Univ.,* 213 F.3d 858, 879 (5* Cir.2000); *Neal v. Bd. of Trustees of California State Univs.,* 198 F.3d 763, 771 (9th Cir.1999); *Boulahanis v. Bd. of Regents,* 198 F.3d 633, 637-38 (7th Cir.1999); *Cohen,* 101 F.3d at 637-38; *Horner,* 43 F.3d at 273; *Roberts v. Colorado State Bd. of Ag.,* 998 F.2d 824, 828 (10th Cir.1993), *Williams,* 998 F.2d at 171. The Court, therefore, will not exclude the Policy Interpretation based on Defendants' argument that it is unconstitutional.

3. Is the Policy Interpretation Effective?

Defendants argue that the Policy Interpretation is not effective because it was not signed by the President. Defendants cite to the district court's decision in *Pederson* and claim that it stands for the proposition that the Policy Interpretation must have been signed by the President to be effective. *Pederson v. Louisiana State Univ.,* 912 F.Supp. 892, 910 (M.D.La.1996) ("[The Policy Interpretation] was never approved by the president. The Policy Interpretation does not have the binding effect of those rules, regulations or orders authorized by 20 U.S.C. § 1682.").

First, the Court finds no reason why the Policy Interpretation must be signed by the President as it is only a guideline to interpret Title IX and not a rule, regulation, or order. *See Cohen,* 879 F.Supp. at 199. Second, the *Pederson* court still relied on the Policy Interpretation when analyzing the plaintiffs' claims, even though it noted that it had not been submitted to the President for approval. *Pederson,* 910 F.Supp. at 910-12. Therefore, this argument does not justify excluding the Policy Interpretation.

Defendants have not produced a reason, evidentiary or otherwise, to exclude the Policy Interpretation. Thus, the Court denies its Motion *in Limine.*

An Order consistent with this Opinion will follow.

ORDER

In accordance with the Opinion entered this day;

IT IS HEREBY ORDERED that Defendants' Motion *in Limine* to Exclude Application of OCR Inter-Collegiate Athletic Policy Interpretation (Dkt. No. 302) is **DENIED.**

All Citations

Not Reported in F.Supp.2d, 2007 WL 5830967

Footnotes

[1] Examples of the cases in which Dr. Lopiano provided testimony are: *Pederson v. Louisiana State University,* 213 F.3d 858 (5th Cir.2000); *Cohen v. Brown University,* 101 F.3d 155 (1st Cir.1996); *Roberts v. Colorado State Bd. of Agriculture,* 998 F.2d 824 (10th Cir.1993).

[2] Interpretation of Title IX Education Amendments of 1972, 44 Fed.Reg. 71413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).