

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Marian Spencer, et al.) Case No. 1:04-cv-00738
)
Plaintiff,) (Judge Dlott)
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-v-)
)
J. Kenneth Blackwell, et al.) MOTION IN LIMINE OF DEFENDANT
) INTERVENORS TO EXCLUDE THE
) TESTIMONY OF HOWARD TOLLEY,
Defendant.) OR IN THE ALTERNATIVE, LIMIT THE
) SCOPE OF HIS TESTIMONY

Defendant Intervenors, Charles H. Winburn, Sam Malone, and Clara Pugh (collectively “Intervenors”), hereby move this Court for an order excluding the testimony of Plaintiff’s identified expert, Howard Tolley. As discussed more fully in the attached Memorandum in Support, Mr. Tolley’s testimony is irrelevant and unreliable and, therefore, inadmissible.

Respectfully submitted,

/s/ Drew M. Hicks

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MEMORANDUM IN SUPPORT

In the seminal case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court reinforced the trial court's role as the "gatekeeper" for expert evidence. The court's duty, as explained in *Daubert*, is to determine the relevance and the reliability of any proffered expert opinion *Id.* at 592-93; *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 249, 250 (1999).

Rule 702 of the Federal Rules of Evidence, which was amended effective December 1, 2000 to codify the Supreme Court's *Daubert* reliability standard, provides:

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (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 (West 2004).

I. Mr. Tolley's Proposed Testimony Is Not Relevant To The Issues That Will Be Decided By This Court.

Thus, the Court's first task as "gatekeeper" of proposed expert testimony is to determine whether or not it is relevant; that is, whether it will assist the trier of fact to determine a fact in issue. *Kumho Tire*, 526 U.S. 137, 152 (objective of *Daubert* is to ensure reliability and relevancy of expert testimony); *Greenwell v. Boatwright*, 184 F.3d 492, 496 (6th Cir. 1999) (relevance requirement ensures that there is a "fit" between expert testimony and the issue to be resolved by the trial); *Pride v. BIC Corp.*, 218 F.3d 566, 577 (6th Cir. 2000) (same).

In this action the Court is simply asked to enjoin the Defendants from permitting challengers in the polling places of Hamilton County during the November 2, 2004 election. Specifically, this Court is to consider only four factors in determining whether to grant injunctive

relief: (1) movant's likelihood of success on the merits; (2) the extent to which the movant is being irreparably harmed by the conduct complained of; (3) the extent to which the defendant will suffer irreparable harm if the injunctive relief is granted; and (4) whether the public interest would be served by the issuance of injunctive relief. *ACLU v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003).

None of Mr. Tolley's opinions bear any relevance or connection with issues to be decided in this case. No where in his Declaration does Mr. Tolley attempt to explain the specific harm that would result from the placing of challengers in polling places. He does baldly and speculatively state that African American voters will be "intimidated" by this process, but he does not explain the irreparable harm that results from such "intimidation." Neither does Mr. Tolley attempt to explain how the public interest would be served by the issuance of injunctive relief. In short, there is not a "fit" between Mr. Tolley's testimony and the issue to be resolved by the trial. *See Greenwell*, 184 F.3d at 496.

II. Mr. Tolley's Proposed Testimony Is Unreliable And Inadmissible.

The second aspect of the Court's *Daubert* inquiry relates to the reliability of the proposed expert testimony. An expert may not opine to conclusory or untested opinions: "The word 'knowledge' [in Rule 702] connotes more than subjective belief or unsupported speculation" as the basis for expert opinion. *Daubert*, 509 U.S. at 590. While courts are not to be concerned with the reliability of conclusions generated by valid methods, principles, and reasoning, they are charged with the special obligation to determine whether the principles and methodology underlying the testimony are valid. *American & Foreign Ins. Co. v. General Electric Co.*, 45 F.3d 135, 138 (6th Cir. 1995). In this case, the methodologies underlying Mr. Tolley's conclusions are entirely subjective and wholly unreliable. As the court in *Grdinich v. Bradlees*,

187 F.R.D. 77, 82 (S.D.N.Y. 1999), a court performing a Daubert analysis must exclude expert testimony where the expert “seems to base his conclusions on his own authority,” because it has not reliable foundation. As is clear throughout Mr. Tolley’s Declaration, his opinions are based almost entirely on his “thirty-year career in higher education” and the classes that he has taught. Mr. Tolley’s exclusive reliance upon his own authority requires that this Court exclude his testimony.

Additionally, in *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994), the Sixth Circuit held that a person was not a non-scientific expert merely because he had a general knowledge or understanding of a subject. The Court excluded the testimony of a purported expert on general police procedures and practices even though he had been educated in criminal justice, had formally been a police officer, and taught police management techniques. *Id.* at 1348-1349. Such credentials did not qualify him as an expert because they did not provide him with anymore knowledge than a trier of fact would have on the effect of disciplinary shortcomings on the future conduct of police officers. *Id.* at 1352. As the Court analogized:

The distinction between scientific and non-scientific expert testimony is a critical one. By way of illustration, if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.

On the other hand, *if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness IF a proper foundation were laid for his conclusions.* The foundation would not related to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

Id. at 1349-50 (emphasis added).

Mr. Tolley is like the untrained beekeeper with no experience in observing a bee taking flight, nor has a proper foundation been laid for his supposed expertise. Mr. Tolley has no first hand knowledge that challengers at polling places intimidate African American voters. Instead, he bases his opinions on “thirty-year career in higher education,” and three articles or studies to conclude that, “[a] system of challengers posed disproportionately in African American precincts in Hamilton County under the rules of engagement approved by the Hamilton County Board of Elections will serve to intimidate African American voters in much the same way other techniques have been used to deny the franchise to African Americans.” Thus, his entire opinion relies upon his knowledge of the history of discrimination against African-Americans in the United States and upon only ONE study that discusses the intimidation of African-American voters at the polls, which was published over twenty-years ago in the *Civil Rights Research Review* and reported that poll watchers intimidated prospective minority voters in some Georgia counties.

The other two articles or studies cited by Mr. Tolley do not address factual data that would support the conclusion that poll watchers intimidate minority voters. In fact, the last report that Mr. Tolley cites is a study published on the People for the American Way’s website. Mr. Tolley uses this study to outline examples of a “concerted effort to threaten and harass black and Hispanic voters.” These alleged examples do not address the effects that poll watchers might have on potential minority voters; they focus solely on incidents in which groups of voters have been allegedly singled out because of their race. Not one of the examples remotely refer to the issues of this matter. Moreover, nothing in Mr. Tolley’s background provides him with the experience to opine that what may have happened in another part of the country during another time period will happen now, in 2004, in the State of Ohio and the County of Hamilton.

Accordingly, the Court should exclude Mr. Tolley's testimony, or in the alternative limit his testimony to his personal observations and the history of discrimination.

Respectfully submitted,

/s/ Drew M. Hicks

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document, namely, MOTION IN LIMINE OF DEFENDANT INTERVENORS TO EXCLUDE THE TESTIMONY OF HOWARD TOLLEY, OR IN THE ALTERNATIVE, LIMIT THE SCOPE OF HIS TESTIMONY was served upon counsel of record via the Court's ECF/CM system this 29th day of October, 2004.

/s/ Drew M. Hicks

Drew M. Hicks