

2003 WL 41997

Only the Westlaw citation is currently available.  
United States District Court,  
S.D. New York.

Elsa GULINO et al., Plaintiffs,  
v.

THE BOARD OF EDUCATION OF THE CITY  
SCHOOL DISTRICT OF THE CITY OF NEW  
YORK and the New York State Education  
Department, Defendants.

No. 96 Civ. 8414(CBM). | Jan. 6, 2003.

Black and Latino teachers, who brought suit against state and city boards of education, filed motions in limine seeking to exclude testimony of State Education Department experts. The District Court, Motley, J., held that: (1) director of non-profit educational advocacy group was sufficiently qualified as an expert on education policy to testify on at least some of the issues, and (2) expert testimony of president of consulting firm specializing in employment risk management would assist the trier of fact to understand the evidence presented on the complex issue of what standards for validation should be applied to the tests at issue.

Motions granted in part and denied in part.

## Opinion

### MEMORANDUM OPINION AND ORDER

MOTLEY, J.

\*1 Plaintiffs in this case have filed four Motions *in Limine*. The first, to exclude evidence concerning the educational backgrounds, teaching performance and other qualifications of individual class members, was granted by the court orally on the first day of trial, December 8, 2002. At that time, the court allowed defendants State Education Department (SED or “the Department”) and New York City Board of Education (BOE or “the Board”) until December 20, 2002 (further extended to December 27, 2002) to respond to the remaining three motions. Those motions are to exclude the reports and testimony of SED experts: (1) Katherine Haycock; (2) Joan Haworth; and (3) James Sharf, respectively. Defendants having timely responded, the court now addresses these motions

in order.

#### 1. Katherine Haycock

<sup>[1]</sup> Defendant SED has listed Katherine Haycock as an expert witness who will testify to the benefits of teacher testing. She is the Director of the Education Trust, a non-profit educational advocacy group in Washington, D.C.; prior to that she was Executive Vice President of the Children’s Defense Fund. She has an M.A. in education policy and completed the necessary course-work for a Ph.D. in the same.

Plaintiffs move to exclude her testimony and report as irrelevant, unreliable, and the expert opinion of a witness not actually qualified as an expert.

Her testimony is *irrelevant*, they say, because her conclusions are based on studies of teachers who were subjected to *validated* exams; thus, she assumes the issue disputed at trial. The principal question in this trial, argue plaintiffs, is whether the tests are valid in the first place; they do not dispute that the state may require teachers to pass valid exams. By assuming that the tests are valid, say plaintiffs, Ms. Haycock’s report and testimony address an issue not in dispute and are therefore irrelevant.

Second, plaintiffs claim that Ms. Haycock’s report fails the tests for *reliability* set forth in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), in that her conclusions are based on studies of other states with different tests. Further, plaintiffs claim that her report is largely comprised of unsupported generalizations and devoid of scientific rigor. For example, in her report, Ms. Haycock states that several members of her staff examined questions from the National Teacher Examinations (NTEs) given in the mid–1990s; but there is no explanation of how such questions were chosen for examination, who performed the review or why earlier tests were not reviewed. The result, say plaintiffs, is a random study with no probative weight.

Plaintiffs argue that as a policy expert, Ms. Haycock is not qualified to testify about test development and validation, teacher performance and evaluation, and the use of the NTE and Liberal Arts and Sciences Test (LAST) in New York. Since those three issues are what this case is about, plaintiffs submit, her expertise is in an area unrelated to this case.

\*2 Lastly, plaintiffs specifically move to exclude any

testimony by Ms. Haycock regarding the U.S. Secretary of Education's June 2002 Report ("Secretary Paige's Report"), since it was not, according to plaintiffs, disclosed as grounds for her testimony until fewer than ninety days before trial. Therefore, pursuant to Fed. R. of Civ. Pro. 37(c)(1) and 26(a)(2), it should be excluded.

Although the court is mindful of plaintiffs' objections and deems them not without merit, since this is a bench trial, the court has decided to exercise its discretion in favor of admission.<sup>1</sup> Ms. Haycock is sufficiently qualified as an expert on education policy to testify on at least some of the issues in this trial.

Plaintiffs, of course, retain the right to object to those questions put to Ms. Haycock that call for testimony beyond her area of expertise, as well as to cross examine her about her methods, the scientific rigor (or lack thereof) of her report and any other issue raised in her direct examination. *See B.F. Goodrich v. Betkoski*, 99 F.3d 505, 526 (2d. Cir.1996) ("[I]f [a party] honestly believe[s] [an expert's] scientific evidence is weak, they should cross-examine him vigorously at trial and present contrary evidence to refute his findings and conclusions. This is the traditional and appropriate means of attacking admissible evidence with which one disagrees" (citations omitted)). During the fact-finding stage, the court will grant Ms. Haycock's report and testimony only so much weight as it merits.

In reference to Secretary Paige's Report, one of SED's attorneys, Jane Conrad, has filed a sworn statement that at Ms. Haycock's deposition on July 15, 2002, she (Ms. Conrad) informed plaintiffs' counsel that Ms. Haycock's conclusions were supported by Secretary Paige's Report, that she (Ms. Haycock) would so-testify at trial and that at plaintiffs' request, SED would produce her for another deposition concerning the Report. Conrad Decl., ¶ 5. According to that statement, plaintiffs' counsel requested a letter "advising him that Ms. Haycock would testify regarding that report." *Id.* That letter was sent in early October 2002. *Id.*, ¶ 8; Pl.s' Mem. in Supp. of Mot. *in Limine* in re Haycock at 13. The Department provides no explanation for the almost three month delay in sending the letter; however, it does not appear that plaintiffs have been unduly prejudiced by that delay. They have been aware of the report and that Ms. Haycock would testify about it since July 2002, well beyond the ninety-day window required by Fed. R. Civ. Pro. 26(a)(2)(C).

Accordingly, plaintiffs Motion *in Limine* to exclude the reports and testimony of Katherine Haycock is DENIED.

## **2. Joan Haworth.**

Dr. Joan Haworth is defendant SED's chief expert witness on the issue of whether or not the NTE and LAST manifest a disparate impact on black and Latino teachers compared with white teachers. The subject matter of her testimony was discussed at greater length in this court's Opinion and Order of November 22, 2002, disposing of the many and varied motions and cross motions for summary judgment in this case. *See Gulino et al. v. Board of Educ. of City School District of City of New York*, 2002 WL 31654974 at \*20-21 (S.D.N.Y.)

\*3 Consistent with that Opinion and Order, Dr. Haworth may not testify in an attempt to explain the differential pass rates of blacks and Latinos versus whites on the NTE and the LAST through reference to the social, economic and educational backgrounds of persons taking the tests. *See id.*

However, also consistent with the November 22 Opinion and Order, Dr. Haworth may testify with respect to the issue of whether the tests in fact have a disparate impact on black and Latino test-takers as well as to methods of statistical analysis in general (provided she is not asked about the subject matter prohibited in the preceding paragraph). *See id.* at 22.

Accordingly, plaintiffs Motion *in Limine* to exclude the reports and testimony of Joan Haworth is GRANTED in part and DENIED in part.

## **3. James Sharf**

<sup>121</sup> Dr. Sharf is the president of Sharf & Associates, "a consulting firm specializing in employment risk management by advising [employers] on developing, implementing and defending selection and appraisal systems." Fourth McHale Decl. Report of James Sharf at 1. He has a Ph.D. in Industrial Psychology, and he worked for the United States Equal Employment Opportunity Commission (EEOC) from 1974 to 1978 and again from 1991 to 1993, helping to draft the guidelines used to evaluate employment and licensing tests. *Id.*, ¶¶ 4, 7.

Plaintiffs move to preclude his testimony and report on the grounds that they "address strictly legal issues that are within the province of this Court to decide." Pl.s' Mem. in Supp. of Mot. *in Limine* in re Sharf at 2. It is well-settled that "experts may not invade the court's province by testifying on issues of law." *In re Initial Public Offering Securities Litigation*, 174 F.Supp.2d 61, 64 (S.D.N.Y.2001) (citations omitted).<sup>2</sup>

SED submits that there are three different industry

standards for employment and licensing tests: (1) EEOC guidelines; (2) Principles for the Validation and Use of Personnel Selection Procedures, promulgated by the Society for Industrial and Organizational Psychology, Inc. (SIOP Principles); and (3) Standards for Educational & Psychological Tests, prepared by a Joint Committee of the American Psychological Association, American Educational Research Association & National Council on Measurement in Education (APA Standards). SED further submits that determining which standards apply to which types of tests requires a complex analysis that Dr. Sharf can help the court to undertake.

The court agrees with SED that Dr. Sharf's testimony "will assist the trier of fact [in this case, the court] to

understand the evidence" presented on the complex issue of what standards for validation should be applied to the tests at issue. Fed.R.Evid. 702. Industry standards and the application thereof, contrary to plaintiffs' assertions, are not strictly legal issues. Again, it goes without saying that plaintiffs retain the right to vigorously cross-examine Dr. Sharf, as well as to object to individual questions which call for a legal conclusion.

\*4 Accordingly, plaintiffs' Motion *in Limine* to exclude the reports and testimony of James Sharf is DENIED.

#### Footnotes

- 1 It is well-settled that the admission or exclusion of expert testimony is within the court's discretion. See *Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76, 81 (2d. Cir.1997) (citing *Boucher v. United States Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d. Cir.1996)(per curiam).
- 2 See also Pl.s' Mem. in Supp. of Mot. *in Limine* in re Sharf at 1 n. 1 (collecting cases).