

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
Plaintiff,)
and)
)
KEVIN ARMSTRONG,)
Intervening Plaintiff)
)
)
)
)
NORTHWEST AIRLINES, INC.,)
)
)
Defendant.)

CIVIL ACTION NO.

00-2916 Ma/A

**PLAINTIFF EQUAL OPPORTUNITY COMMISSION'S MEMORANDUM IN SUPPORT OF MOTION IN LIMINE
TO DISQUALIFY DR. O'CONNELL AND DR. ZANICK AS EXPERT WITNESSES**

INTRODUCTION

Plaintiff Equal Employment Opportunity Commission ("Commission" or "EEOC") submits this memorandum in support of its motion in limine to disqualify Dr. Kevin O'Connell and Dr. David Zanick, as expert witnesses pursuant to Federal Rule of Evidence 702. The Commission contends that Dr. O'Connell and Dr. Zanick are fact witnesses. (1) their expert opinions involving the treatment, management, and symptoms of diabetes generally and the symptoms and management of Kevin

Armstrong's diabetes specifically do not meet the legal standard for the admissibility of expert testimony set forth in Fed. R. of Evid. 702, *Daubert v. Merrell-Oow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1998), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

APPLICABLE FACTS

On September 27, 2000, the EEOC filed this action on behalf of Kevin Armstrong alleging that Northwest Airlines ("Defendant" or "NWA") violated the Americans with Disabilities Act of 1990 ("ADA") when it withdrew its offer of employment to Kevin Armstrong to fill the Equipment Service Employee ("ESE") position because of his disability, insulin-dependent diabetes. During the course of the litigation, Defendant hired Dr. Kevin O'Connell and Dr. David Zanick to prepare expert reports on Kevin Armstrong's diabetes in support of its claim that Armstrong cannot be placed in the ESE position because he poses a direct threat to himself or others.

Kevin Armstrong's Diabetes

Kevin Armstrong is a Type I, insulin-dependent diabetic. *Exh. 1, Medical Records from Dr. Myers*. Evidence produced during discovery establishes that he is substantially limited in the major life activities of eating and caring for himself. Specifically, he must contend with significant dietary restrictions and, unlike the average person, he must, on a daily basis, engage in a balancing act between the insulin doses he must administer and the food he eats. *Exh. 2, Armstrong Dep. 162:10-21*. When Armstrong's blood sugar levels fall, he has to eat something. *Exh. 2, Armstrong Dep. 187:25, 188:1-25*. His blood sugar levels can drop simply because he exercises more strenuously or gives himself too much insulin. *Id. 193:10-14*. Conversely, when his blood sugar levels rise, he has to increase his insulin intake. *Id. 189:6-10*.

According to Dr. Lisa Myers, Armstrong's treating physician, a board-certified endocrinologist, these elevated levels are associated with risks of future complications such as developing kidney failure, diabetic eye problems or foot problems. *Exh. 3, Myers Dep. 66:10-18*. During her deposition, Dr. Myers testified that as long as Armstrong checks his blood sugar and has access to food, he can handle the ESE job. *Exh. 3, Myers Dep 159:11-17*. She explained that the references to poor control in Armstrong's medical records would actually be more likely to prevent Armstrong from such hypoglycemia episodes. *Exh.3, Myers Dep. 156:12-25*. Defendant seeks to offer the expert testimony of two other doctors, Dr. Kevin O'Connell and Dr. David Zanick on the treatment management and symptoms of diabetes generally and specifically as to Kevin Armstrong's diabetes. The EEOC submits that both Dr. O'Connell and Dr. Zanick lack the experience and scientific knowledge to qualify as experts in this area.

STANDARD OF REVIEW

A. Legal Standard for the Admissibility of Expert Testimony

The Supreme Court's evidence "trilogy" sets forth the standard covering the admissibility of expert testimony, first in *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, (1993), then in *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997) and later in *Kumho Tire Co. Limited v. Carmichael*, 526 U. S. 137 (1999). These cases make clear that the relevance and reliability tests in Fed. R. Evid. 702 provide district court judges with the criteria for making preliminary "gatekeeper" decisions to ensure that no opinion is admitted unless it is based

Scientific knowledge as the basis for an expert opinion connotes more than "subjective belief or unsupported speculation," *Daubert*, 509 U.S. at 590, and requires more than the expert's inadmissible bald assertion supporting that view. *Daubert* sets forth a checklist of factors to be considered by district courts to determine whether proposed expert testimony is scientifically valid, hence admissible. These factors examine (1) whether the expert's theory can be and has been tested, (2) whether the theory has been published in peer-reviewed journals and subject to professional scrutiny and criticism, (3) what is the known or potential error rate associated with applying the expert's theory and method to real data, and (4) whether the expert's theory enjoys general acceptance in the relevant scientific community. 509 U.S. at 593-94. *Joiner* reaffirmed the Court's view that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert." 522 U.S. at 146.

Kumho Tire is fully consistent with and expands on the two earlier decisions. Justice Breyer's opinion makes clear that the checklist is "helpful, not definitive." 526 U.S. at 151. Additional factors may be relevant on a case by case basis, depending on the particular at-issue expert's scientific community. One such factor found to be relevant in determining the scientific reliability of expert testimony is whether the experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." Fed R. Evid 702 Advisory Committee's Note quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir.), cert. denied 516 U.S. 869 (1995).

B. Federal Rule of Evidence 702

Rule 702 requires that a witness must be an expert and must reliably assist the finder of fact. Even before *Kumho Tire*, *Daubert* made clear that where proposed experts relied on unrealistic and unreliable assumptions, or as *Joiner* characterized them as "subjective belief or unsupported speculation," 522 U.S. at 140, the testimony should be rejected. *Target Market Publishing, Inc. v. ADVO, Inc.*, 136 F.3d 1139 (7th Cir. 1998).

ARGUMENT

A. Dr. Zanick and Dr. O'Connell Are Fact Witnesses and they Should Be Disqualified as Expert Witnesses under the Supreme Court's Evidence Trilogy -*Daubert*, *Joiner*, and *Kumho Tire*

Before considering expert opinions of the sort proposed here by Defendant, the "trilogy" requires the district court to exercise its "gatekeeping responsibility" and exclude any testimony that is not both relevant and reliable. The proposed reports of Dr. Zanick and Dr. O'Connell are precisely the type of unsubstantiated speculation that *Daubert* and its progeny were intended to weed out. Neither doctor has direct experience nor scientific knowledge to qualify him to opine about the symptoms and treatment of insulin-dependent diabetes. Dr. O'Connell acknowledged, during his deposition, that his board certification is in internal and occupational medicine. *Exh. 5, O'Connell Dep.51: 6-9*. One hundred percent of his practice involves work-related situations at the Park Nicollet Clinic, where he works. (2) *Id.* 53: 1-17 He doesn't treat diabetics as part his practice. *Id.* 55: 1-5 He hasn't had recent course work on diabetes *Id.* 55:6-10. Indeed, Dr. O'Connell's list of publications does not include any papers or presentations on the subject of diabetes. Despite this lack of knowledge of the trends in the care of diabetes, the only literature Dr. O'Connell consulted, in preparing his report, was the Washington Manual of Internal Medicine, a general desk reference, not specific to

Likewise, Dr. Zanick does not claim to be an expert in the symptoms and treatment of diabetics. He too is certified in occupational medicine. *Exh. 6, Zanick Dep.* 11 :3,4. He described that specialty as "looking at the worksite -almost as a patient." *Id.* 12:4-7. Like Dr. O'Connell, he sees patients for pre-placement exams, fitness-for-duty evaluations and worker injuries. *Id.* 12:14-22. On treating diabetics, Dr. Zanick testified that he believed that he may have treated less than three diabetic patients in the last ten years. *Id.* 15:2-17. He could only identify one patient, a forty year old, with adult onset diabetes. *Id.* 15: 18-25, 16: 1-4. As to his relationship with Defendant, Dr. Zanick indicated that 90 percent of his time is spent exclusively working with Northwest Airlines as a consultant. *Id.* 17: 11-25, 18:1. Further, Dr. Zanick admitted that he didn't review any medical manuals or treatises in preparation for his report. *Id.* 38:4-16. Finally, a review of his curriculum vitae demonstrates that Dr. Zanick has never written about, or given presentations on, the subject of diabetes.

District Courts have excluded expert testimony in similar cases where the medical doctors, who purport to be experts, do not have the knowledge or personal experience to testify as experts in a particular field. (3) The case of *Harvey v. Rines*, 1999 WL 33117105 * 6 (D. Me. Jan. 19, 1999) is instructive (4). In that case, the court excluded the expert testimony of Dr. Guzelian, a board-certified internist and liver specialist, because he had no direct experience or knowledge on the subject of drug overdoses from the drug Tegretol. *Id.* There, as here, Dr. Guzelian testified that he had not done any studies and did not claim to be an expert in the field. He also acknowledged that he had not treated any patients with Tegretol overdoses and that his opinion was drawn from a review of literature, not personal knowledge. In granting a motion in limine to exclude Dr. Guzelian's expert testimony the Court remarked "...that Dr. Guzelian's proffered testimony is more 'unscientific speculation offered by a genuine scientist' than it is 'genuinely scientific'. ..." *Id.* (quoting *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996). See *O'Conner v. Commonwealth Edison Company*, 13 F. 3d 1090, 1107 (7th Cir.) cert. denied. 512 U.S. 1222 (1994)(noting that physician expert's treatment of five patients with radiation-induced cataracts, in twenty years, not sufficient for scientifically sound opinion on the subject); *Alexander v. Smith & Nephew*, 98 F. Supp.2d 1310, 1315 (N.D. Okla. 2000)("A blanket qualification for all physicians to testify to anything medically-related would contravene the Court's gate-keeping responsibilities."). *But cf. Government of Virgin Islands v. Sampson*, 94 F. Supp. 2d 639, 648 (D. V.I. 2000) (Once doctor is qualified as expert in one speciality area, he may testify in another). In this case, Dr. O'Connell and Dr. Zanick simply lack the training or personal experience to opine on the management and treatment of Armstrong's diabetes. Their opinions may be best seen as the testimony of fact witnesses offered to support Defendant's legal argument in the guise of expert testimony Thus, they should be disqualified as experts.

2 The Park Nicollet Clinic was known as the Airport Medical Clinic in 1998 when Armstrong applied for the ESE position.

3 *Burton v. Danek Med., Inc.*, No. CIV.A. 95-5565, 1999 WL 118020, *3-4 (E.D. Pa. Mar. 1, 1999) (a board certified neurologist barred from testifying on spinal surgery based upon a review of the literature rather than training or experience); *Diaz v. Johnson Matthey, Inc.*, 893 F. Supp. 358, 372-73 (D.N.J. 1995) (pulmonologist incompetent to testify regarding platinum allergy based upon merely a casual study of the literature); *Smith v. Rasmussen*, 57 F. Supp. 2d 736, 769-70 (N.D. Iowa 1999)(court excluded under Daubert and Kumho the opinion testimony of defendant's psychiatrist who based his testimony upon a review of the literature only); *Cuevas v. E.I. DuPont De Nemours and Co.*, 956 F. Supp. 1306 (S. D. Miss. 1997) (court excluded testimony of expert after determining that he had no knowledge of toxicological effects that herbicide could produce).

3. **The Expert Opinions of Dr. O'Connell and Dr. Zanick lack Scientific Rigor Because They Are Not Based on Adequate Scientific Knowledge**

The gatekeeper function necessitates that the court "make certain an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co.* 526 U.S. 137,152 (1999). The expert's knowledge, from which he draws his conclusions, must be based on a body of known facts or ideas from such facts. *Daubert*, 509 U.S., at 580. As noted above, Dr. Zanick and Dr. O'Connell, spend their professional time on such matters as work-related injuries and pre-placement physicals. They have both acknowledged that they don't treat diabetics and they have not kept current with the field of endocrinology. Further, both doctors admit that they did not review any medical literature or treatises, specific to diabetes, before preparing their reports.

The management of diabetes is not a static discipline that would allow a nonspecialist to speak with authority on the treatment of diabetes without first familiarizing himself with the current state of the field. Enormous strides have been made, over the last decade, in the ability to screen and manage the risks associated with individuals with insulin-dependent diabetes. In 1991, the Federal Aviation Administration ("FAA") initiated a program to allow insulin-dependent air traffic controllers to remain in their post, based on advances in the management of diabetes. *Exh.7, Special Issuance of Third-Class Airman Certificates to Insulin Treated Diabetic Airman Applicants*, 61 *Fed. Reg.* 59282, 59288 (1996). Five years later, the FAA changed its policy to allow the issuance of special medical certificates for third class airmen with insulin-dependent diabetes, based on, among other things, the recommendation of a panel of experts in the field of endocrinology, that the risks associated with diabetes could be minimized. *Id.* at 59285. (5)

The Department of Transportation (DOT) has now issued proposed regulations to allow insulin-dependent diabetics to drive commercial motor vehicles on interstate highways. A panel of physicians, expert in the treatment of diabetes, expressed the opinion that "advances in the treatment of diabetes make it possible both to control the disease and to permit the identification of those individuals capable of doing so." *Exh. 8, Notice of Intent to Issue Exemptions and Request for Comments*, 66 *Fed. Reg.* 39548, 39550 (2001). Based on an analysis of the American Diabetes Association (ADA), the DOT received more than 300 comments, during its initial comment period, from individuals and organizations, with 97 % of the responses supporting permitting insulin-dependent diabetics to drive, with appropriate protocols. *Ex. 9 ADA Comments* p. 4. Moreover, the ADA pointed to the progress made in blood-sugar self monitoring, routine hemoglobin testing, new types of insulin and new insulin delivery systems. *Id.* at 6. Of particular note are the improved insulin regimens that minimize the risk of hypoglycemia and the new monitoring devices that provide continuous monitoring. *Id.* at 5, 6. Illustrative of the unprecedented advances in the monitoring of blood sugar is the Cygnus Glucowatch, which, warn like a wrist watch, provides continuous monitoring of blood sugar and sounds an alarm if the blood sugar

drops below the user-selected alert level and, more important, alarms for rapidly falling glucose, before the onset of hypoglycemia. *Id*; *Exh. 10, Selected Medical Journals*.

Given the "explosion of advances" in the management of the risks imposed by someone with diabetes over the last 15 years, the failure of Dr. O'Connell and Dr. Zanick to review even one medical journal, on the current state of the field, renders them unqualified to testify as experts on the symptoms and treatment of Kevin Armstrong's diabetes. *Ex. 9 ADA Comments p.11*. See *Wade-Greaux v. Whitehall Labs., Inc.*, 874 F. Supp. 1441, 1476 (D.V.I.) *affirmed* 46 F.3d 1120 (1994)(doctor who had not engaged in studies relating to issue upon which he proffered expert opinion and whose only knowledge or experience comes from review of selected literature for the purpose of testifying was not qualified to offer expert testimony); *Mancuso v. Consolidated Edison Co. of N.Y.*, 967 F. Supp. 1437, 1443-1446 (S.D.N.Y. 1997) (excluding the testimony of a medical doctor with no experience in toxic torts from testifying regarding the effects of PCBs). Because Dr. O'Connell and Dr. Zanick did not review any of the appropriate literature, in the field, they cannot demonstrate that they possess the body of knowledge necessary to present scientifically sound testimony that meets the intellectual rigor required *Daubert*. See *Claar v. Burlington Northern Railway Co.*, 29 F.3d 499, 503 (9th Cir. 1994) (excluding expert testimony, district court noted that opinion was formed prior to reviewing relevant literature). Dr. O'Connell and Dr. Zanick are included on Plaintiffs and Defendant's witness lists as fact witnesses, all or part of their testimony may be admissible. However they should be disqualified as experts.

CONCLUSION

The proposed expert reports and opinions of Dr. O'Connell and Dr. Zanick on behalf of Defendant do not satisfy Federal Rule of Evidence 702, and the legal standard for the admissibility of expert testimony set forth in the Supreme Court's "trilogy" of expert admissibility cases. Because Dr. Zanick and Dr. O'Connell are only fact witnesses, they should be disqualified as experts.

Respectfully Submitted,

NICHOLAS M. INZEO
Acting Deputy General Counsel

GWENDOLYN REAMS
Associate General Counsel

KATHARINE W. KORES
Regional Attorney
BPR #6283

FAYE WILLIAMS
Supervisory Trial Attorney
BPR# 011730

DEIDRE SMITH
Senior Trial Attorney
BPR #018499

EQUAL EMPLOYMENT OPPORTUNITY

COMMISSION
1407 Union Avenue, Suite 621
Memphis, Tennessee 38104
(901) 544-0140

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff Equal Employment Opportunity Commission's **Memorandum In Support of Motion n Limine to Disqualify Dr. O'Connell and Dr. Zanick as Expert Witnesses** was mailed this date via U.S. Mail to the following counsel of record.

Herbert Gerson, Esq.
Timothy Bland, Esq.
Ford and Harrison, LLP
6750 Poplar Avenue, Suite 600
Memphis, TN 38138

Joe Lee Wyatt, Esq.
McWhirter & Wyatt
Union Commons
73 Union Ave.
Memphis, TN 38103