2000 WL 1191078
United States District Court, S.D. New York.

George P. **RONIGER**, Plaintiff,

v.

H. Carl **MCCALL**, individually and as Comptroller of the State of New York, and Rosemary Scanlon, individually and as State Deputy Comptroller for the City of New York, Defendants.

No. 97 Civ. 8009(RWS).
|
Aug. 22, 2000.

Attorneys and Law Firms

Berenbaum Menken Ben–Asher & Fishel, New York, NY, By: John A. Beranbaum, for Plaintiff, of counsel.

Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY, By: Debo P. Adegbile, Robert S. Smith, Maria H. Keane, for Defendants, of counsel.

OPINION

SWEET, J.

***1** Plaintiff George P. **Roniger** ("**Roniger**") moves for an an order excluding expert testimony and to try the causation issue of his Section 1983 claim to an advisory jury. Defendants H. Carl **McCall** ("**McCall**") and Rosemary Scanlon ("Scanlon") (collectively, "the Defendants") oppose the motion.

For the reasons set forth below, the motion will be granted in part and denied in part.

Parties, Facts and Prior Proceedings

The parties, facts, and prior proceedings in this action are set forth in the prior opinions of this Court, familiarity with which is presumed. *See* ***Roniger*** *v.* ***McCall***, 72 F.Supp.2d 433 (S.D.N.Y.1999) ("**Roniger** I"); ***Roniger*** *v.* ***McCall***, 22 F.Supp.2d 156 (S.D .N.Y.1998) ("**Roniger** II"). Pursuant to those decisions, which granted in part and denied in part the Defendants' motions to dismiss and for partial summary judgment, the claims remaining in this action are: (1) a First Amendment retaliation claim against **McCall** in his official capacity, pursuant to 28 U.S.C. § 1983, seeking equitable relief, and (2) a civil conspiracy claim against **McCall** and Scanlon individually, pursuant to 28 U.S.C. § 1985, seeking monetary damages.

From May of 1993 until approximately December 1, 1994, **Roniger** was employed in the Office of the State Deputy Comptroller for the City of New York ("OSDC"), a division of the Office of the State Comptroller. As set forth in ***Roniger*** I and II, **Roniger** has alleged in this action that he was terminated from his position at the OSDC as a result of his politically embarrassing statements in deposition testimony concerning a June 29, 1993 letter that **McCall**, who is the Comptroller for the State of New York, sent to then-Mayor David Dinkins in connection with New York City's efforts to prevent a downgrading of its bond rating. Although the record is less than clear concerning the specifics of **Roniger's** discharge, it is not disputed that he was notified of his dismissal from his position on December 1, 1994 and that the "effective date" of his termination was February 10, 1995. His annual salary as of that date was $103,477.

The Defendants retained Charles L. Sodikoff, Ph. D. ("Sodikoff"), to render an expert opinion in this case. Sodikoff has a Ph. D. in industrial/organizational psychology and has worked for more than 25 years in the field of hiring and career development consulting. Sodikoff subsequently prepared an "Assessment of Job Search Activity in the Matter of **Roniger** v. H. Carl **McCall**" (the "Expert Report"). The Expert Report sets forth matters concerning which the Defendants intend to call Sodikoff to testify at trial. Specifically, it contains opinions by Sodikoff concerning the length of time it should have taken **Roniger** to find a comparably paying job or to build a profitable consulting practice, and the reasonableness of **Roniger's** job search. The Expert Report concludes that **Roniger** should have obtained comparable work within six to ten months of his termination from the OSDC and that he should have built a consulting practice sufficient to replace his compensation in 1994 within two years of his termination. The report also reviews the steps taken by **Roniger** to obtain employment subsequent to his termination and concludes that **Roniger** did not conduct a "fully active and proper job search."

***2** The instant motion *in limine* was filed on April 11, 2000, and oral argument was heard on May 3, 2000, at which time the matter was deemed fully submitted.

Discussion

I. *The Motion To Exclude Expert Testimony*

Roniger does not dispute that Sodikoff is a qualified expert in the field of hiring and career development. The dispute herein turns on whether the testimony offered by Sodikoff is (a) reliable and (b) a proper subject for expert opinion evidence. **Roniger** seeks to exclude Sodikoff's testimony regarding when **Roniger** should have obtained comparable employment or build a consulting practice as unreliable under *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). **Roniger** seeks to exclude Sodikoff's testimony as to the reasonableness of **Roniger's** job search on the ground that it would not assist the jury and would invade their province of decision-making. *See Andrews v. Metro North Commuter R.R. Co.,* 882 F.2d 705, 708 (2d Cir.1989)

A. *Reliability Under Kumho and Daubert*

The standard for the admissibility of expert testimony at trial is set forth in Federal Rule of Evidence 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to 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.
>
> Fed.R.Evid. 702.

The trial judge is to act as a "gatekeeper" with respect to expert testimony to ensure that such testimony is both relevant and reliable. *See Daubert,* 509 U.S. at 589–91. This rule applies not only to scientific knowledge, but also to technical or other specialized knowledge. *See Kumho,* 526 U.S. at 141. The determination as to the relevance and reliability of such evidence is committed to the sound discretion of the trial court. *See id.* at 158.

Daubert sets forth specific factors, such as "testing, peer review, error rates, and 'acceptability' in the relevant scientific community," which the trial court may consider in determining reliability. 509 U.S. at 595. The *Daubert* test is flexible, however, and this "list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho,* 526 U.S. at 141. Expert testimony is reliable where it has "a traceable, analytical basis in objective fact." *Bragdon v. Abbott,* 524 U.S. 624, 653 (1998) (*citing General Elec. Co. v.. Joiner,* 522 U.S. 136 (1997)). "[O]pinion evidence that is connected to existing data only by the *ipse dixit* of the expert" should not be admitted. *Kumho,* 526 U.S. at 157 (*citing Joiner,* 522 U.S. at 146). It is within the trial court's discretion to determine what are reasonable criteria to be used to determine reliability in a particular case and whether the proposed testimony meets those criteria. *See Kumho,* 526 U.S. at 158 (decision to exclude expert evidence within trial court's discretion where based on "failure to satisfy either Daubert's factors or any other set of reasonable reliability criteria").

B. *The Expert Testimony As To When **Roniger** Should Have Found Comparable Work Or Established A Profitable Consulting Practice Will Be Excluded*

1. *Expert Testimony As To Mitigation By **Roniger** Is Relevant*

***3** An employee who has been subject to discriminatory discharge is required to mitigate his damages. *See Dailey v. Societe Generale,* 108 F.3d 451, 455 (2d Cir.1997). In *Greenway v. Buffalo Hilton Hotel,* the Second Circuit explained that this duty means that the discharged employee " 'must use reasonable diligence in finding other suitable employment,' which need not be comparable to [his] previous positions." 143 F.3d 47, 53 (2d Cir.1998) (internal citation omitted). The employer bears the evidentiary burden to show failure to mitigate by the employee. *See id.* Generally speaking, this requires the employer to show that suitable work exists in the marketplace and the discharged employee "has not made reasonable efforts to find it." *Id.* However, under *Greenway,* which involved a case in which the discharged employee "failed to pursue employment at all," there is an exception to the requirement that the employer establish the availability of comparable employment "if it can prove that the employee made no reasonable efforts to seek such employment." *Id.* at 54. Under the applicable legal standard, then, the expert evidence offered by **McCall** is relevant with respect to the issue of whether **Roniger** satisfied his obligation to mitigate his damages.

2. *The Expert Evidence As To When **Roniger** Should Have Found Comparable Employment Is Not Reliable*

Sodikoff states in the Expert Report that, in his opinion, **Roniger** should have found comparable employment "within a year, with the most likely range between 6 to 10 months" after his termination. Sodikoff further states that this opinion is based on his own experience and on statistical data. Sodikoff discusses two sources of statistical data. The first is a study conducted by Drake Beam Morin, Inc. (the "DBM Study"), a management consulting firm, of the job search experience of over 1000 senior management and executive level job seekers across the United States. According to this study, the average length of job searches by these executives before finding employment was 7.7 months in 1995. The average salary of these executives' new jobs was $100,207 as compared with the average salary of their old jobs of $101,014. The second source of statistical data is a survey by the National Association of Business Economists (the "NABE Survey"), which reported the median salary in 1996 of economists with over 25 years of experience as $95,000. The NABE Survey does not report data by geographic region but states that New York is one of the four top cities in the nation with respect to salary structure.

There are several problems with the reliability of Sodikoff's opinion as to how long it should have taken **Roniger** to find comparable work. First, he does not explain what theory or method he used to arrive at this opinion. It is not necessary that Sodikoff's methodology be subject to the specific criteria set forth in *Daubert,* such as peer review or error rates. *See* 509 U.S. at 595. Nonetheless, however simple Sodikoff's method or theory, he must provide some explanation thereof so that it can be evaluated as to its reliability. *See Kumho,* 526 U.S. at 157 (citation omitted). Sodikoff has failed to do so. Second, the statistical data he cites is too general to render his opinion reliable. The DBM Study results as to the average length of job search concerns "senior management and executive" job seekers as a whole without distinguishing as to their field. **Roniger** is an economist. In order to be reliable, Sodikoff's opinion as to when **Roniger** should have found comparable work should be based on information that is pertinent to **Roniger's** field.[1] *See Berk v. Bates Advertising USA, Inc.,* No. 94 Civ. 9140, 1998 WL 726030, at *3 (S.D.N.Y. Oct. 14, 1998) (admitting expert's opinion as to available employment opportunities based on information concerning executive positions in the advertising industry); *Barbour v. Medlantic Management Corp.,* 952 F.Supp. 857, 862–63 (D.D.C.1997) (admitting expert's opinion as to when plaintiff should have obtained comparable work based in part on survey of opportunities for materials management directors in hospitals).

***4** In addition, the DBM Study concerns the nation as a whole and does not provide data with respect to the relevant geographic region within which **Roniger** would be expected to find comparable work. *Cf. Birch v. FMC Corp.,* 98 Civ. 269 J (D.Wyo. Aug. 18, 1999) (unpublished opinion) (admitting expert's opinion as to employment opportunities available to plaintiff based on comparing plaintiff's credentials with database of classified ads for jobs in areas relatively near plaintiff's residence); *Barbour,* 952 F.Supp. at 862–63 (admitting expert's opinion as to when plaintiff should have found comparable work based in part on survey of available jobs in the geographic area). As for the NABE Survey, this study provides only salary data and does not provide a basis for a reliable opinion as to when **Roniger** should have found comparable work.

Finally, although it is permissible for Sodikoff to base his opinion on his own experience as a job counselor, *see Kumho,* 526 U.S. at 150, he must do more than aver conclusorily that his experience led to his opinion. *Cf. Berk,* 1998 WL 726030, at *3 (expert, who offered opinion as to available job opportunities based on expert's experience and plaintiff's credentials, supported her opinion with 151 'assignments' worked on during the relevant period concerning positions in advertising agencies compatible with plaintiff's skills and experience).

In sum, there is simply too great an "analytical gap" between the data and the opinion proffered for the opinion to be reliable. *Joiner,* 522 U.S. at 146; *see also Kumho,* 526 U.S. at 153 (evidence not reliable where "outside the range where experts might reasonable differ, and where the jury must decide among the conflicting views of different experts, even though the evidence is 'shaky' ').

3. *When **Roniger** Should Have Established A Consulting Practice To Replace His Compensation At OSDC*

The Expert Report also includes an opinion by Sodikoff that **Roniger** could have build an active consulting practice to replace the compensation he was earning at OSDC in 1994 "within two years of his termination, if not sooner." The report contains numerous observations by Sodikoff as to the nature of the efforts **Roniger** has made to build his consulting practice, and opinions by Sodikoff as to the adequacy or vigorousness of those efforts. However, Sodikoff does not identify—and the Court cannot discern—a basis for his opinion as to a specific time period within

which **Roniger** should have established a consulting practice providing compensation comparable to what he received in 1994. Therefore, Sodikoff will not be permitted to testify to that opinion.

C. *The Expert Testimony As To **Roniger's** Job Search Will Be Admitted In Part And Excluded In Part*

Under Rule 702, expert testimony is admissible if it is helpful to the trier of fact. *See* Fed.R.Evid. 702. Under Rule 704(a), opinion testimony that is otherwise admissible "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed.R.Evid. 704(a). However, the Advisory Committee Notes to Rule 704(a) caution that the provisions of Rule 704(a) "do[ ] not lower the bar so as to admit all opinions." Fed.R.Evid. 704(a) advisory committee's note. More specifically, the Notes observe that, pursuant to Rules 701, 702, and 403, "opinions which would merely tell the jury what result to reach" are not admissible. *Id.* Consistent with these rules, an expert will not be permitted to testify where she "undertakes to tell the jury what result to reach, [since] this does not aid the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury." *United States v. Duncan,* 42 F.3d 97, 101 (2d Cir.1994) (citations and internal quotation marks omitted).

***5** It would not be proper for Sodikoff to testify as to whether **Roniger's** efforts to find comparable employment were "reasonable" because this is an ultimate question in this case which is for the jury to decide based on all the evidence and this Court's instructions. *See Berk,* 1998 WL 726030, at *4 (expert in unlawful discharge case would not be permitted to testify as to whether plaintiff's efforts to find employment were "reasonable"); *see also Hygh v. Jacobs,* 961 F.2d 359, 364 (2d Cir.1992) (expert in excessive force case may not testify as to whether arresting officer's conduct was "not justified under the circumstances," not "warranted under the circumstances," and "totally improper"); *Andrews,* 882 F.2d at 709 (expert may not testify as to whether plaintiff was "reasonable" or defendant "negligent" in tort case); *Strong v. E.I. DuPont de Nemours Co., Inc.,* 667 F.2d 682, 685–86 (8th Cir.1981) (expert may not testify as to whether product warnings rendered product unreasonably dangerous). Such testimony is not helpful to the jury and invades their province of decision-making. Therefore, Sodikoff will not be permitted to testify to conclusions contained in the Expert Report as to whether **Roniger's** job search was "reasonable," "active and proper," "vigorous," "serious," and the like.

However, this does not mean that Sodikoff may not testify regarding **Roniger's** job search efforts. It is proper for Sodikoff to do so to the extent that his testimony offers information that is relevant to the issue of **Roniger's** mitigation and that lies outside the knowledge of a layperson. *See Duncan,* 42 F.3d at 102 n. 3. Thus, based on his own experience as a job consultant or other proper basis, Sodikoff may testify regarding matters such as: the nature and degree of efforts which typify an average or successful job search, the effect one would expect **Roniger's** age to have on his search, the resources available to a person in **Roniger's** position, the number of interviews one might expect to see generated based on certain search efforts, what makes for effective networking, and how **Roniger's** efforts compare to what are typical—or successful—efforts. *Cf. Marx & Co., Inc. v. The Diner's Club, Inc.,* 550 F.2d 505, 509 (2d Cir.1977) (expert testimony concerning ordinary practice in industry proper to assist jury in evaluating parties' conduct against that standard).

II. ***Roniger's** Request That The Section 1983 Causation Issue Be Tried To An Advisory Jury Will Be Granted*

Roniger and the Defendants agree that **Roniger's** Section 1983 claim for reinstatement is an equitable claim that must be tried to the Court rather than a jury. **Roniger**, however, has requested that the Court try the causation issue involved in his Section 1983 claim to an advisory jury.

Federal Rule of Civil Procedure 39(c) provides in relevant part that "[i]n all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury." The decision whether to use an advisory jury is committed to the discretion of the trial court. *See Peele v. New York City Dep't of Social Servs. Human Resources Admin.,* No. 92 Civ. 3765, 1995 WL 110085, at *5 (S.D.N.Y. March 14, 1995). Such juries have been utilized in discrimination cases. *See Peele,* 1995 WL 110085, at *5 (Title VII); *Ragin v. Harry Macklowe Real Estate Co., Inc.,* 801 F.Supp. 1213 (S.D.N.Y.1992) (Fair Housing Act), aff'd. in part, rev'd in part on other grounds, 6 F.3d 898 (2d Cir.1993). Responsibility for reaching a decision, including making findings of fact, remains with the court, *see Ragin v. Harry Macklowe Real Estate Co., Inc.,* 6 F.3d 898, 907 (2d Cir.1993), except that findings by the jury as to facts common to both claims are binding on the Court, *see Wade v. Orange County Sheriff's Office,* 844 F.2d 951, 954 (2d Cir.1988) (jury findings as to common facts in case involving both legal and equitable

claims preclude contrary findings by the court with respect to equitable claim) (citations omitted).

***6** An advisory jury is appropriate here for similar reasons as those cited by the Honorable Leonard Berkinow, United States Magistrate Judge, in *Peele,* 1995 WL 110085, at *5. A jury must be empaneled to hear **Roniger's** Section 1985 claims. Therefore, trying the Section 1983 causation issue to the jury in an advisory capacity would not undermine the efficiency of the trial or waste the jurors' time. *See id.*. Indeed, efficiency will be facilitated to the extent the parties and the Court will not be required to address issues concerning which evidence may be heard by the jury and which may not. *See id.* Finally, the facts concerning the two claims are overlapping, so that it can be expected that the jury would hear much of the evidence in any case. *See id.* Thus, **Roniger's** request will be granted.

Conclusion

Therefore, for the reasons set forth above, **Roniger's** motion to exclude expert testimony is granted in part and denied in part, and his request for an advisory jury is granted.

It is so ordered.

All Citations

Not Reported in F.Supp.2d, 2000 WL 1191078, 55 Fed. R. Evid. Serv. 523

Footnotes

1 The Defendants urge that Sodikoff is not required to provide data regarding opportunities for “municipal finance economists.” This argument is misplaced. **Roniger** does not contend, and this Court does not conclude, that the data must be so narrow.

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