IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

AMY LYNN HUGHES, :

Plaintiff, :

vs. :

GOODRICH CORPORATION, et al., :

Defendants. :

Case No. 3:08cv263

JUDGE WALTER HERBERT RICE

DECISION AND ENTRY SUSTAINING OSNER'S UNOPPOSED MOTION TO TAKE THE PERPETUATION OF TESTIMONY DEPOSITION OF DEAN DAVIS (DOC. #48); DECISION AND ENTRY OVERRULING GOODRICH'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF ROBERT GAYLOR, M.D. (DOC. #53); CONFERENCE CALL SET

Plaintiff Amy Hughes ("Plaintiff" or "Hughes") brings this litigation against her former employer, Defendant Goodrich Corporation ("Goodrich"), and a supervisor employed by Goodrich, Defendant Tobias Osner ("Osner"). The gravamen of Plaintiff's Complaint (Doc. #1) is that she was the victim of sexual harassment while employed by Goodrich. Osner is alleged therein to have been one of those who harassed her. In her Complaint (Doc. #1), Plaintiff has set forth a number of claims arising under both federal and state law, to wit: 1) a claim against Goodrich of hostile environment sexual harassment against under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq.; 2) a

similar claim of sexual harassment against Goodrich and Osner under Chapter 4112 of the Ohio Revised Code ("Chapter 4112"); 3) a claim of constructive discharge for sexual harassment under Title VII and Chapter 4112 against Goodrich; 4) a claim against Goodrich for the tort of sexual harassment under the common law of Ohio; 5) a claim against Goodrich for discharge in violation of public policy under the common law of Ohio; and 6) a claim against both Goodrich and Osner of intentional infliction of serious emotional distress under the Ohio common law.[1]

This case is now before the Court on Goodrich's Motion in Limine to Exclude Testimony of Robert Gaylor, M.D. (Doc. #53), with which it requests that the Court prevent him from testifying at the trial of this matter.[2] Gaylor is Plaintiff's treating gastroenterologist who treats her for Crohn's disease and Irritable Bowl Syndrome ("IBS"). Herein, the Defendant challenges the admissibility of Gaylor's proposed testimony, based upon Rule 702 of the Federal Rules of Evidence and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). To support that challenge, Defendant relied upon Gaylor's deposition testimony. According to Plaintiff, Goodrich, in support of its motion, had attempted "to sew together highly selective excerpts of a lengthy, argumentative deposition," during which "Goodrich

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[1]The Court has entered summary judgment against the Plaintiff on her claim of discharge in violation of public policy.

[2]Osner's Motion to Take the Perpetuation of Testimony Deposition of Dean Davis (Doc. #48) is also pending. Davis' knee surgery and difficult recovery from that surgery before the previously scheduled trial date of February 2, 2010, caused Osner to file that motion. Given that no party has filed a memorandum opposing same, the Court sustains Osner's unopposed Motion to Take the Perpetuation of Testimony Deposition of Dean Davis (Doc. #48). It should be noted, however, that the use of such a deposition at trial will be dependent on Davis being unavailable, as that term is defined by Rule 32(a) of the Federal Rules of Civil Procedure.

failed to directly ask Dr. Gaylor for his opinions and the basis for them." Doc. #79 at 1-2.

Without commenting on the Plaintiff's accusations, this Court fully agreed with the unstated premise, underlying her position, that it is at best difficult to ascertain whether an expert witness's proposed testimony complies with Daubert and Rule 702, based upon the deposition of that witness, taken by counsel for the party opposing the witness's testimony. Whatever such counsel taking the deposition seeks to accomplish, demonstrating that the witness's testimony is admissible under Daubert and Rule 702 is not among the goals of the deposition. This case is no different. Accordingly, the Court declined to rule on Goodrich's Motion in Limine to Exclude Testimony of Robert Gaylor, M.D. (Doc. #53), and deferred ruling on that motion until after it conducted a hearing on the matter.

That hearing was conducted on August 26, 2010, during which Gaylor was examined by Plaintiff's counsel and cross-examined by counsel for Goodrich. See Transcript of August 26, 2010, Hearing ("Tr.") (Doc. #98). The parties have filed their post-hearing memoranda. See Docs. ##99-101. For reasons which follow, the Court overrules Goodrich's Motion in Limine to Exclude Testimony of Robert Gaylor, M.D. (Doc. #53).

During the hearing, Gaylor testified he will opine at trial, if one assumes Plaintiff was sexually harassed as she alleges, that her IBS was exacerbated by the stress she suffered as a result of the sexual harassment she suffered while employed at Goodrich. Tr. at 9-13. He also explained the methodology and rationale which supported his opinion, i.e., that he relied upon certain recognized

studies and the timing of the exacerbation of Hughes IBS.[3] Goodrich cross-examined Gaylor on all manner of topics which could cause a jury to disregard, or give little weight to, Gaylor's testimony, such as: that he is not a psychiatrist; that he had diagnosed Hughes with atypical Chron's disease, which is a term not found in a medical dictionary; that he could not be certain when Plaintiff's IBS began; that he was not even certain that she had IBS until 2009; that a person can develop IBS or exacerbate that condition, without stress; that he did not obtain Hughes' obstetrics/gynecology, surgery and neurological records; and that any kind of stress could have caused or exacerbated Plaintiff's IBS. With that overview of the evidence in mind, the Court turns to the legal principles applicable to Goodrich's motion.

Rule 702 provides:

> 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, 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.

In Daubert, the Supreme Court "established a general gatekeeping [or screening] obligation for trial courts" to exclude from trial expert testimony that is unreliable and irrelevant. Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 792 (6th

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[3]To oppose Goodrich's motion, Plaintiff submitted Gaylor's Declaration. See Doc. #79 at Exhibit A. Therein, Gaylor stated that he will opine that Plaintiff's IBS is not causally related to her ingestion of Mountain Dew or any other carbonated beverage, smoking cigarettes, using diet aids such as Hydroxycut and Xenadrine, her mother's alleged drinking habits, Plaintiff's alleged eating disorders or the events that are alleged to have occurred before her employment with Goodrich. Those topics were not touched upon during the August 28th Hearing.

Cir. 2002) (citations omitted). This gatekeeping function applies "when considering all expert testimony, including testimony based on technical and other specialized knowledge." Clay v. Ford Motor Co., 215 F.3d 663, 667 (6th Cir. 2000) (emphasis in original). Accord Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999). In determining whether evidence is admissible under Daubert, the District Court must determine whether the evidence "both rests on a reliable foundation and is relevant to the task at hand." Id. In assessing relevance and reliability, the District Court must examine whether the expert is proposing to testify to scientific or other specialized knowledge which will assist the trier of fact to understand or to determine a fact in issue. Jahn v. Equine Servs., PSC, 233 F.3d 382, 388 (6th Cir. 2000). This involves a preliminary inquiry as to whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. Id. Some of the factors that may be used in such an inquiry include: 1) whether the theory or technique can be tested, 2) whether it has been subjected to peer review and publication, 3) whether the potential rate of error is known, and 4) its general acceptance. Daubert, 509 U.S. at 593-94; Hardyman v. Norfolk & W. Ry. Co., 243 F.3d 255, 260 (6th Cir. 2001). "This inquiry is a flexible one, with an overarching goal of assessing the 'scientific validity and thus the evidentiary relevance and reliability' of the principles and methodology underlying the proposed expert testimony." United States v. Langan, 263 F.3d 613, 621 (6th Cir. 2001) (citation omitted). "[A] trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." Kumho Tire Co., 526 U.S. at 152. Of course, "nothing in either Daubert

or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997). The proponent of expert opinion evidence has the burden of demonstrating by the preponderance of the proof that the evidence complies with Rule 702 and Daubert. Daubert, 509 U.S. at 592 n. 10; Nelson v. Tennessee Gas Pipeline Co., 243 F.3d 244, 250 (6th Cir.), cert. denied, 534 U.S. 822 (2001). Of course, in addition to meeting the criteria of Daubert, testimony from a particular expert witness is admissible under Rule 702, only if that witness is qualified to give same by knowledge, skill, experience, training, or education. See e.g., Morales v. American Honda Motor Co., Ltd., 151 F.3d 500, 514-16 (6th Cir. 1998).

As to the question of whether a plaintiff's treating physician may testify about the cause of his patient's illness, the Sixth Circuit has written:

> As a threshold matter, Plaintiffs contest the district court's decision to exclude statements by Dr. DeJonge and Dr. Natzke [their treating physicians] as unreliable opinion testimony. Generally, a treating physician may provide expert testimony regarding a patient's illness, the appropriate diagnosis for that illness, and the cause of the illness. See Fielden v. CSX Transp., Inc., 482 F.3d 866, 870 (6th Cir. 2007). However, a treating physician's testimony remains subject to the requirement set forth in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), that an expert's opinion testimony must "have a reliable basis in the knowledge and experience of his discipline." Id. at 592.

Gass v. Marriott Hotel Services, Inc., 558 F.3d 419, 426 (6th Cir. 2009). Therein, the Sixth Circuit also stressed that "a physician need not demonstrate a familiarity with accepted medical literature or published standards in [an area] of specialization in order for his testimony to be reliable in the sense contemplated by Federal Rule of Evidence 702," because "the text of Rule 702 expressly

contemplates that an expert may be qualified on the basis of experience." Id. at 427 (internal quotation marks and citation omitted; emphasis and brackets in the original). The Gass court also reiterated that the "exclusion of a medical doctor's professional opinion, rooted in that doctor's extensive relevant experience, is rarely justified in cases involving medical experts as opposed to supposed experts in the area of product liability." Id. (internal quotation marks and citation omitted). In Gass, the plaintiffs sought to recover for damages allegedly suffered as a result of being exposed to pesticides when staying as guests at defendant's hotel. The Sixth Circuit held that the District Court had correctly concluded that the plaintiffs' two treating physicians could testify as to their diagnosis of plaintiffs, that they were suffering from acute pesticide exposure, while properly excluding their testimony about where and when the plaintiffs had been exposed to pesticides, because such testimony was outside their area of professional experience and personal knowledge. See also Dickenson v. Cardiac & Thoracic Surgery of Eastern Tenn., P.C., 388 F.3d 976 (6th Cir. 2004).

In its Post-Hearing Memorandum (Doc. #99), Goodrich argues that Gaylor's testimony that stress can be a cause or aggravator is inadmissible, because it is irrelevant, unless he is able to link Hughes' IBS to stress caused by the sexual harassment she is alleged to have suffered while employed at Goodrich. Although agreeing with Goodrich's premise, this Court parts company with Goodrich, because the Court concludes that Gaylor's proposed testimony establishes the requisite link, were he to assume the truth of Plaintiff's allegations.[4] Goodrich also

[4]Fed R. Evid. 703 allows an expert to base an opinion as to causation on assumed facts provided to him at or before trial.

challenges Gaylor's testimony, by asserting that the medical literature Gaylor relied upon does not support his opinion, given that the articles do not address the question of IBS caused by the stress associated with sexual harassment. Nevertheless, a trained medical professional has opined that the articles he cited support his opinion. Whether the medical literature cited by Gaylor at the Hearing supports his opinion can, of course, be explored on cross-examination.[5]

Based upon the foregoing, the Court overrules Goodrich's Motion in Limine to Exclude Testimony of Robert Gaylor, M.D. (Doc. #53), having concluded that the Defendant's objections to that testimony go to the weight to be given same by the finder of fact, not its admissibility.

Counsel will note that the Court has scheduled a telephone conference call on Friday, October 4, 2010, at 8:30 a.m., for the purpose of selecting a new trial date and other dates leading to the resolution of this litigation.

September 27, 2010

WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:

Counsel of Record.

[5]If Gaylor plans to rely on any other articles to support his opinion, Plaintiff's counsel must furnish that information to counsel for each of the Defendants no latter than 30 days before the commencement of trial. In addition, if Plaintiff visits Gaylor between now and the trial, Plaintiff's counsel must furnish copies of Gaylor's notes of all visits to counsel for the Defendants on an immediate basis.