

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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REGINALD G. MOORE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 00-953 (RWR)
	)	
JEH JOHNSON,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM OPINION AND ORDER

The plaintiffs bring this employment discrimination class action against the Secretary of the United States Department of Homeland Security alleging that the United States Secret Service engaged in a pattern and practice of racial discrimination in its promotion of African-American Special Agents ("SAs"). Magistrate Judge Deborah Robinson granted the plaintiffs' motion to strike the defendant's expert report of Dr. Rick Jacobs -- the industrial psychologist the defendant selected to replace the deceased original expert -- on the ground that the report exceeded the scope of discovery this Court permitted for the replacement expert, and the defendant objects. Because the defendant has not shown that the magistrate judge's order is clearly erroneous or contrary to law, the defendant's objections will be overruled.

BACKGROUND

The extensive factual and procedural history of this nearly fifteen-year-old case is detailed in previous memorandum opinions and orders. See, e.g., Moore v. Napolitano, 926 F. Supp. 2d 8, 12-16 (D.D.C. 2013), review denied sub nom. In re Johnson, 760 F.3d 66 (D.C. Cir. 2014). In brief, the individual plaintiffs filed their Second Amended Complaint on August 7, 2006, on behalf of themselves and a putative class of other similarly situated African-American current and former SA's, alleging that the Secret Service violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and the Civil Rights Act of 1991, 42 U.S.C. § 1981(a), by engaging in a pattern and practice of racial discrimination in its promotion of African-American SAs to GS-14 and GS-15 positions, and that the promotion process has an adverse impact upon African-American SAs. Second Am. and Supplemental Class Compl., ECF No. 362 at 2-3. On February 2, 2013, this Court granted the plaintiffs' motion for class certification under Federal Rule of Civil Procedure 23(b)(3). See Moore, 926 F. Supp. 2d at 35-36.

Thereafter, the defendant notified this Court that the defendant's industrial psychologist expert, Dr. Frank Landy, had unfortunately passed away over three years earlier. See Joint Status Report, ECF No. 746 at 4 n.2, 7. The defendant informed this Court that it was "in the process of trying to find a

replacement for [Dr. Landy]," see id. at 7, and requested a period of supplemental fact and expert discovery. In a status hearing on July 31, 2013, this Court ruled that the defendant would be permitted to find a replacement for Dr. Landy but limited the scope of any replacement expert discovery and outlined the limited scope and timeline of any new expert report and replacement expert discovery, stating in part:

And I think the government has asked simply to replace the expert, not to expand beyond what the expert, who is deceased unfortunately, has said, and I think it's good cause to want to replace . . . an expert to have a live witness at the trial. But since it's not new news that the expert has passed, what I want to do is to limit the amount of time for turnaround on these issues.

7/31/13 Status Hr'g Tr., at 12-13. A written order was then issued on September 3, 2013 ("9/3/13 Order"), in part setting a schedule for "limited supplemental expert discovery by an industrial psychologist expert[.]" 9/3/13 Order, ECF No. 752 at 1. The order stated clearly: "The Court will not permit the parties to conduct any further expert discovery other than that attendant to Defendant's replacement of Dr. Landy." Id. at 1-2.

The defendant secured a replacement industrial psychologist expert -- Dr. Rick Jacobs -- and served the plaintiffs with a replacement expert report by September 16, 2013. On November 22, 2013, the plaintiffs moved to strike Dr. Jacobs' replacement expert report in its entirety, asserting that the

defendant had exceeded the limited scope of replacement expert discovery permitted by this Court's oral instructions and order, and arguing that the report "vastly exceeds the scope of Dr. Landy's report and materially alters its substance." Pls.' Mot. to Strike Dr. Rick Jacobs' Expert Report, ECF No. 760 at 1-2. The plaintiffs cited several "entirely new opinions" contained within the replacement expert report and asserted that the report relied on "dozens" of new sources. Id. at 3.

After reviewing full briefings on the plaintiffs' motion to strike, the magistrate judge held an extensive hearing on March 10, 2014 addressing whether the replacement expert report submitted by the defendant complied with this Court's order permitting limited supplemental expert discovery. The magistrate judge ultimately issued a memorandum order granting the plaintiffs' motion to strike Dr. Jacobs' replacement expert report and holding that the defendant "failed to comply" with this Court's order and exceeded the scope of permissible replacement expert discovery. Magistrate Judge's 9/19/14 Mem. Order, ECF No. 784 at 5. Additionally, the magistrate judge found that the "[d]efendant's proposal to excise from the report the objectionable 'sentences' is unworkable[,]" and that "any effort to do so would effectively eviscerate the report." Id. at 4.

The defendant now objects to the magistrate judge's order striking Dr. Jacobs' replacement expert report, arguing that the magistrate judge's order "is clearly erroneous because it 1) ignores the context and guidelines expressed by this Court for the creation and production of Dr. Jacobs' expert report, . . . and 2) fails to properly consider the lack of burden on plaintiffs[.]" Def.'s Objections to Magistrate Judge's Ruling ("Def.'s Objections"), ECF No. 787 at 1. The defendant further asserts that the magistrate judge's order would require a replacement expert to "simply parrot the language of defendant's deceased expert," and argues instead that "[t]his Court's schedule providing for a rebuttal report by plaintiffs and depositions of both experts necessarily contemplated that the new report would not be only an exact recitation of the prior report." Id. at 1-2.

#### DISCUSSION

In a discovery dispute, "Federal Rule of Civil Procedure 72(a) and Local Civil Rule 72.2(b) allow a party to object to a magistrate judge's decision." Greene v. Shegan, 917 F. Supp. 2d 146, 148 (D.D.C. 2013). "Upon consideration of objections filed . . . , a district judge may modify or set aside any portion of a magistrate judge's order[.]" LCvR 72.2(c); see also Jerez v. Republic of Cuba, 964 F. Supp. 2d 52, 55 (D.D.C. 2013), aff'd, No. 13-7141, 2014 WL 7373506 (D.C. Cir. Dec. 30, 2014). A

magistrate judge's findings and decision "are entitled to great deference, and may be modified or set aside only if found to be clearly erroneous or contrary to law." Payne v. D.C., 859 F. Supp. 2d 125, 130-31 (D.D.C. 2012) (internal quotations and citations omitted); see also Graham v. Mukasey, 608 F. Supp. 2d 50, 52 (D.D.C. 2009).

"'Clear error' is a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure, and applies when reviewing questions of fact." Ornelas v. United States, 517 U.S. 690, 694 n.3 (1996). "The clear error standard requires [a court] to reverse a factual finding if on the entire evidence [the court is] left with the definite and firm conviction that a mistake has been committed." Latif v. Obama, 677 F.3d 1175, 1200 (D.C. Cir. 2012) (internal quotations omitted). Accordingly, a court "may not set aside findings of fact 'simply because [it is] convinced that [it] would have decided the case differently.'" Am. Soc. for the Prevention of Cruelty to Animals v. Feld Entm't, Inc., 659 F.3d 13, 22 (D.C. Cir. 2011) (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985)).

The defendant asserts three objections to the magistrate judge's order striking Dr. Jacobs' expert report. The defendant argues that the magistrate judge erred in failing to follow the guidelines expressed by this Court regarding the scope of permissible replacement expert discovery and applying an

unreasonable standard that "require[d] the defendant to produce a replacement expert report that simply duplicated Dr. Landy's report." Def.'s Objections at 3. Additionally, the defendant asserts that the magistrate judge failed to conduct the "proper analysis" required -- namely, "examining the [initial and replacement] reports to assess whether the opinions and conclusions of Dr. Landy and Dr. Jacobs are the same." Id. at 4; see also id. at 5-6, 14-15. Finally, the defendant argues that the magistrate judge erred by failing to identify "any prejudice to plaintiffs as a result of Dr. Jacobs' expert report[,] or to even "search for . . . any independent prejudice[.]" Id. at 14.

I. LIMITED SCOPE OF THIS COURT'S 9/3/13 ORDER

The defendant argues that the magistrate judge erred in interpreting the scope of this Court's 9/3/13 Order and thus applied an incorrect standard in her review. The defendant's objection highlights his own interpretation inconsistencies, though. On one hand, the defendant argues that the magistrate judge takes a "hyper-literal and unreasonably narrow view of" this Court's 9/3/13 Order. Def.'s Objections at 5. The defendant asserts that the magistrate judge read this Court's 9/3/13 Order as requiring that the replacement expert report "simply parrot the language" of Dr. Landy's initial report. Id. at 1. The defendant cannot, however, point to any instance in

the motions hearing transcript where the magistrate judge demands parroted language. Instead, the motions hearing transcript reflects that the magistrate judge attempted to clarify that neither she nor the plaintiffs advocated for an identical language standard. See, e.g., Tr. of 3/10/14 Hearing on Pls.' Mot. to Strike Dr. Rick Jacobs' Expert Report ("Mot. Hr'g Tr.") at 17. The magistrate specifically outlined for the parties at the motions hearing the scope of her inquiry, unequivocally stating that she would not "opine with respect to . . . what some courts have done with respect to substitution of expert reports" but would "only determine whether the Defendant complied with [the Court's] order." Id. at 9.

On the other hand, the defendant argues that the proper scope of this Court's 9/3/13 order and the appropriate inquiry for the magistrate judge is "whether '[i]t is unreasonable to expect two different experts to either share the exact same opinions about the same data or to express those opinions in the exact same way.'" Magistrate Judge's 9/19/14 Mem. Order at 5 (quoting Def.'s Opp. to Mot. to Strike Dr. Rick Jacobs' Expert Report, ECF No. 764 at 2). The defendant's objections repeat the assertions presented to the magistrate judge -- that the magistrate judge should have focused on the fact that the "subject matter" and ultimate "conclusions" articulated in the two expert reports are the same. See, e.g., Def.'s Objections



at 6; Mot. Hr'g Tr. at 32 (defense counsel stating that "the concepts are going to be the same, [but] the verbiage will be different").<sup>1</sup> Thus, the defendant advances simultaneously two ends of a spectrum regarding the scope of permissible supplemental expert discovery: on one end, a requirement that the expert reports be virtually identical; and on the other end, a position that the second expert must simply focus on the concepts and conclusions contained within the first expert's report.

The magistrate judge did not err, instead, in interpreting the plain language of this Court's 9/3/13 Order as "presuppos[ing] that Defendant would not . . . seek to rely on additional opinions, opinions more thoroughly explained, and opinions based on additional authorities." Magistrate Judge's 9/19/14 Mem. Order at 4. Nor did the magistrate judge err in defining the issue for review as "whether or not Defendant complied with the Court's order precluding the successor industrial psychologist from 'expand[ing] beyond what the [first] expert said[.]'" Id. at 5 (quoting Tr. of 7/31/13 Status Hr'g at 14). Rather, the defendant erred in making assumptions about this Court's intent instead of following this

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<sup>1</sup> At the motions hearing before the magistrate judge, defense counsel was unable to provide any citation to a transcript or an order from this Court containing the word "concepts." See Mot. Hr'g Tr. at 43-44.

Court's oral and written instructions limiting the scope of replacement expert discovery. In contrast, the magistrate judge seemingly attempted to find the balance between the two ends of the defendant's spectrum by looking to this Court's oral and written instructions.

## II. SUFFICIENCY OF ANALYSIS BY THE MAGISTRATE JUDGE

The defendant also argues that the magistrate judge erred in conducting an insufficient analysis and inadequate comparison of the expert reports filed by Dr. Landy and Dr. Jacobs. See, e.g., Def.'s Objections at 4 (arguing that "the Magistrate Judge failed" to assess whether the opinions and conclusions contained within the two expert reports were the same); id. at 5 (asserting that "the Magistrate Judge apparently failed to consider the fact[] that Dr. Jacobs' report is founded upon the exact same data that Dr. Landy used"); id. at 14 (stating that "the Magistrate Judge failed to explain how Dr. Jacobs' opinions went 'beyond' what Dr. Landy had previously articulated"). The defendant's characterization of the magistrate judge's analytical process is not supported by the record in this case.

At the motions hearing on March 10, 2014, the magistrate judge notified the parties that she was prepared to go through each individual opinion, section, or point highlighted by the plaintiffs as violative of this Court's 9/3/13 Order. See Mot.

Hr'g Tr. at 7-9.<sup>2</sup> The magistrate judge then went through the numerous examples highlighted by the plaintiffs as possible expansions beyond the scope of Dr. Landy's original expert report, and examined the parallel citations presented by the defendant to demonstrate uniformity between both reports. As the plaintiffs recognize, "the Magistrate Judge spent literally *hours* on the record going through the two reports opinion by opinion and hearing argument from both sides as to whether Dr. Jacobs'[] replacement report contained new opinions not asserted by Dr. Landy." Pls.' Opp. to Def.'s Objections to the Magistrate Judge's Ruling on Pls.' Mot. to Strike, ECF No. 792 at 5.<sup>3</sup>

The record demonstrates that, contrary to the defendant's assertions, the magistrate judge conducted a thorough analysis and inquiry into the alleged differences between the original expert report of Dr. Landy and Dr. Jacobs' replacement expert report, with the goal of determining whether the defendant had complied with this Court's 9/3/13 Order. Magistrate judges are not required to produce memorandum orders of any particular

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<sup>2</sup> Notably, defense counsel indicated that he was prepared to go through each point raised by the plaintiffs, stating: "Your Honor, we have no problem with doing that." Mot. Hr'g Tr. at 9.

<sup>3</sup> This extensive hearing was not the only opportunity for the magistrate judge to consider the plaintiffs' motion to strike. Even before the hearing, the magistrate judge reviewed all of the briefings, the transcript from the 7/31/13 Status Hearing, and this Court's 9/3/13 Order. See Mot. Hr'g Tr. at 3.

length or specific depth. Rather, their opinions are reviewed by the district court in accordance with the "clear error" and "contrary to law" standards. Here, the defendant has not shown that the magistrate judge conducted an insufficient analysis or otherwise erred in her consideration of Dr. Jacobs' expert report. She reached a conclusion fully supported by the record.<sup>4</sup>

### III. PREJUDICE TO PLAINTIFFS

Finally, the defendant argues that the magistrate judge erred by failing to address whether Dr. Jacobs' expert report actually prejudiced the plaintiffs. Specifically, the defendant argues that the magistrate judge's order "is clearly erroneous" for disregarding the lack of prejudice to the plaintiffs. The defendant appears to rely on the "goals" of Federal Rule of Civil Procedure 26 to support its argument that a prejudice analysis is required. See Def.'s Objections at 14. However, the defendant points to no statutory or case law authority requiring that a magistrate judge analyze the issues of prejudice and "point to any unfair surprise[.]" See id. at 14-16.

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<sup>4</sup> For example, the transcript of the March 10, 2014 motions hearing contains references to Dr. Jacobs' elaborations and expansions of the concepts in Dr. Landy's report, Mot. Hr'g Tr. at 28-29, 56; additional details not contained within Dr. Landy's report, id. at 46; additional sources and scholarship considered and cited by Dr. Jacobs, id. at 46, 48-50; and additional opinions contained within Dr. Jacobs' report, id. at 63-64.

The defendant asserts that by setting a schedule for depositions of a replacement expert and a rebuttal expert report, this Court "obvious[ly] anticipat[ed] . . . possible differences between" the expert reports and "provided for rebuttal and discovery mechanisms for plaintiffs[.]" Id. at 15. Thus, the defendant seemingly argues, the magistrate judge's order is erroneous because it ignores the fact that any prejudice to the plaintiffs caused by additional information in Dr. Jacobs' replacement expert report could be cured through a deposition and rebuttal report.

This Court's statements during the July 31, 2013 status conference did not indicate any anticipation of a *need* for depositions or rebuttal reports, but rather simply addressed the possibility that the plaintiffs might *want* to engage with a replacement expert witness:

I think it would be fair, then to . . . give the plaintiffs a 45-day period . . . in which to depose that new expert *if that's what you all want to do*. I suspect, *if you want* to produce some kind of a rebuttal expert report, I think we should limit it to a 30-day period beyond that deposition deadline, and I think that would be consistent with the notion of trying to move the case forward.

Tr. of 7/31/13 Status Hr'g at 13 (emphasis added). Allowing for the plaintiffs to conduct ordinary follow-up discovery of a new defense expert is no implicit approval for the defendant to secure an expanded replacement expert report, particularly when

securing such an expanded report contradicts this Court's explicit instructions. Thus, the magistrate judge did not err in failing to address prejudice in the memorandum order granting plaintiffs' motion to strike.<sup>5</sup> The issue before the magistrate judge was whether the defendant had exceeded the bounds of the limited supplemental expert discovery permitted in this Court's order, not whether any prejudice to plaintiffs stemming from Dr. Jacobs' replacement expert report was unduly burdensome or capable of being cured by depositions and a supplemental expert report.

#### CONCLUSION AND ORDER

The magistrate judge did not err in finding that the defendant exceeded the limited scope of supplemental expert discovery permitted by this Court's September 3, 2013 Order. Because the defendant has not demonstrated that the magistrate judge's order [784] striking the defendant's replacement expert report was clearly erroneous or contrary to law, it is hereby

ORDERED that the defendant's objections [787] to the magistrate judge's order be, and hereby are, OVERRULED. Because

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<sup>5</sup> At the motions hearing, the magistrate judge did address the defendant's argument that this Court's 9/3/13 order contemplated differences. See Mot. Hr'g Tr. at 68-71. The defendant was unable to identify either language in this Court's 9/3/13 order that contemplated "differences" in the expert reports, or an instance where the defendant informed this Court that it anticipated there being "differences in the report." Id. at 70-71.

the defendant failed to comply with both this Court's oral instructions and written order outlining the limited scope of supplemental expert discovery almost eighteen months ago, the defendant at trial in seeking to offer expert industrial psychologist evidence will be limited to offering the initial report and deposition testimony of Dr. Landy. Thus, it is further

ORDERED that the parties confer and file within 14 days a joint status report and proposed order outlining a schedule for briefing any remaining dispositive motions. It is further

ORDERED that the plaintiffs' corrected motion [796] for a status hearing be, and hereby is, DENIED as moot. If the parties wish to enter mediation, as is suggested by the plaintiffs' motion, the parties are directed to file a joint motion for referral to mediation. It is further

ORDERED that the plaintiffs' motion [802] for entry of a scheduling order be, and hereby is, DENIED as moot.

SIGNED this 8th day of January, 2015.

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/s/  
RICHARD W. ROBERTS  
Chief Judge