

2005 WL 2245239

Only the Westlaw citation is currently available.  
United States District Court,  
N.D. Ohio.

Anthony LUKE, et al., Plaintiffs,  
v.  
CITY OF CLEVELAND, et al., Defendants.

No. 1:02CV1225. | Aug. 25, 2005.

#### Attorneys and Law Firms

Christy B. Bishop, Dennis R. Thompson , Thompson Law Office, Akron, OH, for Plaintiffs.

Kevin J. Gibbons, Leslye M. Huff, Theodora M. Monegan, Department of Law, Britt J. Rossiter, Thomas H. Barnard, Jr., Ulmer & Berne, Joseph W. Diemert, Jr., Law Office of Joseph W. Diemert, Jr., Cleveland, OH, for Defendants.

#### Opinion

### OPINION AND ORDER

GWIN, J.

#### [Resolving Doc. No. 164, 227]

\*1 Before the Court is the “Motion to Strike and to Exclude Expert Witness of Barrett & Associates, Inc., Gerald Barrett, and City of Cleveland,” filed by Plaintiffs Anthony Luke, *et al.* [Docs. 164, 176]. Defendants the City of Cleveland, Barrett & Associates, and Gerald Barrett oppose the motion. [Docs. 169, 170, 202]. For the reasons that follow, the Court DENIES the plaintiffs’ motion to strike. The Court also DENIES the plaintiffs’ motion to refer their motion to strike to Magistrate Judge Hemann. [Doc. 227].

#### I. Background

In this suit, various individual firefighters sue the City of Cleveland and others for alleged discriminatory practices relating to the Cleveland Fire Department’s promotion examinations in 1996, 2000, and 2002. The Clerk of

Courts originally assigned this matter to Judge Paul Matia. Although the plaintiffs filed their complaint in June 2002, Judge Matia never set a trial date or a deadline specifically for expert discovery. Judge Matia originally ordered the parties to complete discovery by April 21, 2003. Judge Matia extended the discovery deadline several times at the plaintiffs’ request. [Docs. 96, 98, 103, 121, 132]. On December 9, 2004, the plaintiffs filed a motion to extend the discovery deadline until February 15, 2005. [Doc. 136]. Judge Matia granted the plaintiffs’ motion on December 28, 2004. [Doc. 145]. On May 2, 2005, Judge Matia extended the discovery deadline until June 30, 2005, again at the plaintiffs’ request. [Doc. 182].

The City retained Dr. Norman Henderson as an expert witness. Dr. Henderson submitted a report to the plaintiffs near February 15, 2005. Defendant Gerald Barrett seeks to offer expert testimony on behalf of the Barrett Defendants. Near February 17, 2005, the plaintiffs received an expert report from Defendant Barrett. The defendants apparently offer Barrett and Henderson as experts on the content of the promotion examinations. In October 2003, the plaintiffs retained Dr. Robert Johnson as a statistical expert to provide a disparate impact analysis of the examination results.

The plaintiffs say that (1) the defendants never identified Barrett or Henderson as experts in this case, (2) the defendants falsely stated that documents relating to the 1996 and 2002 were destroyed, (3) the Barrett Defendants are guilty of “undeniable dilatoriness in discovery,” and (4) the reports are based on unverifiable information. [Doc. 176 at 1-2]. The plaintiffs seek an order preventing the City from using Dr. Henderson as an expert in this matter.

#### II. Legal Standard

When the trial court does not set discovery deadlines, the default deadlines of the Federal Rules of Civil Procedure govern. Under Rule 26(a)(2)(C), a party must disclose the identity of its proposed experts and reports of their opinions and supporting data “at least 90 days before the trial date or the date the case is to be ready for trial.” A party must disclose rebuttal experts within 30 days after the other party’s expert disclosure. Fed.R.Civ.P. 26(a)(2)(C). A party must make other pretrial disclosures, including the identities of trial witnesses and exhibits, at least 30 days before trial. Fed.R.Civ.P. 26(a)(3).

\*2 If a party fails to make the required disclosures under Rule 26(a), the Court may strike the materials or order other appropriate sanctions. Fed.R.Civ.P. 37(c). Whether to strike expert testimony lies within the discretion of the

trial court. *UAW v. Aguirre*, 410 F.3d 297, 304 (6th Cir.2005).

### **III. Analysis**

The Court will not strike the Henderson and Barrett reports as untimely. At the plaintiffs' request, Judge Matia extended the discovery deadline until February 15, 2005. [Doc. 145]. The defendants' expert submissions met that deadline. *See* Fed.R.Civ.P. 6(e). Judge Matia later extended the deadline to June 30, 2005, again at the plaintiffs' request. [Doc. 182].

The expert submissions were also well within the default discovery provisions of the Federal Rules of Civil Procedure. The trial date in this matter is October 24, 2005. The defendants disclosed the identities of their experts and their reports in mid-February 2005. The submissions thus complied with Rule 26(a)(2)(C).

In their motion to strike, the plaintiffs object that Barrett and Henderson base their opinions on information that the Barrett Defendants did not produce until November 2004. [Doc. 164 at 3]. The plaintiffs suggest that the timing made it impossible for them to identify their own exam content expert. The Court disagrees. Under Rule 26(a)(2)(C), the plaintiffs had until 30 days after the defendant submitted their expert reports to offer a rebuttal expert. Under Judge Matia's May 2, 2005 order, the plaintiffs arguably could have waited until June 30, 2005 to produce expert discovery on the content issue. The plaintiffs thus had approximately seven months between the time the Barrett Defendants disclosed the testing materials and the final discovery deadline. Under that

circumstance, it strains credulity to argue that the timing of the defendants' disclosures prevented the plaintiffs from securing their own content expert.

The plaintiffs also suggest that they suffered prejudice by hiring a statistical expert in 2003 based on the lack of testing data and documents available at that time. The Court disagrees. In the plaintiffs's words, their statistical expert offered "incontrovertible conclusions" regarding the "compelling disparities" in the testing results. [Doc. 176 at 9, 10]. The plaintiffs will surely rely on such materials in making their disparate impact claim.

The plaintiffs offer scant support for their suggestion that the defendants' experts based their opinions on unverifiable data. Regardless, the plaintiffs have had access to that data since November 2004, and have had plenty of time to depose Barrett and Henderson. If Barrett and Henderson's opinions are untrustworthy or unverifiable, the plaintiffs can raise that issue in a properly supported motion in limine before trial.

### **IV. Conclusion**

For the reasons discussed above, the Court DENIES the plaintiffs' motion to strike. [Doc. 164]. The Court also DENIES the plaintiffs' request to transfer the motion to strike to Magistrate Judge Hemann as moot. [Doc. 227].

**\*3 IT IS SO ORDERED.**