IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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| **RAMON PEREZ** | § | |
| | § | |
| **V.** | § | **CASE NO. A-07-CA-044 AWA** |
| | § | |
| **CITY OF AUSTIN, ET AL.** | § | |

## MEMORANDUM OPINION AND ORDER

Before the Court are Defendants' Objections and Motion to Exclude Testimony of Plaintiff's Rebuttal Expert, Jerry R. Staton, filed on February 22, 2008 (Clerk's Doc. No. 55), Defendants' Objections and Motion to Exclude Testimony of Plaintiff's Experts, Stephen A. Thorne and Melba J.T. Vasquez, filed on February 25, 2008 (Clerk's Doc. No. 56), Plaintiff's Response to Defendants' Objections and Motion to Exclude Testimony of Plaintiff's Rebuttal Expert, Jerry R. Staton, filed on March 4, 2008 (Clerk's Doc. No. 57), Plaintiff's Response to Defendants' Objections and Motion to Exclude Testimony of Plaintiff's Rebuttal Experts, Stephen A. Thorne and Melba J.T. Vasquez, filed on March 7, 2008 (Clerk's Doc. No. 59), Defendants' Reply to Plaintiff's Response to Objections and Motion to Exclude Plaintiff's Rebuttal Expert, Jerry R. Staton, filed on March 14, 2008 (Clerk's Doc. No. 61), and Defendants' Reply to Response to Objections and Motion to Exclude Testimony of Plaintiff's Experts, Thorne and Vasquez, filed on March 17, 2008 (Clerk's Doc. No. 63).

### I.  BACKGROUND

This case arises from the departure of Plaintiff Ramon Perez ("Perez") from his position as a probationary police officer with the Austin Police Department ("APD").  Perez brought suit under § 1983 of Title 42 of the United States Code alleging that Defendants violated his rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution.  According to Perez, he was forced to leave the APD because of his Christian beliefs and because he refused to perform an

illegal and unconstitutional act.  Perez also claims that the APD used two incidents as a pretext for his forced departure.  The first incident involved Perez's refusal to "tase" a suspect who he felt was adequately under control.  The second involved a traffic stop directed by the APD Gang Unit, in which Perez allegedly exhibited "poor officer safety."  Perez further contends that APD psychologist Dr. Carol Logan ("Dr. Logan") manufactured a report that he was psychologically unfit to be a police officer in order to further justify his improper termination.

In the motions presently before the Court, Defendants seek to exclude the testimony of three expert witnesses.  In their first motion, Defendants seek to exclude the testimony of Perez's police practices rebuttal expert Jerry R. Staton ("Staton").  In the alternative to the wholesale exclusion of Staton's testimony, Defendants claim certain portions of Staton's expert report should be stricken. In their second motion, Defendants seek to exclude the testimony of Perez's psychology experts Dr. Stephen A. Thorne ("Dr. Thorne") and Dr. Melba J.T. Vasquez ("Dr. Vasquez").  Defendants also seek to exclude ceratin portions of Dr. Vasquez's expert report in the alternative.

## II.  ANALYSIS

Under Federal Rule of Evidence 702, expert testimony is admissible when it will assist the trier of fact.  *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 2795, 125 L. Ed. 2d 469 (1993).  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.

FED. R. EVID. 702.  While a district court must act as a gatekeeper to exclude all unreliable expert testimony, "the rejection of expert testimony is the exception rather than the rule."  FED. R. EVID. 702 advisory committee's note (2000).  The district court has considerable discretion to admit expert testimony under Rule 702.  *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158, 119 S. Ct. 1167, 1179, 143 L. Ed. 2d 238 (1999).  The decision to admit or exclude expert testimony will be reviewed on appeal only for abuse of discretion.  *General Elec. Co. v. Joiner*, 522 U.S. 136, 139, 118 S. Ct. 512, 515, 139 L. Ed. 2d 508 (1997).

The burden is on the party offering the expert testimony to establish by a preponderance of the evidence that it is admissible.  *Moore v. Ashland Chem. Co.*, 151 F.3d 269, 276 (5th Cir. 1998).  The party offering the challenged expert opinions need not, however, prove "that the expert's testimony is correct."  *Id.*  Expert testimony is admissible if the proponent demonstrates that: (1) the expert is qualified; (2) the evidence is relevant to the case; and (3) the evidence is reliable.  *See Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 584 (5th Cir. 2003).  The district court's responsibility "is to make certain that an expert, whether basing testimony upon 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. at 152.  The Court "must ensure the expert uses reliable methods to reach his opinions; and those opinions must be relevant to the facts of the case."  *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004).

Reliability does not require certainty, but must be demonstrated by evidence that the knowledge is more than speculation.  *Daubert*, 509 U.S. at 590.  To demonstrate reliability, the proponent of the expert testimony must present "some objective, independent validation of the expert's methodology.  The expert's assurances that he has utilized generally accepted scientific methodology is insufficient."  *Moore*, 151 F.3d at 276.  The Court must consider: (1) the validity of

the scientific principles used; (2) the accuracy of the data relied upon by the expert; and (3) the

correctness of the application of the scientific principles to the relevant data. *See, e.g., Watkins v.*

*Telsmith, Inc.*, 121 F.3d 984, 988-89 (5th Cir. 1997); *Marcel v. Placid Oil Co.*, 11 F.3d 563, 567 (5th

Cir. 1994). "The nonexhaustive list [of *Daubert* factors] includes 'whether [a theory or technique]

can be (and has been) tested,' whether it 'has been subjected to peer review and publication,' the

'known or potential rate of error,' and the 'existence and maintenance of standards controlling the

technique's operation,' as well as 'general acceptance.'" *Watkins*, 121 F.3d at 989 (quoting *Daubert*,

509 U.S. at 593-94). However, the analysis is a flexible one. "[N]ot every *Daubert* factor will be

applicable in every situation; and a court has discretion to consider other factors it deems relevant."

*Guy*, 394 F.3d at 325.

## A.      Perez's Police Practices Rebuttal Expert Jerry R. Staton

Defendants argue Staton's testimony should be excluded for three reasons. First, Defendants

contend Staton is not qualified to testify as a police practices expert because he lacks experience as

a field training officer or supervisor. According to Defendants, Staton's expertise regarding tasers

does not qualify him to opine on the issue of whether Perez was properly adapting to the law

enforcement profession during the time leading up to his departure from the APD. Second,

Defendants argue that Staton's report and testimony regarding tasers are not relevant merely because

Perez was involved in an incident where another officer tased a suspect. Defendants also contend

Staton's testimony is not relevant because Perez was an at-will employee who could be terminated

with or without cause. Third, Defendants contend Staton's analysis is unreliable because his opinion

is not supported by sufficient facts and data, he was once disciplined by the APD in the form of a

15 day suspension, and he has not worked as a law enforcement officer for the past eight years.

Alternatively, Defendants argue that certain portions of Staton's report should be stricken because they are subjective, conclusory, speculative, and beyond the scope of rebuttal.

In response to Defendants' arguments, Perez contends that Staton is qualified because his expertise goes beyond taser use. He cites ample evidence regarding Staton's qualifications in the police policies and procedures field. Second, Perez contends Staton's report and testimony are relevant to Defendants' expert Albert Rodriguez's ("Rodriguez") opinions, including the issue of whether Perez failed to properly adapt to the law enforcement profession during his time with the APD, because they call into question the methodology and conclusions of Rodriguez. Rodriguez contends in his report that Perez was not a very good police officer, and that he was never going to have the requisite constitution to be an adequate police officer. Third, Perez contends that Defendants' arguments regarding Staton's reliability go to weight rather than admissibility, and that Defendants' argument that Staton is unfamiliar with applicable law enforcement standards is simply incorrect. Finally, Perez contends that Defendants' alternative arguments concerning specific portions of Staton's report should be rejected because they go to weight rather than admissibility, directly relate to Rodriguez's methods and conclusions, and the statements challenged are based on extensive experience, training, and familiarity with APD procedures and customs.

Staton's expertise goes beyond taser use. He is qualified to testify regarding law enforcement policies and procedures with respect to the APD. Staton served as a police officer for twenty-five years with the APD, the very entity whose conduct is being challenged in this case. *See* Affidavit of Jerry R. Staton ("Staton Aff."), attached as "Exhibit B" to Plaintiff's Response to Defendants' Objections and Motion to Exclude Testimony of Plaintiff's Rebuttal Expert, Jerry R. Staton at p. 4. Contrary to Defendants' contentions, Staton has experience in the capacities of field training officer and supervisor. *See* Staton Aff. at p. 2. He participated in the training of numerous cadet and

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