

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

JOHN R. STELLY, II,  
Plaintiff

VERSUS

STATE OF LOUISIANA, THROUGH  
DEPARTMENT OF PUBLIC SAFETY  
AND CORRECTIONS, OFFICE OF  
STATE POLICE  
Defendant

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\* CIVIL ACTION NO. 23-772  
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\* SECTION "T"  
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\* JUDGE GREG G. GUIDRY  
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\* MAGISTRATE JUDGE  
\* JANIS VAN MEERVELD  
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**REPLY MEMORANDUM IN SUPPORT OF  
MOTION *IN LIMINE* TO EXCLUDE AND/OR LIMIT EXPERT TESTIMONY**

Defendant, The State of Louisiana, through Department of Public Safety and Corrections, Office of State Police ("Defendant" or the "State Police"), respectfully submits this Reply Memorandum in Support of its Motion *in Limine* to exclude and/or limit certain expert testimony and opinions of Plaintiff, John R. Stelly, II and expert, Andrew Broadway.

**A. Plaintiff has not demonstrated that he is qualified to offer expert testimony.**

As discussed at length in the State Police's Memorandum in Support of their Motion *in Limine*, Stelly's proposed expert testimony fails to satisfy the requirements of *Daubert* and Rule 702 of the Federal Rules of Evidence because he lacks the requisite qualifications to provide opinions on statistical analysis of promotional data and whether such analysis can be interpreted to indicate that the State Police used race as a factor in its promotions. Although Stelly has degrees in mathematics and took two statistics classes in graduate school, he has failed to demonstrate that he is an expert in statistical analysis through knowledge, skill, experience, training, or education, as is required under Federal Rule of Evidence 702.

In support of its position that Stelly does not have the requisite qualifications to testify as a statistical expert, the State Police referenced and discussed *Reid v. Albermarle Corp.*, a case with similar facts, wherein the Middle District of Louisiana found that a proffered statistical expert did not have sufficient academic credentials and had not produced sufficient information about his work to qualify him as an expert in statistical analysis despite the fact that he had bachelor's degrees in Mathematics and Economics, a master's degree in Physical Education, a Ph.D. in Sociology, and a minor in Statistics, had been an associate professor in Temple University's Department of Resource Administration for over a decade, and had testified as an expert in 11 federal suits.<sup>1</sup> Notably, Plaintiff fails to rebut this case with competing case law or distinguish the facts in that case from the present action. His only legal citation is for the general statement that an expert need not be highly qualified and that differences in experience bear on weight to be assigned to the testimony.<sup>2</sup> But Plaintiff here is not only *not* highly qualified, he is not qualified at all. Plaintiff fails to present any cases in which individuals with qualifications similar to his have been accepted as expert witnesses.

Instead, Plaintiff relies on completely self-serving and unsupported assertions that his education and experience conducting a single "statistical study" in 2013 while employed by the State Police render him an expert in statistics and qualify him to provide expert testimony in this matter. But he does not claim – and cannot claim – that the study he did in 2013 made him qualified to run the advanced binomial and Monte Carlo analyses he attempts to offer here. He claims to have 30 years of practical experience in this field and that he used his statistical knowledge throughout his law enforcement career but provides no support for these statements or further explanation of this alleged on-the-job statistical experience. Although Plaintiff claims he has

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<sup>1</sup> *Reid v. Albermarle Corp.*, 207 F.Supp.2d 499, 501, 505 (M.D. La. 2001).

<sup>2</sup> R. Doc. 127, at p. 8.

authored multiple statistical analyses on the State Police promotional system,<sup>3</sup> this is misleading given only one of those analyses was in a formal, professional capacity. All other statistical analyses were conducted in a personal capacity and at his own direction.<sup>4</sup> The fact that Plaintiff took it upon himself to conduct statistical analyses of promotional data for purposes of his own EEOC complaint and the lawsuit he filed against the State Police does not mean that he should be regarded as an expert in statistics. Furthermore, being asked to conduct a single statistical analysis while employed by the State Police does not demonstrate that Plaintiff worked as a statistician or gained significant experience in statistical analysis while at the State Police. This is likewise true for vague and unsupported allegations that Stelly “devised techniques to analyze various performance metrics of troopers’ enforcement practices” or “devised accountability software that used statistical measurements to detect abnormalities in troopers’ enforcement practices.”<sup>5</sup>

In any event, Plaintiff has not explained how or why the alleged statistical analysis done throughout his career is substantially similar to the analyses conducted in his report. Despite his contentions, Plaintiff has not explained why or how he is qualified to conduct demographic analyses, binomial analyses, or Monte Carlo analyses nor provide opinions on these specific methods.

While Plaintiff contends his lack of membership in a professional statistics organization does not preclude his ability to offer expert testimony, he provides no support for this position.<sup>6</sup> In fact, this position is directly rebutted by *Reid v. Albermale Corp.*, wherein the court found that a proposed expert was not sufficiently qualified in statistical science by virtue of his education and

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<sup>3</sup> R. Doc. 127, Plaintiff’s Opposition, at p. 2.

<sup>4</sup> See R. Doc. 127, at pp. 2-3.

<sup>5</sup> R. Doc. 127, at p. 7.

<sup>6</sup> R. Doc. 127, at p. 9.

training, in part because he was not a member of the American Statistical Association.<sup>7</sup> Stelly also claims that his being unaware of the content of the ASA's ethical guidelines does not mean that he did not follow said guidelines. Stelly misses the point entirely. Stelly being unaware of the guidelines for statistical professionals further demonstrates that he himself is *not* a statistical professional. As Plaintiff has not sufficiently demonstrated his qualifications to testify as a statistics expert, his expert testimony should be excluded.

**B. Plaintiff has not demonstrated that certain statistical evidence is relevant to his claims.**

*1. Statistical evidence from other promotional panels is irrelevant.*

Under *Daubert*, expert testimony is relevant if it will assist the trier of fact to understand or determine a fact in issue.<sup>8</sup> Here, the jury's role is to determine whether on July 9, 2021, the decision not to promote Stelly was based impermissibly on race or rather, as the evidence will show, was based entirely on merit. As such, statistical evidence from promotional panels prior to July 2021 and opinions as to whether analysis of those statistics indicate the State Police promotional decisions were racially motivated will not aid the jury in determining whether the reason Plaintiff was not promoted on July 9, 2021 was racial discrimination.

In his Opposition, Plaintiff claims statistical evidence from earlier promotional panels and testimony regarding same are relevant because they present "evidence of a pattern and practice of discrimination."<sup>9</sup> However, the existence of a pattern or practice is not relevant here and is not what Plaintiff must prove for his claims against the State Police. Given this Court has determined Plaintiff only has causes of action with respect to the two promotions on July 9, 2021, Plaintiff must prove that racial discrimination is the reason he did not receive either of those promotions.

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<sup>7</sup> *Reid v. Albermarle Corp.*, 207 F.Supp.2d 499, 501 (M.D. La. 2001).

<sup>8</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993).

<sup>9</sup> R. Doc. 127, at p. 4.

Plaintiff claims that statistical evidence from earlier panels and opinions as to whether analysis of those statistics indicate that race was a motivating factor aid the jury in determining whether race was a motivating factor in denying Stelly two promotions on July 9, 2021.<sup>10</sup> However, he provides no support or further explanation for this contention.

This Court has found that expert opinions as to the probability of discrimination based on data relating to a large number of employees are irrelevant to an individual plaintiff's discrimination claim and therefore inadmissible under Rule 702.<sup>11</sup> In *Sullivan*, the court found that opinions regarding a company's overall employment statistics are irrelevant as they will not assist the trier of fact in determining whether the employer intentionally discriminated against the individual plaintiff.<sup>12</sup> Although Plaintiff asserts that the State Police misstates the law, he provides no competing case law on the use of overall employment statistics in discrimination cases brought by a single employee and instead provides an analysis of standard for granting summary judgment, rather than a motion in limine, which is what is at issue here.<sup>13</sup>

Plaintiff's claim that the holding in *Sullivan* is inapplicable here because that case involved age discrimination is without merit. Although *Sullivan* was an age discrimination case rather than a race discrimination case, it still involved the same *McDonnell Douglas* burden shifting framework wherein a plaintiff must rebut an employer's non-discriminatory explanation for an employment decision in order to prove discrimination.<sup>14</sup> There, this Court noted that overall employment statistics were insufficient to rebut the employer's non-discriminatory reason for their decision or to show the reason was pretextual.<sup>15</sup> The *McDonnell Douglas* burden shifting framework and

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<sup>10</sup> R. Doc. 127, at p. 12.

<sup>11</sup> *Sullivan v. Worley Catastrophe Services, LLC*, 2013 WL 5530277, at \*9, 12 (E.D.La. 2013).

<sup>12</sup> *Id.*

<sup>13</sup> R. Doc. 127, at pp. 13-14.

<sup>14</sup> *Sullivan*, 2013 WL 5530277, at \*5-7.

<sup>15</sup> *Id.* at \*13-15.

showing of a pretext for discrimination are the same standards applicable in the present case. While Plaintiff points to a case stating that courts may infer racial discrimination based on statistics, it is important to note that the case cited was a class action.<sup>16</sup> Plaintiff has not and cannot cite to any cases where courts found overall employment statistics indicating a pattern of discrimination were relevant to proving the existence of discrimination against a single individual in a specific instance.

Moreover, the contention that Plaintiff is seeking to present “evidence of a pattern and practice of discrimination” is undermined by the fact that neither he nor Broadway analyzed all available data. Stelly admits he only looked at data from promotional panels between September 26, 2017 to October 4, 2021 because this is the time period relevant to his personal experience.<sup>17</sup> He also failed to consider all 32 captain panels conducted during this period, instead considering only the 18 captain panels conducted during that time wherein there was at least one black candidate.<sup>18</sup> As such, Stelly and Broadway ignore data from the other 14 captain panels conducted during the selected time period as well as data from any panels before September 2017 or after October 2021.<sup>19</sup> Thus, any argument that they conducted statistical analyses to assess the existence of a pattern or practice of discrimination is disingenuous when rather than taking a holistic look at all available data, Stelly selected data to try and find discrimination by using a limited data set corresponding with his perception of when discrimination against him occurred. Essentially, if Stelly seeks to assess overall patterns and practices of discrimination, it does not make sense to consider only some of the panels conducted during a specified period of time. Certainly, if Plaintiff

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<sup>16</sup> See *Lewis v. N.L.R.B.*, 750 F.2d 1266 (5th Cir. 1985).

<sup>17</sup> R. Doc. 120-4, Amended Report of John Stelly, at p. 13.

<sup>18</sup> R. Doc. 120-6, Stelly’s Second Deposition, at pp. 7-8.

<sup>19</sup> R. Doc. 120-7, Broadway Deposition, at pp. 10-11. From 09-26-17 through 10-04-21, State Police conducted 32 captain panels. Of these 32 panels, there were 18 in which at least one candidate was black and 25 in which at least one candidate was non-white.

were comparing the individuals promoted with the qualified pool of employees, as he claims he does,<sup>20</sup> this pool would also include qualified applicants on all-white promotional panels.

Finally, in asserting that there must be sufficient data in order to conduct statistical analysis and data from two promotions would be insufficient,<sup>21</sup> Plaintiff acknowledges why his statistical analysis will not be helpful to the jury in determining the facts at issue in this case. There are only two promotions at issue here and data from two promotional panels is insufficient for conducting a meaningful statistical analysis. As such, Plaintiff is essentially conceding that he would be unable to conduct statistical analysis in this matter without considering statistics that have no bearing on the reasons the State Police declined to promote him to captain on July 9, 2021.

***2. Opinions regarding factors the panels did and did not consider are improper and irrelevant.***

Plaintiff contends that analysis of the factors considered supports the conclusion that racial discrimination was the most likely reason for the promotions “given that no merit-based explanation for the differences in promotion were statistically significant.”<sup>22</sup> This statement is unsupported and completely inaccurate. The State Police leadership testified uniformly that a significant factor in promotions was having a broad range of experience in the State Police, including experience in the section in which the promotion was sought.<sup>23</sup> This is consistent with the fact that both Robert Burns and Saleem El-Amin, the candidates promoted to captain over Plaintiff on July 9, 2021, had years of experience in the sections in which they were promoted.<sup>24</sup> Although Plaintiff may have been qualified for these promotions, Burns and El-Amin were deemed more qualified based on their experience in their specific sections and demonstrated leadership

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<sup>20</sup> R. Doc. 127, at p. 15.

<sup>21</sup> R. Doc. 127, at pp. 4, 11.

<sup>22</sup> R. Doc. 127, at p. 3.

<sup>23</sup> See R. Doc. 118-2, Memorandum in Support Motion for Summary Judgment, at p. 7.

<sup>24</sup> *Id.*

and communication skills in those roles. Despite Plaintiff's unsupported and conclusory allegations that he was more qualified based on his education and experience and that his not being promoted must have been due to racial discrimination, case law demonstrates that specific experience relevant to the position sought can reasonably outweigh another candidate's better education and longer tenure with the company.<sup>25</sup>

Contrary to Plaintiff's assertions,<sup>26</sup> P.O. 229 only requires that certain factors be reviewed for promotions, not that such factors must be considered to any particular extent. In arguing that the State Police's apparent disregarding of certain factors means promotional decisions must have been race-related, Plaintiff is ignoring the fact that relevant experience was a significant factor in the two promotional decisions on July 9, 2021. Plaintiff is making assertions about what factors he believes are the most important in promotional decisions because they are the factors that are most helpful to him. The reality is that there is an objective factor which made a difference in the vast majority of captain promotions – experience in the relevant section<sup>27</sup> – but Plaintiff ignores this because it does not support his claim.

### ***3. Testimony and evidence regarding consideration of test scores are irrelevant.***

Opinions that candidates with higher test scores on promotional exams or more time-in-grade are less likely to be promoted are irrelevant because they will not assist the trier of fact in determining whether the State Police discriminated against Stelly on the basis of race on July 9, 2021. Even accepting these conclusions as true, they have nothing to do with race or whether race played a part in the State Police's promotional decisions. Plaintiff makes no attempt to rebut this point, stating only that “statistical evidence exists that the objective factor of exam scores played

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<sup>25</sup> *Runnels v. Texas Children's Hosp. Select Plan*, 167 F. App'x 377, 383 (5th Cir. 2006); *Price v. Federal Exp. Corp.*, 283 F.3d 715, 722-723 (5th Cir. 2002).

<sup>26</sup> *See* R. Doc. 127, at p. 17.

<sup>27</sup> *See* R. Doc. 118-2, at p. 24.



no role in LSP's deciding promotions despite the fact that all LSP personnel responsible for promotions were aware of at least the score rank of all promotional candidates if not the candidates' actual scores."<sup>28</sup> While he may take issue with the State Police's alleged failure to consider or assign what he deems "proper" weight to candidates' exam scores, this has no bearing on whether race was or was not considered in the promotional decisions. If the State Police were, in fact, "discriminating" against candidates with high exam scores and more experience, this would equally impact all high scoring and experienced candidates, regardless of race.

Plaintiff's opinions regarding the impact of test scores and experience on the likelihood that a candidate will be promoted will not assist the trier of fact in determining whether the State Police discriminated against him on July 9, 2021 because he is white, which is the only factual dispute to be resolved here. As such, these opinions are irrelevant and thus, inadmissible.

**C. Stelly and Broadway's testimony will be impermissibly cumulative.**

Plaintiff's Opposition asserts, without support, that both Stelly and Broadway should be allowed to testify because they use different analyses. Plaintiff contends that although both he and Broadway draw similar conclusions, they applied different methodologies to reach these conclusions.<sup>29</sup> Given experts are not permitted to offer the same or overlapping opinions, whether they formed their opinions through similar or distinct methodologies is immaterial. Regardless of the methodologies applied, Stelly and Broadway reached the same or very similar conclusions. As such, allowing both Stelly and Broadway to offer their proposed testimony would be impermissibly cumulative.

Notably, Plaintiff makes no attempt to distinguish his and Broadway's opinions to argue why both should be permitted at trial. Instead, he asserts that Broadway's report provides an

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<sup>28</sup> R. Doc. 127, at p. 5.

<sup>29</sup> R. Doc. 127, at p. 5.

“extremely valuable and insightful perspective” of disparities in promotional rates that Stelly’s analysis did not address.<sup>30</sup> However, he makes no mention of what Stelly’s analysis and opinions offer than Broadway’s do not. Thus, Plaintiff is at best arguing that his expert opinions are unnecessary if Broadway is permitted to testify as an expert at trial.

**CONCLUSION**

This Court should grant the State Police’s Motion *in Limine* and exclude Plaintiff as an expert witness or alternatively, limit Plaintiff and Andrew Broadway from offering expert opinions as to statistical evidence prior to July 2021, information that was and was not considered by the promotional panels, and statistical analysis of test scores.

Respectfully submitted,

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<sup>30</sup> R. Doc. 127, at p. 6.