testing, and detailed reasoning that addressed Mr. Wycoff's strengths, the specific impairment on which he concluded Mr. Wycoff was not competent to stand trial, and the relationship between his impairment and mental disorder. This speaks to the importance of the expert's credibility and the need for forensic psychiatrists to conduct and document the rigorousness of the assessment employed by the expert to reach a conclusion in competency to stand trial determinations.

Expert Witness Testimony in Hostile Work Environment Case

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Court Considers Whether Lower Court Erred in Precluding Testimony of Opposition's Retained but Non-Testifying Expert

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Key words: expert witness; hostile work environment; harmless error

In *Cooper v. City of St. Louis*, 999 F.3d 1138 (8th Cir. 2021), the Eighth Circuit Court of Appeals affirmed the district court's ruling after considering an appellant's claim that a district court had erred in not allowing him to utilize testimony and a report from the nontestifying expert psychiatrist retained by the City. The court said it would not reverse the trial court's decision to exclude testimony absent fundamental unfairness.

Facts of the Case

Rodney Cooper was a St. Louis Public Parks employee, working in a crew dedicated to Forest Park when he experienced a religious conversion in 2013. Following this event, he would frequently discuss religious topics at work, including God and Christianity.

Information from the lower court opinion in *Cooper v. City of St. Louis*, No. 4:16 CV 1521 RWS (E.D. Mo. Jun. 22, 2018) is summarized here for additional relevant facts: During his deposition, Mr. Cooper reported that his supervisor called him nicknames, insulted him, and would allegedly often tell Mr. Cooper to "shut up." In a supplementary affidavit from Mr. Cooper's co-worker, it was disclosed that the supervisor once told Mr. Cooper that he would get fired "on the spot" if he did not stop praying. In his deposition, the supervisor admitted to calling Mr. Cooper "Reverend Rodney" but refuted the other allegations. Mr. Cooper additionally reported that he was overlooked for overtime opportunities by his supervisor.

Mr. Cooper pursued legal action for a hostile work environment and claimed that the City's actions caused his depression and anxiety. The circuit court opinion makes clear that Mr. Cooper filed an action against the City for hostile work environment on the basis of his religious beliefs and claimed damages, including emotional pain and suffering and mental anguish related to an intimidating environment.

On August 1, 2018, prior to his trial on August 20, Mr. Cooper shared intent to call Kristin Bulin, his treating therapist, as a witness. Mr. Cooper did not intend to call her as an expert witness, so the City requested to exclude Ms. Bulin's testimony. Another conference was held prior to the trial, and the district court postponed the trial date and ordered that Ms. Bulin be available for deposition by the City by September 14, 2018. Ms. Bulin was deposed, and the court ordered that if an independent medical examination (IME) was planned for Mr. Cooper, that it be completed by January 30, 2019. The City was also ordered by the court to share intent to call any expert witnesses by February 15, 2019 and ensure the availability of those experts for deposition by March 15, 2019. The new trial date was then set for June 10, 2019.

The City retained John Rabun, MD as a psychiatric expert, and he conducted an IME of Mr. Cooper on January 29, 2019. Though retained, the City did not officially disclose Dr. Rabun as an expert witness by the February 15, 2019 deadline imposed by the court. On March 18, 2019, Mr. Cooper requested Dr. Rabun's report and received the report shortly thereafter. Mr. Cooper then planned to call Dr. Rabun as a witness. The City argued that Dr. Rabun's testimony should be excluded because he was not designated as an expert by the City.

The district court agreed with the City on the grounds that Dr. Rabun was a consulting expert for

the City and was not designated as an expert witness to be called during the trial. The City argued that his report be excluded as well. The district agreed on the grounds of hearsay, since the report would not have accompanying testimony by Dr. Rabun. At trial, the jury found that the City had not subjected Mr. Cooper to a hostile work environment. During the trial, Ms. Bulin testified to Mr. Cooper's psychic damages. On December 17, 2020, Mr. Cooper submitted an appeal, arguing that the district court erred by excluding Dr. Rabun as an expert witness.

Ruling and Reasoning

The U.S. Court of Appeals for the Eighth Circuit said that review of the lower court's decision to exclude evidence would be conducted under an abuse of discretion standard. But the court said that it need not address the merits of the lower court's decision to exclude the expert testimony in this case because any error was harmless. The court said that the IME findings and any testimony from Dr. Rabun would have been cumulative of Ms. Bulin's testimony on causation of mental health symptoms and emotional damages. Since Mr. Cooper's claim that he was subject to a hostile work environment was rejected by the jury, there was no need to further assess whether Mr. Cooper sustained mental or emotional damages. Exclusion of the expert's opinions did not result in fundamental unfairness for the claimant. Therefore, the court upheld the judgment of the district court.

Discussion

Cooper v. City St. Louis highlights the complicated nature of admission of expert witness testimony. In this case, the court referenced a related case, *House v. Combined Ins. Co. of Am.*, 168 F.R.D. 236 (N.D. Iowa 1996), in which a plaintiff sought to use an expert previously retained and then withdrawn by the defense. *House* differed from *Cooper* in that the defense in *Cooper* had not formally disclosed the intent to call Dr. Rabun as a testifying expert witness, whereas in *House* the defense had disclosed intent to call their expert and then later withdrew that expert.

To expound on this point, it is important to review the different types of experts that may be utilized in civil cases. Citing commentary to the Rules of Civil Procedure (Wright C, Miller A, Marchs R. Federal Practice and Procedure. 1994. CIVIL § 2032, p 447), the court identified four different types of experts, including those anticipated to be used as testifying witnesses at trial; those retained not to testify but to aid the preparation for trial or litigation; those not retained and used for informal consultation in trial preparation; and experts not used in trial preparation. The discovery of information from each of these types of experts differs depending on the expert type. In the case of *Cooper*, Dr. Rabun would fall under the second type of expert, and his opinions would be subject to discovery only in exceptional or other unique circumstances.

Federal Rule of Civil Procedure 35 (Rule 35) (Pub. L. No. 100–690, title VII, §7047(b) (2007)) addresses physical and mental examinations for civil court. This rule has two parts, part a and part b. Part a addresses that the court can order a party to submit to a physical or mental examination when there is a question about that party's physical or mental condition. Part b addresses that if the examined party requests the report from the examination, the request must be honored in writing. Rule 35 was applied in the case of *Cooper* with Mr. Cooper's being issued a copy of Dr. Rabun's report immediately upon his request.

House explores further standards outside of "exceptional circumstances" that would allow for the plaintiff to use an expert previously retained by the defense. In this case, the standards of "entitlement," "balancing" or "discretionary" standards, and "exceptional circumstances" were all explored. Exceptional circumstances can be summarized as circumstances such that the facts and opinion of the case cannot be obtained by another expert. Entitlement standards apply should a legal party be subject to an invasion of privacy through examination by an expert, in which case the examinee is entitled to utilize the results of that examination. Balance or discretionary standards involve the court balancing the "probative" value, or the value of the expert to provide information that helps to resolve a relevant disputed point with the prejudice that the jury may experience if it is disclosed that the expert was previously retained by one party and then used by the opposing party. For instance, in *House*, the court found that the expert could be utilized by the plaintiff with the expectation that no information about how the expert became involved in the case could be included in the trial.

In *Cooper*, Dr. Rabun was a retained expert, though not formally disclosed to the court as being used by the defense, and therefore one could look to *House* to see if an exception applied, which would

permit the expert's opinions. This case does not fit "exceptional circumstances" as the information and opinions gathered by Dr. Rabun drew upon his experience as a psychiatrist and could be reached by another expert psychiatrist. "Entitlement" does not apply in *Cooper* since he already brought his mental well-being into question, and therefore it is not considered as an additional invasion on his person for him to undergo psychiatric examination. When balancing probative versus prejudicial impact in *Cooper*, Dr. Rabun's testimony would have minimal probative value as the court found that his testimony would only be applicable for damages.

Use of Mental Health Evidence in Immigration Court

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Mental Health Conditions Should Be Considered in a Crime Analysis Determining If a Noncitizen Committed a "Particularly Serious Crime" Barring Protection from Deportation

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Key words: withholding of removal; board of appeals; asylum; significant crime analysis; mental health

In *Shazi v. Wilkinson*, 988 F.3d 441 (8th Cir. 2021), the Eighth Circuit Court of Appeals reversed the decision of the Board of Immigration Appeals (BIA). The court found the BIA's categorical ban on consideration of mental health evidence in the analysis determining if a noncitizen had been convicted of a "particularly serious crime" that would bar protection from deportation to be an arbitrary and capricious construction of federal law (8 U.S.C. § 1231 (2006)).

Facts of the Case

Laith Shakir Shazi was born in Baghdad, Iraq on March 20, 1971, and is a citizen of Iraq. He was a member of an organization that assisted the United States in its efforts to overthrow the regime of Saddam Hussein in the 1990s. As a result of his involvement, Mr. Shazi reportedly experienced PTSD, depression, and anxiety. In October 1996, he was admitted to the United States (Guam) as a parolee. Under immigration law, a parolee is an individual who is "paroled" into the United States under emergency, humanitarian, or other public interest reasons.

In March 1997, Mr. Shazi was granted asylum and eventually moved to Minnesota. His first criminal convictions were in 2007 for assault and making terroristic threats. The Department of Homeland Security began removal proceedings in 2012. Although the Immigration Judge (IJ) sustained the charges, the IJ granted Mr. Shazi's application for withholding of removal, thus allowing him to remain in the United States.

In 2016, Mr. Shazi was driving recklessly with his daughter and significant other as passengers. Following an argument, his daughter and significant other left the car and decided to walk. Mr. Shazi reportedly followed them in the vehicle, held up a knife, and verbally threatened to kill them. Subsequently, Mr. Shazi called home and threatened to hold a gun to his significant other's head. As a result, he was charged and convicted of malicious punishment of a child, felony domestic assault, and terroristic threats.

In 2018, the Department of Homeland Security reopened removal proceedings against Mr. Shazi, and the IJ terminated the bar of deportation. Mr. Shazi opposed the termination and applied for protection under provisions of the United Nations Convention Against Torture and Other Crime, Inhuman, or Degrading Treatment (CAT), 8 C.F.R. § 1208.16(c)(2) (2006), which states that noncitizens seeking protection from removal must show it is more likely than not that they would be tortured if returned to the country. Mr. Shazi's application was denied by the IJ, stating that his conviction of making terroristic threats in 2016 qualified as a "particularly serious crime," which bars withholding of removal. The IJ rejected Mr. Shazi's argument that his mental health conditions mitigated the seriousness of his crime. The IJ's rulings were upheld by the BIA, which concluded that mental health information cannot be included in the analysis of the seriousness of a crime. Mr. Shazi appealed to the Eighth Circuit Court of Appeals.