

Labor and Employment Corner

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The Use of Experts in Employment Discrimination Litigation

When attorneys think of expert witnesses, they may not automatically think of employment cases. Instead, counsel may believe that experts are usually unnecessary because most employment cases do not require stereotypical “experts,” like accident reconstructionists or CSI-like DNA experts. Expert witnesses can, however, be very useful in employment cases—and in some unexpected ways. In recent years, litigants have begun to go beyond relatively uncontroversial “number cruncher”

experts and to push the envelope of expert testimony in employment cases by calling on social psychologists, sociologists, and human resources experts to offer opinion testimony. After giving some brief background on the standard for the admissibility of expert testimony in federal courts, this article discusses some less familiar uses of expert testimony in employment cases.



The *Daubert* Trilogy and Federal Rule of Evidence 702

In the 1990s, the U.S. Supreme Court issued a series of opinions clarifying the standards that courts should use when deciding whether or not to allow expert testimony. The so-called *Daubert* Trilogy¹ established several principles that are embodied in Federal Rule of Evidence 702, which allows for opinion testimony by experts under the following conditions:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact 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.

This rule governs the admissibility of expert evidence in federal employment cases.

Use of Experts in Employment Litigation: New Frontiers

Experts are commonly used in a number of

ways in employment litigation. For example, parties regularly engage economic experts to calculate the economic damages allegedly lost by the plaintiff—including such items as benefits and pensions, which are difficult to quantify. Similarly, statisticians may testify about whether certain minority groups fail a standardized employment test at a disproportionately high rate or whether the pattern of employees chosen for a reduction in force suggests age discrimination. Vocational experts also may testify about a plaintiff’s employability to aid the fact finder in determining if the plaintiff has mitigated his or her damages adequately. In recent years, however, litigants have attempted to expand the boundaries of expert testimony in employment litigation beyond these relatively uncontroversial areas. Legal practitioners should be aware of these trends and plan their litigation strategy accordingly.

Experts at the Class Certification Stage

Increasingly, parties are turning to experts to help them achieve or defeat class certification in employment cases. For example, in the widely publicized *Dukes v. Wal-Mart Stores Inc.* case, the named plaintiffs sought to represent a class that included hundreds of thousands of members—encompassing all women employed by Wal-Mart at any time after Dec. 26, 1998. The plaintiffs alleged that Wal-Mart subjected women to discriminatory pay and promotion policies and offered the expert testimony of a sociologist in order to show that there were questions of law or fact common to the class, as required by Federal Rule of Civil Procedure 23(a)(2).

The sociologist engaged in the case opined that Wal-Mart’s centralized coordination and strong organizational culture sustained a uniformity in personnel policy and practice. He also identified what he thought to be significant deficiencies in Wal-Mart’s employment policies and practices. Based on these findings, he opined that Wal-Mart’s personnel policies and practices made all of Wal-Mart’s pay and promotion decisions vulnerable to gender bias. The plaintiffs then argued that the expert’s opinion showed that there was evidence of a common policy of discrimination—which established a common issue of fact or law for class certification purposes.

Wal-Mart objected, arguing that the sociologist’s conclusions were vague and imprecise and that they failed to meet the standards of Rule 702 or the *Daubert* ruling. Both the district court and the Ninth

Circuit rejected Wal-Mart's argument and concluded that the plaintiffs' expert provided enough of a basis for his opinion at the class certification stage and that the jury would decide whether or not his opinion was persuasive. Both the district court and the Ninth Circuit specifically declined to resolve any conflict between the parties' experts.²

It is important to note that the Ninth Circuit did not decide whether district courts should apply a full *Daubert* analysis at the class certification stage. Courts are split on this issue, with some courts holding that a full *Daubert* analysis should be undertaken.³ Similarly, some courts hold that, in cases in which expert testimony is necessary for determining class certification, courts must resolve disputes between competing testimony offered by experts.⁴ This issue will likely continue to be contentious in the coming years. Therefore, savvy practitioners should consider using experts at the class certification stage but should also be aware that the proper analysis of such expert testimony is currently open to debate.

Human Resources Experts

Even more controversial than the use of experts at the class certification stage is the use of human resources experts. In the landmark cases of *Burlington Industries v. Ellerth* and *Farragher v. City of Boca Raton*,⁵ the U.S. Supreme Court held that employers could establish an affirmative defense to certain kinds of sexual harassment liability if they could show that (1) they exercised reasonable care to prevent harassment and acted promptly to correct any harassment identified and (2) the complaining employee unreasonably failed to take advantage of preventive or corrective opportunities offered by the employer. Under this rule, evidence that the company maintained and enforced a reasonable antiharassment policy is key. Moreover, establishing that the employer acted appropriately in responding to any employee's complaint of harassment is crucial. As such, litigants have begun to designate human resources experts who seek to opine on the adequacy of a company's antiharassment policies and responses to complaints of harassment.

Courts have shown a varying degree of receptiveness to such experts. Some courts allow such testimony. For example, in *EEOC v. Sierra Pacific Industries*,⁶ the defendant designated an expert with experience in human resources and management counseling. The expert opined that the defendant acted within the appropriate standard of care in acting upon, and responding to, complaints of discrimination and/or harassment. The Equal Employment Opportunity Commission moved to exclude the expert's testimony, but the court denied the motion, concluding that the expert's 30 years of experience qualified him to offer expert testimony.⁷

By its nature, however, the field of human

resources is not a "hard" discipline that is marked by objective analyses or "scientific" proof. Consequently, courts are often skeptical about the reliability of the expert's methodology and the utility of the testimony. For example, in *Wilson v. Muckala*,⁸ the plaintiff sought to designate a human resources specialist as an expert who would testify about the defendant's response plan in cases of sexual harassment and the reasonableness of the defendant's response to the plaintiff's claim. The trial court excluded the evidence, finding that, even though the evidence was relevant, the facts were "not so complicated as to require the testimony of an expert witness on either the adequacy of the plan or policy or the investigation."⁹

Courts are similarly reticent to allow experts to testify to ultimate issues of fact—such as whether certain conduct amounts to harassment, retaliation, or discrimination. Instead, courts find that such matters are within the comprehension and ability of the jury to decide, eliminating the need for expert testimony. For example, in *Brink v. Union Carbide Corp.*,¹⁰ the plaintiff offered an affidavit from an expert with experience in the field of corporate human resources in which the expert expressed the opinion that the plaintiff was a victim of age discrimination. The court excluded the affidavit, finding that human resources is "not an area that requires expert testimony since a lay jury is capable of understanding the facts and issues here without the aid of an expert."

Ultimately, the admissibility of testimony from human resources experts remains unsettled. Although litigants may consider using such testimony, they should be aware that significant evidentiary challenges may lie ahead. In addition, when an opposing party designates a human resources professional as an expert, counsel should consider making a *Daubert* challenge to the expert's testimony.

Other Disciplines

In addition to human resources experts, litigants in employment cases have increasingly turned to experts from other "soft" disciplines—such as psychology and sociology. The application of *Daubert* to such disciplines is still evolving, but, for the time being, such testimony remains controversial.

For example, in *Collier v. Bradley University*,¹¹ the plaintiff designated a social psychologist as an expert who would testify that the plaintiff was a victim of racial discrimination, harassment, and retaliation. She based her opinion on the plaintiff's deposition, depositions of others involved in the case, documents provided to her by plaintiff's counsel, and an interview with the plaintiff. The court granted the defendant's motion to strike her opinion because it was not based on a reliable methodology. When

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deposed, the expert could not even describe her methodology. In addition, when asked how much credit she gave to what the plaintiff said, the expert said that she assumed that 90 percent of what the plaintiff said was true and that 10 percent of it was false. The expert did not offer a basis for making this determination and also could not identify what evidence she had credited and discredited. Accordingly, the court found the expert's methodology to be unreliable and excluded her testimony.¹²

Although courts remain skeptical of experts from these disciplines, some litigants have had success. For example, in *Tuli v. Brigham & Women's Hospital Inc.*,¹³ the plaintiff engaged an expert who specialized in social framework analysis, which specifically addresses issues of sex stereotyping and discrimination. The expert did not offer an opinion on whether or not any particular action was discriminatory. Instead, he discussed the settings in which discrimination typically occurs and reported that the allegations in the case were consistent with those observed patterns. He based his analysis on social psychological testing of stereotyping and discrimination that had been carried out over the past 30–40 years. The defendant moved to strike the expert's report, but the court denied that motion. In so doing, the court found that the expert's methods were recognized and that he did not overreach by purporting to offer an opinion on whether discrimination occurred in the case at issue.

Conclusion

Courts continue to wrestle with the admissibility of various kinds of experts in fields related to employment and are likely to do so for some time. As such, it may be hard to find certainty in this area of the law. One thing, however, is certain: Litigants will continue to push the boundaries in this area, and employment law practitioners should be prepared to meet the challenge. **TFL**

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Endnotes

¹*Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S.

137 (1999).

²*Dukes v. Wal-Mart Stores Inc.*, 603 F.3d 571 (9th Cir. 2010); *Dukes v. Wal-Mart Stores Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004).

³See, e.g., *Amer. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010) (district court must perform full *Daubert* analysis if the situation warrants).

⁴See, e.g., *Blades v. Monsanto Co.*, 400 F.3d 562, 569–70 (8th Cir. 2005) (district courts may be required to resolve expert disputes at the class certification stage).

⁵*Burlington v. Ellerth*, 524 U.S. 772 (1998); *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998).

⁶*EEOC v. Sierra Pacific Industries*, No. 2:08-CV-01470-MCE-DAD, 2010 WL 3941416 (E.D. Cal. Oct. 5, 2010).

⁷See also *EEOC v. GLC Restaurants Inc.*, No. CV-05-618, 2007 WL 30269 at **5–6 (D. Ariz. Jan. 4, 2007) (allowing plaintiff's human resources expert to testify on the adequacy of the defendant's anti-discrimination policies, even though she did not rely on any accepted standards for evaluating those policies, but instead relied on her own experience in the human resources field).

⁸*Wilson v. Muckala*, 303 F.3d 1207 (10th Cir. 2002).

⁹See also *Naeem v. McKesson Drug Company*, 444 F.3d 593 (7th Cir. 2006) (trial court should have excluded expert testimony as unreliable where the expert's opinions were not tied to specific portions of the company's policies and appeared to be general observations regarding what is normal or usual business practice).

¹⁰*Brink v. Union Carbide Corp.*, 41 F. Supp. 2d 402, 405 (S.D.N.Y. 1997).

¹¹*Collier v. Bradley University*, 113 F. Supp. 2d 1235 (C.D. Ill. 2000).

¹²See also *EEOC v. Wal-Mart Stores Inc.*, No. 6:01-CV-339-KKC, 2010 WL 583681 (E.D. Ky. Feb. 16, 2010) (testimony of sociologist is irrelevant and inadmissible because testimony about subconscious gender stereotyping did not shed light on whether defendant intentionally discriminated and would likely confuse the jury).

¹³*Tuli v. Brigham & Women's Hospital Inc.*, 592 F. Supp. 2d 208 (D. Mass. 2009).