

***THE USE OF EXPERTS  
IN EMPLOYMENT LITIGATION***

**HCBA CLE  
April 5, 2002**

**By**

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## I. EVIDENTIARY FRAMEWORK FOR EXPERT TESTIMONY

### A. Federal Standard: Federal Rule of Evidence 702

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.

Fed. R. Evid. 702. (Minn. R. Evid. 702 is worded exactly the same.)

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993), set new standards for the admissibility of expert scientific testimony. In Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167 (1999), the Supreme Court extended Daubert to non-scientific experts. The Supreme Court reasoned that the testimonial latitude available to expert witnesses requires that an expert's opinion have a reliable basis in the knowledge and experience of his discipline.

The Supreme Court instructed courts to screen expert testimony for relevance and reliability by considering a nonexclusive list of factors:

- Whether the theory or technique in question can be and has been tested;
- Whether it has been subjected to peer review and publication;
- What the known potential rate of error is; and
- The degree of acceptance within the relevant scientific community.

Daubert is considered to have established a policy favoring the admissibility of the opinions of qualified experts. However, expert testimony will be excluded if it draws inferences or reaches conclusions within the jury's competence or within an exclusive function of the jury. See Nichols v. American National Insurance Co., 154 F.3d 875 (8th Cir. 1998) (employer's psychiatric expert witness testimony went beyond permissible areas).

### B. Minnesota Standard of Admissibility

In Goeb v. Tharaldson, 615 N.W.2d 800 (Minn. 2000), and Sentinel Management Co. v. Aetna Casualty & Surety Co., 615 N.W.2d 819 (Minn. 2000), the Minnesota Supreme Court rejected Daubert and reaffirmed the Frye-Mack two-pronged standard for the admissibility of scientific evidence. Under the Frye-Mack standard, expert scientific testimony is inadmissible unless it is generally accepted as scientifically reliable within the relevant scientific community. Although the Frye-Mack standard specifically addresses scientific expert testimony, it is likely that litigants will rely upon Goeb's more restrictive view of expert testimony to argue for the exclusion of expert witness testimony under Minn. R. Evid. 702.

## II. THE SEX STEREOTYPE EXPERT WITNESS

### A. The Starting Place for Expert Witness Testimony on Sexual Stereotyping

In Hopkins v. Price Waterhouse the Supreme Court accepted the plaintiff's use of expert witness testimony on sexual stereotyping and thereby opened up a new avenue for litigants. Hopkins v. Price Waterhouse, 490 U.S. 228, 109 S. Ct. 1775 (1989), remanded 737 F. Supp. 1202 (D.D.C. 1990), aff'd 920 F.2d 967 (D.C. Cir. 1990). Prior to Hopkins v. Price Waterhouse, courts admitted evidence of stereotypes in discrimination actions but this evidence rarely came in through a designated sex stereotype expert. See, e.g., EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), aff'd 839 F.2d 302 (7th Cir. 1988) (Sears used an historian to support its defense -- which the court accepted — that the segregation of women in lower-paying jobs was the expression of the women's own choices).

In Hopkins v. Price Waterhouse, the Supreme Court held that the denial of partnership to a female employee based on her "abrasive" personality was sexual stereotyping in violation of Title VII. The partners' written evaluations on Hopkins were framed in the context of her sex: She needed to take a "course at charm school," "she may have overcompensated for being a woman," "many male partners are worse than Ann," and "she is a lady using foul language." The Supreme Court considered that these evaluations were evidence that Price Waterhouse used stereotypical criteria when denying Hopkins partnership.

The Supreme Court approved of the district court's reliance on the expert witness testimony of Dr. Susan Fiske, a social psychologist and academic from Carnegie Mellon University. Dr. Fiske testified that Price Waterhouse's denial of partnership to Hopkins was heavily influenced by the male partners' sexist expectations and attitudes. She testified that, because Hopkins did not exhibit stereotypical feminine characteristics, she was passed over for partnership. Dr. Fiske testified that, in her opinion, the denial of partnership was partially the result of sex stereotyping and at least partially based on sex.

The D.C. Court of Appeals determined that Price Waterhouse had a discriminatory motive even though the court acknowledged that the partners' sexist comments could have been unconsciously motivated. Ultimately, in a split decision, the Supreme Court reversed the judgment in favor of Hopkins and remanded the case for further proceedings. However, the Supreme Court's opinion broke new ground for the use of sex stereotyping experts. See also Jensen v. Eveleth Taconite Co., 824 F. Supp. 847, 882-883 (D. Minn. 1993) (plaintiffs' social psychologist expert provided the court "a sound, credible theoretical framework that confirms the court's conclusion . . . of sexual harassment.")

## **B. Who Qualifies as a Sex Stereotyping Expert?**

Fed. R. Evid. 702 and Minn. R. Evid. 702 require the court to determine that a proposed expert has the requisite knowledge, skill, experience, training or education to be qualified to offer expert testimony. A proposed expert's education and experience must rise to the level of "specialized" knowledge.

The fact that a person spends substantially all of her time consulting with attorneys and testifying in trials is not an automatic qualification guaranteeing admission. Lipsett v. University of Puerto Rico, 740 F. Supp. 921, 924 (D.P.R. 1990) (social worker and social psychologist who regularly consulted with attorneys and testified at trials not qualified as experts because their testimony would not possess the professional safeguards ensuring objectivity). The court in Lipsett found that both experts "failed to rise to the level of specialized knowledge we deem necessary to qualify them as experts, and that their testimony would not possess the professional safeguards ensuring objectivity." Id.

No court has articulated clear guidelines as to what qualifies someone to testify as an expert in sexual stereotyping. Dr. Fiske, Hopkins' expert witness, was a social psychologist and an academic. Can a clinical psychologist, organizational behavior consultant or social worker who specializes in women's issues qualify as well?

## **C. Sampling of Cases**

Blakey v. Continental Airlines, Inc., 1997 U.S. Dist. LEXIS 22074 (D.N.J. Sept. 9, 1997). The court limited plaintiff's expert witness to the general policies and practices a company may undertake in an effort to be effective in preventing and addressing allegations of sexual harassment. The plaintiff's expert was a psychologist who described herself as a leading authority on "organizational practices regarding the prevention and resolution of sexual harassment in the workplace." The court would not allow the expert to testify about everything in her report, "much of which contains legal conclusions and invades the province of the jury."

Shuford v. Alabama State Bd. of Educ., 968 F. Supp. 1486, 1501-02 (M.D. Ala. 1997). The court considered testimony regarding sexual stereotypes used in hiring and promotion, as well as the history of sexual discrimination.

Butler v. Home Depot, Inc., 984 F. Supp. 1257 (N.D. Cal. 1997). Over Home Depot's Daubert objections, the court ruled that the plaintiffs could call three experts: An expert in diversity management; Dr. Fiske (from Hopkins v. Price Waterhouse) who is described as an expert in the fields of social psychology and stereotyping; and an expert in the fields of sociology, social psychology and organizational development who was to testify about the interplay of gender stereotyping and subjective employment practices.

Jensvold v. Shalala, 925 F. Supp. 1109, 1114-15 (D. Md. 1996). In a bench trial, the court admitted testimony of plaintiff's expert on sex stereotyping and the expert's conclusion that stereotypes were in use in plaintiff's workplace and applied to her. However, the judge found the expert's conclusions not helpful because the judge rejected the underlying factual allegations of the plaintiff.

Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991). The plaintiff's expert, Dr. Fiske (from Hopkins v. Price Waterhouse), testified that the existence of pornographic pictures of women in the workplace in a traditionally male-dominated division could contribute to and create a sexually hostile work environment. The court credited Dr. Fiske's testimony, determining that it "provided a sound, credible theoretical framework from which to conclude that the presence of pictures of nude and partially nude women, sexual comments, sexual joking, and other behaviors . . . creates and contributes to a sexually hostile work environment." Id. at 1505.

By contrast, in Jacksonville Shipyards, the court did not credit the defendants' expert testimony on the psychological effects of sexual materials. The expert had concluded that the "pictures do not create a serious or probable harm to the average woman." Id. at 1508. The court found the expert's conclusions to lack reliability and validity because it found that the expert's studies did not involve the workplace.

### III. THE EMPLOYMENT PRACTICES EXPERT

#### A. Faragher Affirmative Defense

The Supreme Court's decisions in Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), and Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), invigorated the use of human resource consultants and employment attorneys as expert witnesses. The now-familiar Faragher affirmative defense gives both plaintiff's and defense counsel much to work with in terms of expert witness testimony. The defense comprises of two necessary elements:

- (a) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and
- (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

At the forefront of this affirmative defense are two critical issues which lend themselves well to expert testimony: (a) whether a given policy of prevention and correction was reasonable and effective; and (b) whether a plaintiff was justified in not following the company's complaint process.

Even before Ellerth and Faragher, employment practices experts were used to either support or refute the employer's defense of prompt corrective and remedial action. However, Ellerth and Faragher provide even more support for the use of employment practices experts. Employment practices experts address the effectiveness of the employer's sexual harassment policy, complaint mechanism and investigation process, and how the employer applied these procedures with respect to the plaintiff.

## **B. Who Qualifies as an Employment Practices Expert?**

Unlike the sex stereotyping expert, the employment practices expert usually has developed his or her expertise by way of practical experience, rather than education. An employment practices expert could be a lawyer who practices in the employment area, an experienced human resources manager, or a human resources consultant.

## **C. Sampling of Cases**

Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 127 N.M. 47 (N.M. 1999). As a defense to sexual harassment allegations, Wal-Mart claimed that it had a good sexual harassment policy. Plaintiff's expert was allowed to testify about the minimum standards for an effective sexual harassment corporate policy and how an employer should enforce its sexual harassment policy.

Huffman v. City of Prairie Village, Kan., 980 F. Supp. 1192 (D. Kan. 1997). Plaintiff designated a retired police officer and former deputy chief of the Detroit, Michigan Police Department to offer expert testimony about the defendant's deficient sex discrimination policy. In response, the defendant designated two experts: The chief legal counsel of the Kansas Department of Human Resources and a law school instructor, as well as the program manager of a government training institute. Stating that "the court is not enthusiastic about any of the proposed expert testimony," the court denied both parties' motions in limine and scheduled a Daubert hearing prior to trial. Id. at 1209.

Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1997). Plaintiff's expert testified that Walmart's open door policy was not implemented and was ineffective.

Karibian v. Columbia University, 930 F. Supp. 134 (S.D.N.Y. 1996). The court excluded a clinical social worker's expert testimony on the reluctance of people to make complaints about sexual harassment. The court determined that "testimony about the reluctance of people to complain about sexual harassment would involve such an oversimplification of the issue that it would be of no real help to the jury and could be misleading." Id. at 142.

Fowler v. Kootenai County, 918 P.2d 1185 (Idaho 1996). The court allowed the plaintiff's expert to testify about different types of sexual harassment, his opinion as to whether specific factors could contribute to a hostile workplace (like vulgar language), and the effect of harassment on a person. However, the court did not allow the expert to testify about whether the plaintiff in particular was a victim of sexual harassment or whether the defendant's workplace was a hostile work environment. The court considered that such testimony would invade the province of the jury. Following an employer verdict, the Idaho Supreme Court affirmed the trial court's evidentiary rulings.

Butta-Brinkman v. FCA Intern., Ltd., 950 F. Supp. 230 (N.D. Ill. 1996). The court granted employer summary judgment, in part, based upon defendant's expert witness' un rebutted affidavit that the company's sexual harassment policy was clear and specific, and that women had "every reason to expect a prompt, thorough investigation and prompt, effective remedial action when they bring forward a complaint of harassment." The defendant's expert was a consultant in sexual harassment prevention and had previously worked at the EEOC for seven years.

#### **IV. EXPERTS TESTIFYING ABOUT "REASONABLE ACCOMMODATIONS" IN ADA CASES**

##### **A. Necessity of an Expert**

Evidence in the form of an expert opinion from a vocational, medical, or other expert is not necessary in every Americans with Disabilities Act ("ADA") case. In some cases, the plaintiff may be able to furnish reliable evidence of a particular reasonable accommodation, without any expert testimony. See Carrozza v. Howard County, 847 F. Supp. 365 (D. Md. 1994). However, the absence of an expert can compromise the plaintiff's chance of surviving summary judgment. See Ballard v. Alabama, 1996 U.S. Dist. LEXIS 18224, \*59 (S.D. Ala. Jan. 25, 1996)(granting summary judgment when plaintiff offered only her lay observation that she could have performed the essential functions of her job if provided with an executive chair).

##### **B. Sampling of Recent Cases**

Richards v. Farner-Bocken Co., 145 F. Supp.2d 978 (N.D. Iowa 2001). In Richards, plaintiff survived summary judgment on part of her ADA claim based upon her vocational rehabilitation expert's opinion that the plaintiff's disabilities could have been reasonably accommodated. The court held that the plaintiff, through her expert, raised a genuine issue of material fact on the "reasonable accommodation issue."

Kinnaman v. Ford Motor Co., 2000 U.S. Dist. LEXIS 235 (E.D. Mo. Jan. 10, 2000). In Kinnaman, the defendant moved to strike from the summary judgment record the plaintiff's expert witness reports. The expert witness had provided reports opining on whether, among other things, the plaintiff could have performed jobs with or without reasonable accommodations. The district court conducted a Daubert hearing and subsequently granted the defendant's motion to strike. The court held that the expert (a qualified rehabilitation counselor) had failed to show that she used an acceptable methodology when developing her conclusions.

Erickson v. Board of Governors, State Colleges & Universities for Northeastern Illinois University, 1997 U.S. Dist. LEXIS (N.D. Ill. Aug. 29, 1997). In Erickson, the plaintiff alleged, among other things, that the university had discriminated against her based upon her disability (infertility). In the context of cross motions for summary judgment, plaintiff offered the expert witness deposition testimony of a psychologist who counsels women experiencing infertility and who opined on the reasonable accommodations the university could have taken. The court relied extensively on this testimony in denying the cross motions for summary judgment.

## **V. PSYCHOLOGISTS/PSYCHIATRISTS AND THE CONTROVERSY OVER INDEPENDENT MEDICAL EXAMINATIONS**

### **A. The Legal Standard**

Some courts have held that a plaintiff claiming emotional distress does not have to provide expert testimony to withstand summary judgment. Kohn v. Minneapolis Fire Dep't., 583 N.W.2d 7, 14-15 (Minn. Ct. App. 1998) (holding that damages for mental anguish may be based on subjective testimony); Kim v. Nash Finch Co., 123 F.3d 1046, 1067 (8th Cir. 1997) (allowing damages for emotional distress claim to stand despite the absence of expert testimony); Delph v. Dr. Pepper Bottling Co., 130 F.3d 349 (8th Cir. 1997) (only the plaintiff and his wife testified regarding plaintiff's emotional distress; court reduced the amount of damages plaintiff received, but permitted the subjective evidence of plaintiff's emotional distress); Passantino v. Johnson & Johnson Consumer Products Inc., 212 F.3d 493 (9th Cir. 2000) (compensatory damages awarded based on plaintiff's testimony, as corroborated by her husband and sister). Cf. Deli v. University of Minnesota, 578 N.W.2d 779, 783 (Minn. Ct. App. 1998) (stating that "[i]n the absence of any medical testimony, such testimony fails to provide the 'guarantees of trustworthiness' necessary to overcome the speculative nature of this claim because we cannot be certain of the extent of her distress and can only speculate as to its source").

Often, when an employee claims emotional distress damages arising from alleged discrimination, the employer seeks to compel the employee to undergo an independent medical or psychological examination. Federal Rules of Civil Procedure, Rule 35(a) states:

When the mental or physical condition (including the blood group) of a party, . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner . . . . The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(Minn. R. Civ. P. 35.01 is substantially the same). In Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964), the Supreme Court stated that the “in controversy” and “good cause” requirements of Rule 35 would not be satisfied by conclusory allegations contained in pleadings, or by assertions of mere relevance to the case. Rather, the movant must make an affirmative showing that the Rule 35(a) requirements have been satisfied. Id. Therefore, the court must initially determine whether defendant has made an affirmative showing that plaintiff has placed his or her mental condition “in controversy” by making a claim for emotional distress damages.

#### **B. Courts That Consider “In Controversy” Requirement Satisfied Whenever Emotional Distress Damages Are Pled**

The following courts have held that a plaintiff puts his or her mental condition “in controversy” by simply making a claim for emotional distress damages as part of an employment discrimination claim. See Jansen v. Packaging Corp. of America, 158 F.R.D. 409, 410 (N.D. Ill. 1994); Smedley v. Capps, Staples, Ward, Hastings & Dodson, 820 F. Supp. 1227, 1232 (N.D. Cal. 1993); Zabkowicz v. West Bend Company, 585 F. Supp. 635, 636 (E.D. Wis. 1984).

### **C. Courts That Require More Than Pleading of Emotional Distress Damages**

Some courts, however, will not require a plaintiff to submit to a medical examination unless, in addition to a claim for emotional distress damages, one or more of the following factors is also present: (1) plaintiff has asserted a specific cause of action for intentional or negligent infliction of emotional distress; (2) plaintiff has alleged a specific mental or psychiatric injury or disorder; (3) plaintiff has claimed unusually severe emotional distress; (4) plaintiff has offered expert testimony in support of her claim for emotional distress damages; or (5) plaintiff concedes that her mental condition is “in controversy” within the meaning of Fed. R. Civ. P. 35(a). See Turner v. Imperial Stores, 161 F.R.D. 89, 93-95 (S.D. Cal. 1995); Smith v. J.I. Case Corp., 163 F.R.D. 229, 230 (E.D. Penn. 1995); Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 221-222 (S.D.N.Y. 1994). Most reported cases address the last prong: Whether the plaintiff “concedes” that his or her mental condition is in controversy. Generally, court’s look to the plaintiff’s allegations in the pleadings to ferret out whether the plaintiff has conceded this point.

Minnesota reported case law is limited on this issue. In O’Sullivan v. Minnesota, 176 F.R.D. 325, 328 (D. Minn. 1997), the court denied the employer’s motion for an independent medical examination because none of the five factors mentioned above were present. The court noted that the plaintiff’s mere allegations of “physical and emotional distress” are not sufficient to place her mental state “in controversy.” See also Navarre v. S. Washington County Sch., 633 N.W.2d 40 (Minn. App. Ct. 2001) (recognizing that it is within the trial court’s discretion to deny an independent medical examination).

### **D. Sampling of Cases**

Womack v. Stevens Transport, Inc., 201 U.S. Dist. LEXIS 9753 (E.D. Pa. Feb. 14, 2001). In Womack, the court concluded that the plaintiff placed his mental condition “in controversy” through the pleadings, as he alleged, among other things, “mental anguish, suffering and emotional distress.” The court further held that the employer met its burden of showing “good cause” where there were “no other means of determining the present psychological state of [plaintiff].” Id. at \*8. Therefore, the employer met both the “relevance” and “need” requirements of Fed. R. Civ. P. 35(a).

Pearson v. City of Austin, 2000 U.S. Dist. LEXIS 20622 (W.D. Tex. May 12, 2000). In Pearson, four plaintiffs sought damages for mental anguish arising out of an alleged unlawful arrest. The court stated that “the routine request for damages for mental anguish or emotional distress, as opposed to causes of action based upon emotional distress, does not place a party’s mental condition in controversy . . . so long as they are ordinary, garden variety claims that an objective fact-finder can evaluate.” Id. at \*3. Therefore, the defendant’s request for an independent medical examination was denied with respect to three of the plaintiffs. Because the fourth plaintiff was offering an expert witness who would testify that her depression and anxiety were exacerbated by the incident, the court concluded that her claim went beyond a routine request for mental anguish damages and she was ordered to undergo a medical examination.

Fox v. The Gates Corp., 179 F.R.D. 303 (D. Colo. 1998). The plaintiff brought an ADA claim for lost wages and emotional distress damages. The court determined that the plaintiff did not allege a specific mental or psychiatric injury or disorder. The court determined that the plaintiff had merely alleged a “garden variety” claim for emotional damages. Therefore, the court denied the employer’s motion to compel for an independent medical examination of the plaintiff. The court also stated that “the amount of emotional distress damages claimed by plaintiff is insufficient, without more, to justify an IME under Rule 35(a).” Id. at 308; see also Flanagan v. Keller Products, Inc., 2001 U.S. Dist. LEXIS 21881 (D.N.H. Dec. 18, 2001) (holding that claims for “garden variety” mental anguish do not implicate the predicate *Ain controversy* requirement of Fed. R. Civ. P. 35(a)).

Haensel v. Chrysler Corp., 1997 U.S. Dist. LEXIS 13093 (E.D. La. Aug. 25, 1997). In Haensel, the plaintiffs sought recovery against their employer for, among other things, past and future mental anguish and emotional distress. The court determined that “[b]ecause plaintiffs allege mental injuries, an independent medical examination is justified in order to determine the existence and extent of the asserted injuries.” Id. at \*3 (citing Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 609 (C.D. Cal. 1995) (explaining that plaintiff’s allegation that her emotional distress is ongoing is sufficient to establish good cause to compel mental examination)).

Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). In Sarko, the plaintiff did not assert a separate claim for emotional distress, but rather alleged that her depression “has a long-term impact on her mental state.” The court concluded that the plaintiff’s mental state is relevant to the litigation because she used the present tense “has” in her allegation. Therefore, the employer showed good cause for ordering the examination and “that its expert must have ‘some limited opportunity’ to examine plaintiff to determine the nature and extent of this alleged long-term impact.” Id. at 131. The court, however, limited the examination to the plaintiff’s current mental state.

## VI. THE ECONOMIC DAMAGES EXPERT WITNESS

### A. Who Qualifies as an Economic Damages Expert?

Generally speaking, those who qualify as an economic damages expert are either economists or accountants having substantial experience in quantifying damages for litigation purposes. Often, parties will also seek to offer the testimony of vocational rehabilitation professionals to opine on issues of front pay and mitigation. Like other particular areas of expertise, the court will determine whether one qualifies as an economic damages expert based on his or her training, education, and experience in the field. Again, Rule 702 guides the court's decision-making process.

### B. Sampling of Cases

Coleman v. Dydula, 139 F. Supp.2d 388 (W.D.N.Y. 2001). The court allowed the testimony of a forensic economist related to plaintiff's lost future wages. The former employer sought to exclude the plaintiff's expert on the basis that his methodologies were not generally accepted in that community. The court found the expert to be reliable and cited to other jurisdictions which have also concluded that forensic economists were sufficiently reliable under Daubert and Kumho Tire. See also Finch v. Harecks, Inc., 941 F. Supp. 1395 (D. Del. 1996) (court allowing a forensic economist to testify as to statistical evidence in employment discrimination cases).

Flebotte v. Dow Jones & Co., 2000 U.S. Dist. Lexis 19862 (D. Mass. Dec. 22, 2000). In a reduction-in-force and age discrimination action, both plaintiff and defendant sought to exclude the testimony of the other's economic damages expert. The plaintiff sought exclusion of the employer's expert because he relied on out-dated information and was therefore inaccurate. Likewise, the employer sought exclusion of the plaintiff's expert on the basis that his findings were too speculative and based on inaccurate facts. The court allowed the testimony of each expert concluding that both experts were "able to express a reasonably accurate conclusion" as to economic damages.

Voilas v. General Motors Corp., 73 F. Supp.2d 452 (D.N.J. 1999). In an action by multiple plaintiffs against their employer for fraud in the employment context, the court allowed the testimony of an economic damages expert regarding lost wages and benefits. The employer sought to exclude the testimony of the plaintiffs' expert claiming he did not have "specialized knowledge" in the field of employment benefits and options. In denying the employer's motion, the court found the expert qualified as he was a professor of economics at a well-respected university; he received his B.S., M.A. and Ph.D. in economics; he had provided testimony in more than 250 trials, arbitrations and depositions; and he lectured and authored numerous articles on the subject of lost wages and employee benefits. The court, however, concluded that the expert could not testify about the plaintiff's punitive damages.

Equal Employment Opportunity Commission v. Rockwell Int'l. Corp., 60 F. Supp.2d 791 (N.D. Ill. 1999). In an ADA case, the court determined that plaintiff's vocational counselor's report did not meet the Daubert test because the expert deviated from the methodology and principles normally applied in his field of expertise. Moreover, the vocational expert failed to employ the same level of intellectual rigor that characterizes the practice of experts in his field due to his failure to independently verify the information given to him by counsel. Although his qualifications were not challenged, the court did not allow the vocational expert to testify due to the failure to meet the Daubert test.

Drago v. Aetna Plywood, Inc., 1998 U.S. Dist. Lexis 12249 (N.D. Ill. Aug. 3, 1998). In a sexual harassment action, the employer sought to exclude the testimony of plaintiff's expert because he had no specific experience in calculating lost wages. The court allowed plaintiff's economic damages expert. Plaintiff's expert was a CPA and had an MBA. The court also determined that the expert had considerable accounting experience including valuations for litigation purposes sufficient to qualify under Fed. R. Evid. 702. The court recognized that "the accuracy of expert testimony goes to the weight rather than the admissibility of the evidence, and, as such, it is a matter for the jury to resolve." Id. at \*11.

## **VII. USE OF STATISTICIANS TO PROVE "DISPARATE IMPACT" IN EMPLOYMENT DISCRIMINATION CASES**

### **A. The Legal Standard**

There are extensive treatises written on the use of statistical evidence in employment litigation. I provide only a very general overview of the legal analysis that is applied here. Since there is no statistical threshold mandating a finding of disparate impact, the court must assess the significance or substantiality of the disparities on a "case by case" basis considering not only the statistics, but also all the surrounding facts and circumstances. Waisome v. Port Authority of New York and New Jersey, 948 F.2d 1370 (2nd. Cir. 1991). In order to establish a prima facie case of disparate impact, a plaintiff must first isolate and identify "the specific employment practices that are allegedly responsible for any observed statistical disparities." Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 994, 108 S.Ct. 2777, 2789 (1998).

Once the employment practice is defined, “the statistical evidence must be of the kind and degree sufficient to raise the inference that the employment decision was based upon an impermissible factor . . . .” Goetz v. Farm Credit Services, 927 F.2d 398, 405 (8th Cir. 1991). Under the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § § 1607.4 (1998), the so-called “four-fifths rule” states:

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

Therefore, the use of a statistician in these types of discrimination cases has become second-nature and is instrumental in proving a disparate impact.

## **B. Sampling of Cases**

EEOC v. Venator Group, 2002 U.S. Dist. Lexis 1724 (S.D.N.Y. Feb. 5, 2002). In Venator Group, the court denied defendant's motion to exclude the testimony of the plaintiff's statistical expert. The defendant-employer claimed the expert's methodologies were unreliable. The expert opined that his statistical analysis of the rate of layoffs of older employees versus younger employees showed a disparate impact. The employer argued that the expert had improperly failed to employ multiple regression analysis in her examination of the layoffs. In response, the court stated multiple regression analysis is not a prerequisite for the admission of statistical reports. Rather, the omission of a particular variable affects the probativeness of the evidence, not its admissibility.

Smith v. Xerox Corp., 196 F.3d 358 (2nd Cir. 1999). In Smith, the plaintiffs' statistician testified that the defendant's reduction-in-force practices were used to discriminate against female and older workers. The defendant argued that plaintiff's expert's methodology failed to take into account multiple regression analysis and also used flawed groupings of workers. While it did not analyze the statistician's methodologies under Daubert, the court concluded that his analysis was of little probative value. Therefore, the plaintiff failed to make out a prima facie case of disparate impact. See also Fischer v. Vassar College, 70 F.3d 1420, 1443 (2nd Cir. 1995) (plaintiff may not “gerrymander” data to skew results of statistical analysis in her favor).

Green v. Town of Hamden, 73 F. Supp.2d 192 (D. Conn. 1999). In Green, the plaintiff's statistician was employed to give an expert opinion on the defendant's hiring practices. The statistician opined that there was a significant disparity as a result of defendant's hiring practices of minorities versus non-minorities. The court concluded that, based on the statistician's analysis, the scenario offered by the plaintiff "comfortably tips the scales in favor of a finding of disparate impact." Id. at 198. Therefore, the plaintiff presented sufficient prima facie evidence that the defendant engaged in racially discriminatory hiring practices.

Vitug v. Multistate Tax Commission, 88 F.3d 506 (7th Cir. 1996). In Vitug, to avoid summary judgment, the plaintiff offered affidavits of two statisticians as evidence of a prima facie case of disparate impact as a result of defendant's hiring and promotion practices. The court concluded that the affidavits did not offer any statistics or data in support of the plaintiff's disparate impact claim. Id. at 513. Rather, the affidavits merely alleged that defendant's "hiring and promotion procedure constitutes a 'mechanism' which lends itself to discrimination." Id. at 514. Therefore, the Court of Appeals affirmed the trial court's grant of summary judgment in favor of defendant.

Garner v. Arvin Indust., Inc., 885 F. Supp. 1254 (E.D. Mo. 1995). In Garner, the plaintiff brought a claim against her former employer alleging that she was terminated from her employment on the basis of her age. The employer argued that the plaintiff's statistician's methods were fatally flawed, namely because the sample pool used by the statistician was too small. The court found that plaintiff's statistical evidence was not of the degree or kind mandated by Goetz in order to raise a reasonable inference of age discrimination. Therefore, the plaintiff failed to make a proper showing that her termination of employment was pre-textual or that age motivated the defendant's decision.

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