Commentary:

Making the Best Use of Liability Experts In Discrimination and Harassment Litigation

By Amy Oppenheimer*

Using an expert in discrimination and harassment cases to either bolster or defeat liability can be a powerful tool. The use of economists and/or psychologists at the damages phase of the trial is routine. It is less common, but equally important, to use experts at the liability phase. Some attorneys shy away from using liability experts for fear their testimony will not be permitted.

Of course, there are limits to what an expert can testify about, and not every case will benefit from such an expert. However, there is a wide range of areas that liability experts are permitted to go into. The trick is selecting the right type of expert for the particular case.

General Restrictions on Expert Testimony

Under Federal Rule of Evidence 702, expert testimony is permitted when it will "assist the trier of fact to understand the evidence or to determine a fact in issue."

The authority on admitting expert testimony is *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), which sets out that the court is the "gatekeeper" and must ensure that expert testimony is both relevant and reliable.

Daubert lists four factors to consider when making this determination: whether the theory can be tested, whether it has been subjected to peer review, its known or potential rate of error and its general acceptance in the relevant professional community.

The *Daubert* holding was developed further in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), in which the U.S. Supreme Court held that it could not rule out or rule in, for all cases and for all time, the applicability of the factors in *Daubert*.

"The objective of [*Daubert*'s gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony," the high court said in *Kumho*. "It 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 practices of an expert in the relevant field. ... [W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony." *Kumho Tire* at 152.

The wording of *Daubert* has caused some practitioners to fear that an expert must be a "hard scientist" to be permitted to testify. This is not so.

Courts have allowed expert testimony in topics that require specialized knowledge, from police gangs to stock photography to workplace discrimination and harassment. *United States v. Hankey*, 203 F.3d 1160, 1167-1170 (9th Cir. 2000); *Groobert v. President and Directors of Georgetown College*, 219 F. Supp. 2d 1, 7-11 (D.D.C. 2002); see *infra*.

Discrimination Cases

In discrimination cases, liability experts come from varying backgrounds including statistics, social science, psychology (experts can testify about bias, stereotyping and hiring practices) and human resources.

"Courts have traditionally allowed litigants to present statistical evidence in employment discrimination cases." *Finch v. Hercules Inc.*, 941 F. Supp. 1395, 1425 (D. Del. 1996).

In *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1217 (3d Cir. 1995), the court allowed statistical evidence to prove discriminatory animus. In *Washington v. Vogel*, 880 F. Supp. 1545, 1548 (M.D. Fla. 1995), the District Court found that *Daubert* allowed the use of statistical evidence to prove employment discrimination and pretext.

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Courts have not permitted statistical evidence in all cases, disallowing evidence that is either irrelevant or unreliable.

In *Raskin v. Wyatt Co.*, 125 F.3d 55, 65 (2d Cir. 1997), a case under the Age Discrimination in Employment Act, the court excluded statistical evidence based on a finding that the expert inflated the retirement age and did not consider the population at large.

In *Munoz v. Orr*, 200 F.3d 291, 301-301 (5th Cir. 2000), the 5th Circuit found that the methodology used by the expert was not sound — the expert had assumed that the employer's promotion system discriminated against Hispanics without considering other variables such as education and experience; hence, the testimony was not allowed.

Courts have considered testimony from experts on both sex stereotyping and racial stereotyping/bias.

There is U.S. Supreme Court authority for allowing such testimony: *Hopkins v. Price Waterhouse*, 490 U.S. 228 (1989), approved the trial court's use of a social psychologist as an expert to discuss gender stereotyping. The same expert testified to the types of problems faced by women in male-dominated industries in *Robinson v. Jacksonville Shipyards Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), a sexual harassment case. The *Robinson* court also permitted expert testimony from a social scientist about patterns and response to sexual harassment and remedial steps that employers can take in response to harassment.

In *Graffam v. Scott Paper Co.*, 60 F.3d 809 (1st Cir. 1995), an age discrimination case, the court permitted an industrial psychologist to testify about the employer's selection procedures. In *Jensvold v. Shalala*, 925 F. Supp. 1109, 1114 (D. Md. 1996), the District Court allowed an expert to testify about sex stereotyping but rejected the testimony as it applied to that case, entering judgment in favor of the defendant.

In regard to racial stereotyping, in *Mukhtar v. California State University, Hayward*, 299 F.3d 1053, 319 F.3d 1073 (9th Cir. 2002), an expert on racial discrimination was permitted to testify at trial in a case alleging that the plaintiff was passed over for tenure due to race discrimination. The jury found in favor of the plaintiff. The appellate court found that social-science testimony is proper in an employment discrimination case but remanded for a new trial solely because the trial judge failed to make specific reliability findings under *Daubert*.

However, in *Tyus v. Urban Search Management*, 102 F.3d 256, 263 (7th Cir. 1996), a case involving racial discrimination in housing, the 7th Circuit reversed the trial court for *not* allowing testimony from two expert witnesses: a sociology professor who would have testified about the history and patterns of housing discrimination, and a psychologist/statistician who would have testified about how advertising sends a message to its target market and how an advertising campaign featuring only whites affects blacks.

The *Tyus* court found that social-science testimony must be tested in the same way as other expert testimony proffered under Rule 702 and, further, that genuine expertise may be based on experience or training.

Harassment Cases

Workplace harassment cases brought under Title VII of the Civil Rights Act of 1964 or state fair-employment-practices statutes are often good candidates for expert testimony because a central issue in many, if not most, of these cases is whether the employer has failed to act as a reasonable employer would to prevent and/or respond to harassment.

While an expert should not be permitted to invade the jury's province and testify to the ultimate issue of whether the harassment itself occurred, many courts have permitted experts to testify about whether the employer's policies and procedures in preventing and responding to harassment are typical of what would be expected, or consistent with "good human-resource practice."

The 11th Circuit in *Steele v. Offshore Shipbuilding Inc.*, 867 F.2d 1311 (11th Cir. 1989), allowed testimony by a human-resources consultant that the employer conducted a reasonable investigation and took prompt remedial action. The court in *Kimzey v. Wal-Mart Stores Inc.*, 107 F.3d 568 (8th Cir. 1997), allowed an expert to testify that the employer had not adequately trained its employees regarding investigating complaints of sexual harassment. In *Shrout v. Black Clawson Co.*, 689 F. Supp. 774 (S.D. Ohio 1988), the court admitted testimony by an HR consultant that sexual harassment policies and procedures were inadequate.

Contrast these cases with *Lipsett v. University of Puerto Rico*, 740 F. Supp. 921, 925 (D.P.R. 1990), where a well-regarded expert was not permitted to testify on whether sexual harassment or a hostile work environment was present in the workplace.

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What is the lesson to be learned from this line of cases? The crucial test under which expert opinions will be admitted is not whether the named expert has sufficient expertise (of course, it is important to find someone who is both experienced and knowledgeable on the relevant issues). Rather, the court will be concerned with whether the proffered testimony goes to issues that either invade the jury's province or do not need the explanation of an expert to understand.

Thus, in *Lipsett*, an individual with excellent credentials was not permitted to testify because the testimony went to whether the work environment was intimidating, hostile and offensive, a determination that would usurp the prerogative of the jury. *Lipsett* at 1114.

But courts have allowed experts when the testimony focused on the employer's policies and practices, as in *Coates v. Wal-Mart Stores Inc.*, 976 P.2d 999, 1007 (N.M. 1999).

"Wal-Mart challenges the admission of the expert testimony on the ground that 'such testimony did not assist the trier of fact in understanding the evidence or in determining an issue of fact.' We disagree," the New Mexico Supreme Court said. "This case involves sexual harassment, and the expert testified regarding the minimum standards for an effective sexual harassment corporate policy. She also testified as to how an employer should enforce its sexual harassment policy in a manner likely to protect employees. Wal-Mart, as a defense, had claimed that it had good sexual harassment policies. The expert's testimony was relevant to refute Wal-Mart's defense and assist the jury in understanding the issue. Under these circumstances, we conclude that the testimony assisted the jury in understanding the evidence and in determining a factual issue of consequence to the case."

Although experts on workplace harassment were permitted to testify before 1998, the U.S. Supreme Court decisions in *Faragher* and *Ellerth* from that year, and their progeny, are a further basis on which to argue for admission of this testimony. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998).

Faragher and *Ellerth* established an affirmative defense for supervisor harassment. Pursuant to that defense, an employer can avoid liability for workplace harassment if the employer shows it had reasonable policies that the plaintiff unreasonably failed to utilize and/or the employer acted reasonably in its response to a complaint. Thus, experts can be used to show the employer either did or did not meet the standards set out in *Faragher* and *Ellerth*, such that the affirmative defense would or would not apply.

Although both *Faragher* and *Ellerth* were sexual harassment cases, the Equal Employment Opportunity Commission has asserted that the same standards should apply to any type of workplace harassment that violates Title VII. *See* Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, Notice Number 915.002 (E.E.O.C. June 18, 1999).

Conclusion

In bringing and defending employment discrimination litigation, practitioners should consider whether an expert could be used to support or defend the case. Experts can assist juries in understanding stereotypes, including why certain actions were perceived to be biased or discriminatory. They can speak to the statistical basis for asserting that a workplace is or is not representative of a protected group, and they can discuss what types of practices employers use to prevent and respond to discrimination and harassment.

While an expert may not invade the jury's province by opining on the ultimate issue in the case (*i.e.*, whether discrimination did or did not occur in that case), they will be permitted to testify about a wide range of topics that are germane to the liability phase of a discrimination or harassment case.

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