The Employer seeks to exclude the testimony on the basis that it is irrelevant because the Employer does not dispute that the nursing assistant is a practicing Muslim and that wearing a burqa and face covering in a normal situation is a tenet of her faith. For its part, the Employer seeks to call as an expert witness a medical doctor who is a gerontologist, who will testify that employees with coverings over their faces may frighten or confuse elderly residents and interfere with proper resident care and treatment.

Do you permit the representative from CAIR to testify and, if so, on what points? Do you let the gerontologist testify and, if so, what would you expect to hear from him before you give any weight to his opinion?

III. A View From the Plaintiff's and Union's Perspective: The Use (and Misuse) of Expert Witnesses in Labor and Employment Cases

Alan B. Epstein*

Introduction

It is axiomatic that the landscape of both labor arbitration and employment litigation provides difficult challenges for plaintiffs seeking compensation or injunctive relief from the wrongful actions of their employers. Whether climbing the steep face of the mountain of a summary judgment defense, weathering the sea of multiparty arbitration, or surviving the dangerous forest of trial, every employee's or union's counsel is required to utilize every effective tool in completing the difficult journey to a successful resolution of the client's cause. This clear responsibility is often made more difficult by a judiciary that does not share a view of the law favorable to the pursuit of individual liberties, labor arbitration forums that do not well-serve complex resolution processes, and a lack of financial resources to platonically prosecute the client's case.

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From the standpoint of individual plaintiffs and employees represented by unions, an ally in this difficult and dangerous adventure is the expert witness. Unfortunately, hampered by a lack of time and funding, attorneys for plaintiffs and unions involved in employment litigation and labor arbitrations sometimes overlook the important aid that an expert can provide in overcoming the employers' advantage in securing summary judgment, hurdling the obstacles in gaining a jury verdict or winning the heart and mind of a labor arbitrator.

The purpose of the following brief discussion is to provide a better understanding of the use of experts in combating the long odds of successfully completing the task of guiding individual and union clients to a winning solution to their legal problems. It is suggested that the creative use of expert testimony can often tear down the barriers to a successful resolution in even the most difficult case.[1]

Qualifying the Expert Witness[2]

Daubert v. Merrell Dow *and Its Progeny*

In the case of *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923), the Court of Appeals for the District of Columbia Circuit held that, before scientific evidence could be admitted, it had to gain general acceptance in the particular field to which it belonged. Up until 1993, there was considerable controversy as to whether Rule 702 of the Federal Rules of Evidence, as it was then constituted, incorporated or rejected the *Frye* "general acceptance" test.

In 1993, the U.S. Supreme Court resolved that controversy. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), the Court unanimously rejected the *Frye* test as a basis for assessing the admissibility of scientific expert testimony under Rule 702, and in a 7–2 opinion, written by Justice Blackmun, established general, flexible guidelines for making a determination regarding the admissibility of scientific expert testimony. The Court

[1]An often used excuse for not employing an expert is that they are too expensive. While many experts are costly, the avoidance of well-known "forensic" gurus and the recruitment of academics and other frequently overlooked but qualified individuals can often overcome this apparent difficulty.

[2]The following discussion regarding the history and generally accepted procedures for the qualification of expert witnesses is derived largely from the notes following the text of Rule 702 of the Federal Rules of Evidence.

declared that the trial judge must act as a "gatekeeper" and evaluate the proffered testimony to ensure that it is at least minimally reliable—i.e., concerns about expert testimony cannot be simply referred to the jury as a question of weight.

More specifically, the *Daubert* opinion set forth a five-factor, nondispositive, nonexclusive, "flexible" test to be employed by the district court under Rule 702 in determining the "validity" of scientific evidence: (1) whether the technique or theory can be or has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards and controls; and (5) the degree to which the theory or technique has been generally accepted in the scientific community.

Amended Rule 702

Based upon the Court's rulings in *Daubert* and *Kumho Tire, Co. v. Carmichael* , 119 S. Ct. at 1176 (1999), Federal Rule of Evidence 702 was amended effective December 1, 2000, to reflect the proper standard for admissibility of expert opinion testimony. Amended Rule 702 provides that experts who are offered must have based their opinions on a reliable foundation:

> Rule 702. Testimony by Experts.
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in 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.

General Principles Regarding the Application of Rule 702

While the Court in *Daubert* set forth a nonexclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony, and *Kumho* clarified that these factors might also be applicable in assessing the reliability of nonscientific expert testimony, no attempt was made in the Rule to "codify" these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony.

See Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist); *Kannankeril v. Terminix International, Inc.,* 128 F.3d 802, 809 (3d Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amended Rule 702 broadly require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have also found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact, e.g., (1) whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying" [*Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1317 (9th Cir. 1995)]; (2) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. [*General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered")]; (3) whether the expert has adequately accounted for obvious alternative explanations [*Claar v. Burlington N. R.R.,* 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiffs condition)]; (4) whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting" [*Sheehan v. Daily Racing Form, Inc.,* 104 F.3d 940, 942 (7th Cir. 1997)]; *Kumho Tire, Co. v. Carmichael* 119 S. Ct. at 1176 (1999) (*Daubert* requires the trial court to ensure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"); (5) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give [*Kumho Tire Co. v. Carmichael,* 119 S. Ct at 1175 (1999) (*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy")]; *Moore v. Ashland Chemical, Inc.,* 151 F.3d 269 (5th Cir. 1998) (*en banc*) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently

grounded in scientific methodology); *Sterling v. Velsicol Chemical Corp.,* 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable)]. While all of these cited factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended, other factors may also be relevant and no single factor is necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc.,* 167 F.3d 146, 155 (3d Cir. 1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules").

A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi,* 80 F.3d 1074, 1078 (5th Cir. 1996).

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. *Daubert,* 509 U.S. at 595.

Simply stated, the amendment was not intended to provide an excuse for an automatic challenge to the testimony of every expert.

In keeping with the ruling in *Kumho Tire*, the amended Rule 702 additionally does not distinguish between scientific and other forms of expert testimony. While the relevant factors for determining reliability will vary, the Rule openly dismisses the notion that an expert's testimony should be treated more or less permissively simply because it is outside the realm of science. *See Watkins v. Telsmith,* Inc., 121 F.3d 984, 991 (5th Cir. 1997). While some expert testimony will be more objectively verifiable, expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded.

The amendment also did not suggest a change in the general principle that experience alone—or experience in conjunction

with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony. In fact the Rule expressly states that an expert may be qualified on the basis of experience alone. Where the testimony is based solely or primarily on experience, then the witness must simply explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. As in the case of opinions based on academic and published scientific criteria, the more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. *Kumho Tire,* 119 S. Ct. at 1176 ("[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Finally, Amended Rule 702 makes no attempt to set forth procedural requirements for exercising the trial court's gate-keeping function over expert testimony. *See* Daniel J. Capra, *The Daubert Puzzle*, 38 GA. L. REV. 699, 766 (1998) ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule. *See, e.g., Cortes-Irizarry v. Corporacion Insular,* 111 F.3d 184 (1st Cir. 1997) (discussing the application of *Daubert* in ruling on an MSJ); *In re Paoli Railroad Yard PCB Litigation,* 35 F.3d 717, 736, 739 (3d Cir. 1994) (discussing the use of *in limine* hearings); *Claar v. Burlington N. R.R.,* 29 F.3d 499, 502–05 (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

Requirements of Clause (1)—Facts and Data

The emphasis in Amended Rule 702 on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

Earlier cases reveal that the sufficiency of the evidence is a factor that is best left to the proper exercise of the trial court's discretion. *See Kelley v. Airborne Freight Corp.,* 140 F.3d 335 (1st Cir. 1998) (sufficient evidence to support the opinion of Plaintiff's expert in the estimation of front-pay damages resulting in front-pay award of $1,000,000, where no statistical evidence was admitted); *Boyd v. State Farm Insurance Cos.*, 158 F.3d 326 (5th Cir. 1998) (doctor's summary judgment affidavit offering nothing more than the unsupported conclusion that employee's medical condition left him "unable to perform his job was insufficient to create an issue of fact as to whether employee suffered serious health condition under the Family and Medical Leave Act [FMLA] so as to preclude grant of summary judgment to employer on employee's FMLA claim); *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997) (psychologist's naked affidavit testimony that there was good chance that employee could have returned to work following her leave of absence was wholly uninformative and entitled to no weight in determining whether employee was qualified individual with a disability under The Americans with Disabilities Act (ADA), absent description about what in psychologist's educational and experiential background supported his opinions concerning projected course of employee's depression); *Broussard v. University of California, at Berkeley*, 192 F.3d 1252 (9th Cir. 1999) (vocational rehabilitation specialist's declaration did not provide sufficient credible evidence that university employee was substantially limited in major life activity of working due to carpal tunnel syndrome (CTS), as would defeat university's MSJ on employee's ADA claim, since specialist's declaration did not take employee's vocational abilities into account, but, instead, was based upon conclusions on categories of jobs (such as "sedentary" and "light manual" specialist), did not compare jobs employee could do before and after onset of her medical problems, and there was no indication of what time periods he was analyzing); *Eskra v. Provident Life and Accident Insurance Co.*, 125 F.3d 1406 (11th Cir. 1997) (employee's expert's testimony that, during relevant time period, 70 percent of employer's managers adversely affected by territorial assumptions, forced retirement, or office closures were over 50 years of age, that affected managers were half of managers in the over-50 age group, that a pattern of affected offices could not have occurred but for age being considered as a factor, and that there

was no correlation between affected offices and their profitability was not sufficient direct evidence of discrimination in violation of the Age Discrimination in Employment Act [ADEA]).

Although prior to the amendment of the Rule, there was some confusion over the relationship between Rules 702 and 703, the amended Rule makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a sufficient basis of information—whether admissible information or not—is governed by the requirements of Rule 702.

Requirements of Clause (2)—
Reliable Principles and Methods

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." 509 U.S. at 595. Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). Under the amended Rule 702, as under *Daubert,* when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc.,* 89 F.3d 594, 598 (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli Railroad Yard PCB Litigation,* 35 F.3d 717, 745 (3d Cir. 1994), "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."

Requirements of Clause (3)—Reliable Application to the Facts of the Case

If the expert purports to apply principles and methods to the *facts* of the case, it is important that this application be conducted *reliably*.

However, it might also be important in some cases for an expert to educate the fact finder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the fact finder on principles of the case's specific subject matter without ever knowing about or trying to tie their testimony into the facts of the case. The amendment to Rule 702 simply did not alter the practice of using expert testimony to educate the fact finder on general principles. For such generalized testimony, Rule 702 only requires that (1) the expert be qualified; (2) the testimony address a subject matter on which the fact finder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

Specific Types of Expert Testimony Employed in Employment Litigation

Statistical

Smith v. Virginia Commonwealth University, 84 F.3d 672, 677 (4th Cir. 1996) (en banc) (existence of material questions of fact raised by plaintiffs' statistical report regarding gender-based pay comparisons were sufficient to preclude grant of summary judgment in favor of university in action by male faculty members under Title VII challenging pay raises given by university to female faculty members in response to salary equity study)

Sheehan v. Daily Racing Form. Inc., 104 F.3d 940 (7th Cir. 1997) (statistical analysis of 17 employees the company wished to retain on office closing entitled to zero weight in considering whether to grant employer's MSJ on employee's ADEA claim (report was arbitrary, failed to correct for any potential explanatory variables other than age, and ignored that the 17 employees held a variety of jobs).

Raskin v. The Wyatt Company, 125 F.3d 55 (2d Cir. 1997) (statistical report showing higher termination rate and lower promotion rate for employer's older workers, as compared to general population, properly excluded from ADEA suit for lack of probative

value, where report did not account for those in general population who did not have pension plans or were self-employed and tended to work longer and included elementary statistical error to extent it did not account for critical factors present during study period)

Thomas v. National Football League Players Ass'n, 131 F.3d 198 (D.C. Cir. 1998) (plaintiffs did not make out a *prima facie* statistical case of a pattern and practice of discrimination where expert did not consider the relevant qualifications of those passed over or approved for promotion. A *prima facie* case of statistical disparity must include the minimum objective qualifications of the applicants).

Ross v. University of Texas at San Antonio, 139 F.3d 521 (5th Cir. 1998) (statistician's conclusory opinion on ultimate issue of age discrimination rejected at summary judgment stage).

McMillan v. Massachusetts Society for Prevention of Cruelty of Animals, 140 F.3d 288 (1st Cir. 1998) (In pay discrimination suit, statistical expert's pay differential analysis properly admitted as evidence of pretext, even though it did not incorporate variables allegedly relied on by hospital president when he set initial salaries and determined annual incremental increases. Expert incorporation of legitimate variables such as seniority, department head status, specialization, and budget size demonstrated reasoning for her exclusion of President's averred variables).

Brennan v. GTE Government Systems Corp., 150 F.3d 21 (1st Cir. 1998) (exclusion of statistical evidence not an abuse of discretion where other evidence admitted [limited raw data indicating the ages of the persons listed in the rating and ranking and terminated in the reduction in force]; even if error, no prejudice found).

Hollander v. American Cyanamid Co., 172 F.3d 192 (2d Cir. 1999) (statistical analysis of terminations of managerial employees was not probative of age discrimination as to 58-year- old employee where analysis failed to account for nondiscriminatory reasons for voluntary quits among managers aged 50 to 59 and made misleading 15-year age grouping that skewed data in employee's favor).

Munoz v. Orr, 200 F.3d 291 (5th Cir. 2000) (testimony of employees' expert at summary judgment stage of Title VII action properly excluded where expert made miscalculations, assumed that promotion system in question was discriminatory, stated that discrimination was cause of disparities observed, failed to consider variables such as education and experience, failed to conduct

multiple regression analysis, and relied on plaintiffs' compilations of data without seeking to independently verify them).

Adams v. Ameritech Services, Inc., 231 F.3d 414 (7th Cir. 2000) (expert's statistical analyses of employers' reduction in force (RIF) programs was admissible in former employees' actions for age discrimination in violation of the ADEA, even though it did not, standing alone, show that age was basis for employers' conduct; analyses were enough to rule out chance, which was important step in former employees' proof, and disputes between parties' experts went to weight of evidence, not its admissibility).

Hemmings v. Tidyman's Inc., 285 F3d 1174, (9th Cir. 2002), *cert denied,* 537 U.S. 1110 (2003) (no abuse in admission of expert testimony regarding whether defendant's promotion and compensation practices had disparate impact or reflected disparate treatment against women at management level; inadequacies in methodology proper subject of cross-examination).

Kay v. First Continental Trading, 976 F. Supp. 772 (N.D. Ill. 1997) (expert statistician's opinion and calculations based on premise that defendant's conduct caused former employee to lose benefit of 5- to 7.5-year career as trader lacked proper support for admissibility under Federal Rule of Evidence 702).

Garrett v. Kenmore Mercy Hospital, 1998 WL 89357 (W.D.N.Y. Feb. 23, 1998) (expert testimony that reorganization led to termination or demotion of a disproportionate number of employees age 40 or older disallowed where method used to collect the data underlying the statistical analysis was flawed).

Schanzer v. United Technologies Corp., 120 F. Supp. 2d 200 (D. Conn. 2000) (employee's statistical expert admitted where relevant group of employees analyzed and regression analysis employed to test the relationship between employees' most recent performance rating, their ages, and whether they were selected for layoff).

Vocational

W*aldorf v. Shuta*, 142 F.3d 601 (3d Cir. 1998) (witness qualified as vocational expert was permitted about rehabilitation technology available in Florida based on letter witness received from vocational expert in Florida and not required to have personal knowledge regarding every job opportunity available: even though Rizzo did not possess formal academic training in the area of vocational rehabilitation and his qualifications were "a little thin," he

was deemed by the circuit court to have substantially more knowledge than an average lay person regarding employment opportunities for disabled individuals).

Huey v. United Parcel Service, 165 F.3d 1084 (7th Cir. 1999) (Ph. D. in human resource development did not qualify as expert in action alleging retaliation for complaining of racial discrimination, where he failed to do statistical analysis; to study employer's personnel files to determine whether handling of employee's situation departed from employer's norm; to reconstruct underlying facts to determine whether employer had good explanation; or to explain what field of knowledge a professional in human resource development masters or how this knowledge was employed to analyze employee's situation).

Broussard v. University of California, at Berkeley, 192 F.3d 1252 (9th Cir. 1999) (Plaintiff's vocational rehabilitation specialist's declaration based on unsupported conclusions regarding whether university employee was substantially limited in major life activity of working due to carpal tunnel syndrome (CTS) not sufficient to defeat university's MSJ).

EEOC v. Beauty Enterprises, 361 F. Supp. 2d 11 (D.C. Conn. 2005) (in case challenging employer's English-only workplace rule, safety engineer's testimony that there was no safety reason for rule deemed admissible even though engineer's methodology was experience-based).

Martin v. Discount Smoke Shop, Inc., 443 F. Supp. 2d 981 (C.D. Ill. 2006) (expert assessment of employee's academic level admissible).

Human Resources and Employment Practices

Colgan v. Fischer Scientific, 935 F.2d 1407 (3d Cir. 1991) (Abuse of discretion to disallow (as "speculative") expert report (based on employment manuals and concluding that employer breached its standard procedures when it evaluated Colgan's performance); age discrimination could be reasonably inferred from conclusion that employee's evaluation was atypical. District court's determination that the expert did not have personal knowledge of employer's procedures imposed an improper "eyewitness" requirement).

Snider v. Consolidation Coal Co., 973 F.2d 555 (7th Cir. 1992) (nonjury decision properly supported by expert testimony that few victims of sexual harassment made contemporaneous com-

plaint, particularly in occupations traditionally dominated by members of opposite sex).

Eskra v. Provident Life and Accident Insurance Co., 125 F.3d 1406 (11th Cir. 1997) (no abuse of discretion in allowing witness to testify as expert on insurance industry renewal commissions since he was "reasonably familiar with the way insurance agents and managers and brokers are paid on a general basis by insurance companies," had been qualified to testify as expert in about eight different cases involving renewal commissions in insurance industry, and insurance company's witness conceded that witness's methodology was permissible way to calculate renewal commissions).

Brvant v. City of Chicago, 200 F.3d 1092 (7th Cir. 2000) (although general scientific literature in area consisted of only one unpublished study, testimony of promotion expert that promotional examination for police lieutenant was properly admitted where expert had extensive academic and practical experience in designing employment evaluations, based his opinions on job analysis that his firm had formulated, and had published approximately 50 articles on employee selection and promotion testing generally).

Gipson v. Wells Fargo Bank N.A., 460 F. Supp. 2d 9 (D.D.C. 2006) (in retaliation claim against bank alleging her firing was disproportionate to her actions, employee's Federal Housing Administration renovation loan program expert permitted to conclude employee's actions were common in mortgage loan industry).

Psychological

Teahan v. Metro-North Commuter Railroad Co., 80 F.3d 50 (2d Cir. 1996) (expert testimony regarding likelihood of recurrence of employee's substance abuse ruled "predictive" to prove that termination had reasonable basis).

Tvus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996) (in Fair Housing Act case challenging apartment complex's alleged racially discriminatory advertising practices, it was abuse of discretion to disallow testimony of psychologist about how an advertising campaign sends message to its target market and how an all-white campaign affects African Americans).

Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8th Cir. 1997) (testimony of well-qualified psychiatrists and psychologists admissible on issue of damages for mental anguish caused by sex harassment and discrimination).

Nicholas v. American National Insurance Co., 154 F.3d 875 (8th Cir. 1998) (expert testimony impugning the psychiatric credibility of former employee claiming sexual harassment and suggesting that recall bias, secondary gain, and malingering had influenced employee's story, were not a proper subject of expert testimony).

Skidmore v. Precision Printing and Packaging, Inc., 188 F.3d 606 (5th Cir. 1999) (admission of psychiatrist's testimony that employee suffered from posttraumatic stress disorder and depression as result of co-employee's sexually harassing conduct not abuse of discretion).

Gonzales v. National Board of Medical Examiners, 225 F.3d 620 (6th Cir. 2000) (academic psychologist who was not qualified to diagnose a reading disorder was qualified to analyze student's test results and express an opinion as to how his reading ability compared with that of the average person, when he was seeking accommodation for alleged reading disability under the ADA. Although expert relied on a theoretical model that had not been empirically analyzed for purposes of diagnosis and treatment, that did not preclude her from addressing the substantial limitation question since she did not purport to make a diagnosis or suggest treatment but only determined whether student's test results were consistent with a substantial impairment in his reading ability).

Johnson v. County of Los Angeles Fire Department, 865 F. Supp. 1430 (C.D. Cal. 1994) (expert testimony re: connection between reading magazine and "sexual stereotyping" only hypothesis and not admissible as scientific probability to establish causal link between reading of sexually oriented magazine as prohibited by department's sexual harassment policy and poor treatment of female fire fighters).

Lanni v. State of New Jersey, 177 F.R.D. 295 (D.N.J. 1998) (expert in forensic psychiatry was qualified to proffer an opinion about plaintiff's learning disabilities and mental condition even though expert had no special training or experience that qualified him to diagnose a learning disability).

Collier v. Bradley University, 113 F. Supp. 2d 1235 (C.D. Ill. 2000) (social psychologist not permitted to give expert opinion that African American professor was victim of discrimination, harassment, or retaliation at university based on expert's evaluation of professor and observations regarding double treatment in the application of due process as invasion of jury's fact finding responsibility).

Farmer v. Ramsay, 159 F. Supp. 2d 873 (D.C. Md.2001), *aff'd* (4th Cir. 2002) (psychiatrist's report rejected in white medical school applicant's reverse discrimination case).

Sociological

Katt v. City of New York, 151 F. Supp. 2d 313(S.D.NY 2003) (former policeman with 23 years of service as decorated member of city police department who had several degrees in sociology and criminology and had taught sociology and criminal justice was permitted to testify why female civilian employee with sexual harassment claim might reasonably have chosen not to take advantage of established departmental complaint procedures).

Sawyer v. Southwest Airlines Co., 243 F. Supp. 2d 1257 (D.C. Kan. 2003) (in race-based aircraft passengers' commercial airline expert witness's testimony about sensitivities of African Americans born before 1960 deemed speculative and mere expression of personal views and perceptions).

Mitchell v. DCX, Inc., 274 F. Supp. 2d 33 (D.D.C. 2003) (evidence developed through use of testers to show that cab company was providing service to African American area at lower rate than in other areas rejected where evidence was offered as statistical evidence).

Dukes v. Wal-Mart, Inc., 222 FRD 189 (N.D. Cal. 2004) (employer's motion to strike declaration of employees' expert concerning sex stereotyping denied; challenges went to weight rather than admissibility).

Damages

Kelley v. Airborne Freight Corp., 140 F.3d 335 (1st Cir. 1998) (evidence supported Plaintiff's damages expert estimation of front-pay damages was supported by sufficient evidence to permit the jury to find $1,000,000 in front-pay damage).

Finch v. Hercules Inc., 941 F. Supp. 1395 (D. Del. 1996) (damages expert permitted to testify regarding likely date former employee would have retired in absence of his discharge even though expert witness was qualified only as damages expert and not as expert on retirement trends).

Conclusion

Armed with a better understanding of the allowances and restrictions guiding the use of expert testimony, the lawyers representing clients in employment litigation and labor arbitrations can overcome many of the obstacles that are imposed by the judicial and arbitration systems, conservative judges, jaded arbitrators, and skilled opponents by the effective and creative use of experts. Thinking outside of the proverbial box about the employment of the right expert can often lead to a big "win" in the most difficult of cases.