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## Strategic Evidence Issues in Equal Employment Litigation

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# **STRATEGIC EVIDENCE ISSUES IN EQUAL EMPLOYMENT LITIGATION**

Marc Rosenblum<sup>1</sup>

## **I. INTRODUCTION AND OVERVIEW**

This paper is an update on the changing interpretation of certain civil rules in Equal Employment Opportunity (“EEO”) litigation, primarily some of the rules of evidence, but also the interplay of those rules and certain rules of procedure. These changes provide at least some explanation regarding the increasing extent to which cases are being resolved through pretrial motions rather than by trial, largely to the detriment of EEO plaintiffs.

This review selectively covers some intersectional aspects of evidence law as it applies to employment discrimination law, but is in no way exhaustive regarding the total body of evidence or discrimination jurisprudence. Many of the issues covered arise primarily in class cases, where the key or supporting forms of prima facie proof involve expert opinions. These opinions largely rely on statistical inferences regarding groups of employees or applicants, and require subject-matter expertise as well as purely quantitative skills on the expert’s part.

To proceed with such cases, counsel must first understand that there is a need to use one or more experts whose opinions can support those inferences. This whole process is less relevant to individual EEO claims at the liability stage, where evidentiary proof is primarily through direct or other circumstantial means (other than the quantitative, pattern-and-practice approach under discussion here).

That said, the principles of evidence and EEO law covered here apply not just to establishing liability, but also to relief, including the mitigation of damages. As such, it is relevant to all

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strategic evidentiary practices in EEO litigation, individual as well as class-based in nature.

But once the emerging fact pattern points to the need for an expert, the customary pretrial framework and strategy applicable to individual cases – discovery, depositions, motions and the like – no longer applies. It must now take into account the fact that all aspects of the expert's opinion must satisfy the revised intersection of evidence and civil procedure covered here, or risk summary disposition at any stage.

## II. THE CONFLUENCE OF APPLICABLE RULES

### A. Evidence

#### 1. Rule 104 -- The "Gatekeeper"

During the seventy years up to 1993, admissibility of scientific evidence in federal trials was evaluated under a "general acceptance" standard, under the precedent of *Frye v. United States*.<sup>2</sup> In *Daubert v. Merrell Dow Pharmaceuticals*,<sup>3</sup> Justice Blackmun's majority opinion held that because the Federal Rules of Evidence had superseded *Frye*, admissibility is governed by the standards of Rule 702: the expert's testimony must be based on "scientific knowledge" and must "assist" the trier of fact.<sup>4</sup>

*Daubert* then held that the trial judge's authority under Rule 104(a)<sup>5</sup> to address witness qualifications generally would also apply to Rule 702 issues to ensure that juries were not confused by hired-gun experts peddling junk-science.<sup>6</sup> Hearings on motions *in limine* to exclude opposing experts are discretionary on the part of the trial judge.<sup>7</sup>

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<sup>2</sup> 393 F. 1013, 1014 (D.C. Cir. 1923).

<sup>3</sup> 509 U.S. 579 (1993).

<sup>4</sup> *Daubert*, 509 U.S. at 588.

<sup>5</sup> FED. R. EVID. 104(a). This rule provides in pertinent part that "[p]reliminary questions concerning the qualifications of a person to be a witness . . . shall be determined by the court . . . ." *Id.*

<sup>6</sup> *Daubert*, 509 U.S. at 597.

<sup>7</sup> See *Hoult v. Hoult*, 57 F.3d 1 (1st Cir. 1995).

Such motions are mandatory on the part of objectors to expert opinions, however, and parties who fail to object to an expert's qualifications or the scientific basis of an expert's opinion cannot later object to a jury verdict accepting that opinion.<sup>8</sup>

Similarly, timely objections are required to preserve opposition to the admissibility of opposing expert testimony. For example, a party waives objection to the expert's opinion on appeal if he or she does not preserve (through proffer) the objection, even after and aside from a denied motion *in limine* to exclude the same expert's opinion.<sup>9</sup> In fact, the Fifth Circuit held that admission of an expert's unobjected-to testimony was not plain error by the trial court where, after denial of its motion *in limine* to exclude the expert, the challenging party then failed to object again to the expert's actual trial testimony.<sup>10</sup> Additionally, the court held that under Rule 103(d),<sup>11</sup> the cross-examination of the expert during the trial regarding his qualifications was insufficient itself to preserve for appeal the objection to the expert's testimony, because it was considered an attack on the expert's credibility (which must be determined by the trier of fact), not the admissibility of his opinion.<sup>12</sup>

Expert challenges under *Daubert* are now a routine part of pretrial motion practice. Increasingly, such challenges are linked to motions for summary judgment to Civil Procedure Rule 56<sup>13</sup>

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<sup>8</sup> See *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396 (8th Cir. 1994); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996), *cert. denied*, 519 U.S. 1108 (1997).

<sup>9</sup> *Marcel v. Placid Oil Co.*, 11 F.3d 563, 567 (5th Cir. 1994); *see also*, *Lindsey v. Navistar Int'l. Transp. Corp.*, 150 F.3d 1307, 1315, n.2 (11th Cir. 1998) (holding that failure to object to admissibility of expert's qualifications constitutes waiver of objection on appeal to the expert's testimony and opinion).

<sup>10</sup> *Marceaux v. Conoco, Inc.*, 124 F.3d 730 (5th Cir. 1997).

<sup>11</sup> FED. R. EVID. 103(d), provides in pertinent part that "[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." *Id.*

<sup>12</sup> *Daubert*, 509 U.S. at 596.

<sup>13</sup> FED. R. CIV. P. 56 (c), provides in pertinent part that, "[t]he judgement sought shall be rendered forthwith if the pleadings . . . show that there is no genuine issue as to any material fact . . . ." *Id.*

whenever the non-moving party's expert is included and there are no remaining factual issues in dispute that would take the case to the jury. In *Raskin v. Wyatt Co.*, the court noted that a flawed expert report is not "a talisman against summary judgment."<sup>14</sup>

## 2. Rule 702 – Experts

Prior to *Daubert*, some courts of appeals continued to follow *Frye*, while others looked to Rule 702<sup>15</sup> to determine expert admissibility. The split in the circuits aside, there were enough difficulties in applying *Frye* consistently so as to invite Supreme Court review. These problems stemmed from the difficulty in determining general acceptance in particular scientific fields, and even more so in those fields' subfields.

*Daubert*, in effect, shifted these decisions from the scientists and practitioners in the various disciplines to the federal courts.<sup>16</sup> The district court was specifically tasked with closing the gate on proposed expert testimony that could not satisfy a flexible admissibility criteria checklist, including whether the expert's opinion and the underlying facts on which the opinion is based:

- Had been or were capable of being tested;
- Had been subjected to peer-review publication;
- Had a known or potential methodological error rate;
- Was "generally accepted" in the relevant scientific community responsible for addressing such questions.<sup>17</sup>

General acceptance, the *sine qua non* of admissibility under *Frye*, is now only one factor in the mix. Additional criteria were added by various circuit courts, including:

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<sup>14</sup> 125 F.3d 55, 66 (2d Cir. 1997). See also, *Herrero v. St. Louis Univ. Hosp.*, 109 F.3d 481 (8th Cir. 1997).

<sup>15</sup> FED. R. EVID. 702. This rule currently provides in pertinent part: "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." *Id.* This rule of evidence, among others, has been amended and took effect on December 1, 2000. See *infra* note 53 and accompanying text.

<sup>16</sup> *Daubert*, 509 U.S. at 587.

<sup>17</sup> *Id.* at 593-94.

- Whether the opinion was expressly developed for litigation, rather than growing out of research conducted in a more objective forum;<sup>18</sup>
- Whether the opinion reflects anything beyond the expert's pecuniary interest in forensic activity as a lucrative income source;<sup>19</sup>
- Whether the opinion considers all relevant factors, or whether it selectively ignores those variables that could undercut or invalidate the expert's conclusion.<sup>20</sup>

Based on the fact pattern of each case, the gatekeeper determines which admissibility criteria to apply.<sup>21</sup> The gatekeeper's decision is reviewed on an abuse of discretion standard.<sup>22</sup>

In *General Electric Co. v. Joiner*,<sup>23</sup> the United States Supreme Court reaffirmed and expanded the trial court's gatekeeper responsibility in significant respects. First, it rejected a more stringent "hard look" standard under which appellate courts could substitute plenary review when the decision to exclude an expert was outcome-determinative and eliminated the evidentiary basis of a party's case.<sup>24</sup> Short of clear error, a gatekeeper decision to admit or reject expert testimony will be upheld.<sup>25</sup>

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<sup>18</sup> *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir.), *cert. denied*, 519 U.S. 819 (1996); *Braun v. Lorillard, Inc.*, 84 F.3d 230 (7th Cir.), *cert. denied*, 519 U.S. 992 (1996).

<sup>19</sup> *Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 597 (9th Cir. 1996) (affirming the exclusion of a "professional witness" who was "influenced by a litigation-driven financial incentive").

<sup>20</sup> *Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999) (affirming exclusion of an expert who "assumed" (at counsel's request) the at-issue question, and admitted he "didn't address" that problem); *Jaurequi v. Cater Mfg. Co., Inc.*, 173 F.3d 1076, 1083 (8th Cir. 1999) (excluding an expert after he admitted he did not know certain relevant facts and "did not care what they had said").

<sup>21</sup> *Daubert*, 509 U.S. at 593.

<sup>22</sup> *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

<sup>23</sup> *Joiner*, 522 U.S. at 143.

<sup>24</sup> *Id.* at 141.

<sup>25</sup> *Id.* at 142.

While *Daubert* was initially interpreted by some to distinguish between an expert's scientific principles and methodology and the conclusions contained in the expert's opinion (limiting the admissibility determination to an evaluation of the former), *Joiner* clarified that the gatekeeper must also determine if the expert applied an acceptable theory and methodology to the at-issue facts.<sup>26</sup> If the expert failed to do so, the opinion was inadmissible as unhelpful to the trier of fact, rather than admissible subject to later challenge only as to the opinion's weight.<sup>27</sup> Finally, if the "analytical gap" between the data and the opinion was too great, the trial judge could reject the conclusion on either or both grounds.<sup>28</sup>

In completing its admissibility trilogy, the Supreme Court in *Kumho Tire Co., Ltd. v. Carmichael*,<sup>29</sup> affirmatively resolved the question of whether *Daubert* applied to all experts, or only to those whose expertise was "scientific" in nature. Several circuits had interpreted *Daubert* as applying to any opinion derived from "scientific, technical or other specialized knowledge."<sup>30</sup> Several other circuits had held that the *Daubert* test should not be used if the expert's skill rested on experience and non-scientific training, or where one or more of the admissibility checklist factors did not apply, assuming that if certain experts could not be evaluated on all the criteria, then Rule 702 alone, and not *Daubert*, determined admissibility.<sup>31</sup>

In *Kumho*, the *Daubert* standard was held to apply to non-scientific expert testimony which requires the trial judge to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the

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<sup>26</sup> *Id.* at 145.

<sup>27</sup> *Id.* at 146.

<sup>28</sup> *Id.*

<sup>29</sup> 526 U.S. 137 (1999).

<sup>30</sup> See, e.g., *Moore v. Ashland Chemical Corp.*, 151 F.3d 269 (5th Cir. 1998) (en banc), *cert. denied*, 526 U.S. 1064 (1999); *Peitzmeier v. Hennessey Ind. Inc.*, 97 F.3d 293 (8th Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997).

<sup>31</sup> See *Iacobelli v. County of Monroe*, 32 F.3d 19 (2d Cir. 1994); *McKendall v. Crown Control Corp.*, 122 F.3d 803 (9th Cir. 1997); *Compton v. Subaru of America, Inc.*, 82 F.3d 1513 (10th Cir.), *cert. denied*, 519 U.S. 1042 (1996).

courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”<sup>32</sup>

*Kuhmo* impliedly rejected an expansive reading of Rule 702 that favored the broad admissibility of proposed experts on the theory that their credibility could be tested through cross-examination rather than in pretrial proceedings.<sup>33</sup> The decision makes clear that gatekeeper scrutiny applies to all proposed experts, because Rule 702 makes no distinction between the technical or other specialized knowledge of an expert qualified by her skill or experience, the expertise gained through graduate training, and its application in scientific pursuits.<sup>34</sup> Justice Breyer’s majority opinion also took the opportunity to further strengthen the trial court’s gatekeeper role, reiterating *Joiner*, and stated that, in determining the admissibility of nonscientific expert opinions, the trial judge should look particularly at whether the method underlying the opinion is generally accepted by the related expert community, and whether that approach is prone to producing erroneous results.<sup>35</sup>

### 3. Rule 401 – Relevancy

Relevancy has always been a principal criterion governing admissibility of any type of evidence,<sup>36</sup> but the interpretation of what constitutes relevant evidence has been reshaped by the *Daubert/Joiner/Kuhmo* trilogy. In *Daubert*, the Supreme Court held, first, that the expert’s testimony must be reliably rooted in valid scientific reasoning and methods,<sup>37</sup> and second, it must assist the trier of fact.<sup>38</sup> Expert testimony that is not relevant

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<sup>32</sup> *Kuhmo*, 526 U.S. at 152.

<sup>33</sup> *Id.* at 156.

<sup>34</sup> *Id.* at 141.

<sup>35</sup> *Id.* at 152-53.

<sup>36</sup> FED. R. EVID. 401. This rule provides in pertinent part: “‘Relevant Evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Id.*

<sup>37</sup> *Daubert*, 509 U.S. at 592.

<sup>38</sup> *Id.*



cannot provide such assistance.<sup>39</sup> *Daubert* characterized relevance in terms of a “fit” between the expert opinion and the at-issue facts.<sup>40</sup> This interpretation of relevance, arguably independent of Rule 401,<sup>41</sup> provides the gatekeeper with an enhanced degree of discretion to reject opinions that lack a fit.<sup>42</sup>

The logical outcome of this reasoning also leads to the exclusion of expert opinions that apply valid scientific principles incorrectly to a particular fact pattern, and to opinions that rely on faulty assumptions or methods to reach invalid conclusions.<sup>43</sup>

## B. Civil Procedure

### 1. Rule 26 – Discovery

The Federal Rules of Civil Procedure were amended in 1993 to require more detailed disclosure of the material and experts that parties to civil litigation use in the proof process.<sup>44</sup> Under the amended rules, parties are required to notify their opponents whenever a testifying expert is retained and, within thirty days thereafter, provide that expert’s written report.<sup>45</sup> The report must contain the expert’s opinion, along with the basis and

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<sup>39</sup> *Daubert*, 509 U.S. at 589.

<sup>40</sup> *Id.* at 591.

<sup>41</sup> FED. R. EVID. 401. *See supra* note 36 and accompanying text.

<sup>42</sup> *See Turrentine v. Bell Canada*, 173 F.3d 846 (2d Cir. 1999) (excluding a proposed expert who failed to establish that his methodology reliably established causation under the particular facts at issue); *Sutera v. Perrier Group of America, Inc.*, 986 F. Supp. 655, 662 (D. Mass. 1996) (holding that the expert’s theory was unreliable as scientific evidence and did not fit the facts of the case). *See also*, 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE 702-02 (1997).

<sup>43</sup> *See, e.g., Bickerstaff v. Vassar College*, 196 F.3d 435, 449 (2d Cir. 1999) (affirming a trial court’s ruling that plaintiff’s statistical expert opinion was inadmissible because it was not relevant as required by Rule 401). *cert. denied*, 120 S. Ct. 2688 (2000).

<sup>44</sup> *See* FED. R. CIV. P. 26(a)(1), (2) (West Supp. 1993) Advisory Committee’s note.

<sup>45</sup> FED. R. CIV. P. 26(a)(2)(B), provides in pertinent part that, “with respect to a witness who is retained or specially employed to provide expert testimony in the case . . . [the witness’ disclosure shall] be accompanied by a written report prepared and signed by the witness.” *Id.*

reasoning underlying that opinion, and a list of the sources and materials considered by the expert.<sup>46</sup> The expert's qualifications must also be provided, including a list of the expert's publications from the previous the past ten years, the rate at which the expert is being compensated, and most importantly, a list of all cases within the past four years in which the expert was deposed or had testified.<sup>47</sup> A supplemental disclosure requirement<sup>48</sup> covers instances where the original response is in some material way incorrect or incomplete.

Non-testifying experts are not subject to Rule 26 disclosure, since their work product will not be translated into evidence.<sup>49</sup> Non-testifying experts are used primarily to evaluate the opinions of testifying experts, without risk of their critiques being discovered.

## 2. Rule 37 – Sanctions

One sanction that may be imposed upon parties who violate Rule 26 is exclusion of the expert testimony in part or in its entirety.<sup>50</sup> The threat of such exclusion promotes increased

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<sup>46</sup> FED. R. CIV. P. 26(a)(2)(B), providing that “[t]he report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions.” *Id.*

<sup>47</sup> FED. R. CIV. P. 26(a)(2)(B), providing that the report shall also contain “the qualifications of the witness, including a list of all publications authored by the witness within the preceeding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceeding four years.” *Id.*

<sup>48</sup> FED. R. CIV. P. 26(e)(1), provides in pertinent part that, “[a] party is under a duty to supplement at appropriate intervals its disclosures . . . if the party learns that in some material respect the information disclosed is incomplete or incorrect.” *Id.*

<sup>49</sup> FED. R. CIV. P. 26(a)(2)(B). *See supra* notes 45-47 and accompanying text.

<sup>50</sup> FED. R. CIV. P. 37(c)(1), provides in pertinent part that, “[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at trial . . . any witness information not so disclosed.” *Id.* *See supra* notes 45-48 and accompanying text.

compliance, although in practice some courts are reluctant to invoke the exclusionary provision unless the opposing party would be substantially prejudiced by admission of the at-issue material, or where evidence of bad faith non-compliance with the rule is found.<sup>51</sup>

The evidentiary issues affect the use of experts in EEO litigation. It is important for employment lawyers to recognize the extent to which discovery and, in particular, the sanctions for violating the expert discovery process, can affect the evaluation of opposing expert opinions. This, in turn, directly influences the decision to seek exclusion of the questionable expert opinion rather than rebutting it at trial, and the decision to offer the direct testimony of one's own expert as part of the case-in-chief.

### C. Codifying the Gatekeeper Provision

#### 1. Rule 702

Based on recommendations by the Advisory Committee on Evidence Rules, the Judicial Conference of the United States earlier this year approved changes to the Federal Rules of Evidence that will codify the *Daubert* gatekeeper provision. Rule 702 presently reads:

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.<sup>52</sup>

Under the added proviso, the witness will be admitted to offer expert testimony if:

(1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied

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<sup>51</sup> See *In Re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 792-93 (3d Cir. 1994), (reversing the district court's exclusion decision where the prejudice was "extremely minimal."), *cert. denied*, 513 U.S. 1190 (1995).

<sup>52</sup> FED. R. EVID. 702.

the principles and methods reliably to the facts of the case.<sup>53</sup>

By not disapproving, Congress permitted the changes to become law.<sup>54</sup> As the advisory committee noted:

While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissibly simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist.<sup>55</sup>

Clearly, the emphasis of the rule change is on the reliability of the expert opinion, one of the basic *Daubert* criteria,<sup>56</sup> along with relevance, which is expressed as assisting the trier of fact.

## 2. Rule 703

Changes have also been approved in Rule 703, to strengthen the trial judge's gatekeeper discretion regarding the admissibility of expert testimony. The Rule 703 change is intended to curb experts who "slip in" inadmissible evidence into their opinions.<sup>57</sup> The Committee explained:

Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, it is the opinion or inference, and not the information, that is admitted into evidence.<sup>58</sup>

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<sup>53</sup> As of December 1, 2000, FED. R. EVID. 702 was changed to the language in the text. See 192 F.R.D. 398 (2000).

<sup>54</sup> Chief Justice Rehnquist, by direction of the Supreme Court, brought before Congress amendments to several federal rules of evidence, among which was FED. R. EVID. 702. The amendments took effect on December 1, 2000. 192 F.R.D. at 398.

<sup>55</sup> 192 F.R.D. at 421.

<sup>56</sup> *Daubert*, 509 U.S. at 592.

<sup>57</sup> 192 F.R.D. at 409.

<sup>58</sup> 192 F.R.D. at 424.

### 3. Rule 701

Rule 701 covers the admissibility of testimony by lay witnesses.<sup>59</sup> The rule change is intended to block a possible loophole under which a party could label her expert as a lay witness to avoid both *Daubert* and the enhanced version of Rule 702. The Committee stated:

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 be evaded through the simple expedient of proffering an expert in lay witness clothing . . . to the extent that the witness is providing scientific, technical or other specialized information to the trier of fact . . . the amendment also insures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert in the guise of a lay person.<sup>60</sup>

The Rule 701 change is consistent with the logic of *Kumho* in eliminating the distinction between scientific and non-scientific experts in applying gatekeeper scrutiny. All experts are evaluated under one set of uniform standards and criteria, all lay witnesses under another.

Similarly, prior to *Kumho*, several courts of appeal had fashioned their own qualitative supplements to the *Daubert* checklist. Each, in its own way, articulated an inverse relationship between the expert's reliability and the degree of gatekeeper scrutiny that the trial court must exercise: experts relying primarily on their experience (the *ipse dixit* opinion) must

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<sup>59</sup> FED. R. EVID. 701 presently reads:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

*Id.*

<sup>60</sup> 192 F.R.D. at 416.

explain in more detail the basis of their opinions relative to experts who simply rely on and apply a scientifically established methodology.<sup>61</sup>

### III. APPLYING THE RULES AND DECISIONS EMPHASIZING RELEVANCE AND RELIABILITY TO EEO LITIGATION

Expert analysis of statistical data has historically been a key part of litigation under Title VII of the Civil Rights Act of 1964<sup>62</sup> and the Age Discrimination in Employment Act of 1967<sup>63</sup> involving class claims, under both disparate treatment (pattern-and-practice) and disparate impact theory. In recent years, the use of experts has expanded to include stereotyping (in gender, race and age contexts), employment practices and business practices generally, and damages, with respect both to economic loss and mitigation.

This discussion sets forth, via the example of decisions critical of proposed expert testimony, to identify some of the practices that counsel should avoid in filing and developing employment discrimination suits. The illustrations, particularly since the lessons of *Daubert* are increasingly being factored in pretrial strategies, may include the use of experts generally.

In the context of this forum, however, the focus remains primarily on fact patterns that involve experts whose analyses and opinions address statistical proof, because the Supreme Court acknowledged the probative value of such evidence in three decisions during its 1976 term: *Castaneda v. Partida*,<sup>64</sup> *International Brotherhood of Teamsters v. United States*,<sup>65</sup> and *Hazelwood School District v. United States*.<sup>66</sup>

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<sup>61</sup> See *Daubert*, 509 U.S. at 591; *O'Connor v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir.), cert. denied, 512 U.S. 1222 (1994).

<sup>62</sup> 42 U.S.C. 2000(e)(1)-(17) (1995).

<sup>63</sup> 29 U.S.C. §§ 621-34 (1995).

<sup>64</sup> 430 U.S. 482 (1977).

<sup>65</sup> 431 U.S. 324 (1977).

<sup>66</sup> 433 U.S. 299, 308, n.14 (1977).

Subsequent to those decisions, courts assessed the admissibility and weight to be accorded to a variety of fact patterns entailing analytical issues and expert opinion evidence, such as imprecise and irrelevant statistical comparisons,<sup>67</sup> and the use of complex statistical techniques going beyond the more basic difference comparisons covered initially.<sup>68</sup>

### A. Identifying a Qualified Expert

In *In re Unisys Savings Plan Litigation*,<sup>69</sup> the Third Circuit affirmed the trial court's rejection of a financial analysis expert under Federal Rules of Evidence 702 and *Daubert* where the expert's doctoral degree was from a correspondence school, where the expert had made inconsistent and untruthful statements in deposition and in *voire dire* testimony regarding his credentials, and where his expertise was in a parallel but dissimilar subfield to the at-issue question.<sup>70</sup> For an expert's opinion to be reliable and relevant the expert should have legitimate credentials similar to other job applicants.<sup>71</sup>

In *Gridinich v. Bradlees*,<sup>72</sup> the court was dubious of an expert who claimed to have been retained one hundred times, deposed fifty times, and testified in twenty cases, where a Westlaw search revealed only one instance where the expert testimony was relied on.<sup>73</sup>

*Mancuso v. Consolidated Edison Co. of New York*<sup>74</sup> covered the dismissal of the plaintiff's claim after plaintiff's counsel ignored the trial court's discretionary power to determine whether the expert's conclusion was supported by relevant

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<sup>67</sup> *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

<sup>68</sup> *Bazemore v. Friday*, 478 U.S. 385 (1986); *Sobel v. Yeshiva Univ.*, 839 F.2d 18 (2d Cir. 1988), *cert. denied*, 490 U.S. 1105 (1989).

<sup>69</sup> 173 F.3d 145 (3d Cir. 1999).

<sup>70</sup> 173 F.3d at 156 (affirming district court's analysis in *In re Unisys Savings Plan Litigation*, 21 E.B.C. 2514 (1997)).

<sup>71</sup> *Id.*

<sup>72</sup> 187 F.R.D. 77 (S.D.N.Y. 1999).

<sup>73</sup> *Gridinich*, 187 F.R.D. at 80, n.1.

<sup>74</sup> 56 F. Supp. 2d 391 (S.D.N.Y. 1999).

scientific literature in the field.<sup>75</sup> The court rejected the plaintiff's third proposed expert, a medical doctor who was not qualified in toxicology.<sup>76</sup> The court had previously rejected the plaintiff's second proposed expert on largely the same grounds, after the plaintiff's first proposed expert, an "eminent" toxicologist, failed to support the hypothesis that the plaintiff's illness was attributable to his employment with the defendant.<sup>77</sup>

Finally, the court, in *Martincic v. Urban Redevelopment Authority*, held that a proposed expert who characterized himself as an "accredited personnel diplomat" and a "certified personal consultant" was inadmissibly unqualified.<sup>78</sup>

## B. Specifying a Proper Methodology

In *Bickerstaff v. Vassar College*, a decision issued in November 1999, the Second Circuit affirmed the summary dismissal of the plaintiff's claim where the statistical expert misspecified the regression equations used to determine the effects of gender and race on the promotion process.<sup>79</sup> The court held that the plaintiff's expert omitted two major factors that could possibly have helped account for the observed differences, hence, the omissions were rendered to be of no probative value and inadmissible.<sup>80</sup> Those factors, teaching and university service, could not be ignored as marginal.<sup>81</sup> Where factors are marginal the report would be admissible, but entitled to reduced

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<sup>75</sup> *Mancuso*, 56 F. Supp. 2d at 392.

<sup>76</sup> *Id.* at 394.

<sup>77</sup> *Id.* at 398.

<sup>78</sup> *Martincic v. Urban Redevelopment Authority*, 844 F. Supp. 1073, 1075 (W.D. Pa.) *aff'd.*, 43 F.3d 1461 (3d Cir. 1994).

<sup>79</sup> *Bickerstaff v. Vassar College*, 196 F.3d 435, 430 (2d Cir. 1999) *cert. denied*, 120 S. Ct. 2688 (2000). "We thus conclude that, because the regression analysis failed to account for the major factors that Vassar considers in evaluating salary increases, the district court did not abuse its discretion in according the regression analysis probative weight." *Id.*

<sup>80</sup> *Bickerstaff*, 196 F.3d at 449 (stating that "Gray's regression analysis, however, does not even purport to account for two of the major variables – teaching and service").

<sup>81</sup> *Id.*



weight under *Bazemore v. Friday*.<sup>82</sup> This case represents the exception to the general principle set forth in *Bazemore* and holds instead that when a major factor is omitted the regression is inadmissible.<sup>83</sup>

Additionally, in *Raskin v. The Wyatt Co.*, the Second Circuit affirmed summary judgment, following exclusion by the trial court of the plaintiff's economist expert because the expert's methodology and assumptions were flawed.<sup>84</sup> The expert's comparison pool looked only at older workers who were not promoted, and ignored employees who turned age fifty during the at-issue time period and were promoted.<sup>85</sup>

Finally, in *Boucher v. U.S. Suzuki Motor Corp.*, the Second Circuit held that the trial court had abused its discretion in allowing an expert to testify based on facts that were not supported by record evidence.<sup>86</sup> The court ruled that experts should be excluded if their methodological assumptions are "so unrealistic and contradictory as to suggest bad faith," or to be in essence an "apples and oranges comparison."<sup>87</sup>

*Allard v. Indiana Bell Telephone Co.* excluded four experts under *Daubert* as unreliable and unhelpful to the jury, and under Evidence Rule 403 as prejudicial.<sup>88</sup> The court was particularly critical of the plaintiff's counsel for framing the analysis conducted by one of the economic experts in such a way as to ignore the possible causes of the disparity in termination rates other than discrimination, and treated gross termination rate disparities as discriminatory.<sup>89</sup> The testimony of another expert was excluded as untrustworthy and inadmissible, given evidence

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<sup>82</sup> *Id.* "Bazemore counseled that 'normally, failure to include variables will affect the analysis' probativeness, not its admissibility." *Id.* (quoting *Bazemore v. Friday*, 478 U.S. at 400).

<sup>83</sup> *Id.* "[T]here may . . . be some regressions so incomplete as to be inadmissible as irrelevant." *Id.* (quoting *Bazemore*, 478 U.S. at 400, n.10).

<sup>84</sup> 125 F.3d 55, 66-67 (2d Cir. 1997).

<sup>85</sup> *Raskin*, 125 F.3d at 67.

<sup>86</sup> 73 F.3d 18, 22 (2d Cir. 1996).

<sup>87</sup> *Boucher*, 73 F.3d at 21.

<sup>88</sup> 1 F. Supp. 2d 898, 907 (S.D. Ind. 1998).

<sup>89</sup> *Allard*, 1 F. Supp. 2d at 906.

that “he did not actually write the report,”<sup>90</sup> and that the opinions of the other experts were similar to those already rejected in a companion case.<sup>91</sup>

### C. Applying the Methodology Correctly

In *Wado v. Xerox Corp.*, the trial judge did not exclude plaintiff’s statistical expert, but agreed with the defendant’s critique that the expert’s methodology was flawed and of no probative value because the expert’s analysis failed to take into account non-discriminatory job factors such as performance ratings.<sup>92</sup> The expert failed to control for performance rates (which he assumed were manipulated to disadvantage older workers), thereby eliminating plaintiff’s ability to detect disparities arising from the application of facially-neutral job practices.<sup>93</sup>

*Sheehan v. Daily Racing Form, Inc.* illustrated that an expert’s flawed assumptions and methodology were neither admissible nor satisfactory to forestall summary judgment.<sup>94</sup> A statistician, unqualified to address whether the at-issue pool of employees in dissimilar jobs were fungible for comparing terminations on the basis of age, simply assumed that they were.<sup>95</sup> Also, by omitting other potentially explanatory variables, the expert gave up the opportunity to test alternative, age-neutral hypotheses regarding the employer’s termination pattern.<sup>96</sup>

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<sup>90</sup> *Id.* at 904.

<sup>91</sup> *Id.* at 905.

<sup>92</sup> 991 F. Supp. 174, 184 (1998), *aff’d*, *Smith v. Xerox Corp.* 196 F.3d 358 (2d Cir. 1999).

<sup>93</sup> *Wado*, 991 F. Supp. at 184. See also, *Diehl v. Xerox Corp.*, 933 F. Supp. 1157, 1167 (W.D.N.Y. 1996) (dismissing plaintiff’s case where the expert’s opinion was entitled to no weight because she deliberately omitted, rather than controlled for, data she believed to reflect defendant bias).

<sup>94</sup> *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997).

<sup>95</sup> *Id.* at 942. “The expert’s failure to make adjustments for variables bearing on the decision whether to discharge or retain a person on the list other than age . . . indicates a failure to exercise the degree of care that a statistician would use in his scientific work . . . .” *Id.*

<sup>96</sup> *Id.*

Further, in *Camp v. Lockheed Martin Corp.*, an expert industrial psychologist's opinion that age stereotypes affected the defendant's decisionmaking was stricken, because the expert selectively relied on his prior research results that supported plaintiff's position, ignoring his own disclaimer about generalizing findings from one study to another, and his findings "which contradict[ed] the desired conclusion."<sup>97</sup>

Finally, in *EEOC v. Rockwell*, the trial court excluded the opinion of plaintiff's vocational rehabilitation expert on several grounds, including reliance on "facts and data which no expert in his field, or any other, including himself, would rely,"<sup>98</sup> and the expert's admission at the *Daubert* hearing that his Rule 26 report contained textual language and a chart supplied by counsel.<sup>99</sup>

#### IV. CONCLUSION

Subsequent to *Daubert* but prior to *Joiner* or *Kumho*, the Second Circuit, in *McCullock v. H.B. Fuller Co.*,<sup>100</sup> held that the gatekeeper should focus on an expert's methodology, and not the substantive opinion based on that methodology.<sup>101</sup> The court rejected the defendant's contention that the trial judge should have excluded plaintiff's medical expert, holding that such an exclusion would have been "an unwarranted expansion of the gatekeeper role."<sup>102</sup>

That aspect of *McCullock*, and similar reasoning in *In re Joint Eastern and Southern District Asbestos Litigation*,<sup>103</sup> appear to be inconsistent with *Kuhmo*, extending the gatekeeper's role to all elements of an expert's opinion – the methodology and the

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<sup>97</sup> *Camp v. Lockheed Martin Corp.*, 74 Emp. Prac. Dec. (CCH) 45713 (S.D. Tx. 1998).

<sup>98</sup> *EEOC v. Rockwell, Int'l Corp.*, 60 F. Supp. 2d 791, 797 (N.D. Ill.), *r'hg. denied*, 1999 WL 1252542 (N.D. Ill. 1999).

<sup>99</sup> *Id.*

<sup>100</sup> 61 F.3d 1038 (2d Cir. 1995).

<sup>101</sup> *McCullock*, 61 F.3d at 1044.

<sup>102</sup> *Id.* at 1043.

<sup>103</sup> 52 F.2d 1124 (2d Cir. 1995).

results.<sup>104</sup> Similarly, the decision in *Stagl v. Delta Airlines, Inc.*,<sup>105</sup> that it was an abuse of discretion by the trial court to exclude an otherwise qualified expert (on the basis of education and general experience) whose expertise “was insufficiently tailored to the facts” of the case,<sup>106</sup> cannot easily be reconciled with *Kumho* and the further expansion of gatekeeper discretion that decision represents.

*Raskin*, and most recently *Turrentine*, suggest that the requirement that experts not only be qualified, but also establish that their methodology is reliable, as a prerequisite to admissibility, is now clear. With respect to experts in employment discrimination cases, the two lines of legal analyses controlling the admissibility of their opinions continue to converge. That is, comparisons that are insufficiently refined will not satisfy Title VII or ADEA standards as to substance, and gatekeeper scrutiny on evidentiary and procedural grounds promises to eliminate at least those most blatantly unqualified to offer expert opinions.<sup>107</sup>

The force of this convergence is likely to become more pronounced in coming years, as the full effects of the evidence trilogy become widely understood. The use of experts in employment discrimination cases, like all other civil litigation, will proceed accordingly.

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<sup>104</sup> *In re Joint Easter and Southern District Asbestos Litigation*, 52 F.2d at 1133; *McCulloch*, 61 F.3d at 1042.

<sup>105</sup> 117 F.3d 76 (2d Cir. 1996).

<sup>106</sup> *Stagl*, 117 F.3d at 82.

<sup>107</sup> See *Wooley v. Smith & Nephew Richards, Inc.*, 67 F. Supp. 2d 703, 706 (S.D. Tx. 1999) (excluding as “bad science and junk medicine” a physician whose opinion had already been excluded by at least ten courts in related cases).

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