

EXPERT WITNESSES IN EMPLOYMENT LITIGATION

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**25th Annual Labor and Employment Law Conference
The University of Texas School of Law
May 10-11, 2018
AT&T Conference Center, Austin, Texas**

I. INTRODUCTION

Prior to 1993, most federal courts applied the standard for the admissibility of expert witness testimony articulated in 1923 by the D.C. Circuit Court in *Frye v. United States*, which held that expert opinion based on a scientific technique was inadmissible unless the technique was "generally accepted" as reliable in the relevant scientific community. *Frye v. United States*, 293 F. 1013, 1129-1130 (D.C. Cir. 1923). In 1993, the United States Supreme Court discarded this framework, and adopted a less rigid test focusing on the reliability and relevance of the testimony and, in turn, placing a heavier burden on the trial judge to act as the "gatekeeper" for the admission of expert testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993). Then, in *Kumho Tire Co. v. Carmichael*, the United States Supreme Court further expanded this flexible standard to cases involving non-scientific testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). These more flexible standards, together with the fact that virtually all employment discrimination cases have been tried to juries since the enactment of the Civil Rights Act of 1991, have contributed to an increase in the use of expert testimony in employment litigation.

The purpose of this article is to outline the standards used in Texas state and federal courts for determining the admissibility of expert witnesses, and to examine the types of expert testimony frequently encountered in employment litigation.

II. THE STANDARD FOR ADMISSIBILITY OF OPINION TESTIMONY BY EXPERT WITNESSES

Although scientific expert testimony is not completely alien to employment litigation, unlike products liability cases, expert testimony in employment litigation increasingly stems from the non-scientific or soft science arena as attorneys on both sides of the courtroom attempt to use experts to establish the reasonableness of a company's employment processes or procedures, the existence and cause of an alleged medical condition, the reasonableness of a harassment investigation, sex and race stereotyping, and equal work. See John V. Jansonius & Andrew M. Gould, *Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility*, 50 Baylor L. Rev. 267 (1998); see also Debra S. Katz and Lynne Bernabei, *Damages Issues in Employment Discrimination Cases: Expert Testimony in Sexual Harassment and Other Employment Discrimination Cases After Daubert v. Merrell Dow Pharmaceuticals, Inc.*, American Law institute - American Bar Association Continuing Legal Education Course Study (1998). In order to understand the circumstances under which such expert testimony

may be admissible, it is important to understand the standards that will be applied by both federal and state courts to any proposed expert testimony.

A. The Federal Approach

The federal standard for admissibility of expert witness testimony is set forth in three seminal United States Supreme Court decisions and in the Federal Rules of Evidence.

1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993)

In *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court rejected the time honored "general acceptance" standard for the admissibility of expert witnesses espoused some 70 years earlier by the D.C. Circuit Court in *Frye v. United States*. Relying on the Federal Rules of Evidence, the court articulated a more flexible standard which focused on the reliability and relevance of the proffered testimony and called upon trial judges to act as "gatekeepers" to ensure such reliability and relevance.

The Plaintiffs in *Daubert* were children and parents of children who suffered from limb related birth defects which they alleged were caused by prenatal ingestion of Bendectin, a prescription drug marketed by the Defendant. The Defendant filed a motion for summary judgment based on the affidavit of a well-credentialed expert who concluded, based on his review of scientific literature on the subject, that Bendectin was not a known cause of such birth defects. In response to Defendant's Motion for Summary Judgment, the Plaintiffs submitted testimony of eight other experts, all with impressive credentials, who concluded, based on test tube and live animal studies and pharmacological studies of the chemical structure of Bendectin, that Bendectin could cause birth defects. Plaintiffs' expert testimony was ruled inadmissible under *Frye* because the studies relied upon had not been published or subjected to peer review. Thus, summary judgment was granted in favor of the Defendant and the Ninth Circuit Court of Appeals affirmed the decision.

On review, the Supreme Court reversed the Ninth Circuit Court of Appeals and held that the *Frye* test had been superseded by the adoption of Rule 702 of the Federal Rules of Evidence, which did not establish "general acceptance" as an absolute prerequisite to admissibility. Instead, the court stated that, under the Federal Rules of Evidence, the two primary requirements for the admissibility of expert testimony are reliability and relevance. *Daubert*, 509 U.S. at 592-93.

Specifically, the trial judge, acting as the "gatekeeper" of expert testimony, must make the initial determination of whether the reasoning or methodology underlying the proposed expert testimony is scientifically valid and whether that reasoning or

methodology can be properly applied to the facts at issue. *Id.* The trial court has broad discretion in making this determination since "many factors" will bear on it. *Id.* Among these many factors that a trial judge should consider are: (1) whether the technique or theory used by the expert can be and has been tested; (2) whether the theory or technique used has been subject to peer review and publication; (3) the known or potential rate of error in the expert's methodology; (4) whether the expert's methodology is generally excepted in the scientific community; and (5) the existence and maintenance of standards controlling the technique's operation. *Id.* at 593-94. The court emphasized that the trial court's inquiry must remain flexible such that the presence or absence of any of the four factors listed above is not, in and of itself, determinative. The court also cautioned that trial judges must be mindful of other rules of evidence, including Rule 703 (providing that "expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject"), Rule 706 (giving the court the discretion to procure the assistance of an expert of its own choosing), and Rule 403 (permitting the exclusion of otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury). *Id.* at 595.

Importantly, in *Daubert*, the court limited its decision to scientific testimony and indicated that a trial court's focus in making admissibility decisions must be on the proposed expert's methodology, not on his/her conclusions. *Id.* According to the court, questionable conclusions based on otherwise admissible methodologies, can be handled through cross-examination, presentation of contrary evidence and careful jury instructions. *Id.* at 596. In addition, trial courts remain free to dispose of a case built solely on the questionable conclusions of an expert witness by granting a directed verdict or summary judgment. *Id.*

2. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)

The first case involving expert witness testimony heard by the U.S. Supreme Court after its *Daubert* decision was *General Electric Co. v. Joiner*. In that case, the court determined that the proper standard of review to be exercised by appellate courts when reviewing decisions to exclude expert testimony was "abuse of discretion," as opposed to a much stricter standard followed by certain Circuit Courts. An "abuse of discretion" standard of review greatly increased the authority of trial judges to make decisions with regard to experts, without being overturned on appeal. Moreover, because rulings on the exclusion of experts

are often followed by summary judgment motions based on lack of evidence, some authorities have concluded that the court's decision in *Joiner* empowered the district courts to make outcome determinative decisions. Gerson H. Smoger, J.D., Ph.D., *From Rule 702 to Daubert to Joiner to Kumho Tire: A Review of the Supreme Court's Analysis of the Admissibility of Expert Testimony*, ATLA Winter Convention Reference Materials (February 2000). Nevertheless, increasing the power of district judges with respect to admissibility of experts is consistent with the "gatekeeper" function envisioned by the Supreme Court in *Daubert*.

In addition, the *Joiner* Court blurred the distinction between "methodology" and "conclusions" set forth in *Daubert* by proclaiming that an expert's conclusions and methodology are not entirely distinct from one another. *Id.* Accordingly, the *Joiner* decision empowered trial courts to question not only the validity of the data forming the basis of the expert's opinion, but also the validity of the expert's opinion itself, a power the *Daubert* court was not willing to concede. See *Daubert*, 509 U.S. 579, 595 (stating, "the focus... must be solely on principles and methodology, not on the conclusions they generate") (emphasis provided).

3. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)

Still open to debate after *Daubert* and *Joiner* was the question of whether the new *Daubert* and *Joiner* standards would apply to non-scientific expert testimony. In 1999, the Supreme Court resolved this issue in its *Kumho Tire Co. v. Carmichael* decision, in which it concluded that the *Daubert* factors may apply to the expert testimony of engineers and other non-scientists. In doing so, the court emphasized the importance of the trial court's gatekeeping function and the corresponding need to maintain a flexible standard such that trial courts can properly exercise their discretion in accordance with the facts and circumstances of each particular case. Obviously, the court's decision in *Kumho* is extremely important to employment law practitioners who are more likely to be confronted with issues related to non-scientific experts than scientific ones.

The *Kumho* case involved a roll-over car accident caused by a blown out tire in which one passenger was killed and several others were severely injured. The injured passengers and their representatives subsequently brought suit against the tire's maker and distributor ("Kumho Tire") alleging that the tire was defective. In support of their contention, the Plaintiffs offered testimony from an expert witness who concluded that the tire was defective based on (1) his visual and tactile inspection and (2) his specific theory that a separated tire is

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First appeared as part of the conference materials for the
25th Annual Labor and Employment Law Conference session
"Effective Use of Expert Witnesses"