Can You Use HR Experts In Employment Cases?

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Considering the sort of information that falls within the scope of HR, the answer is generally “No.”

GENERALLY, experts play an important role in employment cases. Historically, experts used most often in employment cases were experts on statistical issues and damages issues relating to emotional distress and economic loss. Recently, parties in employment cases have offered the testimony of professors, consultants, or other individuals trained in management policies or human resources (“HR”). The subject of the testimony may be whether or not the employer properly investigated a harassment complaint, the appropriateness of the employment action in question,
industry standards for diversity or other employer practices, or whether stereotyping may have affected the employer’s decision-making. The courts’ reactions to these experts have varied. However, more often than not, these experts should be excluded for the reasons explained in this article.

**STANDARD FOR EXPERT WITNESS TESTIMONY** • The admission of expert evidence is governed by Federal Rule of Evidence 702, as explained by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993) and its progeny. See *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1066 (9th Cir. 2002). Rule 702 provides that:

“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.”

Under Rule 702 and *Daubert*, district courts must act as “gatekeepers” that admit expert testimony only if it is both reliable and relevant. *Daubert*, supra, 509 U.S. at 589. Moreover, trial judges must apply this gatekeeping role to all forms of expert testimony. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (holding that the district court’s gatekeeping obligation did not apply only to “scientific” testimony); see also *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004). “Maintaining *Daubert’s* standards is particularly important considering the aura of authority experts often exude, which can lead juries to give more weight to their testimony.” *Mukhtar*, supra, 299 F.3d at 1063-64.

To fulfill its obligation under *Daubert*, the court must engage in a rigorous inquiry to determine whether:

“(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.”


**IS HR EXPERT TESTIMONY ADMISSIBLE?** • HR matters do not require expert opinion, and hence should be excluded because they are inadmissible under Fed. R. Evid. 702. Expert testimony in the form of an opinion is limited to an opinion that is “scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702. When the subject matter of an expert’s opinion is not sufficiently beyond the common knowledge of the average layperson, the opinion testimony is inadmissible. See *United States v. Hanna*, 293 F.3d 1080, 1086 (9th Cir. 2002); *United States v. Vallejo*, 56 Fed. R. Evid. Serv. (Callaghan) 64 (9th Cir. 2001); see also *Kotla v. Regents of the Univ. of Calif.*, (2004) (rejecting testimony of plaintiff’s “human resources management expert” when his testimony “created an unacceptable risk that the jury paid unwarranted deference to [his] purported expertise when in reality he was in no better position than they were to evaluate
the evidence”) (applying evidentiary rules similar to Fed. R. Evid. 702 and Daubert).

An expert witness is not necessary, is improper, and not helpful to the trier of fact when “normal experiences and qualifications of laymen jurors are sufficient for them to draw a proper conclusion from given facts and circumstances.” Wilson v. Muckala, 303 F.3d 1207, 1219 (10th Cir. 2002). Furthermore, expert testimony regarding the adequacy of an employer’s investigation is not so complicated as to require the testimony of an expert witness. See Id. at 1218-19 (exclusion of HR expert’s testimony was proper when the issues to which the expert would have testified—the adequacy of the employer’s policy for responding to cases of sexual harassment and the adequacy of the investigation that followed—were “not so impenetrable as to require expert testimony”).

Moreover, with regard to HR matters, a finder of fact is capable of making a determination on such issues without expert opinion. See Miller v. United Parcel Serv., 2004 U.S. Dist. LEXIS 15809, at *47 (N.D. Cal. Aug. 6, 2004), aff’d, 2006 U.S. App. LEXIS 19688 (9th Cir. July 28, 2006) (Hamilton, J.) In Miller, the plaintiff submitted the declaration of an HR expert with his opposition to the defendant-employer’s motion for summary judgment. 2004 U.S. Dist. LEXIS 15809, at *46. The court recognized that the subject of HR investigations was within the common knowledge of the average layperson in noting that “[v]irtually all judges and jurors have been employees or employers themselves.” Id. at *47. The Miller case involved an HR expert offering her opinion as to the sufficiency of the employer’s HR investigation in light of “recognized management practices.” Id. Although the court in Miller simply stated the employer’s arguments pertaining to the irrelevancy of the declaration’s specific contents and to the lack of foundation for the expert’s assertion, the court decided to respond to the employer’s claim that the subject of HR investigations is not so complicated as to require expert opinion. Id. In light of the requirement under Fed. R. Evid. 702 that expert testimony assist the trier of fact, the court made a point of stating that the issue of HR investigations would not assist the finder of fact given the common knowledge the average layperson has from being an employee or an employer. Id. Thus, the court concluded that the finder of fact did not require assistance on the issue of the adequacy of a HR investigation. Id.

Furthermore, in Wilson v. Muckala, supra, 303 F.3d at 1218-19, the plaintiff designated an HR expert to offer testimony regarding the employer’s policy for responding to sexual harassment cases and the reasonableness of the employer’s response to the plaintiff’s claim of sexual harassment. Id. at 1218. In finding that the district court did not abuse its discretion in excluding such testimony, the court of appeal expressly agreed with the district court that such issues were “not so impenetrable as to require expert testimony.” Id. at 1219.

Also, in Lipsett v. Univ. of Puerto Rico, 740 F. Supp. 921, 925 (D.P.R. 1990), the plaintiff proffered as experts a social worker and a social psychologist to testify about sexual harassment and whether there had been sexual harassment and a hostile work environment in violation of the law. Id. at 925. The court determined as part of its Fed. R. Evid. 702 analysis that the subject of the testimony to be offered by these experts would not assist the jury in understanding the evidence or determining a fact in issue. See id. at 925-26. Even though the experts in Lipsett were not HR experts per se and the sufficiency of the employer’s policies and procedures were not expressly at issue, the case remains instructive on how matters that arise in the HR context, matters like sexual harassment, do not lend themselves to expert testimony because they deal with “common occurrences that the jurors have knowledge of through their experiences in everyday life.” See Id.

DOES HR TESTIMONY HELP THE TRIER OF FACT? • The opinions of an HR expert will