Use of Expert Testimony in Wage and Hour Class Actions and Avoidance of *Daubert* Challenges

Wage & Hour Claims and Class Actions
April 29 – May 1, 2008
Hyatt Regency Hotel
Coral Gables, FL

Sam J. Smith
Marguerite M. Longoria
Burr & Smith, LLP
442 W. Kennedy Blvd., Suite 300
Tampa, FL 33606
Tel: (813) 253-2010
Fax: (813) 254-8391
ssmith@burrandsmithlaw.com
mlongoria@burrandsmithlaw.com
www.burrandsmithlaw.com

Expert testimony is useful in FLSA cases and wage and hour class actions to assess the appropriateness of class certification, to select a sample from the putative class members for representative discovery, to argue the merits of the claims and to assist with damage analysis. This paper will examine some of these areas of usefulness and how to avoid challenges under *Daubert v. Merrell Dow Pharms.,Inc.*, 509 U.S. 579, 591 (1993).

I. Federal Rule of Evidence 702

In federal court, the judge acts as a gatekeeper who determines the admissibility of expert opinion testimony under Federal Rule of Evidence 702. As such, the judge may find relevant expert witness testimony admissible on a given issue if he finds that the expert is qualified to testify on the matter at hand; his or her methodology is reliable, and that the testimony will assist the trier of fact to understand the evidence or determine a

fact in issue through the application of scientific, technical or specialized expertise. *See F.R.E.* 702; *Davis v. City of Loganville*, 2006 U.S. Dist. LEXIS 20798 **14-15 (M.D. Ga. March 27, 2006) *citing Daubert v. Merrell Dow Pharms.,Inc.*, 509 U.S. 579, 591 (1993). *See also*, *United States v. Hansen*, 262 F.3d 1217, 1233 (11th Cir. 2001). Expert testimony is not permitted if it "usurp[s] either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it." *Dubiel v. Columbia Hos. (Palm Beaches) L.P.*, 2005 U.S. Dist. LEXIS 45874 *9 (S.D. Fla., January 11, 2005).

In *Kumho Tier Co. v. Carmichael*, 526 U.S. 137 (1999, the Supreme Court expanded the *Daubert* factors[1] to accommodate analysis of the admissibility of non-scientific testimony and acknowledged that the *Daubert* factors may not be pertinent to evaluation of methodology dependent upon the nature of the issue, the particular expertise and subject of testimony. *See City of Loganville*, 2006 U.S. Dist. LEXIS *20.

In *City of Loganville*, a district court analyzed the admissibility of the testimony of a former compliance officer and district director for the DOL as to whether the City's pay practice complied with 7(k) of the FLSA; whether firefighters were entitled to "gap time," and whether the City's institution and administration of its pay plan was in "reckless disregard of the FLSA." 2006 U.S. Dist. LEXIS *11. The court utilized notes of the Advisory Committee to F.R.E. 702 as an alternative to *Daubert*. *Id*. at *22. Accordingly the court followed a five-factor test inquiring whether the expert: 1) was offering opinions about matters growing naturally and directly out of his research independent of the case or whether he has developed his opinions expressly for the

[1] In *Daubert*, the Supreme Court outlined four non-exclusive tests or factors to determine the reliability or trustworthiness of an expert's opinion: (1) testability, (2) error rate, (3) peer review and publication, and general exceptance. 509 U.S. at 593-95.

purposes of testifying; 2) unjustifiably extrapolated from an accepted premise to an unfounded conclusion; 3) adequately accounted for obvious alternative explanations; 4) was being as careful as he would be in his regular professional work outside his paid litigation consulting, and 5) was known in his field of expertise to reach reliable results for the type of opinion the expert offers in court. *Id*. at **24-27.

Factors which courts may address in the Eleventh Circuit to assess the reliability of an expert's reasoning or methodology include: Whether the theory or technique can be tested; whether it has been subjected to peer review; the known or potential rate of error of the technique; the existence and maintenance of standards controlling the technique's operation; and the degree to which the relevant scientific community accepts the theory or technique as reliable. *See Powell v. Carey Int'l, Inc.*, 2007 U.S. Dist. LEXIS 26074 *11 (S.D. Fla., April 9, 2007).

The final determination relevant to admission of expert testimony is a determination whether the evidence will assist the trier of fact to understand the evidence or determine a fact at issue. *Daubert*, 509 U.S. at 591. Evidence which is scientifically valid and which reflects reliable methodology may still be inadmissible as a result of insufficient bearing on the issue but only evidence supported by a valid methodology can have a "relevant fit" to the issue and be of assistance to the trier of fact. *City of Loganville*, 2006 U.S. Dist. LEXIS 20798 at **35-36. *See, e.g., Morales-Arcadio v. Shannon Produce Farms, Inc.*, 2007 U.S. Dist. LEXIS 51950 *9 (S.D. Ga., July 18, 2007) (rejecting in part expert testimony because it would not be of assistance to trier of fact where the proffered testimony was supported merely by logic rather than specialized knowledge.)

II. Class Certification

Expert witnesses can be helpful in opining with respect to the certification of classes pursuant to Rule 23 of the Federal Rules of Civil Procedure and their admissibility in this circumstance is subject to only a limited *Daubert* inquiry. *See Fisher v. Ciba Specialty Chems. Corp*, 238 F.R.D. 273, 281 (D. Ala. 2006). The court need only determine "whether the expert evidence is sufficiently probative to be useful in evaluating whether class certification requirements have been met." *Fisher*, 238 F.R.D. at 281 (D. Ala. 2006) *citing Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 191 (N.D. Cal. 2004). At the preliminary certification stage, a court should not delve into the merits of an expert's opinion and the evidence must meet only a "low hurdle" to receive consideration. *Fisher*, 238 F.R.D. at 281 (*citing In re Natural Gas Commodities Litigation*, 231 F.R.D. 171, 182 (S.D.N.Y., 2005).

III. Selecting Sample Classes for Representative Discovery:

After initial certification, a collective action should "proceed as a representative action through discovery." *Hipp v. Liberty National Life Ins. Co.*, 252 F.3d 1208, 1218 (11th Cir. 2001). When representing large classes the only practical manner to approach certification, discovery and/or trial, may be by establishing a representative sample of plaintiffs for discovery and trial. Courts generally recognize that experts can be helpful in selecting the representative class members and determining that the sample size is adequate to represent the class. Attached as Exhibits 1-3 is the parties' briefing from an FLSA collective action, a sample expert report supporting a statistically-significant representative sample group for discovery, and a revised expert report taking into account

the defendants' allegations that each district of the company had unique practices that impacted the alleged uncompensated work.

The size of representative samples is frequently the subject of dispute. *See, e.g., Reich v. Southern Md. Hosp., Inc.*, 43 F.3d 949, 951-52 (4th Cir. 1995), in which the Fourth Circuit held that representative testimony by 58 employees was insufficient to represent a class of 3,368 employees and *Secretary of Labor v. DeSisto*, 929 F.2d 789, 792-96 (1st Cir. 1991), in which court determined that a single employee could not represent 244 employees at trial.

IV. Expert Testimony on the Merits:

The first prong of the *Daubert* analysis requires that the expert by qualified as a result of "knowledge, skill, experience, training or education." *City of Loganville*, 2006 U.S. Dist. LEXIS 20798 at *14. Under this prong, experts may be qualified as a result of experience applying methodologies used by the DOL or as a result of their personal experience working in an industry.

a. Experts' Proffered as a Result of Experience in Application of FLSA:

As previously touched upon in Section I, *supra*, in *Davis v. City of Loganville*, a district court analyzed the admissibility of testimony of a former compliance officer and district director for the DOL as to whether the City's pay practice complied with 7(k) of the FLSA; whether firefighters were entitled to "gap time," and whether the City's institution and administration of its pay plan was in "reckless disregard of the FLSA." 2006 U.S. Dist. LEXIS *11. The court utilized factors recommended by the Advisory Committee to R. 702 as an alternative to *Daubert*. *See supra*, at Section I. In light of evidence the expert had utilized the same methodology in assessing compliance with 7(k)

which he had previously used while employed by the DOL, the court ultimately determined the methodology would be reliable to determine if a violation of 7(k) had occurred. The court decided the expert's methodology was flawed as to the "gap time" because his opinion failed to acknowledge a widely-accepted rule of law regarding gap time, and then extrapolated to an unfounded conclusion, contradicted by almost every other relevant case. *Id*. at **27-30. The court also rejected the expert's methodology as to whether the company had showed "reckless disregard" of the requirements of the FLSA because he failed to describe any methodology in support of his opinion. *Id*. at **35-36. Therefore, the court concluded that the expert's testimony would assist the trier of fact only with the initial issue as to whether the pay practice violated 7(k). *Id*. at *36. *See also, Donovan v. Waffle House, Inc.*, 1983 U.S. Dist. LEXIS 13420 **9-10 (N.D. Ga. September 26, 1983) (approving methodology behind work sampling studies and accepting expert's testimony as to the extent to which restaurant managers' duties involved decision making, communication, general scope of responsibilities and effect on sales and profits).

In *Dubiel v. Columbia Hospital*, 2005 U.S. Dist. LEXIS 45874 * 2 (S.D. Fla., January 11, 2005), defendant attempted to introduce the testimony of an expert with respect to the compliance of the hospital's meal break policy with the FLSA, whether automatic deduction of meal breaks were standard business practice in the industry, and whether defendant's alleged violations were willful. The court found that the proposed expert was qualified based upon his extensive prior experience and training in human resources and his experience with the DOL evaluating pay practices and investigating compliance with wage and hour laws. *Id*. at **6-7. The court acknowledged that

defendant had identified the material the expert had reviewed in forming his opinion, but noted that neither party had addressed whether the expert's methodology was proper. *Id*. at *8. In addition, the court concluded that the proposed testimony would not assist the trier of fact as to the question of compliance with the FLSA and would invade the province of the court and jury in violation of with respect to the willfulness factor. *Id*. at *9. Despite the lack of evidence as to methodology, the court did admit the testimony of the expert with respect to industrial practices regarding meal breaks as potentially of assistance to the trier of fact, and suggested the expert's testimony might also be useful with respect to analysis and interpretation of computerized pay records or the number of weeks for which overtime compensation might be owed. *Id*. at *14.

An expert's opinion on the law will not be admitted if the proponent fails to show it will assist the trier of fact. For instance, defendants objected to the proposed expert testimony of a former DOL investigator in *Medina v. 3C Construction Corp.*, 2005 U.S. Dist. LEXIS 45922 (S.D. Fla., September 26, 2005) whose opinion was being offered to explain how travel time could be construed under DOL interpretations; how to construe a term broadly for purposes of interpreting the FLSA; how to interpret a document at issue; how travel could be construed to be work by the DOL, and how the plaintiffs' transportation had been for the employer's benefit. *Id.* at *5. The court concluded while the testimony might be helpful, that it was not necessary because the facts at issue required no "scientific, technical or specialized expertise" for a layperson to understand. *Id*. at *8.

b. Experts Proffered as a Result of Industry-Specific Experience:

The parties attempted to introduce an expert to testify on various issues involving the seaman's exemption to the FLSA in *Godard v. Alabama Pilot, Inc.*, 2007 U.S. Dist. LEXIS 31376 (S.D. Ala., April 26, 2007). The expert admittedly had no expertise in the FLSA and had not read the applicable exemptions. Based upon his personal experience as a seaman, plaintiffs offered the expert's testimony on whether the plaintiffs were seamen, on whether the duties they performed were seaman's duties, and whether they had been paid in accordance with the applicable collective bargaining agreement. *Id*. The court rejected the purported expert's testimony as to the first two issues for lack of relevant knowledge which could assist the jury because the court had already determined that under the FLSA exemption, "seaman" was a term of art, narrower and more precise, than that used in general maritime parlance. *Id*. As to the third issue, the court found the expert's testimony irrelevant because the scope of the CBA was irrelevant to the question of application of the FLSA exemption. *Id*. at * 7.

V. Expert Testimony as to Damages:

Experts are frequently used by the parties to assist the trier of fact in computing damages. Representative testimony as to damages may be helpful where the employer's records are inaccurate or inadequate. *See, e.g., See, e.g., Morales-Arcadio v. Shannon Produce Farms, Inc.*, 2007 U.S. Dist. LEXIS 51950 *55 (S.D. Ga., July 18, 2007) *citing, Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946).

The testimony of an expert will not be admitted where it constitutes legal arguments rather than specialized knowledge. *See, e.g., Morales-Arcadio,*, 2007 U.S. Dist. LEXIS at *9. For example, in *Powell v. Carey Int'l, Inc.*, 2007 U.S. Dist. LEXIS 26074 *11 (S.D. Fla., April 9, 2007), the court granted defendants' motion to exclude the

expert testimony of a CPA whose findings were based upon erroneous legal conclusions, about which the CPA was attempting to testify despite the fact that he had neither background, education or experience on the issues before the court. *Id*. at *12 and n. 8.

VI. Taxation as Costs

Unfortunately, the FLSA does not provide for the recovery of expert witness fees as costs. *See, Glenn v. General Motors Corp.*, 841 F.2d 1567, 1575 (11th Cir. 1988). There is no language in Section 216(b) or its legislative history to support compensating plaintiffs for expert witness fees. *Id*. at 1576.

CONCLUSION

Expert witness testimony may be warranted in wage and hour class actions and FLSA collective actions as long as the expert's testimony assists the jury or court to understand the evidence or determine a fact in issue through the application of scientific, technical or specialized expertise. Expert testimony is particularly appropriate to estimate the damages of the plaintiff class when the employer has failed to keep accurate time records of the work performed based on the Supreme Court's holding in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946), which allows the plaintiff to establish damages using a reasonable estimate. However, expert testimony is likely to be excluded where the expert merely analyzes the facts and opines on conclusions of law.