Expert witnesses are often important for proving the claims and rebutting the defenses in employment litigation. But are they always needed? When should a plaintiff forego expert testimony? What kinds of expert witnesses can be used in employment litigation? Can the plaintiff’s health care provider also serve as an expert witness? How should the plaintiff litigate Daubert or Frye challenges to expert witness testimony?

**When Is Expert Testimony Needed?**

The threshold question is whether expert testimony is even needed in the first place. Given the potential costs of expert witnesses, including their hourly fees, plaintiff’s counsel should determine if the relevant information could be more readily obtained from fact witnesses, including the plaintiff herself, or her treating health care providers.

In a case involving economic damages, a plaintiff may be able to testify as to her former and current income. If the plaintiff is only seeking back pay, perhaps including lost bonuses or other incentive compensation, and is not seeking front pay, then she may not need an expert to testify about her economic losses, given that no projections of future income are required.

Similarly, in a case involving emotional distress damages, testimony from the plaintiff and her friends or family members about the stress and other emotional changes that plaintiff has suffered since the defendant took adverse employment against her. Similarly, testimony from the plaintiff’s treating health care providers about plaintiff’s condition and prognosis may also be sufficient to aid the jury in its determination of non-economic damages.

However, in circumstances beyond those fairly simple scenarios, an expert witness is likely to be needed to present testimony as to plaintiff’s economic and/or emotional damages. Also, if the plaintiff has a wrongful discharge in violation of public policy claim, or a similar whistleblower claim that involves subject matters unfamiliar to a typical juror such as accounting issues, or financial and securities standards under the Sarbanes-Oxley Act, then an expert witness

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1 Andrea Loveless, a law clerk and student at George Mason University School of Law, helped research several sections of this paper.
may be necessary to explain these issues to the jury. Further, if the defendant has hired an expert witness, and it this expert is testifying about a subject matter that will be admitted in court, then the plaintiff will likely need to hire a rebuttal expert.

Appellate courts have come to conflicting conclusions on whether a plaintiff’s lay testimony is sufficient to sustain a jury verdict on emotional distress damages, absent expert testimony. The Third Circuit, in upholding a sizable jury verdict in a disability discrimination case brought by an employee with multiple sclerosis, held that lay testimony was sufficient to support the award of emotional distress damages:

Gagliardo produced evidence from her co-workers and family demonstrating the effects her problems with [defendant] had on her life. This testimony tied Gagliardo’s pain and suffering to her early employment problems after she was diagnosed with MS and detailed their subsequent worsening effect on her life. The testimony demonstrated the effects of the mental trauma, transforming Gagliardo from a happy and confident person to one who was withdrawn and indecisive. Because this evidence establishes a reasonable probability that Gagliardo incurred the emotional damages, we hold that the trial court did not abuse its discretion by allowing the jury’s verdict to stand [based on lay testimony].


In contrast, the Second Circuit held that lay testimony about the plaintiff’s emotional distress, absent any physical manifestations or other corroboration, did not support the jury’s award of compensatory damages in a gender discrimination case:

Finally, we find that the only evidence of Annis’s emotional distress - her own testimony - is insufficient to warrant an award of compensatory damages for that injury. She has not alleged any physical manifestations of her emotional distress, and, despite the discrimination, she remained a lieutenant with the County police. She testified that she needs and has had counseling, but introduced no affidavit or other evidence to corroborate her testimony. In short, her testimony fails to establish that she suffers from any concrete emotional problems. Annis should be permitted to present other evidence of her emotional problems on remand. . . . We vacate the entire award of both compensatory and punitive damages because . . . the evidence of Annis’s emotional distress is presently insufficient to warrant an award of compensatory damages. Accordingly, we affirm as to liability but vacate and remand for a new trial on both compensatory and punitive damages.

Annis v. County of Westchester, 136 F.3d 239, 249 (2d Cir. 1998).

Plaintiff’s attorneys will need to determine, under these approaches, whether the plaintiff’s own testimony, perhaps supported by her co-workers and family members, will be sufficient to support an award of emotional distress damages, or if expert testimony is required.
Potential Experts in Employment Litigation

**Economic Experts.** If a plaintiff is seeking front pay, then an expert economist will likely be needed to explain to the jury the methods for calculating lost future pay, particularly the need to reduce future earnings to their present value. If the plaintiff receives an award now for future pay covering a number of years, that award needs to be reduced to reflect the fact that the plaintiff can invest the money and earn interest at the standard interest rate (LIBOR) on amounts that would otherwise not have received until later years. Also, if the expert economist compares two income streams, *i.e.*, the compensation the plaintiff would have earned had she remained with the defendant (which terminated her) versus the compensation that the plaintiff has earned and will now earn, given her dismissal, then the assumptions underlying those calculations will also need to be explained to the jury.

Expert economic testimony may also be needed at the summary judgment stage, if the defendant moves for summary judgment on damages, arguing that the plaintiff has failed to present sufficient evidence to allow her claim for damages to go to the jury.

The following discussion by D.C. Court of Appeals of the need for expert testimony to prove lost earnings is typical of the approach taken by the courts to this issue:

Since “arriving at a [reasonable] sum representing future loss of earnings often involves a complicated procedure” [District of Columbia v. Barriteau, 399 A.2d 563, 568 (D.C. 1979)], “the trier-of-fact must have evidence pertaining to the age, sex, occupational class, and probable wage increases over the remainder of the working life of the plaintiff.” Id. Furthermore, it is well settled that “the task of projecting a person’s lost earnings lends itself to clarification by expert testimony because it involves the use of statistical techniques and requires a broad knowledge of economics.” Barriteau, supra, 399 A.2d at 568 (quoting Hughes v. Pender, 391 A.2d 259, 262 (D.C.1978)). Indeed, “where the existence of substantial future economic loss becomes an issue, the use of expert testimony likely would be necessary since seldom will lay witnesses possess the requisite background to testify on a matter such as this – one not likely to be within the common knowledge of the average lay [person].” Id. at 569.

**Psychological and other Medical Experts.** If the plaintiff has emotional distress damages that are quite severe, or reflect symptoms and disorders that are not within the common knowledge of jurors, then an expert opinion as to the plaintiff’s mental health will probably be necessary.

However, the courts have generally prevented expert witnesses, including mental health professionals, from testifying whether they have an opinion as to whether the plaintiff or any other witness is credible or truthful. Two representative district court opinions have drawn this line in precluding such testimony by expert witnesses:
Finally, no expert, including Johnson, will be permitted to opine on the credibility or consistency of others’ testimony. Listening to testimony and deciding whether it is contradictory is the “quintessential jury function of determining credibility of witnesses.” An expert may not substitute his judgment for the jury’s. “When this occurs, the expert acts outside of his limited role of providing the groundwork in the form of an opinion to enable the jury to make its own informed determinations.”


It is clear to the Court that, based even on her own testimony, she [expert] should not be permitted to testify that she either believes Mr. Isely or believes that the incidents he alleges occurred, since she has specifically admitted that she has no empirical way of factually establishing in fact whether the underlying facts occurred. Such testimony would invade the province of the jury by vouching for the credibility of Isely and would, in any event, be unhelpful to the jury since everything she knows about the alleged events is hearsay from Mr. Isely (and perhaps from the deposition testimony of Gale Leifeld).


One way to address this problem is if the defendant raises the issue that the psychologist or psychiatrist is relying only upon information provided by the plaintiff and did not conduct an independent investigation, then the plaintiff should be allowed to elicit testimony from the expert as to why she did not need to do an investigation. In other words, the plaintiff’s description of important facts was consistent, which made the expert view the plaintiff as credible, or there was supporting documentation for the plaintiff’s description of the facts.

Social Science Experts.

The courts have allowed social scientists, such as sociologists, psychologists, and social workers, to testify about workplace issues, such as stereotyping and subjectivity in personnel decisions and an employer’s pay system. Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 438 n.2 (4th Cir. 2000) (“Dr. Beatty, an expert in the field of human resources, who testified during the trial in this case that the kind of subjective criteria system implemented by [the defendant] could easily result in discrimination against racial minorities”). Sociologists and social workers have been allowed to testify about discrimination in the workplace and in other situations. Afscme v. County of Nassau, 96 F.3d 644, 648 (2d Cir. 1996) (district court allowed testimony by sociologist about discrimination issues in Title VII case, and whether defendant’s establishment of salary grades was in good faith); see also Waldorf v. Shuta, 142 F.3d 601, 626-27 (3d Cir. 1998) (upholding district court’s admission of social worker with background in sociology as an expert witness).

An expert witness may be able to testify about “discrimination” in the workplace without rendering a legal conclusion, as long as the expert does not present an opinion as to the legal consequences of his factual conclusions. See Specht v. Jensen, 853 F.2d 805, 809 (10th Cir.)
We recognize that a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms.

Expert witnesses can also testify as to the comparability of an employee’s job duties, which is often at issue in pay discrimination cases. See, e.g., Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1188 (9th Cir. 2002) (expert testimony allowed as to comparison of employees in gender discrimination case); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1173 (3d Cir. 1973) (expert testimony admissible concerning “substantial equality” of positions in Equal Pay Act case); Nance v. Librarian of Congress, 661 F. Supp. 794, 796 (D.D.C. 1987) (expert testimony allowed as to compensation of employees in race discrimination case).

Such testimony is also routinely used during the class certification stage in pay discrimination cases, although its admissibility is usually the most disputed legal issue at that stage. See, e.g., Dukes v. Wal-Mart, Inc., 474 F.3d 1214, 1228 (9th Cir. 2007) (upholding class certification based in part on expert opinion regarding gender stereotyping in defendant’s workplace). The Ninth Circuit described the plaintiffs’ expert testimony on gender stereotyping:

Dr. Bielby testified that by employing a “social framework analysis,” he examined the distinctive features of Wal-Mart’s policies and practices and evaluated them “against what social science shows to be factors that create and sustain bias and those that minimize bias.” In Dr. Bielby’s opinion, “social science research demonstrates that gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors, because substantial decision-maker discretion tends to allow people to ‘seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes.’” Dukes I, 222 F.R.D. at 154. Dr. Bielby concluded: (1) that Wal-Mart’s centralized coordination, reinforced by a strong organizational culture, sustains uniformity in personnel policy and practice; (2) that there are significant deficiencies in Wal-Mart’s equal employment policies and practices; and (3) that Wal-Mart’s personnel policies and practices make pay and promotion decisions vulnerable to gender bias. See id.

Dukes, 474 F.3d at 1226; accord Price Waterhouse v. Hopkins, 490 U.S. 228, 235-36 (1989) (expert social psychologist testified about gender stereotyping in defendant’s workplace); Jensvold v. Shalala, 829 F. Supp. 131, 138 (D. Md. 1993) (same). For example, in a denial of tenure case, the judge allowed the plaintiff to present expert testimony from a social psychologist who has extensively studied gender stereotyping in the workplace. Exhibit A (pages 15-18 infra) is an excerpt from the plaintiff’s successful opposition to defendants’ motion in limine. Plaintiff successfully argued that testimony on gender stereotyping was admissible and relevant.

Ethical Issues: The Treating Health Care Provider as an Expert?

Plaintiffs’ counsel sometimes uses the plaintiff’s treating health care provider in a dual role, as a fact witness and an expert witness, as a cost-saving device. However, the ethics codes of several health care professions may prevent treating health care providers from serving as an
expert witness in litigation involving their patient. The primary rationale for these ethics provisions is that an expert witness is expected to state an “objective” opinion about the plaintiff’s condition and prognosis, which might include testimony that the plaintiff was malingering or otherwise was not suffering from the claimed symptoms. Such testimony would be inconsistent with the provider’s obligations to the patient, which is, at bottom, to act as an advocate for the patient, and always acting in the best interests of the patient.

The American Academy of Psychiatry and Law adopted the “Ethics Guidelines for the Practice of Forensic Psychiatry” (May 2005), which provides in relevant part that:

Psychiatrists who take on a forensic role for patients they are treating may adversely affect the therapeutic relationship with them. Forensic evaluations usually require interviewing corroborative sources, exposing information to public scrutiny, or subjecting evaluatees and the treatment itself to potentially damaging cross-examination. The forensic evaluation and the credibility of the practitioner may also be undermined by conflicts inherent in the differing clinical and forensic roles. Treating psychiatrists should therefore generally avoid acting as an expert witness for their patients or performing evaluations of their patients for legal purposes.

Treating psychiatrists appearing as “fact” witnesses should be sensitive to the unnecessary disclosure of private information or the possible misinterpretation of testimony as “expert” opinion. In situations when the dual role is required or unavoidable (such as Workers’ Compensation, disability evaluations, civil commitment, or guardianship hearings), sensitivity to differences between clinical and legal obligations remains important.


Similarly, the American Psychology Law Society has adopted the “Specialty Guidelines for Forensic Psychologists (1991), which also recognizes the potential conflict of interest if the treating psychologist testifies as an expert witness, which is called a “dual relationship”:

IV.D. Forensic psychologists recognize potential conflicts of interest in dual relationships with parties to a legal proceeding, and they seek to minimize their effects.
1. Forensic psychologists avoid providing professional services to parties in a legal proceeding with whom they have personal or professional relationships that are inconsistent with the anticipated relationship.
2. When it is necessary to provide both evaluation and treatment services to a party in a legal proceeding (as may be the case in small forensic hospital settings or small communities), the forensic psychologist takes reasonable steps to minimize the potential negative effects of these circumstances on the rights of the party, confidentiality, and the process of treatment and evaluation.

In light of these ethical proscriptions, which may open the door for cross-examination of the plaintiff’s health care provider by the employer’s counsel, plaintiffs generally should be wary of using a treating mental health provider as an expert witness.

**Discovery Issues: The Importance of Full Disclosure of Information Provided to the Expert**

Rule 26(a)(2)(B), Fed. R. Civ. P., as amended in 1993, requires that the expert witness report and disclosure shall include “the data or other information considered by the witness in forming the opinions.” Some attorneys have argued that communications between the attorney and the expert witness are privileged under the attorney work product doctrine, so that an attorney’s comments on drafts of an expert report, or the drafts themselves, are not discoverable. Although a few district courts have accepted that position, the majority view is that all communications between the attorney and the testifying expert are discoverable. See, e.g., Elm Grove Coal Co. v. Director, Office of Workers’ Compensation Programs, 480 F.3d 278, 301-03 (4th Cir. 2007); Regional Airport Auth. of Louisville & Jefferson County v. LFG, LLC, 460 F.3d 697, 714 (6th Cir. 2006); Fidelity Natl. Title Ins. Co. of N.Y. v. Intercounty Natl. Title Ins. Co., 412 F.3d 745, 750-51 (7th Cir. 2005); In re Pioneer High-Bred Intl. Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001).


In contrast, under Rule 26(b)(4)(B), discovery of information from consulting or non-testifying experts can only be made upon a showing of exceptional circumstances.

**Daubert and Frye Challenges to Expert Witness Testimony**

It is the rare employment case with expert witnesses where there is no challenge to the admissibility of expert witness testimony. Usually, defendants raise such challenges through pre-trial motions in limine that seek to preclude the expert witness from testifying. Common grounds for excluding expert testimony are that (1) the expert witness lacks the requisite qualifications to offer an expert opinion; (2) the proposed expert testimony is not admissible under the evidentiary rules; or (3) the proposed expert testimony would improperly invade the province of the jury in deciding factual or legal issues.
A threshold consideration at the outset of filing a complaint is whether to file in federal or state court. Assuming that the plaintiff has a choice of forums, one factor may be the different approaches taken by state versus federal courts to the admissibility of expert evidence. A majority of the states have adopted the Federal Rules of Evidence governing expert testimony and apply the Supreme Court’s *Daubert* decision to the admissibility of expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). A minority of states, albeit including some of the most populous states, continue to adhere to the older *Frye* standard for admissibility of expert testimony. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

The courts of 17 states and the District of Columbia have not adopted *Daubert*. These courts either continue to follow *Frye*, or use another approach. These jurisdictions are: Alabama, Arizona, California, Colorado, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, Pennsylvania, Washington state, and Washington, D.C. See Edward J. Imwinkelried, “Evidentiary Balance,” *Natl. Law J.*, May 13, 2002, at B-11. Even so, the differences between *Daubert* and *Frye* have been shrinking in some of these states. Id.

Under *Frye*, the court asks whether the subject of the proposed expert testimony is “sufficiently established to have gained general acceptance in the particular field in which it belongs.” Id. at 1014 (excluding testimony based upon lie detector test). In contrast, the Supreme Court, in *Daubert*, held that the enactment of the Federal Rules of Evidence in 1975, particularly Rule 702, had liberalized the common-law rules governing expert testimony, thereby superseding the *Frye* rule in the federal courts. *Daubert*, 509 U.S. at 587-89. Instead of looking solely at “general acceptance,” under *Daubert*, the courts are to consider various factors, including but not limited to (1) whether the method “can be and has been tested . . . to see if [it] can be falsified;” id. at 593; (2) “whether the theory or technique has been subjected to peer review and publication;” id.; (3) “the known or potential rate of error;” id. at 594; (4) whether the method is repeatable and has recognized standards “controlling the technique’s operation,” id.; and (5) whether the method has met with “widespread acceptance” or “has been able to attract only minimal support.” Id. The Court emphasized that these factors are not a “definitive checklist or test,” but were more in the lines of “general observations” of what courts should consider in analyzing expert witness testimony. Id. at 593.

The *Daubert* Court also reiterated that the role of the trial judge in determining the admissibility of expert witness testimony was to analyze the methodology, not the conclusion: “The focus, of course, must be solely on principles and methodology, not on the conclusions they generate.” Id. at 595. Concerns about the conclusions are more properly addressed through cross-examination at trial, not through a pre-trial motion *in limine*:

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. . . . These conventional devices, rather than wholesale exclusion under an uncompromising “general acceptance” test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

Id. at 596.
However, one fundamental difference between Daubert and some of the state courts that follow Frye is the extent to which expert testimony is to be judged by the standards of those two decisions. On the one hand, the Supreme Court subsequently extended Daubert to cover all expert testimony, not just that in the “hard” sciences. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999). On the other hand, some Frye jurisdictions, including California, hold that Frye applies only to expert testimony from “hard” sciences, such as results from laboratory equipment (e.g., a polygraph or lie detector), but not “soft” sciences such as psychological or other social science testimony. See Edward J. Imwinkelried, “The Escape Hatches from Frye and Daubert: Sometimes You Don’t Need to Lay Either Foundation in Order to Introduce Expert Testimony,” 25 Am. J. Trial Advoc. 213, 217-19 (2002).

Hence, if plaintiff’s counsel anticipates having to use novel expert testimony, then the difference between state and federal courts in the treatment of expert testimony is one factor that should be considered at the outset of the case.

**Daubert and Use of the MMPI by Expert Witnesses**

There are a number of psychological tests that can be administered by a treating or expert psychologist, ranging from Rorschach ink blots to written personality tests. Perhaps the best known test is the MMPI-II, the Minnesota Multiphasic Personality Inventory, which consists of nearly 600 multiple-choice questions. As the MMPI-II has been subject to research on its validity and reliability, it is suitable for a Daubert challenge in employment cases.

As a threshold matter, two appellate courts, in non-precedential decisions involving disability claimants, have found that while the MMPI is a diagnostic tool, it cannot be used to render a definitive diagnosis. Thomas v. Chater, 104 F.3d 356, 1996 WL 730490, at *2 (2d Cir. Dec. 18, 1996) (upholding exclusion of diagnosis of plaintiff since the “heavy reliance upon the results of the MMPI test to diagnose schizophrenia was misplaced from a professional standpoint”); Colvard v. Chater, 59 F.3d 165, 1995 WL 371620 (4th Cir. June 21, 1995) (“The MMPI is not like an IQ test where the score directly documents the person’s level of intellectual functioning. Rather, the MMPI is merely a diagnostic tool, and its results are not a definitive diagnosis or a psychological profile of an individual.”).

The courts have reached conflicting results as to whether a plaintiff can be subjected to the MMPI as part of a Rule 35 mental examination by the defendant’s expert witness. In one case, the defendant sought to require that the employment discrimination plaintiff take five psychological tests, including the MMPI, over a full day. The court granted the plaintiff’s motion for a protective order, on the grounds that there was “substantial information demonstrating the inadequacy of the correlation factors and the validity factors of all five of the tests in question.” Usher v. Lakewood Engineering & Mfg. Co., 158 F.R.D. 411, 413 (N.D. Ill. 1994). Hence, the court held that under Daubert, which stated that “the court ordinarily should consider the known or potential rate of error” in expert testimony, these problems with the accuracy of psychological tests “are certainly appropriate considerations to be placed into the scales in conjunction with the weighing process mandated by Rule 403, as Daubert teaches.” Id.
In contrast, several other courts have allowed the MMPI to be administered as part of a Rule 35 examination. Burger v. Litton Indus., Inc., No. 91 Civ. 0918 (WK), 1995 WL 363741, at *2 (S.D.N.Y. June 19, 1995) (MMPI is “a generally accepted and commonly used test to obtain a psychological profile and history of the subject”); Hirschheimer v. Associated Minerals & Minerals Corp., No. 94 Civ. 6155 (JKF), 1995 WL 736901, at *4 (S.D.N.Y. Dec. 12, 1995) ("Even if the MMPI-II is, as the plaintiff asserts, only a ‘snap-shot’ of an individual’s personality at the time the test is taken, it is still useful as part of a psychological examination."). However, as required under the rules governing disclosure of information used by the expert witness, the courts have required the expert “to disclose the raw data from the MMPI-II if [defendant] intends to call [either expert] as a witness at trial, since the data forms part of the basis for their expert testimony.” Hirschheimer, 1995 WL 736901, at *5 (citing Rule 26(a)(2)(B), Fed. R. Civ. P.).

Even when courts have allowed the defendant’s expert witness to administer the MMPI to a plaintiff, some courts have limited the scope of the expert’s testimony about the results of that examination. In one case, the defendant’s expert, at his deposition, testified that the plaintiff’s scores on the MMPI were “typical of an individual who is defensive, lacks insight, may be an unreliable historian, and tends to deny the existence or importance of unfavorable traits.” Chrissafis v. Continental Airlines, Inc., No. 95 C 5080, 1998 WL 100307, at *1 (N.D. Ill. Feb. 23, 1998). The expert’s deposition testimony also “highlights that among the validity scales of the test, the ‘Lie Scale’ was ‘significantly elevated.’” Id. The plaintiff sought to exclude this evidence at trial on the grounds that it would improperly assert an expert opinion as to her credibility. The court applied Daubert and concluded that the first line of testimony “is relevant to the issues of plaintiff’s damages” since it “will assist the jury in determining whether” plaintiff’s psychological problems may have been caused by unrelated factors. Id. at *2. However, the court precluded the expert from testifying about the “Lie Scale,” since such testimony “would be more prejudicial than probative” under Rule 403. Id.

Thus, even if an MMPI is administered, plaintiffs may still challenge the admissibility of MMPI results under Daubert and the Federal Rules of Evidence.

**Daubert and Vocational Rehabilitation Experts**

Vocational rehabilitation experts are sometimes used in disability and age discrimination cases, as well as personal injury cases, in an attempt to show whether or not the plaintiff is capable of returning to work in any capacity. The courts have addressed several issues relating to the admissibility of such expert testimony, including (1) whether vocational rehabilitation counselors can serve as expert witnesses; (2) the expert’s obligations to review the available evidence before rendering her opinion; (3) whether the court can order a plaintiff to undergo a Rule 35 examination by a vocational rehabilitation expert; and (4) whether the expert testimony has bearing on the court’s determination of the plaintiff’s claim that she is substantially limited in the major life activity of working.

Courts have recognized that vocational rehabilitation counselors can serve as expert witnesses, despite the lack of formal training or credentials that some may have. The Third Circuit, in a personal injury case, upheld the admission at trial of expert testimony by a
vocational rehabilitation counselor, on the grounds that the expert had more knowledge than a lay juror on this subject:

We hold that the district court did not abuse its discretion in qualifying Rizzo as an expert witness. Even though Rizzo did not possess formal academic training in the area of vocational rehabilitation, he did have experience in the field through his employment at the Developmental Disabilities Council in attempting to provide jobs for disabled individuals. During this time, Rizzo also became familiar with the relevant literature in the field. Even if his qualifications are, as the district court described, “a little thin,” he has substantially more knowledge than an average lay person regarding employment opportunities for disabled individuals. In the circumstances, we cannot say that the district court abused its discretion in determining that Rizzo possessed the minimum qualifications necessary to testify as an expert.


Even if the expert may be qualified to testify, the court still needs to determine whether the expert’s testimony satisfies the _Daubert_ criteria. The Third Circuit, in another personal injury case, suggested that the lack of objectivity and repeatability in the expert’s testimony meant that it probably should be excluded under _Daubert_ and Rule 702, but remanded for a formal _Daubert_ hearing by the district court:

Vocational rehabilitation is a social science that does not exactly mirror the fundamental precepts of the so-called harder sciences. However, the gist of the above _Daubert_ factors are nonetheless implicated in this case. Just as a scientist would want to duplicate the outcome when evaluating a colleague’s claim that he had developed a technique for cold fusion, a vocational rehabilitationist assessing Copemann’s disability determination would want to test the underlying hypotheses and review the standards controlling the technique's operation in an attempt to reproduce the results originally generated.

If such testing did not generate consistent results, Copemann’s method would be exposed as unreliable because it is subjective and unreproducible. Moreover, without an inkling as to the standards controlling Copemann’s method – _i.e._, how he excludes for other variables, such as Elcock’s pre-existing injuries or job limitations – an expert trying to reproduce Copemann’s methods would be lost. Because Elcock had neither the need nor the opportunity to test Copemann’s methods in this manner, on the present record we conclude that the first and fourth _Daubert_ factors suggest that Copemann’s method was unreliable and therefore his opinion would not “assist the trier of fact to understand the evidence or to determine a fact in issue....” _Fed R. Evid._ 702.


In a disability discrimination case, the Seventh Circuit upheld the exclusion of expert testimony by a vocational rehabilitation counselor, primarily because the testimony was too speculative, and because the expert had previously offered a contradictory opinion as to the plaintiff’s ability to return to work. _Ammons v. Aramark Uniform Servs., Inc._, 368 F.3d 809
(7th Cir. 2004). In Ammons, Dr. Entenberg, a vocational rehabilitation counselor, first concluded in 1998 that the plaintiff was “not capable of returning to his past work,” based on an interview of the plaintiff and review of his medical records. Id. at 815. However, when the plaintiff retained Dr. Entenberg as an expert witness in 2002, she reached a different conclusion, that the plaintiff’s disability “restrictions did not preclude him from performing the majority of the work duties,” id., even though she had not interviewed the plaintiff anew, or reviewed the deposition transcripts that discussed the work duties in this workplace. In addition to the shifting opinions, the court was troubled by the fact that the new opinion was not based upon the full scope of evidence relevant to the employee’s ability to perform his job duties:

Like the district court, we conclude that Entenberg’s testimony was speculative. Entenberg offered her opinion, that Ammons was capable of performing the vast majority of his job duties, while acknowledging that she could offer no opinion as to whether Ammons could repair several pieces of machinery earlier identified in a deposition of the plant’s former maintenance manager as machinery Ammons would have to repair as part of his job. Not only had Entenberg not reviewed this deposition testimony, she acknowledged she was unfamiliar with the machinery and did not see them being repaired during her tour. Without being able to offer any opinion as to whether Ammons was capable of repairing these pieces of machinery, Entenberg’s opinion was nothing more than speculation.

Id. at 816.

Unless a vocational rehabilitation counselor is formally qualified or licensed as a psychologist, then the plaintiff cannot be compelled to be subjected to a Rule 35 mental examination by the counselor. Acosta v. Tenneco Oil Co., 913 F.2d 205, 209 (5th Cir. 1990) (age discrimination case) (“Rule 35 authorizes a mental examination only by a physician or a psychologist. It is clear that a vocational rehabilitation expert is not a physician under Rule 35. In addition, there has been no showing in this case that Tenneco’s proposed expert is a psychologist.”) (citations omitted).

Finally, even if the vocational rehabilitation counselor is qualified as an expert, and is able to present non-speculative testimony, the courts still have to address whether the expert testimony would help show that the plaintiff had met the burden of proving her claims. In a disability discrimination case, where the plaintiff alleged that she was substantially impaired in the major life activity of working, the Seventh Circuit held that the plaintiff’s expert opinion on this issue was sufficient to create a disputed issue of material fact that precluded summary judgment on that issue:

Emerson presents her vocational rehabilitation specialist’s conclusion that Emerson is foreclosed from a broad range of jobs – 47% of all occupations. NSP challenges the report, arguing that it does not describe how Emerson’s anxiety and need for routine foreclose her from this range of jobs, that the vocational rehabilitation specialist called her impairment “minor,” and that he failed to consider the potential effect of Emerson’s medication when determining the effect of her impairment on her ability to work. NSP’s arguments call the report into question, but do not discredit it to the extent that we can
disregard its conclusions. Emerson has created a question regarding whether she is
disabled that precludes summary judgment on this issue.

Emerson v. Northern States Power Co., 256 F.3d 506, 512 (7th Cir. 2006) (however, the court
then held that the plaintiff was not a qualified individual under the ADA).

Examples of Challenges to Expert Witness Testimony

The following are representative issues that have been litigated in challenges to expert
witness testimony:

(1) **Is the expert witness qualified to render an expert opinion?** This issue is
something that can be determined prior to taking the expert’s deposition. A simple verification
of the expert’s credentials may identify problems with “resume enhancement” or even outright
fabrication of credentials. For example, in a Title VII hostile work environment case, the court
allowed cross-examination about the credentials of a psychologist who was testifying as an
expert witness, where the psychologist’s “license to practice was revoked . . . for his sexual
relationship with a client.” Smith v. DeBeers, No. 03-C-0103, 2006 WL 2253073, at *6 (E.D.
Wis. Aug. 4, 2006).

Next, the attorney should review the court dockets for the cases in which the expert
testified, to identify instances in which the expert was disqualified, or in which the expert’s
testimony was otherwise limited. The attorney should also use listservers, such as those of
NELA and its affiliates, to find out whether other attorneys have also used or opposed the expert
witness in question.

Some expert witnesses have been prosecuted for perjury based on fabrication of their
qualifications or false testimony, but the track record has been mixed. In one case, an expert
witness, a physician, was convicted in state court for allegedly perjurious testimony about his
professional qualifications during a personal injury trial. The Ninth Circuit, in a sharply divided
en banc decision, granted his habeas petition, holding that misleading testimony was insufficient
to convict an expert witness for perjury. Chein v. Shumsky, 373 F.3d 978, 980-81 (9th Cir.
2004) (7-5 decision) (“Chein undoubtedly did calculate the answers for which he was convicted
in the hope that he would succeed in misleading the jury in the personal injury case and the
opposing lawyer in the monetary dispute case.”). Despite this and other acquittals, these experts
will not be viewed credibly by jurors in future cases.

Finally, the attorney should review the publications and presentations of the expert
witness to determine whether the methodology used by the expert witness in this case is
inconsistent with the methodologies that the expert witness has advocated in his publications, or
in his prior testimony in other cases.

(2) **Did the expert witness make mistaken assumptions or otherwise reach
incorrect results?** Regardless of whether the court follows Daubert or Frye, it is important to
realize that challenges to expert testimony should be based “solely on principles and
methodology,” and not on the conclusions drawn by the expert. Daubert, 508 U.S. at 595. Thus,
an expert witness challenge asserting that the expert reached the wrong results, or that the expert’s testimony lacks credibility, usually will be denied on the grounds that such issues are for the jury to decide.

Exhibit B (pages 19-20, infra) includes an excerpt from an opposition to a motion in limine, filed in March 2006, in a state court, which argued against the joint employers’ attempt to exclude expert economic testimony on the grounds that the expert allegedly made mistaken assumptions. The judge denied defendants’ motion, agreeing with plaintiffs that (1) expert witnesses are allowed to make assumptions, and the jury can weigh those assumptions; and (2) any differences between the parties’ expert opinions are credibility matters that are properly reserved for cross examination, not through a pre-trial motion.

(3) Can the expert witness testify about the causation of plaintiff’s injury? Particularly in harassment and retaliation cases, a contentious issue is whether the expert witness can properly opine on potential causes of the plaintiff’s psychological injury. Courts have allowed such testimony, provided that it is properly based on scientific knowledge and would assist the trier of fact. These courts have also recognized that such testimony will allow the jury to determine the extent of the plaintiff’s emotional damages.

Exhibit C (page 21, infra) includes an excerpt from an opposition to a motion in limine, filed in 1998, in the U.S. District Court for the District of Columbia, which argued against the employer’s attempt to exclude expert psychological testimony on the grounds that the expert would be improperly testifying as to causation. The judge denied defendant’s motion and allowed this expert witness to testify for plaintiff in a gender discrimination case.

(4) Can the expert witness engage in some degree of speculation in calculating future economic losses? When the plaintiff was terminated or has resigned and has obtained a new position that is less remunerative or has a lower likelihood of long-term career prospects, then the expert economist may have to make assumptions as to plaintiff’s future compensation. For example, the economist may assume that the plaintiff will remain in her new position for the rest of her working career, or that the plaintiff will receive salary increases or bonuses at a certain rate over that time period, or that the plaintiff’s future salary increases and bonuses will not be commensurate with those in her former position. In such circumstances, the employer may argue that the expert has engaged in impermissible or “mere” speculation as to the plaintiff’s future earnings. However, the courts have recognized that some degree of speculation is inevitable in calculating lost future earnings.

Exhibit D (page 22, infra) includes an excerpt from an opposition to a motion in limine, filed in 2001, in the U.S. District Court for the District of Columbia, which argued against the employer’s attempt to exclude expert economist testimony on the grounds that the expert’s calculation of future lost pay was purely speculative. The judge denied defendant’s motion and allowed the expert to testify for the plaintiff in a gender discrimination and hostile work environment case.
Exhibit A
Opposition to Defendants’ Motion In Limine (1996)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE OR LIMIT THE TESTIMONY OF DR. KAY DEAUX

Plaintiff, through undersigned counsel, files this opposition to Defendants' Motion In Limine to Exclude or Limit the Testimony of Dr. Kay Deaux. Defendants argue that Dr. Deaux's testimony should be excluded because no Maryland case has admitted expert testimony on sex stereotyping; that her testimony would usurp the role of the jury; and that her testimony is unreliable and speculative. However, defendants fail to provide any legal authority, except dissenting opinions, to support their argument that Dr. Deaux's testimony should be excluded. Maryland Rule of Evidence 5-702 provides that expert testimony which is helpful to the jury will be admitted. Moreover, it is well-settled under the Federal Rules of Evidence, which are substantively identical to the Maryland Rules of Evidence, that expert testimony on sex stereotyping is admissible in sex discrimination cases. In at least one federal court in the District of Maryland, the court has admitted the expert testimony of Dr. Kay Deaux on sex stereotyping to assist the jury and the court in a sex discrimination case.

Defendants also argue that Dr. Deaux's testimony should be limited because she has not been named as an expert on the tenure and promotion process. This argument is frivolous, since plaintiff designated Dr. Deaux as an expert "regarding sex discrimination and sex stereotyping in the University's decision to deny plaintiff tenure and promotion." Moreover, plaintiff will not solicit expert testimony on whether the defendants were contractually bound to evaluate her solely on the three criteria listed in defendants' policies, as defendants suggest.

I. BACKGROUND.

Dr. Kay Deaux is a social psychologist who for over 25 years has done extensive research and writing in the areas of gender stereotyping, interpersonal judgments, discriminatory behavior, and women working in nontraditional fields. See Affidavit of Kay Deaux (May 10, 1996) ("Deaux Aff."), submitted in support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment. Dr. Deaux has been designated as an expert witness to offer an expert opinion on whether defendants used sex stereotyping in evaluating plaintiff for tenure and promotion, and whether defendants then relied on those sex stereotyped evaluations in denying her tenure and promotion.

At her deposition, Dr. Deaux testified to the following expert opinions:

(1) Sex stereotyping by the decisionmakers in plaintiff’s case influenced the decisions at the level of the department, the dean, the provost and the president, leading to the denial to plaintiff of tenure and promotion;

(2) The decisionmakers ultimately responsible for tenure and promotion at the School did not make any efforts to limit or eliminate sex stereotyping in plaintiff’s tenure review,
and, therefore, adopted sex stereotyped and discriminatory evaluations of plaintiff that
led to denial of tenure.

Two months later, Dr. Deaux provided an affidavit in support of Plaintiff's Opposition to
Defendants' Motion for Summary Judgment. In the affidavit, Dr. Deaux listed all of the material
she had reviewed for the purpose of rendering her expert opinion, indicating that, at this time,
she had reviewed all relevant material. Deaux Aff. (Exhibit 1) at ¶ 5. The expert opinions
rendered by Dr. Deaux in her affidavit were substantively the same as the opinions she rendered
during her deposition, i.e., that sex stereotyping had been operative in the decision to deny
plaintiff tenure, and that the climate at the School fosters sex stereotyping and sex
discrimination. Id. at ¶¶ 6, 18, 19, 22.

II. ARGUMENT.

A. Dr. Deaux's proffered expert testimony is admissible under Maryland Rule of
Evidence 5-702 and under Supreme Court precedent in sex discrimination cases.

1. Dr. Deaux's expert testimony is admissible under Rule of Evidence 5-702.

Maryland Rule of Evidence 5-702 provides that expert testimony will be admitted if "the
court determines that the testimony will assist the trier of fact to understand the evidence or to
determine a fact in issue." Md. R. Evid. 5-702. In making this determination the court should
decide the following:

(1) whether the witness is qualified as an expert by knowledge, skill, experience, training,
or education, (2) the appropriateness of the expert testimony on the particular subject, and
(3) whether a sufficient factual basis exists to support the expert testimony. Id.

The expert's opinion must be based upon facts or data reasonably relied upon by other
experts within the particular field, Md. R. Evid. 5-703, and may be admitted even if it states an
ultimate issue to be decided by the jury. Md. R. Evid. 5-704.

A trial court has broad discretion to admit expert testimony. See, e.g., Impala Platinum v.
Impala Sales, 283 Md. 296, 389 A.2d 887 (1978); Ankney v. Franch, 103 Md. App. 83, 652 A.2d
of expert testimony is whether the testimony will assist the trier of fact. See, e.g., Consolidated
Kouwenhoven, 242 Md. 115, 218 A.2d 11 (1966). The proper inquiry is whether "the jury can
receive appreciable help from the particular witness on the subject, not whether the jury can
decide the particular issue without expert help." Harper v. Higgs, 225 Md. 24, 38, 169 A.2d 661,
667 (1961); see also Langenfelder v. Thompson, 179 Md. 502, 505, 20 A.2d 491, 492-93 (1941)
(stating that "the true test [for the admissibility of expert testimony] is not the total dependence
of the jury upon such testimony; but their inability to judge for themselves as well as the
witness"). Expert testimony is presumed helpful unless it concerns matters strictly within the
everyday knowledge and experience of the jury. Kopf v. Skyrn, 993 F.2d 374 (4th Cir. 1993);
The Maryland Rules of Evidence, which are substantively identical to the Federal Rules of Evidence, mandate liberal admissibility for expert testimony. See F. R. Evid. 702, 703; Kopf, 993 F.2d at 377-78; L. McLain, Maryland Rules of Evidence § 2.702.3 (West 1993 Supp.). Although the Daubert standard has not yet been explicitly adopted in Maryland, the Maryland Rules are consistent with its flexible approach for the admissibility of expert testimony. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993); K. Carroll, The New Maryland Rules of Evidence: Survey, Analysis and Critique, 54 Md. L. Rev. 1085 (1995).

Under Daubert, whether expert testimony is helpful to the trier of fact is primarily a question of relevance -- whether the proffered expert testimony is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute. Daubert at 2795-96.

Dr. Deaux's expert testimony readily satisfies the standards for admission of expert testimony. First, as one of the nation's leading experts on sex stereotyping, she is undoubtedly qualified to render an expert opinion. Second, her testimony is supported by her knowledge of the facts of this case, including her review of all the depositions of the defendants and the defendants' witnesses in this case. Third, her testimony on sex stereotyping is an appropriate subject for an expert opinion because it will assist the jury in understanding how decisionmakers' evaluations in this case were based on sex stereotypes of women, and thus, led to a decision different than the one that would have occurred in the case of a male faculty member. Sex stereotyping is not a subject matter within the knowledge of the average juror. In fact, since most persons unconsciously employ sex stereotypes in making judgments about men and women, jurors are unlikely to identify sex stereotyping unless it is pointed out to them.

Defendants' contention that Dr. Deaux's testimony would usurp the role of the jury is baseless. Courts may admit expert testimony on subjects within the knowledge of an average juror; the ultimate standard is whether the expert brings a helpful quality to the litigation which otherwise would be lacking. Rossman v. K-Mart Corp., 701 F. Supp. 1127 (M.D. Pa. 1987), aff'd 866 F.2d 1413 (3d. Cir. 1988). For example, expert testimony on contemporary community standards and prurient interest in an obscenity case is admissible, even though the allegedly obscene material speaks for itself and must be examined by jury. Levine v. Moreland, 229 Md. 231, 237, 182 A.2d 484 (1961).

Dr. Deaux's testimony will not usurp the role of the jury because her role in this case is to present specialized knowledge to help the jury understand the impact of sex stereotyping upon the tenure and promotion process in a business school, a subject for which an ordinary juror can use "appreciable help." See Langenfelder, 179 Md. at 505, 20 A.2d at 492-93. In addition, under the Maryland Rules of Evidence, an expert witness may testify as to an ultimate issue to be decided by the jury. Md. R. Evid. 5-704. Therefore, Dr. Deaux should be permitted to testify that plaintiff was denied tenure and promotion on the basis of sex stereotyped evaluations.

2. It is well-settled that expert testimony on sex stereotyping and sex discrimination is admissible in gender discrimination cases.

Despite defendants' claims to the contrary, expert testimony on sex stereotyping and sex discrimination has been routinely admitted in sex discrimination cases. See Jensvold v. Shalala,

In the case of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the Court held that an employer who denied a partnership to a woman on the basis of sex stereotyped evaluations of her and her work would be held to have discriminated on the basis of gender in violation of Title VII. The Court endorsed the use of expert testimony on sex stereotyping in the case, in its statement that it was not "... disposed to adopt the dissent's dismissive attitude toward [the expert's] field of study," and rejected the employer's argument that the expert testimony on sex stereotyping was speculative and unreliable. Id. at 255. The Court also declined to "suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision." Id. at 251.

Defendants rely, inexplicably, on the dissent in Price Waterhouse, which does not constitute legal authority to exclude expert testimony on sex stereotyping. In fact, the majority's explicit rejection of the minority's position in Price Waterhouse must be seen as support for the admission of expert testimony on sex stereotyping.

B. Dr. Deaux has been designated as an expert in the tenure and review process but will not render an opinion as whether a breach of contract occurred.

Finally, defendants argue that Dr. Deaux's testimony should be limited because she has not been named as an expert on the tenure and promotion process. This argument is without merit since plaintiff specially designated Dr. Deaux as an expert "regarding sex discrimination and sex stereotyping in the University's decision to deny her tenure and promotion." Therefore, defendants have been on notice for six months that Dr. Deaux would be asked to testify about the tenure and review process at the University. In addition, Dr. Deaux's credentials, including 25 years of research in the areas of stereotyping, judgment and discrimination, and women in the work force, amply demonstrate that the Court could designate Dr. Deaux as an expert in the area of tenure and promotion, if it deems such additional designation to be necessary.1

III. CONCLUSION.

For the foregoing reasons, this court should deny defendants' Motion In Limine to Exclude or Limit the Testimony of Dr. Kay Deaux and should allow her testimony at trial.

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1 Plaintiff does not intend to solicit expert testimony from Dr. Deaux as to whether she believes defendants' evaluations of her on grounds of "collegiality" constituted a violation of her contract, as defendants suggest. Instead she will testify about how defendants' evaluation of plaintiff on criteria not set forth in the University's and School's policies provide support for her finding of sex stereotyping.
Exhibit B
Opposition to Defendants’ Motion In Limine (2006)

Defendants’ Arguments about Dr. X’s Testimony go to the Weight, Not the Admissibility, of His Testimony.

This Court must find that defendants’ criticisms of Dr. X’s testimony go to the weight to be accorded to his testimony, and not its admissibility. In essence, defendants’ core argument seems to be that Dr. X made mistaken assumptions, and that his calculations are not certain to a mathematical level of precision.

As a threshold matter, expert witnesses are allowed to make assumptions, and the weight to be accorded to those assumptions is a matter for the trier of fact, i.e., the jury, to decide. See, e.g., Ditto v. Stoneberger, 145 Md. App. 469, 495, 805 A.2d 1148 (2002) (“Objections attacking an expert’s . . . basis of knowledge go to the weight of the evidence and not its admissibility.”); First Union Nat’l Bank v. Steele Software Syst. Corp., 154 Md. App. 97, 198, 838 A.2d 404 (2003) (“We are not persuaded by [defendant’s] contentions because we think they all address merely the weight to be given the expert testimony, not its admissibility.”); Great Coastal Express, Inc. v. Schuefer, 34 Md. App. 706, 724, 369 A.2d 118 (1977) (“The opinion of an expert witness, the grounds on which it was formed and the weight to be accorded it are for the trier of facts.”).

Defendants will have a full opportunity to cross-examine Dr. X at trial, which is the appropriate way to challenge his assumptions, not by means of a motion in limine. First Union, 154 Md. App. at 182 (defendant “had the opportunity to cover [its concerns] in cross-examination”). That plaintiffs’ and defendants’ experts offer different opinions is a matter to be considered and resolved by the trier of fact, not in a pre-trial motion. See, e.g., Duvall v. Potomac Electric Power Co., 234 Md. 42, 46, 197 A.2d 893 (1964) (“That the jury had a right to evaluate the testimony of both experts in arriving at its verdict is indisputable.”); Blaker v. State Board of Chiropractic Examiners, 123 Md. App. 243, 259, 717 A.2d 964 (1998) (“When two experts offer conflicting opinions, the trier of fact must evaluate the testimony of both experts and decide which opinion, if either, to accept.”); Quinn v. Quinn, 83 Md. App. 460, 470, 575 A.2d 764 (1990) (“Where, as here, there are two experts, the trier of fact must evaluate the testimony of both of them and decide which opinion, if any, to accept.”).

Further, it is settled law that an expert opinion on economic damages, as any other expert opinion, need only be expressed to a reasonable degree of certainty, not to a mathematically precise degree of specificity. This principle is set forth in the Restatement and has been followed by the Maryland appellate courts in a variety of contexts. The Restatement provides, in contract cases, that:

Courts have traditionally required greater certainty in the proof of damages for breach of contract than in the proof of damages for a tort. This requirement does not mean, however, that the injured party is barred from recovery unless he establishes the total amount of his loss. It merely excludes those elements of loss that cannot be proved with reasonable certainty.
Restatement (Second) of Contracts, § 352, cmt. a (1981). Therefore, the Maryland Court of Appeals and Court of Special Appeals have consistently recognized that only a “reasonable” degree of certainty is required for proving economic damages – not a heightened degree of mathematical precision that defendants argue is required. The Court of Appeals explained, in holding that the trial court’s entry of judgment for the defendants in a breach of contract case was reversible error, that the “certainty” rule was to be flexibly and liberally applied:

Courts have modified the ‘certainty’ rule into a more flexible one of ‘reasonable certainty.’ In such instances, recovery may often be based on opinion evidence, in the legal sense of that term, from which liberal inferences may be drawn. . . .

Some of the modifications which have been aimed at avoiding the harsh requirements of the ‘certainty’ rule include: (a) if the fact of damage is proven with certainty, the extent or the amount thereof may be left to reasonable inference; (b) where a defendant’s wrong has caused the difficulty of proving damage, he cannot complain of the resulting uncertainty; (c) mere difficulty in ascertaining the amount of damage is not fatal; (d) mathematical precision in fixing the exact amount is not required; (e) it is sufficient if the best evidence of the damage which is available is produced; and (f) the plaintiff is entitled to recover the value of his contract as measured by the value of his profits.

M & R Contractors & Builders, Inc. v. Michael, 215 Md. 340, 348-49, 138 A.2d 350 (1958) (emphasis added); accord Zachair, Ltd. v. Driggs, 135 Md. App. 403, 427, 762 A.2d 991 (2000) (quoting M & R Contractors and upholding compensatory damage award in conversion case); Brock Bridge Ltd. Partnership v. Development Facilitators, Inc., 114 Md. App. 144, 157, 689 A.2d 622 (1997) (“The amount, however, need not be proven to a mathematical certainty.”); see also Restatement (Second) of Contracts, § 352, cmt. a (1981) (“Doubts are generally resolved against the party in breach.”). This principle has also been long recognized by the U.S. Supreme Court:

It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.

Exhibit C
Opposition to Defendants’ Motion In Limine (1998)

**Plaintiff’s Expert Witness Can Properly Testify as to the Causation of Plaintiff’s Emotional Injuries.**

Many courts have held that expert opinions of mental health professionals who examine patients for purposes of diagnosis and treatment, are admissible under Daubert. See Webb v. Hyman, 861 F. Supp. 1094, 1114-15 (D.D.C. 1994) (admitting expert testimony of sexual harassment plaintiff’s psychologist relating to the cause of plaintiff’s psychological trauma); Jensen v. Eveleth Taconite Co., 130 F.3d 1287, 1298 (8th Cir. 1997) (exclusion of expert testimony of mental health professionals was error under Daubert where expert’s scientific methodology was clear); Isley v. Capuchin Province, 877 F. Supp. 1055 (E.D. Mich. 1995) (finding that Daubert permits psychological expert’s testimony that the plaintiff suffered from post-traumatic stress disorder and repressed memory syndrome and that the plaintiff’s behavior was consistent with that of people who have suffered abuse). . . .

Defendants argue that [expert] should not be permitted to testify as to the causation of [plaintiff’s] injury. In Webb, 861 F. Supp. at 1113-14, the court admitted psychological testimony regarding the cause of a sexual harassment plaintiff’s psychological trauma. In doing so, the court reiterated the determination in Daubert that expert testimony is admissible if it is based on scientific knowledge and it will assist the trier of fact. Id. at 1114. Significantly, the court in Webb determined that expert testimony regarding causation of psychological injury is admissible, even when an expert acknowledges that factors other than the defendant’s conduct contributed to an injury. Such testimony will still assist the trier of fact, since “[the expert] clearly has scientific knowledge regarding the issues of degree of [injury] and relationship of that injury to the [d]efendants’ behavior.” Id. Other courts also allow psychological expert testimony regarding the causation of a party’s emotional damage. See Jensen, 130 F.3d at 1298 (recognizing the probative value of expert psychological proof regarding causation of a sex discrimination plaintiff’s emotional distress and depression); Karcher v. Emerson Elec. Co., 94 F.3d 502, 509 (8th Cir. 1996) (refusing to find error in jury instruction regarding sex discrimination plaintiff’s damages because expert psychological testimony tied plaintiff’s depression to her job-related problems).

Expert testimony regarding psychological injury also assists the trier of fact in assessing the extent of a plaintiff’s damages. See Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 938-39 (5th Cir. 1996) (recognizing the probative value of expert psychological testimony in determining emotional damages and finding that the absence of expert testimony regarding plaintiff’s emotional distress required an award of only nominal damages); Dang Vang v. Van Xiong X. Toyed, 944 F.2d 476, 482 (9th Cir. 1991) (permitting psychological expert testimony because such testimony will assist the trier of fact in determining damages).
Exhibit D
Opposition to Defendants’ Motion In Limine (2001)

Plaintiff’s Expert Opinion Is Not Based on Mere Speculation.

This Court must find, contrary to Defendants’ assertions, that Dr. X’s opinion in support of [plaintiff’s] lost earnings claims has an ample factual predicate and is most definitely not based on mere speculation. As recognized by the D.C. Circuit, claims of future lost earnings necessarily involve some degree of speculation. In Barbour v. Merrill, 48 F.3d 1270 (D.C. Cir. 1995), the Court rejected the district court’s disallowance of the plaintiff’s claim of future loss based on a similar degree of uncertainty regarding the plaintiff’s future career path:

[A] district court should not refuse to award front pay merely because some speculation about future earnings is necessary, or because parties have introduced conflicting evidence. Indeed, in other contexts, such as when valuing lost earning capacity in a personal injury case, courts (or juries) routinely engage in some speculation, based on the factual record the parties have established. . . . Courts are equally capable of resolving similar uncertainties when awarding front pay to victims of employment discrimination.

48 F.3d at 1280. Whatever element of speculation exists in this case neither forecloses admission of Dr. X’s report nor warrants foreclosing plaintiff’s lost earnings claim.

The recent decision in Croley v. Republican National Committee, 759 A.2d 690 (D.C. 2000) is directly on point, in contrast to the cases relied upon by defendants. In Croley, the D.C. Court of Appeals determined that the trial judge had erred in vacating a damage award for the personal-injury plaintiff’s lost future earnings as a computer consultant. The trial judge had concluded that the testimony of the plaintiff’s damage expert rested on mere speculation and guesswork in that the plaintiff had no history of earnings prior to his injury and that the expert’s opinion regarding the Plaintiff’s future earnings loss was based solely on speculation rather than evidence. However, the Court of Appeals concluded that the plaintiff had demonstrated a potential to generate business based on two contracts over a four-year period prior to his injury.

The record here – including evidence both of [plaintiff’s] potential for advancement in financial management and of the realization of that potential in her career after her termination – equally provides the requisite basis on which to estimate [plaintiff’s] probable future earnings had she remained employed by [defendant]. In any event, “[i]t is well settled that the risk of lack of certainty with respect to projections of lost income must be borne by the wrongdoer, not the victim.” Goss v. Exxon Office Sys. Co., 747 F.2d 885, 889 (3d Cir. 1984) (citing Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 564 (1931)); see also Bartek v. Urban Redev. Auth. of Pittsburgh, 882 F.2d 739, 746 (3d Cir. 1989).

This Court should find that the factual predicate for Dr. X’s testimony easily exceeds that found sufficient in Croley. Defendants’ motion to exclude Dr. X’s testimony must be denied.