



Circuit Reports

First Circuit Report

Admissible Evidence at Daubert Hearing Not Limited to Disclosures Made Pursuant to Rule 26; Expert Witness - Does not Need to Be Perfectly Qualified - Does Need to Provide Jury with Appropriate Context

by Jeanne P. Herrick



The scope of evidence admissible in a *Daubert* hearing was addressed by the federal district court for the District of Maine in *Baldwin v. Bader*, No. 07-46-P-H, 2008 WL 2875351 (D. Me. July 23, 2008). The plaintiff, a minority shareholder in a closely-held corporation, claimed that other shareholders and directors breached their fiduciary duties to him in voting to issue two tranches of shares, diluting his interest in the company. The plaintiff moved to exclude several of the opinions that had been disclosed by the defendants' proposed expert.

At the *Daubert* hearing, both sides introduced oral testimony and exhibits. One of the exhibits offered by the defendants was an excerpt from a publication, which had not been previously disclosed to the plaintiff. The plaintiff objected to admission of the publication on the grounds that it was not probative and was not relied upon by the expert in forming his opinion. The court overruled the objection, concluding that the exhibit was probative, at least of the matter placed in issue by the plaintiff – whether the author of publication held a certain view. You see in his motion to exclude, the plaintiff cited to a prior publication by the same author suggesting that the author held a different view.

In ruling that the evidence was admissible for purposes of the *Daubert* hearing, the court first observed that the plaintiff opened the door by citing the prior publication for the proposition that the author subscribed to a different view. The court further noted that "none of the authorities that the plaintiff cites, including Federal Rule of Civil Procedure 26, can fairly be read to stand for the proposition that a proponent of expert testimony is confined to defending against a *Daubert* challenge solely on the basis of authorities the expert used to formulate his or her opinion." Rather, "at least in some circumstances, it is permissible for proponents of expert testimony to rely on authorities other than those explicitly relied on by the expert to establish the reliability of the expert's methodology."

On another procedural note, the First Circuit in *First Marblehead Corp. v. House*, 541 F.3d 36 (1st Cir. 2008), declined the defendant's invitation to disqualify an expert simply because he did not hold the "ideal" title for the subject matter at issue. One of the issues at stake involved whether the defendant would have exercised stock options within the three month period that followed his resignation had he known of their expiration. In support of its theory that the defendant would not have exercised his stock options, the plaintiff disclosed a certified public accountant, with a bachelor's degree in economics and a law degree who concentrated in two areas of economics: financial economics and industrial organization. The defendant challenged the expert's qualifications, arguing that testimony about how individuals choose investments and arrange portfolios requires a financial planner. Quoting a prior decision in which the court noted that "[i]t is not required that experts be 'blue-ribbon practitioners' with optimal qualifications," the court concluded that "[w]hile a certified financial planner who focuses entirely on individual investment decision-making would also have been qualified to provide this testimony," the proposed expert's experience including his work on the 401(k) committee at his firm and his experience providing investment advice to employees and accredited investors was sufficient.

Finally, this case and two others recently decided provide a brief survey of the appropriate subject matter of opinion testimony. In a medical malpractice case, an expert opinion which was connected to the existing data only by the expert's *ipse dixit* and which failed to eliminate other possible causes left too great an analytical gap between the data and opinion proffered to be admissible. *McGovern v. Brigham & Women's Hosp.*, 584 F. Supp. 2d 418 (D. Mass. 2008). Opinions that are not based on established standards are also not admissible. Hence, an expert who creates a field of expertise based on his own concerns and then makes value judgments that cannot be reviewed simply provides his own conclusions, which are not particularly helpful to the jury. *Tuli v. Brigham & Women's Hosp., Inc.*, 592 F. Supp. 2d 298 (D. Mass. 2009). By the same token, a doctor, who has never testified on what conduct comprises illegal sex discrimination, may not review documentation as he would a medical record and provide an opinion of whether it supports a conclusion of discrimination. *Id.*

Acceptable subject matter for an expert opinion is that which provides the jury with the context for considering the evidence before it. Thus, an expert in social framework analysis, which specifically addresses the issue of sex stereotyping and discrimination, may offer testimony describing "how stereotyping and discrimination operate – in what contexts, in what fashion – based on empirical research and note that the statements and treatment described by [the plaintiff] are consistent with the research." *Id.* And in the investment context, an investment expert may "explain to the jury how stock options function and how an investor would think about exercising those options." *First Marblehead*, 541 F.3d at 42.

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