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**AGE DISCRIMINATION**

The issue of statistical proof in age discrimination cases was addressed recently by the U.S. Court of Appeals for the Ninth Circuit in *Stockwell v. City & County of San Francisco*, which found that the district court waded too far into the merits of the case when deciding the class certification motion, Paul Hastings attorney Kenneth W. Gage and statistical consultant Michael DuMond say in this BNA Insights article.

Claims for classwide discrimination, particularly disparate impact claims, depend upon statistical proof for their survival, the authors say. Because age, unlike other protected characteristics, changes with time, as do abilities and motivations, statistical experts face unique challenges in age bias cases, Gage and DuMond say. They note that a *Daubert* challenge at the class certification stage is a defendant's opportunity to attack the validity of plaintiff's expert's approach to the analysis.

**Stockwell v. City & County of San Francisco: What It Doesn't Say About Statistics in Age Discrimination Cases**

BY KENNETH W. GAGE AND MICHAEL DUMOND,  
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**T**he U.S. Court of Appeals for the Ninth Circuit recently reversed a district court's denial of class certification in a disparate impact age discrimination case, *Stockwell v. City & County of San Francisco*, No. 12-15070, 122 FEP Cases 795, 2014 BL 113930 (9th Cir. 2014) (80 DLR AA-1, 4/25/14), finding that the district court waded too far into the merits of the case on the class certification motion. Commentators on both sides

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have suggested that the decision may make it easier for plaintiffs to litigate workplace class actions, easier than many thought would be the case after *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 112 FEP Cases 769 (2011) (118 DLR AA-1, 6/20/11).

That may or may not ultimately prove to be true, but there is another dimension to this debate that cannot be ignored.

Claims for classwide discrimination, particularly disparate impact claims, depend upon statistical proof for their survival. Whether that statistical proof is sufficient on the merits and whether it is sufficient for purposes of Rule 23 of the Federal Rules of Civil Procedure are two different questions, for sure.

But there is a third question, and it is one that should precede the other two. What about the admissibility of that expert proof? This third question may require closer examination, particularly in age discrimination cases because, unlike other protected characteristics—such as race—age changes, and as it changes, so do

other things, such as abilities and motivations. This presents unique challenges for statistical experts.

## Relevant Background

The material facts of the *Stockwell* case are straightforward. The police department made promotions to the position of assistant inspector using a list known as the Q-35 list, which was based on the results of an exam that had been administered in April and May of 1998.

More than seven years later, the chief of police announced that a new promotional exam, the Q-50 exam, would be administered and the results of that test would be used for promotions instead of the Q-35 list. In the intervening years, many police officers who had taken the Q-35 exam had been promoted from the list; the plaintiffs, however, remained on the list and had not yet been promoted. They were eligible to take the Q-50 exam, which was administered in 2006; some did, and some did not. Promotions based upon the resulting Q-50 list were made in 2007. The plaintiffs filed a class action age discrimination case, seeking to represent officers who were on the Q-35 assistant inspector eligibility list and could have been selected from that list for promotion, but for the adoption of the Q-50 list.

The plaintiffs did not allege that the Q-50 testing procedure itself was biased. Instead, they sought to prove that the employer operated under a general policy of discrimination on the basis of age. Their motion for class certification was supported by statistical evidence ostensibly demonstrating that the decision in 2007 to make promotions based upon the Q-50 list instead of the Q-35 list had a disparate impact on older employees.

Among the employer's central arguments was that the alleged age impact reflected nothing more than the fact that the officers on the Q-35 list had aged by eight years.

The district court considered whether the plaintiffs had established commonality by presenting "[s]ignificant proof that [the] employer operated under a general policy of discrimination" on the basis of age, taking the approach used by the U.S. Supreme Court in *Wal-Mart*.

Agreeing with the employer, the court concluded that there was insufficient evidence that the change to the Q-50 list had a disparate impact *because of the plaintiffs' age*. Among other reasons, the court was critical of the plaintiffs' expert for failing to account for certain non-discriminatory variables in his analysis. As a result, the court found no commonality and denied the plaintiffs' motion for class certification.

The court of appeals held that the district court improperly waded into the merits of the underlying claims "rather than focusing on whether the questions presented, whether meritorious or not, were common to the members of the putative class." It acknowledged that the plaintiffs' statistical proof may well be insufficient for plaintiffs to succeed on the merits of their claim. The court of appeals explained, however, that whether the plaintiffs "could actually prevail on the merits of their claims is not a proper inquiry in determining" commonality.

## Analysis

Courts will continue to struggle with the proper balance between an appropriately "rigorous" analysis of

whether plaintiffs can satisfy Rule 23 in disparate impact discrimination cases and an inappropriate determination of the merits. What if, instead, the district court in *Stockwell* had held the plaintiffs' expert testimony to be inadmissible under the standards set in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 61 USLW 4805 (1993)? Would the outcome at the Ninth Circuit have been different? Maybe, or maybe not, but the facts of the case illustrate the unique nature of statistical analysis in age discrimination cases, as well as the potential for *Daubert* motions in the class certification process.

**Uniqueness of Statistical Analysis in Age Cases.** The legal objective of a statistical analysis is to assess the correlation between employment or compensation outcomes and the employees' protected status—that is, to determine whether a particular outcome differs systematically based on the protected status (rather than other factors that are correlated with protected group status).

A statistical analysis does this by estimating the probability that the adverse outcome for the protected group occurred by random chance. The lower that probability the more likely it is that the result occurred because of some other factor that is not included in the statistical model, and that "other" factor is typically alleged by plaintiffs to be discrimination.

Lawyers (and their retained experts) face unique challenges when attempting to determine whether an employer's decision impacts employees "because of" age as opposed to some other permissible factor. The protected characteristic at issue is mutable unlike, for example, race. Moreover, as we age our abilities and motivations—two factors legitimately affecting employment outcomes—may change as well. The facts in *Stockwell* reflect that not all of the plaintiffs chose to take the Q-50 exam, for example.

Most readers are likely aware of the well-established relationship between age and earnings. Labor economists have documented that the growth rate of an employee's earnings decline with age, and after some point, earnings may even decline. The most commonly accepted rationale for this pattern is that employees will voluntarily and rationally reduce and then stop "investing" in their own "human capital" when the period of time remaining to recoup those investment costs lessens—i.e., as they approach the end of their careers. As employees slow or stop their human capital accumulation, their gains in productivity decrease; this results in fewer promotions and stagnant wages. (Gary Becker, *Human Capital: A Theoretical and Empirical Analysis With Special Reference to Education*, Second Edition (Cambridge, Mass., Nat'l Bureau of Econ. Research, 1975).

It is critical to note, however, that in the theory of human capital, an employee's age, in and of itself, has no bearing on productivity. That is, the theory does not assume that a 50-year old employee is less capable than a 25-year old employee. Indeed, the 50-year old employee is much more likely to have acquired a greater amount of relevant experience than the 25-year old employee, and this leads to the higher average salaries for older employees, all other things being equal.

By extension, employees' salaries do not increase simply because they get older. Instead, salaries increase because the employees gain experience, which increases their stock of human capital. It is impossible to

acquire another year of experience without also acquiring another candle on the birthday cake, however.

The challenge for the labor economist who is tasked with identifying potential age discrimination is to ascertain whether the observed differences in the data reflect the typical implications of labor economic theory or something more nefarious, like age discrimination.

Put simply, human capital theory predicts that employees *choose* to slow their investment as the payoff period for that investment diminishes. This leads, for example, to fewer promotional opportunities. Similarly, an employer who is discriminating against older employees may deny them promotional opportunities.

The labor economist therefore has two competing theories to test, both of which yield the same prediction—that is, that older employees see reduced promotional opportunities. In order to distinguish between the relative strength of these two explanations, the preparation of the statistical analyses becomes paramount. The import of the quality of analyses is arguably more important in an age discrimination case, given the highly interdependent nature of protected group membership with potential exculpatory variables of worker productivity.

This means that unlike cases involving race or gender discrimination, observed disparities in promotions or pay increases for older employees have an automatic explanation that most defendants will likely invoke when liability is determined.

But just as critical is the construction of the statistical analyses. An analysis that does not properly account for the distinctions between age and productivity measures could be considered outside of the generally accepted standards of labor economics and therefore may be susceptible to a challenge under the *Daubert* standards.

**Important Role for *Daubert* Analysis in Class Certification.** Class certification in any case is a game-changer, and that is especially true in employment discrimination cases. Expert testimony, including that of statisticians and labor economists, “can be both powerful and quite misleading because of the difficulty in evaluating it,” as Judge Jack Weinstein explained in a 1991 article (Jack B. Weinstein, “Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended,” 138 F.R.D. 631 (1991)). The risks inherent in expert testimony are greatest with a jury, but the consequences of

admitting such testimony at the class certification stage are great.

Since *Wal-Mart*, lower courts have generally agreed that some level of *Daubert* scrutiny is appropriate at the class certification stage. The Supreme Court did not specifically address the role of *Daubert* in class certification proceedings in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (59 DLR AA-1, 3/27/13), but it held that the plaintiffs’ expert evidence was insufficient to establish predominance under of Rule 23(b)(3). Specifically, the Supreme Court held that the plaintiffs’ failure to present evidence that linked their liability theory to any classwide damages was fatal to their ability to satisfy Rule 23(b)(3). In other words, plaintiffs’ expert’s methodology and analysis did not “fit” or “match” plaintiff’s theories.

Therefore, a *Daubert* challenge at the class certification stage is a defendant’s opportunity to attack the validity of plaintiff’s expert’s approach to the analysis. It is not a challenge to the merits of the expert’s opinion, but rather to its “fit” with the plaintiff’s theories or to its reliability as scientific, technical, or specialized knowledge.

A statistical analysis that purports to show different employment outcomes based on age but does not account for known differences in employee productivity or interest is arguably inadequate, based on generally accepted labor economic theory. A plaintiff’s expert who fails to present more robust analyses that consider the unique factors involved in an age discrimination claim may be subject to an early attack.

For the same reason that age and productivity of employees are intertwined, a *Daubert* motion directed at statistical analyses in an age discrimination case, plaintiffs will argue, is merely an argument over the merits of their class claims. In some cases, as *Stockwell* illustrates, that argument will prevail. It is more likely to prevail if the employer’s argument is cast as a merits-type argument. The challenge for employers, therefore, is to persuade the court that the plaintiffs should only be permitted to reach the merits determination of their class claims where the methodology used by their experts is sufficiently valid and recognizes the uniqueness of statistical analysis in age discrimination cases, regardless of how compelling the results of that analysis may be on the merits.