Assessing Emotional Distress Damages: Torture or Fair Play?

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I. THE ROLE OF THE MENTAL HEALTH PROFESSIONAL IN EMPLOYMENT CASES

Mental health issues have come to play an increasingly prominent role in employment law matters over the last 15 years, due in large part to enactment of the Americans with Disabilities Act in 1990 (which prohibits discrimination against employees with mental as well as physical disabilities) and the Civil Rights Act of 1991 (which permits the recovery of emotional distress damages in employment discrimination and harassment lawsuits), as well as the proliferation of statutory and tort-based causes of action under state law that provide for recovery of compensatory damages. Although the most familiar role is that of expert witness on emotional damage issues, the mental health professional can play a variety of roles in employment cases.

A. Expert on Damages Issues

In this role, the psychiatrist or psychologist examines the plaintiff and then typically gives an expert opinion on one or more of the following issues:

1. Is the plaintiff suffering from a diagnosable mental disorder (or did she suffer from such a disorder in the past)?

2. If so, what was its cause? In other words, was the condition solely caused by workplace events, or were alternative stressors totally or partially responsible?

3. If the mental disorder has not resolved, what is its prognosis and course of future treatment?

B. Expert on Liability Issues

The psychiatrist or psychologist might also testify on liability issues, in addition to or instead of damages issues. This is a developing area of the law, and not all courts permit such testimony, but such liability issues might include:

1. Whether the plaintiff in a discrimination case suffers from a personality disorder that causes him or her to misperceive the words and actions of supervisors or co-workers, or that affects the plaintiff’s interaction with others in the workplace.

2. Whether the plaintiff in a sexual harassment case suffers from a personality disorder traits that caused her to perceive the words or actions of supervisors or co-workers in ways other than a “reasonable woman” would have perceived them, or that caused to “welcome” the conduct at issue in the litigation.

3. Why a plaintiff did not complain of harassment, or whether decision-makers were applying gender stereotypes (this type of testimony is usually given by a social psychologist).
C. Consultant in Litigation

The mental health professional might not actually testify in court, but might instead work behind the scenes with plaintiff or defense counsel to effectively address mental health issues in the case. Tasks commonly performed by litigation consultants include review of medical records, assistance with taking depositions of the opposing party and that party’s treatment providers and mental health experts, and advice on strategies for effective presentation of mental health issues to the court.

D. Psychiatrist or Psychologist?

_Psychiatrists_ are physicians who complete a residency in psychiatry following medical school. Following the completion of their training, they are eligible to become “Board certified,” which means they have passed the examination for their specialty given by the American Board of Psychiatry and Neurology.

_Psychologists_ are doctoral level professionals who have completed a doctorate of philosophy in psychology (Ph.D.) or a doctorate in psychology (Psy.D.). There are several branches of psychology; two are relevant to employment litigation. _Clinical_ psychologists are trained in the diagnosis and treatment of mental illness, and in many states they must complete a clinical internship before being fully-licensed to practice. Clinical psychologists may conduct independent mental examinations and give expert testimony regarding the plaintiff’s diagnosis and treatment in most jurisdictions. _Social_ psychologists are not clinically trained and generally cannot conduct examinations or give diagnoses. They can, however, provide expert testimony on social frameworks, stereotypes and other phenomena where supported by social psychological research.

There are no strict rules for determining whether a psychologist or psychiatrist would be the more appropriate choice as an expert witness. In fact the primary criterion for choosing an expert is his or her fit for the case. For example, a female clinician might be more appropriate as a defense expert in a sexual harassment case tried to a jury. A local doctor may be a better choice in a rural jurisdiction than an expert from a distant large city with a fancier resume. Especially where jury trials are involved, an expert must be evaluated in terms of his or her ability to communicate complex and unfamiliar concepts effectively to laypeople. Nonetheless, the following general guidelines apply with respect to choosing a psychiatrist versus a psychologist:

- Where issues of medication are involved (for example, where a plaintiff’s symptoms might have resulted from side effects of psychotropic medication or might have been the result of overmedication or the wrong medication), a psychiatrist should be chosen because psychologists typically do not receive formal training in pharmacology.

- Where issues of psychological testing are involved (for example, the plaintiff’s treater or expert arrived at a diagnosis via psychological testing), a psychologist should be chosen because psychiatrists typically do not receive formal training in psychological testing.
Note finally that master’s level professionals (masters in social work, marriage and family therapists, etc.) should not be used as expert witnesses. Their training is often not adequate for forensic work and they are quite vulnerable to cross-examination by opposing counsel.

II. RULE 35 MENTAL EXAMINATION OF THE PLAINTIFF

A. When a Mental Examination May Be Ordered

Rule 35 of the Federal Rules of Civil Procedure or its state law counterparts provides that when the mental condition of a party is at issue in a lawsuit, upon a showing of “good cause” the court may order that party to undergo a mental examination by a physician or psychologist.

Although no court order is necessary if the parties agree to a mental examination of the plaintiff, plaintiffs’ attorneys are more frequently objecting to mental examinations, or are agreeing to them only with very restrictive conditions. If no agreement can be reached for a mental examination to occur under conditions sufficiently flexible to allow the defense examiner to conduct a meaningful inquiry, a motion will be necessary.

Usually, the court will order the plaintiff to undergo a Rule 35 mental examination where the plaintiff seeks to recover damages for mental or emotional injuries. Occasionally, however, a court will deny a defendant’s request for a Rule 35 mental examination where the plaintiff describes his or her mental damages in terms of “embarrassment,” “humiliation,” “mental anguish” and similar non-clinical terms. These have come to be known as “garden variety” emotional distress claims.

In Javeed v. Covenant Medical Center, Inc., 218 F.R.D. 178 (N.D. Iowa 2001), the court provided a definition of a “garden variety” emotional damage claim in a sexual harassment lawsuit. As that court put it:

They are claims for emotional distress for which the plaintiff seeks no diagnosis or treatment. They are accurately characterized as being claims of generalized insult, hurt feelings, and lingering resentment. These claims do not involve a significant disruption of the plaintiff’s work life and rarely involve more than a temporary disruption of the claimant’s personal life. In this court’s experience, juries in Northern Iowa most often award between $5,000 and $25,000 for such claims.

The Javeed court went on to find that the claim posed in that case was not a “garden variety” claim because the plaintiff asserted that she suffered weight loss, weight gain, insomnia, rashes, diarrhea and panic attacks as a result of sexual harassment, and that she saw a psychologist for anxiety.

The weight of judicial authority holds that a defendant is entitled to have the plaintiff undergo a Rule 35 mental examination whenever any of the following is present:

- The plaintiff claims to have suffered a diagnosable mental disorder;
- The plaintiff obtained medical or psychological treatment for his or her injuries;
- The plaintiff plans to have a psychiatric or psychological expert testify at trial;
• The plaintiff claims to be suffering continuing emotional distress; and/or
• The plaintiff has pled a separate claim for intentional infliction of emotional distress.


B. Presence of Outsiders

In employment cases, plaintiffs ordered to submit to a Rule 35 mental examination will often request the presence of a third party, such as their attorney, psychotherapist, relatives, or a court reporter. In Edwards v. Superior Court, 16 Cal.3d 905, 130 Cal.Rptr. 14 (1976), the court refused to allow the plaintiff’s attorney to attend her mental examination. The plaintiff had argued that her attorney’s presence was necessary to protect her from improper questioning, to assure accurate reporting, and to make the examination a more comfortable experience for her. The court rejected all three arguments. Concerning that plaintiff’s claim that she needed counsel to protect her from improper questions, the court remarked:

The analyst in a psychiatric examination seeks by careful direction of areas of inquiry to probe, possibly very deeply, into the psyche, measuring stress, seeking origins, tracing aberrations, and attempting to form a professional judgment or interpretation of the examinee’s mental condition. Given such techniques and purposes we do not think that an attorney, no matter how well intentioned, can fairly and objectively monitor such an examination. Psychiatry is a discipline requiring highly specialized skills. Further, while properly objecting to a question on legal grounds, counsel does not necessarily possess the ability to define the psychiatric relevance of elicited answers. Many questions which would be legally objectionable, if posed in a courtroom, might be very relevant in the formulation of a sound psychiatric judgment.

In answer to the plaintiff’s argument that her counsel’s presence was necessary for her comfort and emotional support, the Edwards court expressed its concern that the presence of others during the examination would be “distracting, if not disrupting,” and noted that an examination must proceed free of such disruptions if it is to be valid.

A majority of courts in employment cases have disallowed the presence of plaintiff’s counsel during the Rule 35 mental examination absent compelling reasons to find otherwise. See, e.g., Salemi v. Boccador, Inc., 2005 WL 926965 (S.D.N.Y. Apr. 19, 2005); EEOC v. Grief Brothers Corp., 218 F.R.D. 59 (W.D.N.Y. 2003); Ferrell v. Shell Oil Co., 1995 WL 688795, at *2 (E.D. La. 1995); Hirschheimer v. ASOMA Corp., 1995 WL 736901, at *3 (S.D.N.Y. 1995); Vinson v. Superior Court, 43 Cal.3d 833, 239 Cal.Rptr. 292 (1987); Lowe v. Philadelphia Newspapers, Inc., 101 F.R.D. 296, 299 (E.D. Pa. 1983); see also Wheat v. Biesecker, 125 F.R.D. 479, 480 (N.D. Ind. 1989)(noting that majority rule is that plaintiff’s attorney may not attend a Rule 35 examination). Justifications advanced for this view include: (1) the need to conduct the examination without the distractions of a third person in order to obtain a valid psychiatric profile; (2) providing the defendant with a “level playing field” since the plaintiff’s physician examined the plaintiff without the presence of the defendant’s attorney; (3) preventing a more
adversarial atmosphere during such examinations than is, already, unavoidably present; (4) the possible conflict of interests created by the fact that the presence of the plaintiff’s attorney during the examination makes the attorney a potential witness at trial; and (5) the availability of other less obtrusive devices to protect the interests of the plaintiff.

C. Psychological Testing During the Rule 35 Examination

Psychological testing can be particularly useful in employment cases. The MMPI-2 is routinely allowed during Rule 35 mental examinations. See, e.g., Shirsat v. Mutual Pharm. Co., 169 F.R.D. 68, 71-72 (E.D. Pa. 1996); Hirschheimer v. ASOMA Corp., 1995 WL 736901, at *4-5 (S.D.N.Y. 1995); Workman v. Carolina Freight Carriers Corp., 65 FEP Cases 1209 (M.D. Ala. 1994); Chaparro v. IBP, Inc., 1994 WL 714369 (D. Kan. 1994). For example, in Burger v. Litton Industries, 1995 WL 736901, 68 FEP Cases 737 (S.D.N.Y. 1995), over the plaintiff’s claim that such amounted to “harassment,” the court ordered the plaintiff in an age and sex discrimination case to take the MMPI-2, which it described as a “generally accepted and commonly used test to obtain a psychological profile and history of the subject.” In Greenhorn v. Marriott International, Inc., 216 F.R.D. 649 (D. Kan. 2003), the court permitted the defense examiner to administer psychological testing (including the MMPI-2 and MCMI-III) as part of the Rule 35 examination, but it granted the plaintiff’s request that she be given a copy of the test answer sheets she completed, the test booklets, and the instructions accompanying the test booklets immediately upon completion of the tests.

Only one court has refused to allow such an administration of the MMPI-2. In a peculiar opinion in which the court referred to psychological tests as “mind control” devices, the court in Usher v. Lakewood Engineering & Manufacturing Co., 158 F.R.D. 411 (N.D. Ill. 1994), denied the defendant’s motion to have the plaintiff undergo a battery of psychological tests, including the MMPI-2, during the Rule 35 mental examination. The Usher Court did not provide any extensive analysis in support of its decision; it merely indicated that it felt that the questions on some of the tests were intrusive and of limited relevance to the issues in the litigation. At this point, however, the Usher decision is in the distinct minority.

An issue that is becoming more frequently litigated is whether the defense examiner must identify the psychological tests to be administered at the Rule 35 mental examination in advance of the examination. The obvious problem with advance disclosure is that the testing process becomes compromised; it is unknown whether the plaintiff rehearsed the answers in advance, with the aid of counsel and/or therapist. In Ragge v. MCA/Universal Studios, 165 F.R.D. 605 (C.D. Cal. 1995), the court refused to order the defense examiner to disclose in advance the specific psychological tests to be administered.

D. Restrictions on the Scope of the Examination

Most courts remain reluctant to place subject-matter restrictions on Rule 35 mental examinations. In Stoner v. New York City Ballet Co., 2002 WL 31875404 (S.D.N.Y. Dec. 24, 2002), the court rejected the plaintiff’s request that the defense examiner be restricted from inquiring into “events preceding or separate from” the plaintiff’s employment history. The court remarked: “[W]e cannot imagine that a competent psychiatrist would ever ignore such data when seeking to discern the degree of a subject’s emotional dysfunction and the causes for it.” The court further rejected the plaintiff’s suggestion that the examiner should be limited to reviewing prior treatment records as a substitute for a broad-ranging inquiry into the plaintiff’s
psychological history during the examination. Finally, the court dismissed the notion that the examination should be limited because otherwise it might be stressful for the plaintiff:

We are also not persuaded that the parameters of the proposed examination pose any threat to plaintiff’s well-being, whether or not the prospect of an examination causes him stress. Plaintiff has chosen to press this lawsuit and to seek relief from defendant, and is required to submit to reasonable discovery, even when he finds it unattractive or worrisome.

In *Greenhorn v. Marriott International, Inc.*, 216 F.R.D. 649 (D. Kan. 2003), the court denied the plaintiff’s request that the defense examiner be prohibited from inquiring into non-work-related sexual matters or sexual matters with co-employees besides the accused harasser. It remarked: “This is a sexual harassment case. Plaintiff asserts that the conduct of defendants has caused her current mental state and several specific injuries. To validly assess her mental state and her injuries, the examiner must have leave to make relevant inquiries.” Accord, *Hertenstein v. Kimberly Home Health Care, Inc.*, 80 FEP Cases 355 (D. Kan. 1999).

In *Nyfield v. Virgin Islands Telephone Corp.*, 2001 WL 378858 (D.V.I. Apr. 17, 2001), the defendant proposed the scope of the Rule 35 examination it sought to be “all physical and mental injuries alleged by Plaintiff, as well as pre-existing physical or mental conditions.” The court found this to be overbroad. It ordered the examination to proceed, but without any analysis or explanation it limited the scope to “procedures and testing relevant to Plaintiff’s assertion that his damages include mental anguish, pain and suffering, and loss of enjoyment of life including future damage there from.”

III. THE ROLE OF PERSONALITY DISORDERS IN EMPLOYMENT LITIGATION

Personality disorders can play an important role in employment litigation in two key respects -- by providing an alternative explanation for emotional distress suffered by the plaintiff, and in constituting the primary cause of the workplace incident at issue.

A. Alternative Cause of Plaintiff’s Emotional Distress

Personality disorders often can be the cause of emotional distress that may be misattributed to workplace events that occur in temporal proximity with those events.

For example, persons with Borderline Personality Disorder frequently suffer depressions that are not attributable to contemporaneous events, but rather to the pathological nature of their own personality development. Borderlines and other personality disordered individuals often repeatedly make poor life choices. They may then suffer depression as a result of failures in the areas of interpersonal relationships, academic achievement and vocational success. Other personality disorders may also cause symptoms and other conditions, such as depression, anxiety, marital discord, relationship difficulties, low self-esteem and even suicide attempts, that may be misattributed to the workplace.

Where it appears evident that the plaintiff suffers from a personality disorder, it should be considered whether the plaintiff’s various symptoms of physical and emotional distress might be more accurately attributed to such personality disorder as opposed to workplace events.
B. Catalyst of Many Harassment and Discrimination Claims

Personality disorders are manifest in the workplace - and may be the catalyst of harassment and discrimination claims - in two ways.

First, personality disorders often cause conflicts between an employee and his or her co-workers that lead to claims of victimization by the employee. Such an employee’s own irritability, perfectionism, manipulation of others, or sexually suggestive behavior is often the beginning of a chain of events that ultimately leads to a claim of wrongful termination, harassment, or discrimination. For example, an employee with a Borderline Personality Disorder may direct sexually suggestive comments or even blatantly seductive conduct toward a supervisor and, when he responds in a friendly if not overtly sexual manner, she may misinterpret their relationship as being more intimate than professional. But Borderline personalities tend to view others (particularly those in positions of authority) in extreme terms as either “all good” or “all bad.” Such an employee may idolize her supervisor until he criticizes her work performance and then react with rage and accuse him of misconduct. For example, in Ramirez v. Kelly, 1997 WL 223053 (N.D. Ill. 1997), the plaintiff and the defendant, who was above her in the chain of command, had an ongoing sexual relationship. After the plaintiff (who was diagnosed by the defense psychiatric expert as having a Borderline Personality Disorder) learned that the defendant was married, she sued him for sexual harassment, claiming that she was raped and coerced to carry on the sexual relationship. This is not an uncommon outcome when an employee with a Borderline Personality Disorder becomes involved with a supervisor.

Second, personality disorders often affect an employee’s perception of events in the workplace. Individuals with personality disorders often interpret events in a distorted fashion. This frequently accounts for the diametrically opposite characterization of the very same event by plaintiff and defendant in so many employment lawsuits, particularly in “he said/she said” cases where there are no third-party witnesses to help break the credibility impasse. Employees with personality disorders tend to have relatively good contact with reality. Thus, their accusations of co-worker misconduct, although false, are not obviously bizarre and on the contrary may sound quite plausible. Often, to the personality-disordered individual, “believing is seeing.” For example, if on account of a personality disorder an employee presumes that a colleague is thinking in sexual terms, a variety of behaviors can be construed as sexual in nature - choice of clothing, a friendly smile, an inadvertent touch, a compliment, standing in close proximity, an invitation to lunch, glances, references to other relationships - the list is endless. Similarly, if one assumes that others are discriminating, this assumption becomes a self-fulfilling prophecy - discrimination is perceived to be lurking around every corner. Inattention, inadvertent slights, nonspecific discourtesy, lack of personal concern, random acts of preference, and other ordinary events may be construed by the personality disordered individual as evidence of discrimination. Sometimes the conduct of a personality-disordered employee will alienate co-workers, further buttressing the perception of ostracism. For example, most employees will seek to avoid a colleague who is always talking of plots or conspiracies, who is prone to angry outbursts, or who vigilantly seeks to document all of the wrongs done to himself by others. Such avoidance will likely be perceived as just further evidence of ostracism and discrimination.
The following is a brief description the personality disorders most likely to appear in the workplace and how they are manifest:

**Antisocial** These employees are often a subject of rule violations and disciplinary action. They may become involved in altercations or physical violence with co-workers, or launch disrespectful verbal attacks on a supervisor, and then claim harassment or discrimination when disciplined for it.

**Borderline** These employees are adept at creating scenarios leading to their own victimization. They may act out toward supervisors or co-workers in an inappropriately sexual manner, and then complain of sexual harassment when others respond in kind. They may act seductively toward a supervisor and then become enraged and complain of harassment if rejection by the supervisor is perceived.

**Dependent** These employees may endure abuse by supervisors or co-workers, failing to use internal mechanisms to complain of harassment or discrimination.

**Histrionic** These employees often dress flamboyantly or provocatively for work. They may address flirtatious innuendos to supervisors or co-workers and then react with surprise (and complain of harassment) when one of them responds to the overture. They tend to be quite excitable and they may handle stressful situations poorly.

**Narcissistic** These employees may be self-centered and imperious, perceiving personal slights where none are intended. They may react with rage when faced with a major career setback such as demotion or termination and respond with violence or legal action directed at some perceived external culprit. Their insensitivity to the needs of subordinates may lead to turnover and their ultimate failure as a manager.

**Obsessive-Compulsive** These employees may encounter difficulty interacting effectively with peers who may find their rigid perfectionism difficult to accept. They will often fail as a manager as a result of insisting that subordinates conform to rigid standards.

**Paranoid** These employees will often find malevolent meaning in innocent actions. They may perceive every unfavorable workplace development to be rooted in discrimination or part of a plot. They are prone to spreading rumors and gossip, creating dissension and apprehension among co-workers.

C. Personality Disorders in the Courts

Courts have become increasingly willing to consider whether a plaintiff’s own prior psychopathology contributed to the genesis of the workplace dispute being litigated. In other words, it may be that the plaintiff’s psychological problems (in the form of a personality disorder) caused the workplace dispute in question, instead of vice versa. Personality disorders
have been especially prominent in cases involving alleged workplace harassment and discrimination.

In *Davis v. United States Steel Corp.* 539 F.Supp. 839 (E.D. Pa. 1982), the court held that incidents the plaintiff alleged to be racial harassment were merely legitimate criticisms and discipline that the plaintiff misperceived due to an emotional disorder.

In *Sand v. George P. Johnson Co.*, 33 FEP Cases 716 (E.D. Mich. 1982), in rejecting the plaintiff’s sexual harassment claim, court found that the plaintiff was hypersensitive to sexual cues and cited her personality disorder. The court noted that the plaintiff “had an ambivalent attitude toward relationships with men and because of her particular personality had a tendency to exaggerate male conduct towards her.”

In *Lowe v. Philadelphia Newspapers, Inc.*, 594 F.Supp. 123 (E.D. Pa. 1984), a racial harassment case, the court admitted the testimony of a psychiatrist to show that, because of a personality disorder, the plaintiff was oversensitive to ordinary criticism and perceived it as harassment.

In *Sudtelgte v. Reno*, 63 FEP Cases 1257 (W.D.Mo. 1994), the court admitted psychiatric testimony in a sexual harassment lawsuit concerning the fact that the plaintiff suffered from a paranoid personality disorder that adversely affected her ability to get along with supervisors and co-workers and that caused her to feel persistently “picked on.” The court held that while the plaintiff may have felt subjectively harassed, such was the result of her abnormal sensitivity caused by her personality disorder and she could not show that a “reasonable woman” would have been offended.

In *Pascouau v. Martin Marietta Corporation*, 994 F. Supp. 1276 (D. Colo. 1998), *aff’d in relevant part, 185 F.3d 874 (10th Cir. 1999)*(table), a sexual harassment case, the court described at some length the plaintiff’s pre-existing psychological problems, many of which arose from the plaintiff’s dysfunctional childhood. The court noted, for example, that the plaintiff still suffered symptoms of Posttraumatic Stress Disorder as a result of an incident when she was eight years old in which her mother forced her and her sister into a car at knife point and then drove the car off a bridge in a suicide attempt. The defense psychiatric expert testified that the plaintiff in *Pascouau* suffered from a pre-existing mixed personality disorder with borderline and narcissistic characteristics. The *Pascouau* court explained the relevance of the plaintiff’s personality disorder:

> The personality disorder is a condition, largely the product of being raised in a dysfunctional home with dysfunctional parents, in which Plaintiff did not learn how to solve problems effectively or to communicate effectively with other people. The disorder leads to the formulation of implausible perceptions and thus different kinds of conclusions about what other people’s actions and behavior mean as distinguished from what a reasonable person not subject to such a disorder would perceive them to mean.

Consistent with this disorder, Plaintiff makes judgments that are highly personalized and overly emotional. She sees things in black and white terms rather than shades of gray that permit allowances and generally feels whatever goes wrong is someone else’s fault and she had no role in the misadventure. Persons with this disorder take no responsibility for what goes wrong in their lives.
The *Pascouau* court then went on to discuss the role in the case of the symptoms of Borderline Personality Disorder exhibited by the plaintiff:

The essence of the Plaintiff’s complaints in this case is the product of Plaintiff’s “splitting,” a psychiatric term meaning the patient initially over-evaluates and over-values other people, and then, when the slightest thing goes wrong, demeans those people and becomes angry and upset with them. The major affective characteristic is anger or rage. Secondarily, such a person is fearful of being abandoned or not being liked and does not want to be alone. As a result, the borderline personality very often gets involved in unsuccessful intimate relationships. Depression frequently accompanies this personality disorder because the unsuccessful outcomes of interactions with other people lead to prolonged disappointment.

The court credited the testimony of the defense psychiatrist, a Dr. Plezak, noting:

When asked if Plaintiff’s allegations had any role in the causes of Plaintiff’s disorders, Dr. Plezak replied that the situation is reversed in that the disorders are causes of the allegations. The incidents Plaintiff related were characterized by misinterpretations of events and interactions with fellow employees that were far more intense than would be interpreted by a reasonable person.

In *Lanni v. New Jersey*, 177 F.R.D. 295 (D.N.J. 1998), the plaintiff filed a motion in limine to exclude the testimony of the defendant’s psychiatrist, who had diagnosed the plaintiff as having Narcissistic Personality Disorder, among other conditions. In denying the motion, the court stated that it had reviewed the psychiatrist’s report, which detailed how the plaintiff’s psychiatric condition might explain the plaintiff’s perception that he was being mistreated at work. The court found that the psychiatrist’s testimony would “not only assist the trier of fact in understanding various mental and cognitive conditions, but will also assist in sorting out issues of causation.”

In *Newberry v. East Texas State University*, 161 F.3d 276 (5th Cir. 1998) an Americans with Disabilities Act case, the plaintiff’s psychiatrist testified that the plaintiff suffered from an Obsessive-Compulsive Personality Disorder. The plaintiff himself had testified that this disorder interfered with his relations with others by instilling in him a rigid perfectionism, rigidly ethical behavior, and an insistence on addressing all details of his interpersonal relationships.

In *Stafford v. Noramco of Delaware, Inc.*, 2000 WL 1868179 (D. Del. 2000), the plaintiff claimed that he was not hired for a job for which he applied on account of his race and age. In granting the employer’s motion for summary judgment, the court noted that the defendant had cited a determination by a Social Security Administrative Law Judge that the plaintiff was disabled on account of a “severe personality disorder” and that he is “suspicious, hostile, and continually feels victimized.” The court explained: “While this finding, in and of itself, does not suggest [the plaintiff] is unqualified for the position, it suggests why, despite overwhelming evidence, he continues to believe Noramco discriminated against him.”

Even where personality disorders are not formally diagnosed, courts are increasingly willing to consider that a plaintiff may have misperceived innocent events as harassing or discriminatory. For example, in *Jensvold v. Shalala*, 70 FEP Cases 788, 792 (D. Md. 1996), the court observed:
Plaintiff’s version of events remains an illusion. Her skewed perception of events, whether after-the-fact rationalizations borne of a personal sense of failure, or a contemporaneous self-fulfilling prophesy, is entirely of her own creation. [The plaintiff] was ready to see sinister motive in any action she perceived as remotely critical of her. This is unfortunate, for she obviously had promise as a medical researcher. Instead of trying harder, she sought to lay blame on others.

D. Presentation of Axis II Findings

Axis II pathology may play a variety of roles in an employment lawsuit, which should be explained thoroughly by the expert in any written report or testimony on deposition or at trial. Examples include:

1. **Plaintiff has personality disorder that caused her to instigate events of which she now complains.** This appears sometimes in sexual harassment cases, where an employee with Borderline or Histrionic Personality Disorder “gets the ball rolling” with seductive banter or conduct, and then complains when co-workers respond in kind. This would be relevant to the defendant’s liability, since a plaintiff who “welcomes” harassing conduct cannot later complain about it.

2. **Plaintiff has a personality disorder that caused him to misinterpret words or actions of co-workers.** A Borderline employee may interpret a supervisor’s compliment or friendliness as a sexual overture. An employee with Paranoid Personality Disorder may interpret co-workers’ inadvertent failure to invite him to lunch as racially discriminatory or a sign that he is about to be fired. This would also be relevant to liability, in that the allegations of discrimination are a product of the plaintiff’s psychological processes rather than of external reality.

3. **Plaintiff has a personality disorder that produced symptoms of emotional distress.** A Borderline, Narcissistic or Obsessive-Compulsive employee may suffer great distress as a result of a rejection by a significant other outside of work. Particularly in the case of a Borderline, the reaction may be extreme, including suicidal gestures or requiring psychotropic medication. This would be relevant to damages, as it would provide an alternative explanation (besides the workplace event in question) for the plaintiff’s objectively-verifiable emotional distress.

4. **Plaintiff has a personality disorder but was nonetheless the subject of unlawful conduct.** An Axis II diagnosis does not always carry significance in an employment lawsuit. Sometimes, even though the plaintiff has a personality disorder, she may still be the subject of unlawful treatment and suffer emotional distress as a result that is unrelated to the personality disorder.

5. **Plaintiff has a personality disorder that exacerbates the emotional distress suffered as the result of illegal conduct.** This is an example of the “eggshell skull” principle applied to Axis II disorders. An employee with Dependent Personality Disorder may become inordinately attached to a supervisor and then be devastated by an unlawful termination, or a Borderline employee may be exploited sexually by an unscrupulous supervisor and then attempt suicide and require hospitalization following the breakup of the tryst. The employer would be liable for this additional damage suffered on account of the plaintiff’s heightened susceptibility to harm.
V. AVOIDING “JUNK SCIENCE”

A. What Daubert Means

In Daubert v. Merrill Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993), the U.S. Supreme Court held that a court must ensure the reliability of the methodology underlying scientific expert testimony prior to admitting it into evidence. The Court observed that Rule 702 of the Federal Rules of Evidence provides that the subject of an expert’s testimony must be “scientific knowledge.” It emphasized that the word “knowledge” connotes more than “subjective belief or unsupported speculation.” While maintaining that the inquiry as to the reliability of an expert’s theory and methodology is a flexible one, the Court set forth four indicia of such reliability:

- Whether the theory is capable of being (and has been) tested;
- Whether it has been subjected to peer review and publication;
- The known rate of error; and
- Whether the theory or methodology meets with general acceptance in the relevant scientific community.

The trial court must determine the admissibility (and hence the reliability) of scientific evidence at a preliminary hearing outside the presence of the jury. In Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), the Supreme Court extended the Daubert reliability requirement to expert testimony involving nonscientific “technical” evidence.

On December 1, 2000, the Advisory Committee on Evidence Rules amended Federal Rule of Evidence 702 in light of Daubert and Kumho Tire. Revised Rule 702 provides:

If the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The amended rule essentially codifies the principles enunciated in Daubert and Kumho Tire, requiring that expert testimony be both reliable and helpful to the jury in order to be admissible. Rule 702 now formally empowers the trial judge to act as gatekeeper—screening the expert testimony to determine if it is sufficiently reliable and helpful to the trier of fact. The role of the trial court as gatekeeper differs from the role of the trier of fact because the court’s focus is on the “principles and methodology” of the expert’s testimony, not on whether or not the conclusion is correct.
B. Applications of Daubert to Mental Health Expert Testimony in Employment Cases

Daubert may apply to a variety of forensic issues in an employment case. Obviously, counsel will want to ensure that his or her expert avoids these problems while being alert for their presence in the work of an opposing expert.

1. The Expert’s Training and Experience

A mental health expert’s opinion may be inadmissible if the expert lacks the proper clinical training or the requisite clinical experience in the subject area. Courts have applied Daubert specifically to the qualifications of a proffered psychological expert. In Isley v. Capuchin Province, 877 F. Supp. 1055 (E.D. Mich. 1995), the court set forth two prerequisites that a mental health expert must meet before being found qualified to testify. First, the expert must demonstrate that he or she has education and training in the discipline at issue “sufficient to give him/her expertise or special knowledge such that any opinions that the expert has will be of assistance to the jury in its fact-finding responsibilities.” Second, the expert must show that he or she has personal experience in treating patients with the condition at issue. For example, a psychiatrist who has never treated patients with personality disorders would have the requisite training and education but would lack the requisite clinical experience to qualify to give an opinion as to whether a plaintiff in an employment lawsuit does or does not suffer from a personality disorder. See also Bleek v. Supervalu, Inc., 95 F.Supp.2d 1118 (D. Mont. 2000) (court refused to allow two licensed mental health counselors to testify that the plaintiff’s termination caused an exacerbation of his prior PTSD that caused him to become totally disabled, remarking that neither of the counselors “is a medical expert qualified to testify that [the plaintiff’s] termination caused him to become 100% disabled”).

Perhaps the most striking example of the disqualification of a social worker’s testimony is found in Gilbert v. DaimlerChrysler Corporation, 470 Mich. 749, 685 N.W.2d 391 (2004). The Michigan Supreme Court overturned the largest single plaintiff sexual harassment verdict ($21 million) in history; a verdict that was obtained on the basis of extensive testimony by a social worker that sexual harassment caused a permanent change in the plaintiff’s “brain chemistry” that would cause her to relapse into substance abuse and depression and ultimately would lead to her untimely and excruciating death. The social worker, Mr. Hnat, testified that he had read medical records prepared by other medical professionals, and that those records read like a “preview of [the plaintiff’s] death certificate.” He further testified that the plaintiff’s body was beginning to “decompensate” and that she was “clearly dying.” The Michigan Supreme Court criticized both the trial court and the appellate court below for failing to play any “gatekeeper” role whatsoever so as to prevent the introduction of a “faux ‘medical’ opinion of an individual who lacked any medical education, experience, training, skill or knowledge.”

2. Failure to Utilize Accepted Diagnostic Protocols

An expert’s citing Daubert or Kumho Tire to justify a departure from mainstream diagnostic protocols and principles on the ground that the cases no longer absolutely require that an expert’s theories be generally accepted by the relevant scientific community would be misplaced. Kumho Tire still requires that an expert’s methodologies be reliable in order to be admissible, and as noted above, diagnosis is an inherently scientific process. Where an expert’s chosen methodologies are not based on the scientific method and lack sufficient other indicia
of reliability, the Daubert and Kumho Tire standards will not be met. Revised Rule 702 requires that expert testimony be “the product of reliable principles and methods that are reliably applied to the facts of the case.” Although the “principles” and “methods” applied in forensic psychiatry and psychology are different than those applied in the hard sciences, the requirement of reliability is no less applicable. See Turner v. Iowa Fire Equipment Co., 229 F.3d 1202, 1207 (8th Cir. 2000) (“Daubert ensures that all expert testimony is scientifically reliable before being submitted to the jury. A treating physician’s expert opinion on causation is subject to the same standards of scientific reliability that govern the expert opinions of physicians hired solely for purposes of litigation”). Other courts have reached similar conclusions. See, e.g., Amorionos v. National R.R. Passenger Corp., 303 F.3d 256 (2d Cir. 2002); Munafo v. Metro. Transp. Auth., 2003 WL 21799913 (E.D.N.Y. Jan. 22, 2003).

In employment cases, experts most frequently fail to use accepted diagnostic protocols in two ways: (1) by failing to apply the diagnostic criteria set forth in the DSM, and (2) by failing to apply principles of differential diagnosis.

(a) Failure to Use the DSM. Sometimes experts fail to follow the DSM in rendering a diagnosis. Instead, they employ subjective, idiosyncratic diagnostic criteria not found in any manual. To the extent an expert’s diagnosis of a plaintiff fails to conform with DSM-IV-TR criteria, there is an issue as to whether that diagnosis will be admissible under either Daubert or Kumho Tire. But see Mancuso v. Consolidated Edison Co. of New York, 967 F. Supp. 1437 (S.D.N.Y. 1997)(testimony of expert diagnosing a learning disorder using different criteria than those found in DSM-IV admitted).

One common situation in which a plaintiff’s expert may fail to adhere to standard diagnostic protocols occurs where the expert evaluated the plaintiff prior to the commencement of litigation, with an eye toward prescribing treatment rather than toward giving testimony in court. For example, in Gier v. Educational Service Unit No. 16, 845 F. Supp. 1342 (D. Neb. 1994), aff’d, 66 F.3d 940 (8th Cir. 1995), the court excluded expert testimony from various mental health professionals seeking to demonstrate that the plaintiffs had been sexually and emotionally abused. The court explained:

Plaintiffs have failed to demonstrate by a preponderance of the evidence that their experts’ methodologies for evaluating the plaintiffs in this particular case are reliable for the investigative purposes plaintiffs now seek to use them. The witnesses all testified that their purposes in evaluating plaintiffs were for the provision of therapy, not investigation. The methods used here may well have been sufficiently reliable for purposes of choosing a course of psychotherapy for these disturbed children, a course which must, to some extent, rely upon perception as well as reality, and upon the subjective reports of parents and others. However, the methodologies have not been shown to be reliable enough to provide a sound basis for investigative conclusions and confident legal decision-making.

The Gier court quoted Daubert for the point that “scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.” In Neely v. Miller Brewing Co., 246 F.Supp.2d 866 (S.D. Ohio 2003), the court excluded the testimony of an attorney/licensed social worker that the plaintiff suffered from PTSD as a result of race discrimination, even though she purportedly used the DSM criteria in reaching a diagnosis. The plaintiff’s discrimination claim was based on her employer not allowing her to return to light duty work after an injury when Caucasian employees were allegedly permitted to do so, vandalism to her car, and racial remarks
by a supervisor and co-workers. The social worker opined that the plaintiff met all of the *DSM-IV* requirements for a PTSD diagnosis, but the court held that she mis-applied the *DSM-IV* criteria. With respect to the stressor criterion, she opined that the name-calling and vandalism, plus incidents of being asked to fix a dangerous machine and some inappropriate touching by a non-employee that were not at issue in the lawsuit, all “coalesced to make [the plaintiff] feel threatened, unprotected, and devalued.” With respect to the persistent re-experiences criterion, the proffered expert said of the plaintiff: “She relives the inequities on a daily basis, she dreams of being raped and of having co-workers taunt her and tell her that she invited it. And make no mistake about it – Ms. Neely has been raped – of her ideals, of her trust in others and of her ability to obtain pleasure from her life.” The *Neely* court held that the proffered expert could not rely on incidents that were not at issue in the lawsuit to support a PTSD diagnosis. When those incidents were disregarded, all that was left was some name-calling and tire-slaughtering, which the court maintained did not amount to “an obvious threat to physical integrity or threat of serious injury” so as to justify a PTSD diagnosis using the *DSM-IV* criteria.

**(b)**  **Failure to Conduct Differential Diagnosis.** It is fundamental principle of forensic psychiatry and psychology that any mental evaluation must include an exploration of significant prior and concurrent events in the plaintiff’s life to determine whether there may be an alternative cause -- besides the alleged acts or omissions of the defendant -- for the mental condition at issue in the litigation. Specifically, the examiner must probe the plaintiff’s prior psychological history for evidence of preexisting mental disorders (for example, bipolar disorder or chronic depression), personality disorders, or significant prior traumas such as sexual assault or childhood sexual abuse. The examiner also must explore whether concurrent stressors exist in the plaintiff’s personal life that may have affected that person’s psychological condition, such as marital problems or substance abuse.

The examiner must not only ask questions of the plaintiff about these matters during the clinical interview but also review all available records pertaining to the plaintiff. This records review should include medical and psychological records, employment records, criminal records, divorce records, and school records. Such a records review is essential because the plaintiff’s own account of his or her history may at best be subject to memory lapses, and at worst be intentionally misrepresented.

Only after a comprehensive review of the plaintiff’s prior psychological history and potential concurrent stressors can a clinician render an objective opinion as to the causation of the plaintiff’s current condition. The expert must rule out preexisting mental or personality disorders, prior traumas, and concurrent stressors as potential causes of the plaintiff’s current condition to render any scientifically valid opinion that sexual harassment caused the plaintiff’s current psychopathology.

Numerous courts have excluded expert testimony under *Daubert* because the expert failed to conduct such a process of differential diagnosis. For example, in *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), the Third Circuit affirmed exclusion of expert testimony of two physicians who failed to employ differential diagnosis. The court remarked that “at the core of differential diagnosis is a requirement that experts at least consider alternative causes -- this almost has to be true of any technique that tries to find a cause of something.” The court went on to explain:
Defendants’ experts explained that a reliable differential diagnosis generally requires a physical examination of the patient, a review of medical records, taking a history and conducting of laboratory tests, and always requires careful consideration of alternative causes. We agree with the defendants that performance of physical examinations, taking of medical histories, and employment of laboratory tests all provide significant evidence of a reliable differential diagnosis, and that their absence makes it much less likely that a differential diagnosis is reliable.

The *Paoli* court noted that a clinician does not have to employ all these techniques for a differential diagnosis to be reliable. The court was emphatic, however, that a medical expert may not rely simply upon a plaintiff’s own self-report of symptoms and causation. It affirmed the exclusion of the testimony of one physician who had simply given the plaintiff’s a written questionnaire and based his diagnosis on the answers given by the plaintiffs. It described such questionnaires as “an unreliable source of information.” Other courts similarly have condemned plaintiffs’ experts’ failure to employ differential diagnosis to take into account the potential impact of alternative psychosocial stressors on a plaintiff’s mental condition. E.g., *Munajfo v. Metropolitan Transportation Authority*, 2003 WL 21799913 (E.D.N.Y. 2003)(plaintiff’s expert psychiatrist’s testimony excluded for failure adequately to account for alternative stressors); *Mancuso v. Consolidated Edison Co.*, 967 F. Supp. 1437 (S.D.N.Y. 1997) (failure of plaintiffs’ expert to employ differential diagnosis “is particularly disturbing in light of the common nature of many of the plaintiffs’ complaints”); *Alberts v. Wickes Lumber Co.*, 69 FEP Cases 304, 306 (N.D. Ill. 1995) (condemning plaintiff’s expert’s acceptance of plaintiff’s version of events as true and failing to consider other possible causes of plaintiff’s condition). See also *Borawick v. Shay*, 68 F.3d 597, 609 (2d Cir. 1995) (in part because there was no record of the procedures that the plaintiff’s expert used, the expert’s testimony was excluded because the court had no means, independent of the expert’s testimony, to determine whether or not appropriate methodology was applied).

Experts who simply diagnose a plaintiff as suffering from one or more mental disorders based upon the plaintiff’s self-report of symptoms and then endorse the plaintiff’s view that workplace events were the sole cause of the emotional difficulties, without conducting any independent inquiry into alternative causation, therefore are highly vulnerable to attack under Rule 702.

3. Mis-use of Psychological Testing

Propriety administered and interpreted, psychological testing can be quite helpful in an employment case if properly administered and interpreted by plaintiffs’ clinicians. Many “tests” relied upon by experts in litigation are not tests grounded in the scientific method, however, but merely inventories of symptoms. For example, in *McGuire v. City of Santa Fe*, 954 F.Supp. 230 (D.N.M. 1996), the court barred admission of the “Lost Pleasure of Life Scale” developed by the plaintiff’s expert, noting that it only produced data that was no more reliable than that “which might be drawn out of a hat.”
Improper methods of administration and interpretation include the following:

- Unsupervised administration of the test (for example, having the plaintiff complete the test at home);
- Careless scoring of tests;
- Failure to follow generally accepted protocols for scoring the tests (for example, failure to use the Exner System in scoring the Rorschach Ink Blot Test);
- Failure to take account of the various validity scales on the MMPI; and
- Taking isolated portions of a test out of context (for example, concluding that a person is depressed based upon his or her endorsement of a few items indicating depression).

A clinician's failure to use tests that have been validated, or a failure to properly administer and interpret those tests that have been validated, would render any opinion derived from those tests suspect and likely inadmissible under the Supreme Court standard set forth in Daubert.

C. Special Issues

1. “Posttraumatic Stress Dishonesty”

A PTSD diagnosis is coveted by many plaintiffs looking to cash in on their workplace misfortune. An expert witness' attaching a PTSD label to a plaintiff (whether or not any valid scientific basis exists for doing so) suggests to a jury that the plaintiff has suffered horrible torment akin to that suffered by torture victims and prisoners of war. Invoking the term “trauma” to characterize most of the workplace events that lead to employment lawsuits, however, is often grossly overstating the case.

Key to a diagnosis of PTSD is a traumatic stressor. DSM-IV-TR defines the Criterion A stressor in the following terms:

A. The person has been exposed to a traumatic event in which both of the following were present:

(1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others

(2) the person's response involved intense fear, helplessness, or horror.

Scholars who have studied and written about PTSD stress that a traumatic stressor must be dramatic and severe in order to justify a PTSD diagnosis. As one commentator has noted: “Most clinicians agree that the stressor event is not an inconsequential happening but represents a realistic threat to life or limb.” C.B. Scrignar, Post-Traumatic Stress Disorder: Diagnosis,
DSM-IV-TR sets forth a list of examples of stressors that would qualify under Criterion A. It includes military combat, violent personal assault (sexual assault, physical attack, robbery, mugging), being kidnapped or taken hostage, being the victim of a terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents, being diagnosed with a life-threatening illness, and observing the serious injury or unnatural death of another person due to violent assault, accident, war or disaster.

Nowhere on the DSM-IV-TR list of qualifying stressors for PTSD is being fired, or being the victim of employment discrimination or sexual harassment. In fact, DSM-IV-TR expressly cautions that "being fired" is not a sufficiently extreme stressor so as to qualify for a PTSD diagnosis. As Scrignar observes, although "PTSD is a favorite diagnosis for some clinicians" in sexual harassment cases, "people claiming sexual harassment may not meet the stressor criterion for PTSD. It is difficult to establish that an improper sexual advance was associated with actual or threatened death or serious injury." Two other prominent commentators agree:

In sexual harassment cases, most triggering incidents simply do not constitute life-threatening events. Although some workplace harassment involving sexual coercion, unwanted touching, or even circumstances involving humiliation before coworkers may fit within the scope of the current PTSD diagnostic criteria, it is probably inappropriate to apply the PTSD diagnosis to most sexual harassment cases. Overuse of the PTSD diagnosis in this context adds no diagnostic precision and does little to advance the understanding of the finder of fact of the plaintiff's emotional reactions.


In an attempt to circumvent the requirement that a triggering stressor be life-threatening and severe in order to support a PTSD diagnosis, some plaintiffs' experts seeking to justify a PTSD diagnosis in harassment and discrimination cases have fashioned the concept of "cumulative stressor PTSD." Under this notion, while relatively minor stressors such as name-calling or unwanted requests for would not themselves qualify for a PTSD diagnosis, a combination of such incidents over some period of time might qualify. This is not valid. Cumulative stressors might be relevant to certain types of employees (police officers and emergency medical technicians, for example) who regularly witness death and serious injury, and who might not develop PTSD as a result of one or a few such exposures but may develop PTSD as a result of multiple exposures over time. Each such incident involving death or serious injury would itself qualify as a Criterion A stressor, however. To allow a collection of non-traumatic stressors to qualify under Criterion A would run counter to the notion of PTSD as a response to extraordinary and life-threatening trauma.

In spite of the fact that employment termination, discrimination and most forms of harassment do not qualify as triggering stressors for PTSD within the DSM's definition, PTSD remains a very popular diagnosis in employment lawsuits today. In spite of any lack of scientific basis for it, plaintiffs in employment lawsuits are routinely diagnosed with PTSD following non-traumatic incidents, in most cases in the ostensible hope that the jury will award a larger verdict to a victim of PTSD than to just a victim of a bad break.
2. "Social Framework Evidence"

In spite of the impossibility of ascribing a standardized measure of emotional harm that might be presumed to flow from adverse workplace events, a new breed of expert testimony has appeared recently that purports to attempt to do just that. In recently published articles, social psychologist Louise Fitzgerald begins by positing that discovery into the existence and amount of a plaintiff's mental suffering serves no purpose other than further abuse of the plaintiff. She then proposes "social framework" evidence - based upon purportedly empirical studies of the consequences of harassment - as a solution. As she puts it: "This type of evidence is by now sufficiently strong that if the facts are proved, one has, in effect, also proved the damages - without exposing the plaintiff to the invasive procedure of a mental examination." See Louise F. Fitzgerald, Sexual Harassment and Social Justice: Reflections on the Distance Yet to Go, 58 Amer. Psychologist 915 (2003); Louise F. Fitzgerald, A New Framework for Sexual Harassment Cases, Trial 36 (Mar. 2003).

There are at least two flaws in this approach, however. The first is that the data from which Fitzgerald would conclude that sexual harassment always causes emotional harm has been held by at least one court to be so unreliable as to fail to meet the standards set by the Supreme Court in Daubert.

In EEOC v. Dial Corp., 2002 WL 31061088 (N.D. Ill. 2002), Dr. Fitzgerald attempted to use the results of a study she conducted to support her opinions that the employer's workplace was permeated by a high level of sexually hostile behavior and that the environment caused a variety of emotional and health-related problems for the women who encountered them. Dr. Fitzgerald's opinions relied heavily upon a testing instrument she developed, called the "Sexual Experiences Questionnaire" (SEQ), which purported to measure the survey respondent's "offensive sex-related experiences at work." The defendant filed a motion in limine to exclude Dr. Fitzgerald's opinions based on the SEQ on the ground that the instrument is so inherently flawed it cannot satisfy the requirements of Rule 702. Specifically, the defendant argued that: (1) the SEQ is not a valid measure of unlawful sexual harassment; (2) the SEQ's survey sample size is too small to permit the survey findings to be generalized to the entire relevant population of female employees at Dial; (3) the survey failed to confine its focus to the relevant time frame; and (4) the survey was biased.

With respect to lack of validity, the defendant attacked the SEQ as not measuring sexual harassment as defined by Title VII of the Civil Rights Act of 1964, but rather as defined in broader social science terms. The court maintained that the fact that the SEQ does not measure "legal" sexual harassment does not necessarily affect its validity, but the fact that the SEQ measures something other than "legal" sexual harassment does raise the possibility of jury confusion. The court went on to find, however, that in any event, the SEQ was not capable of measuring what it claimed to measure, i.e., offensive sex-related experiences at work. The court focused its criticism on the SEQ's design; specifically on the manner in which it posed questions to its respondents. The questionnaire asked: "During the time you worked at Dial Corporation, have any of your supervisors or coworkers..." and then it listed a number of items such as "told dirty stories or jokes?" Accompanying each item was a scale ranging from 0 to 4, such that 0 is associated with the response "never," 1 with "once or twice," 2 with "sometimes," 3 with "often," and 4 with "many times." Significantly, the SEQ failed to instruct respondents to limit their responses to incidents that were offensive or that were performed by male supervisors or coworkers, which means that several SEQ items could be answered with "3" or "4" by
respondents who may actually have experienced nothing offensive at work. For example, a respondent who enjoyed joking with her female coworkers “many times” would enter a 4 on the first item of the SEQ, even though she would not likely have viewed this activity as an offensive sex-related experience at work.

Another question on the SEQ asked if a supervisor or coworker tried to get the respondent to “talk about personal things.” Thus, a respondent who was asked “how is your family?” could be characterized as a victim of sexual harassment because accumulation of even a single point on the SEQ means that the respondent experienced “sexual harassment” as Dr. Fitzgerald defined the term. This, remarked the court, “raises serious doubts about the validity of her analysis and her conclusions.”

The Dial court also took issue with the generalizations drawn by Dr. Fitzgerald from her findings. For example, the defendant argued that the number of respondents to the SEQ was too small to warrant drawing conclusions about the experiences of all of the relevant employees. Nonetheless, Dr. Fitzgerald asserted that the SEQ’s results “provide strong inference [sic] that the working environment at Dial Aurora had a pervasive pernicious effect on the women who worked there.” As the court recognized, however, while this statement refers to a pervasive effect upon “the women who worked” at Dial, conclusions derived from the survey results cannot validly be extended beyond the subset of women who completed the survey; generalization of those conclusions to all women in the workplace is not appropriate.

The Dial court further criticized Fitzgerald’s study for failing to focus on a relevant time frame. As the court recognized, there was no limitation in the study of a time frame for occurrences of sexual events. Given that the average tenure of the survey respondents was 14 years, the court noted the possibility that many respondents may have included descriptions of events and experiences in their surveys that occurred beyond the time frame relevant to the litigation. This feature of the study, combined with the response options available to the respondents who completed the SEQ, interferes with the survey’s reliability in yet another way, according to the court:

For example, a respondent who worked at Dial for two years and who heard a “dirty joke” once per year would select the “once or twice” response option on the appropriate portion of question number 35. An employee who worked at Dial for 15 years and who heard a “dirty joke” once per year would likely select “many times” in response to the same question, even though she experienced the jokes at the same rate as the other respondent. This creates an “artifact” that causes persons who worked at Dial for longer periods of time to present higher SEQ scores. This artifact interferes with the survey data’s ability to describe the rate at which the respondents experienced the “harassing” events listed in the survey.

Finally, the Dial court highlighted several sources of bias in Dr. Fitzgerald’s study. For one thing, the court attacked Dr. Fitzgerald’s inclusion of a large number of plaintiff class members in the survey sample. As the court recognized: “The class members are highly motivated to return surveys that enhance their chance for recovery, and it seems that they may have done precisely that.” It noted that the difference between the class members’ responses and the other employees’ responses was pronounced.
As the *Dial* court recognized, the social science definition of harassment (to the extent social scientists can even agree upon one) is much broader than the legal definition. A respondent’s answering even one question on Fitzgerald’s SEQ is enough for Dr. Fitzgerald to conclude that the respondent has experienced sexual harassment -- even if that one positive response relates to non-offensive joking by same-sex co-workers or a supervisor asking an employee about her family. Thus, Dr. Fitzgerald’s SEQ, which she touts as “the most psychometrically sound measure of its type,” was not only ruled scientifically defective by the *Dial* court, it utilizes a definition of harassment that is not consistent with the legal definition.

The second flaw in Dr. Fitzgerald’s “social framework” approach is found in her own admission that the harm flowing from sexual harassment is not homogeneous. She concedes that “harassment is not a homogeneous experience and harm to the victim will vary depending on what was done to her, by whom, and for how long....” Dr. Fitzgerald cites studies indicating that sexual harassment victims report experiencing such wide-ranging symptoms as gastrointestinal disturbances, jaw tightness and teeth grinding, nervousness, binge eating, headaches, inability to sleep, tiredness, nausea, loss of appetite, weight loss, and crying spells ... anger, fear, depression, anxiety, irritability, lowered self-esteem, feelings of humiliation and alienation, and a sense of helplessness and vulnerability. To this list can be added disruption of sexual adjustment (e.g., loss of desire, flashbacks during intercourse), and difficulties with partners, families and significant others.

Dr. Fitzgerald also notes recent research linking harassment with “major depression, posttraumatic stress disorder, substance abuse and eating disorders.” In addition, Dr. Fitzgerald correctly observes that “various personal experiences, characteristics, and resources can exacerbate or buffer the effects of a stressor, leading to more or less severe outcomes than would otherwise occur.

It is unclear from Dr. Fitzgerald’s articles just how much of this symptomatology the courts are supposed to presume has been experienced by the “typical” victim of harassment. Dr. Fitzgerald admits that “there will always be some role for forensic evaluations, particularly in egregious or complicated cases.” One might wonder just how many cases are likely to be conceded by plaintiffs’ counsel as not being “egregious or complicated.”

“Social framework” evidence therefore is not a viable substitute for forensic evaluations in employment lawsuits in which emotional damages are sought. The empirical data upon which such evidence is based may not be sufficiently reliable to satisfy the *Daubert* standard. Moreover, even if reliable data could be derived regarding the incidence of harassment and discrimination and their consequent effects, the effects vary so widely from victim to victim that reliable generalizations are impossible and a specialized forensic inquiry will still be necessary in virtually every case.