

EXHIBIT 13

Not Reported in F.Supp.2d, 2005 WL 6201455 (E.D.Wash.)
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Only the Westlaw citation is currently available.

United States District Court,
E.D. Washington.
Ricky J. WALSH, an individual, Plaintiff,
v.
CITY OF RICHLAND, a Municipal Corp., and
Glenn Johnson and Jane Doe Johnson, husband and
wife and the marital community thereof, Defend-
ants.
No. CV-02-5067 EFS.
Feb. 24, 2005.

Named Expert: Maui Garza.

[Janet E. Taylor](#), Janet Taylor Law Firm, LLC, Richland, WA, for Plaintiff.

[Kenneth W. Harper](#), [Rocky Leroy Jackson](#), Menke Jackson Beyer Eloffson Ehlis & Harper, Yakima, WA, [George Fearing](#), Leavy Schultz Davis & Fearing PS, Kennewick, WA, for Defendants.

**ORDER GRANTING IN PART AND DENYING
IN PART CITY OF RICHLAND'S MOTION
TO EXCLUDE, GRANTING CITY'S MOTION
FOR PARTIAL SUMMARY JUDGMENT, AND
DENYING DEFENDANTS' MOTIONS TO
STRIKE**

[EDWARD F. SHEA](#), District Judge.

*1 BEFORE THE COURT, without oral argument, [FNI](#) are the Defendant City of Richland's (hereinafter, "the City") Motion for Partial Summary Judgment on Claim of Front Pay, (Ct.Rec.120), the City's Motion to Exclude, (Ct.Rec.118), and the Defendants' Motions to Strike Statement of Facts, (Ct. Rec. 167, 172, & 178). Plaintiff opposes the motions. After reviewing the submitted material, the record, and applicable law, the Court is fully informed and enters the instant

order granting in part and denying in part the Motion to Exclude, granting the motion for partial summary judgment, and denying the motions to strike. Briefly, Mr. Garza may testify regarding Mr. Walsh's employability, marketability, and lost promotion to City of Richland Battalion Chief position; however, Mr. Walsh may not assert a claim for front pay, i.e. lost wages following date of trial, as Mr. Garza is not qualified to testify regarding present value.

[FNI](#). In his response, Plaintiff requested oral argument. However, reviewing the materials, the Court finds oral argument is unnecessary. LOCAL RULE 7.1(h)(3).

The City's motions are both related to Plaintiff's claim for front pay. Plaintiff identified Maui Garza as an expert regarding front pay. The issue presented in the Motion for Partial Summary Judgment is whether a claim of front pay can be permitted in the absence of competent testimony to support the same; and the issues presented in the Motion to Exclude are: (1) whether Mr. Garza is competent to opine on the likelihood of promotion of an employee and on the economic consequences of promotion when these subjects are beyond his expertise, and (2) whether there is a factual basis to support an opinion.

A. Motion to Exclude

1. Standard

Rule 702 governs the admissibility of expert witnesses:

If 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....

Id. The three requirements set out in Rule 702 for the admission of testimony from a qualified expert are “(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.” [FED.R.EVID. 702](#). The trial judge's responsibility includes screening the reliability and relevance of expert testimony. [Daubert v. Merrell Dow Pharmaceuticals, Inc.](#), 43 F.3d 1311, 1318 (9th Cir.1995). For the “product of reliable principles and methods,” the Supreme Court suggested the following four factors to guide district courts: (1) whether a theory or technique can be or has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, and (4) whether the theory or technique has attained “general acceptance” in the relevant scientific community. [Daubert v. Merrell Dow Pharmaceuticals, Inc.](#), 509 U.S. 579, 593-94 (1993). The Ninth Circuit acknowledged that these factors are illustrative and may not be applicable in some cases. “Rather we read the Supreme Court as instructing us to determine whether the analysis undergirding the expert's testimony falls within the range of accepted standards governing how scientists conduct their research and reach their conclusions.” [Daubert](#), 43 F.3d at 1316-17. The objective of *Daubert's* gate-keeping requirement is “to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” [Kumho Tire Co., Ltd. v. Carmichael](#), 526 U.S. 137 (1999). The burden is on the party offering the proposed expert opinion testimony to prove by a preponderance of the evidence that the testimony satisfies the requirements for admissibility. [Daubert](#), 509 U.S. at 592 n. 10.

2. Mr. Garza's Qualifications

*2 The City argues Maui Garza is not qualified or

capable to opine on economic issues because he lacks education or training in economics. As explained below, the Court agrees Mr. Garza is not qualified to opine on economic issues, but finds Mr. Garza is qualified to testify as to Mr. Walsh's employability, marketability as an employee, and lost opportunity for a promotion to Battalion Chief with the City of Richland.

Mr. Garza possesses a Bachelor of Arts degree in the field of Bilingual/Bicultural Education, and a Masters of Education in Counseling Psychology, both from Washington State University. From 1993 to the present, Mr. Garza worked as a vocational rehabilitation consultant. Mr. Garza has been providing vocational rehabilitation services since October 1993. Within this job, he has provided testimony or participated in depositions in over fifty workmen's compensation cases, over 100 social security hearings, and three civil cases.

Mr. Garza testified he has not calculated economic losses in any of the cases he has been involved in and would not feel comfortable reducing future damages to present value. Mr. Garza explained,

[a]s Vocational Rehabilitation professional and expert, it is often my job to identify the proper method for determining salary damages. It is the job of the vocational expert to look at salary differences. I do not put the numbers into present value-it is my job to identify the appropriate dollar amounts to consider in determining a loss. In cases where future losses are to be presented in a case I then give this information to an economist, who performs the necessary calculations and provides expert opinions on discount rates and the like. In this case, however, I will simply provide the jury with the salary information and they will be able to do the simple subtraction necessary to calculate Mr. Walsh' [sic] losses. My opinion regarding the proper measure of damage and methodology for calculating the damage is the type of opinion I regularly reach in my work as an expert and I have used well-established and accepted methodologies in forming my opinions

in this case.

Due to Mr. Garza's own admitted lack of education and training in economics and Plaintiff's statement that Mr. Garza is not offering an opinion as to present value, the Court finds Mr. Garza cannot provide an opinion as to the present value of any of Mr. Garza's economic losses. *See Berlyn v. Gazette Newspapers*, 214 F.Supp.2d 530, 538 (D.Md.2002). However, given his professional experience, the Court finds Mr. Garza is qualified to provide an opinion on Mr. Walsh's employability, marketability as an employee, and lost opportunity for a promotion to Battalion Chief with the City of Richland. Therefore, the City's motion is granted in part and denied in part.

3. Methodology & Factual Foundation for Lost Promotion

The City questions the methodology and factual foundation used by Mr. Garza in determining that Mr. Walsh lost a promotion on the grounds that Mr. Garza did not apply a discernible methodology to known facts, but rather offers a pseudo-methodology that is unreliable and unknown to his discipline. The City specifically argues Mr. Garza's opinion is unreliable and does not fit within any identifiable methodology because (1) there are no peer-reviewed articles or treatises on the pseudo-methodology of predicting lost promotion opportunities, (2) Mr. Garza's pseudo-methodology is suspect because he did not conduct a labor market survey, which he acknowledges is necessary, (3) in the absence of such survey, and in the absence of accumulating data on several other topics identified by Mr. Garza, his conclusion suffers from substantial analytical gaps, and (4) an effort to assign a rate of error to these kinds of conclusions derived from this pseudo-methodology is futile.

***3** In determining whether Mr. Walsh was likely to obtain the Battalion Chief position, Mr. Garza considered Mr. Walsh's education, training, experience, physical ability, mental ability, age, geographic loc-

ation, and other factors affecting marketability. He then compared Mr. Walsh's qualifications to those qualifications expected for the Battalion Chief position. After conducting such research and analysis, in light of his training and experience, Mr. Garza opined:

Mr. Walsh's current occupation outlook is limited to his current position in the City of Richland's Fire Department due to the fact he was denied the opportunity to apply, test and interview for the position of Battalion Chief within the City of Richland's Fire Department. Had Mr. Walsh not been terminated during the aforementioned time period, it is probable that he would have been promoted to Battalion Chief within the City of Richland's Fire Department. Wages earned by Fire Fighters promoted to Battalion Chief represent what Mr. Walsh is likely to have earned had he not been terminated. As a direct result of Mr. Walsh's termination, he is unable to obtain employment as a Battalion Chief or of higher rank, thus affecting his life-time earnings.

Defendants correctly point out that during his deposition, Mr. Garza stated:

Q: But none of that training tells you when somebody will be passed over for a promotion, does it?

A: Not passed over for a promotion, no, but it gives me the knowledge needed to ascertain whether or not an individual is likely to be able to obtain that type of position.

Q: All right. Okay. Does anything in your knowledge or training predict when someone who's qualified for a position will be passed over for a position?

A: No.

However, these statements were made when discussing lost promotion in the abstract. Here, Mr. Garza was able to research the City's "previous hiring practices and what kind of review or qualifica-

tions are looked at for the future openings, who makes up those questions or what the board is comprised of to make the determination of who's going to be given to the chief for picking the Rule of Three and how much information is available to those individuals to review." Thus, Mr. Garza's opinion regarded a specific lost opportunity for a promotion for a specific position with a specific employer. For this reason, the Court finds the failure to conduct a Labor Market Survey does not make Mr. Garza's opinion unreliable. Similarly, the Court finds the absence of peer-reviewed articles regarding the methodology to be used when determining lost promotion is not grounds to exclude the testimony, given the parameters of Mr. Garza's analysis.

The analysis that Mr. Garza performed is similar to the analysis he uses when determining the marketability or employability of a petitioner in a social security or disability case. See *Hemmings v. Tidymans, Inc.*, 285 F.3d 1174, 1188 (9th Cir.2002). The Court finds Mr. Garza's methodology and factual foundation used to opine regarding Mr. Walsh's lost promotion to City of Richland Battalion Chief sufficient to withstand a *Daubert* motion and the Defendants' course of action is to challenge Mr. Garza's opinion on cross-examination.^{FN2}

FN2. The Defendants also filed Motions to Strike pages 3-5 and a portion of page 7 of Mr. Garza's Declaration submitted in opposition to the *Daubert* Motion. Defendants seek to strike pages 3-5 on the grounds that they are an untimely supplementation of Mr. Garza's expert opinion and page 7, lines 14-15 on the basis that it is hearsay, not based on personal knowledge and/or is inadmissible opinion testimony regarding when or how the fire chief could 'bypass Mr. Walsh.' " The Court denies the Motions to Strike because (1) an expert has an obligation to supplement his report and these pages contain opinions that are consistent with Mr. Garza's previ-

ous report and statements during his deposition and (2) [Federal Rule of Evidence 703](#) allows an expert to rely on hearsay "[if] of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Vocational experts rely upon an employer's past hiring and promotion processes in order to make employability and marketability determinations.

*4 Finally, the City argues Mr. Garza's opinion that Mr. Walsh has lost a promotional opportunity is not helpful to the trier of fact because his testimony focuses on a topic that simply is not amendable to expert opinion because the possibility of a promotion at any specific time is subject to very different propositions. The Court concludes Mr. Garza's experience and training in the field makes his testimony useful to the jury and, thus, Mr. Garza can testify as to Mr. Walsh's employment outlook and lost opportunity for the Battalion Chief promotion. However, Mr. Garza cannot testify as to the economic ramifications of such. For these reasons, Defendant's Motion to Exclude is granted in part (Mr. Garza is not qualified to testify regarding present value/economics) and denied in part (Mr. Garza is qualified to testify regarding Mr. Walsh's employability, marketability as an employee, and lost opportunity for a promotion to Battalion Chief with the City of Richland; and sufficient foundation and reliable methodology for such opinions).

B. Summary Judgment on Issue of Front Pay

1. Standard

A party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party seeking summary judgment must show that there is an absence of disputed issues of material fact and that he is entitled to judgment as a matter of law. [FED. R. CIV. PROC. 56\(c\)](#). In other words, the

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moving party has the burden of showing that no reasonable trier of fact could find other than for the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). “A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth.” *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir.1982). The court is to view the facts and draw inferences in the manner most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Chaffin v. United States*, 176 F.3d 1208, 1213 (9th Cir.1999).

A burden is also on the party opposing summary judgment to provide sufficient evidence supporting his claims to establish a genuine issue of material fact for trial. *Anderson*, 477 U.S. at 252; *Chaffin*, 186 F.3d at 1213. “[A] mere ‘scintilla’ of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the non[-]moving party must introduce some ‘significant probative evidence tending to support the complaint.’ “ *Fazio v. City & County of San Francisco*, 125 F.3d 1328, 1331 (9th Cir.1997) (quoting *Anderson*, 477 U.S. at 249, 252).

2. Analysis

The City argues calculations of front pay or loss of future income involve technical evidence presented by an economics expert, which Plaintiff has failed to identify. Thus, the City submits Plaintiff's front pay claim should be dismissed.

Plaintiff submits Mr. Garza will subtract the amount Mr. Walsh earned as a firefighter from what he would have earned had he been promoted to Battalion Chief. Plaintiff also states the January 30(b)(6) deposition of the City of Richland employee will provide Plaintiff with the wage information for Battalion Chiefs. With this wage information, the Court finds a reliable formula can be drafted to calculate Plaintiff's claimed past wage lost (i.e. the difference between Battalion Chief and firefighter's pay from the claimed promotion date to the date of

trial; and/or lost firefighter pay from date of termination to either the claimed promotion date or date of trial). However, Plaintiff fails to recognize that the mere subtraction of firefighter wages from Battalion Chief wages does not take into account the present value of a front pay claim (i.e. lost wages from date of trial to some date in the future); Defendants are correct that Plaintiff has a responsibility to provide evidence to assist the jury in reducing a possible lost profits award to present value. *See Bruso v. United Airlines*, 239 F.3d 848, 862 (7th Cir .2001) (listing factors to be utilized when determining lost profits); *McKenna v. Pacific Rail Serv.*, 817 F.Supp. 498, 518 (D.N.J.1993). Therefore, due to Plaintiff's failure to provide evidence to assist the jury in reducing a possible lost profits award to present value, the Court grants the Defendants' Motion for Summary Judgment, excluding the issue of front pay.^{FN3}

FN3. The Court notes this ruling does not impact Plaintiff's ability to seek back pay (i.e. claimed wages from date of termination and/or lost promotion to date of trial).

*5 Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant City of Richland's Motion to Exclude, (**Ct.Rec.118**), is **GRANTED IN PART** (Mr. Garza is not qualified to testify regarding present value/economics) **AND DENIED IN PART** ((a) Mr. Garza is qualified to testify regarding Mr. Walsh's employability, marketability as an employee, and lost opportunity for a promotion to Battalion Chief with the City of Richland, (b) sufficient foundation for such opinions, and (c) reliable methodology for such opinions).

2. Defendant City of Richland's Motion for Partial Summary Judgment on Claim of Front Pay, (**Ct.Rec.120**), is **GRANTED** (Plaintiff may not seek front pay damages, i.e. wages from date of trial to some date in future).

3. Defendants' Motions to Strike Statement of Facts, (**Ct. Recs. 167, 172, and 178**), are **DENIED**.

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