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**Commonwealth of Kentucky
Perry Circuit Court**

Moujahed Achar,)
)
Plaintiff,)
)
vs.) Civil Action No. 02-CI-00014
)
Curtis Green and Clay Green, Inc. d/b/a/ Green's)
Toyota and Toyota Motor Corporation,)
)
Defendants.)

Affidavit of John P. Tierney, MA

COMES NOW, John P. Tierney, being first duly sworn upon his oath states the following:

Defense has filed a motion to exclude my testimony and, by association, the testimony of my associate, David Gibson. This motion centers around the following key areas:

1. Qualifications
2. Medical support
3. Current Population Survey data
4. "Rough approximation"

Each of these points is refuted in the discussion that follows. As the motion centers around issues related almost solely to my testimony, this affidavit will be from me alone.

1. Qualifications

The requirement that an expert's specialized knowledge assist the trier of fact to understand the evidence or to determine a fact is in keeping with my vocational economic assessment. This is true both in the context of understanding the evidence of work disability and in determining the economic impact of that disability.

My knowledge, skill, experience, training, and education all combine to qualify me as an expert. As noted in my Curriculum Vitae (Attachment A), I have a Master's degree in Guidance and Counseling and additional graduate level coursework specific to vocational counseling, vocational rehabilitation counseling, and economics as it pertains to the assessment of loss of lifetime earnings.

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In addition to my education, I have work experience specific to placing persons with disabilities in jobs. In particular, I was employed by the Metropolitan Sewer District from 1976 to 1987 and by the River Region Mental Health/Mental Retardation Board from 1974 to 1976. In both of these jobs, I managed Employee Assistance Programs that worked toward the rehabilitation and placement of persons with disability.

From 1986 to 1992, I was under contract as a vocational expert with the U.S. Department of Health and Human Services, Social Security Administration. In this capacity, I provided opinion testimony regarding the employment potential of disabled persons seeking Social Security disability benefits. I provided such testimony at the government's request on numerous occasions.

My education and experience provide me with specialized knowledge pertaining to the immediate and ongoing needs of persons with disability in finding and maintaining employment. In addition, data are available from the U.S. Census Bureau's Current Population Survey (CPS) that pertain specifically to the earnings and worklife expectancy of persons with and without a work disability. These data are analyzed in various government publications and scientific articles, demonstrating the impact of work disability on earnings and employment (worklife). This combination of education, experience, and technical data enables me to assess the loss of lifetime earnings of Dr. Achtar in a way that is beyond the realm of common knowledge.

Defense goes on to impugn my credentials, noting that I neither practice as a rehabilitation counselor nor belong to any associations for rehabilitation counselors. Again, they confuse the basis of my testimony. For this case, I offer the court vocational expertise on the expected impact of disability on Dr. Achtar's annual earnings and worklife expectancy. This expertise requires knowledge of available statistics and how disabilities impact a person's ability to perform work and earn money. These are the skills that I have used continuously in my positions over the last twenty years. The work of a rehabilitation counselor, however, pertains to the direct counseling, training, and assisting of a person with a disability to adjust to the world of work and, if possible, to use their abilities to reenter the workforce – a totally different skill set.

1.1. Not a medical doctor

Defense criticizes my expertise, appearing to believe that, because I am not a medical doctor, I should not be allowed to testify regarding Dr. Achtar's work disability. Defense confuses the training and expertise of the two disciplines. A medical degree is necessary to make a medical diagnosis and opine to the permanency of physical limitations. However, it is the province of a vocational expert to translate these medically determined limitations into the expected impact for the plaintiff in his or her employment (current or future). Medical impairments cannot translate into vocational or economic opinions by themselves. They must be translated into vocationally-relevant data by experts knowledgeable about the world of work and the effects of impairments on ability to work.

Medical findings (e.g., the June 18, 2003 report of Dr. Christopher C. Annunziata and the March 31, 2003 report of Dr. Robert Granacher, Jr.) identify impairments for Dr. Achtar

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without detailing their specific vocational impact. Defense motion seems to require that this impact be analyzed only by a medical doctor – somebody that has no training in occupational or vocational analyses. As noted previously, I have years of experience working with people with disabilities and as a vocational expert with the U.S. Department of Health and Human Services, Social Security Administration. It is with this experience that I examine the limitations identified to analyze their impact on the plaintiff's ability to function in the workforce.

2. Medical Support

My assessment of Dr. Achtar's work disability is based on a combination of his cognitive, behavioral, and physical limitations. As with any vocational economic assessment, this is based on medical reports in combination with the self-defined limitations of Dr. Achtar. This enables me, as a vocational expert, to obtain a full view of the effects of Dr. Achtar's limitations on his day-to-day functioning.

Defense objects because the "Reported Problems" section of my December 4, 2003 report contains only physical difficulties. This section is simply a list of some of Dr. Achtar's self-reported complaints and is not intended to be a complete accounting of every problem listed in every report in the file. The following "Information Reviewed" section is included to cover other medical and psychiatric findings that were available at the time of the original report and that were considered in the preparation of the vocational economic analysis. This clearly includes the cognitive and behavioral impairments delineated by Dr. Granacher.

In addition, given the frequent time delay between conducting an initial vocational economic assessment and the eventual trial date, it is not unusual for new information to be received. In this case, this includes medical reports from Christopher C. Annunziata, MD. In his June 18, 2003 report (received by us in July 2005), he gives permanent impairment ratings for Dr. Achtar's elbow, wrist, and lower extremity. This new information supports the opinions expressed in our original report from December 2003.

3. Current Population Survey data

Defense objects to our use of the US Census Bureau's Current Population Survey (CPS) data for measuring the effects of Dr. Achtar's impairments on his future earnings and worklife expectancy. Each of their criticisms is responded to below.

3.1. Census caveat

Defense contends that the presence on the Census Bureau website of a document discussing possible limitations of CPS work disability data precludes use of the data. As titled, the document does discuss "Uses and limitations of CPS data on work disability" (Defense Attachment A). As noted in the text, however, this is intended to be a caveat regarding the data, not a document precluding their use. As noted on page 3 of the paper, "data users have to look at the questions and the use to which they plan to put the data to determine the adequacy

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for the purpose at hand.” Therefore, the paper simply cautions the user to be aware of the impact of potential errors in the survey, a wise caution before using any survey data.

Similar caveats apply to any survey. In fact, the Bureau of Labor Statistics has an even stronger warning regarding the widely-used *Occupational Outlook Handbook* (OOH). This caveat states that the OOH should not be used to compute future lost earnings in adjudication proceedings. Despite this, many expert witnesses continue to see the earnings data as valuable and continue to use them, in combination with their experience and expertise, to calculate lost earnings. Just as we recommend with the CPS data, the user must understand the source and limitations of the data and adjust their use of it accordingly.

It is important, however, for users to understand the potential imperfections in order to be able to use the data most effectively. Understanding the issues can enable an expert to use CPS (or OOH) data as one element in calculating losses in individual cases. A fuller discussion of specific points mentioned by Defense can be found in Sections 3.3 and 3.4.

3.2. Hale article

Defense points to the *Monthly Labor Review* article written by Dr. Thomas Hale (Defense Attachment B), an economist formerly employed by the Bureau of Labor Statistics (BLS). The article criticizes the CPS as a data source for studying the employment experience of persons with a disability as measured by the Americans with Disabilities Act (ADA).

Dr. Hale’s goal as an employee of BLS was to find/develop a survey to enable measurement of the employment experiences of persons with a disability as it is defined by the ADA. The ADA definition of disability is much broader than the CPS work disability definition in that it includes people who do not have limitations in their ability to work. The CPS definition, which does focus on limitations in work, is more appropriate for assessing lost earnings.

Dr. Hale's criticisms of the CPS are not new. They are either irrelevant to my calculations, or are not substantial enough to warrant discontinuing use of the CPS for estimating the earnings of persons with and without work disability. His reservations are contradicted by many leading researchers who use the CPS data to study the impact of disability (See Section 3.3 for an expanded response to specific Defense criticisms.).

There is no official government position against use of the CPS to define work disability. In fact, the Census Bureau regularly generates cross-tabulations of these data and publishes them annually on its web site.¹ Another page on the Bureau’s website enables users to extract data from the CPS to derive figures pertaining to the employment experiences of people with a work disability using this exact same definition.² In addition, two noted former Census officials (McNeil and Miller, contained in Attachment B) have authored affidavits to the validity of CPS for measuring work disability.

¹ <http://www.census.gov/hhes/www/disability/disabcps.html>

² http://www.census.gov/hhes/www/cpstc/cps_table_creator.html

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3.3. Validity/Purpose of the Data³

Defense contends that the CPS data are not valid for studying the employment experiences of people with a disability and that they were not intended to identify people with a work disability. In reality, the CPS survey is the primary source of employment data for persons in the United States, and the source of the government's monthly unemployment rates that are widely quoted by the media.

The Census Bureau collects disability statistics from four different surveys: CPS, Survey of Income and Program Participation (SIPP), the decennial census, and the American Community Survey (ACS). The Bureau notes that "depending on your needs, one survey may be more suitable than another."⁴ In terms of the disability questions asked, the sources range from limited (decennial census and ACS) to most expansive (SIPP). Most importantly, the CPS focuses on work disability – a pivotal measure for disability-specific worklife expectancy computations necessary in forensic settings.

In March of each year beginning in 1981, the CPS has been expanded to collect more information on income and employment. This supplement forms the basis for the rates of participation and employment used in the worklife expectancy tables through expanded questions that specifically address work disability.

The contention that the CPS was not intended to identify work disability is clearly wrong. The Census Bureau began publishing data from the March Supplement in 1983 in a publication entitled *Labor Force Status and Other Characteristics of Persons with a Work Disability: 1982*. The beginning of the publication addresses the issue of measuring the experiences of persons with disability:

One of the issues that this country has tried to address through the Federal statistical system is the extent to which persons with a disability are able to participate in the labor force. Programs and policies have been established to discourage discrimination and encourage training and rehabilitation, but the success of these programs and policies cannot be measured without some type of statistical monitoring system. Statistics on persons with a disability are obtained from two sources: program statistics and household surveys. While the former source is critical for certain purposes, the basic unit in a statistical monitoring system must be household surveys. Only through household surveys is it possible to obtain estimates of the number of persons with a disability and learn how their situation changes over time.

Recent changes to the questionnaire used in the March Income Supplement to the Current Population Survey (CPS) make it possible for the March CPS to be used as a source of information on the labor force status and other characteristics of noninstitutional persons with a work disability. (p. 1)

³ All documents referenced in this section are contained in Attachment B.

⁴ <http://www.census.gov/hhes/www/disability/overview.html>

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In the 1989 publication *Labor Force Status and Other Characteristics of Persons With a Work Disability: 1981 to 1988*, the Census Bureau expands on the reasoning behind these questions:

According to Saad Nagi, a major figure in the development of survey data on persons with disabilities, a person has a disability if he or she has a limitation in the ability to perform one or more of the life activities expected of an individual within a social environment. The primary way this basic concept is operationalized in the March CPS is to ask whether any household member has a health problem or disability which prevents them from working or which limits the kind or amount of work they can do. (p. 1)

Various independent researchers use CPS data in research on the employment experiences of persons with a work disability. In a presentation before the National Association of Forensic Economics (NAFE) in November 2000, John McNeil (2000a), a special assistant for disability statistics for the U.S. Census Bureau, now retired, reaffirmed the application of CPS data for the study of persons with a work disability. As part of the presentation, he produced a study entitled "Employment and Earnings of Individuals 18 to 64 by Disability Status: Data from the March 2000 Current Population Survey." The study explores the participation and employment rates for persons with work disability using the same data used in *The New Worklife Expectancy Tables*. In addition, he signed an affidavit stating he sees no reason why the CPS data for work disability cannot be used in the manner applied by Vocational Econometrics, Inc. He also authored an article further supporting use of CPS data for studying worklife issues for people with a work disability (McNeil, 2002).

Miller (2001) functioned as the chief of the Population Division of the Census Bureau. He has also signed an affidavit noting that the CPS data are "the most appropriate source for studying the employment experiences of people with a work disability."

Private researchers also use CPS data to study employment patterns of the U.S. population. Burkhauser, Daly, and Houtenville (2001), for example, used data from the March supplement of the CPS to compare the employment experience of people with and without disability during the 1990s business cycle. This paper was published through the Rehabilitation Research and Training Center (RRTC) for Economic Research on Employment Policy for People with Disability at Cornell University (http://www.ilr.cornell.edu/ped/dep/dep_pubs.html?cat_id=7). The Cornell RRTC has also published several other papers using CPS data on persons with a work disability. These include multiple papers (e.g., Houtenville, 2000a, 2000b, 2000c) that studied the prevalence, employment rates, and household income of people with disability, as well as a paper by Burkhauser, Houtenville, and Wittenburg (2003) that compared the employment trends of persons with work limitations using the CPS and two other government surveys.

The extensive use of the CPS data for research on employment issues and the similar findings from other disability data provides corroborative evidence of the validity of the CPS data. Independent researchers from various institutions and with various purposes would not all use the CPS data unless the data are meaningful.

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In addition, research using data other than the CPS shows similar impacts in employment for those with a disability. Pflaum, et al. (2003) for example, found a drop in the probability of employment using data pertaining to individuals with a spinal cord injury. McCollister and Pflaum (2004) discussed use of the National Health Interview Survey for studying the effects of disability on employment and offered specific examples for those with back pain.

3.4. Validity of the First Disability Question

A key criterion in screening for work disability is this question from the Current Population Survey (CPS) survey:

(Do you/Does anyone in this household) have a health problem or disability which prevents (you/them) from working or which limits the kind or amount of work (you/they) can do?

Defense contends that this question is invalid because it is ambiguous and that people may knowingly or unknowingly respond incorrectly. This question, however, was based on work done by the Social Security Administration (McNeil, 2002; included in Attachment B) and is accepted as a valid one as shown by the fact that an almost identical question is used as the cornerstone in another major survey, the Survey of Income and Program Participation (SIPP), also conducted by the Census Bureau. Similar questions are asked in the National Health Interview Survey, conducted by the U.S. Census Bureau for the U.S. Department of Health and Human Services, and the Panel Study of Income Dynamics, conducted at the Survey Research Center, Institute for Social Research, University of Michigan.

Statistical analysis of CPS data (Gibson, 2001; Attachment C) demonstrates that 81% of those responding positively to this question also responded positively to one of the other six questions comprising the complete work disability definition.⁵ Of the remaining 19%, the overall rate of employment is .77 – in line with the overall Not Severely Disabled rate of .73, and well below the Not Disabled rate. If the question were as ambiguous as Defense claims, one would not expect such consistency in responses specific to probability of employment.

3.5. Use of statistics for doctoral degrees

In conducting our assessment, we used data specific to males with either a doctoral degree (e.g., PhDs, EdDs) or a professional degree (e.g., MD, JD). Defense objects to our use of such data because they claim it is “broad and non-representative.” In fact, we used the data in order to provide the trier of fact with a reliable estimate of the effect of disability on earnings and worklife expectancy.

Based on a statistical analysis of the CPS data that we utilized, the overall rates of employment for persons with a professional degree were not statistically different from persons with a doctorate. (This finding is further supported by data from the US Census Bureau’s newest survey, the American Community Survey – employment rates for the two degrees are not

⁵ The complete work disability definition can be found at:
<http://www.census.gov/hhes/www/disability/disabcps.html>

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statistically different.) Therefore, in order to derive a sufficient sample size to further measure employment by age, we combined the two education levels. Limiting the data only to those with medical degrees would have reduced the sample size to such a degree that the resulting statistic would have been unreliable. By using all males with doctoral degrees, we are able to provide reliable data for people similar to Dr. Achtar.

4. “Rough Approximation”

Defense further criticizes my opinion because I mention that the estimate of Dr. Achtar’s lost future earnings is a “rough approximation.” No statistic, no matter how fine-tuned, can provide an exact predictor of an individual’s future. The United States Supreme Court recognized this uncertainty several years ago, in their decision in *Jones and Laughlin Steel Corporation v. Howard E. Pfeifer* 462 U.S. 523 (1983):

By its very nature the calculation of an award for lost earnings must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a “rough and ready” effort to put the plaintiff in the position he would have been in had he not been injured.

In using that phrase, I was not intending to be vague, but simply to acknowledge a fact as presented by the US Supreme Court. Indeed, my entire analysis is based upon statistics intended to provide a strong scientific foundation for each component of Dr. Achtar’s future expected earnings.

FURTHER, THE AFFIANT SAYETH NAUGHT.

John P. Tierney, MA
Senior Analyst

Subscribed and sworn to before me, a notary public, in this ____ of September, 2005.

Notary Public

My Commission Expires _____