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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

DANIEL WILLIAMS, JOSEPH WILLIAMS,
EMMANUEL BATTLE, DELLENA
BATTLE, infants by their mother and natural
guardian, DEBRA BATTLE, and DEBRA
BATTLE, Individually,

Plaintiffs,

vs.

Index No. 9454/96

THE CITY OF NEW YORK AND THE NEW
YORK CITY DEPARTMENT OF HEALTH,

Defendants.

AFFIDAVIT OF ANDREW GLUCK, EdD, CRC

COMES NOW, Andrew Gluck, EdD, CRC, being first duly sworn upon his oath states the following:

Regarding the Plaintiffs' Disability Status

Defense states that "each of these plaintiffs is a seemingly normal child" and that "there is no evidence that any of the infant plaintiffs is 'disabled.'" This is incorrect.

Neuropsychologist Joel Redfield, PhD, has classified these plaintiffs as disabled. Dellena Battle, Emmanuel Battle, Daniel Williams, and Joseph Williams have all been diagnosed by Dr. Redfield as having cognitive disorders and Attention-Deficit/Hyperactivity Disorders (ADHD). In addition, Dr. Redfield has diagnosed Dellena as having a receptive language disorder. He has determined that Emmanuel has an IQ of 83 (13th percentile) and Daniel an IQ of 84. Joseph has been further diagnosed with a reading disorder and an IQ of 78 (7th percentile). These are conditions that will result in work limitations for these plaintiffs as adults, and further cause them to meet the definition of work disability (see next section). Therefore, the defendant's assertion is clearly wrong.

Regarding the Definition of Disability

Defense asserts that "the United States government's lifework expectancy charts do not categorize workers by disability status" and later that the computer program I used contains "random characterizations of disabled versus nondisabled [that] were concocted by Mr. Gamboa." In fact, the government created and controls the definition of work

disability that is used by them in gathering earnings and employment information on persons with and without a disability.

The U.S. Census Bureau, using research and survey work done by them and by the Social Security Administration, developed the definition of work disability for use in the Current Population Survey (CPS) and began using it in the March Supplement survey in 1981. As part of this definition, the government also created the sub-categories of severely and not severely disabled. As early as 1983, the Census Bureau began publishing data based on the definition. This first publication, *Labor Force Status and Other Characteristics of Persons With a Work Disability: 1982* was updated in 1989.

Beginning with data from the 1995 survey, the Census Bureau has published the data on its web site (<http://www.census.gov/hhes/www/disable/disabcps.html>). My opinion and the computer program I used simply utilize the government data that continue to be tabulated using the government's original definition.

In a presentation before the National Association of Forensic Economics (NAFE) in November 2000, John McNeil, a now retired special assistant for disability statistics and former division chief for the U.S. Census Bureau, presented the definition of work disability used in the CPS. This definition (Attachment A) continues to be used by the Census Bureau.

Again, the defense is clearly wrong.

Regarding Educational Attainment and the Effects of Work Disability

Defense focuses on the fact that my assessments do not include a reduction in educational attainment. This is irrelevant to a proper assessment of lost earnings. Persons with high school diplomas have a wide range of intellectual capabilities and, therefore, a wide range of earning capabilities. Saying that a person will still be able to obtain a high school diploma does not negate the possibility of a loss of earnings.

Even with diplomas, the plaintiffs will have to contend with such problems as low IQ (as low as the 7th percentile) and ADHD. These problems place them well below what is expected of the average high school graduate, placing them at a comparative disadvantage in the labor market in terms of finding and maintaining jobs and in the types of jobs they are likely to hold. These disadvantages will result in lower lifetime earnings than they would have had absent these problems.

These facts are supported by information available from the U.S. Census Bureau (<http://www.census.gov/hhes/www/disable/disabcps.html>). These data demonstrate that persons meeting the government's definition of work disability, as these plaintiffs do, are less likely to work than persons without a work disability. In addition, even when they work year-round, full-time, persons with a work disability earn less on average than persons without a work disability.

These facts are further supported in research produced by Edward Yelin, PhD, from the University of California at San Francisco (Attachment B) in a study entitled “The Labor Market and Persons with and without Disabilities: Analysis of the 1993 through 1995 Current Population Surveys.” This study shows that persons with a work disability are more likely to lose a job when employed and less likely to obtain a new job when unemployed.

Regarding the VALE Software

Defense criticizes my use of a computer program entitled Vocational Assessment of Lost Earnings (VALE). The VALE software used does not develop opinions on cases. It is used merely as a spreadsheet tool for calculating earning capacity, worklife expectancy, and loss of lifetime earnings. As such, use of the VALE software is similar to use of a calculator, which is accepted without question. As with a calculator, users review the output for reasonableness and accuracy.

Use of VALE allows a very complex calculation to be conducted accurately and efficiently. The U.S. Department of Labor, in the *Dictionary of Occupational Titles*, defines the worker characteristics required in over 12,000 jobs existing in the United States. In addition, the U.S. Census Bureau and the U.S. Bureau of Labor Statistics provide information on the number of people employed in 500 job categories and the average earnings of people in these categories. The software combines this government data, producing average earnings for persons with specific characteristics. In this case, average earnings were calculated given the abilities of the plaintiffs both with and without their limitations. This calculation could be conducted manually, but doing it manually would take tremendous time and would increase the likelihood of error.

To assure accuracy, quality control personnel within Vocational Econometrics checked the VALE software calculations thoroughly and repeatedly. In addition, other personnel under the expert’s supervision check the manual input of the expert to assure consistency with the facts of the case.

Regarding My Degree in Economics

Defense asserts that I have no degrees in economics, though my baccalaureate degree is in economics. In addition, my doctoral degree was an interdisciplinary degree combining the fields of philosophy, psychology, and economics. One of the dissertation advisors was an economist, and another a statistician.

Regarding *Estevez* and *Myrlak*

Defense notes two court cases that “specifically have criticized Dr. Gluck.” As my testimony list (Attachment C) notes, I have testified in about 60 cases in various jurisdictions. Defense has picked out two isolated cases in which someone had a disagreement with my presentation. It is expected in the fields of vocation rehabilitation and economics that disagreements will occur, especially when dealing with forecasts of

the future experiences of people. The U.S. Supreme Court acknowledges the uncertainty in calculating lost earnings in a 1983 decision (*Jones and Laughlin Steel Corporation v. Howard E. Pfeifer* 462 U.S. 523):

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 *Myrlak v. Port Authority of New York and New Jersey*, 694 A.2d 575 (N.J. 1997), the issue centers on the reduction for taxes. When I first produced a report in this case, I was asked not to consider the possible impact of taxes, but was later asked to do so at the time of trial. The confusion centered around the presentation of the tax impact, an issue irrelevant in this case.

Estevez v. United States of America, 72 F. Supp. 2d 205 (S.D.N.Y. 1999) dealt with a case of a boy with foot drop. The future earnings for this are not as obvious as the current cases. My opinion as a vocational rehabilitation expert was that future earnings and worklife expectancy would be reduced as a result of the boy’s limitations. The judge disagreed on the issue of earnings, while agreeing with the reduction of worklife. In the current cases, the plaintiffs have ADHD and a reduction in mental capacity, which more obviously result in earning capacity lower than the capacity for persons without these limitations.

Regarding *Elcock v. Kmart*, 228 F. 3d 448,452 (3d Cir. 2000)

Defense further asserts that the court in *Elcock* criticized the use the worklife expectancy estimates produced by Vocational Econometrics. This is a gross misstatement of the court’s opinion.

In fact, the worklife expectancy tables are not mentioned in the decision by either the vocational or the economic expert. The vocational rehabilitationist in the case notes that he applied a procedure recommended by A. M. Gamboa in determining the plaintiff’s loss, a procedure that the defense did not dispute was an accepted methodology in the vocational rehabilitation field.

The Third Circuit in this case remanded the case for a new trial on economic damages to include a Daubert hearing. It did not state, as defense in this case asserts, that testimony based on the tables should be overturned. The tables were not mentioned in the decision.

Regarding *Michels v. United States*, 815 F. Supp 1244, 1259 (D. Iowa 1993)

Defense states that the court in *Michels* criticized use of the worklife expectancy tables produced by Vocational Econometrics. This statement, however, is misleading in that it is incomplete.

The court disallowed the use of the tables by an economist. The economist used the tables to quantify a loss of worklife expectancy, despite the fact that the vocational rehabilitation expert opined that there was no loss of worklife expectancy in the case.

In addition, the court objected to the worklife publication used by the economist because it was an older version produced before the passage of the Americans with Disabilities Act (ADA). In the current case, I used data gathered after passage of the ADA.

The court also stated that the tables used data for persons with at least a 5% whole body impairment or who were eligible for Social Security benefits. As seen in Attachment A, the U.S. Census Bureau's definition of work disability does not consider percent of whole body impairment, and eligibility for Social Security is only one factor out of seven that are included in the definition.

Michels also questioned the use of the worklife statistics because they are derived from average statistics for various disability populations. The consternation seems to stem from a need for a very precise formula to apply these population statistics to an individual plaintiff. This is the same quandary vocational and economic experts must face when applying any statistic, not just worklife expectancies.

Averages from various populations have long been accepted as a means for prediction – life expectancy, earnings, and others. No statistic, no matter how fine-tuned, can provide an exact predictor of an individual's future. This is as true of worklife expectancies as it is of various measures of annual earnings and growth and discount rates.

Economists, actuaries, insurance companies, and gambling establishments use population averages when making rational bets on human outcomes. The basic belief is that in the absence of more specific and precise information, the best predictors of outcomes are statistical averages or relative frequencies. Following this, it is not true that disability data would have to be disaggregated by disability type in order to be reliable or meaningful.

Even if disaggregated data existed, its use would be limited at best. Persons with the same diagnosis and the same length of time since injury can have dramatically different experiences in terms of their experience in the workplace, especially when education level is factored in. Worklife expectancy statistics of all sorts must be used responsibly and applied by persons familiar with the world of work and career theory. When assessing persons with disability, the user must be familiar with the effects of impairment on ability to work and earn money as well as the experiences of disabled persons in the labor market.

I considered the limitations of the plaintiffs in this case when developing my opinion regarding loss of worklife expectancy. For three of the plaintiffs, it was my opinion that their post-injury worklife expectancy was best represented in the government's definition of not severely work disabled. For the fourth plaintiff, Daniel Williams, my opinion is that he is 50% of the way between the averages for not severely disabled and nondisabled

male high school graduates. My use of the statistics provided by the U.S. Census Bureau enables me to offer a scientific basis from which to mold my opinion regarding worklife expectancy for the plaintiffs in this case.

FURTHER THE AFFIANT SAYETH NAUGHT.

Andrew Gluck, EdD, CRC
Vocational Economic Analyst

Subscribed and sworn to before me, a notary public, in this ____ of May 2001.

Notary Public

My Commission Expires _____