

1 William J. Becker, Jr., Esq. (SBN 134545)
2 **THE BECKER LAW FIRM**
3 11500 Olympic, Blvd., Suite 400
4 Los Angeles, California 90064
5 Phone: (310) 636-1018
6 Fax: (310) 765-6328
7 Attorneys for Plaintiff, David Coppedge

FILED
LOS ANGELES SUPERIOR COURT

JAN 27 2012

JOHN A. CLARKE, CLERK
[Signature]
BY RAUL SANCHEZ, DEPUTY

8 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

10 **DAVID COPPEDGE**, an individual;
11
12 Plaintiff,

Case No. BC435600

The Honorable Ernest M. Hiroshige, Dept. 54

13 vs.

14 **JET PROPULSION LABORATORY**, form
15 unknown; **CALIFORNIA INSTITUTE OF**
16 **TECHNOLOGY**, form unknown; **GREGO-**
17 **RY CHIN**, an Individual; **CLARK A.**
18 **BURGESS**, an Individual; **KEVIN KLENK**,
19 an Individual; and **Does 1 through 25**, inclu-
20 sive,

**NOTICE OF MOTION AND MOTION
IN LIMINE NO. 5 TO PRECLUDE DE-
FENDANT'S LABOR ECONO-
MIST/STATISTICIAN EXPERT WIT-
NESS FROM TESTIFYING REGARD-
ING PLAINTIFF'S MITIGATION EF-
FORTS; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

21 Defendants.

[Decl. of W.Becker, Exhs. , Appdx. of Non-
Calif. Auth's., filed concurrently herewith]

FSC: February 24, 2012
HEARING TIME: 9:00 a.m.
DEPT: 54

Trial Date: March 7, 2012

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BY FAX

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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on February 24, 2012, at 9:00 a.m., or as soon after that
3 date as the matter can be heard, in Department "54" of the above-entitled court, located at 111 N.
4 Hill St, Los Angeles, California 90012, Plaintiff David Coppedge ("Plaintiffs"), will move the
5 Court for an Order in limine to preclude Defendant's labor economist/statistician expert witness
6 from offering his opinion regarding Plaintiff's mitigation efforts, including the reasonableness of
7 Plaintiff's efforts to find comparable work.
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9 This motion is made on the grounds that Defendant's expert witness lacks the qualifica-
10 tions to render such testimony. This motion is made on the further grounds that such testimony
11 would be based upon speculation and conjecture, is not sufficiently beyond the common experi-
12 ence of the jury, would not meaningfully assist the jury's understanding of the facts and issues,
13 would mislead the jury and confuse the issue, would invade the province of the jury and would
14 otherwise prejudice Plaintiff's case by suggesting that an expert's opinion is backed by certain
15 authority the jurors lack.
16

17 On November 24, 2012, counsel for Plaintiff satisfied the meet and confer requirements of
18 Local Rule 3.57 by speaking with counsel for Defendant regarding the substance of this Motion.
19 See Declaration of William J. Becker, Jr. Defendant's counsel stated that Defendant would not
20 agree to limit the evidence at trial in a manner consistent with the limitations requested in this
21 Motion. *Id.*
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1 This Motion will be based on this notice of motion, on the attached Memorandum of
2 Points and Authorities, the Declaration of William J. Becker, Jr., and Exhibits attached thereto in
3 Support Thereof; the Appendix of Non-California cases; all papers, pleadings, and records on
4 file in this action and on any evidence presented at the hearing of the motion.
5

6 DATED: January 27, 2012

THE BECKER LAW FIRM

William J

Becker Jr, Esq

By:

WILLIAM J. BECKER, JR., ESQ.

Attorneys for Plaintiff, DAVID COPPEDGE

Digitally signed by William J Becker Jr,
Esq
DN: cn=William J Becker Jr, Esq, o=THE
BECKER LAW FIRM, ou,
email=wbeckerlaw@gmail.com, c=US
Date: 2012.01.27 14:43:03 -08'00'

01/27/12

THE BECKER
LAW FIRM
1000 Orange Blvd.
Los Angeles, California
90061

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Is a labor economist/statistician qualified to express an opinion as to whether a plaintiff
4 has performed an adequate job search? Defendant JPL's labor economist/statistician expert wit-
5 ness intends to offer the opinion that Coppedge failed to use "reasonable" efforts to find "compa-
6 rable" employment. But JPL's labor economist/statistician expert witness is not the factfinder,
7 and has no experience hiring workers with Coppedge's professional skills and qualifications. In
8 short, he has no business telling a jury what it can discern from itself by listening to the evidence

9
10 JPL's expert witness's opinions lack foundation because they are based upon speculation
11 and conjecture, not reliable facts or data. *See* Evid. Code § 801(b); Evid. Code § 803 (no proper
12 reliance upon speculation and conjecture). For these reasons, Coppedge seeks an order limiting
13 JPL's expert witness testimony and precluding him from giving opinion testimony about whether
14 Coppedge (1) failed to use reasonable efforts to find alternative work, and (2) failed to apply for
15 or accept "comparable" work.
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17 **II. MOTIONS IN LIMINE**

18 This motion is authorized pursuant to Local Rule 3.25(h)(2), which provides:

19 "In a direct calendar case, the parties must file and serve any trial preparation motions
20 and dispositive motions, other than summary judgment motions, including motions in
21 limine or bifurcation motion, with timely statutory notice so as to be heard on the day of
the final status."

22 **III. LEGAL STANDARDS**

23 The court in its discretion may exclude evidence if its probative value is substantially
24 outweighed by the probability that its admission will (a) necessitate undue consumption of time
25 or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the
26 jury. Evid. Code § 352.
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1 Evidence Code § 801 prescribes two specific preconditions to the admissibility of expert
2 opinion testimony. The testimony must be of assistance to the trier of fact and must be reliable.
3 Evid. Code, § 801. The opinion of the expert will assist the factfinder if the subject of inquiry is
4 “sufficiently beyond common experience.” *Id.*

5
6 **IV. JPL’S LABOR ECONOMIST/STATISTICIAN EXPERT WITNESS IS**
7 **UNQUALIFIED TO OFFER OPINION REGARDING THE REASONABLENESS**
8 **OF COPPEDGE’S EFFORTS TO FIND COMPARABLE WORK, AND HIS**
9 **OPINIONS ARE BASED ON SPECULATION AND CONJECTURE, NOT**
10 **SUFFICIENTLY BEYOND COMMON EXPERIENCE, WILL NOT**
11 **MEANINGFULLY ASSIST THE JURY AND WILL SUBSTANTIALLY**
12 **PREJUDICE COPPEDGE’S CASE.**

13 Damages may be mitigated by a showing that a plaintiff seeking work, through the exer-
14 cise of reasonable diligence and effort, could have procured comparable employment. *See Par-*
15 *ker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 182, n.5. The reasonableness of
16 an employee’s efforts, or his excuses for failure, to find other similar employment is properly
17 submitted to the jury as a question of fact. *Id.*, citing numerous cases for the proposition.
18 The duty of mitigation of damages does not require the plaintiff to seek or to accept other em-
19 ployment of a different or inferior kind. *Id.* at 182. A lesser compensation is not to be considered
20 in mitigation, as an employee is not required to accept it. *Rabago-Alvarez v. Dart Industries, Inc.*
21 (1976) 55 Cal.App.3d 91, 98-99 (citing *Parker, supra*, stating “the employee’s rejection of or
22 failure to seek other available employment of a different or inferior kind may not be resorted to
23 in order to mitigate damages”).

24 JPL’s expert witness, Michael Ward, Ph.D., was deposed on January 24, 2012.¹ Dr.
25 Ward identified himself as a “labor economist” and “statistician.” Dr. Ward testified that he
26 agreed that an employee’s efforts to find similar employment or his excuses for failing to find

27 ¹ Coppedge is unable to obtain a certified copy of the deposition transcript in time to file this motion. Coppedge
28 intends to supplement this motion with references to page and line prior to or at the hearing of the motion.

1 similar employment are for a jury to decide based upon the facts, not based upon an expert wit-
2 ness's opinions ("Q. Do you agree that the reasonableness of an employee's efforts to find other
3 similar employment or his excuses for failing to find other similar employment are for a jury to
4 decide on the facts, not based on an expert's opinion? A. Well, it's certainly the role of the jury
5 to make that determination."). (Becker Decl., Exh. No. 1, Excerpts from the Deposition of Mi-
6 chael Ward taken January 24, 2012.) Dr. Ward further testified that he is not and has never been
7 qualified as an expert witness in the fields of vocational rehabilitation , executive recruitment or
8 employee headhunting. *Id.* In fact, his resume contains no mention of any experience in fields
9 relating to hiring and career development. (*Id.*, Exh. No. 2, Resume of Michael Ward, attached
10 to the Deposition of Michael Ward as Exh. 1.) Indeed, Dr. Ward's only experience with hiring
11 people is hiring people for his own company. (*Id.*, Exh. No. 1.)

14 Dr. Ward's ultimate opinion concerning Coppedge's economic loss derives from his cal-
15 culation of past and future lost earnings based on at least two erroneous assumptions: (1) That
16 Coppedge must accept and cannot refuse employment at a salary level constituting the average
17 within the field of systems administration; and (2) that Coppedge could find comparable em-
18 ployment within a particular range of time without adjusting for age (he turns 61 years of age in
19 March 2012), residency location and commute length/time (he resides in Santa Clarita), skill set
20 (he is experienced in Solaris Unix systems and Cisco networks and not in Windows, cloud tech-
21 nology or other systems) or health (he experiences severe headaches twice per day that have in-
22 creased in intensity since leaving JPL).

24 Dr. Ward testified repeatedly that he bases his opinions on the facts made known to him
25 through Coppedge's deposition testimony (taken on June 10, 2011) and interrogatory responses
26 (verified September 7, 2011), and would thus be unaware of additional facts that may be brought
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1 out at trial. He further testified that in his opinion as a labor economist, Coppedge has not been
2 “continuously” looking for work and should be receiving rejections from applications, this de-
3 spite the fact that Coppedge utilizes a protocol in which jobs potentially matching his skills and
4 qualifications are “pushed” to his e-mail when they become available through a service he sub-
5 scribes to.
6

7 To support his opinions, Dr. Ward relied upon internet articles showing that the job mar-
8 ket for IT systems administrators in the Southern California region is strong, but failed to look at
9 similar internet articles showing that the prospect for applicants in any field over the age of 55 is
10 bleak (even while conceding that it is more difficult for older individuals to find comparable em-
11 ployment).
12

13 In short, Dr. Ward cannot say without speculating or relying on insufficient data whether
14 Coppedge’s efforts to find work have been reasonable because (1) he doesn’t know all the facts,
15 and (2) his opinion is not sufficiently beyond common experience such that his opinion would in
16 any way assist the jury.

17 Nor is Ward qualified to say what kind of work would be comparable, substantially simi-
18 lar or substantially equivalent to Coppedge’s former job at JPL without speculating as to whether
19 Coppedge rejected or failed to seek different or inferior kind of work. *See Parker, supra*, 3
20 Cal.3d at p. 182 (“[B]efore projected earnings from other employment opportunities not sought
21 or accepted by the discharged employee can be applied in mitigation, the employer must show
22 that the other employment was comparable, or substantially similar, to that of which the employ-
23 ee has been deprived; the employee’s rejection of or failure to seek other available employment
24 of a different or inferior kind may not be resorted to in order to mitigate damages.”) What con-
25 stitutes “reasonable” efforts is also a question of fact. “A substantially equivalent position is one
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1 which affords 'the claimant virtually identical promotional opportunities, compensation, job re-
2 sponsibilities, working conditions, and status.'" *Meyer v. United Air Lines, Inc.* (N.D. Ill. 1997)
3 950 F.Supp. 874, 876.

4 This Court must "make certain that an expert ... employs in the courtroom the same level
5 of intellectual rigor that characterizes the practice of an expert in the relevant field." *Elsayed*
6 *Mukhtar v. California State University, Hayward* (9th Cir. 2002) 299 F.3d 1053, 1063 (quotation
7 and citation omitted). Dr. Ward's own testimony indicates he is not a vocational expert qualified
8 to render opinions about Coppedge's job search and related mitigation of damages.

9 Dr. Ward's opinions are intended to substitute for the jury's own decisionmaking based
10 on facts to be presented. An expert's opinion is often given greater weight by a jury. *Elsayed*
11 *Mukhtar, supra*, 299 F.3d at pp. 1063-1064 (recognizing "the aura of authority experts often ex-
12 clude, which can lead juries to give more weight to their testimony"). To allow Dr. Ward to in-
13 vade the province of the jury and to substitute his opinions for theirs would substantially preju-
14 dice Coppedge's case.

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17 **V. CONCLUSION**

18 Dr. Ward's testimony should be limited to his economic analysis – his calculations of
19 Coppedge's economic losses – and JPL should be precluded from offering expert testimony
20 on mitigation of damages or employment search efforts. The court is respectfully urged to enter
21 an order precluding Dr. Ward from expressing an opinion regarding the reasonableness of
22 Coppedge's search efforts and whether Coppedge failed to accept comparable employment.

23 DATED: January 27, 2012

THE BECKER LAW FIRM

24
25 William J
26 By: Becker Jr, Esq
27 WILLIAM J. BECKER, JR., ESQ.
28 Attorneys for Plaintiff, DAVID COPPEDGE

Digitally signed by William J Becker
Jr, Esq
DN: cn=William J Becker Jr, Esq,
o=THE BECKER LAW FIRM, ou,
email=bbbeckerlaw@gmail.com, c=US
Date: 2012.01.27 14:42:51 -0800