

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT – DIVISION 8
CIVIL ACTION NO. 14-CI-2514

CHARLES COWING

PLAINTIFF

vs.

AMENDED COMPLAINT

LOCKHEED MARTIN CORPORATION, et al

DEFENDANTS

Plaintiff Charles Cowing for his Amended Complaint against defendants Lockheed Martin Corporation and Andy Commare herein states as follows:

I

Nature of the Case

1. This is an action pursuant to the Kentucky Civil Rights Act (KCRA), KRS Chapter 344, seeking recovery of damages, including lost pay and benefits, compensatory damages for emotional distress and mental anguish, attorney's fees, litigation expenses and costs arising from defendants' unlawful actions.

II

Jurisdiction and Venue

2. Fayette Circuit Court has jurisdiction over this case pursuant to KRS 23A.010, and venue is proper herein because the claims arose in Fayette County, Kentucky.

Ex-A

III

Parties

3. Plaintiff Charles Cowing is a citizen of the United States of America and a resident of Fayette County, Kentucky.

4. Defendant Lockheed Martin Corporation (Lockheed Martin) is a Maryland corporation that maintains a place of business in Fayette County, Kentucky. Lockheed Martin's agent for service of process, according to electronic databases maintained by the Kentucky Secretary of State, is CSC – Lawyers Inc. Service Company, 421 West Main Street, Frankfort, KY 40601.

5. Defendant Andy Commare, who was identified in the original complaint as Andy Commere, is, upon information and belief, a resident of Madison County, Kentucky. He is sued in this action because he took actions giving rise to individual liability and causing injury to Cowing in Fayette County, Kentucky.

IV

Facts Giving Rise to Lawsuit

6. At all times pertinent hereto, Cowing has been an employee of Lockheed Martin within the meaning of KRS 344.030(5).

7. At all times pertinent hereto, Lockheed Martin has been the employer of Cowing within the meaning of KRS 344.030(2).

8. At all times pertinent hereto, Cowing was a “person” and/or “individual” within the meaning of KRS 344.010(1).

9. At all times pertinent hereto, Cowing was a “person” and/or “individual” within the meaning of KRS 344.010(1).

10. From November 1997 to March 2001 Cowing served in the United States Army.

11. While serving in the United States Army, Cowing suffered significant injuries to his right knee, feet and lower back.

12. As a result of the aforescribed injuries and their further deterioration, Cowing is substantially limited in the following major life activities within the meaning of KRS 344.010(4)(a): performing manual tasks, walking, sitting, standing, lifting, reaching and working.

13. At all times pertinent hereto, Cowing suffered from a “disability” within the meaning of KRS 344.010(4).

14. At all times pertinent hereto, Cowing was a qualified individual with a disability within the meaning of KRS 344.030(1).

15. On or about April 2, 2012, Cowing began employment with Lockheed Martin at its facility located in Fayette County, Kentucky.

16. Cowing’s job for Lockheed Martin was aircraft mechanic (structural).

17. At all times pertinent hereto, Cowing performed his job duties satisfactorily for Lockheed Martin, notwithstanding that he suffered from a “disability” within the meaning of KRS 344.010(4).

18. On August 12, 2013, Cowing fell at work and began experiencing back pain severe enough to affect his ability to continue working that day.

19. Cowing promptly reported the incident and his situation to a supervisor, Rob Gates.

20. Subsequently, Cowing discussed the incident and his situation with another supervisor, Justin Miculinich, known in the Lockheed Martin workplace as "Mitch."

21. Miculinich suggested to Cowing that he have his doctor prepare a "profile" for him. A "profile" is a list of physical work restrictions.

22. Following his discussion with Miculinich, Cowing drove himself to the emergency room at Central Baptist Hospital, as he had been directed to do by Lockheed Martin's supervisory personnel.

23. Consistent with Miculinich's direction Cowing requested his physician, Dr. Luis Vascello, to prepare for him a list of physical restrictions.

24. Dr. Vascello did prepare this list of physical restrictions regarding Cowing and provided it to Lockheed Martin on or about September 6, 2013.

25. The physical restrictions applicable to Cowing as stated by Dr. Vascello were as follows: (1) not to lift, push or pull over 20 pounds with both upper extremities; (2) not to bend, stoop or perform twisting motions over 20 min. per hour without using torquing activities; (3) rotate tasks using different muscles/tendon groups; (4) pause for stretching 5 minutes per hour; (5) stand or walk to tolerance; (6) alternate from sitting to standing working

positions; (7) perform work in kneeling or squatting positions up to 10 minutes per hour; (8) not to lift over 20 pounds from floor level up to 10 minutes per hour; (9) not to lift over 15 pounds above shoulder level up to 10 minutes per hour; (10) no long lever arm lifting with trunk rotation and flexion; and, (11) limit positions causing bending and twisting of the lower spine.

26. In performing his actual job duties for Lockheed Martin as a aircraft mechanic (structural), Cowing was not required to lift, push or pull over 20 pounds with both upper extremities.

27. In performing his actual job duties for Lockheed Martin as an aircraft mechanic (structural), Cowing was able to rotate tasks using different muscles/tendon groups.

28. In performing his actual job duties for Lockheed Martin as an aircraft mechanic (structural), Cowing was able to pause for stretching 5 minutes per hour.

29. In performing his actual job duties for Lockheed Martin as an aircraft mechanic (structural), Cowing was able to stand or walk to tolerance.

30. In performing his actual job duties for Lockheed Martin as an aircraft mechanic (structural), Cowing was not required to lift over 20 pounds from floor level at least ten minutes per hour.

31. In performing his actual job duties for Lockheed Martin as an aircraft mechanic (structural), Cowing was not required to lift heavy objects.

32. In performing his actual job duties for Lockheed Martin as an aircraft mechanic (structural), Cowing did not have to lift over 15 pounds above shoulder level.

33. In performing his actual job duties for Lockheed Martin as an aircraft mechanic (structural), Cowing did not have to do any long lever arm lifting with trunk rotation and flexion.

34. Although Cowing did have to bend and twist in performing his actual job duties for Lockheed Martin as an aircraft mechanic (structural), it was possible for him to limit these activities while still performing his job to the reasonable satisfaction of Lockheed Martin.

35. The restrictions for Cowing identified by Dr. Vascello would not have prevented Cowing from performing the necessary bending, reaching, stooping, balancing, pushing, pulling, kneeling, grasping, crouching, crawling, working in narrow aisles/passageway and/or working in enclosed spaces that restrict movement including aircraft fuel tanks for extended periods of time necessary to perform adequately and satisfactorily his job duties as aircraft mechanic (structural).

36. The restrictions for Cowing identified by Dr. Vascello would not have prevented Cowing from standing for sustained periods of time necessary to perform adequately and satisfactorily his job duties as aircraft mechanic (structural).

37. The restrictions for Cowing identified by Dr. Vascello would not have prevented Cowing from work primarily with his fingers such as picking, pinching, typing, etc. necessary to perform adequately and satisfactorily his job duties as aircraft mechanic (structural).

38. The restrictions for Cowing identified by Dr. Vascello would not have prevented Cowing from working in the following environmental conditions: noise, vibration, proximity to moving mechanical parts, chemicals, odors, dust, which were incidental and/or necessary to perform adequately and satisfactorily his job duties as aircraft mechanic (structural).

39. The restrictions for Cowing identified by Dr. Vascello would not have prevented Cowing from routinely performing industry-standard ambidextriosities required to complete tasks necessary to perform adequately and satisfactorily his job duties as aircraft mechanic (structural).

40. The restrictions for Cowing identified by Dr. Vascello would not have prevented Cowing from reaching above his shoulders as necessary to perform adequately and satisfactorily his job duties as aircraft mechanic (structural).

41. The restrictions for Cowing identified by Dr. Vascello would not have prevented Cowing from reaching at or below shoulder height as necessary to perform adequately and satisfactorily his job duties as aircraft mechanic (structural).

42. The restrictions for Cowing identified by Dr. Vascello would not have prevented Cowing from performing such repetitive movement/tasks necessary to perform adequately and satisfactorily his job duties as aircraft mechanic (structural).

43. The restrictions for Cowing identified by Dr. Vascello would not have prevented Cowing from performing such extreme positions of his head and/or neck necessary to perform adequately and satisfactorily his job duties as aircraft mechanic (structural).

44. The physical restrictions list generated for Cowing by Dr. Vascello did not prevent him from resuming or returning to the same job that he was performing for Lockheed Martin as of August 12, 2013.

45. Dr. Vascello released Cowing to return to work on September 9, 2013, subject to the restrictions listed above.

46. Prior to September 9, 2013, Cowing discussed his return to work and the physical restrictions applicable to him with Lockheed Martin supervisory personnel, Rob Gates and Tim Dykes.

47. Gates suggested to Cowing that Cowing could be reassigned from aircraft maintenance to the fabrication shop. Gates stated to Cowing, "we've moved other guys on profile, and it won't be a problem." Cowing replied, "I'd love to move to the fab shop."

48. Gates further assured Cowing that he could and would be reassigned to the fabrication shop, stating that the fabrication shop was

behind in their workload and that Lockheed Martin had similarly reassigned employees in the past.

49. Subsequently, Cowing spoke with Dykes. Cowing informed Dykes of his aforescribed conversation with Gates about his reassignment to the fabrication shop. As with Gates, Dykes assured Cowing that such a reassignment could and would be done, stating further that there were vacancies in the fabrication shop.

50. On September 9, 2013, Cowing did report and return to work at Lockheed Martin.

51. On September 9, 2013, when Cowing arrived at his work area, he was met by defendant Andy Commare, his second-level supervisor.

52. Commare, among other things, stated to Cowing: "you can't be here, you are a liability."

53. Despite the vacancies in the fabrication shop and despite Cowing's capacity to return to his job as aircraft mechanic (structural), Commare's view that Cowing was "a liability" on account of his disability prevailed and Cowing was sent home from work.

54. Lockheed Martin failed and refused to consider returning Cowing to his job as aircraft mechanic (structural) and/or reassigning him to the fabrication shop, asserted it had no work or job for him consistent with his disabilities and provided him with a short-term disability benefits claim form.

55. Lockheed Martin failed and refused to consider the actual job duties, tasks and essential functions of Cowing's job as aircraft mechanic (structural), and instead relied upon an inaccurate recitation of essential job functions as set forth on Ex. 1 to this amended complaint.

56. As a direct and proximate result of this failure and refusal, Cowing was unlawfully excluded from Lockheed Martin's workforce on September 9, 2013.

57. Lockheed Martin could have returned Cowing to its workforce on September 9, 2013, by reassigning him to one of the vacant positions in the fabrication shop or even to one that became available on a later date.

58. Lockheed Martin has refused to consider this reasonable accommodation and otherwise has refused to return Cowing to active employment with it.

59. As a direct and proximate result of Lockheed Martin's actions and inactions, Cowing has suffered, is suffering and is reasonably certain to suffer in the future, lost wages and benefits, impairment to his future earning capacity, emotional distress and hardship along with mental anguish.

60. Commare has aided and abetted unlawful employment practices by Lockheed Martin.

V

CAUSES OF ACTION

Count 1

Disability Discrimination – Exclusion for Workforce

61. Cowing incorporates paragraphs 1 through 60 hereof as if fully set forth herein.

62. The KCRA prohibits discrimination by an employer against an employee that is a qualified individual with a disability.

63. Included within the KCRA's definition of prohibited disability discrimination is an unlawful exclusion from the workforce of a qualified individual with a disability capable of performing the essential functions of his job with or without reasonable accommodation.

64. The KCRA imposes on an employer a duty to engage in good-faith in an interactive process regarding whether a particular individual's disabilities impact his ability to perform what are the actual essential functions of his job, and to determine on an individualized basis whether an employee can perform his actual essential job functions with or without reasonable accommodation.

65. As part of its duty to engage in this individualized inquiry regarding the individual's disability and the actual essential job functions of his position, the employer may not rely rotely on a written job description of the position's essential functions but must engage in a good-faith examination of what the position's actual duties and tasks actually are.

66. Lockheed Martin failed to engage in good faith in any interactive process with Cowing. No Lockheed Martin personnel ever discussed with Cowing what he had found his actual job duties and tasks to be during his 1

½ years of employment and/or how, if at all, the restrictions imposed by Dr. Vascello would or would not prevent him from continuing his work as an aircraft mechanic (structural).

67. Lockheed Martin failed to inquire sufficiently of Cowing even to be able to determine his basic physical capabilities, as evidenced by its denial of alleged lack of information as to Cowing's capabilities for performing manual tasks, walking, sitting, standing, lifting, reaching and working.

68. Had Lockheed Martin engaged in the required interactive process with Cowing it would have determined that his actual essential job functions were not inconsistent with the restrictions imposed by Dr. Vascello, that Cowing's disabilities did not impact materially his capacity to perform adequately and satisfactorily his job as an aircraft mechanic (structural) and that he could and should be returned to his job as an aircraft mechanic (structural).

69. Instead of engaging in good-faith in the required interactive process with Cowing, a process that would have yielded the good-faith conclusion that there was no impediment to Cowing resuming his job as an aircraft mechanic (structural), Lockheed Martin chose to regard Cowing as a "liability" in its workforce and insist that he request a reasonable accommodation because his physical restrictions were inconsistent with the "essential job functions" as set forth inaccurately on the form attached hereto as Ex. 1.

70. Lockheed Martin has discriminated against Cowing in violation of the KCRA by failing to engage in good-faith in the required interactive process, failing to make a good-faith individualized inquiry and determination regarding the consistency of Cowing's disabilities and the actual essential job functions of his job as aircraft mechanic (structural) and, as a result, excluding him from its workforce on account of a disability.

71. As a direct and proximate result of Lockheed Martin's unlawful disability discrimination against Cowing, he has suffered, is suffering and is reasonably certain to suffer in the future damages including lost pay and benefits, impairment to his future earning capacity, emotional distress and mental anguish.

Count 2

Discrimination by Failure to Allow or Provide a Reasonable Accommodation

72. Cowing incorporates paragraphs 1 through 71 hereof as if fully set forth herein.

73. The KCRA prohibits discrimination by an employer against an employee that is a qualified individual with a disability.

74. Included within the KCRA's definition of prohibited discrimination the failure to make reasonable accommodations to the known physical limitations of an otherwise qualified individual with a disability who is an employee unless doing so would impose an undue hardship on the employer.

75. The employer's failure to offer a reasonable accommodation is direct evidence of discrimination. *Kleiber v. Honda of America Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir. 2007).

76. The ADA requires that an employer and employee engage in an interactive process to determine whether a reasonable accommodation can be achieved. *Kleiber v. Honda of America Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007).

77. Both employer and employee have a duty to participate in good faith in the interactive process to determine whether a reasonable accommodation can be achieved. *Kleiber, supra*.

78. Lockheed Martin has failed to provide or allow a reasonable accommodation to Cowing, who is a qualified individual with a disability.

79. Lockheed Martin could and can allow a reasonable accommodation for Cowing without undue hardship.

80. Lockheed Martin has discriminated against Cowing in violation of the KCRA by failing to allow or provide a reasonable accommodation for his disability.

81. As a direct and proximate result of Lockheed Martin's unlawful discrimination against Cowing arising from its failure to allow or provide a reasonable accommodation for his disability, he has suffered, is suffering and is reasonably certain to suffer in the future damages including lost pay and

benefits, impairment to his future earning capacity, emotional distress and mental anguish.

Count 3

Aiding and Abetting Discrimination In Violation of the KCRA

82. Cowing incorporates paragraphs 1 through 81 hereof as if fully set forth herein.

83. It is a violation of the KCRA, KRS 344.280, for an individual to aid and abet discriminatory and unlawful employment practices that violate the KCRA.

84. Commare has aided and abetted the discriminatory and unlawful employment practices to which Lockheed Martin has subjected Cowing.

85. As a direct and proximate result of Commare's aiding and abetting of unlawful employment practices by Lockheed Martin, Cowing has suffered, is suffering and is reasonably certain to suffer in the future damages including lost pay and benefits, impairment to his future earning capacity, emotional distress and mental anguish.

VI

DEMAND FOR RELIEF

WHEREFORE, plaintiff Charles Cowing demands the Court enter judgment as follows:

(1) awarding him compensatory damages in an amount in excess of this Court's jurisdictional minimum and such additional amount as determined by a jury to be fair based on the evidence at trial to compensate

him for the lost wages and benefits, emotional distress and mental anguish, embarrassment and humiliation, impairment to his earning capacity, past, present and future, caused by defendants' unlawful actions;

(2) award and/or grant him any other remedies allowable under the KCRA;

(3) award him costs, reasonable attorney's fees, and litigation expenses pursuant to KRS 344.450; and,

(4) all such other relief to which he proves entitled.

DEMAND FOR TRIAL BY JURY

Plaintiff demands pursuant to CR 38 trial by jury of all issues herein so triable.

Respectfully submitted,



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