

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF KENTUCKY
 CENTRAL DIVISION at LEXINGTON

CHARLES COWING,)	No. 5:15-CV-129-KKC
)	
Plaintiff)	Memorandum of Law <i>Contra</i>
vs.)	Defendant’s Motion for
)	Summary Judgment
LOCKHEED MARTIN CORP.,)	
)	
Defendant)	
)	e-filed

Lockheed Martin contrived a pretext – that lifting a tool or item weighing 10 lbs. or less would actually be lifting more than 20 lbs.¹ – to get Charles Cowing out of its workforce and to terminate his employment. The restrictions imposed by Cowing’s physician impacted his ability to resume working as a structural aircraft mechanic either not at all or, at most, in rare and fleeting circumstances, according to a number of witnesses. Cowing, a good and productive employee, should have resumed his employment on September 9, 2013. Furthermore, his damages should not be limited as defendant urges. Accordingly, defendant’s motion for summary judgment should be denied in its entirety.

Statement of the Case

Charles Cowing is a qualified individual with a disability within the scope of the Kentucky Civil Rights Act (KCRA), KRS Chapter 344. This suit arises from violations of the KCRA by defendant when Cowing attempted to return to work following a brief medical leave.

¹ The contrivance exemplified by this type of assertion: “an item that potentially could weigh 10 pounds could far exceed 20 pounds[.]” (Justin Miculinich depo. at 84).

Cowing pleaded two causes of action in his amended complaint against defendant, Lockheed Martin Corporation (Lockheed Martin), for disability discrimination in two forms: wrongfully excluding him from the workplace based on a disability and/or failure to reasonably accommodate his disability. (*See* Amended Complaint, DE 1-1, PageID 44-49). The evidence indicates that Cowing should have been permitted to resume his employment as a structural aircraft mechanic. Instead, his employment was terminated because of his disability.

Statement of Facts

The record, viewed in the light most favorable to Cowing, as it must be at this stage, supports the following factual conclusions.

(1) Evidence & Testimony regarding Cowing's Job and Workplace

1. Cowing was employed by Lockheed Martin from April 2012 to September 2013 in a position referred to as aircraft mechanic or structural mechanic. Cowing was in both grade I and II of this position. (Charles Cowing depo. at 61).² Going from grade I to grade II as a structural aircraft mechanic is a promotion and indicates greater experience and technical capability, according to one of Cowing's supervisors, Justin Miculinich. (Justin Miculinich depo. at 19). The majority of a structural mechanics working time was spent doing things like drilling, cutting, riveting and installing small metal components, according to another of Cowing's supervisors, John Craig. (John Craig depo. at 15).

2. Cowing was a good and productive employee for Lockheed Martin, as a number of his supervisors, Miculinich, Rob Gates, Craig, Tim Dykes and

² The depositions cited herein have been filed in the record in accordance with ¶ 3(b) of the Scheduling Order (RE 10).

Andy Commare, attest. (Miculinich depo. at 24; Rob Gates depo. at 20; John Craig depo. at 6; Tim Dykes depo. at 8; Andy Commare depo. at 19).

3. Cowing was part of a work crew, referred to as a “team,” for Lockheed Martin comprising usually of around 20 employees. (Miculinich depo. at 12). Of a team of 20 employees 18 would be structural or general aircraft mechanics, one would be an aircraft helper and one would be an aircraft worker. (*Id.* at 20). The work that these workcrews performed was rehabilitation and modification of military aircraft, principally helicopters. (Commare depo. at 10). A team leader had great discretion as to how to assign his employees on a day-to-day basis. (Miculinich depo. at 10). There were, during the time of Cowing’s employment by Lockheed Martin, usually four teams and about 80 employees. (*Id.* at 11).

4. The job descriptions Lockheed Martin produced for these positions recited necessary technical capabilities and expertise; they did not recite any lifting or other physical requirements. (*See* Miculinich depo. exs. 1-4).

5. There was substantial fluidity among the teams. It was not at all unusual for employees to be switched temporarily to another team due to workload or workflow requirements. (*Id.* at 12, 27). The employees were highly-skilled and versatile, the work is highly technical and detailed, and there are 400+ procedures/modifications done on the aircraft. (Commare depo. at 10-11; Craig depo. at 7).

6. The fab shop is a section of the hangar where Cowing and the rest of 80 some employees worked. (Miculinich depo. at 16). Structural aircraft mechanics worked in the fab shop. Fab shop workers “build components for the

aircraft,” which exceeded 500 in number. (Ken Barnett depo. at 8, 14). Table top assembly is 20-30% of fab shop work; the remainder would be “running the machines and form fit on an aircraft.” (*Id.* at 9). Running the machines means running industrial machines such as a drill press, a pressure testing machine for testing lines, a machine to bend and form air lines, a metal-cutting machine and a machine that cuts threads into bolts.” (*Id.* at 10). Form-fitting means form-fitting a door on an aircraft, something that was rare and an employee could go as long as six months without being involved with it. (*Id.* at 30). When it did come up, it was a two-man lift. (*Id.*).

(2) Cowing’s Back Problems & Events, August 12, 2013 – Sept. 9, 2013

7. While serving in our Nation’s armed forces and prior to beginning employment with Lockheed Martin, Cowing suffered back and knee injuries that ultimately caused his medical discharge from the Army. (Chuck Cowing depo. at 10-11). He is rated as a 40% service disability as a result of these injuries. (*Id.* at 14). Nevertheless, Cowing was physically able to do his job as a mechanic. (*Id.* at 12). Do it quite well, as his supervisors attested.

8. During the course of his employment with Lockheed Martin, Cowing had a number of flare-ups with his back. To deal with these flare-ups Cowing stepped up his regimen of cortisone shots and physical therapy, both appointed and self-directed. (*Id.* at 22-23).

9. On August 12, 2013, Cowing’s back began troubling him while at work. (*Id.* at 30-31). He informed his supervisors, Rob Gates and Justin Miculinich, who is commonly referred to as “Mitch.” (*Id.* at 31-32). Miculinich

suggested that Cowing go to the emergency room, a suggestion he heeded and drove himself to the emergency room at Central Baptist hospital. (Miculinich depo. at 51; Cowing depo. at 32-33).

10. Cowing was informed by Miculinich, who was his second-level supervisor, that he should have his doctor prepare a physical restrictions profile and promised that Lockheed Martin would protect him. Cowing explained in his deposition:

I was sitting in there with Mitch, who handles a lot of guys that are on profile, and we are talking about my previous conditions, my back and my knees, and, he said, "Well, if you need to be on a profile, put yourself on a profile. You need to protect yourself." He said, "we can take care of you," he goes, "but you got to protect yourself." (Cowing depo. at 85).

11. Miculinich confirms that he discussed with Cowing having his doctor prepare a list of physical restrictions and that he represented to Cowing concern for his welfare. (Miculinich depo. at 52-53).

12. Cowing trusted Miculinich, and, as a result, he had his pain management doctor, Dr. Luis Vascello, prepare a physical restrictions profile for him, just as Miculinich had encouraged him to do. (Cowing depo. at 85; Vascello depo. ex. 1).

13. Following up on Miculinich's encouragement, another of Cowing's supervisors, Rob Gates, prepared an essential functions form that Cowing's doctor could review while preparing the physical restrictions form Miculinich had encouraged Cowing to have prepared. Gates emailed Cowing this form on August 12, 2013. (Plaintiff's Supplemental Document Production to Lockheed Martin

Document Request 13.)³ Miculinich confirms that Gates was knowledgeable enough to prepare such an essential functions form. (Miculinich depo. at 105).⁴ Cowing provided it to Dr. Vascello, who, in consultation with Cowing's physical therapist, drew up a list of physical restrictions. (Cowing depo. at 86; Vascello depo. at 10, 19-20).

14. Cowing was seen on August 14 and August 30, 2013, by his treating neurosurgeon, Dr. Steven Kiefer, regarding his back. (Dr. Steven Kiefer depo. at 7-8). Dr. Kiefer found Cowing's symptoms to be the same as on previous visits. (*Id.*). Dr. Kiefer had discussed a three-level fusion with Cowing, but it had not been done because Cowing's insurer was refusing coverage. (*Id.* at 7, Vascello depo. at 7).

15. Dr. Kiefer released Cowing to return to work at Lockheed Martin on August 30, 2013, with no physical restrictions whatsoever. (Kiefer depo. at 8-9; Kiefer depo. ex. 2).

16. Between August 12, 2013, and September 9, 2013, Cowing had a number of conversations with his supervisors, Rob Gates and Tim Dykes. (Cowing depo. at 81).

³ This document production and produced documents are tendered as Ex. 1 to this memorandum.

⁴ Lockheed Martin implies that Gates was incompetent to prepare the form and/or that his doing so was somehow irregular. Defendant's memo at 8 n. 9. Karen Sims, who is Lockheed Martin's EEO representative and responsible for administering its reasonable accommodation process, testified that the essential functions forms are typically completed by either the employee's supervisor or manager. (Karen Sims depo. at 9). According to Sims, then, Gates completing the form was a proper procedure.

17. Gates brought up to Cowing that Cowing, upon his return to work at Lockheed Martin, could be transferred to a work area known as the “fab shop” (short for fabrication shop). (Cowing depo. at 94).

18. Cowing believed Gates and thought it would be good for his back to be reassigned to the fab shop. (*Id.*).

19. Gates, when informing Cowing that he could be reassigned to the fab shop, assured Cowing that such a reassignment had been done in the past and, therefore, could be done for Cowing. (Cowing depo. at 95). Gates even referenced an employee with a prosthetic leg, stating if accommodation could be made for that employee, accommodation could be made for Cowing. (Cowing depo. at 95-96). Miculinich testified that he had overheard a conversation between Tim Dykes and another person in which it was reported that Gates had informed Cowing that Cowing would be reassigned to the fab shop when he returned to work. (Miculinich depo. at 96).

20. The employee with the prosthetic leg, David King, was also employed as an structural aircraft mechanic, the same job as Cowing. (David King affidavit ¶ 1).⁵

21. According to Mike Carter, King’s supervisor, King’s prosthetic leg did prevent him from performing some of the jobs and functions that an aircraft mechanic otherwise would perform. (Mike Carter depo. at 49-50). Carter explained that this would include getting atop the aircraft and working in

⁵ Mr. King’s affidavit is tendered as Ex. 2 to this memorandum.

confined spaces. (*Id.*). At times, King removed his prosthetic leg and propped it up inside an aircraft. (*Id.* at 19).

22. Because of his prosthetic leg, King, according to his supervisor, Carter, presented some safety concerns. (*Id.* at 18-19).

23. On September 6, 2013, Dr. Vascello prepared the restrictions list Cowing had requested. (Vascello depo. ex. 1). The list was sent to Cigna, which performed some type of human resources functions for Lockheed Martin. In any event, Cigna, sent it on to Lockheed Martin. On September 6, 2013, a Donna Smith, who is apparently some sort of human resources employee for Lockheed Martin, emailed Commare inquiring about Cowing's restrictions and whether they could be accommodated or not. (Miculinich depo. ex. 10 at p. LM 65). The restrictions were reported as follows:

- not to lift, push, or pull over 20 pounds with both upper extremities
- not to bend, stoop, or perform twisting motions over 20 minutes per hour, without using torquing activities
- rotate task using different muscle/tendon groups
- pause for stretching five minutes per hour
- stand or walk to tolerance
- alternate from sitting to standing working positions
- perform work in kneeling or squatting positions up to 10 minutes per hour
- not to lift over 20 pounds from floor level up to 10 minutes per hour
- not to lift over 15 pounds above shoulder level up to 10 minutes per hour
- no long lever arm lifting with trunk rotation and flexion
- limit positions causing bending and twisting of the lower spine (Miculinich depo. ex. 10 at p. LM 65)

(3) Cowing's Return to Work on September 9, 2013

24. Cowing reported for work on September 9, 2013. Based on his conversations with gates he was expecting to be reassigned to the fab shop. (Cowing depo. at 103).

25. Per the usual procedure, Cowing reported to an occupational nurse, who released him to go ahead on into his work area. (Cowing depo. at 115; Medcor Patient Care Report for 9/9/13).⁶

26. Upon arriving at his work area, Cowing encountered one of the supervisors, Andy Commare, a meeting Cowing describes as follows:

He had this profound puzzled look on his face, and said, "What the f**k are you doing here?" I said, "well," I said, "I'm returning back to work." He said, "no, you're not. You're a liability. You cannot be here." He said, "don't move. Don't touch anything. I'll be right back." (Cowing depo. at 116).

27. Cowing interpreted from Commare's statements and demeanor that Commare did not want him as part of Lockheed Martin's workforce. (Cowing at 117).

28. Commare, for his part, admitted that he told Cowing he was a liability, although Commare recalls having a friendlier demeanor when doing so:

I ... said, you need – you can't be on this hangar floor until you've been cleared by the medical office.

And he's like, "well, what's the deal," and I said, "well, you're a liability." Well, how? I said, safety, legally and everything else; there is procedures to follow.

And – and then I pulled out the restrictions list. This is – this is crazy, I'm not sure what they're going to do with you, I said. We – it wasn't a hostile conversation, and we parted after – I don't know – maybe a minute or so. (Commare depo. at 50-51).

⁶ A copy of this report is tendered as Ex. 3 to this memorandum.

29. Cowing was directed to and sat in a Kevin Wilson's office. After about 20 minutes, Miculinich came into the office and informed him that Lockheed Martin would not accommodate his restrictions and was placing him on short-term disability. (Cowing depo. at 118). Miculinich, however, assured him that Lockheed Martin would work something out with him. (*Id.*). Sometime during their conversations that day, Cowing acknowledged to Miculinich that his job as a structural aircraft mechanic was aggravating his back condition. Nevertheless, Cowing, according to Miculinich, was firm in his resolve at returning to work in that job. (Miculinich depo. at 61, 64-65).

30. Miculinich did not discuss with Cowing how or whether he could perform his job consistent with the restrictions. (*Id.* at 63). The restrictions were understood to be permanent. (Miculinich depo. ex. 10 at p. LM 68).

31. At 9:42 AM the morning of September 9, 2013, Miculinich sent an email to Brittany Streitzel and Cynthia Schindele, who were human resources department employees for Lockheed Martin, and others, stating that Cowing's restrictions could not and would not be accommodated. (*Id.* at 69; Miculinich depo. at 69; Miculinich depo. ex. 10 p. LM 0064). Miculinich had not consulted any books, documents or materials in reaching this conclusion. (*Id.*). He claims that he concluded in conjunction with Brittany Streitzel that Cowing would not be accommodated. (Miculinich depo. at 62). Streitzel denies such responsibility and testified that she did not know who was responsible on behalf of Lockheed Martin for excluding Cowing. (Streitzel depo. at 14). Miculinich also testified that he consulted with Commare regarding Cowing's return to work and Commare

advocated strongly against, a position that influenced Miculinich's decision. (Miculinich depo. at 92-94).

32. In response to Miculinich's email, Streitzel emailed Miculinich back at 10:45 a.m. asking Miculinich to prepare and complete an essential functions form regarding Cowing's job so it could be used while Lockheed Martin pretended to go through the motions of an accommodation process. Streitzel emailed as follows:

Attached is what I need completed ASAP so we can hold and accommodations meeting to discuss why we cannot accommodate him. And accommodations meeting will make the denial of the medical restrictions more formal. (Miculinich depo. ex. 10 at p. LM 0063).

33. There would be no going back or bona fide consideration. Miculinich completed an essential functions form regarding Cowing's job that even Cowing acknowledges was inconsistent with his restrictions and one with which he could not comply. (Cowing depo. at 110). Miculinich completed an essential functions form after he had already reported that Cowing would not be accommodated. (Miculinich depo. at 70-71; Streitzel depo. at 30).

34. The problem is that the essential functions form completed by Miculinich on September 9, 2013, is not an accurate or near-accurate reflection of the actual job duties and tasks of a structural aircraft mechanic. A reasonable jury can find both that it is not accurate and that it was created as part of Lockheed Martin's unlawful effort to exclude Cowing from its workforce and terminate his employment.

35. Contrary to the representations that Streitzel now makes in an affidavit, Cowing did not inform her that he could not perform or continue doing

his job as a structural aircraft mechanic. (Charles Cowing affidavit ¶ 2).⁷ Streitzel was antagonistic and duplicitous in her discussions with Cowing. (Cowing depo. at 123-24, 149-50).

(4) The Record Regarding the Applicability of the Restrictions

36. Cowing pleaded in his amended complaint that none of the restrictions created any type of issue as to performing his actual duties as a structural aircraft mechanic. (Amended Complaint ¶¶ 26-43, PageID 34-37). Lockheed Martin answered that “the duties of an aircraft mechanic at Lockheed Martin cannot be broken down into separate and discreet functions, as aircraft mechanics are required to perform many and varied duties” and denied “that Cowing’s restrictions permitted him to perform all of the essential functions of an aircraft mechanic.” (Answer to Amended Complaint ¶¶ 26-43).

(a) Restriction: Not to Lift, Push or Pull Over 20 lbs. With Both Upper Extremities

37. Lockheed Martin’s managers, Miculinich and Commare, contrive a patently ridiculous explanation to support their claim that Cowing, in performing his job as a structural aircraft mechanic, would be called upon regularly to lift, push or pull over 20 lbs. with both upper extremities. This nonsensical assertion is premised on the utterly bizarre proposition, for instance, that lifting an object weighing 10 lbs. is actually lifting more than 20 lbs. Miculinich explains:

an item that potentially could weigh 10 pounds could far exceed 20 pounds as you’re trying to exert the force to pick up the item.
(Miculinich depo. at 84).

⁷ Mr. Cowing’s affidavit is tendered as Ex. 4 to this memorandum. Streitzel was asked in her deposition what she recalled about her discussion with Mr. Cowing on September 9, 2013; she did not testify that he made any type of statement as she claims he did in her affidavit. (Streitzel depo. at 9-11).

38. Miculinich did not testify how often a structural aircraft mechanic would actually be lifting, pushing or pulling something that actually weighed more than 20 lbs.

39. Commare made the same ridiculous claim that lifting an item or tool weighing less than 20 lbs. would be actually lifting something weighing more than 20 lbs.: “it is not just the weight of the object; it is the force that you have to use to lift or push it.” (Commare depo. at 22). Like Miculinich, Commare did not testify how often a structural aircraft mechanic would actually be lifting, pushing or pulling something that actually weighed more than 20 lbs.

40. Cowing testified that he was not called upon during his 1 ½ years of working as a structural aircraft mechanic to lift, push or pull an item weighing more than 20 lbs. with both upper extremities. (Cowing depo. at 90). His experience was not unusual.

41. Luis Toledo worked for Lockheed Martin as a structural mechanic from January 2012 to February 2015, more than twice as long as did Cowing. (Affidavit of Luis Toledo ¶ 1).⁸ Toledo worked with Cowing in the same hangar; Rob Gates and Tim Dykes also served as Toledo’s supervisors. (*Id.* ¶ 2). In over three years working as a structural mechanic, Toledo “did not encounter any job tasks or procedures that required me to lift, push or pull more than 20 lbs. with both upper extremities.” (Toledo aff. ¶ 5). Toledo, in over three years employment in the same job in the same place as Cowing, was never “called upon to perform

⁸ Mr. Toledo’s affidavit is tendered as Ex. 5 to this memorandum.

any that required lifting, pushing or pulling more than 20 lbs. with both upper extremities.” (*Id.*).

42. Mike Carter was a supervisor, a team leader of structural mechanics and other aircraft mechanics and workers for about four years for Lockheed Martin at the same job location as Cowing worked. (Mike Carter affidavit ¶ 1).⁹ He supervised an average of 20 employees, although the number fluctuated from 10 to 35. (*Id.*). Carter’s responsibilities included the day-to-day job duties and assignments of the structural mechanics he supervised. (*Id.* ¶ 3).

43. Carter advises that of the 400+ structural modifications done on the aircraft his employees worked on, there were some involving lifting, pushing or pulling more than 20 lbs. with both upper extremities, but “the frequency of this type of task coming up for any particular structural mechanic would have been rare.” (*Id.* ¶ 6). Moreover, Carter further advises that “it would not have posed any significant disruption to the workflow to either reassign a structural mechanic from this type of task or to assign some assistance to help with any lifting, pushing or pulling involved.” (*Id.*).

44. John Craig was one of Cowing’s immediate supervisors. (Craig depo. at 5). He had several years of opportunity to observe structural aircraft mechanics doing their job for Lockheed Martin. (*Id.* at 9). According to Craig, “not very often” would a structural aircraft mechanic be called upon to lift, push or pull over 20 pounds with both upper extremities, explaining “it would depend

⁹ Mr. Carter’s affidavit is tendered as Ex. 6 to this memorandum.

on what job you were on." (Craig depo. at 9-10). In any event, according to Craig, such an activity would not be "an everyday task." (*Id.* at 10).

45. David King also worked as a structural aircraft mechanic for Lockheed Martin from May 2012 to January 2015. (David King affidavit ¶ 1). He worked in the same hangar as did Cowing. (*Id.* at ¶ 2). He is knowledgeable about the different job tasks that structural aircraft mechanics were called upon to perform. (*Id.* at ¶ 9). With regard to procedures involving lifting, pushing or pulling more than 20 pounds for more than 10 minutes with both upper extremities, Mr. King advises that he "can't say how few or many precisely but should be understood is very few and they could not be considered a significant part of the job duties." (*Id.* ¶ 9). King further advises that "given the number of available structural mechanics, the versatility in the number of different modification procedures (400+) on the aircraft, it was easily done for structural mechanics to be assigned to task and procedures that they could do productively without creating issues regarding any physical restrictions." (*Id.*).

(b) Restriction: Not to Lift Over 20 lbs. from Floor Level Up to 10 Minutes Per Hour

46. According to David King and based on his experience performing his job duties as a structural aircraft mechanic for Lockheed Martin and based on observing other structural mechanics doing their jobs, he offers that he does not "believe that a structural mechanic was called upon to lift over 20 pounds from floor level for more than 10 minutes per hour." (King affidavit ¶ 10).

47. According to Luis Toledo and based on his experience performing his job duties as a structural aircraft mechanic for Lockheed Martin and based on

observing other structural mechanics doing their jobs, he advises that he also does not “believe that a structural mechanic was called upon to lift over 20 pounds from floor level for more than 10 minutes per hour.” (Toledo affidavit ¶ 6).

48. According to Mike Carter, the supervisor, and based on his observations of the work performed by structural mechanics on the aircraft at Lockheed Martin, it is his “opinion that a work restriction prohibiting an aircraft structural mechanic from lifting over 20 pounds from floor level up to 10 minutes per hour would not be a work restriction that would become applicable.” (Carter affidavit ¶ 8).

49. Cowing testified that this restriction would not have come into play in the course of his performing his job duties. (Cowing depo. at 91).

50. John Craig, another supervisor, testified that based on his experience a structural aircraft mechanic would not be called upon to lift over 20 pounds from floor level for more than 10 minutes per hour.” (Craig depo. at 10).

51. Miculinich offers little help to Lockheed Martin. With regard to the frequency in which cowing would be called upon to lift over 20 pounds from floor level at least 10 minutes per hour, he says first that, “I have no idea at this time.” (Miculinich depo. at 29-30). Then he goes on to explain that some days it would not be at all, others probably an hour a day give or take, all depending upon lifting items weighing less than 20 pounds being considered as lifting items weighing more than 20 pounds. (*Id.* at 29-31).

52. Commare could not say whether Cowing would be required to lift over 20 pounds from floor level at least 10 minutes and hour or not. (Commare depo. at 33-34).

(c) Restriction: Not to Lift Over 15 lbs. Above Shoulder Level up to 10 Minutes Per Hour

53. John Craig, the supervisor, testified that based on his experience a structural mechanic would not be called upon to lift over 15 pounds above shoulder level up to 10 minutes per hour. (Craig depo. at 11). Craig acknowledges that if a structural mechanic were lifting 15 pounds, it would be something done in a few seconds or very quickly. (*Id.*).

54. Toledo, another structural aircraft mechanic, advises that in “performing [his] job duties as a structural aircraft mechanic for Lockheed Martin and based on observing other structural mechanics working, I was not called upon to lift over 15 pounds above shoulder level for more than 10 minutes per hour.” (Toledo affidavit ¶ 8).

55. David King, a structural aircraft mechanic, advises that based on his experience himself working and observations of others, “a structural mechanic would very rarely have been called upon by any job task to lift over 15 pounds above shoulder level for more than 10 minutes per hour. This type of activity would have been minimal at best for any structural mechanic. Again, the presence of jacks, hoists, cranes and co-workers would have enabled a structural mechanic to get help with any lifting of this sort, if they were called upon to do it.” (King affidavit ¶ 12).

56. Carter, a supervisor, advises that “it was possible for a structural aircraft mechanic to have a job duty or task that would have required him to lift over 15 pounds above shoulder level up to 10 minutes per hour. Again, the frequency of this occasion would have depended on the particular job assignments received by the particular mechanic. In my opinion, as a team leader, it would have been possible to minimize if not eliminate such job assignments for a structural mechanic subject to this limitation or restriction without impacting the workflow and productivity of the team.” (Carter affidavit ¶ 9).

57. Cowing, like Toledo, testified that he was not called upon to lift over 15 pounds above shoulder level up to 10 minutes per hour in the course of performing his job duties as a structural aircraft mechanic for Lockheed Martin. (Cowing depo. at 91).

58. Miculinich testified that working overhead with a tool weighing as little as 3-4 pounds would cause Cowing to transgress this 15 lb. restriction. (Miculinich depo. at 33). He could not say how often Cowing would have violated this 15-pound restriction by working with something weighing as little as 3-4 pounds, explaining that it would depend on the assignments that Cowing received. (*Id.* at 34).

59. Commare could not say how much time, if any, in a typical workday Cowing would have spent lifting 15 pounds over shoulder level. (Commare depo. at 42). He acknowledged that it would depend on what job Cowing was assigned and the availability of people around him to help out. (*Id.*).

(d) Restriction: Not to Bend, Stoop, or Perform Twisting Motions over 20 Minutes Per Hour, without Using Torquing Activities

60. Mike Carter, the supervisor, based on his observations of the work performed by structural aircraft mechanics at Lockheed Martin, advises that “it was possible for a structural aircraft mechanic to adequately and satisfactorily perform his job duties even if they were subject to a work restriction providing that they were not to bend, stoop or perform twisting motions for over 20 minutes per hour without using torquing activities.” (Carter affidavit ¶ 7).

61. John Craig, another supervisor, agrees with Carter and testified that based on his experience a structural mechanic would be able to adequately and satisfactorily perform his job duties even if he was not supposed to bend, stoop or perform twisting motions for over 20 minutes an hour. (Craig depo. at 12).

62. Cowing agrees with both of his former supervisors that this restriction would not have come into play in doing his job as a structural aircraft mechanic. (Cowing depo. at 90, 94).

(e) Evidence Regarding Other Restrictions

63. David King advises that in his experience and based on observing other structural mechanics working, he does “not believe that a structural mechanic was called upon to lift alone items weighing over 50 pounds.” (King affidavit ¶ 11). He further advises that there “were jacks, hoist and cranes, as well as co-workers, present in the workplace to use of lifting of any heavy object was required.” (Id.). Mr. Toledo, another structural mechanic, advises the same.

(Toledo affidavit ¶ 7). John Craig, the supervisor, testifies in agreement. (Craig depo. at 11-12).

64. Craig, the supervisor, addresses some of the other restrictions as well. Craig advises based on his experience supervising structural mechanics and observing them perform their job duties as follows: (1) a structural mechanic would be able to shift positions in 20 minute intervals and still be able to perform his job duties adequately and satisfactorily; (2) a structural mechanic would be able to adequately and satisfactorily perform his job duties without working in kneeling or squatting positions up to 10 minutes per hour; and, (3) a structural mechanic would be able to limit positions causing him to bend and twist his lower spine and still be able to get his job done adequately and satisfactorily. (Craig depo. at 13-14).

65. Toledo was, at one time, subject to a standing restriction “for extended or long periods of time.” (Toledo affidavit ¶ 4). He advises that this and other applicable restrictions (no lifting over 10 pounds and no heavy lifting), had, as a practical matter, “little if any impact on the jobs I did as a structural mechanic; my work and workflow continued on without any real change from before the restrictions became applicable.” (*Id.*). Miculinich agrees that there is no reason to think that cowing would not have been able to manage how long he stood and still been able to get his job done. (Miculinich depo. at 37).

66. Miculinich acknowledged that Cowing would be able to rotate task using different muscle/tendon groups and still get his job done properly. (Miculinich depo. at 26). Likewise, stretching and alternating from sitting to standing positions would not have been an issue either. (*Id.* at 37). He cannot say

whether or not long lever arm lifting would have been an issue or not. (*Id.* at 36). It would not, according to Craig, the supervisor, who advises that the mechanics did their work close into the body. (Craig depo. at 19-20).

67. Cowing can present evidence that none of the restrictions were applicable to him performing his actual job duties as a structural aircraft mechanic or that they would not have presented any impediment to him performing his job duties adequately and satisfactorily. The only real restrictions that Miculinich and Commare claim create any issue, are the lifting restrictions with regard to certain weights, and they create those issues by asserting incredibly that items or tools weighing far less than the applicable weight restriction amount would entail lifting and amount of weight in excess of the restriction.

(5) The Evidence Regarding an Essential Functions Form for a Structural Aircraft Mechanic

68. The essential functions form (Lockheed Martin form C-575-2) that Miculinich prepared regarding Cowing after he had determined that Lockheed Martin could not and would not allow Cowing to return to work is one of many in the record for the job of structural aircraft mechanic working where Cowing did. Exhibits 6, 7 and 8 to Miculinich's deposition were all essential functions forms for the job of structural aircraft mechanic. (Miculinich depo. exs. 6-8). Neither Miculinich nor Streitzel had any explanation for this multitude. (Miculinich depo. at 72-73; Streitzel at 18).

69. Karen Sims, Lockheed Martin's EEO representative and the person in charge of its accommodations process, offered that the essential functions form

for an aircraft mechanic could vary from day-to-day depending on their assignments:

So you could have aircraft mechanics doing different duties, depending on what they're working on. ... So his duties could be slightly different from someone working on a different portion of the aircraft, depending on where the individual works. So not all aircraft mechanics are the same. (Karen Sims depo. at 17-18).

70. Sims did not know whether Lockheed Martin prepared an essential functions form for an employee before or after the employee presented his list of physical restrictions. (*Id.* at 11).

71. Sims did not know why two essential functions forms would have been prepared for Cowing. (*Id.* at 8). She did not recall any discussion during the accommodations process conference call (which was held after the decision had already been made to exclude Cowing from the workforce) as to why there were two different essential functions forms for Cowing. (*Id.* at 19).

72. Although Sims was responsible for administering the accommodations process for Cowing, she did not recall reviewing a job description applicable to him. (*Id.* at 16).

73. Sims never communicated with Cowing. (*Id.* at 12).

74. Although supposedly in charge of administering Lockheed Martin's accommodation process, Sims did not know the meaning of certain material terms on the inaccurate essential functions form prepared after Cowing presented his list of restrictions. When asked what Lockheed Martin considered to be a task continuously performed, Sims replied: "I wouldn't know that." (*Id.* at 26).

75. The essential job functions forms prepared regarding Cowing vary substantially. The form prepared by Rob Gates says nothing about lifting anything in its essential job functions section. (*See* Miculinich depo. ex. 7). However, the one prepared by Miculinich after he had determined that Lockheed Martin could not and would not permit Cowing to return to his job as a structural aircraft mechanic states with regard to lifting that the job holder must be able to lift/maneuver up to 50 lbs. (Miculinich depo. ex. 6). Maneuver must be the operative term; Toledo, who worked in the same job as Cowing for over three years, reports that no such lifting was required and “[t]here were jacks, hoists and cranes, as well as co-workers, present in the workplace to use if lifting of any heavy object was required.” (Toledo affidavit ¶ 7). David King says likewise. (King affidavit ¶ 11). John Craig, a supervisor, testified that this 50 lb. lifting/maneuvering requirement was not accurate. (Craig depo. at 22-23).

76. Carter, one of Cowing’s supervisors, noted that what Lockheed Martin describes as a “continuous” activity on the essential functions form “could be, in fact, something that happens as little as 15 seconds in a day.” (Carter depo. at 65; *see also* Miculinich depo. ex. 7).

77. A reasonable jury could conclude that something occurring no more than 15 seconds a day is not a continuous activity.

Argument

Point 1

The Motion for Summary Judgment Should Be Denied

(A) The Summary Judgment Standard

At this stage, the court must view the evidence in the light most favorable to Cowing. *Rorrer v. City of Stow*, 743 F.3d 1025, 1038 (6th Cir. 2014). Any inferences that can be drawn must be drawn in Cowing's favor. *Id.* Where evidence conflicts, the conflict must be resolved in Cowing's favor. *Id.* The Court's role is not to weigh the evidence or assess the credibility of witnesses; any such considerations must be resolved in Cowing's favor. *Id.* Any direct evidence "offered by [Cowing] must be accepted as true." *Id.*, quoting, *Muhammad v. Close*, 379 F.3d 413, 416 (6th Cir. 2004).

(B) The Proof and Claim Elements

Lockheed Martin does not claim that Cowing's employment was ended by it for any other reason other than his medical condition left him unable to perform what it claims are the essential functions of his job as a structural aircraft mechanic. Disability discrimination claims under the KCRA are guided by and largely incorporate the Americans With Disabilities Act (ADA) and its standards. *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 591 (Ky. 2003). A discrimination claim under KRS Chapter 344 requires proof only that Cowing's disability was a substantial factor but for which he would not have been terminated. *Asbury Univ. v. Powell*, 486 S.W.3d 246, 255-57 (Ky. 2016). On that point, there is no dispute.

There are two types of direct evidence disability discrimination cases under the KCRA. *Noel v. Elk Brand Mfg. Co.*, 53 S.W.3d 95, 101 (Ky. App. 2000). One is where the plaintiff claims he can function capably in his job. *Id.* The second is where the plaintiff claims "that a job requirement is not essential or

that, if the employer provides reasonable accommodations, [he] can do the job.”
Id. Cowing can prevail under both.

The elements and burdens of proof as to Cowing’s claim are as follows: (1) he must be able to establish that he is “disabled” within the meaning of the KCRA; (2) Cowing must be able to show that he is “otherwise qualified” for his job as a structural aircraft mechanic despite his disability without accommodation from the employer, or with an alleged “essential” job requirement eliminated, or with a proposed reasonable accommodation; and, (3) the employer will bear the burden of proving that a challenge job criterion is essential, and therefore business necessity, or that a proposed accommodation will impose on it an undue hardship. *Id.*

Cowing can establish that he suffers from a disability within the meaning of the KCRA. A disability is a physical or mental impairment that substantially limits a major life activity. KRS 344.010(4). EEOC guidelines under the ADA, which Kentucky courts have relied upon for this issue, *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 709-710 (Ky. App. 2004),¹⁰ defines a major life activity as follows: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. 42 C.F.R. § 1630.2(i)(1)(i). “An impairment is a disability ... if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An

¹⁰ The ADA guidelines were also applied by the Kentucky Supreme Court in *Wagner’s Pharmacy v. Pennington*, 2015 WL 2266374 (Ky. 2015).

impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.” 42 C.F.R. § 1630.2(j)(1)(C). A temporary 20 lb. lifting restriction is a substantial limitation to the major life activity of lifting. 29 C.F.R. Part 1630, Appendix, Interpretive Guidelines for Section 1630.1(j)(1)(viii). Finally, whether Cowing’s impairment substantially limited his major life activities is a fact issue for the jury. *Hallahan*, 138 S.W.3d at 707; *Cehrs v. NE Ohio Alzheimer’s Research Center*, 155 F.3d 775, 781 (6th Cir. 1998).

The evidence indicates that Cowing suffered from a disability. The permanent restrictions imposed by Dr. Vascello regard and recognize that Cowing’s back problems had left him substantially limited with regard to the major life activities of walking, standing, reaching, lifting, and bending, as compared to most people in the general population. Cowing has a 40% service disability assessed by the VA. Furthermore, that an individual with a prosthetic leg, David King, can perform the structural aircraft job shows how severe Cowing’s condition can be regarded. The various and permanent lifting restrictions 15 & 20 lbs. establish a disability as to the major life activity of lifting under the ADA guidelines, according to the EEOC. Finally, Lockheed Martin directed that Cowing go on disability leave on September 9, 2013, instead of permitting him to resume work. Accordingly and contrary to defendant’s argument, a jury can find that Cowing suffered from a covered disability.

Cowing can establish that he, despite his disability, was otherwise qualified to perform his job as a structural aircraft mechanic with or without reasonable accommodation. Cowing was a good and productive employee,

according to a number of his supervisors. (Miculinich depo. at 24; Gates depo. at 20; Craig depo. at 6; Dykes depo. at 8; Commare depo. at 19). There is no claim or evidence that he could not do his job for some reason independent of his physical impairments.

A jury can find that his restrictions did not impact at all Cowing doing his job as a structural aircraft mechanic. First, Toledo, who worked the job twice as long as Cowing, indicates that he was never “called upon to perform any [job task as a structural aircraft mechanic] that required lifting, pushing or pulling more than 20 pounds with both upper extremities.” (Toledo affidavit ¶ 5). Second, David King and Toledo, who worked as structural aircraft mechanics, as well as two supervisors, Mike Carter and John Craig, all offer that a structural aircraft mechanic would not be called upon to lift over 20 pounds from floor level up to 10 minutes per hour. (King affidavit ¶ 10; Toledo affidavit ¶ 6; Carter affidavit ¶ 8; Craig depo. at 10).

Third, Toledo and Craig agree that, in their experience and observation, a structural aircraft mechanic would not be called upon to lift over 15 pounds above shoulder level up to 10 minutes per hour in the course of performing his job duties. (Craig depo. at 11; Toledo affidavit ¶ 8).

Carter and Craig, two supervisors, agree that based on their experience and observations, a structural mechanic would be able to adequately and satisfactorily perform his job duties, even if he was not supposed to bend, stoop or perform twisting motions for over 20 minutes an hour without using torquing activities. (Carter affidavit ¶ 7; Craig depo. at 12).

The evidence indicates that the rest of Cowing's restrictions are also immaterial to him doing his job. Jacks, hoists, cranes and co-workers were available to use when lifting of any heavy object was required. (King affidavit ¶ 11; Toledo affidavit ¶ 7; Craig depo. at 11-12). Craig, a supervisor, advises that Cowing's restrictions pertaining to shifting positions in 20 minute intervals, not working in kneeling or squatting positions up to 10 minutes per hour and limiting positions causing him to bend and twist his lower spine would not impede him from getting his job done adequately and satisfactorily. (Craig depo. at 13-14). Miculinich agrees that Cowing would have been able to manage how long he was standing and still get his job done. (Miculinich at 37; *see also* Toledo affidavit ¶ 4). Neither would alternating tasks to use different muscle/tendon groups or stretching and alternating from sitting to standing position have impaired Cowing's ability to get his job done, according to Miculinich. (Miculinich depo. at 26, 37). Finally, Craig advises that the mechanics did their work close to their body so the long lever arm lifting restriction would not have been an issue either. (Craig depo. at 19-20).

Because there is evidence and testimony from coworkers and supervisors with more than ample basis to know, Cowing can establish through direct evidence that he could function capably as a structural aircraft mechanic even while working with the restrictions imposed by Dr. Vascello. The Court must accept this evidence as true, *Stow*, 743 F.3d at 1038. Accordingly, the motion for summary judgment must be denied.

(C) Even if Cowing's Restrictions Did Impact His Job They Did Not Impact Any Essential Function

Even if there wasn't ample evidence that Cowing's restrictions did not impact at all his ability to do his job as a structural aircraft mechanic, Cowing is able to present evidence that any impact they had did not impact an essential job function.

"Whether a job function is essential is a question of fact that is typically not suitable for resolution on a motion for summary judgment." *Keith v City of Oakland*, 703 F.3d 918, 926 (6th Cir. 2013). "Whether a function is essential is evaluated on a case-by-case basis by examining a number of factors." *Rorrer v. City of Stow*, 743 F.3d 1025, 1039 (6th Cir. 2014), quoting *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1230 (11th Cir. 2005). The essential functions of a job are "the fundamental job duties of the employment position the individual with a disability holds or desires. The term ... does not include the marginal functions of the position." 29 C.F.R. 1630.2(n)(1). A function may be considered essential to a job because (1) the position exists to perform the function, (2) a limited number of employees are available that can perform it, or (3) it is highly specialized." *Id.* § 1630.2(n)(2). Two important factors are "the employer's judgment as to what functions of a job are essential" and in employer's "written description" of the job. *Stow*, 743 F.3d at 1039. The following factors should also be considered: (1) the amount of time spent on the job performing the function; (2) the consequences of not requiring the incumbent to perform the function; (3) the terms of any collective bargaining agreement; (4) the work experience of past incumbents in the job; and/or, (5) the current work experience of incumbents in similar jobs. *Id. citing* 29 C.F.R. § 1630.2(n)(3)(iii)-(vii).

The Sixth Circuit advises that at “the summary judgment stage, the employer’s judgment will not be dispositive on whether a function is essential when evidence on the issue is ‘mixed.’” *Stow*, 743 D.3d at 1039; *see also Keith*, 703 F.3d at 926. This is because if an employer’s judgment about what constitutes an essential task was conclusive, an employer wishing to avoid ever accommodating a disabled employee could simply assert that the function is essential and evade all reach of the KCRA and/or ADA. *Id.* This danger is heightened even more where, as here, the employer only troubles to identify the essential functions of a position *after* Cowing informed it of his restrictions.

Written job descriptions also are not dispositive. *Id.* Testimony from a supervisor that a job function is actually marginal may effectively rebut a written description stating that a job function is essential. *Id.* Conflicting deposition testimony concerning a job’s essential functions leave a disputed issue of material fact for a jury to decide. *Id.*

The evidence is at worst for Cowing mixed as to whether the essential functions of the position of structural aircraft mechanic are implicated by Cowing’s lifting restrictions. First, the job descriptions for all the job positions working on the aircraft speak to technical expertise, not lifting requirements. (Miculinich depo. exs. 1-4). Second, John Craig, a supervisor, disagreed that lifting was an essential function for the job as reported on the essential function form created by Miculinich after Cowing presented his restrictions. (Craig depo. at 22-23; Craig depo. ex. 1 & Miculinich depo. ex. 6). Third, what the essential functions form describes as a “continuous” activity “could be, in fact, something that happens as little as 15 seconds in a day.” (Carter depo. at 65).

Where the evidence would indicate that lifting does come up for a structural aircraft mechanic, the testimony is also that it is rare, fleeting and easily worked around if necessary. This evidence and testimony comes from persons who have worked several years as a structural aircraft mechanic or supervised them. Carter, King and Craig all speak to the very marginal function of a structural aircraft mechanic lifting, pushing or pulling more than 20 lbs. with both upper extremities and how easily around it it was to work. (Carter affidavit ¶ 6; Craig depo. 9-10; King affidavit ¶ 9). King and Carter depart from Craig and Toledo and state that a structural aircraft mechanic could infrequently be called upon to lift over 15 lbs. above shoulder level up to 10 minutes per hour; both attest to how marginal the task was and how easy to work around. (King affidavit ¶ 12; Carter affidavit ¶ 9). Carter, a supervisor, offers that a supervisor can practically eliminate such job assignments for a structural mechanic without impacting the workflow or productivity of the team. (Carter affidavit ¶ 12).

Because they rely on assertions that, for instance, lifting a 10 lb. item is really lifting more than a 20 lb. item, the assertions of Miculinich and Commare that Cowing's lifting restrictions implicate the essential functions of the job of structural aircraft mechanic are unreliable and unpersuasive. A jury should properly find this explanation to be a contrived pretext. Accordingly, putting aside the evidence that Cowing's restrictions did not impact at all his ability to do his job as a structural aircraft mechanic, the evidence is "mixed" as to whether they impacted the essential functions of his job. Therefore, there is a disputed issue of material fact, and the motion for summary judgment should be denied.

(D) Lockheed Martin Did Not Act In Good Faith

Lockheed Martin asserts that it should escape liability, because it acted in good faith. This argument is without merit.

As a threshold matter, the KCRA required “an individualized inquiry in determining whether [Cowing’s] disability or other condition disqualifies him from a particular position.” *Keith, supra*, 703 F.3d at 923, quoting *Holiday v. City of Chattanooga*, 206 F.3d 637, 643 (6th Cir. 2000). “A proper evaluation involves consideration of the applicant’s personal characteristics, his actual medical condition, and the of fact, if any, the condition may have on his ability to perform the job in question.” *Stow*, 703 F.3d at 923. “The [KCRA] requires employers to act, not based on stereotypes and generalizations about a disability, but based on the actual disability and the effect that disability has on the particular individual’s ability to perform the job.” *Id.*

This case illustrates well the value of the individualized inquiry, of a reasoned assessment of an employee’s restrictions, if any, and how, if at all, they impact his ability to do his job’s essential functions, an assessment that entails a reasoned consideration of what an essential function actually is. Lockheed Martin claims that Cowing somehow admitted he could not do his job when he asked Vascello to prepare some restrictions, something Miculinich had suggested that he do. Cowing simply did as he was directed by his supervisor. More to the point, he showed up for work on September 9, 2013, ready to resume working as he had been, that he was ready to do so at the price of physical pain, even substantial physical pain, is to his credit. It is not a concession regarding his claim.

The good-faith inquiry and individualized assessment required of Lockheed Martin did not happen. Instead, the record indicates the following:

(1) Miculinich decided that Lockheed Martin could not and would not return Cowing to work within 20 minutes or so of encountering him the morning of September 9, 2013.

(2) The basis for Miculinich's decision is the patently incredible notion that lifting a 10 lb. item is actually lifting an item weighing more than 20 lbs.

(3) No one consulted with Cowing as to how the restrictions would impact him doing his job as a structural aircraft mechanic.

(4) The essential functions form supposedly applicable to Cowing was prepared only after Miculinich had reported to Streitzel that Lockheed Martin could not and would not bring Cowing back to work.

(5) The accommodations meeting was not a good faith, bona fide consideration of Cowing's situation; it was held merely to affirm the decision that had already been made.

(6) Miculinich claims that he informed the participants in the accommodations meeting that Cowing should not be returned to work because of the weight limits and shared with it his theory that items weigh more than double their weight. (Miculinich depo. at 86). On the other hand, Streitzel, who was present, did not recall this information or theory being shared then or ever. (Streitzel depo. 19-20).

In sum, the evidence indicates that Lockheed Martin terminated Cowing's employment based on the utterly incredible and unfounded notion that his disabilities and attendant physical restrictions prevented him from performing his job, because the act of lifting 3 lbs. is really the act of lifting more than 15 lbs. or the act of lifting 10 lbs. is really the act of lifting more than 20 lbs. A

reasonable jury can find that Cowing's disability was used as a pretext to terminate his employment. Therefore, defendant's motion should be overruled.

(E) Cowing Did Not Voluntarily Leave the Workforce and His Backpay should Not be Limited

Cowing provided Lockheed Martin with 27 pages of documents reciting his efforts to find employment after it fired him, evidence which Lockheed Martin does not mention.¹¹ Cowing was unsuccessful in his job search. However, he did succeed in retraining himself and obtained a degree from Midway University in May 2016.

Dollar Gen. Partners v. Upchurch, 214 S.W.3d 910 (Ky. App. 2006), does not support defendant's argument, because the plaintiff in *Upchurch* did not look for work at all and instead returned to school. Cowing, by contrast, exercised due diligence in looking for appropriate work after being fired by Lockheed Martin. Accordingly, defendant's argument his back pay damages should be limited, which is made in Point VII A of its memo, is without merit and should be overruled.

(F) Cowing Can Present Competent Evidence of Emotional Distress

Cowing is not required to present expert testimony in support of claim for emotional distress damages. *Banker v. Univ. of Louisville Athl. Ass'n*, 466 S.W.3d 456, 463-64 (Ky. 2015); *MacGlashan v. ABS Lincs KY, Inc.*, 84 F.Supp.3d 595, 604-05 (W.D. Ky. 2015). In *Banker*, the Supreme Court affirmed a jury award of \$300,000 in compensatory damages for the plaintiff's emotional distress based on the plaintiff's testimony and her mother's that the plaintiff

¹¹ This document is tendered as Ex. 7 to this memorandum.

suffered depression, loss of weight and sleep disturbance following her termination. 466 S.W.3d at 463. The plaintiff in *Banker* did not seek medical treatment and did not present expert testimony. *Id.* The testimony from Cowing and from his spouse, Marcie, is, unfortunately, very similar to the proof in *Banker*. Furthermore, Cowing has provided defendant with records regarding his treatment for emotional distress by a provider related to this case. (See Plaintiff's Answers to Defendant's Additional Interrogatories and Document Requests, Interrogatory no. 7).¹² Accordingly, it is sufficient to support an award of compensatory damages for emotional distress, and the motion for summary judgment on this point too should be denied.

Conclusion

For the foregoing reasons, Lockheed Martin's motion for summary judgment motion should be overruled in its entirety.

Respectfully Submitted,

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¹² This discovery response and the aforementioned job search documents are tendered herewith as Ex. 7 to this memorandum.

Certificate of Service

I certify that on August 25, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to the following: All Counsel of Record.

BY: s/Robert L. Abell
Robert L. Abell
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