**EXHIBIT C.8**

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

WILLIAM R. DOWNING, JR. PLAINTIFF

VS. CASE NO: 4:15-CV-00570

DEPARTMENT OF FINANCE AND ADMINISTRATION,
An Agency of the State of Arkansas
BOB HAUGEN, Individual and Official Capacity
And , DAVID JUSTICE, Individual and Official Capacity DEFENDANTS

**AMENDED COMPLAINT**

COMES THE PLAINTIFF, by and through Counsel and for his Amended Complaint he states:

**PARTIES AND JURISDICTION**

1. Plaintiff is a resident and citizen of the State of Arkansas, who formerly worked for the Department of Finance and Administration, an agency of the State of Arkansas. The state Defendant is the Department of Finance and Administration (DFA), an agency and instrumentality of the State of Arkansas. This is an action brought under Title I of the ADA, §504 of the Rehabilitation Act of 1973, the Arkansas Civil Rights Act of 1993, and the FMLA of 1993. The individual Defendants Bob Haugen and David Justice are individuals who interfered with the use of Plaintiff's FMLA leave by refusing to allow him to return to work after six weeks and fired him for requesting accommodation and FMLA in violation of the FMLA and the ACRA. The individuals are not sued as employers under the ADA or Section 107 of the ACRA. The State of Arkansas is not sued for damages under the FMLA, but each individual Defendant is sued for compensatory and liquidated damages in his individual capacity under the FMLA and Section 108 of the ACRA, However, each Defendant is sued for declaratory and injunctive relief under the doctrine of *Ex parte Young* in their official capacity. Since the acts giving rise to this action arose in this county, venue is proper under §28 U.S.C. 1391(b). This Court has personal

and subject matter jurisdiction under §28 U.S.C. 1331, as well as supplemental jurisdiction under 28 USC 1367. All actions were taken under color of law.

**GENERAL ALLEGATIONS OF FACTS**

2. Plaintiff was hired by the DFA in October of 2011. The DFA receives, and has received at all times relevant, federal funds sufficient to subject waive its immunity under Section 504 of the Rehabilitation Act of 1973.

3. At all times relevant, Plaintiff performed his job satisfactorily.

4. In 2012, Plaintiff began having difficulty with his hips, which caused him to be substantially limited in his ability to walk, lift, and engage in other regular activities. As an example, a normal person in average population has the ability to lift more than 50lbs. But Plaintiff cannot. The inability to lift more than 50lbs restricts Plaintiff from thousands of jobs. These jobs, span all job categories, and require lifting of more than 50 lbs. Thus, Plaintiff is, or is regarded as, a person with a disability.

5. So, Plaintiff timely approached his supervisor, Bob Haugen, and requested that he be allowed leave in order to have his hips replaced.

6. Plaintiff was granted leave from a job that required only 50 pounds lifting. The job was entitled Surplus Agent, Internet Sales, and did not require lifting more than 50 pounds. Plaintiff's previous supervisor, Allen Saugey, had accommodated Plaintiff's lifting difficulties by allowing Plaintiff to use two wheelers and seek assistance from other employees from time to time. Mr. Saugey also restructured Plaintiff's job, and Defendants knew this. Defendants then revoked the accommodation, and Defendants required Plaintiff to return to the job described by Exhibit "A," which required more than 50 pounds lifting.

7. Six weeks into his FMLA leave, Plaintiff was released to return to work by his physician, who determined that Plaintiff could perform he essential functions of his job with accommodation. However, Haugen and David Justice then refused to re-instate Plaintiff to a

comparable position. So, Plaintiff was forced to take more FMLA than he needed, in violation of the FMLA.

8. When Plaintiff's need for FMLA leave ceased after six weeks, he was ready willing and able to do the job that he previously held with the accommodation of a cane, but Haugen and David Justice refused to allow Plaintiff to return to work, Eventually, they required Plaintiff to perform a job that he could not physically perform. See Exhibit "A." The job described by Exhibit "A" was more physically demanding than Plaintiff's regular job and was not comparable.

9. Indeed, Haugen and David Justice required Plaintiff to be 100% healed. See Exhibit A, incorporated by reference herein.

10. After six weeks, Haugen and David Justice refused to re-instate Plaintiff unless he could produce a doctor's release with no restrictions. Haugen and Justice had been trained on ADA and FMLA issues. Even though they knew a 100% healed policy was illegal, they required Plaintiff to produce such a release. This delayed Plaintiff's return to work, causing him to lose pay.

11. Furthermore, Haugen and David Justice had been trained that they could not force Plaintiff to take more leave than was necessary, and they had also been trained that they must reinstate Plaintiff to the same or comparable job. But, Haugen and David Justice deliberately ignored this training.

12. Then, within 12 weeks, Plaintiff returned with no restrictions, expecting to be returned to his old position. But Haugen and David Justice surprised Plaintiff by requiring him to work a position that was not comparable to his previous position with increased physical demands. Haugen and David Justice had changed the job, to one week on Internet Sales and one week in the Warehouse, which increased the lifting requirements. The job had been four days in Internet sales and one day in the Warehouse. So, Plaintiff protested, which is protected activity. Defendants then refused to engage in any good faith discussion with the Plaintiff.

Plaintiff also requested accommodation of catastrophic leave, leave without pay for a few weeks, or job re-assignment from Amy Valentine, and she summarily refused. In fact, she flippantly mislead Plaintiff about the requirements for catastrophic leave, saying that such leave is only granted to individuals with cancer, heart transplants, etc.…

13. Yet Bob Hogan, an individual who has not insisted on his rights under the FMLA and ADA, was granted catastrophic leave for a back condition.

14. As alleged, this position was not comparable because the lifting restrictions were increased, Plaintiff was not allowed the accommodations he had previously been granted, and Plaintiff's former job required only two days in the Warehouse in a two week period. Haugen and Justice had been trained on ACRA, ADA and FMLA issues. Even though they knew Plaintiff must be returned to the same or comparable position under the FMLA, they refused to return to Plaintiff to the same or comparable position. Then, even though they knew the ACRA and FMLA prohibited retaliation, Haugen and David Justice then terminated the Plaintiff because plaintiff had requested FMLA leave and unpaid leave as an accommodation, as well as insisted on retaining his old position or a comparable position.

**COUNT I**

15. Plaintiff re-alleges foregoing against DF&A as if fully set out herein.

16. Plaintiff timely filed a Charge of Discrimination under Title I of the ADA of 1990 and has received his Right-to-Sue letter. Furthermore, Defendant is a federal financial aid recipient, as that term is defined by §504 of the Rehabilitation Act of 1973.

17. Plaintiff is a person with a disability, as that term is defined by the ADA and §504. Plaintiff is, or was regarded as, a person with a disability, as defined by §504 and the ADA, because he was substantially limited in his ability to walk and required hip surgery.

18. Accordingly, as alleged above, Plaintiff requested leave or job reassignment as an accommodation. With accommodation, Plaintiff was a qualified individual with a disability.

19. A 100% healed requirement is a violation of the ADA and Section 504, and such violation has been clearly established since at least 2011.

20. Plaintiff was granted leave by the Defendants, but then Haugen and David Justice refused to re-instate Plaintiff unless he was 100% healed. See Exhibits A and B. A review of Exhibit A shows Defendants required Plaintiff to perform all of the essential functions without accommodation in violation of the ADA, Section 504, and the FMLA.

21. As a result, DFA has failed to engage in a good faith interactive process designed to accommodate Plaintiff's disability and has discriminated on the basis of his real or perceived disability in violation of §504 and the ADA.

22. Alternatively, Defendants have retaliated against Plaintiff by requesting accommodation. Had Plaintiff not requested accommodation, Defendants would not have acted in the manner that they did.

23. As a direct and proximate cause of Defendants acts and omissions alleged herein, Plaintiff has suffered severe mental and emotional harm, lost wages, lost fringe benefits, lost retirement, lost seniority, increased taxes, and incurred other damages in an amount to be proven at trial.

**COUNT II-FMLA**

24. Plaintiff re-alleges the foregoing all Defendants as if fully set out herein.

25. Plaintiff is an eligible employee, working for a covered employer under the FMLA, ADA, Section 504, and the ACRA.

26. Since 2011, Plaintiff has worked for the Defendant until he needed hip replacement surgery. In the year before his FMLA leave, Plaintiff worked full-time, forty hours per week. He is therefore an eligible employee as that term is defined by the FMLA.

27. DF&A is a public entity, who, at all times relevant, employed more than fifty (50) people within seventy-five (75) miles of Plaintiff's former worksite in 2014 and 2013.

28. Accordingly, DF&A is an employer covered under the FMLA. At all times relevant, Haugen and David Justice were acting within the scope of the authority granted them by the DF&A. Haugen and David Justice had the ability to hire and fire the Plaintiff, as well as affect the terms and conditions of his employment. Haugen and David Justice are therefore employers as that term is defined by the FMLA and persons subject to Section 108 of the ACRA.

29. Plaintiff gave timely and prompt notice of a need for FMLA leave, but Haugen and David Justice refused to reinstate him to his former position, or a comparable position, after FMLA leave. He saw a doctor more than two times, was prescribed pain medication, was hospitalized one night, and was released from work for several weeks. Although they knew this, Haugen and David Justice refused to re-instate Plaintiff to comparable position. At the end of six weeks of his leave, Plaintiff was able to perform all functions of his former job with reasonable accommodation, in the absence of Haugen and David Justice's violations of state and federal law. However, Defendants required Plaintiff to perform all of his essential functions without accommodation in violation of the ADA, Section 504, and the FMLA.

30. At the end of twelve weeks of his leave, Plaintiff was able to perform all functions of his former job with reasonable accommodation, in the absence of Haugen and David Justice's violations of state and federal law.

31. The right to be reinstated to a former position with essential job functions with reasonable accommodation was clearly established at the time of the alleged infraction. Haugen and David Justice's requirement that Plaintiff be 100% healed forced Plaintiff to take more FMLA than was necessary. All of these rights, as alleged herein, were clearly established, and Defendants knew their actions were illegal, as herein alleged.

32. As alleged herein, Defendants discharged the Plaintiff in retaliation for requesting FMLA leave and other accommodation. Plaintiff insisted on his rights under the FMLA, ADA,

and ACRA. In response, the Defendants became hostile and required Plaintiff to be 100% healed. They also intentionally created a job they knew Plaintiff could not do.

33. Plaintiff was replaced by a 23 year old person, Caleb Kelley, who did not have a disability, who had not requested leave under the FMLA and as an accommodation, and who had not resisted specific violations of the FMLA and ADA. He was less qualified than the Plaintiff, as demonstrated by the fact he lasted only six months.

34. Defendants knew each of these actions was illegal, yet violated the law anyway.

35. As direct and proximate cause of Defendant's acts and omissions alleged herein, Plaintiff has lost wages, lost fringe benefits, lost retirement, lost seniority, increased taxes, and incurred other damages in an amount to be proven at trial.

36. All of Defendant's actions have been willful.

**COUNT III**

37. Plaintiff re-alleges against the foregoing against Haugen and David Justice under the ACRA and FMLA individually as if fully set out herein.

38. DF&A is a public entity subject to the ACRA and the FMLA.

39. Plaintiff is a person with a disability because he can only lift up to 50 lbs.

40. Plaintiff has seen a doctor on more than two (2) occasions has been prescribed prescription medication and has been released from work for weeks.

41. Plaintiff requested accommodation in the form of FMLA leave as well as re-instatement to his position. This request was refused. However, both of these requests were reasonable as a matter of law because Plaintiff was entitled to re-instatement under the FMLA. Nonetheless, Defendants refused without a reasonable basis in law or fact.

42. Had Plaintiff not requested FMLA leave as an accommodation, he would be working now. Thus, Haugen and David Justice have retaliated against the Plaintiff by refusing to re-hire him in violation of the ACRA and the FMLA.

43. As direct and proximate cause of acts and omissions alleged herein, Plaintiff has suffered severe mental and emotional harm, lost wages, lost fringe benefits, lost retirement, lost seniority, increased taxes, and incurred other damages in an amount to be proven at trial.

44. Defendants' actions have been willful.

WHEREFORE Plaintiff prays for appropriate compensatory and liquidated damages exceeding $75,000.00, punitive damages against each individual, for declaratory judgment that the Defendant's policy requiring individuals with disabilities to be 100% healed violates the ADA and ACRA, for an injunction requiring the Defendant to cease this illegal practice of requiring employees to be 100% healed, for Declaratory Judgment that such a policy violates the ADA, for re-instatement or front pay, for reinstatement of state retirement, for a trial by jury, for reasonable attorney's fees, for costs, and for all other proper relief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been served on 28th day of December, 2015, via ECF upon counsel for the Defendant:

Jennifer Merritt

*/s/ Luther Oneal Sutter*
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