 EXHIBIT C.3

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

WILLIAM R. DOWNING, JR. **PLAINTIFF**

v. **Case No. 4:15-CV-570-DPM**

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

Defendants' Trial Brief

Defendants Arkansas Department of Finance and Administration, Bob Haugen, and David Justice respectfully submit this trial brief pursuant to the Court's April 26, 2017, Second Amended Final Scheduling Order (Doc. 77).

Summary of the Facts

Plaintiff William R. Downing, Jr. went to work as a Warehouse Specialist with DFA's Marketing and Redistribution division ("M&R") on September 4, 2011. He was responsible for the acquisition, storage, maintenance, and distribution of supplies in a central storage area, and occasional heavy lifting was required. A few months later, in February 2012, DFA hired Downing to fill a new Warehouse Specialist position at M&R. This position required all of the knowledge, skills, and responsibilities as any other Warehouse Specialist but also included additional knowledge, skills, and duties related to internet property sales including monitoring

the computer system, photographing state surplus items, developing property descriptions, uploading items to a website for sales to the public, and coordinating the shipping or pickup of items sold online. While there was a new position number for the job (Position Number 2208-0074), Downing's job title and pay remained the same.

Although Downing's new position involved running M&R's internet-based property sales, warehousing remained an essential function of Downing's job. Downing always worked in the warehouse at least one full day each week in addition to other times in connection with his web sales. According to Downing, 60% of his job was "desk work" on the computer and 40% of his job was "warehouse work." Downing's position was not a "light duty" position.

In June of 2013, M&R upgraded all Warehouse Specialists to a new job title of "Surplus Property Agent" and gave them a raise, but the job duties remained the same. DFA's job description for the Surplus Property Agent explained that "[t]his position may require lifting heavy and cumbersome objects." Downing testified that his job functions as a Surplus Property Agent were the same as when he was a Warehouse Specialist.

On January 17, 2014, Downing submitted a request for FMLA leave from February 7 through May 7, 2014, for hip-replacement surgery. DFA granted his request. Six weeks after his surgery, Downing's doctor released him to return to work, but Downing had to use a cane for six weeks. M&R could not reasonably

accommodate the cane restriction, so Downing took another six weeks of FMLA leave. Downing took the full 12 weeks of FMLA leave allowed by law.

During Downing's FMLA leave, another Surplus Property Agent (Caleb Kelly) handled Downing's web-related duties. That employee developed a more efficient way of posting property to the web that minimized to 18-20 hours per week the *total* time required to manage the internet sales. And only about six to eight hours of that time each week was actual computer time plugging that information in; the rest of the Surplus Property Agent's time (32-34 hours per week) was spent in the warehouse. M&R management decided to realign the web-related work schedules for the two Surplus Property Agents who handled web duties (Downing and Kelly) accordingly upon Downing's return from leave.

On May 2, 2014, Downing returned to work with a full release to duty. M&R managers met with him and explained that his position now required one week of primarily web duties and responsibilities, followed by a week of primarily warehouse responsibilities. Justice had determined that a one-week-on, one-week-off schedule for the web-posting duties would better serve the needs of the warehouse because it ensured that two Surplus Property Agents would be fully trained on those duties. An alternating weekly schedule would also allow Downing to get caught up on processing property in the warehouse, which he was behind on. Downing told his managers that he would be unable to perform assigned duties in the warehouse for medical reasons. Because the doctor's release did not include any

restrictions, M&R management required clarification from Downing's physician. Downing did not see his doctor again for over a month, until June 4, 2014.

In the interim—and because Downing had exhausted all available leave options—M&R management allowed Downing to return to work with temporary light-duty accommodations until he could get a full release. They essentially allowed him to work the same schedule he had worked prior to taking leave (four days primarily desk work, one day warehouse) despite not having enough desk work to keep him busy during that time. On May 7, 2014, Justice informed Downing in writing that he must provide a "fit for duty" statement from his doctor releasing him to return to work and perform all essential job duties by June 5, 2016. Justice explained that, "[u]nfortunately, there is not 'light duty' work available in the essential functions of this position."

During the temporary "light duty" period, M&R management and DFA administrators met with Downing again to discuss his job description and responsibilities and whether he could be accommodated. During this meeting, Downing requested his job duties to be changed. He wanted to work as a full-time web specialist. But DFA administrators told Downing that the M&R warehouse did not need a full-time web specialist, and that that was not a job they were going to create. Warehousing was an essential job function of Downing's Surplus Property Agent position; the internet posting was just a small portion of the job that could be done in a few hours a day.

On June 4, 2014, Downing presented his supervisors with a doctor's note containing permanent job restrictions that limited Downing's warehouse time to two days per week. By this point, M&R management and DFA administrators had already reviewed the essential functions of Downing's position as well as the needs of the warehouse on multiple occasions, but they discussed everything again to see if there was anything they could do for him. DFA determined that, based on the essential job functions of the Surplus Property Agent position and the needs of the warehouse, there were no available accommodations for Downing at M&R. M&R had two or three Surplus Property Agent vacancies that they were trying to fill at that time, and they simply did not have enough computer work to keep Downing busy for the three days per week (24 hours) his doctor said he had to work at a desk job. HR reviewed the vacancies in the Office of State Procurement to see if they could transfer Downing to another position, but there was no opening for which he was qualified. Ultimately, M&R management, HR management, DFA's Deputy Director Tim Leathers, and Revenue Legal Counsel John Theis agreed that there were no other options besides termination. OSP Administrator Benton decided to terminate Downing because he was not ever going to be able to perform the essential functions of the Surplus Property Agent position. Haugen notified Downing of the decision.

Downing is not substantially limited in any major life activity, and he is not regarded as disabled by the Defendants. Downing can engage in his own self-care (cooking, bathing, and feeding). Downing mows the grass with a self-propelled

lawnmower, does weed-eating, gets down on his hands and knees to weed flowerbeds, and cleans house. Downing works full-time as a shipping and receiving clerk at the University of Arkansas for Medical Sciences campus. Downing lifts and moves objects and delivers packages throughout the hospital every day at his job. He is on his feet all day walking and delivering packages at UAMS. Downing can lift up to 50 pounds. Downing denied having a disability on his job application with UAMS.

While many of the material facts in this case are undisputed, Defendants have identified the anticipated factual issues should any of Downing's claims proceed to trial in their Pretrial Disclosures (Doc. 82).

Summary of Legal Arguments

The undisputed facts show that Downing was terminated for a legitimate, non-discriminatory reason. Downing could not and would not ever be able to perform the essential functions of his job as a Surplus Property Agent, according to his own doctor, and no reasonable accommodation was available in the busy, understaffed M&R warehouse. Defendants reinstated Downing to the same position he held prior to taking FMLA leave, and the law does not require M&R to create a new, unneeded position at Downing's request. All of his claims fail as a matter of law, and Defendants deserve judgment as a matter of law.

Rehab Act Claims. Plaintiff has **no** cognizable claim under the Rehab Act. He has asserted claims not based on disability and cannot establish that his alleged

disability was the **sole** reason for the Defendants' actions. *See, e.g.*, 29 U.S.C. § 794; *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1029 n.5 (8th Cir. 1999). Defendants deserve judgment as a matter of law on the Rehab Act claims.

Disability Discrimination Claims. Downing alleges that the Defendants discriminated against him because of his hip problems under both the ADA and the Rehab Act. The disability discrimination claims fail for each of the following reasons:

- ***Downing does not have a physical or mental impairment that substantially limits one or more of his major life activities.*** Downing can walk, lift, work, and carry out other major life activities without substantial limitations.
- ***None of the Defendants regarded Downing as having such an impairment.*** Downing was not in a light-duty position before his hip replacement, and the Defendants anticipated that Downing would be able to return to work at full capacity after his 12-week rehab period.
- ***Downing is not qualified to perform the essential functions of his job as a Surplus Property Agent with or without reasonable accommodation.*** Warehousing is an essential function of Downing's job, but Downing's doctor said he cannot work in the warehouse more than two days a week. This was a permanent restriction. Downing's claim that DFA should have let him work his old schedule of four days doing "web" work and one day in the warehouse is unreasonable as a matter of law

because DFA improved the web-posting process and simply did not have enough computer work for him to do. *See Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 950 (8th Cir. 1999).

- ***DFA made a good-faith effort to accommodate Downing.*** Downing admits that the Defendants had at least four different meetings with him about his requests for accommodations and that they gave him temporary light-duty accommodations so that he could return to his doctor and seek a full release. DFA's Human Resources Administrator also tried to help Downing find another job within DFA that was less physically demanding and put in a good word for Downing with other state agencies.
- ***There are no circumstances that give rise to an inference of unlawful discrimination based on disability.*** The two issues Downing raises on this point – the "document of conversation" regarding performance problems and the random drug test – both occurred *before* Downing alleges he became disabled (when he had his hip replacement).
- ***No disability discrimination.*** DFA's decision to terminate Downing based upon the permanent restrictions imposed by his doctor, when no jobs accommodating those restrictions were currently available, does not constitute disability discrimination as a matter of law. *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995).
- ***No retaliation.*** There is no evidence to show a causal connection between Downing's requests for accommodation and his discharge.

FMLA Claim. Downing also asserts a failure-to-reinstate claim under the FMLA against Haugen and Justice in their official capacities. The evidence at trial will show that Downing was reinstated to the same or an equivalent position as required by the FMLA. It is not an FMLA violation to terminate an employee who cannot perform essential job functions after exhausting available leave.

Anticipated Evidentiary Issues

- ***Motion in Limine.*** Defendants have filed a renewed motion in limine (Doc. 58) seeking confirmation that the Court's prior rulings (Doc. 76) still apply. In addition, Defendants anticipate that issues will arise at trial despite the Court's rulings *in limine* regarding information that came to light or was otherwise discussed during the post-termination internal audit that DF&A performed after Downing lodged complaints. Specifically, Downing likely will attempt to introduce evidence or argument regarding irrelevant information included in those documents such as the agency's supposedly deficient, false, or misleading EEOC response. *See* Pl.'s Trial Br. (Doc. 81) at 20-22. The EEOC proceedings, however, are not relevant to any issue of fact or law in this case, and all evidence and argument regarding the EEOC investigation should be excluded from evidence.
- ***Expert testimony.*** Plaintiff has not disclosed any expert witnesses or produced any expert reports, but he has identified his treating physician as a lay witness. Defendants anticipate that issues regarding the proper scope of

the physician's testimony will arise at trial. The treating physician should not be permitted to offer any expert opinions.

- ***Bench trial on FMLA and ADA claims.*** Defendants believe that the Court, not the jury, should adjudicate all of the FMLA and ADA claims because the only available relief on those claims is equitable in nature. *See* 8th Cir. Civil Jury Instr. § 10.0 (explaining that there is no constitutional right to a jury trial on ADA claims for injunctive relief) (citing *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261 (9th Cir. 2009)).
- ***Damages.*** Plaintiff seeks to recover damages for "severe mental and emotional harm." Am. Compl. ¶¶ 23, 43. But, as noted above, Plaintiff seeks only injunctive relief on his ADA claims, and emotional distress damages are not recoverable under either the Rehab Act or the FMLA. *Rodgers v. City of Des Moines*, 435 F. 3d 904, 908-09 (8th Cir. 2006) (holding damages recoverable under the FMLA are strictly defined in the statute and measured by actual monetary losses); *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566, 570 (8th Cir. 1989). Therefore, testimony and evidence regarding Plaintiff's mental and emotional harm is irrelevant and should not be admissible at trial.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

By: */s/ Jennifer L. Merritt*

Jennifer L. Merritt
Ark. Bar No. 2002148
Senior Assistant Attorney General
Arkansas Attorney General's Office
323 Center Street, Suite 200
Little Rock, AR 72201
Telephone: (501) 682-1319
Fax: (501) 682-2591
jennifer.merritt@arkansasag.gov

Christine A. Cryer
Ark. Bar No. 2001082
Senior Assistant Attorney General
Arkansas Attorney General's Office
323 Center Street, Suite 200
Little Rock, AR 72201
Telephone: (501) 683-0958
Fax: (501) 682-2591
christine.cryer@arkansasag.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Jennifer L. Merritt, hereby certify that on March 1, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

Luther Oneal Sutter
luthersutter.law@gmail.com

Lucien Gillham
lucien.gillham@gmail.com

/s/ Jennifer L. Merritt
Jennifer L. Merritt