 EXHIBIT C.4

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

TRIAL BRIEF

Plaintiff, Gary Downing, by and through his attorneys, for his Trial Brief, states:

INTRODUCTION

Summary Judgment was granted in part, the remaining claims are: (1) an FMLA claim for failure to reinstate under an ex parte young theory; (2) ADA/Rehab Act discriminatory discharge (actual and perceived disability); (3) ADA/Rehab Act failure to accommodate; and (4) Rehab Act - retaliation.

STATEMENT OF FACTS

I. Key facts that demonstrate there is no basis for a directed verdict in this case.

As of the day Downing went on FMLA leave, and before, his job "was that he was working four days on web related duties, one day on pure warehouse duties, and Kelly would work one day on web related duties, and four days on pure warehouse related duties. D.E. 35-17, Haugen, 10.4-11. After the FMLA leave, "it wasn't going to be that way anymore." D.E. 35-17, Haugen, 31.15-25. They changed the job to require more walking than in the past. D.E. 35-17, Haugen, 28.16-23, 29-30. Downing's duties were being given to Kelly, who had not taken FMLA leave. D.E. 35-17, Haugen, 32.3-12.

Defendants admit there are a lot of jobs that do require lifting over 50 pounds, such as construction, farm work, and many factory jobs, that Downing's lifting restriction would preclude him from doing. D.E. 39-1, Justice, 89.

Defendants required that to return to work, Downing get a fully recovered, full duty release, without restrictions. Failure to get that is the reason they claim for Downing's termination. D.E. 35-17, Haugen, 35, 38.12-17, 40.3-10; D.E. 36-15, Valentine, 46-48, 50, 57-58; D.E. 39-2, depo. ex. 9, DFA 536. However, they have also stated that Downing's lifting restriction was the reason for his termination. D.E. 39-1, Justice, 68; Ex. F, Letter of 6/15/16, Dir. Walter, p. 1, para. 2-4. The problem being that this also amounts to an admission of disability discrimination because lifting over 50 pounds was not an essential job function, and the elimination of marginal functions is a reasonable accommodation. D.E. 39-1, Justice, 88.4-21, 92-93.

Defendants engaged in no discussion with Downing, with each other, or other DFA management about ways in which Downing's limitations might be accommodated, did not do any research on the issue, and did not look to see if there was equipment that would let Downing do the job. D.E. 35-17, Haugen, 13.2-14.21, 15.5-20, 16-17; D.E. 39-1, Justice, 41-47, 67-68, 70, 78-79.

With reasonable accommodations, it is possible that Downing could have done his job. D.E. 35-17, Haugen, 21.22-22.2; D.E. 39-1, Justice, 70, 88.4-21.

II. Timeline

A. The Beginning

Plaintiff was hired in August 2011. After starting the DFA job, at home, Downing began complaining about his hips, he was waking up with leg cramps. It got progressively worse. D.E. 39-5, Ladd, 31-32. A lot of times when he came home from work he was in so much pain he could not help around the house. His partner would have to get help from other people moving

things. D.E. 39-5, Ladd, 36. They had to decrease activities like hiking and camping since the hip issues arose. D.E. 39-5, Ladd, 30; D.E. 35-14, Downing Depo., 26.

Haugen and Justice had seen Downing limping. Justice asked if was going to be able to do warehouse work with that limp. Downing told them that he had arthritis and might have to have surgery to have his hips replaced. D.E. 35-17, Haugen, 16.9-15; D.E. 35-14, Downing Depo., 49; D.E. 39-1, Justice, 31-33. Downing was going to the doctor from the end of 2011 through the end of 2013. D.E. 39-5, Ladd, 36.

B. **Web worker job and evaluations**

Then Supervisor Allen Saugey began letting Downing fill in for an employee who was leaving doing web sales. D.E. 39-5, Ladd, 33-34. This relieved some of the pain Downing was having, though he still had difficulty sleeping at night, being unable to do so at times, and would have to sleep man nights in a recliner, the couch, or another bed so as not to disturb Ladd. D.E. 39-5, Ladd, 34. This was Johnathan Burns. "Downing was selected to fill-in the position vacated by J. Burns keeping his Warehouse Specialist Title, Class Code, and Pay Grade. Ex. A, depo. ex. 8, DFA 530. Downing applied for a web job, which was different than the other workers. He got the job. D.E. 35-14, Downing Depo., 75. Johnathan Burns was an administrative specialist, and he did the web-related duties at issue, "full-time." Burns did not drive a truck around the state or anything like that. He also got decent evaluations, and was not disciplined. D.E. 39-1, Justice, 103-104.

The job process was that commodities were identified that would be good for a web sale for more money than they would bring at the warehouse. The items were staged and pictured, information was gathered, and then it was posted on the website. It is then bid on similar to Ebay. D.E. 39-1, Justice, 26-27.

When Defendant submitted a hiring freeze exception request for the job Plaintiff got, that job description, contained in his personnel file, stated duties consistent with what Plaintiff has described, not what Defendant now claims:

> This Warehouse Specialist will work under supervision and is responsible for monitoring the computer system, photograph state surplus items, develop descriptions and upload to a website for a sale to the public. Customer service, filing, and organization skills a must. Will answer customer questions online and on the phone. Send professional emails to buyers on eBay, track the listing and sales of eBay items on an Excel spreadsheet. Coordinate the shipping of items sold on-line or picking up items on sale.

Ex. B, Def. Prod., DFA 669-671. Also pulled from his personnel file is Ex. B, Def. Prod., DFA 771. It was signed by Valentine and requested by Defendant Justice. Jane Benton, who was involved in the termination wrote a letter in support of the hiring freeze exception request:

> This position is critical to M&R in maintain the ARSTATESUPLUS website to sell inventory online. Due to the recession and increased marketing of M&R's services, the workload has significantly increased. This position is needed to continue work for all state agencies turning in surplus items, movement of inventory on-line and loading for customers when sold. If inventory turn rate is not sufficient, items stack up at the agency level and less money is received when sold, due to obsolescence.

Ex. B, Def. Prod., DFA 773. Also in Downing's personnel file is yet another document Defendants have chosen not to present the Court, which describes Plaintiff's job, stating:

> **Position Title: Warehouse Specialist**
>
> **Essential**
>
> Knowledge of computer hardware, software and internet capabilities. Ability to operate digital camera and upload & download into existing systems. Knowledge of database management to maintain surplus items.
> Ability to write detailed descriptions of surplus items to place on line.
> Organization skills.
>
> **Desirable**
>
> Customer service skills.
> Excellent verbal, written communication skills.
>
> **Beneficial**
>
> Experience selling on eBay or other on-line venues.
>
> Logistical and inventory experience.
> Interaction with general public.
> SAP experience.
> Auction experience.

Ex. B, Def. Prod., DFA 777. Notably, these documents are all from Plaintiff's personnel file, and all were created by Defendants. None of them talk about lifting, standing, walking, or how much time is spent in the warehouse. Furthermore, even the documents Defendants claim are accurate job descriptions for Plaintiff do not talk about the amount of walking and standing occurring. Ex. A, depo. ex., 2-3.

The evaluation for September 2011-2012 was signed off on by David Justice, giving Downing acceptable and exceeds ratings. Ex. A, depo. ex. 4. The evaluation from September 2012-2013, signed off on by David Justice, gave acceptable and exceeds ratings. It lists Downing's job duties, which include: (1) " . . . selection of items suitable for listing on our website(s) and warehousing of those items"; (2) " . . . organize and keep records on all items sold through the web selling areas." ; (3) " . . . act as the web sales representative for GovDeals as well as Marketing and Redistribution to all of our clientele"; (4) " . . . maintain a safe and secure working environment at all times"; (5) " . . . serve as a positive member of the Warehouse Team". Ex. A, depo. ex. 5. Once again, walking and standing are not mentioned. Id. Haugen and Justice had to give and approve these evaluations, and made sure they were accurate and honest. Furthermore, they look at ALL aspects of a person's job. The warehouse supervisors evaluated Downing, and Justice would approve the evaluations. If he felt something were wrong or incorrect, he would fix the evaluation. D.E. 39-1, Justice, 10, 23-25, 31; D.E. 35-17, Haugen, 6-7.

Around June 11, 2014, before the filing of an EEOC charge, Defendants, through Bob Haugen, told the Unemployment Security Department that no prior warnings had been given to Downing, that he had satisfactorily performed his job duties in the past, doing his job duties to the best of his ability. Ex. A, depo. ex. 7, resp. # 14-15. Downing engaged in no misconduct and has not been disciplined. D.E. 39-1, Justice, 21-23.

There was a time prior to Downing's FMLA leave that he had no backup. D.E. 39-1, Justice, 36-37. As of the day Downing went on FMLA leave, and before, his job "was that he was working four days on web related duties, one day on pure warehouse duties, and Kelly would work one day on web related duties, and four days on pure warehouse related duties. D.E. 35-17, Haugen, 10.4-11; D.E. 39-1, Justice, 25-26, 28. Sixty percent of his job was desk duty. Four days doing web duties, one in the warehouse. D.E. 35-14, Downing Depo., 50. The duties remained the same throughout. D.E. 39-1, Justice, 9.

Finally, the DFA did an internal audit citing the aforementioned documents that concluded:

> Based upon or review of . . . Downing's personnel file, he did apply and was transferred to the Warehouse Specialist position added to coordinate the sale of inventory on the ARSTATESURPLUS website. We do not offer an opinion on the degree of physical effort required to perform the duties and/or whether Mr. Downing's duties were inappropriately changed when he returned from FMLA.
>
> While reviewing the hire documents for the Warehouse Specialist position #22080074, we determined the KAS used to rate the applicants does not match the KAS for the Warehouse Specialist classification. This deviation from the standard classification further demonstrates DFA's intended use of the position. The KAS and minimum qualifications listed in the Class Specification for a Warehouse Specialist should have been included in the applicant evaluation.
>
> During our review of DFA's response to the EEOC, prepared by DFA Legal Counsel, we noted it does not include any reference to Warehouse Specialist position #22080074, which could be relevant in the EEOC's determination. In conclusion, we recommend DFA's EEOC response be amended to include information about the lateral transfer received on 2/5/12, and the functional responsibilities associated with the position.

Ex. F, Letter of 5/22/15, p. 3 of 8. The Director of the DFA's response is illuminating:

> Your investigation found that Mr. downing was hired on February 5, 2012 into a position which had different Essential, Desirable, and Beneficial skills than the other Warehouse Specialist positions at M&R. This position was designed to assist in placement of inventory items on the M&R website as a component of the job. This information was not part of the DFA response to the EEOC complaint filed by Mr. Downing.
>
> In your report you did not include the fact that as part of Mr. Downing's job the incoming items at M&R had to be unloaded, catalogued and moved into the proper area of the warehouse. This part of the job required Mr. Downing to lift, stoop and move inventory items within the warehouse.

> Mr. Downing was terminated because he could not lift, stoop and or move heavy objects as required in the Special Job Dimensions section of the . . . job description of Warehouse Specialist. The fact that he was in a Warehouse Specialist job that had primary responsibility for the surplus website maintenance had no bearing on the fact that he had to be able to lift and stoop in his job. The EEOC complaint will not be amended.

Ex. F, Letter of 6/15/15, Walter, p. 1, para. 2-4.

Despite all this, Defendants now claim Downing would do a few hours a day of web-related work, and then go do normal warehousing duties. D.E. 39-1, Justice, 29. When asked in discovery to list Plaintiff's job functions, computer related functions were not listed at all. Ex. C, Resp. Int. No. 6 (Int-1).

C. Notice of need for leave/accommodation and Response – January to February 2014

Downing verbally requested FMLA leave and was almost immediately sent for a drug test. D.E. 35-14, Downing Depo., 49, 61. Defendants acknowledged his request in writing on January 17, 2014. D.E. 35-12, FMLA acknowledgement; D.E. 39-1, Justice, 85-85. On January 21, four days later, Defendants Haugen and Justice had the documented conversation with Downing alleging performance problems. D.E. 35-17, Haugen, 7; D.E. 39-1, Justice, 85. The allegations in the documented conversation were ridiculous. They had different people answering calls on different weeks, not just Downing, and there was another area, that they did not control that also answered these calls, and there was simply no way to fairly attribute a failure to call people back to Downing. D.E. 35-14, Downing Depo., 66-67. One of the calls was something the other person doing the job had messed up. D.E. 35-14, Downing Depo., 67.

Haugen knew Downing was going for hip surgery, and had seen him limping. D.E. 35-17, Haugen, 7, 16.9-15. As of the day Downing went on FMLA leave, and before, his job "was that he was working four days on web related duties, one day on pure warehouse duties, and Kelly would work one day on web related duties, and four days on pure warehouse related duties. D.E. 35-17, Haugen, 10.4-11; D.E. 39-1, Justice, 28.

The FMLA Notice of Eligibility and Rights & Responsibilities sent to Downing did not indicate that Plaintiff would be required to submit a return to work certification. Ex. B, Def. Prod., DFA 13-14.

D. **First Six Weeks of Medical Leave, February 7-March 2014**

On February 7, 2014, Downing began his FMLA leave. Ex. A, depo. ex. 8. He called them every week or two while on FMLA leave, telling them what the doctor had said. D.E. 35-14, Downing, 49. Six weeks into his leave, he was released to return with a cane and tried to do so.

E. **First Attempt to Return to Work, March 2014**

In March 2014, Downing came to Haugen seeking to return to work, while using a cane. D.E. 35-17, Haugen, 7-8. Haugen put Downing on hold to see what Justice wanted to do. D.E. 35-17, Haugen, 8. He presented the cane limitation to Justice, and they then talked with Jane Benton and Amy Valentine. D.E. 35-17, Haugen, 8.

Justice and Haugen the met with Downing and said he could not return with a cane, and "that he appreciated how far I had brought the web up and I had done a good job . . . ." D.E. 35-14, Downing Depo., 50. Downing asked about other jobs he might do, and Justice said no. Then Justice said "he would actually give me a good reference, and that was both him and Bob [Haugen]." D.E. 35-14, Downing Depo., 51.

After being told he could not return to work, Downing set an appointment with HR. D.E. 39-5, Ladd, 46-48. They claimed the refusal to let Downing return with a cane was safety, but he did not believe that because "there had been all kinds of other people that had worked out there with boots on their feet, Alan Saugey; braces on their hand, Brad Ecklund warehouse specialist. Ecklund could not do all his essential job functions, and mainly was tagging objects. D.E. 35-14, Downing Depo., 52-54. Gus Whisenant hurt his back and had a limited amount of weight he could lift, and did only some jobs. D.E. 35-14, Downing Depo., 54-56. Brad Holland

hurt his shoulder and was allowed to work for a week or two with a 10 pound lifting restriction. D.E. 35-14, Downing Depo., 57-58.

Downing and his partner, Ladd, attended the meeting. Valentine's tone was flippant. Downing asked if there was any way he could work. D.E. 39-5, Ladd, 49. When it was mentioned that others had worked with boots or slings, Valentine refused to reconsider. She was flippant and non-informational, stating that "David can say no, and if he says no, that's the way it is." D.E. 35-14, Downing Depo., 58. They asked Valentine about catastrophic leave, and Valentine said he would not qualify for that. D.E. 39-5, Ladd, 50-51. They did not mention safety. D.E. 39-5, Ladd, 53. Valentine recalls very little of the conversation. D.E. 36-15, 17.7-17, 20, 22-23.

Through this point, Defendants had said nothing to Downing about his job changing, even though it would have been pertinent if they were going to explain why Downing could not come back with a cane. D.E. 39-1, Justice, 60-61.

For the next six weeks, Downing rehabbed at home. D.E. 39-5, Ladd, 54.

F. **Failure to Reinstate, Failure to Accommodate, May-June 2014**

According to Defendant, on May 1, 2014, Downing presented a return to work release on May 1, 2014, at the end of the day, and was told to report to work, 7:30 a.m., May 2, 2014. Ex. A, depo. ex. 8.

When Downing returned to work, Defendants told him pretty quickly that they were going to require him to work a week in the warehouse, and a week web related duties. D.E. 35-17, Haugen, 8-9, 11.16-20. It was going to require more walking than in the past. D.E. 35-17, Haugen, 10.12-15, 28.16-23, 29-30. "[T]he reality is that before FMLA leave it was four days web related jobs, one day warehouse only job, and after it wasn't going to be that way anymore." D.E. 35-17, Haugen, 31.15-25. Downing's duties were being given to Kelly, who had not taken FMLA leave. D.E. 35-17, Haugen, 32.3-12.

Plaintiff told them the new job was not comparable to his previous job that he could do his old job and that is what he had talked to the doctor about. Plaintiff asked if he could do the web job the first week til he got back on his feet, and Justice said no, stating that he could send Plaintiff out alone on a truck with a standard shift. Most of the time they go out in pairs. They have two trucks, one standard, and one automatic, and it is common knowledge that persons with foot or leg injuries frequently have difficulty with standards. The tone indicated this was a threat. Ex. E, Downing Aff., resp. Par. 28-29. Downing said that was going to be a problem because he could not work in the warehouse for a week at a time. D.E. 35-17, Haugen, 11.19-12.7; Ex. A, depo. ex. 8.. So then Downing needed an appointment with his Doctor to get information on what he could be released to do. D.E. 35-17, Haugen, 12. Downing ended up working for a month after that within his restrictions, at his old job, so that he would have time to see the Doctor and get an updated release. D.E. 35-17, Haugen, 9.

Defendants did not create any documents related to changing Downing's job, and they do not know when they made that decision, other than that it occurred after the FMLA leave began and before the May return to work. D.E. 35-17, Haugen, 22.8-23.9. Mr. Haugen and Mr. Justice made that decision together. D.E. 35-17, Haugen, 22. The structure and number of employees were pretty much the same. There was a title change from warehouse specialist to surplus property agent. D.E. 39-1, Justice, 8-9. The duties remained the same though. D.E. 39-1, Justice, 9. According to Justice, the job change was to let Downing catch upon his warehouse work and getting his property processed. Justice was then asked about the issue that Downing's "evaluations don't really reflect that he was falling below a satisfactory level of keeping up with his warehouse work." Justice falsely answered, "one does, and one doesn't." D.E. 39-1, Justice, 48; Ex. A, depo. exs. 4-5, Evaluations. Justice acknowledged there was no documentation of the alleged increased inefficiency that they have produced, and that evaluations were supposed to measure the quantity and quality of his work and were satisfactory. D.E. 39-1, Justice, 58-59.

Haugen claims that it never occurred to him that after observing a limp and knowing about hip surgery, Downing might possibly have trouble returning to work, 5 days a week in the warehouse, six weeks after he had been moving around on a cane. D.E. 35-17, Haugen, 23.10-19, 27.12-22, 28.20-29.2. This despite knowing that people do not always fully recover from surgeries and contending that the warehouse job requires quite a bit of walking. D.E. 35-17, Haugen, 27.23-28.19.

Defendants had not told Downing that his job was being changed before he actually returned to work in early May. Downing "had not been made aware of those changes." D.E. 35-17, Haugen, 10.16-18, 11.5-8. This meant that Downing had not been given the opportunity to talk to the physician about whether or not he could return to work under the new job's duties. D.E. 35-17, Haugen, 11.9-15.

On May 6, 2014, there was a meeting with HR and the administrator and a decision was made to allow Downing to return to work on Wednesday May 7, 2014 to work posting items to the GovDeals website and one day warehouse duties (Fridays) until his next doctor's visit so he could get for duty statement a full release "unrestricted" fit. Ex. A, Depo. Ex. 8. They indicated that he was told on May 7, 2014, that "If he could not provide a letter clearing him to return to work and perform his essential duties to full capacity, then his employment with DFA would have to be terminated." D.E. 39-2, depo. ex. 9, DFA 540. In the May 7, 2014, letter, Defendants purported to change Downing's job to require lifting of up to 100 pounds. D.E. 35-14, Downing Depo., 128-129.

Defendants admit that ultimately, they required Downing to obtain a full, unrestricted release to return to work from his doctor. D.E. 35-17, Haugen, 38.12-17, 40.31-10; Ex. A, depo. ex. 8.

G. **Last Release, Failure to Accommodate, Termination - June 2014**

On June 4, 2014 . . . "Downing provided a return to work statement limiting his warehouse working position to ONLY two (2) day per week and could not lift anything greater than 50 pounds and will be a PERMANENT restriction." Ex. A, depo. ex. 8 DFA 531; D.E. 35-17, Haugen, 12, 16; D.E. 36-15, Valentine, 27, 33. The reason for the two-day restriction was the issue of walking. D.E. 35-14, Downing Depo., 109.

Haugen claimed he did not know why there was a two day limit on Downing working in the warehouse, or that it was related to walking. D.E. 35-17, Haugen, 16.16-24. However, Haugen made no inquiry about the reason for the two-day limitation. D.E. 35-17, Haugen, 16-17.

Neither Justice, nor Haugen, nor Valentine, nor anyone else from DFA had any conversation with Downing about the reason for his restrictions or ways to accommodate him. Nor did they conversations with each other about those issues. Nor did Defendants conduct research on possible accommodations or look at possible equipment that might help Downing do his job. D.E. 35-17, Haugen, 13.2-14.21, 15.17-20; D.E. 36-15, Valentine, 42-46; D.E. 39-1, Justice, 42-47, 67-68, 70, 78-79. Justice was asked if they ever attempted to figure out if there was a way Downing could do the job with reasonable accommodation. The answer was: "

> No, sir. The letter that I gave Downing when he was leaving out . . . explained . . . that we had to have that release form his doctor giving him the green light to come back to work. If we didn't get that fit for duty without any restrictions that we wouldn't be able to continue his employment there because he couldn't do his essential duties . . . .

D.E. 39-1, Justice, 46. They simply made a decision to terminate Downing, and there was no further conversation about attempting to accommodate him. D.E. 35-17, Haugen, 15.5-16; D.E. 39-1, Justice, 41.

Justice, Haugen, and Valentine met with Downing. D.E. 36-15, Valentine, 27, 33. He had requested to discuss his job descriptions and duties. D.E. 36-15, Valentine, 28. Downing was in effect asking to go back to his old job. D.E. 39-1, Justice, 79. They

claimed this was a job that had never existed at all. Yet aside from being contradicted by the documentation cited above, Valentine has admitted that it did. D.E. 36-15, Valentine, 29-32, 35, 38. Downing was using a hiring freeze document in which his hiring had been justified by DFA by saying that he was going to be selling property on the computer. D.E. 36-15, Valentine, 36. Valentine claims that Downing said he did not want to do the manual labor, and he would simply do the data entry. D.E. 36-15, Valentine, 33. Their response was that that was not a job, and they were not going to create it. D.E. 36-15, Valentine, 34-35. They told Downing he was fired. D.E. 35-17, Haugen, 15-16. The termination decision was made by Justice, Haugen, Valentine, and Benton. Ex. C, Resp. Int. No. 2; D.E. 35-17, Haugen, 35; D.E. 36-15, Valentine, 47; D.E. 39-1, Justice, 41.

They stated that "Mr. Downing was terminated from employment with DFA on June 4, 2014, because his physician could not give him an unrestricted release to return to work . . . ." D.E. 39-2, Depo. Ex. 9, DFA 536; D.E. 36-15, Valentine, 46-48, 57-58. If Downing presented a note without restrictions, he would not have been fired. D.E. 36-15, Valentine, 50.

The excuses for not attempting to accommodate Downing are rather lame. Justice claimed he did not think walking was an issue. However, he also knew that the limits were related to Downing's hips. D.E. 39-1, Justice, 67. Then, when asked if hips would relate to walking and standing, Justice claimed "I don't know." D.E. 39-1, Justice, 67. Later he acknowledged it did relate to walking, and that he had known Downing had a limp such that he asked about his ability to work. D.E. 39-1, Justice 67, 104.20-105.5. Justice then retreated, claiming that though he knew about the limp, the cane, arthritis, and hip surgery, that he had no idea it could possibly be a problem for Downing to come back immediately to a job where he

would work five days a week in the warehouse. D.E. 39-1, Justic, 105.6-22. Justice also claimed that he did not know lifting was an issue. D.E. 39-1, Justice, 67-68. Yet he acknowledges that the restrictions were for two days in the warehouse, and a lifting restriction from the doctor's note D.E. 39-1, Justice,. 68. When asked if lifting was part of the termination decision, Justice said he thought so. D.E. 39-1, Justice, 68. Yet, Justice admitted that the lifting restriction could have been accommodated, and then changed his story to lifting not being a part of the decision. D.E. 39-1, Justice, 88.4-21, 92-93.

III. Was reasonable accommodation possible.

If walking and standing were the issue, things like carts and forklifts would have made it easier for Downing to do his job, and reduced the amount of walking needed. D.E. 35-17, Haugen, 17.4-9, 20.2-18. There were numerous ways available to accommodate the 50 pound lifting restriction such that Downing could have done his job. D.E. 35-17, Haugen, 17.10-19.3, 19.19-21.21. Justice also acknowledged that there were reasonable accommodations possible, that would have allowed Downing to do his job. D.E. 39-1, Justice, 70, 88.4-21. Justice also stated that the 50 pound lifting restriction was not the problem for returning Downing to work. D.E. 39-1, Justice, 92-93.

Property comes into the warehouse from various state agencies to the warehouse in south Little Rock. It could be all sorts of things, video cameras, furniture, vehicles, equipment, commercial refrigerators, and ATVS. D.E. 39-1, Justice, 14. Bigger things are moved by forklifts, or cranes. D.E. 39-1, Justice, 15. Desks will be stacked by forklift. D.E. 39-1, Justice, 15-16. They will use two-wheel dollies. They will help each other move things. D.E. 39-1, Justice, 15-16. Employees need to use judgment in how they do the job, and they want employees to work in a safe way. D.E. 39-1, Justice, 16. The heavier a thing you lift, the more likely you are to be inured. 16. Accordingly, when a bigger item needs to be moved, they would like employees to get help, or use items, such as a furniture float. D.E. 39-1, Justice, 17. A furniture float is a four wheel dolly that is only 3-4 inches off the ground and can be used to roll

furniture. D.E. 39-1, Justice, 17-19. Rather than lifting things, they may tip them on their sides so they do not have to lift them. D.E. 39-1, Justice, 19.

There are 2500 DF&A employees. D.E. 39-2, depo. ex. 9, DFA 535. They have forklifts. D.E. 39-1, Justice, 30. Golf-carts and rideable items come through the warehouse, such as ATVs. D.E. 39-1, Justice, 30. The warehouse can purchase items they need. D.E. 39-1, Justice, 30-31. The essential functions for warehouse work is not how much you can lift or how far or long you can stand or walk. Rather, the essential functions for warehouse work is that objects in the warehouse need to moved in a timely and safe manner. D.E. 39-1, Justice, 62-63. If you can find a way to move those items in a timely, safe manner without lifting over 50 pounds, such as using forklifts, floats, 2-wheel dollies, or getting help from others you should. D.E. 39-1, Justice, 63. They do help each other at the warehouse. D.E. 39-1, Justice, 64. Short portable cranes could help you do your job. D.E. 39-1, Justice, 64-65. They could use wheeled devices such as golf carts or forklifts to let Downing move around the warehouse to avoid walking the longest distances, and let him rest. D.E. 39-1, Justice, 65-66, 111.16-21.

They have fire lanes, which is a clear area that forklifts drive through. It is where furniture, pallets, floats, and things like that go through. D.E. 39-1, Justice, 106. There are firelanes throughout the warehouse. D.E. 39-1, Justice, 106.15-19. There is not some big block of warehouse that does not have firelanes. 107. They do not have to climb over furniture to do their job. D.E. 39-1, Justice, 113.18-114.3. That is because through most of the areas there are little smaller lanes, trough which you can roll chairs, dollies, and things like that. D.E. 39-1, Justice, 114.4-18. These accommodations would have let Downing do the warehouse job. D.E. 39-1, Justice, 71-73, 75-78.

The structure and number of employees were pretty much the same. There was a title change from warehouse specialist to surplus property agent. D.E. 39-1, Justice, 8-9. The duties remained the same though. D.E. 39-1, Justice, 9.

With the accommodations described regarding walking, standing, and lifting, it is possible that Downing could have done his job. D.E. 35-17, Haugen, 21.22-22.2.

They claimed to have had numerous discussions with Downing wherein he "sought to have a position created for him." Yet Justice could remember none of those, and Haugen reported none to him D.E. 39-1, Justice, 80. However, if Downing were requesting accommodation in the form of going back to his old job the way it had been done, Haugen should tell Justice. D.E. 39-1, Justice, 80.

Notably, Justice's story on how much time the web-work part of the job took has repeatedly changed. At one point, Justice said that Downing and Kelly "were going to share a week on and a week off duties on posting and warehouse work." D.E. 39-1, Justice, 48.5-7. Downing was asked if "the plan was they are each just doing a week straight of either web-related work or warehouse related work; right?" and his answer was "uh-huh." D.E. 39-1, Justice, 55.21-56.1; see also 56.2-23. At another point Justice said that Downing "would do warehouse work eight hours a week and then web-related work 32 hours a week." D.E. 39-1, Justice, 50.21-24. At another point, he has said that "He would spend about 18 to 20 hours a week doing web . . . work." D.E. 39-1, Justice, 37.24-38.2. Notably, Downing said that the web job was 60% of his duties, which is 24 hours a week, not much different than the alleged massive increase in efficiency from Kelly. D.E. 35-14, Downing Depo., 50. Now he gets down to six to eight hours a week. See response to para. 46.

IV. Reasonable Accommodation Processes

Employees can request accommodation through HR or a manager. 9-10. If the manager has a question, they contact HR. D.E. 36-15, Valentine, 10; D.E. 39-1, Justice, 20-21. After a request for accommodation is made, she is to research and reference what they are required to

do by law. D.E. 36-15, Valentine, 14. They may talk to the employee and ask them questions, or the managers and ask them questions. D.E. 36-15, Valentine, 15.

The good faith interactive process means that when someone requests help they have to talk to them and communicate and engage in a problem-solving process to figure out an accommodation D.E. 36-15, Valentine, 15.17-22. The employee may not know what they need, but that does not let the DFA off the hook. D.E. 36-15, Valentine, 15.23-16.3. the employees is not entitled to a particular accommodation, but they are entitled to a reasonable accommodation that will let them do their essential job functions, if one can be found. D.E. 36-15, Valentine, 17.6-14. To get to that accommodation, they may to talk to the employee, their managers, in-house counsel, or research. D.E. 36-15, Valentine, 16.15-20. The good-faith, interactive process means you need to speak to each other truthfully and not obstruct the flow of information. D.E. 39-1, Justice, 80-81. Requests for accommodation to a supervisor need to be relayed by that supervisor. D.E. 39-1, Justice, 81.

It would not be appropriate to change an employee's job duties with the purpose of trying to keep them from returning to work. D.E. 36-15, Valentine, 62-63.

V. Downing's disability

Defendants admit there are a lot of jobs that do require lifting over 50 pounds, such as construction, farm work, and many factory jobs, that Downing's lifting restriction would preclude him from doing. D.E. 39-1, Justice, 89.

After starting the DFA job, Downing began complaining about his hips, he was waking up with leg cramps. It got progressively worse. D.E. 39-5, Ladd, 31-32. Justice was informed that Downing had arthritis. D.E. 39-1, Justice, 31-32. A lot of times when he came home from work he was in so much pain he could not help around the house as much. She would have to get help from other people moving things. D.E. 39-5, Ladd, 36. They have decreased activities like hiking and camping since the hip issues arose. D.E. 39-5, Ladd, 30. Then Supervisor Allen Saugey began letting Downing fill in for an employee who was leaving doing web sales. D.E.

39-5, Ladd, 33-34. This relieved some of the pain he was having, though he still had difficulty sleeping at night, being unable to do so at times, and would have to sleep man nights in a recliner, the couch, or another bed so as not to disturb Ladd. D.E. 39-5, Ladd, 34. He was going to the doctor from the end of 2011 through the end of 2013. D.E. 39-5, Ladd, 36. He used to go hiking and camping, but that has been reduced and limited due to his hip. D.E. 35-14, Downing Depo., 26.

Downing was in the hospital overnight after surgery. D.E. 39-5, Ladd, 41. He came home on pain medication using a heavy duty narcotic, hydrocodone. D.E. 39-5, Ladd, 42. She had to stay with him to care for him, help him get from bed to chair. D.E. 39-5, Ladd, 41. During the first two weeks of his recovery from surgery, Downing had to have assistance getting in and out of bed, chairs, and help with exercise and an apparatus for his legs. D.E. 39-5, 39, 41. They were leg compression devices trailing electrical cords. D.E. 39-5, Ladd, 43. After that he progressed using physical therapy, and it took time to heal. He could not drive the first six weeks. D.E. 39-5, Ladd, 39-40. After the first two weeks, he started using a walker from week 2-6. 43-44. Then he began using a cane. D.E. 39-5, Ladd, 44.

Downing talked to his doctor about his job duties and was released to work using a cane. D.E. 39-5, Ladd, 44. Downing indicated that he had to go to the warehouse, find inventory he could list on the internet for sale, taking photos, making sure it was stored in the correct area for sales, answering questions that came upon the items on the internet, and packaging items. D.E. 39-5, Ladd, 45.

Downing still has pain and inflammation, and daily takes ibuprofen, Tylenol, and Aleve. D.E. 39-5, Ladd, 66, 76; D.E. 35-14, Downing Depo., 33. It can be managed, but there are days when he comes back from work physically exhausted and in pain from working. D.E. 39-5, Ladd, 76. If he gets on the floor he has to use a stationary object to pull himself up, or get a hand from someone else. D.E. 39-5, Ladd, 78; D.E. 35-14, Downing Depo., 29. Although he is not required to do so, if he goes to Wal Mart, he will use a cart frequently to decrease the

amount of time he is on his feet. D.E. 39-5, Ladd, 79. They now use a yard service for leaves instead of doing it themselves. D.E. 39-5, Ladd, 79. He used to go hiking and camping, but that has been reduced and limited due to his hip. D.E. 35-14, Downing Depo., 26. He mows the grass, but it is a self-propelled lawn mower. D.E. 35-14, Downing Depo., 28.

Downing still deals with hip issues after the surgery, and always will. He has difficulty hiking, traveling in cars or vans where his knees are higher than his hips, he has difficulty jumping and stepping down. It is more difficult to walk on uneven surfaces. When he goes to the restroom, he makes sure there are handrails than can be grabbed if needed. D.E. 35-14, Downing Depo., 32. It is preferable to have higher toilets so that he can get up. D.E. 35-14, Downing Depo., 33.

Downing has the same 50 pound restriction as before. D.E. 35-14, Downing Depo., 34-35. Downing has arthritis in his back and in his hip. D.E. 35-14, Downing Depo., 42-43. He may need back surgery, takes medications, and has had x-rays which showed bone loss. D.E. 35-14, Downing Depo., 43.

In his new job, his walking is not all over the UAMS campus. He uses dollies. D.E. 35-14, Downing Depo., 35-36, 38. Doing these functions did cause him pain and to need to take medications. He got accommodation to load carts less heavily. D.E. 35-14, Downing Depo., 38-39.

Downing's hip issues were actually at their worst not long before he took FMLA leave for a hip replacement. They continue to exist. They impair him in a number of ways, slowing down how fast he can walk, decreasing how long he can stand and walk, and making standing and walking involve more energy, pain, inflammation, and exhaustion, such that Downing is frequently unable to engage in ADLs such as housework and yardwork, acitivities such as hiking or camping, and making it far more difficult to get adequate sleep. Ex. E, Downing Aff.

VI. Comparators

Before Downing had to go on leave, Haugen went out for 3-4 weeks on non-FMLA leave for a non-worker's comp surgery. He did not get fired, and did not have enough paid leave to cover the time off. They did not look into his ability to do the job with a recent back surgery. D.E. 35-17, Haugen, 32-34; D.E. 39-1, Justice, 103-104, 115-116. Warehouse supervisor monitors day-to-day activities, schedules property being delivered, trucks going out, and what the staff does. They have been the same for years. D.E. 39-1, Justice, 12. The warehouse supervisor has to help move property around, and do actual warehousing, not just supervising. D.E. 39-1, Justice, 12-13. They will drive forklifts or move furniture as part of their normal job functions. D.E. 39-1, Justice, 13.

After his leave, Downing's duties were being given to Kelly, who had not taken FMLA leave. D.E. 35-17, Haugen, 32.3-12.

After his termination, Plaintiff was replaced by someone without a disability. Ex. D, Resp. Int. No. 11 (INT-2). Alkire replaced Downing. He did the same job duties that Downing had done, warehouse and web work. D.E. 39-1, Justice, 37. He would spend 18-20 hours a week doing web work. The rest of the time was in the warehouse or driving the truck. D.E. 39-1, Justice, 37-38. The 18-20 hours of web work would include keyboarding, selecting items, loading the website up. D.E. 39-1, Justice, 38.

VII. False Statements and Shifting Explanations – Lying to the EEOC

Defendant has claimed that "At no point during his employment with DFA did Mr. Downing request an accommodation." Ex. B, Def. Prod., DFA 658. Yet even they admit that he requested FMLA leave, that he requested to go back to his old position, and that he presented the restrictions in June 2014.

Defendant claimed to the EEOC that the Administrative Specialist II position had "not been filled since 2011 because M&R does not need an additional Administrative Specialist II." Ex. B, Def. Prod., DFA 664.

Defendant admits there is a Catastrophic leave program that Downing was advised of, but claimed to the EEOC that he did not apply for it. Ex. B, Def. Prod., DFA 665. The problem being he was fired before he had a chance to do so, and they had already told him he was not eligible. They state that:

> Even if DFA conceded that Mr. Downing satisfied these requirements (which it does not), he would also have to show that DFA refused to meet and discuss possible methods of granting a request for an accommodation. That he cannot show. Numerous discussions were held when Mr. Downing sought to have a position created for him."

D.E. 39-2, Depo. Ex. 9 DFA 536-537. They claimed that:

> . . . Mr. Downing was never employed as "Web Worker," M&R has never had such a position in its organization. The reason there is not Web Worker or central data entry person is because no such position could be justified for the amount of web marketing required, and taking an agent off the warehouse floor would create an undue burden on M & R.

D.E. 39-2, Depo. Ex. 9 DFA 537. Indeed, they did not tell the EEOC about Downing' s actual duties before the FMLA leave. D.E. 39-1, Justice, 84-85.

They note that "the job includes 'heavy lifting' when required." D.E. 39-2, Depo. Ex. 9 DFA 537. They claimed that the jobs of Surplus Property Agent and Warehouse Specialist:

> "remained essentially the same . . . namely receiving and uploading incoming property, organizing the property in the warehouse, and transporting the property, both by the use of heavy equipment, and by manually 'lifting heavy and cumbersome objects.'"

D.E. 39-2, Depo. Ex. 9 DFA 537-538.

They then claimed that all Surplus Property Agents had the same level of responsibility for web work. D.E. 39-2, Depo. Ex. 9 DFA 538. They claimed that:

> "Mr. Downing alleges that his job duties at some point had been changed. Prior to Mr. Downing's surgery, he performed the same essential duties as each of the other Surplus Property Agents. . . . His claim is based upon the untenable assertion that DFA should have created a job for him to do when, after exhausting leave under FMLA, he was not able to be given a medical release to perform the essential functions of the job he occupied before he took leave."

D.E. 39-2, Depo. Ex. 9 DFA 538. They claim that:

> "Mr. Downing had been informed prior to his taking Family Medical Leave that he could not return to his job until he was released to perform all essential job functions without restriction. Likewise under FMLA, when an employee exhausts all of his or her Family Medical Leave, he or she is expected to return to work and be capable or performing all essential job functions without restrictions or be discharged from that position."

D.E. 39-2, Depo. Ex. 9 DFA 539.

They told the EEOC a false account of the events of May 1 and May 2, 2014, as though Mr. Downing had attempted to return to work knowing that his job was working 5 days a week in the warehouse, when that had not been the job. D.E. 39-2, Depo. Ex. 9 DFA 539.

When these false and misleading statements to the EEOC was brought to DFA's attention, it had the opportunity to correct them. Ex. F, Letter of 5/5/15, p. 2-3 of 8. DFA point blank refused and continued to mislead the EEOC. Ex. F, Letter of 6/15/15, p. 1, para. 2-4.

They indicated that Downing was allowed to return to work with a modified set of duties, but in reality that was essentially his old job as it had been done before FMLA leave. D.E. 39-2, Depo. Ex. 9 DFA 539.

Justice claimed Downing's performance left a lot to be desired. D.E. 39-1, Justice, 21. Justice claimed Downing's performance did not improve after initial training, making multiple mistakes a day. D.E. 39-1, Justice, 21. He claims the initial training period is 6 months. D.E. 39-1, Justice, 21.

ISUES OF LAW

I. Disability discrimination claims – Rehab Act and ADA

The elements of a discharge claim are: (1) either an actual or perceived disability; (2) adverse action; (3) ability to do the job, with or without reasonable accommodation; (4) knowledge of the impairment; and (5) that Plaintiff's disability was a motivating factor in the decision to terminate him. 8th Cir. MCJI 9.40-41. The only disputes are on disability, ability to do the job, and intent. On a failure to accommodate claim Plaintiff must show: (1) actual disability; (2) that the employer was aware of this disability, (3) that accommodation was

requested and denied; and (4) make a facial showing that reasonable accommodation was possible. At that point, the burden of production shifts to the employer to show that it is unable to accommodate the employee. *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995); *Wood v. Omaha Sch. Dist*., 985 F.2d 437, 439 (8th Cir. 1993); *Arneson v. Heckler*, 879 F.2d 393, 396 (8th Cir. 1989). Here, the disputes are on actual disability, whether reasonable accommodation was possible, and whether Defendants refused to engage in the good-faith, interactive process.

A. Downing can show he had an actual or perceived disability, even udner pre-ADAAA case law, which employed a higher standard.

Perceived disability is simpler, so we begin there. "An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*." 42 U.S.C. 12102(1), (3)(A) (emphasis added); *Brown v. City of Jacksonville*, 711 F.3d 883, 888-89 (8th Cir. 2013). Defendants admit to knowing that Downing had a limp, arthritis, used a cane for a period of time, and took FMLA leave for hip surgery, so 'perceived as' is established.

The facts also easily establish Plaintiff had an actual disability. Defendant relies on a bunch of pre-2009 amendment cases, but "the term 'substantially limits' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA." 42 CFR 1630.2(o)(iv). That case law is invalid. The regulations further state:

> the term "substantially limits" shall be construed broadly in favor of expansive coverage . . . and] is not meant to be a demanding standard. (ii) An impairment is a disability within the meaning of this section 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 impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. . . . . (v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. . . . (vi) The determination of whether an

> impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. . . . (vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

42 CFR 1630.2(o); *see Summers v. Altarum Inst*., 740 F.3d 325 (4th Cir. 2014) (discussing in detail implications of regulatory changes). The relevant time frame for determining whether someone has a disability, is the time of the adverse action or denial of accommodation. *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1047 (8th Cir. 1999).

Most crucially, the EEOC is entitled to deference in interpreting its own regulations. In *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007), the Supreme Court held that deference is due to an agency's interpretation of its own regulations, and gave "controlling" weight to "an 'Advisory Memorandum' issued only to internal Department [of Labor] personnel." *Id.,* at 2349. As to the major life activity of working, the EEOC indicated that plaintiffs do not have to provide evidence of the numbers and types of jobs they cannot do, expressly disavowing prior case law. 29 CFR 1630, Appx. to Part 1630. More specifically, they provided an example that is spot on with Downing's situation:

> . . . if a person whose job requires heavy lifting develops a disability that prevents him . . . from lifting more than fifty pounds and, consequently, from performing not only his or her existing job but also other jobs that would similarly require heavy lifting, that person would be substantially limited in performing the class of jobs that require heavy lifting.

Id. *See also Summers v. Altarum Inst*., 740 F.3d 325 (4th Cir. 2014) (holding that EEOC regulations on disability are entitled to deference and were reasonable interpretations of the ADAAA).

There are a trio of pre-2009 cases under the ADA that are useful in showing when disability is established, even now. This is because Downing could have established disability under the older, more difficult standards in the original law pursuant to those cases. If he would have a disability under that law, he surely would under the new law.

In *Duty v. Norton-Alcoa Propellants*, 293 F.3d 481 (8th Cir. 2002), a pre-2009 case, the employee had a lifting restriction involving chronic pain, but continued to perform heavy work by lifting up to 50 pounds comfortably, 50-75 pounds regularly, and 100-150 pounds occasionally, and by working between 40 and 60 hours a week on his farm baling hay and driving a dump truck. Notably, this was a case under the old ADA, before the requirements to establish disability were relaxed in January 2009. If a 50-pound lifting restriction constituted a disability at that time, under the older and higher standards for disability, it surely does now. In *Battle v. United Parcel Service*, 438 F.3d 856 (8th Cir. 2006), a Division Manager over 600 people was found to be both qualified and disabled, where there was testimony that he thought and concentrated at a slower rate, had to spend extra time on projects, and had difficulty performing duties at the household after hours due to the effort of working through his disability. In *Fenney v. Dakota, Minn. & Eastern RR. Co*., 327 F.3d 707, 713-16 (8th Cir. 2003), the loss of a thumb slowed the man down in ADLs, substantially, and was found to be disabled. As in *Battle* and *Fenney*,

Plaintiff is frequently subject to pain and inflammation after working, and has difficulty sleeping, cannot perform household duties or has difficulty doing so, and cannot do activities for enjoyment, such as hiking or camping. He has indicated that his hip issues have substantially increased the difficulty of standing and walking, effecting how quickly he can walk, the duration with which he can walk and stand, the labor involved in carrying out these activities, and the impact of doing these activities in terms of pain, inflammation, exhaustion, and inability to engage in other activities for those reasons. Ex. E, Downing Aff.

Accordingly, given the light burden of establishing a prima facie case, the case law, the new regulations under the ADA, the requirement that the Court draw inferences in Plaintiff's favor, and the EEOC's determination that a 50-pound lifting restriction is a disability, Plaintiff has established a disability.

B. Downing can make out a failure to accommodate claim because: (1) he requested accommodation for his health issues; (2) Defendants refused to engage in the good faith interactive process; (3) applied a full duty, no restrictions policy to him; and (4) there were numerous reasonable accommodations available that Defendants have admitted would allow Downing to do his job.

Downing can make out a failure to accommodate claim because: (1) Defendant refused to engage in the good-faith, interactive process; (2) Defendant applied a facially illegal, 100%, fully recovered, full duty, no restrictions type policy; and (3) Defendants have admitted that: (a) Downing requested accommodation; (b) that he could do his job with reasonable accommodations; and (c) that they denied reasonable accommodations.

Once the plaintiff requests accommodation, the parties must engage in an "interactive process" to determine what precise accommodations are necessary and the nature of the disability. See 29 C.F.R. § 1630.2(o)(3) & § 1630 App., § 1630.9; *accord Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 951 (8th Cir. 1999). Failure of an employer to engage in an interactive process is prima facie evidence that the employer may be acting in bad faith. *Id.*, at 952. Once the plaintiff makes a facial showing that reasonable accommodation is possible, the burden of production shifts to the employer to show that it is unable to accommodate the employee. *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995); *Wood v. Omaha Sch. Dist.*, 985 F.2d 437, 439 (8th Cir. 1993); *Arneson v. Heckler*, 879 F.2d 393, 396 (8th Cir. 1989).

In concluding that an employer may be liable under certain circumstances for failing to engage in the interactive process to determine reasonable accommodation, the *Fjellestad* court cited with approval a Third Circuit case, *Taylor v. Phoenixville School District*, 174 F.3d 142 (3rd Cir. 1999), and employed the *Taylor* court's four-part analysis. See Id. at 952. An employer's obligation to participate in the interactive process is triggered once the employer knows of an employee's disability and the employee or the employee's representative has requested accommodation. *Taylor*, 174 F.3d at 158-59. To hold an employer liable, an ADA plaintiff must

demonstrate the following factors to show that the employer failed to participate in the interactive process:

> "1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith."

Fjellestad, 188 F.3d at 952 (quoting *Taylor*, 174 F.3d at 165 (citations omitted).

Policies that require that employees be 100%, have no restrictions, or be capable of full duty, are a *per se* violation of the ADA and Rehab Act as they preclude an individualized assessment of the employees ability to do the job with reasonable accommodations. *Hill v. Walker*, 2013 U.S. Dist. LEXIS 7801, *24-26 (E.D.Ark. 2013). In *McGregor v. National Railroad Passenger Corp., aka Amtrack*, the Ninth Circuit reasoned as follows:

> McGregor alleges that Amtrak officials repeatedly told her that she could not return to work or bid on any other position until she was "100% healed," and that such a policy is a per se violation of the ADA. McGregor is correct in noting that "100% healed" policies are per se violation of the ADA. A "100% healed" or "fully healed" policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is "100% healed " from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation. *See Hendricks-Robinson v. Excel Corp*., 154 F.3d 685, 699 (7th Cir. 1998); *Weigel v. Target Stores*, 122 F.3d 461, 466 (7th Cir. 1997) (stating that the determination whether one qualifies as a qualified individual with a disability "necessarily involves an individualized assessment of the individual and the relevant position"); *Norris v. Allied-Sysco Food Servs., Inc*., 948 F.Supp. 1418, 1437 (N.D. Cal. 1996); *see, e.g., Heise v. Genuine Parts Co*., 900 F. Supp. 1137, 1154 & n.10 (D. Minn. 1995) (holding that a "must be cured " or "100% healed" policy is a per se violation of the ADA because the policy does not allow a case-by-case assessment of an individual's ability to perform essential functions of the individual's job, with or without accommodation); *Hutchinson v. United Parcel Serv., Inc*., 883 F.Supp. 379, 397 (N.D. Iowa 1995) (same); *Sarsycki v. United Parcel Service* , 862 F.Supp. 336, 341 (W.D. Okla. 1994) (holding that under the ADA "individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices"). As we have noted, whether Amtrak has a "100% healed" policy or its functional equivalent is a disputed issue of material fact which makes granting summary judgment on this issue inappropriate.

187 F.3d 1113, 1116 (9th Cir. 1999). The reasoning of *McGregor* has been confirmed by other Circuits. *See Powers v. USF Holland, Inc*., 667 F.3d 815, 819 (7th Cir. 2011); *Duty v. Norton-Alcoa Proppants*, 293 F.3d 491, 497 (8th Cir. 2002) (listing as a basis to support a verdict of intentional discrimination and punitive damages "the absence of any effort by NAP to return Duty to work unless he functioned at 100% capacity"); *Henderson v. Ardco., Inc*., 247 F.3d 645, 653 (6th Cir. 2001). The Courts dealing with this issue have generally found that the violation must cause some sort of injury. Accordingly, if there was no way an employee could be reasonably accommodated, then they would not be able to make out a case, because they would not have been accommodated regardless of the 100% policy.

Pursuant to the ADA, use of equipment, job restructuring, changes to the manner in which the job is performed, seeking assistance from other employees, and taking medical leave are all reasonable accommodations. 29 C.F.R. 1630.2(o)(2); *Jackson v. City of Hot Springs*, 751 F.3d 855 (8th Cir. 2014). So is elimination of marginal job functions. *Battle v. UPS*, 438 F.3d 856, 863-64 (8th Cir. 2006). However, transfer is not a favored accommodation and is more of a last resort if other accommodations will not work.

Defendants admissions certainly make out a case, and should be sufficient to merit judgment as a matter of law in Plaintiff' favor. Specifically, they have admitted that:

1. Plaintiff identified as having a disability and requested accommodation.
2. Reasonable accommodations existed that would have allowed Plaintiff to perform his job duties, such as: (a) equipment to help with lifting, walking, and standing; (b) not requiring a full week of warehouse duty at a time from him, since the job was split anyway with another employee; and (c) letting Downing go back to his old job as previously performed, since it had been illegally changed in violation of the FMLA anyway;
3. They did not talk with Plaintiff, with each other, with anyone at DFA, see if there was equipment, or do any other research, or take any other actions to see if there were

accommodations available that would allow Plaintiff to do his essential job functions; and

4. They applied a 100%, full duty, no restrictions policy to Plaintiff, and that policy is only applied to persons taking medical leave.
5. They fired him based on under the 100% policy based on a false claim that he could not be accommodated.

Thus, Plaintiff has established a failure to accommodate claim by showing that: (1) he was disabled, (2) he requested accommodation, (3) reasonable accommodations which would allow him to do his job were possible, and (4) that Defendant refused to engage in the good-faith interactive process, and applying an illegal 100%, no restrictions, full-duty policy to him.

C. Downing established discriminatory intent through direct evidence or the McDonnell Douglas structure because of: (1) the full duty, no restrictions policy; (2) refusal to engage in the good faith interactive process; (3) admissions that Downing was fired due to his health issues; (4) offering him job references six weeks into his medical leave; and (5) a number of kinds of circumstantial evidence of intent.

Plaintiff can establish intent through the *McDonnell Douglas* proof structure or through direct evidence. Russell v. City of Kansas City, 414 F.3d 863, 866-67 (8th Cir. 2005). The term "direct evidence" refers not just to direct status of discriminatory animus, but also circumstantial evidence that shows "a specific link between the alleged discriminatory animus, and the challenged decision." Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004). If one is proceeding under McDonnell Douglas, the plaintiff makes out a prima facie case, the defendant offers a legitimate, non-discriminatory reason, and the plaintiff must then establish is a pretext to cover discrimination. Although producing a comparator is the most common way of making out a prima facie case under a McDonnell Douglas analysis, it is not necessary:

> the plaintiff in a discharge case may satisfy his prima facie case burden by showing (i) that he belongs to a protected class; (ii) that he was qualified for a job; (iii) that he was discharged; and (iv) that, after his discharge, he was replaced by a person with similar qualifications.
>
> . . . .

> In some cases, we have concluded that **evidence of pretext**--normally considered only at step three of the McDonnell Douglas analysis--**satisfied this aspect of the plaintiff's prima facie case burden**. See Young v. Warner-Jenkinson Co., 152 F.3d 1018, 1022 (8th Cir. 1998); Landon v. Northwest Airlines, Inc., 72 F.3d 620, 624 (8th Cir. 1995). A common way of proving pretext is to show that similarly situated employees were more favorably treated. See Harvey v. Anheuser-Busch, Inc.., 38 F.3d 968, 972-73 (8th Cir. 1994)."

Putman v. Unity Health System, 348 F.3d 732, 736 (8th Cir. 2003). "[T]he burden of establishing a prima facie case of discriminatory treatment is not meant to be 'onerous.'" Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101S.Ct. 1089, 67 L.Ed.2d 207 (1981)). Plaintiff need not find an exact comparator, but must merely "raise genuine doubt as to the legitimacy of the defendant's motive." Davenport v. Riverview Gardens, 30 F.3d 940 (8th Cir. 1994). Further, whether the actions of given employees are properly deemed comparable is a question of fact for the jury. Lynn v. Deaconess Medical Center, 160 F.3d 484, 488-89 (8th Cir. 1998).

On the issue of qualification, it has been established in the previous sections that Plaintiff has a disability and could do his job with or without reasonable accommodations, leaving only the issue of intent.

Plaintiff has direct evidence of intent for several reasons. First, Defendants refused to engage in the good-faith, interactive process, which is prima facie evidence of bad faith. *Fjellestad v. Pizza Hut of Am., Inc*., 188 F.3d 944, 952 (8th Cir. 1999). Second, Defendant applied a full duty, no restrictions, 100% policy to Downing, which is a per se violation of the ADA. Third, Defendants have admitted that they fired Plaintiff based on his health issues, and nothing else. Fourth, when Plaintiff attempted to return to work in March, they refused to discuss accommodations and instead, unsolicited, offered Plaintiff a good reference. Fifth, the illegally changed his job when he was entitled to be reinstated to his old job under the FMLA. The changes were to require a lot more walking and lifting up to 100 pounds (which they now admit was not an essential job function), of a man who had arthritis, had been limping, had been using a cane, and who had just had a hip replacement. And now they expect the Court to

believe it never crossed their mind that this might cause a problem. Sixth, there is considerable other circumstantial evidence that would permit an inference of discrimination, either because it corroborates the aforementioned evidence and adds to their weight, or because, it and the aforementioned evidence constitute evidence of pretext.

Shifting or false reasons for conduct are evidence of pretext. Young v. Warner-Jenkinson Co., 152 F.3d 1018, 1023-24 (8th Cir. 1998). Courts have also recognized that where a witness has been, or could be considered to be false in one area of the case, he may also be false in his legitimate, non-discriminatory reason. Dey v. Colt Construction & Development Co., 28 F.3d 1446 (7th Cir. 1994); and Burns v. AAF-McQuay, Inc., 96 F.3d 154, 179 (4th Cir. 1996). Courts also more closely scrutinize subjective reasons for adverse job actions. Widoe v. District No. 111 Otoe County School, 147 F.3d 726, 730 (8th Cir. 1998) and Lyoch v. Anheuser-Busch Cos., 139 F.3d 612, 615 (8th Cir. 1998). A long period of tension, closer supervision, and snubs can help establish intent, even though there was a period of more than nine months between the protected activity and termination. Graves v. Arkansas Dep't of Fin. and Admin., 229 F.3d 721 (8th Cir. 2000). Closeness in time between an adverse action and protected activity can be evidence of retaliatory intent. Quinn v. Green Tree Credit Corp., 159 F.3d 759, 770 (2nd Cir. 1998). Failure to use normal procedures is a basis for showing pretext. *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1024 & n.6 (8th Cir. 1998). Accusations of a drastic decline in performance are considered an indicator of pretext. *Morales v. Merit Sys. Protection Bd.*, 932 F.2d 800, 803 (9th Cir. 1991).

III. The FMLA Claims

Under the FMLA, "an eligible employee shall be entitled to a total of twelve workweeks of leave during any twelve-month period . . . because of a serious health condition that makes the employee unable to perform the functions of the position of such employee" 29 U.S.C. § 2612(a)(1)(D). The elements of an FMLA reinstatement case are: (1) eligible employee, (2) covered employer, (3) serious health condition, (4) appropriate notice of that serious health

condition to the employer; and (5) that on the employees return to work, they were denied reinstatement to a comparable position. Eighth Cir. Mod. Jury Instr. 5.81F.

Defendant has admitted that Plaintiff was an eligible employee and that Defendant was covered employer. Amd. Cplt., para. 25, 27-28; Ans., para. 25, 27-28. Defendants have admitted that Downing requested FMLA leave for his hips, giving appropriate notice. Amd. Cplt., para. 5, 29; Ans., para. 5, 29. As to serious health condition, Downing was hospitalized had an operation replacing his hip, and was unable to work for six weeks. Ex. E, Downing Aff.

B. Failure to reinstate – Defendants denied reinstatement by changing Downing job duties to substantially different ones, and Defendants cannot prove that these changes would not have happened if Downing had not taken FMLA leave. This led to his termination.

Any violation of FMLA regulations constitutes an interference with FMLA rights. 29 C.F.R. 825.220. An employee is entitled to return to the same position they held when leave commenced, or to a position with equivalent benefits, pay, and other terms and conditions of employment. 29 C.F.R. 825.214. An equivalent position is one that is virtually identical in pay, benefits and *working conditions*, including privileges, prerequisites, and status. "*It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.*" 29 C.F.R. 825.215(a). To deny restoration *the employer must prove* the employee would not have been in their former position, even if they had never taken FMLA leave. 29 C.F.R. 825.216.

Every witness deposed, some unwillingly, has acknowledged that when Downing returned to work in early May 2014, he was given different, more physically onerous duties, than when he went out on FMLA leave. Accordingly, Plaintiff was not returned to a substantially similar job, because the conditions, duties, responsibilities, and effort were not similar. This in turn means that Defendant:

> must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example: . . . An employer would have the burden of proving

> than employee would have been laid off during the FMLA leave period and, therefore would not be entitled restoration.

29 CFR 825.216(a)(1). This is essentially a same decision defense, which, unlike a legitimate, non-discriminatory reason, cannot be accepted just because it is offered.

So, how does one prove a same decision defense? In considering the same-decision defense, the Supreme Court has ruled that: "An employer may not . . . prevail . . . by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of its decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, 109 S.Ct. 1775, 1791-92 (1989). In analyzing the similar after-acquired evidence defense, the Eighth Circuit has noted that meeting such a burden at summary judgment would be "significant" and that affidavits in such a hypothetical situation were likely to be "self-serving" *Welch v. Liberty Mach. Works, Inc*., 23 F.3d 1403 (8th Cir. 1994). In *Sheehan v. Donlen Corp*., 173 F.3d 1039, 1046 (7th Cir. 1999), the Seventh Circuit, also in an after-acquired evidence case, held that the defense failed as a matter of law where the defendant failed to produce comparators. In *Hill v. Lockheed Martin Logistics*, 314 F.3d 657, 674 (4th Cir. 2003) (reversed on other grounds by an *en banc* court, on grounds ultimately discredited by the Supreme Court in *Staub v. Proctor Hosp*.), to prevail on summary judgment, the employer had to provide evidence so one-sided that a rational fact finder could only conclude that the employer would prevail on the defense. *See also* Perry v. King, 878 F.2d 1056 (8th Cir. 1989) (mere articulation of reasons will not suffice to meet burden of proof); *Bell v. Birminham Linen Svc.*, 715 F.2d 1552 (11th Cir. 1983).

In considering whether Defendant met this burden, it must be kept in mind that "An employee is entitled to . . . reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence." 29 C.F.R. 825.214. Under a *McDonnell Douglas* theory the Courts have found that "when an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not our province to decide whether that reason was wise, fair, or even correct . . . ." *Wilking v. County of Ramsey*, 153 F.3d 869,

873 (8th Cir. 1998). As to the "not forbidden by law" aspect, that refers to the law at issue in the case. *Id*. A legitimate, non-discriminatory reason will pass muster, if illegal but not discriminatory; while a reason that is illegal because it violates the FMLA cannot be a legitimate, non-discriminatory reason in an FMLA case. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612-613 (1993). The point being that one cannot offer up a reason that violates the FMLA, as the basis for a same-decision defense under the FMLA. That is exactly what the Defendants have done.

Defendants have also failed to meet their burden period by failing to offer any objective evidence that they would have changed his job duties no matter what. If this is the state of the record at trial, undersigned counsel will move for a directed verdict. Under the standard of review, even if Plaintiff presented no evidence at all, a jury could disbelieve the defendants, and their defense fail. This means they cannot obtain summary judgment. Indeed, Defendant has essentially admitted that the job changes would not have occurred if Plaintiff had not gone on leave by virtue of their rationale for changing the job.

Furthermore, Plaintiff has presented an enormous amount of evidence showing that there is in fact discriminatory and retaliatory intent, as described above, thus, there would be fact disputes regardless, and Defendants are not entitled to summary judgment. If Plaintiff had been reinstated, he would not have been in the position of being fired a month later because he could clearly do his old job in his new restrictions.

III. ADA and Rehab Act Retaliation Claims – Plaintiff has proved intent.

In a retaliation claim, this is done by establishing a protected activity; an adverse action; and causation, which is a light burden, which is a minimal and light burden. Gilooly v. Missouri Dep't of Health and Sr. Svcs., 421 F.3d 734 (8th Cir. 2005); Young v. Warner-Jenkinson Co., 152 F.3d 1018, 1022 (8th Cir. 1998). This can be done by timing alone. Smith v. Riceland Foods, Inc., 151 F.3d 813 (8th Cir. 1998); see also Smith v. Allen Health Systems, Inc., 302 F.3d 827, 834 (8th Cir. 2002) (2 weeks); Sprenger v. Federal Home Loan Bank of Des Moines, 253

F.3d 1106, 1113-14 (8th Cir. 2001) (weeks); O'Bryan v. KTIV Television, 64 F.3d 1188, 1193-94 (8th Cir. 1995) (3 months). Notably, Plaintiffs are not required to prove a "qualification" element in a retaliation claim. *Cossette v. Minn. Power & Light*, 188 F.3d 964 (8th Cir. 1999) (ADA); *Heisler v. Metro. Council*, 339 F.3d 622, 632 (8th Cir. 2003) and *Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002) (FMLA). There is no question about adverse action or protected activity having occurred. Qualification is not an issue. So that leaves intent, which can be proved through direct evidence or the *McDonnell Douglas* analysis.

Here, Plaintiff established that nearly as soon as he requested FMLA leave, they drug tested him and then claimed that his performance suddenly got worse and disciplined him. When he went out on FMLA leave, they changed his job to one that required far more walking, and lifting one hundred pounds (even though they later admitted it did not). They then claimed they had no idea that might cause a problem, even though they had seen him limping, knew he had gone out for hip replacement, seen him using a cane, and knew that sometimes people do not fully recover from a surgery. When he attemtped to return to work in March 2014, they, unsolicitted, offered him favorable job references. They then violated their own policies by refusing to discuss potential accommodations with him so he could return to work. They applied an illegal 100% policy to him. They have told numerous lies about what his job duties were, their efforts to accommodate, and alleged performance problems.

This is a basis for a retaliation claim.

IV. Damages

Based on the court's rulings, Plaintiff can obtain injunctive relief on his FMLA claims, and, if he prevails, attorney's fees and costs.

As to compensatory damages under the Rehab Act, Defendant is wrong and needs to stop citing cases that were effectively decided under different statutes. In 1991, the law was amended to state that: "In an action brought by a complaining party under . . . the Rehabilitation Act of 1973 . . . or the regulations concerning the provision of a reasonable accommodation . . .

the complaining party may recover compensatory . . . damages . . . ." 42 U.S.C. 1981a(2) (punitive damages were also authorized, except against governmental entities such as defendant).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served on 1st day of March 2018, via ECF upon counsel for the Defendant:

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2016-02-06 trl brf pltf - Downing, William Rick