IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

MARCUS KIMM, Plaintiff, v. AEROTEK, INC., Defendant.	**NO. 2:17-CV-221-SAB** PLAINTIFF'S BRIEF IN RESPONSE TO DEFENSE MOTION FOR SUMMARY JUDGMENT Hearing Date: October 17, 2018 2:30 PM With oral argument

> Anti-discrimination laws and lawsuits have 'educated' would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination...is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 117 n. 10 (9th Cir. 2004)(citation omitted).

I. INTRODUCTION & SUMMARY OF ARGUMENT

Aerotek (a nation-wide staffing company) screened Marcus Kimm (a member

of the Washington Air National Guard) out of the applicant pool once it became fully aware that Mr. Kimm's upcoming deployment would cost Aerotek money.

On March 31, 2017, Aerotek telephoned Mr. Kimm to see if he was interested in applying for a RF Technician position with one of Aerotek's clients, Transtector. (SOF[1] ¶82-87). Mr. Kimm said "yes" that same day. *See id.* An in-person interview occurred on April 3, 2017. (SOF ¶90). At that interview Mr. Kimm told Lindsey Lee, a Spokane, Washington based Recruiter for Aerotek, that he had an upcoming deployment with the Washington Air National Guard. (SOF ¶92). Once Mr. Kimm communicated the effect of that deployment Ms. Lee's body language changed, she became withdrawn, and the interview "skidded to a halt." (SOF ¶93). Within minutes of the interview's end Ms. Lee emailed Mr. Kimm. (SOF ¶94). That email did not ask Mr. Kimm for references nor did it ask Mr. Kimm about his qualifications. *Id.* It asked Mr. Kimm about his upcoming military deployment. *Id.* When Mr. Kimm responded that he had "a deployment mid-July" Ms. Lee (two minutes later) emailed back saying "this position would be longer-term, hoping for someone to stick around full time." (SOF ¶95, 99)

The next day Ms. Lee doubled down telling Mr. Kimm, in writing, "[t]hey are

[1] SOF refers to Plaintiff's "Statement of Facts" and CSOF refers to Plaintiff's Counter Statement of Facts. The CSOF is at the end of Plaintiff's SOF statement.

hoping for a candidate that would be there to fulfill the whole 6-month contract to hire. I will keep you in mind for other opportunities that may be before you leave." (SOF ¶110). By "they" Ms. Lee meant Transtector. *Id.* However, neither Ms. Lee (nor anyone else at Aerotek) presented Mr. Kimm's information to Transtector for consideration during this timeframe. (SOF ¶109, 110). Mr. Kimm then asked (twice) whether his deployment was the reason he wasn't being considered for the job. (SOF ¶117, 118). Ms. Lee did not answer that straightforward "yes" or "no" question. *Id.*

And instead of confirming what she already wrote (that Mr. Kimm's deployment was the real reason Aerotek wasn't presenting him to Transtector) Ms. Lee (with the assistance of her manager, Phil MacArthur, and (after the lawsuit was filed) Shannon Landmeier, a Minnesota-based HR representative) embarked on a campaign to cover up the overt discrimination by: (a) breaking hiring protocol by moving Harlan Kamm (who hadn't worked a single job in four years and felt he "didn't have enough knowledge around the … RF Technician position") from consideration by Alliance (another Aerotek customer) to Transtector and allowing Mr. Kamm to start work at Transtector before Aerotek completed a single reference check on him even though Aerotek requires two reference checks to be done before a candidate can start work (SOF ¶63-68, 71-72); (b) lying to Mr. Kimm by (i) implying that Transtector didn't want him when Aerotek didn't talk to anyone at

Transtector until after Mr. Kimm filed this lawsuit (SOF ¶110), (ii) promising to call Mr. Kimm's references but not doing so (SOF ¶121), and (iii) stating that Mr. Kimm would be presented to Transtector but not doing so (SOF ¶102, 109); (c) lying about Mr. Kimm to Transtector (after Mr. Kimm filed suit) by wrongly claiming that Mr. Kimm did not have component repair experience when he did (SOF ¶127-128); and (d) changing its reasons for non-hiring Mr. Kimm. (CSOF ¶23)

The reason for Ms. Lee (and Aerotek's) cover up is simple: Aerotek only gets paid if it places a contract worker at a customer, like Transtector. (SOF ¶8 – 11). If that contract worker has to leave the workplace for military leave, then a "backfill" is required. (SOF ¶14-17). Aerotek's management tells Ms. Lee (and her fellow Recruiters/Managers) to get "in the mindset that backfills suck." (SOF ¶17). Backfills suck because backfills cost Aerotek money. (SOF ¶16). Indeed, all of Aerotek's witnesses admit that it was physically possible for the company to have presented Mr. Kimm to Transtector for consideration, other RF Technician openings existed, and Aerotek's contract with Transtector insulated Aerotek from any financial penalty should Aerotek send a poor performer to Transtector. (SOF ¶ 42-45, 124). It should be for a jury to determine why Aerotek, who says it's an "equal opportunity employer", did not take an extra five minutes and email Mr. Kimm's information to Transtector for consideration. Aerotek's motion should be denied.

II. ARGUMENT

On summary judgment reasonable inferences must be made in favor of the non-moving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Association,* 809 F.2d 626, 631 (9th Cir. 1987). In the employment discrimination context, "a grant of summary judgment…is generally unsuitable [when] the plaintiff has established a prima facie case because of the 'elusive factual question' of intentional discrimination." *Yartzoff v. Thomas,* 809 F.2d 1371, 1377 (9th Cir. 1987). The Ninth Circuit "emphasize[s] the importance of zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses." *McGinest,* 360 F.3d at 1112. In USERRA discrimination cases the "question of an employer's intent to discriminate is a pure question of fact for a jury to decide." *See Tarin v. Cty. of L.A.,* 123 F.3d 1259, 1262 (9th Cir. 1997). As it relates to this failure to hire case, Mr. Kimm need not show that he would have been hired but only that he was eliminated from the applicant pool as a result of his protected activity, here informing Aerotek of his military obligation. *See Ruggles v. California Polytechnic State Univ.,* 797 F.2d 782, 786 (9th Cir. 1986).

The reasonable inferences show once Aerotek learned the full effect of Mr. Kimm's military deployment and that the deployment would cost Aerotek money it screened Mr. Kimm out of the applicant pool. When Mr. Kimm asked "[a]m I not

being considered because of the deployment" the circumstantial evidence shows Aerotek embarked on a scheme to cover up its discrimination.

A. Direct evidence and substantial circumstantial evidence support Plaintiff's USERRA discrimination claim.

The USERRA 38 U.S.C. § 4311 "prohibit[s] discrimination against persons because of their service in the uniformed services." *Leisek v. Brightwood Corp*., 278 F.3d 895, 898 (9th Cir. 2002). This includes hiring discrimination. 20 C.F.R. § 1002.40. To establish a *prima facie* USERRA discrimination claim, the employee must prove: (a) membership in the armed services; (b) an adverse employment decision; and, (c) that the employee's military service was a "motivating factor" – not the sole factor – in the employer's adverse decision. 38 U.S.C. §4311(c)(1)-(2); *Leisek*, 278 F.3d at 898. "Motivating factor" means "that if the employer was asked at the moment of the decision what its reasons were and if it gave a truthful response, one of those reasons would be the employee's military position or related obligations." *Robinson v. Morris Moore Chevrolet-Buick, Inc.* 974 F.Supp. 571, 576 (E.D. Tex. 1997) (*citing Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)). A USERRA plaintiff can establish the "motivating factor" element through direct or circumstantial evidence. *Sheehan v. Dep't of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). Indeed, recognizing that workplace discrimination is seldom

open and announced, courts allow plaintiffs, like Mr. Kimm, to prove their claims through both direct and circumstantial evidence. *McGinest*, 360 F.3d at 1122.

In this case reasonable inferences drawn from the direct and circumstantial evidence establish that summary judgment should be denied. Mr. Kimm establishes the claim's first two elements: membership in the military and failure to hire, an adverse employment action. Regarding causation, the direct and circumstantial evidence is as follows.

The direct evidence in this case consists of Ms. Lee's emails to Mr. Kimm regarding his deployment being inconsistent with the company's "hoping for someone to stick around fulltime." (SOF ¶99, 110). Buttressing this direct evidence[2] is Mr. Kimm's testimony that Ms. Lee's body language and demeanor changed from "bubbly" and "excited to…go over the position" to "withdrawn" and not as "interactive" when Mr. Kimm told her about his deployment during the in person interview. (SOF ¶93)[3] While Aerotek may claim that Ms. Lee's emails were "to

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[2] "Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did." 9th Circuit Model Civil Jury Instruction 1.9 (2007 edition).

[3] The Defense makes much of Mr. Kimm's deposition correction sheet as it relates to his conversation with Ms. Lee on March 31st. (ECF No. 41, pg. 3 n.1) Setting

ensure that Plaintiff was placed in a position that was consistent with [Ms. Lee's] understanding of [Mr. Kimm's] immediate career goals" (ECF No. 41, p. 7) a reasonable inference, which must be made in Mr. Kimm's favor on summary judgment, is that Ms. Lee was telling Mr. Kimm that since he wasn't "sticking around" fulltime he was no longer being considered for the RF Technician position. Indeed, Ms. Lee's April 4, 2017 11:53 AM email says as much. (SOF ¶110). After writing that Transtector was hoping for a candidate to "fulfill the whole 6-month contract to hire" she wrote "I will keep you in mind for other opportunities" from which a reasonable inference could be made that Mr. Kimm was no longer being kept in mind for "this", *i.e.* the RF Technician, "opportunity." But more to the point, when asked "why" she sent the April 3, 2017 4:44 PM and April 4, 2017 11:53 AM emails, Ms. Lee responded "**I don't remember my mindset at that time**" and "**I don't know what I was thinking at that time**." (SOF ¶100, 110). Tellingly, Ms.

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aside the undisputed fact that Ms. Lee and Mr. MacArthur testified they have no reason to question Mr. Kimm's honesty (SOF ¶80), Mr. Kimm does not deny mentioning the National Guard or an "appointment" on March 31, 2017. (ECF No. 42-1, PG ID 506) What is clear from Ms. Lee's demeanor in the April 3, 2017 in person interview coupled with her follow up emails was that the full impact of Mr. Kimm's National Guard obligation was not made clear until that time.

Landmeier agreed that Ms. Lee would "absolutely" and "definitely" need retraining on Aerotek's EEO policies given the above-referenced April 3rd and April 4th emails. (SOF ¶112). Ms. Landmeier waffled when asked whether the April 3rd and April 4th emails were consistent with Aerotek's EEO policies. (SOF ¶101, 111)

The circumstantial evidence, in this case includes: (a) closeness in time between the protected activity and the adverse employment action; (b) evidence of employer dishonesty; (c) inconsistencies/shifting reasons; (d) deviation from workplace rules; and (e) dissimilar treatment of similarly situated applicants.

(a) The *proximity in time* between a plaintiff's protected activity and an adverse employment action is circumstantial evidence of discrimination. *Yartzoff*, 809 F.2d at 1375. The closeness in time between Mr. Kimm informing Aerotek of the significance of his deployment on April 3rd and being screened out of the applicant pool on April 3rd (the day Mr. MacArthur alleges - - more on that below - - he decided that Mr. Kimm wasn't qualified for the job (SOF ¶103)) or April 11th (the day Ms. Landmeier says the non-hire decision was made (SOF ¶138-139)) standing alone, is sufficient to survive summary judgment. (SOF ¶93-95, 68). Even if, as Ms. Lee claims, Mr. Kimm told her the full extent of his deployment on March 31, 2017, and the decision to screen Mr. Kimm out wasn't made until April 11th, the twelve-day timeframe between learning of the deployment and deciding to screen out Mr. Kimm is enough to establish causation. *Davis v. Team Elec. Co.*, 520 F.3d

1080, 1094 (9th Cir. 2008)("We have found a prima facie case of causation when termination occurred fifty-nine days after EEOC hearings."). This rule applies to USERRA (and WLAD) cases. *Hanson v. Cty. of Kitsap*, 21 F. Supp. 3d 1124, 1151 (W.D. Wash. 2014)("Defendants' motion for reconsideration of the Court's decision to deny summary judgment on Plaintiff's § 4311 (discrimination) and WLAD retaliation claims on the basis that temporal proximity alone is insufficient to establish retaliatory motive should be denied.").

(b) As to the *employer dishonesty*, it is a "general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt" and the jury in this case has ample evidence from which to work as it relates to Aerotek's propensity to tell the truth vis-à-vis its dealings with Mr. Kimm. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000). Mr. MacArthur testified to seeing Mr. Kimm's resume (and deciding it wasn't good enough) the "day [April 3rd] Lindsey interviewed him" because Ms. Lee "brought his resume to me." (SOF ¶96 – 98, 103 – 106) Yet Mr. MacArthur was out of the office on vacation that day. (SOF ¶ 105). Ms. Lee testified to an April 4, 2017 in-person conversation with Mr. MacArthur: a day Mr. MacArthur was also away on vacation. (SOF ¶113-114). Ms. Lee told Mr. Kimm that she would contact Mr. Kimm's employment references. (SOF ¶119-121). She never did. *Id.* When asked at deposition as to whether she had ever been dishonest with a job applicant she said

"no" only to later, in that deposition, agree that she misled Mr. Kimm, a job applicant. (SOF ¶ 131-135). Ms. Lee lied about lying. *Id.* Further, Shannon Landmeier (the above-referenced Minnesota-based HR employee) signed a verification that her answer to Interrogatory 1 (which sought the date the decision to not hire Mr. Kimm was made and the information upon which that decision was based) was based "upon facts complied by employees and/or business records" yet she never spoke to a single employee or reviewed a single document in executing those discovery requests. (SOF ¶138-142). Mr. MacArthur misled Transtector in August 2017 when he told Transtector[4] that Mr. Kimm had no experience in making component level repair when Mr. Kimm had such experience. (SOF ¶127).

(c) As to the *deviations from policies/rules*, "[a] plaintiff may also raise a triable issue of pretext through evidence that an employer's deviation from established policy or practice worked to her disadvantage." *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1117 (9th Cir. 2011). Aerotek requires its recruiters to conduct two reference checks before a candidate is presented to a customer: a process followed "99% of the time." (SOF ¶18, 19). Aerotek followed that two-

[4] Ms. Lee/Mr. MacArthur didn't "recall" why Aerotek emailed Transtector on August 4, 2017. (SOF ¶ 128) Mr. Kimm's June 16, 2017, lawsuit, which originally included Transtector as a defendant, likely drove the email. ECF No. 001.

reference-check-complete process before it presented Paul Rokusek to Transtector. (SOF ¶59). But Aerotek allowed Harlan Kamm to start work at Transtector before completing any reference check. (SOF ¶71-77) Aerotek has a "red flag" for candidates who have been unemployed for long periods of time. (SOF ¶22) Aerotek disregarded that "red flag" in ensuring Mr. Kamm (a non-reservist who had been completely out of the workforce since 2013) could get presented to Transtector. (SOF ¶66). By way of comparison, Mr. Kimm had recently spent from July 2015 to February 2017 doing RF Technician work for the Air National Guard. (CSOF ¶19) Ms. Lee saw no "red flags" on Mr. Kimm's resume nor did any "red flags" come up in Mr. Kimm's interview. (SOF ¶89). Other deviations include Aerotek's practice of recruiting candidates for more than one position, as it did with Mr. Rokusek and Mr. Kamm, but Aerotek did not recruit Mr. Kimm for any position after it learned of his July 2017 deployment. (SOF ¶136-137). After Transtector fired Mr. Rokusek for poor performance Aerotek proactively reached out to him for other jobs and, in October 2017, began the process of seeing whether he was interested in an RF Technician job at Transtector - - - the same company that fired him seven months earlier. (SOF ¶61-62). When presenting candidates to customers Aerotek sends a written email about the candidate and a custom-made resume but Aerotek did neither when Transtector contacted Aerotek after Mr. Kimm filed suit. (SOF ¶24, 56, 127-128). In fact, Aerotek went out of its way to ensure that Transtector did not hire Mr.

Kimm by sending a non-Aerotek stamped resume and an email explaining the reasons why Mr. Kimm shouldn't be hired. (SOF ¶ 127-128)

(d) As to *inconsistencies*, which are circumstantial evidence of pretext, *Payne v. Norwest Corp.*, 113 F.3d 1079, 1080 (9th Cir. 1997), Aerotek's defense that it did not submit Plaintiff as a candidate for a technical position because Plaintiff failed to provide timely employment references is the fourth reason that Aerotek has given as to why Mr. Kimm was not presented to Transtector. (CSOF ¶23). First, on April 3, 2017 Ms. Lee told Mr. Kimm that she was hoping for someone who "could stick around" fulltime - - - a reasonable inference being that Mr. Kimm was out of the running because of his deployment. (SOF ¶99). Second, on April 4, 2017, Ms. Lee told Mr. Kimm "they" were looking for someone who could be there to fill the whole six-month contract - - - a reasonable inference being that Mr. Kimm was out of the running because of his deployment. (SOF ¶110). Third, on April 17, 2017 (and after not responding to Mr. Kimm's questions about whether his deployment was the reason he was being rejected) Ms. Lee told Mr. Kimm that while his resume was "great!" Mr. Kimm did not get hired because Mr. Kamm allegedly had more experience in a manufacturing setting - - - even though Ms. Lee could not explain the difference between at what an RF Technician did in or out of the manufacturing setting. (SOF ¶117, 129-130). Fourth, on February 9, 2018 (the day Ms. Landmeier

signed the Interrogatory No. 1 verification) Aerotek came up with the "Kimm didn't get the references in on time" defense. (SOF ¶138-139)

The inconsistencies do not end there, Ms. Lee claimed she discussed, with Mr. MacArthur, the emails she was exchanging with Mr. Kimm; MacArthur denies this. (SOF ¶125-126). Ms. Lee said she had more than two conversations with Mr. MacArthur about Mr. Kimm's deployment; MacArthur denies this. (SOF ¶115-116). Ms. Lee and Mr. MacArthur have slightly different versions of Aerotek's claimed plan to present Mr. Kimm to Transtector. (SOF ¶107-108). Aerotek makes much about the fact that it took Mr. Kimm nearly 24 hours (from the afternoon of April 3rd to the afternoon of April 4th)[5] to provide it his (Kimm's) reference contact information but admit no-one ever told Mr. Kimm that his failure to provide that information by a date or time would eliminate him from consideration. (SOF ¶122) Tellingly, Mr. MacArthur said he "didn't know" whether Aerotek's screening Mr. Kimm out of the applicant pool for not getting his reference information in on time was an act consistent with that of an equal opportunity employer. (SOF ¶123). The

[5] Mr. Kimm was not told to bring reference information to the April 3, 2017 in person interview. (SOF ¶91) Between the April 3rd interview and the evening of April 4th Mr. Kimm had to contact the references to get their permission to be used as references. (SOF ¶91)

"you didn't get the references in on time" reason for his non-hire was not communicated to Mr. Kimm until months after this lawsuit was filed and turns on testimony Ms. Landmeier read (at the company's FRCP 30(b)(6) deposition) from a prepared script (that she didn't write) regarding an Aerotek "business model" (that isn't memorialized in any Aerotek policy). (SOF ¶143 – 144)

(e) As to *dissimilar treatment*, "a comparison with employees who are similarly situated" is relevant circumstantial evidence because "[u]nequal treatment of a different class in the same employment context is significant evidence of pretext." *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982). Transtector has never outright rejected any RF Technician candidate presented by Aerotek. (SOF ¶50, 52). Since 2017 five individuals have applied, through Aerotek, for the Transtector RF Technician position. (SOF ¶53). Of those five individuals Aerotek has presented four. *Id.* The only individual that Aerotek did not present to Transtector was Mr. Kimm. (SOF ¶53-54). Mr. Kimm was the only individual of those five who was an actively serving member of the military reserves. *Id.*

Against this backdrop Aerotek argues that "there is no evidence that Mr. Kamm would not have been hired over" Mr. Kimm and base this argument on Mr. Kimm's alleged lack of qualifications and distinguishable caselaw. (ECF No. 41, p. 17) Aerotek is wrong on the law and the facts.

Regarding the law, all Mr. Kimm must prove is that he was screened out of the applicant pool on account of his military obligation. *See generally Ruggles*, 797 F.2d at 786. The non-9th Circuit cases Aerotek uses to support its argument (ECF No. 41, p. 17 – 18) involve applicants who did not meet the minimum qualifications for the job: *Stoots* involved a plaintiff who scored a 17/100 on a test that required a 73 passing score; *Becker* involved a plaintiff not challenging the employer's conclusion about his low qualifications; *Cossette* involved the plaintiff not having a college degree for a position that required one year of graduate school; *Greer* involved the plaintiff not having the required supervisory experience; *Jones* involved the plaintiff not having a required year of specialized experience. Yet Aerotek admits that plaintiff had "relatively thin qualifications." (ECF No. 042, PG ID 388, ¶44) "Relatively thin qualifications" is different than the "no qualifications" situations presented in Aerotek's authorities. Indeed, Ms. Lee admitted that Mr. Kimm's resume was "great!" (SOF ¶129) Further, the RWS notes corresponding to Mr. Kimm shows that Ms. Lee marked "Y" or "yes" for Mr. Kimm to "Proceed" in the hiring process after the April 3, 2017, internal interview, the inference being that had Mr. Kimm not been qualified Ms. Lee would have marked "no" and would not have allowed Mr. Kimm to "proceed." (SOF ¶94)

Additionally, Aerotek's inquiry into a candidate's technical qualifications consists of little more than looking at resumes and conducting an interview, which

primarily focuses on pay, shifts, and commute expectation, with candidates whose resumes match Transtector's criteria. (SOF ¶20, 58, 78, 84, & CSOF ¶19). Indeed, Ms. Lee and Mr. MacArthur have little understanding about what RF Technicians do or how they are trained. (SOF ¶46, 47, 48). While Mr. MacArthur makes much about Mr. Kimm's alleged inability to do work "to the component level" Aerotek has yet to produce a shred of evidence that it asked any other RF Technician candidate about "component level" repair. (SOF ¶49) All Aerotek witnesses agree that Transtector (not Aerotek) is best qualified to determine whether and RF Technician candidate can do the job. (SOF ¶51).

Aerotek's summary judgment motion should be denied.

B. Direct evidence and substantial circumstantial evidence supports Plaintiff's WLAD discrimination claim.

Washington law makes it illegal for an employment agency, like Aerotek, to refuse to "refer for employment or otherwise discriminate against an individual because of…military status." RCW 49.60.200. Proof of a WLAD discrimination claim requires evidence that the plaintiff's protected status was a substantial factor in the employer's adverse employment action. *Alonso v. Qwest Commc'ns Co., LLC*, 178 Wn. App. 734, 743 (2013). An employee creates "a genuine issue of material fact [by showing] either (1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was

a substantial factor motivating the employer." *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 446-447 (2014).

Mr. Kimm incorporates the facts he used in supporting his USERRA claim in responding to Aerotek's motion to dismiss his WLAD claim. Aerotek does, however, misstate the law as under the WLAD Mr. Kimm does not have to follow the *McDonald Douglas* burden shifting scheme in order to survive summary judgment nor does he have to disprove (although he has) each "non-discriminatory" reason provided by Aerotek. *See Scrivner*, 181 Wn.2d at 446-447. All Mr. Kimm has to do (and has done) is to show that his military service obligation was a substantial (not the only) factor in Aerotek's decision to screen him out of the RF Technician applicant pool. Aerotek's motion to dismiss the WLAD claim fails.

C. Triable issues of fact exist as to whether Aerotek acted willfully.

"Willful" means the employer knew it was violating USERRA or acted with reckless disregard to whether it was doing so. *See* 20 C.F.R. § 1002.312(c). Willfulness is a question for the jury to decide. *See E.E.O.C. v. Pape Lift, Inc.*, 115 F.3d 676, 681 (9th Cir.1997); *Brooks v. Hilton Casinos Inc.*, 959 F.2d 757, 767 (9th Cir.1992); *Montoya v. Orange Cty. Sheriff's Dep't*, 987 F. Supp. 2d 981, 1022 (C.D. Cal. 2013)(Denying summary judgment on USERRA willfulness claim even after finding **"**there is no evidence in the record that [Defendant] knew of its obligations

under USERRA, there is evidence from which a jury could conclude that [Defendant] was deliberately indifferent to its obligations under the statute.").

There is evidence in this case to permit a jury to conclude that Aerotek acted willfully in screening Mr. Kimm out of the RF Technician applicant pool. First, Defendant has knowledge of USERRA: Aerotek is a nationwide staffing company and Ms. Lee admits to having read the USERRA poster at her Spokane workplace. (SOF ¶40). From that fact alone a jury could conclude that Aerotek, via Ms. Lee, knew that it had an obligation not to discriminate against Mr. Kimm but did so anyway. Second, Aerotek's actions support a conclusion that Aerotek was deliberately indifferent regarding its obligations under USERRA. While Ms. Lee read the USERRA poster, the company did nothing else to educate its workers on the law other than inserting a single sentence about USERRA in a policy manual that doesn't even govern interactions with contractor candidates. (SOF ¶34 n.1). Aerotek's HR representative admits that Ms. Lee's emails to Mr. Kimm "definitely" require that she be retrained on the company's EEO policy yet Aerotek has no plan to retrain Ms. Lee. (CSOF ¶1). Nor does Aerotek, whose revenue exceeds $11 billion, have a single system in place to ensure that hiring discrimination does not occur nor a means to ensure its EEO training is effective. (SOF ¶1, 30-33). It does not train its Washington-based employees on Washington discrimination law. (SOF ¶33). It claims that a candidate's upcoming deployment is never a criterion in

screening out a candidate for possible employment; however, Ms. Lee's April 3rd and April 4th emails show she did just that. (SOF ¶35-36, 99, 110). Ms. Lee agrees it's never okay to mislead a candidate or break a promise with a candidate; yet she did that too. (SOF ¶29, 134-135). Last, but certainly not least, Defendant has a clear financial motivation for denying Mr. Kimm's employment. (SOF ¶8-17).

D. Plaintiff's objections to Defense evidence.

Defendant Fact No. 4 is that Aerotek is a "military friendly" employer and solely relies on a document produced around 4:00 PM on July 12, 2018, less than 24 hours before the 8:00 AM July 13, 2018, Aerotek FRCP 30(b)(6) deposition and four days before the July 16, 2018 discovery cut-off date. (Crotty Decl. ¶8; ECF No. 24, p. 3, ¶11). Plaintiff requests that this document be stricken given its late disclosure as Plaintiff was prejudiced by not having time to conduct discovery regarding that document. *Compare* Fed. R. Civ. P. 26(e)(1)(initial disclosures must be supplemented in a "timely manner") *with* Fed. R. Civ. P. 37(c)(1)(allowing court to exclude document not provided in accordance with Rule 26(e)).

Plaintiff also requests that Mr. MacArthur's July 30, 2018, deposition correction sheet be stricken. Fed. R. Civ. P. 30(e). Mr. MacArthur's attorneys were served with Mr. MacArthur's deposition, had 30 days to provide a correction sheet, but did not provide that sheet within 30 days. (Crotty ¶5).

III. CONCLUSION

Defendant's motion should be denied.

DATED this August 7, 2018.

s/ Matt Crotty
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties, if any, shall be served in accordance with the Federal Rules of Civil Procedure.

Dated this August 7, 2018.

/s Matt Crotty
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