

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>TONI McLAUGHLIN,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 97-132-B</b>
	)	
<b>S. D. WARREN COMPANY</b>	)	
	)	
<b>Defendant</b>	)	

**ORDER AND MEMORANDUM**

Plaintiff, Toni McLaughlin, brings this action alleging that Defendant, S.D. Warren, violated provisions of the American with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, and the Maine Human Rights Act (“MHRA”), 5 M.R.S.A. § 4551 *et seq.*, when Defendant refused to award Plaintiff a position at Defendant’s mill. Defendant now moves for summary judgment and also moves to strike the affidavits, in whole or in part, of Plaintiff’s experts Mary Lee Rounds, Kelly Holbrook, Karl Siegfried, and Plaintiff’s attorney, Jeffrey Neil Young. Also before the Court is Plaintiff’s Motion to Exclude the affidavit of Brian Wilson or to permit Plaintiff to file a supplemental affidavit. After careful consideration of the record the Court:

1. DENIES in part and GRANTS in part Defendant’s Motion to Strike;
2. GRANTS Plaintiff’s Motion to Strike.
3. DENIES Defendant’s motion for summary judgment.

**Background**

In 1991 Defendant hired Plaintiff as a “temporary” worker, a position that required Plaintiff to work in entry-level positions as needed. As a “temporary” worker, Plaintiff became a member of the United Paperworkers International Union. In May 1993 Plaintiff injured her back

which forced her to leave work in June 1993. Except for a brief two-hour period in September, Plaintiff did not work for Defendant again in 1993.

In July 1994 and again in January 1995, Plaintiff's physician released Plaintiff to work with certain restrictions, but Defendant did not have any positions available that were compatible with the restrictions imposed on Plaintiff by her physician. In April 1995, Plaintiff's doctor released Plaintiff to work with only one restriction, that Plaintiff be limited to lifting 45 pounds occasionally and 30 pounds frequently. Defendant then scheduled Plaintiff to see the company's occupational physician for a functional capacity evaluation ("FCE") to test Plaintiff's physical condition.

On April 11, 1995, Plaintiff bid on four positions: paper machine reserve, maintenance services, utility and recovery reserve and pulping reserve. Plaintiff was the senior bidder for each position and was therefore, under the collective bargaining agreement, entitled to be awarded the position if she was physically able to perform the job.

Later that April, Carl Turner, Plaintiff's Union president, met with Randy Robinson, Defendant's employment and compensation manager. At the meeting Turner and Robinson determined that because of the restriction placed on Plaintiff, the "pulping reserve"<sup>1</sup> position was the position that best matched Plaintiff's physical limitations. As a result of that meeting, Turner was led to believe that Plaintiff would be awarded the position of "pulping reserve" and Plaintiff withdrew her name from consideration for the other positions.

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<sup>1</sup> The pulping process requires several pulping operators that are designated as P-1, P-2, P-3, P-4 and pulping reserve. The pulping reserve is the operator with the least experience and assists the other operators as needed. Duties may include helping the P-1 with valving or the P-4 with unloading railroad cars.

Defendant's medical personnel met with Plaintiff and issued an FCE on Plaintiff's condition on May 16, 1995. On May 23, 1995 Plaintiff and Turner met with Robinson and Defendant's human resources personnel. At some time before the meeting Defendant developed written functional job requirements<sup>2</sup> for the pulping reserve position. Defendant did not mention any concern about the result of Plaintiff's FCE examination or Plaintiff's ability to meet the requirements and Turner left the meeting believing that Plaintiff would be awarded the position.

On June 23<sup>rd</sup> Plaintiff and Turner met with Robinson and company officials to discuss long-term accommodations Plaintiff might need. Robinson and the officials arrived at the meeting with billboards that compared Plaintiff's FCE results with the new written requirements. Robinson stated that Plaintiff would be unable to perform hazardous waste response duties ("hazmat" duties). Turner was surprised by Robinson's statement and attempted to suggest some reasonable accommodations Defendant could provide for Plaintiff but Defendant was not interested in hearing Turner's suggestions. Defendant then terminated Plaintiff's employment because she exceeded the two year maximum for leave due to a disability. In August, the union proposed suggestions to reduce the physical nature of the position. Although many of the union's suggestions were later implemented, Defendant never responded to the union's suggestions as they applied to Plaintiff.

## **I. Motion to Strike Affidavits**

### **A. Wilson, Siegfried, Holbrook and Clarke**

In support of its summary judgment motion Defendant filed the affidavit of Brian Wilson.

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<sup>2</sup> The functional job requirements are those requirements a candidate must meet before being awarded the position.

Brian Wilson is an occupational therapist who went to Defendant's mill and used a dynamometer to measure the force needed to turn valves a pulping reserve would normally turn. Brian Wilson made those measurements on behalf of Susan Clarke, an ergonomist designated as an expert by Defendant. In the affidavit Clarke filed in support of summary judgment, she states that comparing Wilson's measurements to Plaintiff's FCE, Plaintiff could not perform the essential function of turning valves. Plaintiff's attorney asks the Court to strike both Wilson's affidavit and those portions of Clarke's affidavit that rely on the measurements taken by Wilson because Wilson was never designated as an expert by Defendant. In the alternative Plaintiff asks the Court to permit Plaintiff to file the affidavits of Kelly Holbrook, an occupational therapist, and Karl Siegfried, an ergonomist, to dispute Clarke's assertions that Plaintiff cannot perform the essential function of valving. Defendant has filed a motion to exclude both Siegfried and Holbrook affidavits on the ground that Plaintiff did not designate them as experts within the time period set by this Court.

The court's original scheduling order required that Defendant designate all experts by January 13, 1998. The parties later agreed to extend the deadline by one week and the Court permitted Plaintiff to designate an additional expert on March 13, 1998. Both parties have completed discovery and are now preparing for trial. The Court is satisfied that if it permits either party to designate new experts at this time, that would undermine the very purpose of establishing deadlines for exchanging expert reports and deposing experts during the discovery period. To permit either party to designate an expert at this late time would be unfair to both Defendant and Plaintiff.

Defendant argues that it is not offering Wilson's affidavit as statements from an expert.

The Court disagrees. The use of a dynamometer to measure the pressure needed to turn a valve requires special expertise. That is why Defendant's expert sent a colleague to measure the force needed to turn the valve. If measuring the force with a dynamometer was a task that could be performed by a lay person, any pulping operator at Defendant's mill could have performed that function. Accordingly, the Court strikes the affidavits of Brian Wilson, Kelly Holbrook, and Karl Siegfried because they were not designated as experts before the deadline set forth in the Court's scheduling order.

Also in dispute are certain portions of Clarke's affidavit. Although Defendant designated Clarke as an expert before the deadline in the scheduling order, portions of her affidavit rely upon information supplied by Wilson. Plaintiff deposed Clarke before Clarke received the measurements by Wilson thereby precluding Plaintiff from questioning Clarke about the conclusions she reached based on those measurements. Further, the parties appear to have agreed that if measurements were taken, Plaintiff's expert would be present. If Defendant intended to take dynamometer measurements at some time after Clarke's deposition, it should have notified Plaintiff's counsel so that Plaintiff would have the opportunity to offer evidence that disputed either the accuracy of the measurements or the manner in which Wilson took the measurements. The Court is satisfied that permitting those portions of Clarke's affidavit that rely upon Wilson's measurements into the record is unfair to the Plaintiff. Accordingly, the Court strikes those paragraphs of Clarke's affidavit that rely upon information provided by Wilson.

**B. Mary Lee Rounds and Jeffrey Neil Young**

As a preliminary matter, the Court denies Defendant's motion to strike the affidavit of Plaintiff's attorney, Jeffrey Neil Young, on the ground that the affidavit is irrelevant. Young's

affidavit gives the Court a context with which to view the reason why both Plaintiff and Defendant submitted affidavits of persons not designated experts within the time period set by this Court.

Defendant also moves to strike portions of Mary Lee Rounds's affidavit, Plaintiff's vocational rehabilitation expert, on the ground that portions of her affidavit fail to meet the standard of admissibility. Fed. R. Evid. 702. In *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, the Supreme Court set forth the standard for applying Rule 702. Rule 702 requires that: (1) the witness be qualified as an expert; (2) the expert must testify to scientific, technical or specialized knowledge; and (3) the expert's testimony must assist the trier of fact. *Lanni v. New Jersey*, 177 F.R.D. 295, 299 (D. N.J. 1998) (citing *Daubert*, 509 U.S. at 587-91.).

Defendant concedes that Rounds is an expert but argues that portions of her affidavit fail to meet the final two prongs of Rule 702. After reviewing the affidavit submitted by Rounds, the Court is satisfied the testimony meets the test set forth in Rule 702 and elucidated in *Daubert*. Her testimony regarding Plaintiff's inability to perform certain categories of jobs falls within her specialized knowledge from observing and rehabilitating other persons with injuries. Further, Rounds's affidavit regarding the adequacy of the FCE prepared by Defendant relates to her experience in reviewing scores of FCEs from other employers.<sup>3</sup> The Court is also satisfied that Rounds's testimony will assist the trier of fact in determining two facts at issue, namely whether

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<sup>3</sup> When Defendant conducted its physical exam on Plaintiff it measured the amount of pressure she could push and pull. In paragraph eight of Rounds's affidavit, Rounds states that based on her experience in reviewing FCEs and as a rehabilitation expert, the measurements most relevant to whether Plaintiff could perform the essential function of valving is her ability to turn, not her ability to push and pull. The Court believes Rounds's specialized knowledge in reviewing FCEs will assist the trier of fact at trial and therefore will deny Defendant's request to strike paragraph eight of Rounds's affidavit.

Plaintiff is disabled under the ADA and whether Plaintiff's back injury precludes Plaintiff from performing the essential functions of the job.

The Court is persuaded to grant Defendant's request to strike paragraph nine of Rounds's testimony regarding the adequacy of Brian Wilson's dynamometer measurements because the testimony is irrelevant in light of the Court's striking Wilson's affidavit. Further, the Court strikes Rounds's conclusion that Plaintiff is disabled within the meaning of the ADA because that determination can only be made by the trier of fact. *See Hygh v. Jacobs*, 961 F.2d 359, 364 (2<sup>nd</sup> Cir. 1992); *Marx & Co. v. Diner's Club*, 550 F.2d 505, 509-10 (2<sup>nd</sup> Cir. 1997), cert. denied, 434 U.S. 861 (1977) ("It is not for the witness to instruct the jury as to the applicable principles of law, but for the judge.")

For the reasons stated above the Court STRIKES the affidavits of Holbrook, Siegfried and Wilson. Further, the Court STRIKES those portions of Clarke's affidavit that rely upon the measurements made by Wilson and paragraph nine of Rounds's affidavit and the portion of Rounds's affidavit that states Plaintiff is disabled within the meaning of the ADA. The Court DENIES Defendant's motion to strike other portions of Rounds's affidavit.

## **II. Summary Judgment**

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1<sup>st</sup> Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1<sup>st</sup> Cir. 1993)).

When determining whether summary judgment is appropriate, the Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1<sup>st</sup> Cir. 1993).

### III. Analysis

Plaintiff contends that Defendant discriminated against her on the basis of her disability in violation of the ADA and MHRA.<sup>4</sup> To obtain relief under the ADA, a plaintiff must demonstrate:

First, that he was disabled within the meaning of the Act. Second, that with or without reasonable accommodations he was able to perform the essential functions of his job. And third, that the employer discharged him in whole or in part because of his disability.

*Katz v. City Metal Co.*, 87 F.3d 26, 30 (1<sup>st</sup> Cir. 1996). Defendant maintains that Plaintiff fails to offer evidence that fulfills any of the three requirements listed above.

#### A. Disability

To establish that a “disability” exists under the ADA, one must have: (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) been regarded as having such an impairment. 42 U.S.C. § 12102(c); *Abbot v. Bragdon*, 107 F. 934, 938 (1<sup>st</sup> Cir. 1997). The ADA regulations define “Major Life Activities” as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i). Lifting is also considered a major life activity. 29 C.F.R. pt. 1630, App. § 1630.2(i) at 350.

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<sup>4</sup> A claim under the MHRA mirrors the analysis given to the claim under the ADA. *See Abbott v. Bragdon*, 107 F.3d 934, 938 (1<sup>st</sup> Cir 1997) (“The Maine Supreme Court has indicated that analogous federal law informs the interpretation of the MHRA.”) (citing *Bowen v. Department of Human Services*, 606 A.2d 1051, 1053 (Me. 1992); *Plourde v. Scott Paper Co.*, 552 A.2d 1257, 1261-62 (Me. 1989)).

In addition to demonstrating that an impairment exists, a plaintiff must demonstrate that the impairment “substantially limits” the major life activity. The term “substantially limits” means:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which an average person in the general population can perform that same major life activity.

29 C.F.R. 1630.2(j)(1). The following factors are used to determine if an individual is “substantially limited” in a major life activity:

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. 1630.2(j)(2). When, as in this case, one of the major life activities at issue is working, the ADA regulations state:

- (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.
- (ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of “working”:
  - (A) The geographical area to which the individual has reasonable access;
  - (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training,

knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3).

Plaintiff maintains that she has a back impairment that substantially limits the major life activities of lifting and working. Defendant concedes that Plaintiff has a back impairment, but argues that the impairment does not substantially limit the major life activities of lifting and working.

The parties do not dispute that lifting is a major life activity. 29 C.F.R. pt. 1630, App. § 1630.2(i) at 350. Instead, the parties differ on whether the restriction placed on Plaintiff substantially limits her ability to lift. Plaintiff's physician concluded that Plaintiff could lift 30 pounds frequently and 45 pounds occasionally and Defendant's physician opined that Plaintiff could lift 20 pounds frequently and 35 pounds occasionally. Defendant maintains that those lifting restrictions do not impose a substantial limitation on Plaintiff's ability to lift. Case law differs on whether an injury such as Plaintiff's constitutes a restriction on a major life activity other than working. *Bab v. San Francisco Newspaper*, 6 AD Cases (BNA) 230 (N.D. Cal. 1996) (fifty pound lifting restriction constitutes a substantial limitation); *E.E. Black v. Marshall*, 497 F. Supp. 1088, 1102 (D. Haw. 1980) (plaintiff who could not do heavy lifting "disabled" under Rehabilitation Act); *Compare, e.g., Williams v. Channel Masters Satellite Sys., Inc.*, 85 F.3d 1311, 1319 (4<sup>th</sup> Cir. 1996) (twenty-five pound restriction on lifting does not constitute a

substantial limitation under the ADA); *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 539-540 (9<sup>th</sup> Cir. 1997) (restriction permitting the plaintiff to lift fifty pounds occasionally and twenty-five pounds frequently is not a substantial limitation on lifting.)

Even if the Court assumes, as Defendant contends, that the lifting restrictions do not substantially limit the major life activity of lifting, the Court is satisfied that Plaintiff raises an issue of fact as to whether Plaintiff's back impairment substantially limits the major life activity of "working." Plaintiff's vocational rehabilitation expert, Mary Lee Rounds, states in her affidavit that Defendant is precluded from a class of jobs, heavy and very heavy labor, because of her back injury. Defendant argues that Rounds only pointed to eight types of jobs that Plaintiff could not perform. However, in her testimony Rounds stated that the jobs she listed were not exhaustive and that there were probably many more positions Plaintiff could not perform because of the disability. The Interpretive Guidelines issued by the EEOC state:

For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs.

29 C.F.R Pt. 1630, App. § 1630.2(j) at 352.<sup>5</sup> Rounds testimony clearly raises a factual question as to whether Plaintiff is disabled. Accordingly, the Court is satisfied that whether Plaintiff is "disabled" under the ADA is an issue properly left to be resolved by the trier of fact,

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<sup>5</sup> Although the EEOC interpretive guidelines are not controlling authority to interpreting the ADA, the First Circuit has recognized that the guidelines represent informed judgment that are entitled to "some deference." *Arnold v. United Parcel Svc.*, 136 F.3d 854, 863 (1<sup>st</sup> Cir 1998).

not by the Court.<sup>6</sup>

### **B. Otherwise Qualified**

Defendant argues that even if the Court decides that a factual issue exists as to whether Plaintiff is disabled, Plaintiff is not “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). The regulations define a "qualified individual with a disability" as an:

individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position

29 C.F.R. § 1630.2 (m).

#### ***i. Essential function - hazardous waste response***

While appearing to concede that valving is an essential function to be a "pulping reserve", the parties differ on whether hazmat duties qualify as an essential function. In addition to valving, hazmat duties include wearing heavy gear and quickly responding to an emergency. Among the factors to consider when determining whether a function is essential are:

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;

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<sup>6</sup> Because the Court has determined that Plaintiff is disabled under the first prong of the ADA, it need not address whether Plaintiff had a “record of” a disability or whether Defendant regarded Plaintiff as disabled. Further, the Court will not address at this time whether Plaintiff will be permitted at trial to present evidence that Plaintiff is substantially limited in the major life activities of sitting and standing.

- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of the collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3).

Initially, it must be noted that a court will not lightly "second-guess the employer's judgment in describing the essential functions of the job." *DePaoli v. Abbott Laboratories*, 140 F.3d 668, 673 (7<sup>th</sup> Cir. 1998). *Also see E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 147 (1<sup>st</sup> Cir. 1997). Also, as the Defendant properly points out, the time spent performing the function is not necessarily conclusive on whether the function is essential. *See, e.g. Ethridge v. State of Alabama*, 860 F. Supp. 808, 810-11 (M.D. Ala. 1994). However, the amount of time spent performing a function is at least an indication as to whether a function is essential; therefore Plaintiff's evidence that pulping reserves have only had to respond once in the last fourteen years to a hazardous waste emergency is relevant to the inquiry. Further, evidence that at least two other pulping operators have been excused from hazmat duties raises a question as to whether it is an essential function of the position. Defendant's written description of what the job entails is not particularly conclusive because the description appears to have been written after Plaintiff applied for the position. For the reasons set forth above, I find that a genuine issue of fact exists as to whether hazmat response is an essential function of the pulping reserve position.<sup>7</sup>

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<sup>7</sup> The Court is mindful of the safety concerns associated with a proper and quick response to any hazardous waste release. Defendant will have the opportunity to address such concerns to the trier of fact. *See Ethridge*, 860 F. Supp. at 810-11 (passing a handgun course an essential function for a police officer even though the police officer lived in a rural town that had no

*ii. Plaintiff's performance of essential functions*

The next issue is whether Plaintiff can perform the essential functions of the position with or without reasonable accommodation. Defendant maintains that the type of valves Plaintiff would need to operate either on a daily basis or as part of the hazmat duties require forces ranging from 17 to 90 pounds, weights that exceed Plaintiff's restrictions. Defendant also claims Plaintiff became very fatigued during the FCE, and that it did not award Plaintiff the job because it was concerned Plaintiff could not perform the physical work required for hazmat duties.

To dispute Defendant's assertions Plaintiff offers the affidavit of a vocational rehabilitation expert who states that Plaintiff can perform valving and hazmat duties. Plaintiff also offers evidence from Dennis Bedard, a former pulping reserve and now a P-4, and a statement from Turner, Plaintiff's union representative, that Defendant exaggerated the physical requirements of the pulping reserve position. Bedard suggests that even if Plaintiff must perform hazmat duties, those duties did not come up on a monthly or even yearly basis. I am satisfied that Plaintiff has raised sufficient facts regarding whether she was otherwise qualified to perform the essential functions of the position, with or without accommodations.<sup>8</sup>

**C. Discharged Because of Disability**

In addition to raising issues of fact regarding her disability and qualifications, Plaintiff must also demonstrate that Defendant's proffered reasons for discharging her were a pre-text.

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history of police ever having to use a firearm.)

<sup>8</sup> Defendant concedes that an issue exists as to whether it fulfilled its duty to provide reasonable accommodations. Defendant's Motion for Summary Judgment at 4 ("The issue of whether or not the company fulfilled its duties in the reasonable accommodation process is disputed and, as such, must be reserved for trial.")

*Katz*, 87 F.3d at 26, 30. Since Plaintiff does not argue on this motion for summary judgment that she has direct evidence that she was discharged based on her disability, the burden shifting analysis in *McDonnell Douglas* applies. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). The First Circuit applies the “pretext plus” approach to discrimination in employment based on a disability. *Dichner v. Liberty Travel*, 141 F.3d 24, 30 (1<sup>st</sup> Cir. 1998). Explaining the approach the First Circuit stated:

To prevail under federal law, it is insufficient for a plaintiff merely to undermine the veracity of the employer’s proffered justification; instead, she must muster proof that enables a fact finder to conclude that the stated reason behind the adverse employment decision is not only a sham, but a sham intended to cover up the proscribed type of discrimination.

*Id.* at 30.

As the Court stated above, Plaintiff has established a *prima facie* case that she has a disability, therefore Defendant must present evidence that supports a discharge based on a non-discriminatory reason. Basically, Defendant states that it refused to hire Plaintiff because it did not believe Defendant had the ability, because of her back impairment, to turn the valves, and that she lacked the stamina to perform hazmat duties. In essence, Plaintiff responds that Defendant exaggerated the requirements needed to qualify as a pulping reserve with the purpose of denying Plaintiff the position. Plaintiff offers evidence from both Plaintiff’s union representative and one of Defendant’s employees who worked as a pulping reserve that question whether the written job requirements, written after Plaintiff applied for the job, exaggerates the physical nature of the position. The Court is satisfied that the statements by the union representative and Defendant’s employee that the requirements were exaggerated raises factual questions as to whether Defendant’s proffered reasons for dismissing Plaintiff were pretextual.

To satisfy the second prong of the "pretext plus" standard, Plaintiff must offer some evidence that Defendant discriminated against her on the basis of her disability. The plaintiff may rely on the same evidence to prove both pretext and discrimination. *Smith v. Starts Computer*, 40 F.3d 11, 16 (1<sup>st</sup> Cir 1994). The Court is satisfied that the evidence Plaintiff offers that Defendant exaggerated the functional job requirements together with Defendant's refusal to respond to the union's or Plaintiff's accommodation suggestions raises factual questions about the true nature of Defendant's discharge. Further, the main person responsible for deciding whether to hire Plaintiff, Randy Robinson, stated in her deposition that, "[P]ast experience when you dealt with as many employees with long-term issues and light-duty issues around back injuries and when you get one [back injury], you get another, and it was just that we figured that that's what we were dealing with." Although Robinson made this statement in the context of the company's and union's attempt to place Plaintiff in a suitable position, it raises factual questions as to the nature of Plaintiff's dismissal, especially in light of the fact that Robinson made that statement based on her general knowledge of persons with back injuries, not based on medical evidence before her regarding Plaintiff's back injury.

#### **IV. Conclusion**

For the reasons set forth above:

1. Defendant's Motion for Summary Judgment is DENIED.<sup>9</sup>
2. Defendant's Motion to Strike Affidavit in DENIED in part and GRANTED in part.
3. Plaintiff's Motion to Strike is GRANTED.

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<sup>9</sup> The Court notes that even if it permitted all affidavits submitted in support and in opposition to summary judgment into the record, genuine issues of material fact exist that would preclude the Court from granting summary judgment.

***SO ORDERED.***

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Eugene W. Beaulieu  
U.S. Magistrate Judge

Dated on October 2, 1998.