

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

JORGE FEIJOO,

Plaintiff

v.

COSTCO WHOLESALE CORPORATION,

Defendant.

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NO. 4:21-cv-02444

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

DATED: August 18, 2022

Respectfully submitted,

BY: /s/ Timothy Watson

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INTRODUCTION

Costco terminated Plaintiff Jorge Feijoo’s employment because he attempted to physically attack his coworker, Chris Hall. According to witness statements from Hall and the four other employees who were present on April 4, 2020, the two got into an argument while working at Costco’s warehouse in the Woodlands, Texas, and Feijoo attempted to punch Hall. Hall evaded the punch and started walking away. Feijoo, however, continued pursuing Hall through the warehouse and continued doing so despite two managers yelling at him to stop. Feijoo finally gave up pursuing Hall and was instructed to go home for the day by the two managers. But instead of going home, Feijoo waited for Hall in the parking lot of the warehouse. Hall thus had to be escorted to his car by a security guard in order to avoid any further confrontation with or potential assault by Feijoo.

Despite the events of April 4, Feijoo maintains that his conduct that day is not the real reason he was terminated. Rather, he alleges that he was terminated because of his age and because of a medical condition he has related to his hearing, tinnitus.¹ Feijoo thus asserts

¹ ECF No. 1, at 2, ¶5.2.

wrongful termination claims under the Americans with Disabilities Act (“ADA”) and the Age Discrimination in Employment Act (“ADEA”), as well as Texas’ anti-discrimination statute, Chapter 21 of the Texas Labor Code (“Labor Code”).

Feijoo’s wrongful termination claims fail as a matter of law because he cannot show pretext. He cannot show that Costco’s stated reason for terminating him was false; that Costco failed to follow its policies regarding workplace violence or threats of violence; or that anyone else at the warehouse engaged in similar misconduct but was not terminated. Although Feijoo denies attempting to assault Hall—he claims that Hall started the altercation and that Hall attempted to assault him—his denial is not relevant. As the Fifth Circuit has explained, “a fired employee’s actual innocence of her employer’s proffered accusation is irrelevant as long as the employer reasonably believed it and acted on it in good faith.” *Cervantez v. KMGP Servs. Co. Inc.*, 349 F. App’x 4, 10 (5th Cir. 2009) (citing *Waggoner v. City of Garland, Tex.*, 987 F.2d 1160, 1166 (5th Cir. 1993) (plaintiff must show that decision-makers “did not in good faith believe the allegations [of plaintiff’s misconduct], but relied on them in a bad faith pretext to discriminate against him on the basis of his age”).

Here, there is overwhelming evidence that Feijoo in fact attempted to assault Hall as alleged. All of the witnesses present during the incident—the two managers, Hall, and two other coworkers—provided written statements confirming the events as described above.² In addition, video footage from April 4 shows Feijoo pursuing Hall in the warehouse and the two managers intervening to stop him.³ Although Feijoo denies the allegations, he provides no evidence

² The five statements are attached as Exhibits 17-21. A summary of the investigation is attached as Exhibit 16.

³ The video footage is attached as Exhibit 29 (“Video”). Ryan Pearce’s Declaration authenticating the Video is attached as Exhibit 28. After watching the Video at his deposition, Feijoo claimed he could not

supporting his version of what happened that day. As a result, Feijoo has no basis to suggest that Costco did not reasonably believe he attempted to assault Hall and terminated his employment for that reason. Accordingly, Costco is entitled to summary judgment on Feijoo's wrongful termination claims.

Feijoo also asserts a failure to accommodate claim under the ADA and the TCHRA.⁴ Specifically, he alleges that while he was working at the Woodlands warehouse, he was denied his requested accommodation of having Fridays off so that he could attend his doctor's appointments for his hearing problems. As Feijoo alleges in his complaint, the doctor appointments "were routinely scheduled on Fridays."⁵

Feijoo requested and received intermittent leave to attend "health care provider appointments/treatments" a number of times throughout the duration of his employment at Costco. And each time he did so, he also provided the required medical documentation supporting his request.⁶ Yet Costco has no record of any such request by Feijoo to attend doctor appointments for tinnitus or any hearing problem.

In addition, Feijoo acknowledged in his deposition that after he transferred to Texas from Florida in 2016, he was no longer being treated by any doctor for any hearing or ear problems.⁷ Rather, according to Feijoo's testimony, the doctors he saw in Texas treated him for stomach and

recognize the individuals in the Video. Plaintiff's Deposition (Pl. Dep.) at 75:10-79:5, attached as Exhibit 1.

⁴ ECF No. 1, at 2-3, ¶5.3.

⁵ ECF No. 1, at 2, ¶5.3.

⁶ See Exs. 10-13 and discussion on pages 4-5, 11-12.

⁷ Pl. Dep. at 100:17-18; 103:1-4, Ex. 1. Feijoo's doctor who treated him for his "sinus problems, ears, and balance" practiced in Florida and is no longer practicing. Pl. Dep. at 100:17-18., Ex. 1.

bladder problems.⁸ Thus, Feijoo did not request any accommodation related to his alleged hearing disability while working in Texas.

Also, Feijoo testified that the doctor appointments he did have while working in Texas were on Mondays and Tuesdays—not Fridays.⁹ As a result, Feijoo did not need Fridays off to attend doctors’ appointments. Accordingly, as shown more fully below, Costco is entitled to summary judgment on all Feijoo’s claims in this case.

FACTUAL BACKGROUND

A. Feijoo’s Employment with Costco.

Feijoo began working for Costco in 1992 in Florida as a forklift driver.¹⁰ He transferred to Costco’s Galleria warehouse in Houston in 2016 and then to the Woodlands warehouse in 2017.¹¹ In a number of his performance reviews, Feijoo was counseled for his abrasive and at times aggressive behavior toward his coworkers, and he was encouraged to work on communicating in a more friendly and positive way with others.¹² In addition, in 2015 and 2019, he received counseling notices for his role in an altercation with a coworker¹³ and for engaging in rude and aggressive conduct toward several coworkers.¹⁴

⁸ Pl. Dep. at 100:10-16, Ex. 1.

⁹ Pl. Dep. at 99:6-8; 106:16-107:7, Ex. 1.

¹⁰ Plaintiff’s Transfer Request, attached as Exhibit 7.

¹¹ *Id.*

¹² In 2013, Feijoo was advised to “communicate in a more effective manner with coworkers [because he] tends to be a little too aggressive.” (2012-2013 Performance Review, attached as Exhibit 6 at 1). The following year he was encouraged to “focus on appropriately responding to direction, coaching and criticism.” (2013-2014 Performance Review, attached as Exhibit 5 at 1). His 2016 review notes that Feijoo “does not express disagreements constructively...[which has] led to an antagonistic atmosphere in the department...” (2015-2016 Performance Review, attached as Exhibit 4 at 2). And his 2019 review states that over the past year Feijoo “had ... escalated exchanges with fellow employees in front of members.” (2018-2019 Performance Review, attached as Exhibit 3 at 2).

¹³ Employee Counseling Notice (5/21/2015), attached as Exhibit 14.

¹⁴ Employee Counseling Notice (10/1/2019), attached as Exhibit 15.

Feijoo requested and received a number of accommodations for medical conditions. Specifically, each year between 2013 and 2017, Feijoo requested and received intermittent leave so that he could attend “health care provider appointments/treatments.”¹⁵ Each time Feijoo made a request for an accommodation or a medical leave of absence, he provided the required medical documentation supporting his request. And Costco granted each of his requests.¹⁶ Costco has no record, however, of any request for an accommodation by Feijoo relating to tinnitus or a hearing problem; rather, Feijoo never submitted any such medical documentation to Costco relating to tinnitus or any hearing problem.¹⁷

B. Feijoo’s Attempted Assault of Chris Hall.

According to the witnesses present at the warehouse on April 4, 2020, Feijoo and Hall began arguing after Feijoo started instructing Hall where and how to stock merchandise.¹⁸ When Hall told Feijoo that he could not do what Feijoo was asking because he had been given different instructions by his manager, Feijoo became angry and started yelling at Hall.¹⁹ Feijoo then attempted to punch Hall, but Hall was able to move away and evade the punch. Feijoo then started pursuing Hall through the warehouse and ignored his managers—Ryan Pearce and Justin Kahn—when they yelled at him to stop.²⁰ Video footage from the warehouse shows Feijoo

¹⁵ 2013-2016 FMLA Requests and Approvals, attached as Exhibits 10-13. He also requested and received accommodations allowing him not to work in the warehouse freezer in order to avoid extreme cold (Freezer Accommodations, attached as Exhibit 8) and to “avoid bending/twisting.” (2013 FMLA Approval, Ex. 10). And Feijoo requested and received continuous leave for medical reasons. (2011 FMLA Approval, attached as Exhibit 9).

¹⁶ *Id.*

¹⁷ *Id.*; Declaration of Sarah Rajski, attached as Exhibit 2.

¹⁸ Chris Hall Statement (“Hall Statement”), attached as Exhibit 19; Investigation Interview Notes, attached as Exhibit 22.

¹⁹ *Id.*

²⁰ Justin Khan Statement (“Khan Statement”), attached as Exhibit 20; Ryan Pearce Statement (“Pearce Statement”), attached as Exhibit 21.

pursuing Hall and Pearce and Kahn intervening to attempt to stop Feijoo.²¹ Feijoo initially stops pursuing Hall, but then goes after him again, forcing Pearce and Kahn to again place themselves between Feijoo and Hall to prevent Feijoo from assaulting Hall.²²

After Feijoo eventually stopped pursuing Hall, he met with Pearce and Kahn in the office.²³ According to Pearce and Kahn, Feijoo told them that he was upset because Hall did not follow his instructions. Pearce explained to Feijoo that he (Feijoo) was not Hall's manager and that Hall's actual manager had previously instructed Hall to do what he was doing (which conflicted with the instructions Feijoo was attempting to give Hall).²⁴

Feijoo responded by yelling at Pearce and aggressively approaching him, stopping only after both Pearce and Kahn warned him to stop and back up.²⁵ Feijoo then left the office and went to the breakroom where Hall was sitting.²⁶ He again attempted to instigate a fight with Hall. Feijoo advanced towards Hall, yelling. Pearce and Kahn rushed to the breakroom and both told Feijoo to stop, but Feijoo continued. He yelled at Hall "this isn't over" and "[he] was going to get [Hall] outside."²⁷ Pearce and Kahn had to physically stand between Feijoo and Hall to stop Feijoo from attacking him. Pearce instructed Feijoo to leave the warehouse.²⁸

Feijoo gathered his belongings and walked outside the warehouse, ostensibly to go home as he was instructed to do by Pearce and Kahn. Yet according to Jennifer Castro, an Assistant

²¹ Video, Ex. 29.

²² *Id.*

²³ Kahn Statement, Ex. 20; Pearce Statement, Ex. 21.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Investigation Interview Notes, Ex. 22.

²⁸ Kahn Statement, Ex. 20; Pearce Statement, Ex. 21.

General Manager who investigated the incident, Feijoo acknowledged to her the following day that he did not go home as he was instructed. He instead waited in the parking lot for Hall—just as he had threatened to do.²⁹ Hall was forced to walk to his car with a security escort.³⁰

As part of her investigation, Castro interviewed Feijoo, Hall, Pearce, Kahn, and two other stockers who were in the vicinity of Feijoo and Hall when the argument began. Castro’s report of her investigation notes that Feijoo remained defiant during her investigation and continued to threaten violence during her interview of him. At one point during the interview, Feijoo asked Castro: “Do you think I would hurt Chris [Hall]?” When Castro replied “Yes I do,” Feijoo stated “You’re right; I would.”³¹

Feijoo received a counseling notice and was suspended for three days pending review and approvals of his termination.³² The warehouse General Manager, Jeff Polloreno, made the decision to terminate Feijoo which was approved by Vice President and Regional Operations Manager, Kim Brown and Executive Vice President Russ Miller. Feijoo was terminated effective April 14, 2020 for violating Costco’s policies prohibiting: (1) violence and threats of violence; (2) conduct jeopardizing the order and safety at the warehouse; and (3) serious misconduct.³³

ARGUMENT

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); *See e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party “bears the initial

²⁹ Investigation Interview Notes, Ex. 22.

³⁰ Request for Termination Approval, attached as Exhibit 26.

³¹ Investigation Interview Notes, Ex. 22.

³² Suspension Form (4/5/20 - 4/7/20), attached as Exhibit 23; Counseling Notice (4/5/20), attached as Exhibit 24.

³³ Termination/Resignation Form, attached as Exhibit 25.

responsibility of informing the district court of the basis for its motion,” and identifying the record evidence “which it believes demonstrate[s] the absence of a genuine issue of material fact.” *Celotex Corp.*, 477 U.S. at 323. To survive summary judgment, the nonmovant must identify specific evidence in the record and articulate how that evidence supports that party’s claim. *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014). “A party cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence.” *Lamb v. Ashford Place Apartments LLC*, 914 F.3d 940, 946 (5th Cir. 2019) (citation and internal quotation marks omitted).

A. Legal standard applicable to wrongful termination claims.

To establish a prima facie case under the *McDonnell Douglas*³⁴ burden shifting framework on Feijoo’s wrongful termination claims based on his age or his alleged disability under the Labor Code, the ADEA, and ADA, Feijoo must prove that he was either (a) replaced by someone significantly younger or non-disabled or (b) that he was otherwise treated less favorably than others who were similarly situated but outside his protected class. *Ross v. Judson Indep. Sch. Dist.*, 993 F.3d 315, 321 (5th Cir. 2021) (ADEA; Labor Code). To establish a prima facie case on his retaliatory termination claims under the ADA and the Labor Code, Feijoo must show that he engaged in protected conduct and that a causal connection exists between his protected conduct and his termination. *See, e.g., EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 697 (5th Cir. 2014) (ADA); *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 585 (Tex. 2017) (retaliation under Labor Code).

³⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Feijoo was over forty years of age at the time of his termination, and for the sake of this motion only, Costco assumes that Feijoo can establish the other elements of a prima facie case—that he had a disability and was qualified for his job at Costco.

If Feijoo establishes a prima facie case, then to survive summary judgment on all of his wrongful termination claims, Feijoo must show that Costco’s stated reason for terminating him “is false or unworthy of credence” and that it “was pretext for discrimination.” *Rodriguez v. Eli Lilly and Co.*, 820 F.3d 759, 765 (5th Cir. 2016) citing *LHC Grp.*, 773 F.3d at 702. To meet his burden, Feijoo must present “substantial evidence” of pretext. *Owens v. Circassia Pharm., Inc.*, 33 F.4th 814, 825 (5th Cir. 2022) quoting *Watkins v. Tregre*, 997 F.3d 275, 283 (5th Cir. 2021).³⁵ Feijoo may show pretext by showing evidence of disparate treatment or by showing that in terminating him, Costco engaged “in a meaningful departure from policy.” *Owens*, 33 F.4th at 826, 834, quoting *Lindsey v. Bio-Med. Applications of La., L.L.C.*, 9 F.4th 317, 326 (5th Cir. 2021).³⁶ Here, as shown below, Feijoo cannot meet this burden.

B. Feijoo Cannot Meet His Burden to Show Pretext.

Feijoo has no basis to show pretext. He can produce no evidence suggesting that Costco’s reason for terminating him is false; he cannot show that others were treated more favorably under similar circumstances; and he cannot show that Costco departed from its policy in terminating him.

³⁵ “Evidence is substantial if it is of such quality and weight that reasonable and fair-minded [triers of fact] in the exercise of impartial judgment might reach different conclusions.” *Id.*, quoting *Laxton v. Gap Inc.*, 333 F.3d 572, 579 (5th Cir. 2003).

³⁶ Ultimately, Feijoo must establish his wrongful termination claims under either a “but-for” causation standard or a “because of” / “motivating factor” causation standard. See *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009) (ADEA plaintiffs must show that but-for age discrimination, they would not have been subjected to adverse employment actions); *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013) (Title VII plaintiff must show retaliation was but-for cause of adverse employment action); *Adeleke v. Dall. Area Rapid Transit*, 487 F. App’x 901, 903 (5th Cir. 2012) (ADA and Title VII claims relying on circumstantial evidence follow the same burden-shifting framework); *Sansone v. Jazz Casino Co., LLC*, 2021 WL 3919249, at *3 (5th Cir. Sept. 1, 2021) (ADA plaintiff must show termination because of disability); *White v. United Parcel Service, Inc.*, 407173, 2021 WL 4941998 (S.D. Tex. 2021) (motivating factor standard applies to claims under the Labor Code.) Here, Feijoo cannot meet his burden under either standard.

1. Costco’s good faith reliance on witness statements and the Video.

Feijoo does not dispute that all five Costco employees who witnessed the altercation on April 4, 2020 gave the statements they gave describing Feijoo as the aggressor who pursued Hall and attempted to physically assault him. As Feijoo admitted in his deposition, he does not know why the employees would provide such statements if they were not true.³⁷

The fact that Feijoo disputes the accuracy these statements—as well as the fact that Feijoo claims he cannot recognize himself or Hall in the Video of the incident—has no relevance to the question of pretext. The relevant inquiry is “whether [Costco] reasonably believed the employee[s’] allegation[s] and acted on [them] in good faith,” or whether Costco “relied on them in a bad faith pretext to discriminate against [Feijoo] on the basis of his age [and/or disability].” *Waggoner*, Tex., 987 F.2d 1165–66. Feijoo has no basis to suggest that Costco did not honestly believe the witness statements, and relied on the Video, and terminated him based on the statements and the Video. Feijoo thus has presented no evidence to rebut Costco’s stated reason for terminating his employment.

2. No evidence of policy departure or disparate treatment.

Costco’s Employee Agreement states that violence or threats of violence are grounds for “immediate termination.” Specifically, the agreement lists the following as one of the “Cause[s] for Termination” that can result in immediate termination: “[a]ny actual or threatened act of violence or physical aggression, including, but not limited to, fighting, shoving, striking, or attempting to strike another person on Company premises or on Company time.”³⁸ Feijoo has not alleged that Costco failed to follow its policy regarding terminating employees who engage

³⁷ P. Dep. at 59:10-19, Ex. 1.

³⁸ Employee Agreement Excerpts, attached as Exhibit 27. Section 11.3 (17), listing “actions that can result in immediate termination of employment.”

in violence or attempted violence at work. Likewise, Feijoo acknowledged in his deposition that he knows of no other employee who engaged in similar misconduct but was not terminated.³⁹ Accordingly, Feijoo cannot show pretext, and Costco is entitled to summary judgment on his claims of wrongful and retaliatory termination.

C. Costco Did Not Fail To Accommodate Feijoo’s Hearing Disability.

Feijoo alleges that while he was working at the Woodlands warehouse, he was denied his requested accommodation of having Fridays off so that he could attend doctor appointments for his hearing problems.⁴⁰ According to his complaint, Feijoo’s doctor’s appointments “were routinely scheduled on Fridays.”⁴¹ Under the ADA and the Labor Code, to state a claim for failure to accommodate, a plaintiff must first show that he requested an accommodation. *Jenkins v. Cleco Power, LLC*, 487 F. 309, 317 (5th Cir. 2007).⁴²

Here, Feijoo clearly knew the process he needed to go through in order to request time off for medical appointments: each year between 2013 and 2017, Feijoo requested and received intermittent leave so that he could attend “health care provider appointments/treatments.”⁴³ And in each instance: Feijoo provided the required medical documentation supporting his request, and Costco granted each request.⁴⁴ Costco, however, has no record of any request for an

³⁹ Pl. Dep. at 63:3-11, Ex. 1.

⁴⁰ ECF No. 1, at 2-3, ¶5.3.

⁴¹ *Id.*

⁴² “Texas courts follow . . . and use analogous federal statutes and cases to guide their approach in interpreting the [Labor Code].” *White v. United Parcel Service, Inc.*, 407173, 2021 WL 4941998 (S.D. Tex. 2021) citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 634 (Tex. 2012).

⁴³ 2013-2016 FMLA Requests and Approvals, Exs. 10-13. He also requested and received accommodations allowing him not to work in the warehouse freezer in order to avoid extreme cold (Freezer Accommodations, Ex. 9) and to “avoid bending/twisting.” (2013 FMLA Approval, Ex. 10). And Feijoo requested and received continuous leave for medical reasons. (2011 FMLA Approval, Ex. 9).

⁴⁴ Freezer Accommodations, Ex. 8; 2011 FMLA Approval, Ex. 9; and 2013-2016 FMLA Requests and Approvals, Exs. 10-13.

accommodation by Feijoo relating to tinnitus or a hearing problem.⁴⁵ Rather, Feijoo never submitted any such medical documentation to Costco relating to tinnitus or any hearing problem.

In addition, Feijoo confirmed at his deposition that he was not being treated by any doctors in Texas for tinnitus or for any hearing problems.⁴⁶ Feijoo identified three doctors that he claimed he needed to see regularly: Dr. Pacha, Dr. Mercado, and Dr. Array. He saw Dr. Pacha for a precancerous condition in his throat and mouth and for stomach problems.⁴⁷ And he saw Dr. Mercado for bladder issues.⁴⁸ Feijoo saw Dr. Array for “sinus problems, ears,[and] balance.”⁴⁹ But as Feijoo testified, he saw Dr. Array “when I was living in Florida”⁵⁰ and Dr. Array “doesn’t practice anymore.”⁵¹ Feijoo thus never requested an accommodation to see any doctor in Texas for tinnitus or any hearing problem.

Further, Feijoo testified that he went to his doctor appointments on Mondays and Tuesdays⁵²—not on Fridays as alleged in his complaint and his charge of discrimination.⁵³ As a result, the undisputed facts establish that Feijoo never requested an accommodation as he alleges in his complaint, and as Feijoo’s testimony shows, he did not need the accommodation he claims to have requested. Accordingly, Costco is entitled to summary judgment on Feijoo’s failure to accommodate claims under the ADA and the Labor Code.

⁴⁵ *Id.*; Declaration of Sarah Rajski, Ex. 2.

⁴⁶ Pl. Dep. at 100:17-18; 103:1-4, Ex. 1.

⁴⁷ Pl. Dep. at 100:10-18, Ex. 1.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Pl. Dep. at 103:1-4, Ex. 1.

⁵¹ Pl. Dep. at 100:17-18., Ex. 1.

⁵² Pl. Dep. at 107:5-15, Ex. 1.

⁵³ EEOC Charge of Discrimination, attached as Exhibit 30 at ¶5; ECF No. 1 at ¶5.8.

CONCLUSION

The undisputed facts establish that Feijoo cannot raise a genuine issue of material fact with respect to any of his claims. Costco therefore respectfully requests that its motion for summary judgment be granted and that Feijoo's claims be dismissed with prejudice.

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that I served a copy of Motion for Summary Judgment upon counsel of record, by electronic filing using the CM/ECF system, which will send notification of such filings to the following on this 18th day of August, 2022.

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