

**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

**PLAINTIFF’S RESPONSE TO DEFENDANT COSTCO WHOLESALE  
CORPORATION’S MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

Plaintiff, Jorge Feijoo (hereinafter referred to as “Plaintiff” or “Feijoo”), files this response to Defendant, Costco Wholesale Corporation’s (hereinafter referred to as “Defendant” or “Costco”) Motion for Summary Judgment (“Motion”) and would respectfully show the Court as follows:

**I. SUMMARY OF THE ARGUMENT**

Costco’s Motion for Summary Judgment should be denied because Feijoo is able to establish his prima facie cases of age and disability discrimination and retaliation (based on age and disability) as well as establishing genuine issues of material fact as to Costco’s asserted reason for termination being pretext for discrimination.

Costco’s Motion for Summary Judgment does not dispute that Feijoo is able to establish his prima facie case of disability and age discrimination. The summary judgment evidence also establishes that Feijoo was treated differently than individuals outside of his protected classes of age and disability and that he was replaced by individuals outside his protected classes. Costco’s

entire argument relies on its decision to terminate Feijoo's employment because of an incident that occurred on April 4, 2020, involving another employee, Chris Hall. However, there are multiple genuine issues of material fact as to Costco's asserted legitimate non-discriminatory reason for terminating Feijoo's employment including: (1) inconsistencies in the employee statements upon which Costco claims it relied to make the termination decision, (2) unfair and inconsistent application of Costco's policies regarding threats of violence or violence in the workplace and (3) evident disparity in the way Feijoo was treated when reporting that he was physically assaulted by Chris Hall (Feijoo was suspended and terminated), versus the way Mr. Hall was treated when reporting Feijoo's alleged actions, which did not include any physical contact (Mr. Hall received an apology from Costco and absolutely no disciplinary action).

After 27+ years of successful employment, Feijoo was abruptly terminated after he reported that Mr. Hall, pushed him and he fell to the ground. Chris Hall reported that Feijoo swung at him, but missed. Chris Hall was not terminated and in fact, received no discipline at all, despite reports from other employees that both Hall and Feijoo were heard yelling at each other. There was no evidence (other than Mr. Hall's self-serving unsworn statement) to substantiate any allegation that Feijoo attempted to punch him.

The factual circumstances of this case present an intense swearing match replete with credibility determinations on material elements of the claims and defenses asserted by the parties. Therefore, summary judgment is inappropriate.

## II. STATEMENT OF MATERIAL FACTS

### A. Feijoo worked for Costco for 27+ years as a qualified individual with a disability.

Feijoo worked for Costco for 27+ years from November 19, 1992 to April 14, 2020.<sup>1</sup> He was a Forklift Operator at the time of his termination and was 58 years old.<sup>2</sup> Feijoo suffers from tinnitus, which significantly impairs his hearing. As a result of his condition, he is completely deaf in his right ear and 75% deaf in his left ear. Despite Feijoo's disability, he was able to perform all the essential functions of his job with reasonable accommodations. Feijoo made Costco aware of his disability and notified his managers.<sup>3</sup>

Specifically, Feijoo was accused of being rude and was written up for that alleged behavior. However, in this instance, another employee was speaking to him, but he was unable to hear her because of his disability. This would happen on different occasions while at work because it can be hard for Feijoo to hear at times because of his disability. Feijoo was not trying to be rude, he just could not hear well. Even though Feijoo explained this to his superiors, he was still written up.<sup>4</sup>

Costco asserts that it did not fail to accommodate Feijoo's hearing disability and only asserts a request to have Friday's off. However, in Feijoo's complaint he stated that after disclosing a hearing disability he was subject to increasingly negative treatment. Specifically, Feijoo stated in his Original Complaint that he, "made Defendant aware of his disability and notified his managers when he had doctors' appointments which were routinely scheduled on Fridays. Plaintiff also notified his manager when he needed time off because of doctor's

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<sup>1</sup> Feijoo Declaration, ¶1, Ex. 3.

<sup>2</sup> Feijoo Declaration, ¶2, Ex. 3.

<sup>3</sup> Feijoo Declaration, ¶3, Ex. 3.

<sup>4</sup> Feijoo Declaration, ¶4, Ex. 3.

appointments.”<sup>5</sup> Contrary to Costco’s assertion, nowhere in Feijoo’s Original Complaint does it state that he only needed to go to doctors’ appointments for “his hearing problems.”<sup>6</sup>

Feijoo testified that he spoke with Assistant Store Manager, Jennifer Castro before his termination and informed her about his hearing disability. She wanted him to wear an earpiece connected to the radio transistor inside his ear. However, because of his hearing loss he could not do that because it would result in him not being able to hear anyone around him.<sup>7</sup> After this, Feijoo noticed Ms. Castro started treating him negatively, asserting that she “started making [his] life impossible.”<sup>8</sup> Ms. Castro inevitably requested Feijoo’s suspension and his termination.<sup>9</sup>

Costco also highlights an Employee Counseling Notice that Feijoo received nearly five (5) years before his termination when he worked in a completely different state and a different location.<sup>10</sup> In about June 2016, Feijoo requested a transfer to any Houston, Texas location because his wife had to relocate for work. On his Transfer Request form at that time, Feijoo’s manager indicated that his “job performance is satisfactory for position,”<sup>11</sup>

Just a few months before Feijoo’s termination, he told Costco that he planned to retire when he turned 59 and a ½ years old during a performance evaluation meeting. As Feijoo continued to work, looking forward to his future retirement, Feijoo realized that he was being subjected to increasingly negative treatment. Feijoo also notified her that the change in his schedule interfered with his Friday doctor’s appointments. Feijoo was told by Mr. Jeff Polloreno, the store’s General

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<sup>5</sup> Plaintiff’s Original Complaint, ¶5.3 [Dkt. 1].

<sup>6</sup> Defendant’s Motion for Summary Judgment, p. 11; *cf.* Plaintiff’s Original Complaint [Dkt. 1].

<sup>7</sup> Feijoo Deposition, 14:12-15:15, Ex. 17.

<sup>8</sup> Feijoo Deposition, 14:24-15:4, Ex. 17.

<sup>9</sup> Jennifer Castro Suspension and Termination Request (Costco00009-10), Ex. 18.

<sup>10</sup> Defendant’s Motion for Summary Judgment, p. 4, [Dkt. 16-15]

<sup>11</sup> Transfer Request Form (June 2016) (Costco000526), Ex. 5.

Manager, that Costco did not care about his doctor's appointments, and he needed to just schedule them around his work schedule.<sup>12</sup>

**B. Costco's Asserted Non-Discriminatory Reason for Termination**

Part of Feijoo's job duties included dropping merchandise to get stocked, using the forklift. Feijoo was performing this duty when Chris Hall (who was under forty (40) years old and a new seasonal worker), confronted him angrily and told Feijoo that he was dropping too much merchandise. Mr. Hall repeatedly yelled and cursed at Feijoo, stating that he did not want to work anymore, and he was ready to go home. Mr. Hall was irate because Feijoo was dropping merchandise which he did not want to have to stock (Chris Hall worked as a stocker). Confused by Mr. Hall's belligerent yelling and cursing, Feijoo got off his forklift to discuss the situation with him. Then, suddenly and unexpectedly without provocation, Mr. Hall pushed Feijoo and then ran off towards the manager. Feijoo did not return physical contact after he was assaulted. Chris Hall initiated the incident on April 4, 2020, by cursing at Feijoo and then pushing him.<sup>13</sup>

When Chris Hall pushed Feijoo, he fell to the ground. At that point Mr. Hall ran away towards where the managers were. Feijoo went in that same direction because he needed to speak with a manager as well about what happened. Feijoo was not chasing Chris Hall.<sup>14</sup>

In its Motion, Costco asserts that "Feijoo became angry and started yelling at Hall" and that "Feijoo then attempted to punch Hall, but Hall was able to move away and evade the punch."<sup>15</sup> However, the unsworn witness statements that Costco provides from employees Shaye Massey and Sal Davide, who both allegedly witnessed the incident, are contradictory with Ms. Massey

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<sup>12</sup> Feijoo Declaration, ¶4, Ex. 3.

<sup>13</sup> Feijoo Declaration, ¶8, Ex. 3.

<sup>14</sup> Feijoo Declaration, ¶9, Ex. 3.

<sup>15</sup> Defendant's Motion for Summary Judgment, p. 5.

making no mention of Feijoo swinging at/attempting to punch Mr. Hall.<sup>16</sup> Ms. Massey only states she saw Feijoo get off his lift and saw him chase Mr. Hall down the aisle.<sup>17</sup> Mr. Davide states only that he saw “Chris duck and start running from hoorge” but never states that he actually saw Feijoo attempt to punch Mr. Hall.<sup>18</sup> Feijoo never swung at Chris Hall (he did not attempt to punch him at all).<sup>19</sup> Therefore, Costco’s assertion that, “[A]ccording to witness statements from Hall and the four other employees who were present on April 4, 2020...Feijoo attempted to punch Hall,” is patently false.<sup>20</sup>

Costco acknowledges that Feijoo met with two managers, Ryan Pearce and Justin Kahn in the office.<sup>21</sup> Feijoo repeatedly told managers that Mr. Hall had yelled and cursed at him and then pushed him to the ground. Ryan Pearce asserts that, “The Video accurately shows what occurred on April 4, 2020 in the Warehouse...” but this is not true because Mr. Pearce was not present when Chris Hall pushed Feijoo.<sup>22</sup> He does not have any personal firsthand knowledge of what happened in the moments when Feijoo was pushed.<sup>23</sup> Feijoo told Mr. Pearce that he was pushed by Chris Hall but Mr. Pearce did not say anything.<sup>24</sup> No manager even asked Feijoo if he was ok.<sup>25</sup>

Further, in discovery in this case, Feijoo requested “All video or audiotapes or transcripts of any conversations or meeting when Plaintiff was present or regarding Plaintiff if Plaintiff was not present.”<sup>26</sup> Costco did not lodge any objections and responded “See warehouse video surveillance footage of the April 4, 2020 altercation between Feijoo and Hall produced as part of

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<sup>16</sup> Shaye Massey Unsworn Statement (Costco000040), Ex. 12.

<sup>17</sup> *Id.*

<sup>18</sup> Sal Davide Unsworn Statement (Costco000039), Ex. 13.

<sup>19</sup> Feijoo Declaration, ¶ 9, Ex. 3.

<sup>20</sup> Defendant’s Motion for Summary Judgment, at p. 1, 2.

<sup>21</sup> Defendant’s Motion for Summary Judgment, at p. 6.

<sup>22</sup> Feijoo Declaration, ¶11, Ex. 3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Defendant’s Responses to Requests for Production, RFP #16, Ex. 14.

Costco's Initial Disclosures (Costco0010003)."<sup>27</sup> However, there are cameras all around the store/warehouse and Costco only produced one short clip that does not show where Feijoo was pushed by Chris Hall.<sup>28</sup> If the managers had truly investigated this incident after suspending Feijoo on April 4, 2020, they would have seen video footage of Feijoo being pushed by Chris Hall. Instead, they terminated Feijoo and Chris Hall kept his job.<sup>29</sup> The video that Costco produced to the Court with its Motion for Summary Judgment (Defendant's Exhibit 29) does not show what happened to Feijoo on April 4, 2020.<sup>30</sup>

There are also discrepancies in Chris Hall and Justin Khan's recitation of what happened on April 4, 2020. Mr. Kahn states that when Mr. Feijoo returned to the breakroom after retrieving his lunch box, Mr. Kahn let him out of the building without any other words being said.<sup>31</sup> To the contrary, Mr. Hall states that, "Before leaving Jorge threatened me he was gonna get me outside."<sup>32</sup> Mr. Hall states that this allegedly occurred in front of two managers, but Mr. Kahn (one of these managers) makes no mention of this alleged threat in his statement.<sup>33</sup> Further, in the statement that Ryan Pearce made on April 5, 2020, he also makes no mention of any alleged threat by Feijoo to Mr. Hall that he was going to meet him outside.<sup>34</sup>

Costco asserts that Feijoo also waited in the parking lot for Mr. Hall and made threatening statements that he would hurt Mr. Hall and would meet him outside. Costco relies on Jennifer Castro's unsworn statement to make these assertions. However, Feijoo did not wait for Chris Hall in the parking lot in to attempt to confront him after the incident occurred inside the warehouse on

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<sup>27</sup> *Id.*

<sup>28</sup> Feijoo Declaration, ¶ 16, Ex. 3.

<sup>29</sup> Feijoo Declaration, ¶ 16, Ex. 3.

<sup>30</sup> Feijoo Declaration, ¶ 10, Ex. 3.

<sup>31</sup> Justin Kahn Statement (Costco000042), Ex. 7.

<sup>32</sup> Chris Hall Unsworn Statement (Costco000041), Ex. 8.

<sup>33</sup> Chris Hall Unsworn Statement (Costco000041), Ex. 8; *cf.* Justin Kahn Statement (Costco000042), Ex. 7.

<sup>34</sup> Ryan Pearce Statement (Costco000043), Ex. 15.

April 4, 2020. He also never told Jennifer Castro that he would meet Chris Hall outside. Jennifer Castro's statement that, "Jorge asked if I thought he would hurt Chris? I responded yes, at which point, Jorge stated "You are right, I would" also is not true. Feijoo never said this.<sup>35</sup> He also never told Chris Hall that he was going to meet him outside.<sup>36</sup>

Feijoo was 58 years old at the time of his termination and planned to retire at 59 and a ½. He was so close to retirement he did not want to do anything to jeopardize his employment. Feijoo did not initiate the incident that happened on April 4, 2020. Chris Hall pushed Feijoo, where he fell to the ground. Feijoo had to go find a manager quickly to report the situation which is why he walked in the same direction as Chris Hall did, towards the managers that were on duty that night.<sup>37</sup>

**C. Feijoo has suffered economic and emotional damages from being terminated after 27+ years of employment.**

Feijoo's life has not been the same since his termination. He applied for many jobs but was not able to find anything making the same amount he was making at Costco. Losing his job after 27+ years was very hard for Feijoo emotionally and financially. He eventually had to move out of Texas because he could not afford to live in Houston anymore.<sup>38</sup>

Feijoo was treated entirely different than Chris Hall, who initiated the April 4, 2020 altercation. Although Feijoo reported that he was actually physically assaulted by Chris Hall, by being pushed, nothing was done to investigate Feijoo's allegation. However, Chris Hall's report was investigated, he was issued an apology for the delay in the investigation and was told that his report was valid.<sup>39</sup>

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<sup>35</sup> Feijoo Declaration, ¶12, Ex. 3.

<sup>36</sup> Feijoo Declaration, ¶7, Ex. 3.

<sup>37</sup> Feijoo Declaration, ¶15, Ex. 3.

<sup>38</sup> Feijoo Declaration, ¶17, Ex. 3.

<sup>39</sup> Apology Letter from Costco to Chris Hall (Costco000063), Ex. 11.



It is apparent that Costco ignored Feijoo's complaint about Mr. Hall and initiated disciplinary action against Feijoo only, although both employees were involved in the April 4, 2020 incident. However, just a few months before Feijoo was terminated, Costco supervisor Darryl Williams included in Feijoo's performance review that he thought Feijoo to be "truthful and is dedicated to quality results."<sup>40</sup>

**D. Feijoo was replaced by individuals outside of his protected classes based on disability and age.**

After Feijoo was terminated, he was replaced by Shaye Massey, who is twenty-five (25) years old and has no known disability and Logan Ross, who is 34 years old and has no known disability.<sup>41</sup> Shaye Massey was one of the employees who claimed she saw the exchange between Feijoo and Mr. Hall on April 4, 2020, in an unsworn statement.<sup>42</sup> However, Feijoo has testified under oath that Ms. Massey was not in fact present when he was pushed to the ground by Mr. Hall.<sup>43</sup>

**III. ARGUMENTS & AUTHORITIES**

**A. Summary Judgment Legal Standard**

Under Federal Rule of Civil Procedure 56(a), the moving party bears the initial burden of "informing the district court of the basis for the motion and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue for trial." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291 (5<sup>th</sup> Cir. 1987). If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the nonmoving party to produce evidence or

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<sup>40</sup> Performance Review (11/19/2019) (Costco000494-496), Ex. 4.

<sup>41</sup> Def.'s Responses to Interrogatories, Rog #9, Ex. 6.

<sup>42</sup> Shaye Massey Unsworn Statement, Ex. 12.

<sup>43</sup> Feijoo Declaration, ¶14, Ex. 3.

designate specific facts showing the existence of a genuine issue for trial. *Alan v. Rapides Parish Sch. Bd.*, 204 F.3d 619, 621 (5th Cir. 2000) (internal quotations and citation omitted).

**B. Disability and Age Discrimination (ADA and ADEA)**

***1. Feijoo establishes his prima facie case of age and disability discrimination.***

A plaintiff makes a prima facie case of discrimination based on age and disability by showing he (1) is a member of a protected group (over 40/disabled), (2) was qualified for the position at issue, (3) was discharged or suffered some adverse employment action by the employer, and (4) was replaced by someone outside [his] protected group or was treated less favorably than other similarly situated employees outside of the protected group. *Morris v. Town of Indep.*, 827 F.3d 396, 400 (5th Cir. 2016).

For the purposes of its Motion for Summary Judgment, Costco does not contest Feijoo establishes his prima facie case of age and disability discrimination.<sup>44</sup> Therefore, for the purposes of this response, Feijoo asserts that he has established his prima facie case of age and disability discrimination: disabled and 58 years old at the time of his suspension and termination (ie. the adverse actions) and replaced by individuals outside of his protected classes.<sup>45</sup>

***2. Costco fails to provide any argument that Feijoo is unable to meet the elements of his prima facie case of retaliation under the ADA, ADEA and TCHRA.***

In its Motion for Summary Judgment, Costco asserts the elements of a prima facie case of retaliation under the Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA) and/or under the Texas Labor Code.<sup>46</sup> However, Costco does not dispute

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<sup>44</sup> Defendant's Motion for Summary Judgment, p. 8 ("Feijoo was over forty years of age at the time of his termination, and for the sale 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.”).

<sup>45</sup> See Feijoo Declaration, ¶¶2, 3, and 15, Ex. 3; Def.'s Responses to Interrogatories, ROG #9, Ex. 6.

<sup>46</sup> See Defendant's Motion for Summary Judgment, at p. 8; see also Plaintiff's Original Complaint, ¶¶7.10-7.15, Dkt. 1.

that Feijoo is able to establish his prima facie case of retaliation. As Costco asserts, “the moving party “bears the initial responsibility of informing the district court of the bases for its motion,” and identifying the record evidence “which it believes demonstrate[s] the absence of a genuine issue of material fact.”<sup>47</sup> Therefore, in the absence of any evidence which Costco believes demonstrates the absence of a prima facie case of retaliation, Feijoo asserts that for the purposes of Costco’s Motion, it concedes the existence of a prima facie case of retaliation as well.

In the alternative, however, and in an abundance of caution, Feijoo presents summary judgment evidence that he complained about the way he was being treated as a disabled employee in the last six (6) months of his employment with Costco.<sup>48</sup> Feijoo testified that when he disclosed his hearing disability, his need to go to doctor’s appointments and his need to be accommodated in relation to his hearing disability (for example, not being able to use a radio in his ear), he saw increased negative treatment from Assistant Manager Jennifer Castro.<sup>49</sup> Ms. Castro also recommended Feijoo’s termination.<sup>50</sup>

***3. Costco’s alleged legitimate non-discriminatory reason for terminating Feijoo was pretext for discrimination and retaliation.***

In the summary judgment setting, the plaintiff need not prove pretext but merely establish a genuine issue of material fact on the matter. *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 813 (5th Cir.1991). In the context of a summary judgment proceeding, “the question is not whether the plaintiff proves pretext, but rather whether the plaintiff raises a genuine issue of fact regarding pretext.” *Little v. Texas Dept. of Criminal Justice*, 177 S.W.3d 624, 632 (Tex. App. – Houston (1<sup>st</sup> Dist.), 2005). A plaintiff may attempt to prove that he was the victim of intentional

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<sup>47</sup> Defendant’s Motion for Summary Judgment, p. 8.

<sup>48</sup> Feijoo Deposition, 15-10, Ex. 17.

<sup>49</sup> *Id.*

<sup>50</sup> Jennifer Castro Suspension and Termination Request, Ex. 18.

discrimination by showing that the defendant's proffered explanation is unworthy of credence. *Id.* at 630.

Costco asserts that Feijoo, “can produce no evidence suggesting that Costco’s reason for terminating him is false...”<sup>51</sup> However, Feijoo presents competent summary judgment evidence that creates genuine issues of material fact as to Costco’s asserted reason for his termination. Specifically, Costco submits statements from five (5) of its employees to allegedly support its asserted reason for Feijoo’s termination: (1) Chris Hall (unsworn statement), (2) Shaye Massey (unsworn statement), (3) Sal Davide (unsworn statement), (4) Justin Kahn (unsworn statement) and (5) Ryan Pearce (unsworn statement and sworn declaration).<sup>52</sup>

There are contradictory assertions in these statements that a reasonable fact finder could conclude that Costco’s reason for termination is unworthy of credence. Mr. Kahn states that when Mr. Feijoo returned to the breakroom after retrieving his lunch box, Mr. Kahn let him out of the building without any other words being said.<sup>53</sup> To the contrary, Mr. Hall states that, “Before leaving Jorge threatened me he was gonna get me outside.”<sup>54</sup> Mr. Hall states that this allegedly occurred in front of two managers, but Mr. Kahn makes no mention of this alleged threat in his statement.<sup>55</sup> Further, in the statement that Ryan Pearce made on April 5, 2020, he also makes no mention of any alleged threat by Feijoo to Mr. Hall that he was going to meet him outside.<sup>56</sup>

These contradictions are significant because Costco asserts that Feijoo was terminated, for “threats or acts of violence,” “jeopardize order/safety,” and “serious misconduct.”<sup>57</sup> Costco further

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<sup>51</sup> Defendant’s Motion for Summary Judgment, p. 9.

<sup>52</sup> Chris Hall Unsworn Statement (Costco000041), Ex. 8; Shay Massey Unsworn Statement (Costco000040), Ex. 12; Sal Davide Unsworn Statement (Costco000039), Ex. 13; Justin Kahn Unsworn Statement (Costco000042), Ex. 7; Ryan Pearce April 5, 2020 Statement (Costco000043), Ex. 9; Ryan Pearce Declaration, Ex. 15.

<sup>53</sup> Justin Kahn Unsworn Statement (Costco000042), Ex. 7.

<sup>54</sup> Chris Hall Unsworn Statement (Costco000041), Ex. 8.

<sup>55</sup> Justin Kahn Unsworn Statement (Costco000042), Ex. 7.

<sup>56</sup> Ryan Pearce April 5, 2020 Statement (Costco000043), Ex. 9.

<sup>57</sup> Termination Form (Costco000101,103), Ex. 10.

claims that Feijoo was terminated because, “he tried to physically assault the co-worker numerous times, and made threats that he would “wait for him outside.”<sup>58</sup> However, the two employees who Costco asserts witnessed the incident did not say in their statements (allegedly taken right after the incident occurred) that they ever saw Feijoo swing at, attempt to punch or physically assault Hall.<sup>59</sup> Further the two managers who Costco alleges intervened in the incident at the time, do not report in their statements that Feijoo told Hall he was going to get him outside (allegedly threatening violence).<sup>60</sup>

Additionally, Feijoo provides sworn testimony that directly contradict the statements of Mr. Hall, Ms. Massey, Mr. Davide, Mr. Kahn and Mr. Pearce. Hall, Massey, Davide and Kahn provide only unsworn statements regarding the April 4, 2020 incident for which Feijoo was allegedly terminated.<sup>61</sup> These individuals are employees of Costco yet Costco failed to provide sworn statements in support of its Motion. Feijoo has provided sworn testimony that he did not physically assault Hall, he did not threaten violence and he was in fact the one pushed by Hall on April 4, 2020.<sup>62</sup> “It is the factfinder’s role, not the Court’s at summary judgment, to decide which ... sworn statements carries more weight.” *United States v. Flume*, Civ. A. No. 5:16-cv-73, 2018 U.S. Dist. Lexis 226285, at \*22 (S.D. Tex. Aug. 22, 2018). What version of events is in fact true rests on credibility determinations which the Court cannot resolve at the summary judgment stage. *Acker v. Deboer, Inc.* 429 F. Supp.2d 828, 847 (N.D. Tex. 2006).

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<sup>58</sup> *Id.*

<sup>59</sup> Shay Massey Unsworn Statement (Costco000040), Ex. 12; Sal Davide Unsworn Statement (Costco000039), Ex. 13.

<sup>60</sup> Justin Kahn Unsworn Statement (Costco000042), Ex. 7; Ryan Pearce April 5, 2020 Statement (Costco000043), Ex. 9.

<sup>61</sup> Chris Hall Unsworn Statement (Costco000041), Ex. 8; Shay Massey Unsworn Statement (Costco000040), Ex. 12; Sal Davide Unsworn Statement (Costco000039), Ex. 13; Justin Kahn Unsworn Statement (Costco000042), Ex. 7.

<sup>62</sup> *See generally*, Feijoo Declaration, Ex. 3.

Costco claims that the relevant inquiry in the summary judgment context here is whether Costco reasonably believed the employees allegations and acted on them in good faith.<sup>63</sup> However, the evidence shows that Costco received two reports of alleged physical assault or attempted physical assault on April 4, 2020. Feijoo reported that Hall pushed him, and he fell to the ground but his complaint (as a disabled, 58-year-old employee) was ignored. He was suspended and terminated and replaced by individuals outside of his protected class based on age and disability. Hall remain employed and was not disciplined.<sup>64</sup> Further, by its own admission, Costco's Employee Agreement states, "that violence or threats of violence are grounds for "immediate termination."<sup>65</sup> But, Feijoo reported that Hall physically assaulted him by pushing him hard enough to where he fell to the ground. Costco departed from its proclaimed policy and did not issue any disciplinary action at all to Chris Hall.<sup>66</sup> An employer's selective application of a facially neutral policy is evidence of pretext. *Lyons v. Tex. Dep't of Crim. Justice*, 581 Fed. Appx. 445r, 447-448 (5th Cir. 2014); *see also E.E.O.C. v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445-46 (5th Cir. 1995) (an inference of pretext may be drawn based on evidence that an employer's relevant rules and standards were not consistently applied.).

In its *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) opinion, the Supreme Court clearly repudiated the Fifth Circuit's "pretext plus" standard, holding:

[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

It is permissible for the fact finder to infer discrimination from the falsity of the employer's explanation. Fact questions on the prima facie case coupled with fact questions on pretext is

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<sup>63</sup> Defendant's Motion for Summary Judgment, p. 10.

<sup>64</sup> Def's Responses to Interrogatories, ROG #11, Ex. 6.

<sup>65</sup> Defendant's Motion for Summary Judgment, p. 10; Employee Agreement Excerpts (Costco000987-990), Ex. 16.

<sup>66</sup> Def's Responses to Interrogatories, ROG #11, Ex. 6.

sufficient to defeat summary judgment. *Bowen v. El Paso Electric Cp.*, 49 S.W.3d 902, 910 (Tex. App. – El Paso, 2001).

Given the demanding strictures applicable in the summary judgment context requiring this Court to resolve all factual disputes in favor of the non-moving party, this case presents a swearing-match which must be resolved by a jury, not by a judge on summary judgment. *Future Acquisition Co v. Deep River Operating*, Civ. A. No. 4:17-cv-02485, 2019 U.S. Dist. Lexis 240799, at \*4 (S.D. Tex. Jan. 30, 2019) (*citing E.E.O.C. v. R.J. Gallagher Co.*, 181 F.3d 645, 652 (5th Cir. 1999) (“This is a swearing match – a factual dispute which must be resolved by the ultimate fact finder, not by the judge on summary judgment).

Accordingly, Feijoo has presented sufficient summary judgment evidence to establish genuine issues of material fact as to pretext, precluding summary judgment on his age, disability and retaliation claims.

#### IV. CONCLUSION

Summary judgment is usually considered an inappropriate tool for resolving employment discrimination cases because the claims involve "nebulous questions of motivation and intent." *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 640 (5th Cir. 1985). As the Fifth Circuit explained in *Thornbrough*, it is often true that motivation and intent can only be proved through circumstantial evidence. Therefore, determinations regarding motivation and intent depend on complicated inferences from the evidence and are peculiarly within the province of the fact-finder. *Thornbrough*, 760 F.2d at 641.

In the very least, Feijoo has presented contradicting evidence to rebut Costco’s assertions and that Costco’s alleged legitimate non-discriminatory reason for termination are in fact pretext

for discrimination and retaliation. Therefore, Plaintiff respectfully requests that the Court deny Costco's Motion for Summary Judgment and allow this case to proceed to a trial on the merits.

Respectfully submitted,

/s/ Jacques P. Leeds

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2022, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Southern District of Texas, Houston Division, using the electronic case filing system of the court. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Jacques P. Leeds

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