

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

**JORGE FEIJOO,**  
Plaintiff,

v.

**COSTCO WHOLESALE  
CORPORATION,**  
Defendant.

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CA No. \_\_\_\_\_

JURY DEMANDED

**PLAINTIFF’S ORIGINAL COMPLAINT**

**1. PRELIMINARY STATEMENT**

1.1. Plaintiff demands a jury for any and all issues triable to a jury. This action seeks compensatory and actual/economic damages; and costs and attorneys’ fees for the claims suffered by Plaintiff, JORGE FEIJOO, due to COSTCO WHOLESALE CORPORATION (referred to herein as “Defendant” or “Costco”) taking adverse employment actions against him ultimately resulting in the wrongful termination of his employment as explained herein.

1.2 This action arises under the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. Section 12112 and/or Americans with Disabilities Amendments Act of 2008 (ADA, ADAAA), Age Discrimination in Employment Act, as amended (ADEA) and the Texas Commission on Human Rights Act (TCHRA) (Chapter 21 of the Texas Labor Code).

**2. JURISDICTION**

2.1. Jurisdiction is invoked pursuant to 28 U.S.C. § 1331.

**3. VENUE**

- 3.1. Venue of this action is proper in this court, pursuant to 28 U.S.C. § 1391(b), because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

**4. PARTIES**

- 4.1. Plaintiff is a former employee of Defendant and resides in St. Johns County, St. Augustine, Florida.
- 4.2. Defendant COSTCO WHOLESALE CORPORATION is an employer qualified to do business in Texas and employs more than 50 regular employees. Defendant COSTCO WHOLESALE CORPORATION can be served by serving its registered agent, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136.

**5. STATEMENT OF FACTS**

- 5.1 Plaintiff began working for Defendant as a Forklift Operator on November 19, 1992. He worked for Defendant for over twenty-seven (27) years until he was wrongfully terminated on April 14, 2020.
- 5.2 Plaintiff has a disability that severely limits his ability to hear. He suffers from tinnitus. As a result of his condition he is completely deaf in his right ear and 75% deaf in his left ear.
- 5.3 Despite Plaintiff's disability, he was able to perform all the essential functions of his job with reasonable accommodations. Plaintiff made Defendant aware of his disability and notified his managers when he had doctors' appointments which were routinely scheduled on Fridays. Plaintiff also informed his manager when he needed time off because of

doctor's appointments.

- 5.4 Just a few months prior to Plaintiff's termination, he told Defendant that he may retire when he turned 59 ½ years old, during a performance evaluation meeting.
- 5.5 Plaintiff noticed that he was being subjected to increasingly negative treatment. For example, Plaintiff was accused of being rude and was written up for that alleged behavior. However, in that instance, another employee was speaking to Plaintiff and he was unable to hear because of his disability. Plaintiff explained this to his superiors but was still subject to negative disciplinary action.
- 5.6 Plaintiff's schedule that he had for more than 10 years was also changed and he was put on a schedule that required him to work seven (7) days per week. Plaintiff worked several weeks straight without a day off.
- 5.7 Plaintiff complained to Kim Brown, District Manager, about the negative treatment he was experiencing at work. He also notified her that the change in his schedule interfered with his doctor's appointments where he received medical care relating to his disability.
- 5.8 Defendant did not engage in the interactive process to see if Plaintiff's requests to regain Friday's off for his doctor's appointments could be accommodated. Instead, Plaintiff was told by Mr. Polloreno, General Manager, that Defendant did not care about Plaintiff's doctor's appointments and that he needed to just schedule them around his new work schedule. Plaintiff even tried to present alternatives to try and get the accommodation that he needed, including offering to perform different jobs in the store so that he could regain his previous schedule.
- 5.9 On April 3, 2020, a seasonal worker who was recently hired (Chris, last name unknown), confronted Plaintiff while he was working. Part of Plaintiff's job duties included dropping

merchandise to get stocked using a forklift. Plaintiff was performing this duty when Chris confronted him angrily and told him to stop dropping merchandise because he did not want to continue stocking.

5.10 Chris repeatedly yelled and cursed at Plaintiff. When Plaintiff got down from the forklift, Chris pushed Plaintiff and then ran off as a manager approached. Plaintiff did not return physical contact after he was pushed by Chris.

5.11 Plaintiff was accused of getting into a fight at work, however, this was untrue as Plaintiff was the one pushed and did not return physical contact. Plaintiff was suspended and then terminated after over 27 years of employment.

## **6. CONDITIONS PRECEDENT**

6.1 All conditions precedent to jurisdiction have occurred or been complied with.

6.2 Plaintiff timely filed a Charge of Discrimination with the Equal Employment Opportunity Commission (“EEOC”).

6.3 This lawsuit was filed within ninety (90) days of Plaintiff receiving his Notice of Right to Sue from the EEOC.

## **7. CAUSES OF ACTION**

### ***Disability/Perceived Disability Discrimination and Failure to Reasonably Accommodate (ADA and TCHRA)***

7.1 Plaintiff incorporates by reference all the foregoing allegations in each of the paragraphs above as if fully set forth herein.

7.2 Plaintiff was a member of a protected class as a qualified employee with a disability/perceived disability.

7.3 Defendant was on notice Plaintiff suffered from a disability.

- 7.4 Plaintiff suffered from a disability/perceived disability but was still performing the essential functions of his job.
- 7.5 Plaintiff alleges Defendant violated the ADA and the TCHRA when Defendant took adverse actions against Plaintiff, including suspension and then terminating his employment.
- 7.6 Plaintiff also requested a reasonable accommodation that existed and was reasonable at the time requested.
- 7.7 Defendant failed to engage in the interactive process to see if Plaintiff could be accommodated as a qualified individual with a disability.
- 7.8 Defendant failed to provide the reasonable accommodation requested by Plaintiff.
- 7.9 Plaintiff was replaced by a non-disabled employee and/or treated less favorably than individuals outside of his protected class based on disability.

**Retaliation**  
**(ADA, ADEA and TCHRA/Texas Labor Code)**

- 7.10 Plaintiff incorporates by reference all the foregoing allegations in each of the paragraphs above as if fully set forth herein.
- 7.11 Defendant intentionally retaliated against Plaintiff after making requests for accommodation in violation of the ADA and TCHRA.
- 7.12 Defendant intentionally retaliated against Plaintiff in violation of the ADA, ADEA and TCHRA after complaining to Defendant's management about disability and age discrimination.
- 7.13 Defendant intentionally retaliated against Plaintiff because of his opposition to discriminatory practices (disability/perceived disability and age) in violation of the Texas Labor Code, ADA and ADEA.

- 7.14 Plaintiff faced adverse actions when he was suspended and then terminated.
- 7.15 The adverse actions Plaintiff faced were causally connected to his engagement in protected activity.

**Age Discrimination**  
**(ADEA and TCHRA)**

- 7.16 Plaintiff incorporates by reference each of the facts and allegations set forth above.
- 7.17 Defendant is an employer under the ADEA.
- 7.18 Plaintiff is a member of a protected class based on his age as he was 58 years old at the time of his suspension and termination.
- 7.19 Plaintiff was subjected to adverse actions when he was suspended and then terminated.
- 7.20 Plaintiff was treated less favorably than individuals outside his protected class based on age and/or Plaintiff was replaced by an individual outside of his protected class based on age.
- 7.21 Plaintiff suffered damage as a result of age discrimination when he was suspended and then terminated.

**8. PRAYER**

WHEREFORE, Plaintiff prays the Court order to award such relief including the following:

- 8.1.1 Award Plaintiff actual damages;
- 8.1.2 Order Defendant to pay Plaintiff back pay and front pay and benefits;
- 8.1.3 Award Plaintiff compensatory damages for mental anguish;
- 8.1.4 Award Plaintiff punitive damages to be determined by the trier of fact;
- 8.1.5 Grant Plaintiff pre-judgment and post-judgment interest;
- 8.1.6 Order Defendant to pay Plaintiff's costs and attorney's fees in this action; and,

8.1.7 Order and grant such other relief as is proper and just.

Respectfully Submitted,

/s/ Jacques P. Leeds

Jacques P. Leeds

Federal I.D. No. 2526879

State Bar No. 24092678

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Attorney-in-Charge for Plaintiff

# **EXHIBIT 3**



**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

**JORGE FEIJOO'S DECLARATION**

My name is Jorge Feijoo. I am of sound mind, over the age of 18, have never been convicted of a felony, and am fully competent to make this Declaration. The facts contained in this Declaration are made based on my personal knowledge and are true and correct. I declare under penalty of perjury under 28 U.S.C. §1746, that all statements contained within this declaration are true and correct.

1. I worked for Costco for 27+ years from November 19, 1992 to April 14, 2020.
2. I was a Forklift Operator at the time of my termination, and I was 58 years old.
3. I suffer from tinnitus, which significantly impairs my hearing. As a result of my condition, I am completely deaf in my right ear and 75% deaf in my left ear. Despite my disability, I was able to perform all the essential functions of my job with reasonable accommodations. I made Costco aware of my disability and notified my managers.
4. Just a few months before my termination, I told Costco that I planned to retire when I turned 59 and a ½ years old during a performance evaluation meeting. As I continued to work looking forward to my future retirement, I realized that I was being subjected to increasingly negative treatment. Specifically, I was accused of being rude and was written up for that alleged behavior. However, in this instance, another employee was speaking to me, but I was unable to hear her because of my disability. This would happen on different occasions while at work because it can be hard for me to hear at times. I was not trying to be rude I just could not hear well. Even though I explained this to my superiors, I was still written up.
5. I complained to Kim Brown, the District Manager, about the negative treatment I was experiencing at work. I also notified her that the change in my schedule interfered with my Friday doctor's appointments. I was told by Mr. Jeff Polloreno, my store's General

Manager, that Costco did not care about my doctor's appointments and I needed to just schedule them around my work schedule.

6. I never tried to punch Chris Hall. I also did not swing at Chris Hall.
7. I did not wait for Chris Hall in the parking lot in to attempt to confront him after the incident occurred inside the warehouse on April 4, 2020.
8. Part of my job duties included me dropping merchandise to get stocked, using the forklift. I was performing this duty when Chris Hall (who was under forty (40) years old and a new seasonal worker), confronted me angrily and told me that I was dropping too much merchandise. Mr. Hall repeatedly yelled and cursed at me, stating that he did not want to work anymore, and he was ready to go home. Mr. Hall was irate because I 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, I got down from my forklift to discuss the situation with him. Then, suddenly and unexpectedly without provocation, Mr. Hall pushed me and then ran off towards the manager. I never returned physical contact after I was assaulted. Chris Hall initiated the incident on April 4, 2020, by cursing at me and then pushing me.
9. When Chris Hall pushed me, I fell to the ground. At that point Mr. Hall ran away towards where the managers were. I went in that same direction because I needed to speak with a manager as well about what happened. I was not chasing Chris Hall. Also, I never swung at Chris Hall (I did not attempt to punch him at all).
10. The video that Costco produced to the Court with its Motion for Summary Judgment (Defendant's Exhibit 29) does not show what happened to me on April 4, 2020.
11. Ryan Pearce states in his Declaration (Defendant's Exhibit 28 to the Motion for Summary Judgment) 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 me. He does not have any personal firsthand knowledge of what happened in the moments when I was pushed. I told Mr. Pearce that I was pushed by Chris Hall but he did not say anything. No manager even asked me if I was ok.
12. I never told Jennifer Castro that I would meet Chris Hall outside. I know that Jennifer Castro also said in her statement that, "Jorge asked if I thought he would hurt Chris? I responded yes, at which point, Jorge stated "You are right, I would." I never said this. This is not true.
13. I also never told Chris Hall that I was going to meet him outside.
14. The April 4, 2020 incident happened in the main aisle connecting with the water aisle. I was on the forklift at first when Chris Hall started cursing at me. Shaye Massey and Sal Davide were not there when Chris Hall pushed me and I fell to the ground.



15. I was 58 years old at the time of my termination and planned to retire at 59 and a ½. I was so close to retirement I did not want to do anything to jeopardize my employment. I did not initiate this incident that happened on April 4, 2020. Chris Hall pushed me, where I fell to the ground. I had to go find a manager quickly to report the situation which is why I walked in the same direction as Chris Hall did, towards the managers that were on duty that night.
16. There are cameras all around the store and Costco only produced one short clip that does not show where I was pushed by Chris Hall. If the managers had truly investigated this incident after suspending me on April 4, 2020, they would have seen video footage of me being pushed by Chris Hall. Instead, they terminated me and Chris Hall kept his job.
17. My life has not been the same since my termination. I applied for many jobs but was not able to find anything making the same amount I was making at Costco. Losing my job after 27+ years was very hard for me emotionally and financially. I eventually had to move out of Texas because I could not afford to live in Houston anymore.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 7, 2022.

*Jorge Feijoo*

JorgeFeijoo (Sep 8, 2022 16:13 EDT)

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**JORGE FEIJOO**

# Exhibit 4 - Jorge Feijoo's Declaration

Final Audit Report

2022-09-08

Created:	2022-09-07
By:	Jacques Leeds (jacques@jleedslawfirm.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAA3M9k-23D1qUH9Ke2fN_Di6crN-VtXkzy

## "Exhibit 4 - Jorge Feijoo's Declaration" History

-  Document created by Jacques Leeds (jacques@jleedslawfirm.com)  
2022-09-07 - 9:02:12 PM GMT - IP address: 73.166.10.218
-  Document emailed to jfeijoo0660@yahoo.com for signature  
2022-09-07 - 9:02:27 PM GMT
-  Email viewed by jfeijoo0660@yahoo.com  
2022-09-08 - 8:08:50 PM GMT - IP address: 47.205.138.61
-  Signer jfeijoo0660@yahoo.com entered name at signing as JorgeFeijoo  
2022-09-08 - 8:13:05 PM GMT - IP address: 47.205.138.61
-  Document e-signed by JorgeFeijoo (jfeijoo0660@yahoo.com)  
Signature Date: 2022-09-08 - 8:13:06 PM GMT - Time Source: server- IP address: 47.205.138.61
-  Agreement completed.  
2022-09-08 - 8:13:06 PM GMT

# EXHIBIT 30







**JORGE FEIJOO's EEOC PARTICULARS**

- 1.) Respondent, Costco Wholesale Corporation (“Respondent” or “Costco”), is an American multinational corporation which operates a chain of membership-only warehouse clubs.
- 2.) I began working for Respondent as a Forklift Operator on November 19, 1992. I was given numerous glowing reviews and raises during my 27+ year tenure at Costco. I was wrongfully terminated on April 14, 2020.
- 3.) I suffer from tinnitus, which significantly impairs my hearing. As a result of my condition, I am completely deaf in my right ear and 75% deaf in my left ear. Despite my disability, I was able to perform all the essential functions of my job with reasonable accommodations. I made Costco aware of my disability and notified my managers when I had doctors’ appointments, which were routinely scheduled on Fridays. Additionally, I informed my manager that I needed Fridays off because of my doctor’s appointments.
- 4.) Just a few months prior to my termination, I told Costco that I planned to retire when I turned 59 and a ½ years old during a performance evaluation meeting. As I continued to work looking forward to my future retirement, I realized that I was being subjected to increasingly negative treatment. Specifically, I was accused of being rude and was written up for that alleged behavior. However, in this instance, another employee was speaking to me, but I was unable to hear her because of my disability. Even though I explained this to my superiors, I was still written up. My schedule, that I had for more than ten (10) years, was also changed and I was put on a schedule that required me to work seven (7) days per week. I worked several weeks straight without one day off.
- 5.) I complained to Kim Brown, the District Manager, about the negative treatment I was experiencing at work. I also notified her that the change in my schedule interfered with my Friday doctor’s appointments where I received medical care relating to my disability. Costco did not engage in the interactive process to see if my requests to regain Fridays off for my doctor’s appointments could be accommodated. Instead, I was told by Mr. Polloreno, my store’s General Manager, that Costco did not care about my doctor’s appointments and I needed to just schedule them around my new work schedule. I even tried to present alternatives to try and get the accommodation that I needed, including offering to perform different jobs in the store so that I could regain my previous schedule. However, my efforts were not well received.
- 6.) Ultimately, I was wrongfully accused of getting into a physical altercation with a co-worker. In fact, I was the person who was physically assaulted by another co-worker. On April 3, 2020, a seasonal worker who was recently hired named Chris (last name unknown), confronted me while I was working. Part of my job duties included me



dropping merchandise to get stocked, using a forklift. I was performing this duty when Chris confronted me angrily and told me that I was dropping too much merchandise. I was in fact properly performing my job. Chris further repeatedly yelled and cursed at me, stating that he did not want to work anymore, and he was ready to go home. Chris was irate because I was dropping merchandise which he did not want to have to stock. Confused by Chris' belligerent yelling and cursing, I got down from my forklift to discuss the situation with Chris. Then, suddenly, and unexpectedly without provocation, Chris pushed me and then ran off as the manager approached. I never returned physical contact after I was assaulted. Unfortunately, I was still wrongfully accused of getting into a fight at work and was suspended and then terminated. Upon information and belief, Chris (who is outside of my protected classes based on age and disability) did not face such adverse action.

- 7.) I believe that I have been discriminated against on the basis of my age (at the time of my termination 58 years old) and disability/perceived disability (tinnitus) disability/perceived disability and retaliated against in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e), The Americans with Disabilities Act of 1990 and/or Americans with Disabilities Amendments Act of 2008 (ADA, ADAA), Section 21 of the Texas Labor Code, and the Texas Commission on Human Rights Act and the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. Sections 621-634.
- 8.) The information provided in this Charge of Discrimination is provided for the express purpose of assisting the Equal Employment Opportunity Commission and/or the Texas Commission on Human Rights with its investigation of this claim. This information is not meant to be exhaustive or all encompassing, but rather to give the respondent fair notice of the claims being asserted herein. This information is not being provided so that an attorney representing the Respondent at some later date in the defense of a trial stemming from this Charge can use it to insinuate that it is inclusive to the last detail of the sum of the allegations being advanced against the Respondent.



# EXHIBIT 22

**Name:** Chris Hall

**Date:** 4/5/2020

**Time:** 4:00 PM

**Interviewed By:** Darryl Williams

- **Tell me about the situation that happened last night?**- Justin Finke (the manager) asked us to clean up & go home early. Jorge was upset about leaving early. I told Jorge that the manager Justin Finke gave us the direction, and he is the manager. I told Jorge that he is not my manager, and it freaked him out. Jorge then jumps off of his lift, gets in my face, swings at me to hit me, and falls to the ground. I took off running, as he chased me through Sundries and up the main aisle, where Ryan & Justin were. I stood in clothing, trying to separate myself from him, but he kept trying to come at me. Eventually, he went to the office, and I went into the breakroom.  
While sitting in the breakroom, Jorge appeared again, and started advancing towards me, screaming at me. Ryan comes into the breakroom, to get Jorge, and then Jorge starts getting in Ryan's face. Ryan has to yell in order to get his attention, and to stop Joorge.
  - **What time did this take place?**- Around 830pm
  - **Where were you?**- Stocking on the diaper aisle
  
- **How did the argument start?**- When I told Joorge that he was not my manager.
  - **Did you cuss at Joorge?**- Not at him, I said "this is fuckin bullshit"
  - **If yes, what did you say?**
  
- **Did you ever mention anything to Jorge about getting deported?**- No
  - **If not, why would Jorge say you did?**- He is trying to save his job
  - **If yes, what did you say?**
  
- **Who was involved?**- Myself & Jorge
  
- **Were there any witnesses?**- Shaye, Sal, and Hector
  
- **Did you push Jorge?**
  - **If no, why would he say you did?**- No, he is saying that because he is trying to save his job.
  - **If yes, why would you push him?**

- Did Jorge try to hit you?- Yes, he swung and missed
  - If yes, do you know why?- I told him that he was not my manager
  
- What would you like the outcome to be?- He passed the point of no return, termination
  
- Did Jorge chase you?- Yes
  - Why?- He got angry because I told him that he was not my manager.
  - Where?- In Sundries and up the main aisle.

**Additional Comments:**

~I did not raise my voice or yell

~I told Jorge that he has more to lose than me, this is his 30yr career. Costco is just supplemental income for me.

~Jorge threatened me in the breakroom, that this was not over, and was going to get him in the parking lot.

~I don't understand why Jorge freaked out, I helped him two different times on Saturday, with cleaning up spills he caused.

~I was a cop for 6 years previously, as well as the Marines~ I feel like I can take care of myself. I am more concerned with Costco employee safety, he is a prime candidate for an active shooter.

**Name:** Jorge Feijoo

**Date:** 4/5/2020

**Time:** 1230pm

**Interviewed By:** Jennifer Castro & Darryl Williams

**\*\*Jorge would not sign a statement of confidentiality, and would not agree to questioning. The answers below are based off of the story he told in our meeting\*\***

- Tell me about the situation that happened last night?- I had finished in receiving, and I was dropping pallets to stock, when everyone was cleaning up. I asked why and they told me that it was the direction of the manager, because they wanted to get out early. I told them that I would be staying to stock. Chris came from the dock, cussing at me, that I am not the boss, and pushed me. I kept following him, and asking him why he pushed me. Half way down the main aisle, I noticed that Ryan was walking towards us. Ryan continued to try and protect Chris, and I wanted answers as to why he pushed my. I then went to the office with Justin, to wait to speak to Ryan. In the office, I asked Ryan if he gave direction to finish stocking early, so we would get out early. He said no, which

didn't match what the crew was saying, so they were lying. I also told Ryan that Chris pushed me. Ryan did not care, so I left to go to the breakroom.

In the breakroom, I saw Chris, and started approaching him again, asking him why he pushed me. When Ryan came into the breakroom, I told Chris, that I will meet him outside.

- Who was involved?- Myself & Chris
  
- Were there any witnesses?- Don't know
  
- Did you chase Chris in Sundries?- Yes, I wanted to know why he pushed me.
  - Why would witnesses say you did? \*\*There is video showing you chasing him down the main aisle\*\*
  
- Did you attempt to hit Chris?- No
  - Why would he and another witness say you did?- Don't know
  
- Did you threaten Chris "that you were going to get him outside? Yes, I told him I'll meet you outside
  - Why would he say you did?
  
- What did you say to Ryan when he approached you on the main aisle (right outside of clothing)?- That Chris pushed me
  
- At any point in time, did you aggressively yell at Ryan?- Yes,
  - Why?- I was upset that Chris pushed me, and Ryan didn't care. He was protecting Chris.
  - What was said?- That Chris pushed me
  - Why would he say you did?

### **Additional Comments:**

**~Jorge asked if I thought he would hurt Chris? I responded yes, at which point, Jorge stated "You are right, I would".**

# EXHIBIT 16

## **The Woodlands #1189 Investigation Summary of Complainants Statements**

**Chris Hall-** While stocking dog food, the Night Manager, asked me to wrap it up and start cleaning. After cleaning up, Jorge dropped 6 more pallets, and started bossing everyone around. I let him know that Justin asked us to clean up. Jorge then got off of his forklift and got in my face and yelled “who are you talking to”? He then swung to hit me, missed and fell down, at which point I ran away. He chased me through Sundries and all the way up to the front of the store. Ryan tried to stop him and he still tried to fight me. Once separated, I was in the breakroom, and he was in the office with Ryan. After a few minutes, he came into the breakroom, saw me, and started yelling and coming towards me. Ryan came in and had to scream loudly, and get in front of him to get him to stop. In front of everyone, Jorge threatened me “he was going to get me outside, that this wasn’t over.”

**Sal Davide-** There was an incident that occurred last night between Jorge & Chris, that made all of us feel uncomfortable. I heard the two of them arguing as Chris came off of the dock. Chris was asking Jorge why he keeps barking orders, when everyone else was busy, and he wasn’t fucking helping. Jorge jumped off his lift, and approached Chris. By the sounds of their voices, cussing, and the way Jorge approached Chris, it looked like Jorge was trying to instigate a fight. A moment later, when I looked up from stocking, I see Chris duck and start running to Sundries, where Jorge follows, chasing him through the Sundries aisles, up into the Foods main aisle, where Ryan (Admin. Mgr.) is. At that point, all you can hear is Jorge yelling.

**Shaye Massey-** I heard them yelling, but not what they were yelling about. Chris tried to walk away from Jorge after words were exchanged, but Jorge got off his lift to follow Chris, asking him “What”, and kept yelling as he chased him down the aisle.

**Ryan Pearce-** I got a call on the radio, for a manager on the dock. As I am walking towards receiving, Chris is walking very quickly down the Foods main, with Jorge following quickly on his tail, yelling all of the way to me. As both Chris & Jorge approached me, I could tell that Chris was trying to separate himself from Jorge. Chris tried to go deeper into clothing, and Jorge kept advancing towards him even more, even after I asked him to stop. I told Jorge to go in the office, and as he walked up, he tried to advance towards Chris in clothing again.

When I got into the office to speak with Jorge, he very loudly stated that he was angry because he kept giving direction to Chris, but Chris was not doing what he was asked. When I explained that the Night Manager had already given Chris direction, and that Jorge was not the manager. Jorge then got up and walked out of the office, into the breakroom, where Chris was sitting. When Jorge saw Chris in there, he proceeded to advance towards him again, screaming & yelling. I had to raise my voice and stand in front Jorge, in order for him to stop. The entire time, Jorge was loud and insubordinate. He was asked repeatedly to calm down and he refused, he continually tried to escalate the situation.

**Justin Kahn-** There was a call on the radio, that a manager was needed in receiving. As I was headed towards receiving, Chris was coming up from receiving very quickly, with Jorge trailing close behind. As Chris got closer, he told us (Ryan & I), that Jorge swung at him. He kept moving to create distance between himself & Jorge. As Jorge approached, Ryan asked him to stop, but Jorge originally ignored Ryan, and tried to move forward towards Chris. The only thing I understood from Jorge, was that he was pushed. I tried to take him to the office, but he continued to try and get closer to Chris. After a minute, he then followed me to the office.

Once in the office, Ryan asked Jorge what happened, and he started yelling again, about not knowing they were going to leave early, and that he dropped more pallets for Chris to stock. Ryan asked Jorge to lower his voice, and stop yelling. At which point, Jorge gets in Ryan's face, even more agitated, yelling that he (Chris) pushed him. Ryan & I both yell at Jorge to get back, and he finally does.

I escorted Jorge to the breakroom, where he sees Chris sitting, and starts advancing towards him again, screaming & yelling. Ryan & I continue to try and keep Jorge back, as he was yelling, but he didn't stop until Ryan screamed really loudly.

**Jorge Feijoo-** Jorge refused to write a statement, but did give us a verbal summary of what had happened.

I had finished driving the dock, when I went to the floor to drop pallets. I saw that everyone was cleaning up, and when asked, they said that that was the direction that was given to them by the managers. I told them that I would be staying until 9 and that I would finish the pallets. Chris came off the dock, screaming and cussing at me that I am not the boss. I got off of my lift to talk to him, and he pushed me, and started to run away. I followed him, because I wanted to know why he pushed me. About half way down the main aisle, Ryan and Justin appeared, protecting Chris.

I then went into the office with Justin, waiting to talk to Ryan. When we were done, I went into the breakroom, where I saw Chris sitting there. I asked him why he pushed me, but Ryan came into the breakroom to get me. Ryan then told me to go home. I went to the back to get my stuff, and then went to the parking lot, where I waited for Chris to come out, but when he did, he was escorted by other employees.

I am upset because this is my warehouse and you are protecting Chris.

**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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**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

**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.<sup>1</sup> Feijoo thus asserts

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<sup>1</sup> 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.<sup>2</sup> In addition, video footage from April 4 shows Feijoo pursuing Hall in the warehouse and the two managers intervening to stop him.<sup>3</sup> Although Feijoo denies the allegations, he provides no evidence

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

<sup>3</sup> 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.<sup>4</sup> 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."<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> Rather, according to Feijoo's testimony, the doctors he saw in Texas treated him for stomach and

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

<sup>4</sup> ECF No. 1, at 2-3, ¶5.3.

<sup>5</sup> ECF No. 1, at 2, ¶5.3.

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

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> He transferred to Costco’s Galleria warehouse in Houston in 2016 and then to the Woodlands warehouse in 2017.<sup>11</sup> 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.<sup>12</sup> In addition, in 2015 and 2019, he received counseling notices for his role in an altercation with a coworker<sup>13</sup> and for engaging in rude and aggressive conduct toward several coworkers.<sup>14</sup>

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<sup>8</sup> Pl. Dep. at 100:10-16, Ex. 1.

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

<sup>10</sup> Plaintiff’s Transfer Request, attached as Exhibit 7.

<sup>11</sup> *Id.*

<sup>12</sup> 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).

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

<sup>14</sup> 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.”<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

**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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> Video footage from the warehouse shows Feijoo

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<sup>15</sup> 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).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*; Declaration of Sarah Rajski, attached as Exhibit 2.

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

<sup>19</sup> *Id.*

<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

After Feijoo eventually stopped pursuing Hall, he met with Pearce and Kahn in the office.<sup>23</sup> 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).<sup>24</sup>

Feijoo responded by yelling at Pearce and aggressively approaching him, stopping only after both Pearce and Kahn warned him to stop and back up.<sup>25</sup> Feijoo then left the office and went to the breakroom where Hall was sitting.<sup>26</sup> 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."<sup>27</sup> Pearce and Kahn had to physically stand between Feijoo and Hall to stop Feijoo from attacking him. Pearce instructed Feijoo to leave the warehouse.<sup>28</sup>

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

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<sup>21</sup> Video, Ex. 29.

<sup>22</sup> *Id.*

<sup>23</sup> Kahn Statement, Ex. 20; Pearce Statement, Ex. 21.

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

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

<sup>26</sup> *Id.*

<sup>27</sup> Investigation Interview Notes, Ex. 22.

<sup>28</sup> 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.<sup>29</sup> Hall was forced to walk to his car with a security escort.<sup>30</sup>

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.”<sup>31</sup>

Feijoo received a counseling notice and was suspended for three days pending review and approvals of his termination.<sup>32</sup> 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.<sup>33</sup>

## 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

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<sup>29</sup> Investigation Interview Notes, Ex. 22.

<sup>30</sup> Request for Termination Approval, attached as Exhibit 26.

<sup>31</sup> Investigation Interview Notes, Ex. 22.

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

<sup>33</sup> 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*<sup>34</sup> 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).

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<sup>34</sup> *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).<sup>35</sup> 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).<sup>36</sup> 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.

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<sup>35</sup> “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).

<sup>36</sup> 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.<sup>37</sup>

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.”<sup>38</sup> Feijoo has not alleged that Costco failed to follow its policy regarding terminating employees who engage

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<sup>37</sup> P. Dep. at 59:10-19, Ex. 1.

<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> According to his complaint, Feijoo’s doctor’s appointments “were routinely scheduled on Fridays.”<sup>41</sup> 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).<sup>42</sup>

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.”<sup>43</sup> And in each instance: Feijoo provided the required medical documentation supporting his request, and Costco granted each request.<sup>44</sup> Costco, however, has no record of any request for an

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<sup>39</sup> Pl. Dep. at 63:3-11, Ex. 1.

<sup>40</sup> ECF No. 1, at 2-3, ¶5.3.

<sup>41</sup> *Id.*

<sup>42</sup> “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).

<sup>43</sup> 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).

<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> And he saw Dr. Mercado for bladder issues.<sup>48</sup> Feijoo saw Dr. Array for “sinus problems, ears,[and] balance.”<sup>49</sup> But as Feijoo testified, he saw Dr. Array “when I was living in Florida”<sup>50</sup> and Dr. Array “doesn’t practice anymore.”<sup>51</sup> 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 Tuesdays<sup>52</sup>—not on Fridays as alleged in his complaint and his charge of discrimination.<sup>53</sup> 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.

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<sup>45</sup> *Id.*; Declaration of Sarah Rajski, Ex. 2.

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

<sup>47</sup> Pl. Dep. at 100:10-18, Ex. 1.

<sup>48</sup> *Id.*

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

<sup>50</sup> Pl. Dep. at 103:1-4, Ex. 1.

<sup>51</sup> Pl. Dep. at 100:17-18., Ex. 1.

<sup>52</sup> Pl. Dep. at 107:5-15, Ex. 1.

<sup>53</sup> 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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*/s/ Timothy Watson*

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Timothy M. Watson

**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,

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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

Jacques P. Leeds