

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 228-2017:

CHAD JACKSON,)	
)	
Charging Party,)	
)	HEARING OFFICER DECISION:
vs.)	ORDER GRANTING
)	COSTCO'S MOTION FOR
COSTCO WHOLESALE CORPORATION,)	SUMMARY JUDGMENT
)	
Respondent.)	

* * * * *

In this disability discrimination case, employer and respondent Costco Wholesale Corporation has moved for summary judgment against charging party Chad Jackson, on the grounds that Costco had a legitimate business reason for discharging Jackson. Costco has the burden of establishing the absence of genuine issue of material fact and the entitlement to judgment as matter of law and it has met that burden. Jackson's counsel has made a valiant effort to produce evidence from which (1) A reasonable person could infer that Costco did engage in disability discrimination in discharging Jackson, and (2) A reasonable person could infer that the employer's proffered reason is pretextual. The evidence adduced failed to meet that burden. Summary judgment is proper and is now issued.

Background

Jackson suffers from major depressive disorder and generalized anxiety disorder, and has since approximately 1990. He takes medication for these disorders. In 2015, he had worked for Costco for approximately 20 years before his discharge in early November 2015 for insubordination.

On January 8, 2016, Jackson filed a complaint with the Human Rights Bureau (HRB) of the Montana Department of Labor and Industry (DLI) alleging that Costco illegally discriminated against him in employment because of disability. Specifically, he alleged that on or about November 8, 2015, Costco terminated his employment

for his behavior at work on October 31, 2015 (termed “insubordination”), thereby discriminating against him because of his disability or, in the alternative, because of his perceived disability. He additionally alleged that Costco discriminated against him by failing to make reasonable accommodations for his disability or perceived disability when it discharged him when it knew or reasonably should have known that his behavior resulted from his conditions.

On August 5, 2016, DLI’s Office of Administrative Hearings (OAH) received HRB’s “Request to Certify Case for Hearing,” together with Jackson’s original complaint. On August 9, 2016, OAH served a “Notice of Hearing” on Counsel for Jackson and counsel for Costco, by U.S.P.S. mail. The “Notice of Hearing” designated Caroline A. Holien as presiding Hearing Officer for this contested case proceeding. It also gave notice to the parties that OAH had adopted the applicable parts of the Montana Rules of Civil Procedure and the Montana Rules of Evidence to govern this contested case.

On August 11, 2016, both counsel filed their respective Acknowledgments of Service of the Notice of Hearing. On August 15, 2016, OAH served the “Order Setting Contested Case Hearing Date and Prehearing Schedule” by mail on counsel for each party. On August 25, 2016, OAH served an “Order Resetting Contested Case Hearing Date and Prehearing Schedule” by mail on counsel for each party, using the agreed schedule the parties had submitted with their request for the resetting.

On December 20, 2016, Costco filed and served “Respondent Costco Wholesale Corporation’s Motion for Summary Judgment,” with “Respondent Costco Wholesale Corporation’s Brief in Support of Motion for Summary Judgment” and accompanying affidavits and deposition excerpts.

On January 13, 2017, Jackson filed and served “Charging Party’s Brief in Response to Respondent’s Motion for Summary Judgment,” with an accompanying partial transcript of Jackson’s deposition and a number of exhibits.

On January 26, 2017, Costco filed and served “Respondent Costco Wholesale Corporation’s Reply Brief in Support of Motion for Summary Judgment.” That same date, Costco submitted by e-mail “Costco Wholesale Corporation’s Notice of Supplemental Authority.”

Discussion

Summary judgment is intended to encourage judicial economy through the elimination of any unnecessary trial, delay and expense. *McDonald v. Anderson* (1993), 261 Mont. 268, 272, 862 P.2d 402, 405; *Carter v. MT DOT* (1995), 274 Mont. 39, 905 P.2d 1102, 1103, cert. den., 517 U.S. 1188. The department has the power, pursuant to Rule 56, Mont. R. Civ. P., to grant summary judgment on issues where there is no genuine issue of fact and the movant is entitled to summary judgment as a matter of law. *Trustees of Anaconda Sch. Dist. No. 10 v. Whealon*, ¶¶15-17, 2012 MT 13, 363 Mont. 344, 268 P.3d 1258, citing and quoting from *In re Peila* (1991), 249 Mont. 272, 280-81, 815 P.2d 139, 144, “Due process does not require development of facts through an evidentiary hearing when there are no material factual issues in dispute.”

The movant has the initial burden of establishing the absence of genuine issue of material fact and the entitlement to judgment as matter of law; if that burden is met, the opponent must present evidence that raises a genuine issue of material fact. *Bowen v. McDonald* (1996), 276 Mont. 193, 197, 915 P.2d 201, 204; Rule 56(c), Mont. R. Civ. P; *Kestrell v. Heritage Health Care Co.* (1993), 259 Mont. 518, 858 P.2d 3, quoting *Cecil v. Cardinal Drilling Co.* (1990), 244 Mont. 405, 797 P.2d 232.

The Montana Supreme Court articulated the appropriate burden shifting, under the Montana Human Rights Act, when the respondent moved for summary judgment against the charging party.

. . . [W]e now adopt an analysis consistent with the *Burdine*¹ test, yet more compatible with the traditional analysis used in the summary judgment context. The plaintiff must allege a prima facie case of discrimination in her complaint. In this context, the plaintiff alleges a prima facie case by asserting that plaintiff is a member of a protected class, and that a male colleague with the same credentials, who performs substantially the same work, receives a higher salary. The employer seeking summary judgment must then come forward with a legitimate nondiscriminatory reason for the disparity. If the employer comes

¹ *Texas Dep't of Community Affairs v. Burdine*, (1981), 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207, 214-15 (citing *McDonnell Douglas Corp. v. Green*, (1973), 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668).

forward with a legitimate nondiscriminatory reason, the plaintiff must then, in addition to having alleged a prima facie case in the complaint, produce evidence that establishes her prima facie case as well as evidence which raises an inference that the employer's proffered reason is pretextual.

Of course, this does not mean that a plaintiff in a discrimination action always survives summary judgment when the plaintiff calls the employer's proffered explanation into question. Rather than having to demonstrate with specific facts that the employer's explanation "is a pretext," she need only introduce evidence which raises an inference that the employer's proffered reason is pretextual. To create a genuine issue of material fact as to pretext, the plaintiff must not only introduce evidence from which a reasonable person could infer that she is qualified, she must also introduce evidence that casts doubt on the defendant's contention that there was a legitimate business justification for defendant's action. *Chauhan v. M. Alfieri Co.*, (3d Cir.1990), 897 F.2d 123, 127 (citing *Healy v. New York Life Ins. Co.*, (3d Cir.1988), 860 F.2d 1209, 1220, cert. denied, 490 U.S. 1098, 109 S.Ct. 2449, 104 L.Ed.2d 1004 (1989)).

Heiat v. E.M.C (1996), 275 Mont. 322, 331-32, 912 P.2d 787, 793-94; explained, *Reeves v. Dairy Queen*, ¶¶13-15, 1998 MT 13, 287 Mont. 196, 953 P.2d 703; *Stuart v. First Sec. Bank* ¶¶19-21, 2000 MT 309, 302 Mont. 431, 15 P.3d 1198..

Costco, the respondent, seeks summary judgment in this Human Rights Act case. The Heiat analysis applies. First, Jackson, the charging party, must have alleged a prima facie case. Costco agreed that he did so.

1. Costco Established a Legitimate Business Reason for Firing Jackson

The initial question for this motion is whether Costco has established a legitimate nondiscriminatory reason for its discharge of Jackson. Under the Montana Wrongful Discharge from Employment Act (MWDEA),² "good cause" for discharge means "reasonable job-related grounds for dismissal based on a failure to

² Montana has used definitions from MWDEA in discrimination cases arising pursuant to Title 49. *Baumgart v. State of Montana*, ¶35, 2014 MT 194, 376 Mont. 1, 332 P.3d 225.

satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." Mont. Code Ann. § 39-2-903(5). The Montana Supreme Court has defined a "legitimate business reason:"

A legitimate business reason is a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business. In applying this definition, one must take into account the right of an employer to exercise discretion over who it will employ and keep in employment. Of equal importance to this right, however, is the legitimate interests of the employee to secure employment.

Buck v. Billings Montana Chevrolet, Inc., (1991), 248 Mont. 276, 281-282, 811 P.2d 537, 540; quoted and applied; McConkey v. Flathead Electrical Coop., ¶26, 2005 MT 334, 330 Mont. 48, 125 P.3d 1121; Sullivan v. CNT Cost. MT, LLC, ¶17, 2013 MT 106, 370 Mont. 8, 299 P.3d 832; Baumgart v. State of Montana, ¶35, 2014 MT 194, 376 Mont. 1, 332 P.3d 225.

On October 31, 2015, Jackson was working as a cashier in the front of the store, after it had opened for customers. Jackson's usual shift involved working in the warehouse as a forklift operator starting at 4:00 a.m., then, around 9:30 a.m., fifteen minutes before the doors opened for customers, he would come to the "front end" and work as a cashier on one of the registers. On October 31, 2015, Jackson was wearing a stocking cap as he performed his cashier's duties. The hat was variously described as a "Griz" hat, a red hat and a maroon hat.

During his deposition, Jackson denied that there was, to his knowledge, any store policy about not wearing a hat while working as a cashier. In her affidavit, Stacey Jimenez, General Manager of the Missoula Costco Store at the time, stated in her affidavit that there was a store policy that employees working at the cash register were not permitted to wear hats. In her affidavit, Denise Parrott, Receiving Manager for the Missoula Costco Store at the time, stated that there was a store policy that employees working as cashiers at the front-end were not allowed to wear hats because doing so did not create a professional appearance.

There is no evidence in the current record of Parrott having any knowledge or information that Jackson had depression, a generalized anxiety disorder or that he had a disability related to these conditions, for which he sought or needed

accommodation. On October 31, 2015, she approached Jackson around 11:00 a.m. and asked him to remove the stocking cap he was wearing. Jackson argued with her about whether he could wear a hat. She insisted he remove the hat and take it to his locker. He became agitated and angry and insisted he could wear the hat when he was cold. Eventually he followed her directions. Shortly thereafter, a front-end supervisor, Jennifer Louden, reported to Parrott that Jackson had returned from his locker to his check stand wearing a Costco stocking cap.

The evidence in this case is abundantly clear that Parrott's objection was not to the color or insignia on the "Griz" hat, but to Jackson wearing any kind of hat while working as a cashier. Jackson could not fail to understand that wearing a different hat back to the cash register was directly contrary to what Parrott had directed him to do.

Parrott told Louden to have Jackson meet her at the front end office. When he did meet her at the front end office, and began to address the hat issue, she found Jackson extremely angry and belligerent. She tried to speak to him about the store policy and he yelled at her, refused to sit down, refused to discuss the issue and told her it was "bullshit" that he could not wear a hat when he was cold. Frightened by Jackson, Parrott radioed Wayne Rhoades, Assistant Warehouse Manager for the Missoula Costco Store, for assistance. Parrott reported that before Rhoades arrived, Jackson started to walk out of the meeting.

Rhoades stated in his affidavit that until a subsequent meeting with Jackson on November 8, 2015, Jackson had never advised Rhoades that he, Jackson, had depression and a generalized anxiety disorder, or that Jackson believed he had a disability or of that Jackson wanted or needed an accommodation for those medical conditions. On October 31, 2015, Rhoades arrived at the front-end office door as Jackson was coming out of it. Rhoades stated in his affidavit that Jackson was extremely agitated and upset. Rhoades had to ask Jackson several times to return to the office so they could talk about what was going on. Jackson eventually agreed. Once they were back in the front-end office, Rhoades asked Jackson to sit down and Jackson refused multiple times. Rhoades told Jackson he was being insubordinate and Jackson finally agreed to sit down.

According to Rhoades, he asked Parrott to tell him what had happened. She started to do so, but Jackson interrupted, pointed at her and began yelling at her. Rhoades got Jackson to calm down and again asked Parrott to explain what had

happened. When she started, Jackson erupted again, yelling at her and shaking his finger in her face. When it became clear to Rhoades that Jackson could not compose himself sufficiently to have a rational conversation, Rhoades ended the meeting. He directed Jackson to retrieve shopping carts in the parking lot for the remainder of his shift that day.

Jackson admitted Rhoades asked him to return to the room and testified that he did not recall whether Rhoades asked more than once before Jackson complied. Jackson admitted Rhoades asked him to sit down and told him they could not continue the meeting until he sat down. Jackson admitted that he had difficulty sitting down (because of his heightened anxiety), but added that he eventually did sit down. Jackson admitted his voice was elevated but denied shouting at Parrott. Jackson admitted pointing his finger but denied shaking it at Parrott. To the rest of what happened during that front-end office meeting on October 31, 2015, Jackson, on this record, did not remember.

Rhoades stated in his affidavit that he considered Jackson's behavior on October 31, 2015, well outside the bounds of what is acceptable for employees at Costco. Rhoades stated that he had never experienced an employee act in such an aggressive and belligerent manner. Afterwards, Rhoades consulted with Dan Walsh, an Assistant General Manager about the incident in the front-end office.

According to his affidavit, Walsh was not aware on October 31, 2015, that Jackson had been diagnosed with depression or generalized anxiety disorder. When Rhoades consulted with him, discussing what had happened in some detail, Walsh concluded that Jackson should be suspended for three days for insubordination.

The two men spoke with store General Manager Stacey Jimenez about the incident with Jackson. In her affidavit, Jimenez stated that Costco expects all of its employees to act professionally and respectfully when dealing with other employees in the workplace. In his deposition testimony Jackson agreed this was an appropriate expectation. Jimenez made the decision to suspend Jackson for three days, pending a review by Costco senior management, with Walsh and Rhoades supporting and agreeing with her decision. Jimenez stated in her affidavit that, as of October 31, 2015, Jackson had never advised her that he had depression, a generalized anxiety disorder or that he sought assistance or accommodation for any medical condition or disability.

Costco's Employee Agreement contained a list of employee conduct for which termination was a possible consequence. Included on the list was "Insubordinate conduct including, but not limited to: a. Refusal to comply with the direct instructions or directions of your Supervisor." Jackson admitted that he understood that refusing to comply with instructions or directions of a supervisor was insubordinate conduct.

Because Jackson had been employed continuously for more than five years, senior management had to be involved in a decision whether to discharge him. One of the reasons for imposing the three-day suspension on Jackson was so that Costco senior management could decide whether to terminate his employment for his insubordination.

At the end of Jackson's shift that day, Rhoades and Walsh met with him again and advised him he was being put on a three-day suspension. Both Rhoades and Walsh confirmed in their respective affidavits that Jackson reacted to notice of his three-day suspension by getting very angry and using profanity, and that he then left the office ("stormed out" of it according to Walsh), slamming an office door against an interior wall with such force that it "knocked things off" the wall. They both also stated that Jackson did not tell them during that meeting that he had a medical condition or disability or that he sought assistance or accommodation for any medical condition or disability.

Three members of Costco's Senior Management, Mike Hayes, Vice President of Northwest Operations II, Mario Omos, Senior Vice President, Northwest Region, and John McKay, COO of the Northern Division, considered whether to discharge Jackson. They all three agreed that Jackson's conduct was completely unacceptable for a Costco employee, insubordinate, violated Section 11.3(19) of the Employee Agreement, and was so egregious that discharge was the appropriate decision.

Both Hayes and McKay signed affidavits stating that neither had any information about Jackson having either depression or generalized anxiety disorder nor any information that Jackson had ever sought any assistance or accommodation for those conditions. Neither of them had any knowledge about Jackson claiming a disability or seeking an accommodation for a disability. The only evidence either way regarding Omos (no affidavit by Omos) was Jackson's testimony that he had never communicated at all with Omos.

McKay made the decision to discharge Jackson, based entirely upon the actions of Jackson in his dealings with Denise Parrott, Wayne Rhoades and Dan Walsh on October 31, 2015. McKay communicated that decision to Hayes by email on November 6, 2015. In his affidavit, Rhoades stated that he was advised “sometime around November 6, 2015,” that senior management had decided to terminate Jackson’s employment. On November 8, 2015, both Rhoades and Jimenez attested (in their affidavits) that they met with Jackson and gave him notice of his discharge from employment.

At no time prior to November 8, 2015, did Jackson provide to Costco any documentation attesting that he suffered from depression or generalized anxiety disorder, nor any request or application regarding accommodation of an alleged disability resulting from depression or generalized anxiety disorder. There is no evidence that the members of Costco local management in Missoula, Montana involved in the October 31, 2015, Jackson encounters and incidents and/or subsequently involved in the three-day suspension and the notification to senior management of Jackson’s conduct that day, had any information or knowledge regarding Jackson’s depression or generalized anxiety disorder before November 8, 2015. There is no basis upon which to assert that local management in the Missoula store should have shared such information or knowledge with senior management regarding firing Jackson, because the members of local management who dealt with senior management about Jackson had no information or knowledge about Jackson’s depression and generalized anxiety disorder until after the decision to fire Jackson had already been made by senior management.

On November 8, 2015, Jimenez and Rhoades met with Jackson, for the purpose of informing him that he was fired. In his affidavit, Rhoades stated that during that November 8, 2015, meeting, Jackson told Jimenez and him, for the first time, about “his mental illness and that he was taking medicine for the illness.” Rhoades emphasized that prior to that November 8, 2015, meeting, Jackson “never advised me that he had depression or a generalized anxiety disorder, that he believed he had a disability or that he needed any sort of assistance or accommodation for these medical conditions.”

The admissible evidence of record does not show that before November 8, 2015, Jackson had given Costco any effective notice that he suffered from depression or a generalized anxiety disorder, that he took medication for those conditions, that he believed he had a disability caused by those conditions, or that he needed any sort of assistance or accommodation for those conditions. On the face of Costco’s

evidence, it established the absence of any genuine issues of material fact and Costco's entitlement to judgment as a matter of law.

2. Jackson's Evidence Did Not Cast Doubt on the Legitimate Business Reason

Since Costco met its initial burden as the movant, Jackson had to show, by more than mere denial and speculation, that there remained a genuine fact issue requiring a hearing. *S.M. v. R.B.* (1993), 261 Mont. 522, 862 P.2d 1166, 1168; *Dobrocke v. City of Columbia Falls*, ¶19, 2000 MT 179, 300 Mont. 348, 8 P.3d 71; overruled on other grounds, *Roberts v. Nickey*, ¶14, 2002 MT 37, 308 Mont. 335, 43 P.3d 263. See also, *First Sec. Bank of Bozeman v. Jones* (1990), 243 Mont. 301, 303, 794 P.2d 679, 681. Jackson's facts must be material and substantial as opposed to fanciful, frivolous, gauzy, or merely suspicions. *Klock v. Town of Cascade* (1997), 284 Mont. 167, 174, 943 P.2d 1262, 1266. On the other hand, all reasonable inferences drawn must be resolved in favor of Jackson. *McDonald v. Anderson* op. cit., citing *Payne Realty & Housing, Inc. v. First Sec. Bank of Livingston* (1992), 256 Mont. 19, 24-25, 844 P.2d 90, 93.

For purposes of this motion, the Hearing Officer draws the reasonable inferences that (a) Jackson did and does have major depression disorder and general anxiety disorder; (b) Jackson does have an actual disability as the result of those disorders; (c) Jackson was otherwise qualified to work for Costco, which he had done for almost 20 years and (d) The conduct for which Costco discharged him from employment resulted from behavior triggered by his disability.

Even resolving all reasonable inferences in favor of Jackson, he faced a difficult task in opposing the summary judgment motion. Costco had established several key facts. First, local management of the Missoula Costco Store made a decision to seek senior management approval for discharge of Jackson for insubordination, based upon Jackson's conduct at work on October 31, 2015. Second, at that time, none of the persons involved in that local management decision had any knowledge or information about Jackson's depression and generalized anxiety disorder, any disability arising out of those conditions or any accommodation request or question regarding those conditions. Third, senior management made the decision to discharge Jackson without any knowledge or information about Jackson's depression and generalized anxiety disorder, any disability arising out of those conditions or any accommodation request or question regarding those conditions.

There were two major components to Jackson's opposition to summary judgment. The first major component was Austin Crowley. Crowley was a Costco department manager, for whom Jackson moved product as needed. Crowley was not a direct supervisor of Jackson.

When Jackson came to work on October 31, 2015, he had been off work since he had left early on October 22, 2015, around 6:00 a.m., before he had finished driving the forklift. He was given permission to leave early on the 22nd by Crowley. During the eight days between the 22nd and the 31st, Jackson had called in to report that he would not be coming to work on each of his working days (October 23-26 and 29-30 – the 27th and 28th were his days off).

In his deposition, Jackson testified that on October 22, 2015, while he was driving the forklift in the warehouse, Crowley approached him.

- Q. Okay. And how was it that you happened to eventually talk to Austin Crowley?
- A. Austin Crowley approached me and asked me how I was doing, and I told him I was not doing well.
- Q. And I want you to tell me in as much detail as you can, what you said to Austin Crowley and what he said to you on October 22, 2015.
- A. Austin asked me how I was feeling, and I told him that I wasn't feeling very well, and stated to him that I was emotionally and mentally not feeling well that morning.
- Q. And how did he respond to that?
- A. He asked me if I needed to go home, and I stated that I need to leave work.
- Q. And what did he say when you said that?
- A. He said that would be fine, and asked me if I was going to harm myself that morning. And I told him that, no, I was not.
- Q. Did you say anything to him, other than what you've told me?
- A. I don't recall.
- Q. And did he say anything to you, other than what you've told me?
- A. I don't recall.
- Q. Did you ask Austin for anything else, other than to let you go home that day?
- A. No.

- Q. Okay. Is that the only day that you recall discussing your, you know, emotional and mental health issues with Austin?
- A. I think in passing prior to that I think we had probably discussed my depression with him.
- Q. Do you – are you sure you did that or are you – I’m trying to get – you say you thought in passing.
- A. Well, I just think, you know, we were friends outside of work as well. And I think at times we discussed personal issues with each other.
- Q. Do you have a specific recollection of ever discussing your depression with Austin Crowley prior to August – excuse me – October 22, 2015?
- A. Not specifically.

Jackson Depo. 65: 3 to 66:18.

Based upon his deposition testimony, when Jackson told Crowley that he was emotionally and mentally not feeling well on October 22, 2015, Jackson did not mention depression or a generalized anxiety disorder.

Crowley’s question to Jackson about whether he was going to harm himself suggested that Crowley had some immediate concern about Jackson’s emotional condition. That concern would not by itself establish that Costco had any notice of Jackson’s ongoing major depression and generalized anxiety disorders before it made its decision to fire him. Jackson and Crowley were friendly outside of work. Jackson testified that he had no specific recollection of discussing his disorders with Crowley before October 22, 2015, and his testimony does not establish that he discussed his disorders with Crowley that morning.

Jackson did not recall discussing his depression or general anxiety with any other supervisors prior to October 31, 2015, the date upon which the alleged insubordination occurred. Jackson may have told Crowley something about his emotional problems, but if so, it may have been outside of work on a “friend to friend” basis. Jackson’s testimony is uncorroborated and imprecise about what he and Crowley “probably discussed” “in passing,” before October 22, 2015, and there was no evidence that Crowley, who was not Jackson’s direct supervisor, was ever involved in any Costco management decisions about discharging Jackson.

Jackson's testimony about what he told Crowley was not sufficient to show a genuine issue of material fact regarding pretext. His testimony did not show that Costco's local and senior management personnel who decided to discharge him and did discharge him had any information about his depression and/or his major anxiety disorder when it decided to discharge him or when it did discharge him.

The second major component within Jackson's opposition to summary judgment was the timing of Jackson's discharge. Jackson's counsel made an argument that Jackson was actually discharged on November 12, 2015, not November 8, 2015. "Charging Party's Brief in Response to Respondent's Motion for Summary Judgment," pp. 5-6. Jackson submitted a number of documents with "Charging Party's Brief in Response to Respondent's Motion for Summary Judgment," some of which are of uncertain provenance (i.e., photocopies of undated, and in one instance unsigned, statements of two Costco employees about interactions between Crowley and Jackson on October 22, 2015, Exhibits E and F). Other documents appear to the Hearing Officer to be self-authenticating, such as photocopies of dated e-mail between Costco employees and dated and signed correspondence about the events in this case.

Among the exhibits submitted by Jackson's counsel as attachments to "Charging Party's Brief in Response to Respondent's Motion for Summary Judgment," there was a Costco document Bates stamped as Costco 000563. This was a 1-page e-mail dated November 8, 2015, from Stacey Jimenez, General Manager of the Missoula Costco Store, to Mike Hayes, Costco's Vice President of Northwest Operations II. The e-mail included a list of three attachments, designated as "1." through "3." with identifications of what each was. The identifications also appeared in a fine script on the upper right hand corner of attachments "1" and "2", probably written by Jimenez before scanning each attachment and including it with the e-mail.

Document No. 1 attached to the 1-page e-mail dated November 8, 2015, from Jimenez to Hayes was a "summary of the 'separation of employment' meeting" with Chad Jackson (dated November 8, 2015, and apparently authored by Wayne Rhoades (Costco 000565). The descriptive title to the document is hand-written in the upper right hand corner of Costco 000565. The "summary" reports that on November 8, 2015, Chad Jackson came into the office, sat down across from Rhoades and Jimenez, and asked if he could make a statement before they started. This "summary" appeared to be composed by Rhoades.

Chad stated:

I just want to apologize for my actions on Saturday the 31st. It was not acceptable behavior. I was wrong and should not have acted like that. I am very sorry and it will not happen again, given the chance. I would like to give you guys some background of the events that led up to this situation. (Stacey is outlining this.)

Wayne

This was a very emotional statement from Chad. He was crying, hands shaking and had difficulty getting his words out. After his statement Stacey asked him to sit in the outer office. She contacted Mike Hayes. After consulting with Mike we resumed meeting with Chad. We let Chad know that we were HIPPA certified and that any medical information he shared with us may be passed on the appropriate personnel. Chad agreed to this.

We were very clear with Chad that as of today we have separated employment and we would be in contact with him no later than Tuesday November 12th.

Wayne Rhoades

Document No. 2 attached to the Jimenez to Hayes November 8, 2015 e-mail was identified in Jimenez's e-mail as a "timeline [sic] per Chad [Jackson]." The handwritten note on Document 2 identified Document 2 as a "Time line given by Chad." The typed document was dated at the top "11/8/15." The contents of this "time line" were very clearly not typed by Jackson. Jimenez may have typed up the "time line." It seems clear that whoever typed up the "time line" consulted previous notations in Costco's records regarding Jackson and his attendance at work, but it is unclear what previous notations were consulted. Some of the notations are in italics and others are not. There are references to Jackson reporting that he was consulting his treating health care professionals, that he was sick, throwing up, feeling sick from his medicine, resuming taking his medicine at emergency room directions, calling off work because he was sick, calling off work because of his medication, etc. But over the entire page, there is no mention at all of Jackson's depression and major anxiety disorder.

Document 3 attached to the Jimenez to Hayes November 8, 2015 e-mail was a "Medical Note" reportedly "received on November 2, 2015," according to the e-mail. The Hearing Officer cannot find a copy of a medical report dated on or before November 2, 2015, that has fine script writing in the upper right-hand corner

designating it as "3" and identifying it as "Medical Note" reportedly "received on November 2, 2015." The Hearing Officer has been unable to find any document in the file that fits that description, including having the fine script writing upon it. Among the documents in the record, the Hearing Officer has been unable to find a medical report about Jackson that mentioned his depression and/or major anxiety disorder, which the record confirms Costco received by November 8, 2015.

Over several years, going back to at least August 20, 2009, Jackson had sometimes requested an accommodation (being late for work on some days) from Costco for another condition he suffered, difficulty sleeping. Jackson requested and was granted intermittent FMLA leave in 2009, 2010 and 2014, because the medication he was prescribed to help him sleep sometimes helped so well that he slept late. Costco granted the requests and allowed Jackson to be late for work without adverse consequences. None of the leave requests made any mention of major depression disorder or generalized anxiety disorder. There is no evidence of record now that Jackson's sleep difficulties had any kind of causal connection with his unacceptable behavior at work on October 31, 2015.

On October 5, 2015, Jackson asked his psychologist, Dr. Frey, to complete another Certification of Health Care Provider in connection with an FMLA request relating to his sleep issues. Dr. Frey did so, but she made no mention of Jackson's depression or generalized anxiety disorder. In her deposition testimony she pointedly said that she would not have mentioned those disorders without his consent and direction, in order to protect his privacy rights.

At Jackson's request, Dr. Frey drafted two "return to work" letters, dated October 26 and October 30, 2015, respectively. Neither letter gave notice to Costco of Jackson's major depression disorder or generalized anxiety disorder.

Jackson also sought and received a one-month medical leave of absence from Costco in 2013. His physician, Dr. Willoughby, wrote a letter supporting Jackson's request for the leave, stating that Jackson needed the leave "for medical purposes." The letter made no mention of major depression disorder or generalized anxiety disorder. Dr. Willoughby gave Costco very limited information to protect Jackson's privacy rights.

Jackson sought short term disability payments for his one month leave in 2013. A company named Unum administered Costco's short term disability insurance. Unum faxed Dr. Willoughby a letter requesting that he fill out and fax an

Attending Physician's Statement form regarding Jackson to a specific phone number at Unum (noting that privacy was important). Dr. Willoughby completed the Statement, indicating that Jackson had depression and generalized anxiety disorder. Dr. Willoughby expected and relied upon his office staff to follow the directions in the letter, to protect patient privacy.

There is no evidence that the doctor's office ever provided the completed form to Costco. All communications between Unum and medical providers for Costco employees are handled by Unum. Unum does not share medical information with Costco. There is no credible evidence that Unum ever provided Costco with the Attending Physician's Statement form regarding Jackson, or with information from it, at any time. In fact, this record indicates that Costco's Personnel File for Jackson, as well as Costco's Medical File for Jackson, did not contain any copy or copies of the Attending Physician's Statement regarding Jackson or with information from it.

Jackson attempted to strengthen his case against summary judgment by citing Ninth Circuit decisions holding that, with few exceptions, "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination," and thus as a matter of law his insubordination on October 31, 2015, failed to qualify as a legitimate, nondiscriminatory reason for termination, since it was conduct resulting from his disability. *Dark v. Curry County*, 451 F.3rd 1078, 1084 (9th Cir. 2006), citing *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3rd 1128, 1139-40 (9th Cir. 2001).

Dark is not applicable here. Dark had epilepsy, which caused occasional seizures. Within a day before having a seizure, Dark typically had a unique sensation (an "aura"). About half the times that he experienced this "aura" a seizure did follow. One day, he experienced an "aura" before going to work. He told no one at work about the "aura" and what it meant. He went to work as scheduled. He had a seizure at work that day, while driving a county pickup. A coworker riding with him was able to stop the slow-moving vehicle, so no accident resulted from that seizure. Dark at 1081.

The county had Dark medically evaluated and, based on the medical report, terminated his employment on the grounds that his seizures prevented him from performing the essential functions and duties of his position and his continued employment posed a threat to the safety of others. Dark at 1081-82. On this basis, the trial court granted summary judgment in the county's favor.

On appeal, the Circuit Court held that the employer's decision could not be a legitimate, nondiscriminatory reason for discharge because it knew the conduct – a seizure resulting from a disability – was caused by the disability itself. Dark at 1084. However, the reasons for reversing the trial court's summary judgment in favor of the employer included two kinds of evidence suggesting pretext. First, after discharge of Dark, the county decided a grievance over his discharge against Dark, on the grounds that by going to work after experiencing the aura and operating county equipment he had knowingly put the safety of himself, co-workers and the general public in jeopardy. Dark at 1083. Second, there was evidence of six separate accidents, for which other Road Department workers went undisciplined, in contrast to Dark's discharge without there being any accident. Thus, there was evidence that indicated the discharge was connected to the disability, and in addition there was evidence of pretext, together creating a fact issue for hearing.

A similar fact situation appeared in Humphrey. Her Obsessive Compulsive Disorder ("OCD") resulted in many tardy appearances at and multiple absences from her work. The initial accommodation, attempted by agreement of Humphrey and the employer, failed. Humphrey requested a different accommodation, but the employer discharged her. In reversing summary judgment in favor of the employer, the Circuit Court cited evidence that the plaintiff's treating physician recommended a second accommodation (leave of absence), which would not have caused any undue hardship on the employer, yet the employer did not consider such an accommodation prior to discharge. Humphrey at 1136. This failure to continue the interactive process and explore other accommodation possibilities, as recommended by the plaintiff's doctor, raised a question of pretext.

Both cases did rule that conduct caused by the disability is considered part of the disability, with few exceptions. However, both cases also cited additional evidence that could indicate the legitimate business reason for discharge was a pretext, in addition to a causal link between the conduct that led to discharge and the disability.

Certainly, if local management or Human Resources personnel made a deliberate decision to hide facts pointing to Jackson's disability from the decision maker, while providing the decision maker with the facts regarding Jackson's conduct, this could indicate discriminatory animus as well as pretext. But in this case, there is no evidence of any such efforts to screen McKay from knowledge of Jackson's mental disorders. Clearly, McKay had no knowledge of the mental disorders when he decided, and there is no evidence that he would have had knowledge of the disability

but for deliberate withholding of such information. There was no evidence that senior management had any knowledge of the existence of Jackson's disability until after McKay made his decision. There is also no evidence that any member of local management involved in the decision to ask senior management to look at discharge of Jackson had any knowledge of Jackson's mental conditions. There is also no evidence that Costco expected or required local management to make inquiry of employees, local management or not, regarding whether they had any knowledge of any conditions Jackson might have that could have been responsible for his conduct on October 31, 2015. Thus, there is no evidence to trigger an inference that local management of Costco concealed relevant information regarding Jackson's mental conditions and/or possible disability from senior management. This leaves Jackson with no evidence of pretext and no genuine issue of material fact.

On November 8, 2015, when Stacey Jimenez and Wayne Rhoades met with Jackson to tell him that he was being discharged, Jackson first apologized and cited his mental condition and a medication that did not work appropriately as the cause for his unacceptable conduct at work. It was too late. Costco had already made a legitimate business decision to discharge Jackson for misconduct (insubordination). That decision was reached without knowledge of his mental condition or disability resulting therefrom. There was no possibility that the decision to fire Jackson was influenced by any information about Jackson's disability. Costco met its initial burden as the movant seeking summary judgment. This remains true even if (as Jackson testified) he was not notified of the decision until a later date. Costco's decision to fire Jackson was made without any information that he suffered from depression and major anxiety disorder.

Jackson's counsel made a passionate effort to show, by more than mere denial and speculation, that there remained a genuine fact issue requiring a hearing. His efforts were commendable, but those efforts did not establish a material and substantial genuine fact issue. Jackson's counsel did not cite any applicable authority for his argument that after making the decision to terminate Jackson's employment for a legitimate, nondiscriminatory reason, Costco had some ongoing obligation to reconsider that decision when Jackson, at the November 8, 2015, meeting, alluded to the fact that he did have depression and generalized anxiety disorder and to the fact that he was taking medication for those conditions.

Perhaps at the November 8, 2015, meeting, after Jackson's apology, when Jimenez and Rhoades told Jackson he was fired and also agreed that he could submit any additional documentation he wanted to provide, Jackson, grasping at straws,

hoped that meant Costco would revisit whether he should be fired. In fact, Costco had already made a “clean” decision to fire him, without the decision makers being aware of his depression and major anxiety disorder. Costco was not under any obligation to revisit that decision, nor is there any evidence that Costco did revisit it. Jackson’s perception that he might still have a chance would not change either the facts or the law. Resolving all reasonable inferences in favor of Jackson, Costco is entitled to summary judgment.

WHEREFORE, IT IS THEREFORE ORDERED THAT the summary judgment motion of Costco Wholesale Corporation, respondent herein, IS HEREBY GRANTED. Costco Wholesale Corporation did not illegally discriminate against Chad Jackson, charging party, because of disability, when on November 8, 2015, it notified him that his employment was terminated for insubordination. JUDGMENT IN FAVOR OF RESPONDENT IS HEREBY GRANTED AND CHARGING PARTY’S COMPLAINT HEREIN IS NOW DISMISSED, AND BECOMES A FINAL DECISION UNLESS APPEALED TO THE MONTANA HUMAN RIGHTS COMMISSION WITHIN FOURTEEN (14) DAYS OF ITS ISSUANCE, AS STATED IN THE NOTICE SET FORTH ON PAGE 20 HEREAFTER.

ISSUED this 3rd day of March, 2017.

/s/ TERRY SPEAR
Terry Spear, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

* * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Chad Jackson, Charging Party, and his attorney, Torrance L. Coburn, Tipp Coburn Schandelson PC; and Costco Wholesale Corporation, Respondent, and its attorney, John G. Crist, Crist Krogh & Nord PLLC:

The Hearing Officer Decision above granting summary judgment and dismissing the complaint in its entirety, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c).

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Marieke Beck
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505(4), precludes extending the appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

THERE IS NO TRANSCRIPT OF HEARING, BECAUSE SUMMARY JUDGMENT WAS GRANTED BEFORE HEARING. Direct any questions about the appeal process to Annah Howard, (406) 444-4356, Human Rights Bureau, Department of Labor and Industry.