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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

TAMI WIEDERHOLD,)
)
 Plaintiff,)
)
 v.)
 SEARS, ROEBUCK AND CO.,)
 a New York corporation,)
)
 Defendant.)

No. 03:11-CV-00998-HU

**MEMORANDUM OPINION AND ORDER
ON MOTION FOR
SUMMARY JUDGMENT**

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1 an ongoing issue the court faces in connection with its Local Rules
2 relating to summary judgment motions. At oral argument,
3 Wiederhold's attorney stated it was his intention that the court
4 assume, when he did not respond to a fact asserted by Sears in its
5 motion, that Wiederhold deemed that fact to be irrelevant. Why and
6 how the court would reach that conclusion is far from clear.

7 When the court revised its Local Rules in late 2010, one of
8 the topics that generated a great deal of discussion was whether
9 the court should eliminate the requirement for a separate concise
10 statement of facts in connection with summary judgment motions.
11 Prior to January 1, 2011, a party moving for summary judgment was
12 required to submit a "separately filed concise statement [to]
13 articulate the undisputed relevant material facts . . . essential
14 for the Court to decide only the motion for summary judgment - not
15 the entire case." LR 56-1 (Dec. 1, 2009). Local Rule 56-1 was
16 revised, effective January 1, 2011, to eliminate the requirement
17 for parties to submit a separate concise statement of material
18 facts, unless otherwise ordered by the court. The rule was revised
19 to provide as follows: "A party's factual positions must be
20 supported by citations, by page and line as appropriate, to the
21 particular parts of materials in the record. Unless otherwise
22 ordered by the court, a party is not required to file a separate
23 Concise Statement of Material Facts." LR 56-1(a) (Jan. 1, 2011).
24 Commentary was added to LR 56 to advise practitioners of the
25 change, and to note "that this change is subject to a period of
26 study and evaluation." Amendment History to LR 56, January 1,
27 2011. It was contemplated that Judges and attorneys would experi-
28 ment, to some degree, with different formats to arrive at the most

1 efficient method for the parties to advise the court of their
2 conflicting factual positions, and for the court to determine what
3 material facts are not genuinely disputed. Unfortunately, the
4 results of any such experimentation in summary judgment practice
5 have failed to yield a single, cohesive, efficient procedure.

6 Under the current Local Rule, although a separate concise
7 statement of material facts is not required, a party still should
8 provide a sufficient discussion of the underlying facts, with
9 appropriate citations to the record, to support the party's factual
10 positions. See LR 56-1(a); Fed. R. Civ. P. 56(c) (Procedures:
11 Supporting Factual Positions). Particularly where, as here, a
12 party (in this case, the plaintiff Wiederhold) claims the opposing
13 party (in this case, Sears) is relying on immaterial facts, the
14 facts deemed immaterial should be identified, with some discussion
15 as to why the opposing party deems them immaterial. See Fed. R.
16 Civ. P. 56(c)(1)(B) (assertion that a fact is genuinely disputed
17 must be supported by "showing that the materials cited do not
18 establish the absence or presence of a genuine dispute, or that an
19 adverse party cannot produce admissible evidence to support the
20 fact"). In the present case, without such a discussion, the court
21 cannot identify clearly which factual assertions Wiederhold deems
22 relevant and material, and which she deems immaterial. As a
23 result, the following factual summary is based, for the most part,
24 on Sears's brief, exhibits submitted by both parties, Sears's busi-
25 ness records, and records of Wiederhold's unemployment proceedings.
26 Except where noted, I find the following facts to be undisputed.

27 Wiederhold began working for Sears on October 14, 1987. She
28 initially was hired as a cashier in the automotive department.

1 Over the ensuing years, she held a number of different positions at
2 the store. In February 2009, she became a Merchandise and Customer
3 Assist Associate ("MCA").¹ According to Wiederhold, the MCA
4 position was primarily a customer service job. It required her to
5 keep the fitting rooms clean, put items left in fitting rooms back
6 on the racks, sometimes help the cashiers, make sure racks were
7 organized, keep racks stocked by bringing items out from the
8 stockroom, take care of returned items, keep items displayed on
9 tables nicely folded, and answer questions for customers.² In
10 connection with keeping racks stocked and bringing items to the
11 floor from the stockroom, Wiederhold often had to climb ladders,
12 and lift more than ten pounds.³ She also had to move shelving
13 units that she characterized as "pretty heavy."⁴ She also moved
14 carts full of jeans and other items. The carts were on wheels, but
15 they also were "pretty heavy."⁵

16 Wiederhold also was required to change prices on items,
17 marking them up or down as necessary. This required her to be on
18 her feet, standing and walking around. She also put signs up and
19 took them down, sometimes using a ladder for this task.⁶ She

21 ¹Dkt. #19, ECF pp. 7-8 (citing Dkt. #22-1, Ex. 1 to Decl. of
22 Craig Leis, excerpts from Wiederhold's deposition (hereafter "Pl.
23 Depo."), p. 58, ECF p. 11).

24 ²Dkt. #22-1, Ex. 1, Pl Depo. pp. 81-85, 94, 95; ECF pp. 30-34,
25 41.

26 ³*Id.*, pp. 89-91; ECF pp. 36-38.

27 ⁴*Id.*, p. 91; ECF p. 38.

28 ⁵*Id.*, pp. 92-93; ECF pp. 39-40.

⁶*Id.*, pp. 102-03, 107-08; ECF pp. 47-48, 52-53.

1 explained that prior to March 2009, the pricing job and the MCA job
2 were done by separate teams. In about March 2009, these tasks were
3 combined into one job, and members of both teams then were
4 responsible for all of these tasks.⁷ Wiederhold stated all aspects
5 of the MCA job required a fast pace. She considered the MCA job
6 duties to be strenuous or physically demanding, and she indicated
7 all of the job duties required walking.⁸ At her deposition,
8 Wiederhold agreed the MCA job "for softline pricing" required her
9 to be on her feet "90 to a hundred percent of the time."⁹

10 Around the same time Wiederhold became responsible for all of
11 the various tasks involved in the combined MCA/pricing job, she
12 also sought treatment for bone spurs she had had "for years" on
13 both of her feet.¹⁰ In addition to the bone spurs, she was
14 diagnosed with bursitis and tendinitis in both feet.¹¹ In a "Report
15 of Work Ability," dated March 9, 2009, Wiederhold's podiatrist
16 listed a diagnosis of "Achilles tendonitis."¹² He directed

18 ⁷*Id.*, pp. 103-05, 113-14; ECF pp. 48-50, 57-58.

19
20 ⁸*Id.*, p. 125; ECF p. 66. One area of contention between the
21 parties, discussed later in this opinion, is whether all of these
duties were "essential functions" of the MCA position.

22 ⁹*Id.*, p. 34; ECF p. 2.

23 ¹⁰*Id.*, p. 63-64; ECF pp. 15-16.

24 ¹¹*Id.*, p. 64; ECF p. 16.

25 ¹²Dkt. #22-1, Ex. 6 to Leis Decl., ECF p. 169. Although the
26 form does not so state, these restrictions refer to Wiederhold's
27 left foot. She has problems with both feet, but the ongoing
28 restrictions discussed in this section, and which were the subject
of her doctor's reports, relate to her left foot except where
otherwise indicated.

1 Wiederhold to "wear a boot while at work"; "sit during her work
2 shift as much as is possible"; and limit her time at work to "a
3 total of 5 hrs per day."¹³ Wiederhold provided a copy of this
4 doctor's note to Sears. She was allowed to wear the boot to work
5 for ten to twelve weeks, and her work schedule was reduced to five
6 hours per day.¹⁴

7 On April 15, 2009, Wiederhold submitted an updated Report of
8 Work Ability, restricting her to working "a maximum of 6 hrs a
9 day."¹⁵ She submitted a doctor's note dated May 13, 2009, excusing
10 her from work on May 12, 2009, "due to her painful foot after
11 having physical therapy."¹⁶ A doctor's note dated May 29, 2009,
12 excused Wiederhold from work on May 23, 2009, due to "Foot pain,"
13 indicating she was "[r]eleased for regular work duties on
14 5/24/09."¹⁷

15 Wiederhold submitted a doctor's certification dated May 26,
16 2009, for FMLA leave, indicating Wiederhold would be absent from
17

18 ¹³*Id.*

19 ¹⁴Pl. Depo. pp. 131-32, ECF pp. 68-69. A second Report of Work
20 Ability was completed by the same doctor, on the same day, with the
21 same diagnosis. However, this report indicates Wiederhold was
22 restricted to working no more than "6 hrs a day." Dkt. #22-1, Ex.
23 7 to Leis Decl., ECF p. 170. Wiederhold testified both reports
24 were submitted to Sears, but she did not recall the reason for the
25 two somewhat-conflicting reports. She did, however, indicate that
26 whatever her work restriction was - whether five or six hours a day
27 - Sears complied with the restriction. Dkt. #24-1, Decl. of Eric
28 J. Fjelstad, Ex. 1 (additional excerpts from Wiederhold's
deposition), p. 135; ECF p. 11.

¹⁵Dkt. #22-1, Ex. 9 to Leis Decl., ECF p. 172.

¹⁶*Id.*, Ex. 8; ECF p. 171.

¹⁷*Id.*, Ex. 10; ECF p. 173.

1 work intermittently, two to three days per month, for a period of
2 four months beginning May 1, 2009. The form indicates her absences
3 would be due to doctor's visits, physical therapy, and other
4 treatments for "arthralgia of ankle/achilles tendonitis," and
5 intermittent flare-ups of her condition would prevent her from
6 being able to perform all of the functions of her job.¹⁸

7 On July 27, 2009, Wiederhold's doctor restricted her to
8 working no more than "4-6 hour days per week," with no "more than
9 2 days in a row for 6 hours."¹⁹ Sears apparently was somewhat
10 confused by the meaning of the restrictions noted on the form, and
11 asked Wiederhold to obtain another doctor's note with clearer
12 restrictions.²⁰ She complied, and in a note dated August 10, 2009,
13 her doctor indicated Wiederhold was limited to six hours a day for
14 no more than two days in a row, and then she would require one day
15 of rest before returning to work.²¹ Sears accommodated these work
16 restrictions imposed by Wiederhold's doctor.²²

17 Wiederhold saw her doctor on October 1, 2009, and was
18 scheduled for surgery on her left foot on October 14, 2009. A
19 doctor's note indicated she would require ten weeks off work for
20 recovery, remaining non-weight-bearing, and resting with her foot
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24 ¹⁸*Id.*, Ex. 11; ECF p. 174-77.

25 ¹⁹*Id.*, Ex. 12; ECF p. 178.

26 ²⁰*Id.*, Ex. 1, Pl. Depo. p. 145; ECF p. 73.

27 ²¹Dkt. #22-1, Ex. 13 to Leis Decl., ECF p. 179

28 ²²Dkt. #22-1, Ex. 1, Pl. Depo. pp. 170, 172; ECF pp. 86, 87.

1 elevated.²³ The doctor estimated Wiederhold would be able to return
2 to work on December 16, 2009,²⁴ and Wiederhold requested FMLA leave
3 for a period of ten weeks from the date of her surgery.²⁵ However,
4 when Wiederhold was examined post-operatively on November 24, 2009,
5 her doctor extended the date for her to return to regular work
6 duties to January 4, 2010.²⁶ On December 29, 2009, the doctor
7 indicated Wiederhold would require another two months off work. He
8 did not list a date Wiederhold would be able to return to work,
9 indicating she would "be re-evaluated at next visit."²⁷ On
10 February 26, 2010, the doctor indicated Wiederhold would be
11 released for regular work duties on April 1, 2010.²⁸ According to
12 Sears, it accommodated Wiederhold's need for additional recovery
13 time by extending her FMLA leave beyond her 12 weeks of protected
14 leave.²⁹

16 ²³Dkt. #22, Leis Decl., Ex. 14; ECF p. 180.

17 ²⁴*Id.*

18 ²⁵*Id.*, Ex. 15; ECF p. 181-83.

19 ²⁶*Id.*, Ex. 16; ECF p. 184.

20 ²⁷*Id.*, Ex. 17; ECF p. 185.

21 ²⁸*Id.*, Ex. 18; ECF p. 186.

22 ²⁹Dkt. #19, p. 11. Sears cites pages 159-60 of Wiederhold's
23 deposition in support of this statement. However, the exchange
24 between Sears's attorney and Wiederhold does not confirm that Sears
25 extended Wiederhold's FMLA leave. Sears's attorney asked Wieder-
26 hold if she was "aware that Sears gave [her] additional FMLA
27 weeks," not limiting her "FMLA to the 12 weeks required under law."
28 Wiederhold responded that she was not aware of that fact. Dkt.
#22-1, Ex. 1, Pl. Depo. pp. 159-60; ECF pp. 77-78. Nevertheless,
Wiederhold does not dispute this fact in her response to Sears's
motion for summary judgment. See Dkt. ## 23 & 24.

1 On Friday, March 26, 2010, Nagaraj Ramaswamy, from "Inquiry
2 Services" at Sears Holding Corporation, sent an e-mail to Ann Marie
3 Betancourt-Reyes ("Betancourt"), Sear's Human Resources Lead,
4 discussing Wiederhold's short-term disability status. Ramaswamy
5 had confirmed with Wiederhold's insurance company that she had been
6 approved for short-term disability from October 14, 2009, through
7 March 8, 2010.³⁰

8 On Saturday, March 27, 2010, Betancourt contacted Wiederhold
9 to discuss her upcoming April 1, 2010, return to work. According
10 to Betancourt, she suggested several possible temporary accommoda-
11 tions for Wiederhold, "including shorter hours, possible job
12 modifications, and temporary placement into [an] alternative job
13 until fully recovered[.]"³¹ Betancourt memorialized her conversa-
14 tion with Wiederhold in an e-mail to Ramaswamy. Among other
15 things, she noted the following:

16 On 3/27/10 I contacted Ms. Wiederhold and
17 informed her that I have her scheduled to
18 [return to work] on 4/1/10 and will need a
19 Doctor's [note] to release. Ms. Wiederhold
20 insisted that she is not ready to come back to
21 work and feels that any accommodations that I
22 suggested is [sic] not beneficial for her
(i.e., shorter hours, possible work accom-
modations, alternative job placement until
full job capability) and any accommodations
may be strenuous on other co-workers. She
would speak with her physician and review any

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24 ³⁰Dkt. #20, Declaration of Ann Marie Betancourt-Reyes
25 ("Betancourt Decl."), ¶ 14; Dkt. #21-1, Ex. C, ECF pp. 4-5. In
26 addition, according to Ramaswamy's calculations, Wiederhold had
27 been overpaid during that time period for 227 hours, which would
"have to be retrieved in the future pay checks." Betancourt Decl.
¶ 2. Neither party has asserted any claim in this matter related to
any overpayment of wages.

28 ³¹*Id.*, ¶ 2.

1 accommodations. . . . I reminded her that
2 according to last physicians note she is
scheduled to return to work on 4/1/10.

3 . . .

4 Further, in speaking with Ms. Wiederhold, she
5 stated, she would like to possibly look into a
6 transfer or job placement where she will not
7 be on her feet and iterated that she may need
8 surgery on the other foot due [to] foreseen
signs and symptoms that the MCA/Softlines
positions entitles [sic]. She insists that
MCA Softlines is a too demanding position for
a person with foot problems.³²

9 Wiederhold apparently returned to work as scheduled, but then
10 on April 22, 2010, her doctor placed her left foot in a cast, and
11 directed Wiederhold to be off work for six weeks, noting her
12 return-to-work date would be determined "on 6/3/2010."³³ She saw
13 her doctor on June 21, 2010, and he released her to return to work
14 on June 28, 2010, "with the following restrictions: [she] can only
15 work 25 hours total a week and also can only work 5 hours a day for
16 the next 2 months."³⁴ On July 6, 2010, her doctor signed a report
17 after the fact, indicating Wiederhold was authorized to return "to
18 regular work duties on July 4, 2010."³⁵ According to Sears, it
19 again extended Wiederhold's FMLA leave to accommodate these
20 requests for additional leave time.³⁶

21 Wiederhold worked at the MCA job from July 4, 2010, to
22 September 1, 2010, consistent with restrictions imposed by her

23 ³²Dkt. #20-1, Ex. C, ECF p. 4.

24 ³³Dkt. #22-1, Ex. 19, ECF p. 187.

25 ³⁴*Id.*, Ex. 20, ECF p. 188.

26 ³⁵*Id.*, Ex. 21, ECF p. 189.

27 ³⁶Dkt. #19, ECF p. 18; see note 28, *supra*.

1 doctor.³⁷ Wiederhold saw her doctor again on September 1, 2010.
2 At that time, he imposed additional work-related restrictions,
3 stating, "Pt needs to be off of her feet while working. Pt needs
4 a job at work where she can be off of her feet."³⁸ To accommodate
5 the new restriction, Wiederhold was assigned to work on a backlog
6 of "PCNs" - which involved re-pricing merchandise to reflect a
7 markdown or markup.³⁹ Wiederhold did the PCNs "for two plus
8 months."⁴⁰ When Wiederhold completed the backlog of PCNs, in early
9 November 2010, she was placed back on the regular schedule as an
10 MCA.⁴¹

11 In the meantime, on October 25, 2010, Betancourt provided
12 Wiederhold with a Health Care Provider Certification form for her
13 doctor to complete in order for Wiederhold to request formal
14 accommodation for her ongoing work restrictions.⁴² Wiederhold's
15 doctor completed the certification form on November 11, 2010,
16 indicating Wiederhold's condition was expected to be "permanent,"
17 and due to foot pain, she would be unable to perform job functions
18 involving "[s]tanding, walking, climbing, pushing [and] pulling."⁴³

20 ³⁷Dkt. #22-1, Ex. 1, Pl. Depo. pp. 169-70; ECF pp. 85-86.

21 ³⁸Dkt. #22-1, Ex. 23; ECF p. 194.

22 ³⁹Dkt. #19, ECF pp. 12, 18-19; Dkt. #22-1, Pl. Depo. p. 172,
23 ECF p. 87.

24 ⁴⁰Dkt. #22-1, Pl. Depo. p. 172, ECF p. 87.

25 ⁴¹*Id.*, Pl. Depo. p. 173, ECF p. 88.

26 ⁴²*Id.*, Pl. Depo. pp. 174-76, ECF pp. 89-91; Dkt. #22-1, Exs.
27 24 & 25, ECF pp. 195-97.

28 ⁴³Dkt. #22-1, Ex. 25, p. 1; ECF p. 196.

1 The doctor recommended Wiederhold's limitations be accommodated by
2 "Job Restructuring" in the areas of "Duties, Responsibilities,
3 [and] Sitting."⁴⁴ Wiederhold testified it was her expectation that
4 Sears would either allow her to continue performing those aspects
5 of the MCA job that she was able to perform within the doctor's
6 limitations, or provide some other type of accommodation. She
7 stated she was not aware she had the right to request, for example,
8 a motorized scooter, "or even another job elsewhere."⁴⁵ However,
9 Wiederhold further stated that if she limited herself to the
10 limitations recommended by her doctor, then even with a scooter,
11 she would be unable to perform some of the essential functions of
12 the MCA position. Specifically, she stated she would be unable to
13 perform tasks involving climbing, such as to retrieve items on high
14 shelves or to hang signs on the walls.⁴⁶

15 When Wiederhold noticed she had been put back on the regular
16 schedule at the first of November 2010, she talked with the store
17 manager Jay Kyser, who, according to Wiederhold, "seemed genuinely
18 surprised, like he didn't understand why [she] was back on the
19 schedule[.]"⁴⁷ Wiederhold also contacted the Sears corporate HR
20 department⁴⁸ to ask whether she should ignore her doctor's orders

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22 ⁴⁴*Id.*, Ex. 25, p. 2; ECF p. 197; Pl. Depo. p. 177, ECF p. 92.

23 ⁴⁵Pl. Depo. p. 178, ECF p. 93.

24 ⁴⁶*Id.*, pp. 179-80, ECF pp. 94-95.

25 ⁴⁷Dkt. #22-1, Ex. 4, Transcript of unemployment hearing
26 ("Unemp. Tr."), at 10; ECF p. 156.

27 ⁴⁸Sears refers to its corporate HR department's "telephone
28 hotline that employees can call anytime for issues related to their
(continued...)

1 and work as scheduled, or how she should proceed. She was told to
2 "continue to call out" (i.e., call in sick), and wait for a
3 response to her request for accommodation.⁴⁹ According to
4 Wiederhold, she was unable to perform the MCA job because of its
5 fast pace, which required her to "run[] around the floor at 100
6 miles an hour trying to help customers, and keep the floor cleaned
7 and stocked[.]"⁵⁰ She stated the pain and stress were "just unbear-
8 able," rendering her short-tempered and tearful, and affecting her
9 ability to sleep and enjoy life.⁵¹

10 Despite having talked with Kyser, and the corporate HR repre-
11 sentative, Wiederhold was still listed on the regular MCA schedule
12 for the third week in November. She decided to talk with her
13 immediate manager, Christine Cole Vyse. Cole Vyse clarified
14 Wiederhold's restrictions with her, and then she and Wiederhold
15 "started brain storming" about jobs Wiederhold could do.⁵² Cole
16 Vyse asked Kyser to attend the meeting so everyone would be clear
17 about what was decided. According to Wiederhold, the corporate HR
18 representative and Kyser both explained the reason she was put back
19 on the regular schedule was that while she was working on the PCN
20 backlog, she was paid from a training budget, and those funds were

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23 ⁴⁸ (...continued)
employment" as "88Sears." Dkt. #19, ECF p. 21.

24 ⁴⁹Dkt. #22, Ex. 4, Unemp. Tr. at 10-11, 13; ECF pp. 156-57,
25 159.

26 ⁵⁰*Id.* at 12, ECF p. 158.

27 ⁵¹*Id.*

28 ⁵²*Id.*, p. 14; ECF p. 160.

1 no longer available. As a result, they had to "figure out where
2 the hours were going to come from."⁵³

3 Wiederhold, Cole Vyse, and Kyser decided Wiederhold would try
4 to do a job "called fill from floor," involving restocking the
5 sales floor. Wiederhold agreed to try the job, and she was
6 assigned to those duties for the fourth week of November 2010.⁵⁴
7 Cole Vyse told Wiederhold to let her know if she had problems
8 performing the duties of this job.⁵⁵ Although the job did not
9 require her to be on her feet as much as the MCA job, the duties of
10 the "fill from floor" job still required Wiederhold to be on her
11 feet, walking around, for about 75% of the day. She found the job
12 difficult, and by the end of the day, she would have problems
13 walking, and a lot of pain and swelling in her feet. Her call-ins
14 increased as a result. According to Wiederhold, she tried to
15 explain to Cole Vyse why the job was difficult, but Cole Vyse
16 continued to schedule her in that job each day.⁵⁶

17 On or about December 6, 2010, Sears corporate HR determined
18 that Wiederhold was unable to perform the essential functions of
19 the MCA job. A corporate representative advised Betancourt that
20 Sears would be unable to accommodate Wiederhold's job restrictions.
21 Betancourt was directed to communicate this decision to
22

23
24 ⁵³*Id.*, pp. 13-14; ECF pp. 159-60; see Dkt. #22-1, Pl. Depo, p.
25 45; ECF p. 7; *id.*, Ex. 2, Depo. of Christine Cole Vyse, pp. 80-81,
ECF pp. 142-43.

26 ⁵⁴Dkt. #22-1, Ex. 4, Unemp. Tr. p. 14; ECF p. 160.

27 ⁵⁵*Id.*

28 ⁵⁶*Id.*, pp. 15-16; ECF pp. 161-62.

1 Wiederhold.⁵⁷ Wiederhold described the events of December 2010, at
2 a hearing on her application for unemployment benefits, in March
3 2011:

4 We're at the beginning of December. And
5 pretty much for the . . . until the 19th I did
6 the fill from floor [job], and called in when
7 I needed to, and the doctor told me to stay
8 off my foot, and [I] just struggled to do the
9 best that I could do at the job that I was
10 given. I did not go and talk to anybody again
11 because I knew that we were at the end of the
12 line and I was also afraid for my job . . .
13 [b]ecause I felt that they had already done
14 everything they were going to do, and that
15 there was really no other steps that could be
16 taken and that they were going to . . . just
17 be tired of the situation. The complaining,
18 and the . . . you know, just want to be done
19 with it.

20 . . .

21 [As a result of the request for accommoda-
22 tion,] I was told, I think it was a couple of
23 days before the 19th, that the decision had
24 been made and [Kyser] wanted to talk to me, he
25 told me to call him when I had some free
26 time. . . . And so he had told me when I came
27 in on the 19th that he wanted to talk to me
28 that day before I went home and that they
29 would call me when they were ready. I
30 finished my shift and nobody had called me, so
31 I went up to the office and I [let] them know
32 I was there, and then I waited. It was
33 probably a half hour, 40 minutes, and then
34 [Betancourt, Kyser,] and I went into his
35 office for our meeting about the result of the
36 accommodation. . . . [Kyser] told me that
37 because most jobs within Sears do not fall
38 within the restrictions of my disability, that
39 they would not be accommodating me.

40 . . .

41 They talked about the fact that they had
42 called around to several places that were
43 still part of Sears, but outside my Sears
44 store, for like, you know, maybe delivery, or

28 ⁵⁷Dkt. #20, Betancourt Decl., Ex. F, p. 7; ECF p. 17.

1 outlet stores, or . . . I can't think of all
2 the different places that they had been
3 calling around, trying to see if anything else
4 was available, and because of the time of year
5 it was, they hadn't had any luck. [Kyser]
6 talked about calling the person who made the
7 decision again, and talking to them, because I
8 had asked how they were working for me to
9 provide reasonable accommodations in this
10 situation, and he couldn't answer that so he
11 was going to call and talk to somebody about,
12 you know, if there is anything else I could do
13 or if this was the end of the line. And
14 [Betancourt] was going to call a couple more
15 places and see if anything else had opened.
16 And then they also talked to me about a few
17 jobs in Sears that were available, they would
18 require me to go down to part-time and lose my
19 benefits, and there still wouldn't be accommo-
20 dations, but they wanted me to consider them.
21 One was like a seasonal loss prevention job,
22 and another one was commission on the sales
23 floor, and the third one was an automotive
24 mechanic kind of job, which I'm not even
25 qualified for, so they told [Betancourt] to
26 stop bringing that one up because it wasn't
27 possible. . . . I was told that they would
28 give me 10 days to decide what I wanted to do,
and that was . . . basically the end of the
meeting.⁵⁸

17 After the meeting, Wiederhold believed her only option, if she
18 wanted to continue working full-time for Sears, was to return to
19 the MCA job "in its entirety," with "absolutely no accommodation."⁵⁹
20 She was placed on the schedule for the MCA job, but she called in
21 each week to advise that she "would not be coming in until the
22 situation was resolved," because she was not able to do the MCA
23 job.⁶⁰

24 / / /

25
26 ⁵⁸*Id.*, pp. 16-17; ECF pp. 162-63.

27 ⁵⁹*Id.*, p. 18; ECF p. 164.

28 ⁶⁰*Id.*, p. 19; ECF p. 165.

1 On December 22, 2010, Wiederhold completed an Intake Question-
2 naire to open a discrimination complaint with the Equal Employment
3 Opportunity Commission (EEOC).⁶¹ She indicated the basis for her
4 complaint was that Sears "refused reasonable accommodation" for her
5 disability.⁶² Wiederhold indicated her local store manager, Kyser,
6 and her local HR lead, Betancourt, had "done everything to
7 accommodate" her, and it was a "Hoffman Estates ACH Specialist"
8 that had made the decision on behalf of Sears that her disability
9 could not be accommodated.⁶³ Wiederhold described tasks she had
10 been doing for several months, noting those tasks all were part of
11 the MCA job, just not the "whole job." She expressed confusion as
12 to why she could not continue in the same capacity, because those
13 tasks still had to be done by someone.⁶⁴ She also claimed that
14 after her foot problems began, Cole-Vyse intentionally scheduled
15 her for tasks that were the hardest on her feet "on purpose . . .
16 as if she was trying to force [Wiederhold] to quit by causing [her]
17 misery [sic]."⁶⁵ Wiederhold stated she had to decide by
18 December 29, 2010, whether she would return to the full MCA job
19 duties, against her doctor's orders, or move to a part-time
20 position and lose her benefits.⁶⁶ She stated Sears had "back[ed]

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22 ⁶¹Dkt. #22-1, Ex. 27; ECF pp. 202-07.

23 ⁶²*Id.*, p. 2; ECF p. 203.

24 ⁶³*Id.*

25 ⁶⁴*Id.*, pp. 2-4; ECF pp. 203-05.

26 ⁶⁵*Id.*, p. 3; ECF p. 204.

27 ⁶⁶*Id.*, p. 5; ECF p. 206.

1 [her] into a corner and [made her] lose the income and medical
2 [her] family needs to survive."⁶⁷ Wiederhold checked a box on the
3 form indicating she wanted to file a discrimination charge, and she
4 authorized the EEOC to look into her allegations.⁶⁸

5 Wiederhold's financial situation was suffering due to her lack
6 of income. She spoke with an attorney about her situation, and on
7 December 27, 2010, at her attorney's urging, she called the Sears
8 corporate office and her local store to see if they might provide
9 her with a motorized scooter. According to Wiederhold, she never
10 got a response to this request.⁶⁹ Wiederhold believed there were
11 several jobs at Sears she would have been able to do with some
12 accommodation, including jobs she had discussed in her meetings
13 with management. These included doing mark-downs and markups;
14 making signs; doing some of the MCA functions she could do from a
15 chair; and doing "the sales from floor[.]"⁷⁰ She agreed, however,
16 that even with a scooter, there were some essential functions of
17 the MCA job she would have been unable to perform; specifically,
18 those tasks involving climbing.⁷¹ After the meeting on December 19,
19 2010, Wiederhold did not believe Sears would offer her any
20 modification of job duties or other accommodation.⁷² She was

22 ⁶⁷*Id.*, p. 5; ECF p. 205.

23 ⁶⁸*Id.*, p. 6; ECF p. 207.

24 ⁶⁹*Id.*, p. 18; ECF p. 164.

25 ⁷⁰*Id.*, p. 19; ECF p. 165.

26 ⁷¹Dkt. #22-1, Pl. Depo. pp. 179-81; ECF pp. 94-96.

27 ⁷²*Id.*

1 scheduled to work on January 8, 2011, but instead, Wiederhold
2 tendered her resignation that morning. According to her, Sears did
3 not offer her any other position with the store, or any accommo-
4 dations that would allow her to continue working; they simply
5 accepted her resignation.⁷³

6 In its brief, Sears describes efforts it continued to take
7 following the December 19, 2010, meeting, to try to find a position
8 that would accommodate Wiederhold's restrictions.⁷⁴ Sears made a
9 determination that even using a scooter, Wiederhold would be unable
10 to perform the essential functions of the MCA position. Therefore,
11 Sears began looking at other job possibilities for Wiederhold. On
12 January 4, 2011, Wiederhold called Betancourt to ask for an update
13 regarding her request for accommodation. At Betancourt's request,
14 Wiederhold reiterated the restrictions imposed by her doctor.
15 Betancourt and Wiederhold discussed possible alternative positions,
16 including the possibility of part-time work, or a cashier job.
17 Wiederhold indicated she would be interested in a cashier job, and
18 Betancourt said she would communicate that fact to the HR depart-
19 ment.⁷⁵ Betancourt sent an e-mail to Kyser the same day, indicating
20 Wiederhold would be interested in a cashier position, but would
21 need the ability to use a stool on a permanent basis.⁷⁶ According
22 to Betancourt, when Wiederhold came to work on January 8, 2011,
23 Betancourt had planned to talk with her about the possibility of

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25 ⁷³*Id.*, p. 20; ECF p. 166.

26 ⁷⁴*See* Dkt. #19, ECF pp. 25-30.

27 ⁷⁵Dkt. #20-1, Betancourt Decl., Ex. H, pp. 3-4; ECF pp. 22-23.

28 ⁷⁶*Id.*, Ex. I; ECF p. 25.

1 working in a cashier position, and give her accommodation paperwork
2 for completion. However, Wiederhold never returned to work,
3 instead resigning on January 8, 2011.⁷⁷ According to Betancourt,
4 a full-time cashier position became available on January 10, 2011,
5 that Wiederhold likely could have filled, using a stool as needed.⁷⁸

6 In a supplemental declaration, Wiederhold's attorney submitted
7 information about another piece of equipment - a "man lift" - that
8 Wiederhold argues could have allowed her to perform functions of
9 the MCA job that otherwise would require climbing.⁷⁹ Sears filed
10 a motion to strike the supplemental declaration as untimely and
11 prejudicial⁸⁰, but at oral argument, Sears withdrew the motion, and
12 therefore it need not be decided.

13

14 **B. Duties of the MCA position**

15 As part of its business records, Sears maintains a description
16 of the MCA position that summarizes the position, lists key roles
17 and responsibilities involved, and lists the physical demands of
18 the job.⁸¹ The position is described as follows:

19 The Merchandise and Customer Assist Associate
20 is responsible for the departmental merchan-
21 dising and also assisting customers. The
22 associate will spend his/her time replenishing
23 the floor, maintaining standards, and

23

24 ⁷⁷Dkt. #20, p. 3, ¶ 8.

25 ⁷⁸*Id.*, ¶ 11.

26 ⁷⁹Dkt. #46.

27 ⁸⁰Dkt. ##47-49.

28 ⁸¹Dkt. #20-1, Betancourt Decl., Ex. A.

1 assisting customers. The associate will be
2 responsible for floor recovery.⁸²

3 "Key Roles and Responsibilities" listed for the MCA position
4 include the following:

- 5 • Maintain the sales floor and ensure merchandise
6 presentation standards are met.
- 7 • Replenish the floor.
- 8 • Assist customers upon request.
- 9 • Assist cashiers on customer issues.
- 10 • Hand[le] and resolve customer issues.
- 11 • Follow all applicable laws, regulations, and com-
12 pany policies.
- 13 • Performs miscellaneous duties, as assigned.⁸³

14 Under "Physical Demands of Job," the MCA position description
15 indicates the associate will be required to lift up to twenty
16 pounds occasionally (defined as 1-33% of the time), and ten pounds
17 frequently (defined as 34-66% of the time); kneel, crawl, stand,
18 sit, and type/keyboard occasionally; climb ladders, reach above the
19 shoulders, and do handling/fingering frequently; and bend, squat,
20 twist, turn/pivot, reach outward, and walk constantly (defined as
21 67-100% of the time).⁸⁴

22 When Wiederhold reviewed the MCA job description during her
23 deposition, she agreed the duties listed on the form were essential
24 duties of the job, but she also indicated the list was incomplete.
25 Specifically, she noted the form does not list the duties of the
26 pricing job that was combined with the MCA job in March 2009.⁸⁵

27 / / /

28 ⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.*

⁸⁵Dkt. #22-1, Pl. Depo. pp. 123-24; ECF pp. 64-65.

1 drawn in its favor. *Id.* at 255, 106 S. Ct.
2 2505.

3 *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th
4 Cir. 2010). Notably, “[a]s a general matter, the plaintiff in an
5 employment discrimination action need produce very little evidence
6 in order to overcome an employer’s motion for summary judgment.”
7 *Chuang v. Univ. of Calif. Davis, Bd. of Trustees*, 225 F.3d 1115,
8 1124 (9th Cir. 2000). The *Chuang* court explained that this minimal
9 evidence standard is due to the nature of employment cases, where
10 “the ultimate question is one that can only be resolved through a
11 searching inquiry - one that is most appropriately conducted by a
12 factfinder, upon a full record.” *Id.* (quoting *Schnidrig v.*
13 *Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996)).

14
15 **STANDARDS RELATED TO WIEDERHOLD’S CLAIMS**

16 Wiederhold brings claims under the ADA and the corresponding
17 Oregon Act, alleging Sears discriminated against her because of her
18 disability.⁸⁶ See Dkt. #1. Specifically, she claims Sears (1)
19 constructively discharged her due to her disability; (2) retaliated
20 against her because she sought accommodation for her disability;
21 (3) failed and/or refused to engage in the interactive process to
22 determine if a reasonable accommodation existed that would allow
23 her to perform the essential functions of the MCA job; and (4)
24 failed to accommodate her disability so she could continue working.

25
26 ⁸⁶For purposes of its Motion for Summary Judgment, Sears
27 assumes Wiederhold’s foot problems constitute a disability under
28 the ADA and Oregon law. Dkt. #19, ECF p. 30, note 16. For
purposes of Sears’s motion, the court will make the same assump-
tion.

1 *Id.* She seeks economic and non-economic damages for these alleged
2 violations of the ADA and the Oregon Act. She further claims
3 Sears's actions "were part of a pattern and practice of discrimina-
4 tion against disabled employees," and she seeks an injunction to
5 prevent Sears from continuing the alleged discriminatory practices.
6 *Id.*

7 In general, the ADA prohibits an employer like Sears⁸⁷ from
8 discriminating "against a qualified individual on the basis of
9 disability in regard to job application procedures, the hiring,
10 advancement, or discharge of employees, employee compensation, job
11 training, and other terms, conditions, and privileges of employ-
12 ment." 42 U.S.C. § 12112(a). The ADA defines several terms that
13 are critical to interpreting the Act. A "qualified individual" is
14 defined as:

15 [A]n individual who, with or without reason-
16 able accommodation, can perform the essential
17 functions of the employment position that such
18 individual holds or desires. For purposes of
19 this subchapter, consideration shall be given
20 to the employer's judgment as to what func-
21 tions of a job are essential, and if an
22 employer has prepared a written description
23 before advertising or interviewing applicants
24 for the job, this description shall be con-
25 sidered evidence of the essential functions of
26 the job.

27 42 U.S.C. § 12111(8).

28 The ADA gives examples of what is included within the term
"discriminate against a qualified individual on the basis of disa-
bility":

29 ⁸⁷Neither party disagrees that Sears meets the criteria of an
"employer" or "covered entity" for purposes of the ADA. See 42
30 U.S.C. § 12111(2) & (5).

1 (A) not making reasonable accommodations to
2 the known physical or mental limitations of an
3 otherwise qualified individual with a disa-
4 bility who is an applicant or employee, unless
5 [the employer] can demonstrate that the accom-
6 modation would impose an undue hardship on the
7 operation of the [employer's] business. . . ;
8 or

9 (B) denying employment opportunities to a job
10 applicant or employee who is an otherwise
11 qualified individual with a disability, if
12 such denial is based on the need of such
13 [employer] to make reasonable accommodation to
14 the physical or mental impairments of the
15 employee or applicant[.]

16 42 U.S.C. § 12112(b) (5)⁸⁸.

17 As for what constitutes "reasonable accommodation," the ADA
18 provides as follows:

19 The term "reasonable accommodation" may
20 include -

21 (A) making existing facilities used by
22 employees readily accessible to and usable by
23 individuals with disabilities; and

24 (B) job restructuring, part-time or modi-
25 fied work schedules, reassignment to a vacant
26 position, acquisition or modification of
27 equipment or devices, appropriate adjustment
28 or modifications of examinations, training
29 materials or policies, the provision of quali-
30 fied readers or interpreters, and other
31 similar accommodations for individuals with
32 disabilities.

33 42 U.S.C. § 12111(9).

34 The corresponding Oregon law provides, "It is an unlawful
35 employment practice for any employer to refuse to hire, employ or
36 promote, to bar or discharge from employment or to discriminate in

37 ⁸⁸Sears does not argue that providing reasonable accommodation
38 to Wiederhold would result in an "undue hardship," as defined in 42
39 U.S.C. § 12111(10).

1 compensation or in terms, conditions or privileges of employment on
2 the basis of disability." ORS § 659A.112. The Oregon Act is
3 "construed to the extent possible in a manner that is consistent
4 with any similar provisions of the [ADA]." ORS § 659A.139(1).
5 Thus, Wiederhold's claims under the ADA and the Oregon Act are
6 analyzed the same. See, e.g., *Haddock v. Lucent Technologies,*
7 *Inc.*, 2008 WL 4133573 at *5 (D. Or. Aug. 29, 2008) (Brown, J.)
8 (same analysis applies to claims under ADA and Oregon law) (citing
9 *Washburn v. Columbia Forest Prod., Inc.*, 240 Or. 469, 176-77, 134
10 P.3d 161, 164-65 (2006)).

11 12 **DISCUSSION**

13 Sears claims Wiederhold's disability discrimination claims all
14 fail, for two reasons: (1) Wiederhold was not a "qualified indi-
15 vidual with a disability" because she could not perform the
16 essential functions of her job, with or without accommodation; and
17 (2) Sears did, in fact, engage in the interactive process with
18 Wiederhold for nearly two years, but was unable to continue the
19 interactive process due to Wiederhold's voluntary resignation.⁸⁹
20 In addition, Sears argues Wiederhold cannot prove her disparate
21 treatment claim⁹⁰ because (a) there is no evidence Sears created,
22

23 ⁸⁹Dkt. #19, ECF pp. 30-31.

24 ⁹⁰Although Wiederhold characterized Count 1 of her First Claim
25 for Relief as a "disparate treatment" claim, it appears this is a
26 misnomer. She actually is alleging a disability discrimination
27 claim, where the adverse employment action she suffered was a
28 constructive discharge brought about, alternatively, by Sears's
failure to engage in the interactive process as required by the
ADA, or failure to accommodate her disability as required by the
(continued...)

1 or exposed Wiederhold to, intolerable conditions that forced her to
2 resign; and (b) Wiederhold actually suffered no adverse employment
3 action, instead resigning voluntarily.⁹¹ Further, Sears argues
4 Wiederhold failed to exhaust her administrative remedies with
5 regard to her constructive discharge claim, requiring dismissal of
6 that claim.

7
8 **A. "Qualified Individual"**

9 Sears argues Wiederhold was not a "qualified individual with
10 a disability," for purposes of the ADA and the Oregon Act, because
11 she was unable to perform the essential functions of the MCA job,
12 either with or without an accommodation. Stated differently, Sears
13 claims Wiederhold cannot show she would have been able to perform
14 the essential functions of the MCA job even with the accommodations
15 Wiederhold suggests; i.e., the use of a scooter and a reaching
16 device.⁹² Sears relies on its written job description of the MCA
17 position to establish the "essential functions" of the position.
18 In Sears's view, the "key roles and responsibilities" enumerated in
19 the MCA job description encompassed the pricing-related duties
20 described by Wiederhold in her deposition.⁹³ Sears asserts that

21
22 ⁹⁰ (...continued)

23 ADA. At oral argument, Wiederhold's attorney conceded that there
24 is no evidence Wiederhold was treated differently than other
25 similarly-situated employees; i.e., no evidence of "disparate
treatment."

26 ⁹¹Dkt. #19, ECF pp. 46-50.

27 ⁹²*Id.*, ECF p. 35.

28 ⁹³*Id.*, note 19.

1 given the restrictions imposed by Wiederhold's doctor, she would be
2 unable to perform activities requiring climbing and pushing/
3 pulling. Thus, although a scooter would assist her with mobility,
4 Wiederhold would not be able to perform any of the duties requiring
5 her to climb a ladder, or to push/pull heavy carts full of
6 merchandise.⁹⁴

7 Wiederhold argues Sears is conflating the physical demands of
8 the MCA position and its essential functions. She argues the
9 essential functions of the MCA position, and the means of accom-
10 plishing those tasks, are two different things; in other words,
11 what is important is that the tasks get done, not the means by
12 which they are accomplished. Wiederhold argues she could have
13 performed the essential functions of the MCA position with reason-
14 able accommodations, including the use of a reaching device and a
15 motorized scooter.

16 In her brief, Wiederhold argues that "very little of [her]
17 time performing MCA duties actually required her to be on her
18 feet."⁹⁵ In support of her argument, Wiederhold cites paragraph 3
19 of her Declaration submitted in support of her response to Sears's
20 Motion for Summary Judgment.⁹⁶ Sears moves to strike paragraph 3
21 of Wiederhold's Declaration, arguing, among other things, that her
22 statements contradict and/or substantively alter her deposition
23
24

25 ⁹⁴*Id.*, ECF pp. 33-37.

26 ⁹⁵Dkt. #23, ECF p. 12 (citing Dkt. #24-2, Wiederhold's
27 Declaration, ¶ 3).

28 ⁹⁶*Id.*

1 testimony.⁹⁷ Sears cites numerous instances during Wiederhold's
2 deposition when she testified the MCA job duties frequently
3 required her to climb a ladder; climbing ladders was "very, very
4 difficult" for her, and "one of the hardest things for [her] to
5 do"; and climbing a ladder three times during an eight-hour shift
6 "would hurt."⁹⁸ Wiederhold also testified she has to sit to put on
7 pants, because she "can't stand all [her] weight on one foot."⁹⁹
8 As noted above, Wiederhold also agreed that Sear's written job
9 description for the MCA job, which lists climbing as a "frequent"
10 duty of the MCA job, "looks about right."¹⁰⁰

11 Wiederhold argues her statements in her Declaration do not
12 contradict her earlier statements. She notes that during her
13 deposition, she was never asked if she would have been able to
14 handle occasional climbing duties if she had been accommodated with
15 a scooter or similar device for the performance of the other duties
16 of the MCA position. She also contends that during the last few
17 months of her employment with Sears, she typically did not have to
18 do much climbing, and therefore, she would have been able to

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23 ⁹⁷Dkt. #29; Dkt. #30, pp. 1-7.

24 ⁹⁸*Id.* (citing Wiederhold Depo. pp. 71, 87, 89, 91, 108; and
25 Wiederhold's handwritten statement to the Oregon Bureau of Labor
and Industries ("BOLI"), Dkt. #34-1, Ex. 37; ECF pp. 27-28).

26 ⁹⁹Dkt. #22-1, Wiederhold Depo. p. 67; ECF p. 19.

27 ¹⁰⁰*Id.*, Wiederhold Depo. p. 124; ECF p. 65; see Dkt. #20-1,
28 Betancourt Decl., Ex. A, MCA job description.

1 continue working in that same capacity had she been provided with
2 a scooter.¹⁰¹

3 I recently observed that a party is not permitted to contra-
4 dict prior deposition testimony for purposes of creating an issue
5 of fact. *Nolan v. Transcend Servs., Inc.*, slip op., 2012 WL 14021
6 at *5 (D. Or. Jan. 4, 2012) (Hubel, M.J.). The Ninth Circuit Court
7 of Appeals has observed, "If a party who has been examined at
8 length on deposition could raise an issue of fact simply by
9 submitting an affidavit contradicting [her] own prior testimony,
10 this would greatly diminish the utility of summary judgment as a
11 procedure for screening out sham issues of fact." *Kennedy v.*
12 *Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) (internal
13 quotation marks, citations omitted); accord *Nolan, supra*. However,
14 the *Kennedy* court further noted this rule only applies to actual
15 "sham" testimony, rather than to the case where a subsequent
16 affidavit merely explains or clarifies certain aspects of the
17 deposition testimony. *Kennedy*, 952 F.2d at 266-67.

18 In this case, Wiederhold's explanation of her subsequent
19 Declaration barely escapes the prohibition on contradicting one's
20 own deposition testimony. Her declaration is perilously close to
21 a clear contradiction of parts of her deposition testimony.
22 However, the context of the questioning in the deposition, and the
23 statements in the declaration, if repeated at trial, will need to
24 be evaluated by the finder of fact to determine if she is "changing
25 her story." I find she has, by a slim margin, succeeded in

26
27 ¹⁰¹Dkt. #35, pp. 3-4. See also Dkt. #46, suggesting Wiederhold
28 could have performed duties involving climbing if she were accom-
modated with an "electric man lift," or similar device.

1 establishing a factual issue for the jury's consideration regarding
2 whether she could have performed the essential functions of the MCA
3 job if she had been provided with a scooter, a reaching device, a
4 "man lift," or some other accommodation, and thus, she has avoided
5 summary judgment.

6 Perhaps more importantly, Wiederhold also would be covered by
7 the ADA if she could perform the essential functions of another
8 position in the company which she "desired," with or without
9 reasonable accommodation, even if she were unable to perform the
10 essential functions of the MCA position. *Barnett v. U.S. Air,*
11 *Inc.*, 228 F.3d 1105, 1111 (9th Cir. 2000) (noting this conclusion
12 "is supported by nearly every circuit which has considered the
13 issue"), *rev'd on other grounds*, 535 U.S. 391, 122 S. Ct. 1516, 152
14 L. Ed. 2d 589 (2002). It appears from the statements of Sears's
15 own witnesses that Wiederhold could have performed the cashier
16 position, with the reasonable accommodation of using a stool as
17 necessary. If so, then Wiederhold would be a "qualified
18 individual" on that basis.

19 I therefore **deny** Sear's motion (Dkt. #29) to strike paragraph
20 3 of Wiederhold's Declaration. For the same reason, I **deny** Sear's
21 Motion for Summary Judgment on this basis.

22

23 **B. Interactive Process**

24 Sears argues it did, in fact, engage in the interactive
25 process with Wiederhold in an attempt to determine whether
26 reasonable accommodations would enable her to continue working.
27 Sears argues it complied with every accommodation Wiederhold
28 requested up until December 2010, when it determined she could not

1 perform the essential functions of the MCA job, even with a
2 motorized scooter. Sears notes it modified Wiederhold's work
3 schedule, permitted her to wear a boot and cast, gave her rest
4 breaks as required, extended her FMLA leave beyond what was required
5 by law, and even "temporarily eliminated essential job
6 functions."¹⁰² Sears argues it was Wiederhold's premature resigna-
7 tion that halted the interactive process, rather than any action
8 taken by Sears, and it cannot "be held liable for failure to
9 accommodate unless it 'bears responsibility for the breakdown in
10 the interactive process.'"¹⁰³

11 Wiederhold argues Sears became aware that she required some
12 type of accommodation as early as March 27, 2010, and without
13 question at least by July 4, 2010. She claims Sears never communi-
14 cated with her in good faith regarding appropriate accommodation
15 options, as required by the ADA and the applicable regulations.
16 Wiederhold acknowledges that Sears provided her with certain
17 accommodations for a period of time without discussing available
18 options with her, but she maintains Sears never engaged in any
19 interactive process with her regarding accommodation options, never
20 responded to her request for a motorized scooter, and never told
21 her they were trying to find a cashier job for her.¹⁰⁴

22 The Ninth Circuit has explained what an employer must do to
23 comply with its duty to engage in an interactive process with an
24

25 ¹⁰²Dkt. #19, ECF p. 38.

26 ¹⁰³*Id.*, ECF p. 39 (quoting *Zivkovic v. S. Calif. Edison Co.*,
27 302 F.3d 1080, 1089 (9th Cir. 2002)).

28 ¹⁰⁴Dkt. #23, pp. 15-28; ECF pp. 20-33.

1 employee. The legislative history of the ADA indicates, “A
2 problem-solving approach should be used to identify the particular
3 tasks or aspects of the work environment that limit performance[,]
4 and to identify possible accommodations . . . employers first will
5 consult with and involve the individual with a disability in
6 deciding on the appropriate accommodation.” *Barnett*, 228 F.3d at
7 1111 (quoting S. Rep. No. 101-116, at 34 (1989)). “This inter-
8 active process ‘requires: (1) direct communication between the
9 employer and employee to explore in good faith the possible
10 accommodations; (2) consideration of the employee’s request; and
11 (3) offering an accommodation that is reasonable and effective.’”
12 *U.S.E.E.O.C. v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1110
13 (9th Cir. 2010) (quoting *Zivkovic v. S. Calif. Edison Co.*, 302 F.3d
14 1080, 1089 (9th Cir. 2002)). The employer does not have to provide
15 a particular accommodation requested or preferred by the employee;
16 “‘the employer need only provide some reasonable accommodation.’”
17 *Id.*, 620 F.3d at 1110-11 (quoting *Zivkovic*, 302 F.3d at 1089;
18 internal quotation marks omitted).

19 The employer’s duty to accommodate “‘is a continuing duty that
20 is not exhausted by one effort.’” *Id.* (quoting *Humphrey v. Mem’l*
21 *Hosps. Ass’n*, 239 F.3d 1128, 1138 (9th Cir. 2001)). Thus, when an
22 employer “is aware that the initial accommodation is failing and
23 further accommodation is needed,” *id.*, the employer must continue
24 to engage in the interactive process in order to determine an
25 “appropriate reasonable accommodation” that will enable the
26 employee “to perform the duties of the position.” *Id.*, 620 F.3d at
27 1110-11 (internal quotation marks omitted; citing *Humphrey*, 239
28 F.3d at 1137, 1138). Notably, the issue of whether or not an

1 accommodation is reasonable ordinarily is a question of fact. *Id.*
2 (citing *Lujan v. Pac. Maritime Ass'n*, 165 F.3d 738, 743 (9th Cir.
3 1999)).

4 Wiederhold's contentions regarding Sears's alleged failure to
5 engage in the interactive process as early as March, or even July,
6 of 2010, are not persuasive. As the *Barnett* court noted, the
7 applicable regulation indicates that in determining an appropriate
8 reasonable accommodation, "'it may be necessary for the [employer]
9 to initiate an informal, interactive process with the [disabled
10 employee] in need of the accommodation.'" *Barnett*, 228 F.3d at
11 1111-12 (quoting 29 C.F.R. § 1630.2(o)(3); emphasis added). The
12 court noted the use of the phrase "may be necessary" indicates that
13 in some cases, interaction *will not be* necessary because "the
14 employer and the employee can easily identify an appropriate
15 reasonable accommodation." *Id.*, 228 F.3d at 1112. Such was the
16 case here, where Sears initiated appropriate accommodations in
17 compliance with each of Wiederhold's doctor's notes from the time
18 she began having problems with her feet until at least November
19 2010, when she was put back on the regular work schedule for MCAs.

20 However, on the current record, Wiederhold has shown an issue
21 of fact exists as to whether Sears properly engaged in the
22 interactive process with her from the first of November 2010,
23 forward. There is a question of fact whether appropriate communi-
24 cation between the parties could have prevented Wiederhold's resig-
25 nation altogether, and resulted in her placement in a cashier's
26 position that would have accommodated her needs. Although Sears
27 argues it was continuing to consider Wiederhold's request and was
28 looking for other jobs Wiederhold might be able to do within the

1 company, it is for the jury to decide whether the facts presented
2 satisfy the interactive process required by the ADA. I therefore
3 **deny** Sear's Motion for Summary Judgment on this basis.

4
5 **C. Disparate Treatment/Constructive Discharge Claim**

6 Sears first argues Wiederhold cannot prevail on her disparate
7 treatment claim because she is not a "qualified" individual with a
8 disability, for purposes of the ADA. The court has already
9 resolved this argument for purposes of summary judgment, above.

10 Sears further argues Wiederhold did not suffer any adverse
11 employment action because she resigned voluntarily. Thus, Sears
12 asserts Wiederhold must be able to establish "constructive dis-
13 charge" in order to prevail on this claim.

14 To show constructive discharge under federal law, Wiederhold
15 must show Sears created or maintained working conditions that were
16 "so 'extraordinary and egregious [as] to overcome the normal moti-
17 vation of a competent, diligent, and reasonable employee to remain
18 on the job to earn a livelihood and to serve his or her employer.'" *Wood v. GCC Bend, LLC*, 270 Fed. Appx. 484, 486 (9th Cir. 2008)
19 (quoting *Poland v. Chertoff*, 494 F.3d 1174, 1183 (9th Cir. 2007)).
20 Under Oregon law, Wiederhold must show "that she experience[d] a
21 concrete change in the terms and conditions of her employment that
22 caused her to resign." *Id.* (citing *Doe v. Denny's*, 327 Or. 354,
23 359, 963 P.2d 650, 654 (1998)). Wiederhold must show Sears's
24 alleged failure to accommodate her disability created working
25 conditions for her that were so intolerable, any reasonable person
26 in her position would have resigned because of them. *McGanty v.*
27 *Staudenraus*, 321 Or. 532, 901 P.2d 841 (1995). Sears argues

1 Wiederhold has failed to meet these standards of proof, or to show
2 that any material issue of fact exists regarding whether she was
3 constructively discharged.

4 Further, even if Wiederhold has alleged facts sufficient to
5 support a constructive discharge claim, Sears argues such a claim
6 is barred because Wiederhold failed to exhaust her administrative
7 remedies regarding her constructive discharge claim.¹⁰⁵ Wiederhold
8 moved to strike this argument, raised for the first time in Sears's
9 reply brief, as untimely, and also because she had not had an
10 opportunity to respond.¹⁰⁶ I denied Wiederhold's motion,¹⁰⁷ but
11 allowed the parties to brief the exhaustion issue separately.¹⁰⁸

12 Wiederhold asserts Sears is basing its exhaustion argument
13 solely on the written charge prepared by the EEOC from Wiederhold's
14 "Charge of Discrimination" form. She characterizes the written
15 charge as "very short and rather open-ended."¹⁰⁹ She also argues
16 there is no exhaustion requirement under Oregon law, and she has
17 complied with the state law requirement that her lawsuit be filed
18 within one year of the allegedly discriminatory act.¹¹⁰

19 With regard to her constructive discharge claim under federal
20 law, Wiederhold argues the court must look beyond the language of
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22 ¹⁰⁵See Dkt. #32, ECF pp. 25-29.

23 ¹⁰⁶Dkt. #39.

24 ¹⁰⁷Dkt. #41.

25 ¹⁰⁸See Dkt. ##32, 45, 45-1, 50, & 51.

26 ¹⁰⁹Dkt. #45, p. 1.

27 ¹¹⁰*Id.*, p. 2.

1 her initial charge, and focus on "what claims the EEOC actually
2 investigated, or what claims it reasonably should have investi-
3 gated."¹¹¹ According to Wiederhold, her lawsuit could "encompass
4 any claims that the EEOC would have had to consider to evaluate, or
5 even understand, [her] theory of the case."¹¹² She asserts her
6 claims in this case need only be "consistent with" the facts she
7 reported to the EEOC, and could ""encompass any discrimination
8 like or reasonably related to the allegations in the EEOC
9 charge.""¹¹³ In a supplemental declaration on this issue,
10 Wiederhold states she told the EEOC investigator that she had
11 resigned, and her resignation was based, primarily, on Sears's
12 refusal to accommodate her disability.¹¹⁴ Indeed, she argues she
13 has maintained throughout that her resignation was due to Sears's
14 failure to accommodate her, so a constructive discharge claim is
15 consistent with her failure to accommodate claim.¹¹⁵

16 Sears responds that merely telling the EEOC investigator she
17 had resigned due to Sears's failure to accommodate her falls well
18 short of notifying the EEOC, and therefore of putting Sears on
19 notice, that Wiederhold was claiming Sears "intentionally and
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21 ¹¹¹*Id.*, p. 3 (citing *B.K.B. v. Maui Police Dept.*, 276 F.3d
22 1091, 1100 (9th Cir. 2002)).

23 ¹¹²*Id.* (citing *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th
24 Cir. 1994)).

25 ¹¹³*Id.* (citing *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d
26 632, 636 (9th Cir. 2002), in turn quoting *Oubichon v. N. Am.*
Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973)).

27 ¹¹⁴Dkt. #45-1, ¶ 4.

28 ¹¹⁵See Dkt. #45, p. 4.

1 continually subjected her to a hostile and discriminatory environ-
2 ment in an effort to drive her from the workplace as a result of
3 her disability - constructive discharge."¹¹⁶ Sears agrees with the
4 standards upon which Wiederhold relies, acknowledging that her
5 lawsuit could include allegations of discrimination that either
6 "'fell within the scope of the EEOC's actual investigation or an
7 EEOC investigation which *can reasonably be expected* to grow out of
8 the charge of discrimination.'"¹¹⁷ However, Sears argues the EEOC
9 did not investigate a constructive discharge claim, nor could such
10 an investigation reasonably have been expected to grow out of
11 Wiederhold's failure to accommodate claim.¹¹⁸

12 In support of her assertion that the court should focus on
13 claims the EEOC "reasonably should have investigated," Wiederhold
14 cites *B.K.B. v. Maui Police Department*, 276 F.3d 1091 (9th Cir.
15 2002). Sears argues *B.K.B.* is distinguishable on its facts.

16 In *B.K.B.*, the plaintiff, a female police officer, sued the
17 police department and the County of Maui for alleged discrimination
18 based on her race and sex in violation of Title VII and state law;
19 retaliation; violation of a Hawaii whistleblower statute; and
20 infliction of emotional distress. The district court dismissed the
21 plaintiff's federal and state statutory sexual harassment claims at
22 the summary judgment stage, finding she had failed to exhaust her
23 administrative remedies.

24

25 ¹¹⁶Dkt. #50, p. 2.

26 ¹¹⁷*Id.* (quoting *Freeman*, *supra* note 112, 291 F.3d at 636
27 (citations omitted; emphasis in original).

28 ¹¹⁸*Id.*, pp. 3-5.

1 The record in the case indicates the plaintiff filed a "Charge
2 of Discrimination" in November 1997, with the Hawaii Civil Rights
3 Commission ("HCRC"). A concurrent federal administrative review of
4 her discrimination claim also was initiated as a result of her
5 filing of the form. On the charge form, and in a pre-complaint
6 questionnaire, the plaintiff checked boxes "indicating discrimina-
7 tion and harassment based on race, color, and sex." *B.K.B.*, 276
8 F.3d at 1096. She gave some examples of harassment by fellow
9 officers, and retaliation and harassment she suffered after she
10 wrote a memorandum to her Captain about the alleged harassment, but
11 the examples she gave did not specifically involve sexual harass-
12 ment. "The EEOC and HCRC issued Plaintiff a right-to-sue letter
13 without investigating her claims." *Id.*, 276 F.3d at 1096. After
14 the plaintiff filed suit, she obtained a declaration from an HCRC
15 employee stating her "'Right to Sue was intended to afford her a
16 lawsuit involving harassment, on the protected basis of race,
17 color, and sex as indicated on the Pre-Complaint Questionnaire
18 . . . and the [charge].' Nevertheless, the district court dis-
19 missed Plaintiff's federal and state statutory sexual harassment
20 claims prior to trial, on the ground that she had waived them by
21 failing to raise them adequately in her charge." *Id.*

22 On review, the Ninth Circuit noted that the purposes of an
23 administrative charge are to provide the charged party with notice
24 of the claim, and to narrow the issues for prompt adjudication and
25 decision. *Id.*, 276 F.3d at 1099 (internal quotation marks,
26 citations omitted). Concerning the EEOC's treatment of the
27 administrative charge, the court held as follows:

28

1 The EEOC's failure to address a claim
2 asserted by the plaintiff in her charge has no
3 bearing on whether the plaintiff has exhausted
4 her administrative remedies with regard to
5 that claim. *Yamaguchi v. United States Dep't*
6 *of the Air Force*, 109 F.3d 1475, 1480 (9th
7 Cir. 1997). Similarly, as in the present
8 action, whether the EEOC in fact conducted any
9 investigation at all is not material for pur-
10 poses of exhaustion. *Cf. Martin v. Nannie &*
11 *the Newborns, Inc.*, 3 F.3d 1410, 1413, 1416
12 n.7 (10th Cir. 1993) (where the EEOC "did not
13 complete an investigation" plaintiff neverthe-
14 less succeeded in exhausting claims reasonably
15 related to the allegations included in her
EEOC charge). Subject matter jurisdiction
extends over all allegations of discrimination
that either "fell within the scope of the
EEOC's actual investigation or an EEOC inves-
tigation which can reasonably be expected to
grow out of the charge of discrimination."
[*EEOC v. Farmer Bros [Co.]*, 31 F.3d [891,]
899 (9th Cir. 1994)] (emphasis in the origi-
nal) (internal quotations omitted); see also
Sosa v. Hiraoka, 920 F.2d 1451, 1456 (9th Cir.
1990) ("The jurisdictional scope of a title
VII claimant's court action depends upon the
scope of both the EEOC charge and the EEOC
investigation.").

16 *B.K.B.*, 276 F.3d at 1099-1100 (emphasis in original).

17 The *B.K.B.* court noted that Ninth Circuit precedents take a
18 deferential approach and "construe the language of EEOC charges
19 'with utmost liberality since they are made by those unschooled in
20 the technicalities of formal pleading.'" *B.K.B.*, 276 F.3d at 1100
21 (quoting *Kaplan v. Int'l Alliance of Theatrical & Stage Employees*,
22 525 F.2d 1354, 1359 (9th Cir. 1975), abrogated on other grounds by
23 *Laughon v. Int'l Alliance of Theatrical Stage Employees*, 248 F.3d
24 931 (9th Cir. 2001)). The court found the crucial element of a
25 discrimination charge to be "the factual statement contained
26 therein," noting that a court should consider all of a plaintiff's
27 civil claims "reasonably related to allegations in the charge to
28 the extent that those claims are consistent with the plaintiff's

1 original theory of the case." *Id.* (citations omitted). In *B.K.B.*,
2 the court found the plaintiff had included allegations of sexual
3 harassment in her pre-complaint questionnaire, and the "charge
4 itself [was] deficient in recording her theory of the case due to
5 the negligence of an agency representative who complete[d] the
6 charge form[.]" *Id.*, 276 F.3d at 1102. The court found that the
7 declaration of the HCRC employee suggested any deficiency in the
8 charge itself was attributable to the agency, not to the plaintiff,
9 and because the plaintiff had "checked boxes indicating a charge of
10 sexual harassment, . . . [the court] should read the term
11 'harassment' broadly where it appears in the factual allegations of
12 Plaintiff's discrimination charge. . . . Though not as artfully as
13 we might wish, Plaintiff was complaining about racial and sexual
14 harassment in her charge. We therefore hold that her Title VII
15 sexual harassment claim was properly exhausted." *Id.*, 276 F.3d at
16 1102, 1103.

17 Sears argues that in *B.K.B.*, the EEOC had actual knowledge of
18 the plaintiff's intention to bring a sexual harassment claim. In
19 contrast, in the present case, Wiederhold did not put the EEOC on
20 notice - and, therefore, Sears was not on notice - that Wiederhold
21 intended to assert a claim for constructive discharge. Sears
22 asserts the EEOC never had notice of or investigated a claim of
23 constructive discharge, and the position statement Sears filed in
24 response to Wiederhold's EEOC charge "clearly demonstrates it was
25 not on notice of such a claim[.]"¹¹⁹ Sears argues "the law is clear
26 that constructive discharge claims do not reasonably flow from

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28 ¹¹⁹Dkt. #50, p. 2.

1 prior discriminatory acts, but are separate acts of discrimination
2 that require administrative exhaustion.”¹²⁰

3 Sears relies on *Ong v. Cleland*, 642 F.2d 316 (9th Cir. 1981),
4 for its argument that Wiederhold’s failure to allege constructive
5 discharge in her EEOC complaint is fatal to such a claim in the
6 present action. In *Ong*, the plaintiff, “an American citizen of
7 Chinese national origin,” filed an administrative action claiming
8 she was denied a promotion with the Veterans Administration due to
9 her national origin. While the administrative case was pending,
10 Ong “took a disability retirement due to a nervous condition
11 allegedly provoked by the complained-of employer conduct.” *Ong*,
12 642 F.2d at 317. The administrative action resulted in a ruling in
13 Ong’s favor on her claim that she was not promoted due to her race.
14 She was awarded a retroactive promotion to the date of her disa-
15 bility retirement. However, she did not receive back pay because
16 her new position “was rated lower than her previous position and
17 she did not hold the new position for the twelve-month period
18 required for promotion to the next GS level.” *Id.*, 642 F.2d at
19 318.

20 Ong filed suit for additional damages on the theory that “she
21 was ‘constructively discharged’ by the discriminatory promotional
22 decision of the agency[.]” *Id.*, 642 F.2d at 319. In a deposition
23 taken in connection with the case, she testified her nervous symp-
24 toms that resulted in her retirement arose from her anxiety sur-
25 rounding the administrative action. *Id.* On summary judgment, “the
26 district court found as a matter of law that Ong had waived her
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28 ¹²⁰*Id.* (emphasis in original).

1 right to federal court jurisdiction over her Title VII claim for
2 additional damages by failing to exhaust her administrative
3 remedies." *Id.*, 642 F.2d at 317. The Ninth Circuit's discussion
4 of the issue on appeal is instructive in the present case:

5 Although Ong attempts to frame her disability
6 retirement as "like or reasonably
7 related" to the employer's established discrimination
8 in promotion, her arguments are not persuasive. Ong did not allege
9 administratively that her employer had engaged in a pattern or
10 practice of discrimination against her. [Citation omitted.] Nor did
11 Ong attempt to amend her administrative complaint to encompass
12 events occurring after it was originally lodged. *Cf. Sanchez v. Standard*
13 *Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) (amended charges could
14 be heard in federal court); *De Medina v. Reinhardt*, 444 F. Supp.
15 573, 578-79 (D.D.C. 1978) (plaintiff's failure to amend administrative
16 complaint to add subsequent claims of discrimination was failure
17 to exhaust and required dismissal of those claims from federal court
18 suit). The issue of Ong's disability retirement and particularly,
19 whether it was proximately caused by the agency's promotional decision
20 was not presented administratively. The agency was therefore not
21 given the opportunity to consider the issue before initiation of the
22 Title VII suit. The failure to raise an issue administratively subverts
23 the procedures and policies of Title VII and justifies precluding
24 its presentation in federal court. [Citation omitted.] . . . Ong's
25 failure to raise administratively the issue of her disability retirement
26 as an incident of her employer's discrimination in promotion prevented
27 agency consideration of it. Because Title VII is intended to promote
28 informal conciliation of employment discrimination claims and because
29 Ong's failure to present that issue frustrated Title VII policy, we
30 find that Ong failed to exhaust her administrative remedies.

31 *Ong*, 642 F.3d at 320.

32 In *Wiederhold's "Charge of Discrimination,"* she stated Sears
33 had denied her request for reasonable accommodation for her
34 disability. She asserted, "I believe that I was discriminated

1 against because of my disability in violation of the [ADA]."¹²¹ On
2 her EEOC Intake Questionnaire, Wiederhold claimed Cole Vyse had
3 intentionally scheduled her for tasks that were the hardest on
4 Wiederhold's feet "on purpose . . . as if she was trying to force
5 [Wiederhold] to quit by causing [her] misery [sic]."¹²² Wiederhold
6 indicated Sears had "back[ed] [her] into a corner and [made her]
7 lose the income and medical [her] family needs to survive."¹²³ A
8 subsequent letter to Wiederhold from the EEOC investigator demon-
9 strates that the EEOC was aware Wiederhold had resigned from her
10 job subsequent to initiating the EEOC action. The EEOC investiga-
11 tor wrote to Wiederhold about her discrimination charge, indicating
12 the basis of her charge was an allegation that she was "discrimi-
13 nated against due to [her] disability when [she] was denied a
14 reasonable accommodation."¹²⁴ The investigator described Sears's
15 response to the charge as follows:

16 The employer states that you were provided
17 with reasonable accommodations, including
18 additional leave. When medical information
19 indicated that you were no longer qualified to
20 perform the essential functions of you[r]
21 position as a Merchandise and Customer Assis-
22 tant Associate, the employer did not have any
23 other full time positions available that would
24 allow for the accommodations you needed. You
25 were offer a part time position, but you chose
26 to resign.¹²⁵

27 ¹²¹Dkt. #45-1, p. 3.

28 ¹²²Dkt. #22-1, Ex. 27, p. 3; ECF p. 204.

¹²³*Id.*, p. 5; ECF p. 205.

¹²⁴*Id.*, p. 5.

¹²⁵*Id.*

1 I find Wiederhold's statements on the intake questionnaire, and the
2 EEOC's knowledge that she had resigned, were sufficient to put the
3 agency on notice that Wiederhold was claiming Sears's actions
4 forced her to resign. I find the facts of this case are more
5 analogous to *B.K.B.* than to *Ong*, with the failure to expressly
6 include a constructive discharge claim in the formal charge resting
7 with the agency, not with Wiederhold. This conclusion is
8 consistent with the Ninth Circuit's deferential approach, and
9 recognition that the initial charge and factual recitation are pre-
10 pared "by those unschooled in the technicalities of formal
11 pleading." *B.K.B.*, 276 F.3d at 1100 (internal quotation marks,
12 citation omitted). Thus, I find Wiederhold has exhausted her
13 administrative remedies with regard to her constructive discharge
14 claim. I further find she has shown an issue of material fact
15 exists as to whether Sears's actions, or inaction, created
16 intolerable working conditions that caused Wiederhold to resign.
17 Accordingly, I **deny** Sear's motion for summary judgment as to
18 Wiederhold's constructive discharge claim.

19 However, Wiederhold has not offered any evidence to support
20 her claim that Sears regularly engages in discriminatory treatment
21 of disabled individuals. At oral argument, Wiederhold's attorney
22 conceded that Wiederhold has not produced evidence of a pattern and
23 practice of discrimination by Sears against disabled employees
24 other than Wiederhold. Accordingly, I **grant** Sears's Motion for
25 Summary Judgment as to Wiederhold's claim for injunctive relief,
26 contained in Count I of her First Claim for Relief.

27 / / /

28 / / /

1 **CONCLUSION**

2 Sear's Motion for Summary Judgment (Dkt. #17) is **granted in**
3 **part and denied in part.** The motion is **granted** as to Wiederhold's
4 claim for injunctive relief. The motion is **denied** on all other
5 bases.

6 Sears's motion (Dkt. #29) to strike paragraph 3 of
7 Wiederhold's Declaration is **denied.**

8 Wiederhold's motion (Dkt. #39) to strike section D.1 of
9 Sears's reply brief is **denied as moot.**

10 Sear's motion (Dkt. #47) to strike Eric Fjelstad's supple-
11 mental declaration (Dkt. #46) in support of Wiederhold's opposition
12 to Sears's motion for summary judgment was **withdrawn** by Sears.

13 IT IS SO ORDERED.

14 Dated this 23rd day of August, 2012.

15
16 /s/ Dennis J. Hubel

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18 Dennis James Hubel
19 Unites States Magistrate Judge
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