EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-005-18

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75, LOCAL 3997, Complainant, v. DESCHUTES COUNTY PUBLIC LIBRARY DISTRICT, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On September 24, 2019, this Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe after a hearing on November 16, 2018, in Bend, Oregon. The record closed on December 26, 2018, upon receipt of the parties' post-hearing briefs. At the September 24, 2019, oral argument before the Board, Respondent moved to submit additional briefing concerning the Americans with Disabilities Act (ADA), 42 USC § 12101 *et seq*. This Board granted the motion, and both parties submitted additional briefing on October 16, 2019, at which point the matter was deemed submitted to the Board.[1]

Jennifer K. Chapman, Legal Counsel, Oregon AFSCME Council 75, Salem, Oregon, represented the Complainant at hearing. Jason M. Weyand, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented the Complainant at oral argument.

Bruce Bischof, Attorney at Law, Law Offices of Bruce Bischof, Bend, Oregon, represented the Respondent at hearing. Nancy J. Hungerford, Attorney at Law, The Hungerford Law Firm, Oregon City, Oregon, represented the Respondent at oral argument.

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[1]In their briefs, both parties argued that it was not necessary to rely on or invoke the ADA to decide this case. Relatedly, we note that AFSCME's underlying grievances asserted that the District discriminated against CN because of "either her age or her disability." However, AFSCME presented very little (and not sufficient) evidence to support such a claim and did not focus on this assertion in its post-hearing brief, its objections, or its submissions to the Board.

On February 12, 2018, Complainant Oregon AFSCME Council 75, Local 3997 (AFSCME) filed an unfair labor practice complaint against Respondent Deschutes County Public Library District (District). The issue presented by the complaint is: With respect to ORS 243.672(1)(g), in August 2017, did the District terminate library employee "CN" without just cause, and in violation of Article 6 of the parties' collective bargaining agreement? We conclude that the District did not terminate CN without just cause and therefore did not violate ORS 243.672(1)(g).

RULINGS

All rulings made by the ALJ were reviewed and are correct.

FINDINGS OF FACT

Background

1. The District is a public employer within the meaning of ORS 243.650(20).

2. The District operates six library branches in Deschutes County—one in Sisters, one in La Pine, one in Sunriver, one in Redmond, and two in Bend. One of the two Bend branches is known as the "Downtown Bend" branch.

3. The Sisters branch is relatively small. When fully staffed, the Sisters branch employs just three Public Services Specialists (Public Services Specialist or PSS). Moreover, frequently only one Public Services Specialist is on duty there. In contrast, over 24 employees are assigned to the Downtown Bend branch. Accordingly, employees assigned to Downtown Bend never need to work alone. The Downtown Bend branch is also open seven days a week, while the Sisters branch is open only five days a week.

4. Todd Dunkelberg is the District's Director. Lynne Mildenstein is the Assistant Director. During the events at issue, Tina Williams was the Human Resources Manager. Holly McKinley is the Library Operations Manager. All of the branches' supervisors report to McKinley. Zoe Schumacher is a Public Services Supervisor for the District. In that role, Schumacher supervises a number of Public Services Specialists. Schumacher's "home branch" is the Sisters branch. CN was a PSS at Sisters when she was terminated.

5. AFSCME is a labor organization within the meaning of ORS 243.650(13). It represents a bargaining unit of all regular employees of the District, excluding supervisory and confidential employees, temporary employees, and employees who work less than 80 hours per month. The bargaining unit includes CN's former PSS position and the Materials Specialist position, among others. Jared Kollen is a Council Representative for AFSCME.

6. Over 80 people volunteer for the District. Some of them work at the Sisters branch. However, there is not always a volunteer on duty at every branch. Volunteers are usually between 50 and 60 years old, though there are some teenaged volunteers as well. A volunteer's primary function is shelving books, but volunteers also empty book drops, shred paper, sharpen pencils, and pick up children's areas. Normally, a volunteer's shift is two hours long.

7. Before the events of this case, employees at the Sisters branch have been placed on work restrictions and have relied on help from others in order to help them heal from injuries or surgeries. Whatever accommodations were made were consistent with the injured employees' work releases. One District employee (not CN) who underwent stomach surgery was off work for several months then "had some weight restrictions on what she could lift for a time."

The Collective Bargaining Agreement

8. AFSCME and the District were parties to a collective bargaining agreement (CBA) in effect from July 1, 2015 through June 30, 2018.

9. Article 3 of the CBA addresses management rights. It states, in relevant part:

> "In order to operate its business, the District, in its sole discretion, retains and shall have the following exclusive rights: to determine the number, location and type of facilities; to determine the type and/or quality of services rendered; to determine the methods, techniques and equipment utilized; to hire, supervise, evaluate, discipline, discharge, promote, demote, lay off, transfer and recall the work force; to assign work and change, combine, create or abolish job classifications and job content; to establish and make known reasonable work rules and safety rules for all employees; to contract; and to determine the number of employees, including the number of employees assigned to any particular operation or shift."

10. Article 4, Section 1 of the CBA states, "The District and the Union agree not to discriminate against any employee because of race, color, sex, age, national origin, marital status, religion, disability, sexual orientation, union membership or non-membership." Article 4, Section 2 of the CBA states, "The terms of this Agreement shall be applied equally to all members of the bargaining unit."

11. Article 6 of the CBA addresses discipline and discharge. Article 6, Section 1 of the CBA states, in relevant part, "The principles of progressive discipline shall be used except when the nature of the problem requires more serious action. A non-probationary employee shall not be disciplined or discharged without cause." In practice, the second sentence of that language is referred to as the "just cause" provision.

12. Article 7 of the CBA outlines the grievance procedure. The first step of that grievance procedure – "Step I" – is handled by the aggrieved employee's immediate supervisor, and the second step – "Step II" – is handled by the Director. The final step – "Step III" – is handled by the District Board. The CBA does not provide for binding arbitration as the final step in the grievance procedure.

13. Article 7, Section 2 of the CBA states, in part, "The aggrieved employee or group of employees should verbally present the grievance to the immediate supervisor within fourteen (14) calendar days of the occurrence of the problem or within fourteen (14) calendar days of the time the employee becomes aware of the problem." Article 7, Section 3 of the CBA states, "If the grievance procedures established by this Section are not initiated within the time limits, the grievance shall be considered not to have existed."

Public Services Specialists

14. Public Services Specialists' primary function is providing customer service. However, they are generally expected to perform a variety of physical tasks on any given day. Those tasks can include shelving books, managing book bins, and pulling carts, for example. On that subject, the position description for the PSS position lists some physical demands, including "[s]itting, standing, walking, bending, pulling, pushing, reaching, twisting, lifting (up to 30 pounds)" and "[p]ushing/[p]ulling 100 pound carts." Public Services Specialists also perform a variety of clerical work including managing the "money drawer," printing up "hold lists," and answering the phone, for example. One might also function as a branch's designated volunteer liaison, which can involve training volunteers.

15. When shelving books, Public Services Specialists can use a stepstool to help them avoid lifting books over their heads, though climbing on anything is not a preferred practice. Public Services Specialists are also supposed to alternate which arm is carrying books when shelving, and can also ask a coworker or a volunteer for assistance if one is available. Shelving books is not considered a time sensitive activity.

16. Public Services Specialists often push, pull, load, and unload book bins and carts. Most of the District's books are hardbound books. The average weight of a book is one pound. Depending on how many books are loaded into them, book carts can sometimes weigh over 100 pounds. That said, a PSS can always load fewer books and make more frequent trips with a cart to reduce its weight.

17. For at least half of a typical workday, a PSS is stooping and bending, but rarely pushing or pulling something weighting 100 pounds. During an average day at Sisters in particular, a PSS also bends down, and lifts and carries things that weigh more than 15 pounds, "multiple times" a day. In addition, a PSS frequently has to reach above chest level at the Sisters branch, but that does not typically involve both hands. One book bin is permanently affixed to Sisters' customer service desk and requires Public Services Specialists to bend over to get materials out of it. Before her dismissal, CN personally pushed wheeled carts for "[a] few minutes each day" on average, and lifted something that weighed more than 20 pounds (usually crates) "up to 12 times" a day.

18. A Public Services Specialist often "[p]erforms daily opening/closing procedures" for the assigned branch as well. Those include unlocking a library's main entrance doors in the morning, locking those same doors at the end of the day, and opening and setting up a library's public meeting rooms as needed. The PSS who works the earliest shift at the Sisters branch may need to arrive at work an hour before the library opens to the public. To lock or unlock each of the two main doors at Sisters, the employee on duty must be able to push in a safety bar and reach an overhead latch for each door. That typically requires two hands to do. A person can use a step stool or a ladder to reach a door's latch.

19. All District employees, including Public Services Specialists, are expected to be able to travel to and from the different branches as needed, and most District employees do in fact travel from time to time. How much travel is required can depend on where an employee lives and to which branch an employee is assigned. Some District employees live in Bend and commute to La Pine or Redmond, while others live in Redmond and commute to Bend. One District employee

lives in Bend and commutes to the Sisters branch. Occasionally, employees temporarily fill in for colleagues from other branches.

20. The position description for a PSS lists "[t]ravel to other district locations and/or to workshops/professional meetings/conferences" under "Working Environment/Physical Demands." It also states that a Public Services Specialist "[o]perates District vehicles (*i.e.*, Bookmobile)."

21. A Materials Specialist is a different position with different responsibilities than those of a Public Services Specialist. However, performing materials handling position responsibilities is expressly listed in the Public Services Specialist position description as an essential function of the PSS position. A Materials Specialist's predominant responsibility is checking in and shelving books.

Chronology of Events

22. CN was first hired by the District on September 3, 1996, and her first assignment was at the Sisters branch. Since that date, CN has almost always worked at Sisters, but she has also worked at the La Pine, Redmond, and Sunriver branches. CN once worked at Redmond three evenings a week for almost a year. For some reassignments, the District compensated CN for her mileage. CN's home is in Sisters and is a 12 to 15-minute drive from the Sisters branch. The Downtown Bend branch is farther away.

23. In December 2004, CN had surgery on her feet. Afterward, CN was off work for seven weeks. When she returned to work, she had walking casts on both legs and was unable to perform some of her duties for a time. Later, in or around 2007, CN had carpal tunnel surgery on both hands and was "very briefly" off work. When she returned to work, she could not type on a keyboard at first.

24. On January 10, 2017, while off duty, CN slipped and fell on a small patch of ice at her home and dislocated her left shoulder, severed her left shoulder rotator cuff, detached a bicep, and "tore out a couple of chunks" from the inside of a joint. The accident also caused CN spine and joint instability, back strain, and "serious ulnar nerve damage." In addition, CN "suffered a life-threatening hemorrhage in the ER, leaving [CN] weak with anemia." CN is predominantly right handed.

25. Following her January 10, 2017 injury, CN took paid leave until it expired on April 4, 2017, then took unpaid leave until that expired on May 5, 2017. The District granted CN "additional unpaid leave as an additional accommodation," which ultimately lasted until August 16, 2017.

26. CN was treated by a number of physicians and physician assistants at an orthopedic clinic in Bend called The Center. On January 26, 2017, Physician Assistant Ericka Luckel completed a return-to-work release form for CN. The form released CN for "modified duty" from January 31, 2017 through February 28, 2017, and stated that CN could perform only "[l]ight duty" work, and could work only with her right arm. Around two-thirds of this form was left blank.

27. At the end of January 2017, CN asked the District if she could return to work. The District responded that the return-to-work form that she had submitted was not sufficient. At that time, CN could not use her left arm at all and, as she acknowledged at hearing, she could not have lifted crates at that time. Nevertheless, CN believed that she could "probably push a cart with one hand" at that point. CN asked to come back at this time because she felt that her job was "threatened" and that the District was trying to eliminate her from Sisters. CN did not tell the District that she had those fears, however. At hearing, CN testified that seeking to return to work in January 2017 "was a bit premature."

28. On February 3, 2017, Dr. Timothy Bollom, CN's orthopedic surgeon, completed a "Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)," a form published by the U.S. Department of Labor for use when an employee takes leave provided by the Family and Medical Leave Act (FMLA). Dr. Bollom wrote, in part, that CN was "unable to work" or use her left arm at that time.

29. On March 14, 2017, CN underwent repair surgery on her injured left rotator cuff.

30. On April 24, 2017, Dr. Bollom completed a second FMLA certification. Dr. Bollom indicated that CN's left arm was significantly and persistently limited, and that CN was unable to lift, reach, extend, or repeatedly use her arm. He also indicated that CN would be unable to work until May 5, 2017, and could return to light duty work after that date with "very limited use of" her left arm with "[n]o heavy/repetitive lifting, reaching, pushing, pulling etc."

31. On April 25, 2017, Physician Assistant Nathan Lynch completed an additional return-to-work release form. The form released CN to modified duty from May 5, 2017 through June 12, 2017. Lynch wrote that CN could not perform "[f]ine manipulation" with her left arm and could not crawl, climb, reach, or push or pull "at all." At the bottom of the form, Lynch wrote, "light duty – Right arm work only, no above waist work Left arm."

32. On April 28, 2017, CN met with the District to explore options that might allow her to return to work.

33. On May 1, 2017, Dr. Bollom completed another return-to-work release form. This form stated that CN could perform modified duty from May 5, 2017 through June 12, 2017. This form released CN to "light duty" work "per patient[']s discretion." However, it also stated that CN could not push and pull with her left hand, could not crawl or climb, and could reach and push/pull only intermittently. The form stated that CN was released to lift, carrying, and push/pull less than 10 pounds.

34. On May 12, 2017, CN met with the District again to further explore her options. During the meeting, CN told the District that it should "disregard" the latest return-to-work release form because, in her view, she was actually more capable than the release indicated. Also, at some point in May 2017, CN told the District that she had been "cleared for driving."

35. On May 15, 2017, Dr. James Nelson completed a return-to-work release form. It released CN to modified duty from May 15, 2017 through June 12, 2017. It released her to lift, carry, and push and pull 10 pounds. Among other things, this form indicated that CN could occasionally (as opposed to continuously or frequently) perform a full range of physical actions, but it specified that CN could not reach "above chest level."

36. On May 31, 2017, Dr. Nelson completed another return-to-work release form that covered the same time period. It released CN to lift and carry 15 pounds, and to push and pull up to 100 pounds. In the space after the typed text, "Other functional limitations or modifications necessary in worker's employment," Dr. Nelson added a hand-drawn line next to the typed task "reach," and wrote, "LUE—using left upper extremity—no above chest—no more than physically capable of." That same day, a "pre-dismissal meeting" was also held in which the parties once again discussed CN's options. During that meeting, CN asked the District "for an outside, independent evaluation of the Sisters Library to see what could be done to make [her] return possible." At that time, CN believed that she could open and close the main doors at Sisters. After the meeting, the District gave CN a list of supplemental questions for a doctor to answer.

37. On June 12, 2017, Physician Assistant Luckel authored and signed chart notes. Around that time, CN provided a copy of these notes to the District. However, CN intentionally redacted the following language from the copy she gave the District, and did so without telling the District:

> "With respect to the patient's left shoulder, she is doing well. She will continue with physical therapy following the rotator cuff rehabilitation protocols with focus on range of motion and strengthening exercise. She is to avoid any lifting, pushing, pulling with her left hand/upper extremity. Light activity with her elbow at her side is okay. The patient will plan on following up with Dr. Bollom in 6 weeks time for a recheck of her left shoulder and right shoulder as needed. All patient questions were answered."

38. On June 14, 2017, Dr. Bollom completed a brief questionnaire written by the District. In response to a question about whether or not CN would have any "permanent restrictions," Dr. Bollom responded "TBD." Dr. Bollom's answers also indicated that CN was halfway recovered at the time and would not be fully recovered for four to six more months. After the typed text, "Current range of motion of her left shoulder, arm and elbow," Dr. Bollom wrote, "see last chart notes."

39. On June 16, 2017, CN sent the District a letter with suggested job modifications, including:

> "1 Allowing extra time to complete moving items from one place to another
> "2 Use of step stools to work on the higher shelves
> "3 Limiting drive time to work to 20 minutes one-way; additional driving will add added stress to my left shoulder."

CN's letter also stated: "Please note that while I was recently in the Sisters Library, I took the opportunity to stand on the top step of a step stool and found that materials on all the highest shelves at the Sisters Branch are at chest-height."

40. On June 19, 2017, AFSCME Council Representative Kollen sent the District a letter with accommodations that resembled those of CN's June 16, 2017, letter.

41. On July 24, 2017, Assistant Director Mildenstein gave CN a letter titled, "Reasonable Accommodation Agreement." The letter specifically noted the work restrictions included in Dr. Nelson's May 31, 2017, release and Dr. Bollom's June 14, 2017, supplemental release, then summarized the physicians' stated restrictions as follows:

"• Maximum of two to eight hours per day and 30 hours per week
"• Pushing or pulling up to 100 pounds
"• Lifting and carrying no more than 15 pounds
"• Crouch, crawl, kneel, climb, balance, and push/pull occasionally (34-66% of your day)
"• Stoop/bend, twist, and reach up to four hours per day
"• No reaching above chest level with the left upper extremity."

After that summary, the letter concluded that CN's request for an accommodation at the Sisters branch was not feasible and explained the District's rationale. In essence, the letter noted that the Sisters branch only ever has three Public Services Specialists assigned to it. The letter explained:

> "Members of the management team met to discuss your request for accommodation, your medical work restrictions and proposed modifications, and reviewed the essential functions of your Public Services Specialist (PSS) position at the Sisters Library of the Deschutes Public Library (DPL) district. A major consideration during this discussion was the fact that there are only three (3) PSS responsible for performing duties that maintain library operations, ensure access to the Sisters Library building and its services and provide excellent customer service five days a week, Tuesday through Saturday. With only three PSS in Sisters it means that there will be times when you would be required to work alone especially when one or both of the other PSS are on time management. There wouldn't be anyone available to perform the duties you are unable to perform due to the medical restrictions.
>
> "Additionally, the Sisters Library is limited in the type of PSS tasks you are able to perform that accommodate your medical work restrictions. Equipment that might safely assist in performing the tasks at the Sisters Library were assessed, but due to the equipment's size did not fit within the confines of the library space. Also this equipment is not appropriate to help with some tasks that would need to be performed if employees were not there to help you."

The letter also stated that the District could accommodate CN's restrictions at the Downtown Bend branch and described that location's features in detail. According to the letter, that accommodation would begin on August 1, 2017, and end on September 1, 2017, and any extension of the arrangement beyond that would "be decided on a case-by-case basis" and would be dependent upon additional information from CN's doctor and the needs of the District at that time. It clarified, however, that even if CN received "a full medical release without restrictions," she would nonetheless remain in the Downtown Bend branch. The letter further provided that, if CN accepted the job at the Downtown Bend branch, she would receive the same compensation that she had

while working at the Sisters branch. At the end of the letter, CN could check a box and accept the District's accommodation, or alternatively, check another box with text that read, "I decline to accept the above accommodation and understand that by declining the accommodation I will be separated from employment."

42. On July 26, 2017, Dr. Bollom completed a return-to-work release form that indicated that CN could "return to regular work," but also indicated that CN should attempt to avoid repetitive heavy lifting with her left arm above her shoulder, and noted some limitations on CN's ability to climb, balance, reach, and push/pull.[2]

43. On July 28, 2017, Dr. Bollom completed another return-to-work release form. Dr. Bollom checked the box indicating that CN was released to "modified duty," and wrote that CN could return to "regular duty work as tolerated." Dr. Bollom also noted, in part, that CN should attempt to avoid repetitive heavy lifting with her left arm above her shoulder. CN provided the release to the District on Friday, July 28, 2017. That same day, CN sent the District a series of emails in which she claimed that she was "released to return to work with no special accommodation required."

44. On Sunday, July 30, 2017, CN contacted Library Services Supervisor Schumacher and made arrangements to have Schumacher meet her at the Sisters branch at 12:30 p.m. on Monday, July 31, 2017 (a day when the library was closed) in order to allow CN to turn in her building key and collect her personal items from her desk.

45. During CN's July 31, 2017, meeting with Schumacher, CN handed Schumacher an envelope with a letter that stated:

> "My surgeon has released me to return to work with no special accommodations.[3] However, reassigning me to Downtown Bend would place additional stress on me physically and financially. It is a mere 12 – 15 minute drive from my home to the Sisters Branch. Commuting between my home and the Downtown Bend Branch takes a minimum of 1-1/2 hours each day; often 2 hours due to road & traffic conditions.
>
> "I am willing and able to resume all my usual duties as a PSS at the Sisters Library, but must decline your 'Reasonable Accommodation' with reassignment to another branch. Therefore, I am returning your document, unsigned, as it requires me to transfer or resign. A reasonable accommodation should make it easier on a recovering employee, not harder."

46. CN did not report to work at the downtown Bend branch on August 1, 2017, or report to work at that branch thereafter.

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[2]The record does not indicate whether or when CN provided this release to the District.

[3]During the hearing, CN testified that, in this sentence, she was referring to Dr. Bollom's July 28, 2017 form. But as noted, that particular release does include some restrictions. According to CN's testimony, Dr. Bollom "failed in filling out forms the way he needed to."

47. On August 16, 2017, AFSCME filed a grievance alleging that the District had violated Article 4 of the parties' CBA, the non-discrimination article. The grievance stated, in part: "Any restrictions that are still in place will not affect [CN] in her ability to perform her duties as prescribed in her current position." The grievance also stated that "management has failed to give any reasonable explanation as to why [CN] cannot return to her current position," and alleged that the reason CN was not returned to the Sisters branch was because of discrimination based on age or disability.

48. On August 17, 2017, Director Dunkelberg sent CN a three-page "letter of separation." It outlined the timeline of events and explained why the District concluded that CN's request for an accommodation was not feasible at the Sisters branch, noting specific staffing and equipment issues. It also stated, "Based on your rejection of the accommodation and failure to report to work on August 1, 2017, you are notified that you are dismissed effective August 17, 2017." The letter informed CN that, if she wanted to contest this "action," she "must file an appeal in writing within 14 calendar days of August 17, 2017, in accordance with Article 6 of the collective bargaining agreement." The initial decision to dismiss CN was made by Library Operations Manager McKinley, Library Services Supervisor Schumacher, and Assistant Director Mildenstein as a group, though that fact was not explained in the District's letter.

49. On August 18, 2017, Library Services Supervisor Schumacher sent CN a letter denying the August 16, 2017, grievance as untimely. As explained in the letter, CN was first presented with the District's accommodation on July 24, 2017, and CN's grievance was received on August 16, 2017, which was more than 14 calendar days later.

50. On August 30, 2017, Library Services Supervisor Schumacher responded to another grievance from CN that the District received on August 23, 2017, writing in part:

> "Your separation is based on your rejection of the accommodation offered and failure to report to work on August 1, 2017.
>
> "In reviewing the history of events in your situation, there is no evidence to validate your claim of discrimination based on age or disability. The grievance is denied."

51. On September 8, 2017, CN submitted a Step II grievance form related to her dismissal. The grievance repeated the allegations of CN's earlier grievances but in this instance the grievance specifically alleged that the District violated Articles "4 – Non Discrimination" and "6 – Discharge."

52. On September 18, 2017, Director Dunkleberg sent CN a letter denying the Step II grievance filed on September 8, 2017. At the outset of this letter, Dunkelberg wrote, "I have reviewed the grievance and the reason for termination was not due to discrimination based on age nor disability." At the end of it, he wrote, "Based on your rejection of the accommodation and your failure to report to work, the district declines the request for reinstatement."

53. On September 25, 2017, CN had a "fitness for duty evaluation" conducted by an occupational therapist. In part, this evaluation indicated that CN was released for "[l]ight to medium work," was at a low risk for harming herself or others, and did not need any

accommodations or assistance to do her work. Nevertheless, it also noted that "[r]epetitive heavy lifting above shoulder level" should be avoided.

54. On October 11, 2017, CN filed a Step III grievance that once again alleged violations of Articles 4 and 6 of the CBA. This grievance also included as an attachment a full, unredacted copy of the June 12, 2017, chart notes prepared by Physician Assistant Luckel.

55. In early October of 2017, Dr. Bonnie Malone, CN's chiropractic physician, gave an undated letter to the District Board. In her letter, Dr. Malone asserted that the District's actions were "beyond unreasonable" and that CN was capable of doing the essential functions of her job. However, no records of any of Dr. Malone's treatments of CN were ever presented to the District. As of November 16, 2018, Dr. Malone was still treating CN for her January 2017 injury, though she was only doing so "[v]ery rarely."

56. On November 9, 2017, District Board President Martha Lawler sent CN a letter denying her Step III grievance. This letter stated, in part:

> "During an executive session on November 8, 2017, the [District] Board met with you, union representatives, and members of the management team. During the meeting, you provided information supporting your request for reinstatement.
>
> "After thorough review of all information provided, the [District] Board unanimously denies the grievance and request for remedy."

57. On February 12, 2018, AFSCME filed this unfair labor practice complaint.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.

2. The District did not terminate CN without just cause and therefore did not violate ORS 243.672(1)(g).

In this case, AFSCME alleges that the District discharged CN without just cause in violation of the parties' collective bargaining agreement and ORS 243.672(1)(g). Specifically, the District discharged CN after she did not report to work at the downtown Bend branch library as assigned by the District. AFSCME alleges that the transfer to the Bend branch was unnecessary, and therefore that the District acted as an unreasonable employer in discharging CN for declining that transfer and failing to report to work. In response, the District contends that it had the contractual right to assign CN to the downtown Bend branch, and, moreover, could not reasonably accommodate her in the Sisters branch library because she could not perform the essential functions of her job there because of the limited staffing and small size of that branch. For the reasons explained below, we conclude that the District did not violate the parties' collective bargaining agreement (and therefore did not violate ORS 243.672(1)(g)) when it discharged CN after she failed to show up to work at the downtown Bend branch.

Under ORS 243.672(1)(g) of the Public Employee Collective Bargaining Act (PECBA), "[i]t is an unfair labor practice for a public employer or its designated representative to * * *

[v]iolate the provisions of any written contract with respect to employment relations * * *." When a labor organization alleges that a public employer has violated the provisions of a written contract and "the collective bargaining agreement involved does not have a grievance procedure ending in binding arbitration, ERB's responsibilities to construe the agreement and to find the facts are similar to those of an arbitrator." *OSEA v. Pendleton School District*, 85 Or App 309, 311, 736 P2d 204 (1986), *rev denied*, 304 Or 55, 742 P2d 1186 (1987); *OSEA v. Lake County School District,* 93 Or App 481, 486, 763 P2d 160 (1988) ("if the collective bargaining agreement, as here, does not provide for a grievance procedure ending in binding arbitration, ERB is authorized to find the facts and construe the agreement *just as an arbitrator would be*") (emphasis added).

Here, AFSCME alleges that the District violated Article 6, Section 1 of the collective bargaining agreement (CBA), which provides in relevant part that an employee, such as CN, "shall not be disciplined or discharged without cause." In assessing whether the District terminated CN without cause, the parties argue, and we agree, that we apply a "reasonable employer" test—*i.e.*, whether the employer's decision "was that of [a] fictive reasonable employer." *Brown v. Oregon College of Education*, 52 Or App 251, 258, 628 P2d 410 (1981). "Under the reasonable employer standard, the Board reviews the disciplinary action in light of the factors which should be considered by the fictive reasonable employer and determines first whether the employee's conduct warrants discipline and second, if some discipline is appropriate, what discipline is objectively reasonable." *Oregon School Employees Association v. Canby Union High School District 1*, Case No. UP-33-85 at 17, 9 PECBR 8510, 8526 (1986).[4]

We "begin by determining if the employee actually did what the employee was disciplined for." *Oregon School Employees Association v. North Marion School District 15*, Case No. UP-60-09 at 29, 24 PECBR 661, 689 (2012). Here, the District terminated CN because she failed to report to work at the Bend branch on August 1, 2017. It is undisputed that CN did not report to work on that day (or any time thereafter). Therefore, we conclude that the District established that CN did what she was disciplined for.

[4]The dissent is almost exclusively based on an argument that the District violated the Americans With Disabilities Act (ADA). However, AFSCME, in its post-hearing brief, expressly urged that, "given the posture of this case, the Board need not apply or *even consider* [the] legal standards" under the ADA (emphasis added). Indeed, AFSCME's ADA arguments in its post-hearing brief were presented largely in a single footnote, along with repeated assertions that its (1)(g) claim was not grounded in establishing an ADA violation. AFSCME went so far as to acknowledge that there has been no "finding" that the District violated state or federal law and assured that there was no need to become an "expert[] on disability discrimination" to decide this case, which is also consistent with the ALJ's recommended order. AFSCME's assertions are consistent with how the parties chose to conduct the hearing and present the dispute, as neither AFSCME nor the District presented evidence about the parties' discussions during the interactive process, significant evidence about the time that particular PSS work tasks required, evidence about how often the PSS employees in Sisters work alone, or any testimony from CN's medical providers—the type of evidence typically offered in civil claims under the ADA. Consequently, our decision is based on whether the District acted as a reasonable employer in making and implementing decisions in its attempt to return CN to work at the District. In making that decision, we considered whether, on this record, the District necessarily violated the ADA (and therefore acted unreasonably). In our view, there is insufficient evidence to reach such a conclusion. Given the limited record that these parties chose to submit, and the fact that CN's exclusive representative chose not to present a case grounded in the intricacies of the ADA, we do not resolve this case on the basis advocated by the dissent.

We do not understand AFSCME to argue that the District does not generally have the right under the CBA to assign and transfer its employees to different branches to meet the District's operational needs. Similarly, we do not understand AFSCME to argue that, if an employee refused to show up to work at an assigned time or location, that the District would violate the CBA by disciplining that employee. Here, however, AFSCME asserts that the District violated the CBA when it discharged CN (after she refused to report to her assigned Bend branch location) because the District's decision to assign CN to the Bend branch was improper. Namely, AFSCME argues that the District unnecessarily assigned CN to the Bend branch because it unreasonably concluded that she was could not perform the essential functions of the PSS position in Sisters. According to AFSCME, the medical evidence in this case established that CN had no limitations with respect to her ability to perform her job at the Sisters branch and, therefore, did not need to be accommodated. For the following reasons, we disagree.

The record contains substantial evidence of the functions of the PSS position, including the position description and witness testimony. That evidence indicates that the PSS position includes the functions of handling, moving, and reshelving books. In particular, the employee in a PSS position is required to stoop and bend to unload books from the interior bin at the Sisters branch front desk, which sits approximately three feet above the floor and has a telescoping floor that descends as the crate is filled with books. Emptying that crate, and lifting, handling, and sorting the books, are also functions of the PSS position, as is retrieving and handling books from the external book drop at the back of the branch. In addition, the PSS assigned to the Sisters branch would occasionally be the only District employee on duty when the branch opened or closed, and is responsible for unlocking or locking the library exterior doors. To do so, the PSS is required to engage or unengage the safety bars on each side of the dual doors, which are located at the top of the door; overhead reaching is required to lock and unlock the doors. Locking and unlocking the Sisters branch doors to open and close the library for the day typically requires two hands. Other functions of the PSS position include setting up meeting rooms, cleaning outside areas, removing snow when necessary, creating in-library displays, and operating District vehicles. These functions require pushing, reaching, twisting, and lifting up to 30 pounds, as well as pushing and pulling 100-pound carts.[5]

Lifting, moving, and handling materials, typically groups of books, up to 30 pounds is an essential function of the PSS position in Sisters, as is pushing and pulling carts weighing 100 pounds. Opening and closing the library is also an essential function of the PSS position in Sisters. "Essential functions" means the "fundamental job duties" of the position. 29 CFR § 1630.2(n)(1). Of particular significance here, a job "function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed[.]" 29 CFR § 1630.2(n)(2)(ii).[6] There were only three PSS employees who worked in the Sisters branch, a factor that the District reasonably weighed in favor of concluding that these functions were essential, not marginal. In addition, these functions are listed in the position description, and

[5]AFSCME did not object to Findings of Fact 14 through 21, which outlined the duties of the PSS employees working in the Sisters branch and the physical demands associated with those duties.

[6]Because Oregon law requires that Oregon's disability statutes are construed to the extent possible in a manner consistent with similar provisions of federal law, we refer only to the federal statute and regulations. *See* ORS 659A.139 ("ORS 659A.103 to 659A.144 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended by the federal ADA Amendments Act of 2008 and as otherwise amended.").

the District made a reasonable judgment that they are essential, also relevant factors in determining whether these functions are essential. *See, e.g.*, 29 CFR § 1630.2(n)(3)(i)-(vii) (enumerating evidence that may indicate whether a particular job function is essential).

To determine whether it could accommodate CN in performing these essential functions, the District met with CN on at least three occasions that involved discussions about her return to work—on April 28, May 12, and May 31, 2017. The District reviewed and took into consideration the May 31, 2017, release by Dr. Nelson, indicating that CN was released to modified duty, and able to lift and carry only 15 pounds. Dr. Nelson's note also included an ambiguous statement that appears to state that CN should not reach above chest height "using left upper extremity," and states that she cannot push/pull, reach, stoop, and bend more than four hours per day. The District requested clarifying questions about the May 31 release, and then also considered that clarifying information dated June 14, 2017, and provided by Dr. Bollom. Dr. Bollom opined that CN's degree of shoulder impairment was "not stationary [at] this point," described the percentage of recovery at that point as fifty percent, and identified the anticipated date of full recovery as four to six months later—assessments consistent with Dr. Nelson's judgment that CN was released only to modified duty.

Using that medical information, and after meeting with CN at least three times to consider possible accommodations, the District determined that there were no reasonable accommodations that would enable CN to perform the essential functions of the PSS position *at the Sisters branch*. An employer is not required to remove essential functions from a position; it is required only to reallocate marginal functions. *See* Appendix to 29 CFR § 1630.2(o) ("An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position."); *Dark v. Curry County*, 451 F3d 1078, 1089 (9th Cir 2006), *cert denied*, 549 US 1205 (2007) (employer is not required to exempt an employee from performing essential functions or to reallocate essential functions to other employees). Here, as of July 24, 2017, CN was not released by her physicians to lift the weight needed to perform the essential functions of emptying the crates and handling books, as well as reaching and lifting overhead, as required to open and close the branch. The District assessed equipment that could assist CN, but because of the equipment's size, it did not fit within the spaces available in the branch. Because an accommodation at the Sisters branch was not possible, the District made available a PSS position in the Bend branch.[7]

[7]We note that District employees were hired to work District-wide, not at just one branch, and District employees occasionally rotated among branches. CN herself, over the course of her career at the District, had worked at the La Pine, Sunriver, Redmond, and Sisters branches. When the District assigned CN to the large downtown Bend branch, where a large group of employees was assigned, it was to perform her original position PSS duties at the same rate of pay. Neither party briefed or provided legal authority demonstrating that the District's assignment of CN to the Bend branch constituted a "reassignment" within the meaning of 29 CFR § 1630.2(o)(2)(ii), and we are unaware of any. *See* 29 CFR § 1630.2(o)(2)(ii) (reassignment to a vacant position is a lawful reasonable accommodation); Appendix to 29 CFR § 1630.2(o) ("In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship."). Consequently, we do not decide this case on the basis of whether the District's assignment of CN to work in the Bend branch was inconsistent with this rule, as the dissent advocates.

Although AFSCME and the dissent may have a different interpretation of the medical evidence, we do not agree that the District's assessment of that information was unreasonable.[8] For example, when the District assessed the May 31 release by Dr. Nelson, it was not unreasonable to construe the task-specific limitations in the context of Dr. Nelson's overall conclusion: that CN was released only to modified duty, not to full duty. [9] Moreover, when the District made its best assessment in determining how to accommodate CN based on the medical information CN had provided, CN did not show up for work as assigned and attempt to further the interactive process (discussed more below) or have AFSCME grieve the District's decision. Rather, CN elected to just not show up for work. Under those circumstances, we do not conclude that the District violated the CBA when it disciplined her.

In reaching this decision, we disagree with AFSCME's assertion that the District's reassignment of CN was unreasonable because the District violated CN's statutory rights under the ADA by engaging in the interactive process in only a perfunctory way. Under the ADA, employers and employees are required to engage in an interactive process to determine what reasonable accommodations are appropriate. *Barnett v. U.S. Air, Inc*., 228 F3d 1105, 1114-15 (9th Cir 2000), *vacated on other grounds*, 535 US 391 (2002) (adopting Title VII retaliation framework for ADA retaliation claims); 29 CFR § 1630.2(o)(3) (it "may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of the accommodation"). This interactive process does not require particular concessions or specific conduct; rather, it requires good faith. In this interactive process, *both* the employer and the employee have a duty to act in good faith. "The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees. The *shared goal* is to

[8]We also note that the full text of Physician Assistant Ericka Luckel's June 12, 2017, chart note further confirms that the District's decision was consistent with a reasonable assessment of CN's medical providers' restrictions. In particular, that chart note states that, as of June 12, 2017, CN was "to avoid any lifting, pushing, pulling with her left hand/upper extremity." As set forth above, CN redacted that portion of the chart note when attempting to persuade the District that she could return to work without restrictions. In doing so, CN admitted that she substituted her judgment for the medical providers when submitting this to the employer. This should not be overlooked in determining whether, in attempting to make sense of all the conflicting and often confusing records, the District's ultimate assessment of those records was a reasonable one. The question before us is whether the District's handling of CN's employment status, including its interpretation of her medical releases, was objectively reasonable, not whether some other interpretation is possible.

[9]The dissent argues that CN's May 31 medical release permitted CN to engage in physical activities for sufficient time periods that CN could, in fact, perform all the essential functions of the job in Sisters with accommodations. We read the very limited record these parties chose to submit differently. For example, we conclude that the District adequately demonstrated that lifting up to 30 pounds was required to work as a PSS in Sisters. That requirement is listed in the PSS position description, and several District witnesses described in detail the bending and lifting required to retrieve books from the inside and outside book bins at the Sisters branch. CN testified that she would lift something, typically book crates, that weighed more than 20 pounds as many as 12 times per day; CN's former coworker Linda Kurtz testified that she would have to "lift and carry things that weighed more than 15 pounds" at least ten times in a workday. It is undisputed that the medical information submitted to the District from CN's doctors immediately preceding the July 24, 2017, reasonable accommodation letter did not release CN to lift more than 15 pounds. We do not conclude that the District acted unreasonably by crediting the medical restrictions provided by CN's own health care providers in assessing whether CN could perform the essential functions of the PSS job in Sisters with or without reasonable accommodations.

identify an accommodation that allows the employee to perform the job effectively. Both sides must communicate directly, exchange essential information and neither side can delay or obstruct the process." *Barnett,* 228 F3d at 1114-15 (emphasis added); *Rowe v. City & County of San Francisco*, 186 F Supp 2d 1047, 1051 (ND Cal 2002) ("A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith").

Here, as set forth above, the record demonstrates that the District transferred CN to the Bend branch only after the District engaged in an interactive process with CN and determined that she could not perform all the essential functions of her job at the Sisters branch, with or without a reasonable accommodation. At that point, if CN disagreed with that assessment, she could have sought to further that interactive process by proposing something else. Instead, CN opted to just reject the accommodation and not show up to work.[10] On this record, we do not agree that the District engaged in only a perfunctory interactive process, as AFSCME argues.

We also disagree with AFSCME's assertion that the District's action was unreasonable because it never required CN to undergo a fitness for duty evaluation. AFSCME is correct that the District lawfully could have required such an exam. Under the ADA, when an employee with a disability seeks to return to work, "there is no question" that an employer is "permitted to require a medical examination to determine his fitness to perform essential job functions." *Harris v. Harris & Hart, Inc.*, 206 F3d 838, 844 (9th Cir 2000), citing *Yin v. State of California*, 95 F3d 864 (9th Cir 1996); *see also* 42 USC § 12112(d)(4)(A); 29 CFR § 1630.14(c). The fact that the District could lawfully have required an independent fitness for duty examination does not mean that its decision not to do so was necessarily unreasonable, however. Here, CN gave the District substantial medical information from her own medical providers—Dr. Nelson, Dr. Bollom, and Physician Assistant Luckel—during the two months preceding the District's July 24, 2017, reasonable accommodation letter. Moreover, the District prepared a supplemental questionnaire to clarify Dr. Nelson's May 31 release, which Dr. Bollom completed and which the District considered. CN's medical

[10]On Friday, July 28, 2017, CN submitted another medical release from Dr. Bollom. Dr. Bollom checked the box releasing CN to "modified duty" and wrote that she could return to regular duty "as tolerated" and should "attempt to avoid repetitive heavy lifting" with her left arm and "above shoulder height/lateral lifting." On Sunday, July 30, CN notified Schumacher that she wanted to turn in her key and retrieve her personal possessions on Monday, July 31. CN did so, and submitted a letter communicating that she would accept nothing other than a PSS position in the Sisters branch, despite the restrictions in Dr. Bollom's July 28 release. The obligation to participate in the ADA interactive process is bilateral; unlike the dissent, we do not conclude that the District violated the collective bargaining agreement when CN so clearly communicated that she would no longer participate. *See, e.g.*, *Allen v. Pac. Bell*, 348 F3d 1113, 1116 (9th Cir 2003) (because the employee "failed to cooperate in the [interactive] process, we cannot say that [the employer] failed to fulfill its interactive duty"); *Schuler v. Banner Health*, 2018 US Dist LEXIS 126634 (D Ariz 2018), *aff'd*, 778 Fed Appx 473 (9th Cir 2019) (summary judgment in favor of employer granted where employee, who had a hearing impairment, stated that she did not need an accommodation; the employee's "failure to even 'informally' discuss her needs meant it was impossible for [the employer] to do more than it did. [The employer] cannot be liable for failing to accommodate given that, during the relevant time period, [the employee] was the party unwilling to participate in the interactive process"). Moreover, although CN contended on July 31 that she was fully released to return to work by Dr. Bollom, she simultaneously informed the District that driving to Bend would place "additional stress" on her physically. When questioned about that contradiction at hearing, CN testified that driving to Bend would cause a physical strain to her body. There is, however, no medical evidence in the record related to CN's ability to drive.

providers' opinions were generally consistent. We do not find it unreasonable that, with CN's own medical providers' opinions before it, the District did not obtain an independent fitness for duty examination before issuing its July 24, 2017, letter.

We turn to whether the District acted reasonably in discharging CN, as opposed to using progressive discipline. We begin by acknowledging CN's prior service record. CN was a long-tenured employee, originally hired in 1996, with an excellent performance record. The record includes letters and statements of support for CN by members of the Sisters community, and the District's witnesses also described CN as a valuable employee. Progressive discipline is a "corrective measure[] that put[s] the employee on notice that further misconduct may result in the discipline ultimately imposed and that give[s] the employee a reasonable opportunity to modify" the unacceptable behavior. *North Marion School District 15*, UP-60-09 at 35, 24 PECBR at 695, quoting *Oregon School Employees Association, Chapter 89 v. Rainier School District 13*, Case No. UP-85-85 at 26, 9 PECBR 9254, 9279 (1986). Here, however, the District was not attempting to modify CN's behavior or motivate improved performance. Rather, CN's discharge was the unfortunate culmination of the District's attempt to return CN to work after a very serious off-the-job injury and CN's decision not to report to work at a work location where she did not want to work. Further, CN has not, at any point, indicated a willingness to reconsider and report to work. CN did not request (and apparently did not want) additional leave, so providing additional leave would be inapt here. Given these facts, we do not conclude that progressive discipline was required.

Moreover, the District also provided CN "prompt, timely notice" that separation of employment would result if CN did not report to work. *See Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05 at 36, 22 PECBR 108, 143 (2007). Specifically, in its July 24, 2017, letter, the District notified CN that if she did not accept the accommodation and report for work, she would be "separated from employment." In response, CN informed the District in writing that she was returning the District's letter unsigned because it "requires me to transfer or resign." On these facts, we cannot conclude that CN did not have timely notice and fair warning that her employment would end if she did not report to work at the Bend branch.[11]

Taking all these facts together and applying our "reasonable employer" test, we conclude that the District exercised its contractual right to transfer CN from the Sisters branch to the Bend branch, and did so in an objectively reasonable manner. When CN declined that transfer and did not report to work, the District had just cause to discharge her. Consequently, the District did not violate Article 6 of the CBA and did not violate ORS 243.672(1)(g).

[11]The dissent argues that that the District acted unreasonably by incorrectly assuming that CN would pose a "direct threat" to her own health and safety if she returned to work at the Sisters branch. Under the ADA, if an employee with a disability, with or without a reasonable accommodation, poses a direct threat, then the employee is unqualified. *See* 42 USC § 12113; 29 CFR § 1630.15. AFSCME did not advance such a "direct threat" theory during the hearing or in its post-hearing brief, nor could it—"direct threat" is an affirmative defense to certain claims under the ADA, and the District did not raise it in its answer or at hearing. Although some District witnesses occasionally referred to a concern that CN might re-injure herself, that concern was not the District's rationale as set forth in its July 24, 2017, reasonable accommodation letter.

ORDER

The complaint is dismissed.

DATED: January 31, 2020.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

*Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Sung Dissenting

I respectfully dissent. When the District offered the grievant, CN, the accommodation of reassignment to the Bend branch, it gave her an ultimatum: either accept that offer or be terminated. The District contends that it had cause to terminate CN for declining that offer because it had determined that it was "not feasible" to accommodate CN's physical limitations in her existing position at the Sisters branch. After reviewing the record, I find that the District failed to meet its burden to prove that it was not feasible to accommodate CN at the Sisters branch. Rather, the record shows that CN could perform her job duties with a few effective and reasonable accommodations that the District could have easily provided at the Sisters branch, and that the District terminated her for declining an unnecessary accommodation. Consequently, I would conclude that the District violated the non-discrimination and just cause provisions of the CBA, and therefore ORS 243.672(1)(g).

The majority and I reach different conclusions in this case, primarily because of two differences in our respective approaches: First, the majority grants substantial deference to the District when reviewing its claims that CN could not perform the essential functions of her job because of her physical limitations and that it was not feasible to accommodate those limitations at the Sisters branch. I dissent because, in my view, the CBA's just cause and nondiscrimination provisions require the District to prove those claims by a preponderance of the evidence, and require this Board to subject those claims to more scrutiny than the majority applies in its analysis.

Careful scrutiny is how adjudicators determine whether an employer's claim that an individual cannot do the job because of a physical limitation is valid or discriminatory. As the court explained in *Arline v. Sch. Bd.*,

> "While legitimate physical qualifications may be essential to the performance of certain jobs, both that determination and determination of whether accommodation is possible are fact-specific issues. The court is obligated to scrutinize the evidence before determining whether the [employer's] justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice."

772 F2d 759, 764-65 (11th Cir 1985), *aff'd*, 480 US 273, 107 S Ct 1123 (1987) (citation omitted). Without careful scrutiny, the finder of fact cannot properly determine whether the employer's action was discriminatory or not.

Second, the majority takes the position that it is unnecessary to reach all of the ADA issues addressed in this dissent. In my view, the issue of whether the District discriminated against CN in violation of ADA standards is properly before this Board. Article 4 of the parties' CBA provides: "The District and the Union agree not to discriminate against any employee because of race, color, sex, age, national origin, marital status, religion, disability, sexual orientation, union membership or non-membership." When a CBA contains such a nondiscrimination provision, most arbitrators will interpret the provision as indicating an intent to incorporate the applicable law on the subject. Norman Brand ed., *Discipline and Discharge in Arbitration* at 413 (1998).[12] Additionally, the Union's grievance specifically claims that the District violated both Article 4 (non-discrimination) and Article 6 (just cause), and states, "The Union feels that management has failed to give any reasonable explanation as to why [CN] has not been returned to her position and can only conclude that the reason [CN] has not been returned to her position is because of management's discrimination based on either her age or her disability." In responding to the grievance, the District addressed the Union's discrimination claim on its merits; the District did not contend that the parties had not intended to contractually prohibit discrimination.[13]

Even if this Board were limited to addressing the question of whether the District had just cause to terminate CN, we would still need to address the question of whether the District complied with the ADA and the EEOC's enforcement guidance. A discharge that is discriminatory by definition lacks just cause.[14] Indeed, the District concedes that an employer's exercise of its

[12]As the majority notes, in this case, the Board's "responsibilities to construe the agreement and to find the facts are similar to those of an arbitrator." Majority opinion at 12 (quoting *OSEA Chapter 115 v. Pendleton School Dist.*, 85 Or App 309, 311, 736 P2d 204 (1986), *rev denied*, 304 Or 55, 742 P2d 1186 (1987)).

[13]The majority declines to reach all of the ADA issues because AFSCME, in its post-hearing brief, argued that this Board did not *need* to consider ADA standards to decide that the District lacked just cause to terminate CN. However, AFSCME still cited and discussed the ADA standards, and sufficiently identified all of the issues addressed in this dissent. *See*, *e.g.*, Complainant's Post-Hearing Brief at 7-8 & n 18, 14 & n 26. At oral argument, this Board granted the employer's request for supplemental briefing on those standards. In AFSCME's supplemental brief, it argued that this Board must reach the ADA issues, unless we sustain the grievance on a separate basis. I agree.

contractual right to assign or transfer complies with this Board's "reasonable employer" standard only "as long as the employer makes those decisions within the parameters of the EEOC Guidelines on Reasonable Accommodation and Undue Burden."[15]

The District did not comply with the ADA or the EEOC's guidelines when it required CN to accept the accommodation of reassignment on pain of discharge and then terminated her for declining that accommodation. When CN was returning from her disability leave, she was entitled under the ADA to return to her original PSS position at the Sisters branch, even if she needed reasonable accommodations to perform her essential duties. CN's return-to-work release authorized her to engage in a wide range of physical activities, with some limitations. She requested a few reasonable accommodations so that she could perform her job duties while complying with the limitations specified in her release. CN's supervisors, however, believed that they needed to go beyond those limitations and prevent her from engaging in *any* physical activities. Because they could only eliminate physical activities from the PSS job at the Bend branch, they rejected her request for accommodations at the Sisters branch, and offered her reassignment to Bend instead. Further, the District required CN to either accept that accommodation offer or be terminated. When CN provided an updated return-to-work release that meant she could perform her duties without any accommodations, the District refused to reconsider its position, and reissued its ultimatum. When CN exercised her ADA right to decline an unnecessary accommodation, the District terminated her.

Although CN's supervisors may have believed that they were acting in CN's own best interest by preventing her from performing any work that involved physical activity, their understanding of CN's physical abilities was not based on an objectively reasonable interpretation of her return-to-work releases or a valid, individualized assessment of her ability to do her job safely. Instead, the supervisors acted on their own assumptions about what CN could not or should not do. However well-meaning, the District's decision to terminate CN was "the kind of workplace paternalism the ADA was meant to outlaw." *Chevron U.S.A. v. Echazabal*, 536 US 73, 85-86, 122 S Ct 2045 (2002).

Below, I begin by explaining how the record shows that 1) CN could perform her job duties consistently with her return-to-work releases, at first with reasonable accommodations, and later, without any accommodations, and 2) to the extent that CN needed accommodations, it was feasible for the District to provide them at the Sisters branch. I then discuss how the testimony of the District's supervisors shows that they refused to reinstate CN to her position at the Sisters branch, and ultimately terminated her, because they subjectively believed that CN should not, for her own good, perform *any* physical activities—and because they took it upon themselves to impose far greater restrictions on CN than her medical providers actually prescribed. By overprotecting CN in this manner, the District engaged in a prohibited form of disability discrimination, and consequently, violated the non-discrimination and just cause provisions of the parties' CBA. After addressing the ways in which the District violated the ADA and EEOC enforcement guidance, I also explain why I would conclude, even without regard to the ADA standards, that the District

[14]"The essence of 'just cause' is that the Employer, in carrying out its inherent or express right to discipline employees, must do so in a manner that is not unreasonable, arbitrary, capricious, or discriminatory." *Discipline and Discharge* at 35 (quotation marks and citation omitted).

[15]Respondent's Supplemental Brief at 18.

did not act as a "reasonable employer" would under the circumstances, and therefore lacked just cause to terminate CN.

1. CN could perform the essential functions of the PSS position at the Sisters branch, consistent with the limitations specified in her May 31, 2017, return-to-work release, with reasonable accommodations.

On July 24, 2017, the District provided CN with a document that it had drafted unilaterally and titled, "Reasonable Accommodation Agreement" ("July 24 Accommodation Agreement"). In that document, the District explained that CN had requested accommodations so she could return to work in her Public Services Specialist (PSS) position at the Sisters branch, consistent with her return-to-work release dated May 31, 2017 ("May 31 Release"). Although CN's position at Sisters remained open at that time, the District refused to reinstate her. The District explained that it had determined that her "request for accommodation [wa]s not feasible at the Sisters Library," and that it would offer her the accommodation of "[r]eassignment to the Downton Bend Library" instead. The District made clear that if CN accepted this accommodation, the reassignment would be permanent.[16] The District also explicitly stated that if CN "declin[ed] the accommodation" of reassignment, she would "be separated from employment."

The majority accepts, with little scrutiny, the District's claim that "there were no reasonable accommodations that would enable CN to perform the essential functions of the PSS position at the Sisters branch" consistent with the restrictions set forth in her May 31 Release. Majority opinion at 14. That claim, however, is not supported by substantial evidence in the record. Rather, the record shows that CN could perform her job duties with a few accommodations that the District easily could have provided at the Sisters branch. Below, I address each restriction indicated by the May 31 Release; the extent to which the restriction affected CN's ability to perform the duties of a PSS (if at all); and the ways in which the District could have effectively and reasonable accommodated CN at the Sisters branch.[17]

Pushing and Pulling:

The May 31 Release indicated that CN was "released to return to work" "pushing/pulling" "up to 100 pounds."[18] Where the release form asks the medical provider to indicate how much time the employee can push or pull per day, CN's provider checked the boxes for both "occasionally," and "frequently." The form defines "occasionally" to mean "6-33% of the day," and "frequently" to mean "34-66% of the day." The form does not specify whether the "day" in this definition refers to the total number of hours that the provider has authorized the employee to

[16]Specifically, the District wrote, "Should you receive a full medical release without restrictions it is understood that you will occupy the PSS position for Downton Bend."

[17]As explained in more detail below, the District's supervisors expressed concern about CN's ability to perform certain "materials handling duties," and the District asserts that all such duties are "essential functions" of the PSS position. Although there is evidence indicating that at least some of the materials handling tasks are "marginal functions," for the purposes of this analysis, I assume that they are "essential," as the District asserts.

[18]On the return-to-work release form, CN's provider drew parentheses around the words "pushing/pulling" and then drew an arrow to a handwritten notation, "up to 100lb."

work, or the total number of hours that the employee actually works on a given day. If the former, then CN was authorized to push and pull for over five hours per workday, because CN's provider released her to work up to eight hours per day, and 66% of eight hours equals 5.28 hours. If the latter, then when CN was working a six-hour shift, she could push and pull for up to four hours (66% of six hours equals four hours). For the purpose of this analysis, I conservatively assume that CN could push and pull up to 100 pounds for up to four hours per six-hour shift.

There is no evidence showing that CN would ever have to push or pull *more than* 100 pounds to perform any of the materials handling duties of her position at the Sisters location. The PSS Position Description states that the job's physical demands include "Pushing/Pulling 100 pound carts." Nothing in the position description indicates that a PSS must push or pull *more than* 100 pounds to perform any essential duty. Linda Kurtz, who worked for 15 years as a PSS at the Sisters branch (until she retired on October 31, 2015), could not recall ever having to push or pull more than 100 pounds.

Further, the weight of a cart depends on how many books are loaded onto the cart. The District's Assistant Director, Lynne Mildenstein, testified that employees can simply limit how many books they load on a cart to ensure that it does not weigh more than 100 pounds:

> "Q. Is there any reason that a staff person couldn't choose to only load the cart to 90 pounds and then maybe make a second trip?
>
> "A. No. There is no reason they couldn't do that."

Additionally, there is no evidence that a PSS ever has to push carts weighing up to 100 pounds for *more than four hours* during a six-hour work shift. CN, who worked as a PSS at Sisters for many years, testified (without rebuttal) that she pushed carts for "a few minutes a day."

Accordingly, the record shows that CN could perform the essential duties of her PSS position at the Sisters branch, consistent with her May 31 pushing and pulling limitations, without any accommodation.

Lifting and Carrying:

The May 31 Release indicated that CN was "released to return to work" "lifting" and "carrying" up to 15 pounds both "occasionally" and "frequently." As explained above, this means that the May 31 Release authorized CN to lift and carry up to 15 pounds for up to 5.28 hours per workday (regardless of the actual shift length), or, using more conservative assumptions, up to 66% of the actual workday, *e.g.*, four hours out of a six-hour shift.

The District did not prove that CN would have to exceed either the weight or the durational limit to perform the essential functions of the PSS position. The PSS Position Description indicates that the job's "physical demands" include "lifting (up to 30 pounds)." However, *moving library materials* is the essential duty—not lifting 30 pounds.[19]

Library Operations Manager, Robin McKinley, testified that she believed CN would have trouble "bringing in the newspapers." According to McKinley, "those are over five pounds, they can be up to ten pounds." However, the May 31 Release authorized CN to lift and carry up to 15 pounds.

The District identified only one PSS task that involves lifting and carrying a load that *potentially* could weigh more than 15 pounds: moving a crate of books. However, a reasonable accommodation includes "[a]ltering how an essential or marginal job function is performed (*e.g.*, modifying standing, climbing, lifting, or bending requirements)." *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015).[20] CN testified that she could lift and carry crates of books consistent with her 15-pound weight limitation simply by loading less than 15 pounds of books into each crate, and, if necessary, making a few extra trips. The weight of a book crate, like a library cart, can easily be reduced by loading fewer books into it. According to the District's Public Services Supervisor, Zoe Schumacher, library books weigh an average of one pound each.[21] Further, Kurtz testified that moving library materials is *not* a "time-sensitive" task; there are no library "emergencies" when it comes to moving books. Accordingly, if CN needed a few extra minutes to lift and carry book crates in 15-pound loads, that would not create an undue burden.

[19]Under the ADA, an employer may not disqualify an individual based on a lifting requirement or other physical standard unless the employer can show that the standard is 1) "job-related and consistent with business necessity"; and 2) "that there is no accommodation that would enable the person to meet the existing standard or no alternative approach (itself a form of accommodation) through which the employer can determine whether the person can perform the essential function." *Complainant v. Donahoe,* EEOC Appeal No. 0120080613, 2013 EEOPUB LEXIS 3567, *19-20 (2013) (citing 42 USC § 12113(a); 29 CFR § 1630.15(b)). "When determining if a standard or test is job-related and consistent with business necessity, the central question is whether the standard or test is 'carefully tailored to measure an individual's actual ability to perform the essential function of the job' HR Rep 101-485(II) at 36, 101st Cong., 2nd Sess. 1990, 1990 USCCAN 303, 353-5." *Id*. at *20 (brackets omitted). As discussed above, the District did not show that a 30-pound lifting standard is actually job-related and consistent with business necessity. Further, the record shows that CN could perform the essential function – moving crates of books – by reducing the weight of each crate to 15 pounds or less.

[20]Available at: https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

[21]There is no evidence that a PSS would ever have to lift or carry an item that in and by itself weighs more than 15 pounds.

CN and her union representative specifically asked the District to accommodate CN by allowing her to limit the weight of book crates, and if necessary, take a few extra minutes to move materials.[22] Moreover, the District's Public Services Supervisor, Zoe Schumacher, testified that the District had granted this reasonable accommodation to CN in the past.[23] The District has never explained (either when it rejected CN's request or at the hearing in this matter) why it believed that it would be "infeasible" to provide this accommodation to CN at the Sisters branch, even though it had done so before. Nor did the District introduce any evidence to show that this accommodation would have been ineffective or created an undue burden.

The District did not claim, much less prove, that CN would have to exceed any limit on the number of hours she could lift and carry. As noted above, even when the durational limit is calculated conservatively, CN could lift and carry for up to four hours per six-hour shift. Kurtz estimated that, as a PSS at the Sisters branch, she lifted and carried a load weighing more than 15 pounds roughly 10 times in a work day. CN similarly estimated that she moved a crate of books "[a] few times a day, maybe up to 12 times" per day. There is no evidence or other reason to believe that it would take CN more than four hours to lift and carry the equivalent of 12 crates of books.

Thus, the record establishes that CN could perform the materials handling duties, within the lifting and carrying limits specified in her May 31 Release, with an effective and reasonable accommodation: limiting the weight of book crates to 15 pounds or less, and if necessary, taking the time to make a few extra trips.

Stooping, Bending, and Twisting:

The May 31 Release expressly authorized CN to "stoop/bend" and "twist" up to four hours per day.[24] According to District representatives, a PSS must stoop or bend, and twist, primarily to unload book drop bins. Assuming that unloading book drop bins and similar tasks are an essential function of a PSS, there is no evidence that CN would have been unable to complete such tasks within her prescribed limitations. That is, the District failed to prove that it would take CN more than four hours a day to perform all of the job duties that required her to stoop or bend and twist.

When asked to estimate what percentage of the day a PSS would be required to "stoop and bend," the District's Public Services Supervisor, Zoe Schumaker, responded, "It's kind of really – that's hard to estimate. It's going to depend on the day, but at a minimum, about 50 percent

[22]In a letter dated June 16, 2017, CN provided the District with a few potential accommodations, including, "Allowing extra time to complete moving items from one place to another." Additionally, AFSCME representative Jared Kollen testified that when he and CN met with the District, he "brought up simple accommodations, just a little more time, using two more crates or an extra crate to move heavy objects, just simple things. It wouldn't have cost the district anything."

[23]When Schumacher was asked to provide an example of reasonable accommodations that the District had provided to employees in the past, she explained that the District had previously accommodated CN by permitting her to partially unload crates, "so that she could pick them up and move them over and then transfer[] subsequent material."

[24]On the May 31 Release, the provider handwrote "up to 4 hrs/days" and drew arrows to three of the physical activities listed on the release form: "stoop/bend," "twist," and "reach."

of their time, but it can be more." CN was authorized to stoop or bend for four hours—which is 66% of a six-hour shift. Thus, even assuming Schumaker's estimate was accurate, CN would not have had to exceed the May 31 Release's stooping/bending limitation to do her job.

Assistant Director Mildenstein testified that it was "possible" that CN "could be stooping, bending, and twisting more than four hours per day," but that possibility would arise only "if there is nobody else" at the library branch. That testimony is, at best, conclusory and speculative. There is no evidence that a Sisters branch PSS has ever actually needed to stoop, bend, or twist for more than four hours in a day to perform their essential functions. Further, the District's witnesses explained that they make every effort to avoid scheduling employees to work alone. Although they also testified that, despite those efforts, employees frequently work alone at the Sisters branch for some portion of a shift, there is no evidence indicating that a PSS ever works alone *for an entire shift*. Thus, the District's evidence at most shows that a PSS *might* need to stoop, bend, or twist for more than four hours under circumstances that occur rarely, if ever. That evidence does *not* show that CN needed to be able to stoop, bend, or twist for more than four hours to perform the essential duties of a PSS at the Sisters branch. *See Complainant v. Donahoe*, EEOC Appeal No. 0120080613, 2013 EEOPUB LEXIS 3567, *20-21 (2013) (70-pound lifting requirement was not justified where evidence indicated employees "occasionally lift between 35-50 pounds, and rarely lift between 50-70 pounds").

Indeed, the record shows that the District concluded that CN could not perform her materials handling duties because they believed that CN's release imposed greater restrictions on her stooping, bending, and twisting than her May 31 Release actually did. Specifically, Schumaker testified that it was her "understanding" that CN's release did not allow CN to stoop, bend, and twist "on a repetitive basis," and that it limited those activities to "six percent of a six-hour day" or "20 minutes." However, none of CN's releases actually indicated that she should not stoop, bend, and twist "repetitively." And, as noted above, the May 31 Release actually authorized CN to stoop, bend, and twist for up to four hours per day, not just 20 minutes.

Thus, the District failed to show, as a threshold matter, that CN needed *any* accommodation to perform her materials handling duties consistently with her four-hour limitation on stooping, bending, and twisting.[25]

Reaching:

The May 31 Release authorized CN to "reach" for up to four hours per day. The provider also wrote that CN should not reach with her "left upper extremity" "above chest" level, and "no more than physically capable of." A PSS must reach when performing materials handling duties such as shelving library materials or removing them from bins. However, the District identified

[25]Even if the District had shown that a PSS must stoop, bend, and twist for more than four hours per day to perform their essential functions, we would then need to determine whether the District could reasonably accommodate CN in her position at the Sisters branch. When asked whether there are "alternatives" that the District "can pursue for an employee that has some limitations on stooping and bending," Schumaker responded, "We do." Additionally, a PSS can modify how they perform their materials handling tasks to limit how much they actually stoop, bend, or twist. For example, retired PSS Kurtz testified that she "would bend down multiple times a day," but there were "work-arounds," such as sitting on a step stool, "if that was difficult." The District did not rebut Kurtz's testimony or otherwise establish that such modifications would be ineffective or create an undue burden.

only two PSS duties that potentially involve reaching above chest level: placing or removing books from the highest bookshelf level, and unlocking the main door when opening the library (or locking it when closing the library). As explained below, the record establishes that CN could perform those duties consistent with her May 31 Release simply by reaching up with her uninjured right arm (which is her dominant arm), instead of her left arm.

Reaching the highest bookshelves:

When CN discussed returning to work with the District, she explained that she could use her right arm (instead of her left) to reach the highest bookshelves while complying with her physical limitations. In or about June 2017, the District submitted a supplemental questionnaire to Dr. Bollom, the doctor primarily responsible for treating CN's injury, and asked him to confirm that she could use her right arm exclusively to perform her materials handling duties. Specifically, the District wrote:

> "The majority of tasks for the PSS and MSS positions involves reaching, stooping/bending, crouching, crawling, kneeling, twisting, climbing, balancing, pushing/pulling, walking, sitting, and lifting. Best practice is to have staff use both arms or alternate arms when doing tasks to avoid injury from repetitive use.
>
> "[CN] has stated she can use her right arm for many of these tasks. Is this a concern if [CN] uses her right arm exclusively?"

Dr. Bollom responded, "No." The District offered no explanation as to why, after receiving Dr. Bollom's response, it continued to believe that it should bar CN from engaging in any physical activity instead of allowing her to use her uninjured right arm to perform her duties. And at the hearing in this matter, the District offered no evidence to show that CN could not effectively perform all of her materials handling duties, consistent with her May 31 Release, by using her right arm exclusively.

CN also explained to the District that when she stood on one of the Sisters branch's existing step stools, the highest bookshelf was at her chest level, and that, as a result, she could shelve books without ever reaching above her chest level (with either arm). Thus, even if CN could not use her right arm exclusively (even though her doctor confirmed that she could), she could simply use a step stool instead. Again, there is no evidence showing that using a step stool would be an ineffective accommodation or create an undue burden. Indeed, at the hearing in this matter, Assistant Director Mildenstein confirmed that CN *could* use a step stool when shelving books to avoid reaching above her chest level:

> "Q. And what about with respect to shelving books, is there any reason a staff person couldn't avoid a lot of lifting over their heads by using a step stool?
>
> "A. You can use a step stool. Again, we don't – we try to keep our books so that they are not as high that they have to use step stools. If you look at our – our shelving, much of it is within reach of an average height, so it's not frequently that people will use step stools, and I believe in the Sisters branch as well there – they have – what are they, about five feet? Yeah."

Unlocking and locking the doors:

According to District representatives, an employee must reach above their head with one hand to unlock or lock the main doors at the Sister's branch. There are two doors, and each has a lock or "latch" located at the top of the door, as well as a safety bar. An employee must push the safety bar and reach up to turn the key at the same time. Although the District tries to avoid scheduling employees to work alone, occasionally, an employee must unlock or lock those doors without assistance.

However, there is no evidence that unlocking or locking the door would actually require CN to exceed any of the limitations specified in her May 31 Release. CN testified that she practiced on her own and confirmed that she could open both doors by reaching up to turn the key with her right hand (instead of her left hand), and thereby comply with the restriction against reaching above chest-level with her left arm. At the hearing in this matter, Assistant Director Mildenstein confirmed that CN also could have used a step stool to avoid having to reach above her head to unlock and lock the doors:

> "Q. With respect to the latches above her head, you said that would be difficult for her because it would be above her head. Is there any reason she couldn't use a step stool or a ladder to do that?
>
> "A. No. There was no reason she couldn't."

The District did not rebut CN's testimony or otherwise prove that CN could not lock and unlock the doors by herself, while staying within the limits specified by the May 31 Release.

The District's evidence on this issue consists only of vague expressions of doubt and concern about CN's ability to open the doors by herself. For example, Assistant Director Mildenstein expressed skepticism that CN would have the strength to push the safety bar with her left arm (while turning the latch with her right arm). That skepticism, however, was not objectively reasonable in light of the fact that CN's May 31 Release expressly authorized her to push with her left arm, and to push up to 100 pounds.

Moreover, even if the District had a valid basis for questioning CN's ability to open the door consistent with her May 31 Release, it could have asked CN's doctor to address that issue. Yet, the District failed to ask that question when it submitted supplemental return-to-work questions to CN's doctor in June, or at any other time. Alternatively, the District could have given CN the opportunity to demonstrate that she could open the door without reaching above chest level with her left arm, but it did not.[26]

[26]CN testified that the District did not give her the opportunity to demonstrate her ability to unlock the door. Mildenstein testified that CN "had difficulty" with pushing the door's safety bar, but then admitted that she did not actually witness that. Mildenstein asserted other District representatives could testify about CN's difficulty unlocking the door, but they did not. Public Services Supervisor Schumaker described the door in more detail, and testified that she was "concerned" about CN's ability to unlock the door, but no one testified that they had actually allowed CN to try, or had actually witnessed CN have difficulty unlocking the door.

The record also shows that the four-hour durational limit on reaching would not interfere with CN's ability to perform her job duties. To begin, there is no evidence establishing that a PSS ever has to reach for more than four hours per workday. Further, even if the job actually required reaching for more than four hours, only CN's left arm was actually impaired, and she could avoid reaching for more than four hours with her left arm by reaching with her uninjured right arm instead. As discussed above, CN's doctor confirmed that she could use her right arm "exclusively" to perform her job duties, in response to the District's June 14, 2017, supplemental questionnaire.

Thus, the record establishes that CN could perform any duty that required her to reach while complying with the limitations specified in her May 31 Release. To the extent that CN needed accommodations, the record shows that the accommodations she requested (using her right arm to perform certain tasks, and using an existing step stool) would have been effective and easy for the District to provide at the Sisters branch.

Crouching, Crawling, Kneeling, Climbing, and Balancing:

The May 31 Release authorized CN to crouch, crawl, kneel, climb, and balance "frequently," which means up to 66% of the workday, or at least four hours per six-hour shift. There is no evidence that a PSS at the Sisters location ever has to crouch, crawl, kneel, climb, or balance to perform their essential functions. The PSS Position Description specifies that the job's physical demands include "sitting, standing, walking, bending, pulling, pushing, reaching, twisting, [and] lifting," but it does *not* mention crouching, crawling, kneeling, climbing, or balancing. Retired Sisters branch PSS, Kurtz, confirmed that a PSS does not have to engage in any of those activities to perform their essential functions:

> "Q. How often would you need to in an average day crawl around on the floor?
>
> "A. I wouldn't.
>
> "Q. How often would you * * * crouch or kneel?
>
> "A. I would bend down multiple times a day, but there were work-arounds, too, if that was difficult. There were step stools that were of a perfect height to sit on if one needed to.
>
> "Q. How often would you have to climb on an average workday?
>
> "A. Maybe step up a step or two on a step stool but not climb.
>
> "Q. What about balance, how often would you have to balance?
>
> "A. You mean like on a stool or something like that?
>
> "Q. Yes.
>
> "A. I don't feel like that was an issue. If I were stepping on a step stool in front of bookshelves, I would have the shelves in front of me to rest my hands on if I needed to, but there wasn't a lot of climbing up and down."

Although Assistant Director Mildenstein testified that shelving books involves "bending and crouching," she also admitted, "That's not something that I do in my job necessarily." Even assuming that a PSS must sometimes crouch, crawl, kneel, climb, or balance to perform an essential duty, there is no evidence that a PSS must do any of those activities for more than four hours in a six-hour work shift. Therefore, the record establishes that the May 31 Release's durational limitation on crouching, crawling, kneeling, climbing, or balancing had *no* impact on CN's ability to perform the essential duties of her position.

In sum, the record shows that CN could perform the essential duties of her PSS position at the Sisters branch, consistent with all of the physical limitations specified in her May 31 return-to-work release. To the extent that CN needed accommodations to perform her job duties, the accommodations that she requested—reducing the weight of book crates, using her right arm, and using an existing step stool—were both effective and reasonable. In the July 24 Accommodation Agreement, the District explained that it had considered some unnamed type of equipment that could assist CN, but it did not specifically address any of the accommodations that CN actually requested. And, at the hearing in this case, the District failed to show that any of those requested accommodations would be ineffective, create an undue burden, or otherwise be "infeasible" to provide at the Sisters location.[27]

Both the majority and the District note that the May 31 Release released CN "only to modified duty," and that, on June 14, 2017, Dr. Bollom described CN's "percentage of recovery at that point as fifty percent." Majority opinion at 14. However, neither the majority nor the District adequately explains how being 50% recovered or on modified duty meant CN could not perform the essential duties of a PSS at the Sisters branch even with reasonable accommodations, and the fact that CN was not 100% recovered was not an appropriate basis for refusing to allow CN to return to her position. As the EEOC has explained, "An employer will violate the ADA if it requires an employee with a disability to have no medical restrictions -- that is, be '100%' healed or recovered -- if the employee can perform her job with or without reasonable accommodation * * *." *EEOC Employer Provided Leave and the Americans with Disabilities Act* (May 9, 2016) ("*EEOC ADA Leave Guidance*").[28] In other words, the percentage of recovery is irrelevant. The District was supposed to determine—without regard to her percentage of recovery—whether CN could perform her essential duties within the specific limitations prescribed by her doctor, with or without reasonable accommodations. As discussed above, the record shows that she could.

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[27]If the District was not sure that the accommodations that CN requested would be effective, it should have given her the opportunity to demonstrate that they would be. As the Ninth Circuit explained in *Humphrey v. Mem'l Hosps. Ass'n*, the "continuing duty to accommodate" means that "'an employer must consider each request for reasonable accommodation,'" and "'if a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship.'" 239 F3d 1128, 1138 (9th Cir 2001) (quoting *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, FEP (BNA)* 405:7601, at 7625 (March 1, 1999)). "This rule fosters the framework of cooperative problem-solving contemplated by the ADA, by encouraging employers to seek to find accommodations that really work, and by avoiding the creation of a perverse incentive for employees to request the most drastic and burdensome accommodation possible out of fear that a lesser accommodation might be ineffective." *Id.*

[28]Available at: https://www.eeoc.gov/eeoc/publications/ada-leave.cfm

2. CN could perform all of the duties of the PSS position at the Sisters branch, consistent with her updated return-to-work release dated July 28, 2017, without any accommodation.

On July 24, 2017, the District notified CN that, after considering her May 31 Release and the supplemental return-to-work information provided by her doctor on June 14, 2017, it had "determined that [her] request for accommodation is not feasible at the Sisters Library." The District then offered her the alternative accommodation of reassignment to Bend, and gave her a week, until August 1, 2017, to accept that offer or decline it with the "understand[ing] that by declining the accommodation [she] will be separated from employment."

Four days later, on July 28, 2017, CN gave the District an updated medical release, dated the same day ("July 28 Release"), and she sent the District "a series of e-mails" explaining that she was "released to return to work with no special accommodation required." Although the July 28 Release relaxed or eliminated all of CN's physical limitations, the District insisted that CN's claim that she could work without accommodation was "simply not true." Termination Letter (dated August 17, 2017) ("August 17 Termination Letter"). The District also refused to reconsider whether, in light of the updated release, CN could be accommodated at the Sisters branch. Instead, the District reissued its ultimatum: either accept the accommodation of reassignment to Bend or be terminated. However, the record establishes that CN was correct: she could perform all the duties of her PSS position at the Sisters branch, consistent with the July 28 Release, *without any accommodations*.

As discussed above, only some of the physical limitations specified in CN's May 31 Release potentially affected her ability to perform her job duties: the 15-pound limitation on lifting and carrying; the restriction against reaching above chest level with her left arm; and the four-hour limit on reaching, stooping/bending, and twisting. The July 28 Release relaxed or eliminated each of those limitations, such that CN could perform all of her job duties, consistent with the release, without any accommodation.[29]

Lifting and Carrying:

The May 31 Release authorized CN to lift and carry up to 15 pounds, both "occasionally" ("6-33% of the day") and "frequently" ("34-66% of the day"). The July 28 Release authorized CN to lift and carry *up to 30 pounds*, both occasionally and frequently.[30] The July 28 Release also

[29]Although the other physical limits prescribed by the May 31 Release did not affect CN's ability to perform her job duties or require accommodation, I note that the July 28 Release eliminated those other limits as well. Specifically, the July 28 Release raised the weight limit on pushing and pulling from "up to 100 pounds" to "more than 100 pounds." It also eliminated the durational limit on crouching, crawling, kneeling, climbing, balancing, pushing, and pulling (specifically, it changed "frequently" to "continuous").

[30]The return-to-work release form groups together "lifting, carrying, [and] pushing/pulling." CN's provider drew a circle around "pushing/pulling," and then drew an arrow to the boxes for "100 pounds" and ">100 pounds," and checked the box in the row marked "occasionally." The provider also drew a circle around "lifting," drew a line from that circle to "30 pounds," and checked the boxes for both "occasionally" and "frequently." With respect to "carrying," the handwritten notations are less clear: they could be

(Continued . . .)

authorized CN to work up to 10 hours per day (an increase from the May 31 Release, which authorized her to work up to eight hours per day). Accordingly, the July 28 Release authorized CN to lift and carry up to 30 pounds for up to 66% of a 10-hour workday, which is over six hours. Even using more conservative assumptions to convert the durational limits from percentages into hours, the July 28 Release authorized CN to lift and carry up to 30 pounds for up to 66% of her actual shift, *e.g.*, if she were working a six-hour shift, she could lift and carry for up to four hours. There is no evidence indicating that CN would have to lift and carry significant loads for more than 66% of the workday.[31]

Further, there is no evidence that a PSS at the Sisters branch ever has to lift and carry *more than* 30 pounds. As noted above, the PSS position description indicates that a PSS may have to lift "up to 30 pounds." Because the July 28 Release raised CN's lifting and carrying weight limit from 15 pounds to 30 pounds, CN no longer needed any accommodation to perform the materials handling duties that involved lifting and carrying. Specifically, she would no longer need to limit the weight of book crates to 15 pounds, or take any extra time to move crates of materials.

Reaching:

The July 28 Release specified that CN was "able to" reach "continuous[ly]," *i.e.*, for "67-100% of the day." The July 28 Release noted only that CN "should attempt to avoid repetitive heavy lifting w[ith] left arm/shoulder above shoulder height, lateral lifting." (This note supplanted the note on CN's May 31 Release, which indicated that CN should avoid reaching above chest-level with her left upper extremity.) CN's doctor explained that the July 28 note meant that she should not be "lifting or chucking or pitching bales of hay or cotton up onto a wagon," and that "heavy" meant something like a 40-pound bag of dog food.

There is no evidence that, to perform the essential duties of a PSS, CN would have to engage in any heavy lifting, much less do so with her left arm, above shoulder height, *and* repetitively. Similarly, there is no evidence that CN would ever have to perform a "lateral lift" with her left arm.

Because the July 28 Release eliminated the restriction against "reaching above chest level with left upper extremity," CN could place books on (or remove books from) the highest book shelves in the Sisters branch without any accommodation. She would not even need to use a step stool, or use her right hand exclusively, to perform this work. Likewise, there could no longer be

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(Continued . . .)
construed as authorizing CN to carry up to 30 pounds frequently, or more than 100 pounds occasionally. Because the May 31 Release clearly authorized CN to both lift and carry up to 15 pounds frequently, and the July 28 Release clearly authorized CN to lift up to 30 pounds frequently, for this analysis, I assume that the July 28 Release also authorized CN to carry up to 30 pounds frequently.

[31]In its termination letter, the District claimed that the July 28 Release authorized CN to lift 30 pounds only "occasional[ly]." As noted above, CN's medical provider actually indicated that CN could "lift" both "occasionally" and "frequently." However, even if CN were limited to lifting and carrying "occasionally," that would mean CN could engage in those activities for up to 33% of the workday, and she was authorized to work up to 10 hours per day. There is no evidence that it ever takes a PSS more than three hours (or even 33% of a given shift) to perform essential tasks that involve lifting and carrying.

any question about CN's ability to lock or unlock the doors by herself. She could reach up to turn the door latch with either hand, and push the safety bar in with the other, without exceeding any limitation specified in her July 28 Release, and without any accommodation.

Stooping, Bending, and Twisting:

The May 31 Release had authorized CN to stoop, bend, and twist for up to four hours per day. The July 28 Release authorized CN to stoop, bend, and twist "continuous[ly]," *i.e.*, 67-100% of the day, and authorized her to work up to 10 hours per day. Even if CN had to stoop, bend, and twist for an entire shift (typically six hours), she could do so, consistent with her July 28 Release, without any accommodation.

Finally, the July 28 Release also included a handwritten note which stated, "Patient may return to regular duty work as tolerated." In the August 17, 2017, termination letter, the District suggested that that note meant CN still required "special accommodation." However, the qualifier, "as tolerated," is not a specific limitation, and there is no evidence that CN could not "tolerate" performing all of her essential duties. To the contrary, CN represented to the District, and testified at hearing, that she could perform all of her regular duties, without any accommodations. Her assessment of her ability to perform her job warrants fair consideration; she had 20 years of experience performing the job successfully, and she was well aware of the job's physical demands.

3. CN's May 31 Release expressly stated that CN was "able to" engage in various physical activities for substantial amounts of time, and it specified only a few, relevant limitations. Nonetheless (as the testimony discussed in detail below shows), the District's supervisors believed that they should prevent CN from engaging in any physical activity at all. As a result, when they were determining whether the District could accommodate CN at the Sisters branch, they asked the wrong question: instead of asking whether they could accommodate her actual limitations, they asked whether they could completely eliminate all physical activity from the PSS job. Because it would be difficult to eliminate all physical job duties from the PSS position at the Sisters branch, but feasible to do that at the Bend branch, the District supervisors decided to reassign CN to Bend.

Thus, the District determined that it was infeasible to accommodate CN in her position at the Sisters branch—not based on her prescribed limitations—but based on her supervisors' subjective belief that CN should not, for her own good, engage in *any physical activity at all*. While the supervisors' concern for CN's welfare may have been genuine, when the District imposed greater restrictions on CN than her medical providers actually prescribed, and went so far as to terminate her for declining an unwanted and unnecessary "accommodation," the District engaged in a form of discrimination—"workplace paternalism"—that "the ADA was meant to outlaw." *Chevron U.S.A.*, 536 US at 85.

At the hearing in this matter, the District's counsel asked Assistant Director Mildenstein to explain the District's decision (in July 2017) to "accommodate" CN by reassigning her to Bend. Mildenstein testified,

> "[By] accommodating [CN] at the downtown Bend branch[,] *she would not have to do anything physical at that branch*. She would not be doing any of those -- she would not be shelving, she would not be pushing and pulling carts. * * * [M]ost of her work would be at a desk." (Emphasis added.)

Mildenstein further testified that the District "made every effort to make sure that [CN] *wouldn't have to do anything physical*." (Emphasis added.) Holly McKinley, Library Operations Manager, similarly explained that the District reassigned CN to Bend so that she "would not have to be doing the materials processing aspect of the job."

When the Union's counsel asked Assistant Director Mildenstein to explain how the District concluded that it was necessary for CN "to have a job that had no physical requirements," Mildenstein referred to the May 31 Release and supplemental documents that the District received in June 2017, and then testified that this "return-to-work information * * * mention[ed] that it was modified duty and she had limited lateral use of her arm and shoulder." When AFSCME counsel asked how "limited or modified duty translate[d] into 'she can't do anything physical at all,'" Mildenstein responded:

> "We wanted [CN] to be able to have time to heal and recover. At the downtown Bend branch she would have *no physicality*. She would not even have to lift anything. The return-to-work things were that her – her ability to lift at certain – I think it was under – it was at ten, ten pounds.[32] *We were taking away all of the ability for her to even have to lift anything*. *All she would be doing is sitting at our desks helping customers*." (Emphases added.)

Mildenstein's subsequent testimony further confirms that the District reassigned CN to Bend only because her supervisors wanted to bar her from engaging in *any* physical activity – despite the fact that her May 31 Release expressly authorized her to engage in physical activities with only moderate limitations:

> "Q. Why did the library think it was the library's place to give her time to heal that her doctor didn't think she needed?
>
> "A. The return-to-work releases didn't state -- they stated that she still had modified duty. Her -- her regular work return, they didn't know when it was going to be.
>
> "Q. Do you understand the difference between modified duty and no physical requirements at all?
>
> "A. Yes.
>
> "Q. Okay. So, how did -- I'm trying to understand why the library came to the conclusion that a doctor's note that says modified duty and that limits the physical requirements somehow means that she needed to be in a location where she wouldn't have to do physical work at all.
>
> "A. Again, we were looking at what would be best for [CN] and helping her. We thought that it would be good for her and her injury and to heal. She was having -- the subsequent doctor's releases that she did even after the work release that were

[32]The May 31 Release actually authorized CN to lift and carry up to 15 pounds, not ten.

> dated on July 26th still continued to state, and that would be R-13, that [she] should attempt to avoid repetitive heavy lifting with left arm and shoulder. There is -- modified duty is permanent. Again, if modified duty she still needs to -- are there permanent restrictions? Unknown. We wanted to again help with her injury, her healing, no physical work at all. It was -- we were again --
>
> "Q. How much medical training have you received personally?
>
> "A. None, of course.
>
> "Q. And did you consult with a doctor when you were making conclusions about what would be best for Charlotte's healing?
>
> "A. We consulted the medical work releases that we had at the time."

It was not objectively reasonable for the District to interpret "avoid repetitive heavy lifting" or "modified duty" as meaning "no physical work at all."

The supervisors' testimony also shows that their understanding of CN's physical abilities and limitations was not based on her most current release, but instead based on their own subjective views, or, at best, earlier releases that were supplanted by the May 31 Release. For example, when the District's counsel asked Public Services Supervisor Zoe Schumaker to explain what essential functions she believed CN could not perform, Schumaker asked to look at the work releases, and then referred to CN's "very first work release on April 25th," and noted that "the physician or physician's assistant had marked not to do [certain physical tasks] at all." However, the District did not reject CN's request for accommodation at the Sisters branch and reassign her to Bend until July 24, 2017. At that point, CN had already submitted the May 31 Release, and it was no longer appropriate for the District to base their assessment on a release from April 25th.

Similarly, Schumaker testified that she believed CN could not stoop, bend, or twist on a repetitive basis because CN's "*initial* work releases indicated" that she was limited to doing those physical activities to "six percent of a six-hour day" or "20 minutes." (Emphasis added.) Schumaker did not specify which release she was referring to, and none of the releases actually match her description. The closest match is the release dated May 15, 2017 ("May 15 Release"), which indicated that CN could stoop, bend, and twist (among other activities) for "6-33% of the day." However, that means that 6% was the floor, not the ceiling, and nothing in the May 15 Release indicated that CN should avoid stooping, bending, or twisting "on a repetitive basis." Moreover, the May 31 Release clearly and explicitly authorized CN to stoop, bend, twist, and reach *up to four hours per day*.

And, McKinley testified that, based on CN's return-to-work release, she believed that CN "would also have trouble just answering the phone at the front desk." However, nothing in CN's May 31 Release even suggests that she might have trouble answering the phone. To the contrary, the May 31 Release indicated that CN could engage in "fine manipulation," "pushing and pulling," "simple grasping," and "keyboarding," with both her left and right hands, without any qualifications.

Thus, the testimony of Assistant Director Mildenstein, Public Services Supervisor Schumaker, and Library Operations Manager McKinley, makes clear that they decided reassignment was the *only* accommodation option because they believed that CN should not engage in any physical activity at all. But that belief was not objectively reasonable in light of CN's May 31 Release, which expressly and specifically authorized her to engage in a wide range of physical activities, for many hours per workday.[33] CN could perform all the duties of a PSS at the Sisters branch, while fully complying with her May 31 Release, with a few reasonable accommodations. It was unnecessary for the District to relieve CN from performing *all* materials handling duties (even temporarily), and as a result, it was unnecessary for the District to reassign CN to Bend.

Assistant Director Mildenstein emphasized that the District was trying to do "what would be best for [CN]," and I have no doubt that they sincerely believed that relieving CN of *all* her materials handling duties by reassigning her to Bend "would be good for her and her injury and to heal." However, CN did not actually need to be relieved of all her materials handling duties to comply with her doctor's prescribed limitations, and it was not the District's prerogative to impose restrictions on her that she neither wanted nor needed. As Congress recognized when it enacted the ADA, "overprotective rules and policies" are a form of disability discrimination. 42 USC § 12101(a)(5).

To prevent that form of discrimination, the EEOC enacted the "direct threat" regulation, 29 CFR § 1630.15(b). Under that standard, "an employer will violate the ADA if it claims an employee with medical restrictions poses a safety risk [to herself] but it cannot show that the individual is a 'direct threat.'" *EEOC ADA Leave Guidance*. "'Direct threat' means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." *EEOC Enforcement Guidance: Workers' Compensation and the ADA*.[34] *See also Nathan v. Holder*, EEOC Appeal No. 0720070014,

[33]The majority asserts that the redacted portion of Physician Assistant Ericka Luckel's notes, dated June 12, 2017, confirms that the District's assessment of CN's physical abilities was "consistent with CN's medical providers' restrictions." Luckel's note advised CN to "avoid any lifting, pushing, pulling with her left hand/upper extremity," but also indicated that "[l]ight activity with her elbow at her side is okay." Luckel's notes, however, were inconsistent with CN's May 31 Release, which was completed by a different medical provider, James Nelson, M.D. The form completed by Dr. Nelson specifically asks the provider to indicate which hands the patient can push and pull with, and Dr. Nelson checked the boxes for both left and right hands. (He also authorized her to push and pull with both hands on her May 15 Release.) The form does not ask the provider to indicate which hands the patient can use to lift, but Dr. Nelson authorized CN to lift and carry up to 15 pounds, and she presumably would use both hands to lift and carry that much weight. Dr. Nelson also authorized CN to "reach" for up to four hours, and although he indicated that she should not reach "above chest" level using her "left upper extremity," that implies she could extend her left arm at least up to her chest level (and did not need to keep her left elbow at her side, as Luckel's note suggests). The fact that Luckel's notes contradicted Dr. Nelson's May 31 Release does not justify the District's decision to bar CN from engaging in physical activities that the May 31 Release expressly and specifically authorized her to engage in. Even if Luckel's June 12 notes somehow supplanted Dr. Nelson's May 31 Release, then CN's updated return-to-work release dated July 28, 2017, supplanted Luckel's June 12 note. And the July 28 Release, like the May 31 Release, expressly and specifically authorized CN to reach without any limitation; to push and pull with both hands; and to push, pull, and lift in weight and duration ranges that exceeded what was necessary to perform any PSS duties.

[34]Available at: https://www.eeoc.gov/policy/docs/workcomp.html

2013 EEOPUB LEXIS 3571 at *22 (2013) ("In order to exclude an individual on the basis of possible future injury, the [employer] bears the burden of showing there is a significant risk, for example, a high probability of substantial harm. A speculative or remote risk is insufficient."). "This means that an employer may not 'err on the side of safety' simply because of a potential health or safety risk." *EEOC Enforcement Guidance: Workers' Compensation and the ADA*.

Additionally, "[t]he determination that a direct threat exists must be the result of a fact-based, individualized inquiry that takes into account the specific circumstances of the individual with a disability." *Id.* "A determination of significant risk cannot be based merely on an employer's subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports." *Nathan*, 2013 EEOPUB LEXIS 3571 at *23.

The record in this case shows that the District's assessment of CN's ability to safely perform her materials handling duties was based solely on the subjective view of her supervisors (who are not medical professionals), and actually conflicted with that of her medical providers (who expressly authorized her to resume her regular work duties). That assessment falls far below the EEOC's standard for an adequate "individualized assessment." *See Nathan*, 2013 EEOPUB LEXIS 3571 at *25-27 (explaining that the employer's assessment, which was based on a single study, was "insufficient to establish" that complainant posed a direct threat); *Harrison v. Ashcroft*, EEOC Appeal No. 01A03948, 2003 EEOPUB LEXIS 4333 at *16 (2003) (employer unlawfully based risk assessment on "generalized assumptions about complainant's condition, and preconceived notions about how the condition [would] impact his health").

The majority argues that there is no need to apply the direct threat standard in this case because the District has never raised direct threat as an affirmative defense. Majority opinion at 17 n 11. The District's supervisors, however, testified that they concluded that reassignment was the only feasible option because they believed that CN might harm herself if she performed any materials handling duties. When an employer denies an individual an employment opportunity because of such concerns, an adjudicator (whether the EEOC, a court, an arbitrator, or this Board) must apply the direct threat standard to distinguish between an employer's legitimate refusal to place an individual "at a specifically demonstrated risk" and the "sham protection" or "workplace paternalism" disallowed by the ADA. *Chevron U.S.A.*, 536 US at 86.

The majority declines to apply such scrutiny to the District's claims; instead, they grant deference to both the supervisors' subjective (and demonstrably incorrect) interpretation of CN's releases, and their resulting determination that CN could not perform her duties at the Sisters branch, even with her requested accommodations. Majority opinion at 14-15.[35] In doing so, the majority permits the District to violate its contractual promises not to discriminate on the basis of disability and not to terminate employees without just cause.

[35]For example, when the majority discusses the District's determination that it was infeasible to accommodate CN at the Sisters branch, the majority simply quotes the District's July 24 Accommodation Agreement, which does not specifically address the few accommodations that CN actually requested. The majority does not require the District to explain why it rejected those accommodations, much less prove that they were not feasible.

4. The District violated the ADA by rejecting CN's request for reasonable accommodation in her position at the Sisters location, and instead reassigning her to Bend.

When the District terminated CN, she was attempting to return from unpaid leave that the District had granted her as a reasonable accommodation under the ADA. "Leave as a reasonable accommodation includes the right to return to the employee's original position." *EEOC ADA Leave Guidance*. Accordingly, at the end of her leave, CN was legally entitled to return to her original position: a PSS at the Sisters branch.

CN requested a few accommodations so she could return to work in her original position while complying with the physical limitations specified in her May 31 Release, which was also her right under the ADA. *EEOC ADA Leave Guidance* ("Employees on leave for a disability may request reasonable accommodation in order to return to work.").

So long as the accommodations that CN requested were reasonable (*i.e.*, did not create an undue burden), and effective (*i.e.*, enabled CN to perform the essential duties of her original position), the ADA required the District to provide those accommodations and return CN to her original position, instead of unilaterally reassigning her. *See, e.g.*, 29 CFR § 1630.2(o); *Skerski v. Time Warner Cable Co*., 257 F3d 273, 285-86 (3d Cir 2001).

As the court explained in *Skerski*, "the EEOCs commentary to the [ADA] regulations makes clear that reassignment 'should be considered only when accommodation within the individual's current position would pose an undue hardship.'" *Id.* at 285 (quoting *EEOC Interpretive Guidance*, 29 CFR pt 1630, App 1630.2(o)). In that case, the employee had requested an accommodation that would have enabled him to stay in his position, but the employer rejected his request and reassigned him instead. The court held that if the employee's requested accommodation was reasonable, then "the reassignment * * * did not satisfy the requirements of the ADA." *Id.* at 286. *See also Vollmert v. Wisconsin Department of Transportation*, 197 F3d 293, 301-02 (7th Cir 1999) (rejecting employer's argument that reassignment was a reasonable accommodation as a matter of law, because "reassignment generally should be utilized as a method of accommodation only if a person could not fulfill the requirements of her current position with accommodation"); *Smith v. Midland Brake, Inc.*, 180 F3d 1154, 1177 (10th Cir 1999) (The ADA "*requires the employer to use reasonable accommodation to keep the employee in his or her existing job*, and if that cannot be accomplished, to use reasonable accommodation to offer a reassignment to another vacant job which that person would be qualified to perform with or without a reasonable accommodation." (emphasis added)); *Gile v. United Airlines, Inc.,* 95 F3d 492, 496-98 (7th Cir 1996).

Further, as the D.C. Circuit noted in *Aka v. Wash. Hosp. Ctr.*, the ADA's legislative history confirms that "Congress saw reassignment, as the EEOC does, as an option to be considered *only after other efforts at accommodation have failed*." 156 F3d 1284, 1301 (DC Cir 1998) (citing HR Rep No. 485(II), 101st Cong., 2d Sess. at 63 (1990), *reprinted in* 1990 USCCAN 267, 345; S Rep No. 116, 101st Cong., 1st Sess. at 6 (1989) (emphasis added)).

In this case, the District argues that the ADA did not require it to give CN her preferred accommodations, and that it had the prerogative to choose the accommodation of "reassignment" instead. In support of that argument, the District cites EEOC guidance which states: "The employer may choose among reasonable accommodations as long as the chosen accommodation is

effective." *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (October 17, 2002) ("*EEOC Accommodation Enforcement Guidance*").[36] However, that same enforcement guidance, like the authority discussed above, makes clear that *reassignment* as an ADA accommodation is different: an employer may reassign an employee only as a "last resort." *Id.* (section titled "Reassignment").[37] The guidance that the District relies on means that the District could have chosen to provide any of the accommodations that would have enabled CN to stay in her position at Sisters, but it does not mean that the District could reject all of those accommodations in favor of reassigning her to Bend.

Additionally, the *EEOC's Accommodation Enforcement Guidance* makes clear that if an employer wants to reassign an employee, it is the employer's burden to show that accommodating the employee in their current position would cause undue hardship:

> "Example B: An employee with an ADA disability has taken 10 weeks of FMLA leave and is preparing to return to work. The employer wants to put her in an equivalent position rather than her original one. Although this is permissible under the FMLA, the ADA requires that the employer return the employee to her original position. *Unless the employer can show that this would cause an undue hardship, or that the employee is no longer qualified for her original position (with or without reasonable accommodation), the employer must reinstate the employee to her original position*." (Emphases added.)

Like the employer in the EEOC's hypothetical scenario, the District wanted to reassign CN to an equivalent position (a PSS in Bend), instead of returning her to her original position (a PSS in Sisters). However, the ADA required the District to reinstate CN to her original position, unless it could show that there was no accommodation that would enable CN to perform her essential duties, or that returning CN to Sisters would create an undue hardship. As discussed above, the District failed to make that showing in this case. CN requested that the District permit her to limit the weight of loads that she would need to lift and carry to 15 pounds; use her right arm instead of her left to perform various tasks, such as shelving books; and use the library's existing step stools. The District failed to prove that any of those accommodations would have been ineffective or created an undue burden. Consequently, the District violated the ADA by reassigning CN to Bend instead of reinstating her to her position at Sisters.

The majority asserts that the PSS positions are "District-wide," not branch-specific, and therefore questions whether the District's action "constituted a 'reassignment' within the meaning of 29 CFR § 1630.2(o)(2)(ii)." Majority opinion at 14 n 6. Even if the "reassignment to Bend" was not a "reassignment" for the purposes of the ADA, I would still conclude that the District violated

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[36]Available at: https://www.eeoc.gov/policy/docs/accommodation.html

[37]The Reassignment section of the Accommodation Enforcement Guidance states, in relevant part: "Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in his/her current position. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship."

the nondiscrimination and just cause provisions of the parties' CBA, because the District still discriminated against CN by imposing greater work restrictions on her than she actually needed (as discussed above), and violated the ADA by requiring CN to accept an accommodation offer and terminating her for declining it (as described below).

Nonetheless, based on my review of the record, I find that the PSS positions are branch-specific, and as a result, I conclude that what the District itself described as a "reassignment to Bend" was a "reassignment" within the meaning of 29 CFR § 1630.2(o)(2)(ii). To begin, the parties' CBA provides, "Regular employees shall be assigned a base work location at the time of employment." The parties define the "base work location" as "the location to which the employee normally reports at the start of the workday." Although the District may require an employee to report to an alternate location on a temporary basis, if it does so, the District must pay the employee for "travel time," including "[t]ravel time from home to the temporary work site which is in excess of commute time from the employee's home to the base work site."[38]

Additionally, the District repeatedly referred to the PSS positions by location, and characterized moving CN to Bend as a "reassignment." For example, in the July 24 Accommodation Agreement that the District drafted unilaterally, the District explained that it had "reviewed the essential functions of [CN's] Public Services Specialist (PSS) position at the Sisters Library of the Deschutes Public Library (DPL) district"; determined that her request for accommodation at the Sisters Library was not feasible; and offered CN "[r]eassignment to the Downtown Bend Library" instead. Further, the District made clear that if CN accepted the offered accommodation, the reassignment would be permanent.[39] If the PSS positions were District-wide, as the majority suggests, it would not have been necessary for the District to specify that CN's reassignment to Bend would be permanent.

5. The District also violated the ADA when it terminated CN for declining to accept an unnecessary accommodation.

Under the ADA, "an employer cannot require a qualified individual with a disability to accept an accommodation that is neither requested nor needed by the individual." *EEOC The ADA: Your Responsibilities as an Employer*.[40] *See also* 29 CFR § 1630.9(d) ("An individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept.").

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[38]CN testified at hearing that to reach the Bend branch (instead of the Sisters branch), she would need to travel an additional 45 miles per workday (approximately 58 miles instead of 13 miles), which meant approximately 75 minutes extra commuting time per workday (and potentially more, depending on traffic and weather conditions). If CN accepted the accommodation of permanent reassignment to a position in Bend, the District would not pay her for that additional commuting time.

[39]In the District's July 24, 2017, letter titled "Reasonable Accommodation Agreement," the District wrote, "Should you receive a full medical release without restrictions it is understood that you will occupy the PSS position for Downtown Bend."

[40]Available at: https://www.eeoc.gov/eeoc/publications/ada17.cfm

If an individual rejects an accommodation, the employer can terminate the individual only if, as a result of that rejection, they are no longer "qualified" for their position. 29 CFR § 1630.9(d) ("[I]f [an] individual rejects a reasonable accommodation, aid, service, opportunity or benefit *that is necessary* to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered qualified." (emphasis added)); *EEOC The ADA: Your Responsibilities as an Employer* ("[I]f a necessary reasonable accommodation is refused, the individual may be considered not qualified."). Under the ADA, the term "qualified individual" "means an individual who, *with or without reasonable accommodation*, can perform the essential functions of the employment position *that such individual holds or desires*." 42 USC § 12111(8) (emphases added).

In this case, the District required CN to accept the accommodation of reassignment (which was neither requested nor needed by her) or else be discharged. Specifically, in the July 24 Accommodation Agreement (which the District drafted unilaterally), the District directed CN to "check" one of two boxes:

1) "I accept the [reassignment] accommodation," or

2) "I decline the [reassignment] accommodation and understand that by declining the accommodation I will be separated from employment."

On July 28, 2017, after CN submitted an updated return-to-work release and explained that she no longer needed any accommodation, the District "notified [her] that the [reassignment] accommodation still applied and failure to check any option on the accommodation letter would be considered an indication of [her] declining the accommodation *resulting in separation from service*." August 17 Termination Letter (emphasis added). On July 31, 2017, when CN met with her supervisor to turn in her building key and collect her personal belongings, she also submitted a letter stating that she was "declining" the District's accommodation offer. The District, in its termination letter, confirmed that it terminated CN for declining to accept the accommodation offer, stating:

> "You have rejected the offer despite the fact that we advised you in advance that your rejection of the offer would lead to termination of your employment.
>
> "Based on your rejection of the accommodation and failure to report to work on August 1, 2017, you are notified that you are dismissed effective August 17, 2017."

The District contends that, "[i]f CN had been allowed to reject the accommodation of working in the Bend Library, * * * she would not have been 'qualified' to perform at Sisters the 'essential functions' of retrieving and shelving materials." Respondent's Supplemental Brief at 8. For the reasons discussed above, I find that the District failed to prove that CN was no longer qualified for her position when it terminated her for declining the accommodation of reassignment. Rather, the record shows that, at least by July 28, 2017, CN could perform all of the essential functions of her position at Sisters – including retrieving and shelving materials – without any accommodation. Even though CN no longer needed any accommodation, the District reissued its ultimatum to CN, requiring her to either accept its accommodation offer by August 1, 2017, or be terminated. Because the District terminated CN for declining an unnecessary accommodation, the

District violated the ADA, and therefore the nondiscrimination and just cause provisions of the CBA.

6. Even putting aside the requirements of the ADA and the EEOC's enforcement guidance, I would conclude that the District lacked just cause to terminate CN.

Everyone agrees that to determine whether the District had just cause to terminate CN, we apply the "reasonable employer" test. When applying that test, we must decide "the factual question of whether the [employer's] action itself is objectively reasonable." *Brown v. Oregon College of Education*, 52 Or App 251, 260, 628 P2d 410 (1981). We often reframe that question as "whether a fictive reasonable employer would have taken the same action under similar circumstances." *Oregon School Employees Association v. North Marion School District 15*, Case No. UP-60-90 at 30, 24 PECBR 661, 690 (2012). The fictive reasonable employer, among other fair practices, "takes disciplinary action based on substantial evidence." *Id.* In a dismissal case, we apply the reasonable employer test to each of the employer's stated reasons for the dismissal. *Id.* at 31, 24 PECBR at 691. Additionally, the employer must prove "the underlying facts" of the disciplinary action by a preponderance of the evidence. *Id.* at 31 n 31, 24 PECBR at 691 n 31.

The District, in its August 17, 2017, termination letter, explained its reasons for dismissing CN as follows: 1) the District had "determined that [CN's] request for accommodation is not feasible at the Sisters Library"; 2) on July 24, 2017, the District offered her the alternative accommodation of "a reassignment from Sisters to the Downtown Bend Library stating on August 1, 2017"; 3) CN submitted a new return-to-work release on July 28, 2017, and explained that she was "released to return to work with no special accommodation required"; 4) the District "notified [her] that the accommodation [of reassignment] still applied and failure to check any option on the [July 24] accommodation letter would be considered an indication of [her] declining the accommodation resulting in separation from service"; 5) on July 30, 2017, CN notified the District that she was declining the accommodation offer and arranged to meet Library Services Supervisor Zoe Schumaker to turn in her building key and pick up her personal belongings; 6) CN "rejected the offer [of accommodation] despite the fact that [the District] advised [her] in advance that [her] rejection of the offer would lead to termination of [her] employment"; and 7) the District decided to dismiss CN "[b]ased on [her] rejection of the accommodation and failure report to work on August 1, 2017."

In my view, under the reasonable employer test, the District must prove by a preponderance of the evidence its threshold claim that it was "not feasible" to accommodate CN at the Sisters branch. That claim was the underlying factual basis for every employment action that the District subsequently took, including requiring CN to accept the accommodation of reassignment to Sisters on pain of discharge, and terminating her for declining that accommodation. If the District had proven that claim by a preponderance of the evidence, then I would conclude that its subsequent actions were objectively reasonable. Because the District failed to prove that claim, I conclude that it was not objectively reasonable to dismiss CN for declining the accommodation of reassignment to Bend.

The majority avoids asking whether the District proved that it was not feasible to accommodate CN at the Sisters branch, primarily by asserting that "the District terminated CN because she failed to report to work at the Bend branch on August 1, 2017." By oversimplifying the basis for the dismissal, when the majority asks whether the District proved "that CN did what

she was disciplined for," *i.e.*, they require the District to prove only that CN did not report to work on August 1. There is no dispute that CN did not report to work that day; the District knew on July 31, 2017, that CN was declining its accommodation offer and that she would not report to work on August 1, because the District had made clear that it would terminate her if she declined its offer.

Under these circumstances, I believe that the just cause standard requires this Board to do more than ask whether the District proved that CN failed to report to work. Rather, the just cause standard requires us to ask whether the District proved its stated basis for requiring CN to accept the accommodation of reassignment on pain of discharge. If the District failed to prove the reason why it required CN to accept the accommodation to begin with, then it was not objectively reasonable for the District to discharge CN for declining it.

Further, I believe that the just cause standard also requires us to ask whether it was objectively reasonable for the District to discharge CN for declining the reassignment accommodation after she submitted her July 28 Release, which eliminated the few limitations that had any arguable impact on CN's ability to perform her job duties. I submit that, under such circumstances, a reasonable employer would not have continued to insist that CN accept reassignment to Bend or be terminated. Rather, a reasonable employer would have recognized that the underlying basis for the reassignment had changed. Even assuming that CN would have to perform all of her materials handling duties at the Sisters branch without any assistance, and even assuming that the District still had a legitimate basis for questioning her ability to do so after CN submitted her July 28 Release, a reasonable employer would not simply reissue the ultimatum to either sign the July 24 Agreement or forfeit her employment.[41] There were many reasonable alternatives that would not have involved termination of a 20-year employee "with an excellent service record." Majority opinion at 17. To name a few, the District could have asked CN's medical provider to provide more clarification; it could have required CN to undergo a fitness-for-duty exam; it could have given her the opportunity to prove that she could perform her essential duties at Sisters; it could have offered a temporary assignment to Bend instead of a permanent one.[42]

The majority implies that it does not matter whether the District correctly determined that it was "not feasible" to accommodate CN at Sisters and therefore necessary to reassign her to Bend, because, in the majority's view, CN unilaterally ended the interactive process by failing to

[41]The majority questions CN's representation that she needed no accommodations to perform her PSS duties consistent with her July 28 Release, because she simultaneously stated that driving to Bend would cause her physical strain. I do not find those statements to be inconsistent because the essential duties of a PSS (as described in the record) are unlike driving. As CN testified, driving the longer distance to Bend, unlike any PSS duty, would require her to keep both arms raised at chest level for an extended period of time each day, and driving for longer distances places more physical strain on the body, whether injured or not. In any event, even if there were sufficient reasons to question or disregard CN's representation that she could do her job, I would still find that the record shows CN could perform her essential duties within the few limits specified in her July 28 Release without any accommodation, and that the District failed to meet its burden to prove (1) that she still needed accommodation and, (2) if she did, that it was infeasible to provide such accommodation at Sisters.

[42]Indeed, if the PSS positions are District-wide, as the majority asserts, then it was more unreasonable for the District to insist on permanently transferring CN to Bend, rather than temporarily.

"propos[e] something else" and instead "opt[ing] to just reject the accommodation and not show up to work." Majority opinion at 16. However, CN did not simply "not show up to work." Rather, she did exactly what the majority suggests she should have done: she proposed something else. Specifically, she provided an updated medical release, and proposed that the District return her to position at Sisters without any accommodations. If anyone ended the interactive process, it was the District, when it first informed CN that it would terminate her if she did not accept its offer of reassignment. If issuing such an ultimatum did not clearly signal that the District was done with the interactive process, then the District's response to CN's counterproposal did: the District refused to reconsider its position despite the fact that CN's July 28 Release eliminated any relevant limitations and instead reissued its ultimatum—either accept the District's final accommodation offer or be terminated.

Ultimately, the majority concludes that the District had cause to dismiss CN because she did not comply with the District's directive to report to work in Bend on August 1. In other words, they find that CN was insubordinate. For the following reasons, I do not agree that CN's decision to not report to work, under the circumstances of this case, amounted to insubordination or gave the District cause to dismiss her.

To begin, an employer does not have cause to discipline an employee for refusing to obey a directive unless the employer proves, as a threshold matter, that the directive was reasonable and lawful. Discipline and Discharge at 157, 165-66. For the reasons discussed above, I conclude that the District failed to prove that reassigning CN to Bend was either objectively reasonable or lawful.[43]

Moreover, the District did not simply direct CN to report to work in Bend. Rather, the District directed CN to sign a document that it titled, "Reasonable Accommodation Agreement" (*i.e.*, the July 24 Accommodation Agreement). By its terms, signing that agreement would indicate CN's "acceptance" of the permanent reassignment to Bend, and CN could reasonably believe that if she signed the agreement, she would be waiving her rights or giving up any claim she had to her position in Sisters under the ADA or the collective bargaining agreement. *See, e.g.*, *Oregon Public Employees Union v. Malheur County, Commissioner Cox, Commissioner Hammock and Sheriff Mallea*, Case No. UP-47-87 at 4-5 & 8-9, 10 PECBR 514, 517-18 & 521-22 (1988) (employee reasonably understood that by signing contract she would be repudiating her grievance, even though that was not the employer's intent and there was no express waiver).

[43]The majority points out that the parties' CBA generally permits the District to assign and transfer employees to other locations for operational reasons. However, the District has never claimed that it was reassigning CN to a position in Bend for operational reasons. Rather, the District's stated reason for reassigning CN was that reassignment was the only way to accommodate CN's physical disability, consistent with her May 31 Release. The District failed to prove that assertion. Further, the CBA also prohibits the District from discriminating on the basis of disability. Therefore, as the District acknowledges, it could not exercise its right to assign or transfer CN to a position in Bend if doing so discriminated against her on the basis of disability.

The District also made very clear to CN that if she did not sign the July 24 Accommodation Agreement by August 1, it would terminate her.[44] As a result, after CN notified her supervisor that she was declining the accommodation and returned the unsigned Agreement to the District on July 31, she could reasonably understand that she was terminated as of that date. Indeed, the District's supervisor met with CN on July 31 so she could turn in her building key and collect her personal belongings. Because CN could reasonably understand that the District had terminated her on July 31, she could also reasonably understand that she should not report to work on August 1. Under these circumstances, CN's decision to not report to work in Bend on August 1 was not insubordination or other voluntary forfeiture of her employment, but the natural and probable consequence of the District's directive to sign the agreement or be terminated. *See id.* at 9, 10 PECBR at 523 (holding employer unlawfully terminated employee, where employer presented employment contract on a sign-or-quit basis and employee resigned). Thus, I disagree with the majority's conclusion that CN's decision to decline the accommodation and not report to work gave the District cause to dismiss her, because I conclude that the District's underlying conduct gave CN sufficient cause to make that decision.[45]

Finally, I recognize that the District reasonably accommodated CN by granting her extensive unpaid leave, and that the District engaged in the interactive process when CN requested reasonable accommodations to return to her position at the Sisters Library. However, the fact that the District acted lawfully and reasonably at earlier stages in the process does not mean that the District acted lawfully and reasonably when it dismissed CN for declining an unnecessary accommodation. The question is not whether the District is a generally reasonable employer, but whether the dismissal of CN was objectively reasonable under the circumstances.[46] Again, I conclude that it was not.

Jennifer Sung, Member

[44]Specifically, the District stated in the August 17 Termination Letter, on July 28, 2017, that it "notified [CN] that * * * failure to check any option on the [July 24 Accommodation Agreement] would be considered an indication of [her] declining the accommodation resulting in separation from service." Thus, CN did not have the option of refusing to sign the July 24 Accommodation Agreement but continuing to work for the District after August 1.

[45]Even if CN's failure to report to work in Bend on August 1 could properly be deemed insubordination or other conduct warranting discipline, I would find that the level of discipline that the District imposed—dismissal—was objectively unreasonable in light of the mitigating circumstances, including the District's own conduct and CN's 20-year service record.

[46]"'If the course of action is not one that would have been pursued by the reasonable employer, then we must conclude that 'no reasonable employer' would have acted in that manner, regardless of whether or not we believe the actual employer in question is, overall, a reasonable employer.'" *Brown*, 52 Or App at 258 (quoting *Brown v. Oregon College of Education*, Case Nos. 1046 & 1067 at 8 (1981) (Board Member Hein, dissenting)).