No. 18-0245

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

ERIK HERNANDEZ

*Appellant*,

v.

STUART STOCKTON SYSTEMS,

*Appellee*.

*Appeal from the United States District Court*

*for the District of Colorado*

BRIEF FOR THE APPELLANT

4909

Ring & Porter L.L.P.  
5000 Pearl Street

Boulder, CO 80303

(303) 345-5555

TABLE OF CONTENTS

[TABLE OF AUTHORITIES ii](#_Toc509690373)

[STATEMENT OF JURISDICTION 1](#_Toc509690374)

[STATEMENT OF THE ISSUES 1](#_Toc509690375)

[STATEMENT OF THE CASE 1](#_Toc509690376)

[STATEMENT OF FACTS 2](#_Toc509690377)

[SUMMARY OF THE ARGUMENT 4](#_Toc509690378)

[ARGUMENT 5](#_Toc509690379)

[I. SSS RETALIATED AGAINST MR. HERNANDEZ FOR FILING AN EEOC COMPLAINT BY TERMINATING HIS EMPLOYMENT AND PROVIDING A NEGATIVE REFERENCE. 6](#_Toc509690380)

[A. SSS Committed an Adverse Employment Action Against Mr. Hernandez by Terminating His Employment and by Providing a Negative Job Reference that Contributed to His Unemployment. 7](#_Toc509690381)

[B. Mr. Hernandez’s Termination and Negative Reference Have a Causal Connection to the EEOC Filing as Evidenced by the Temporal Proximity of Two Weeks and Three Months and Inconsistent Behavior From SSS. 8](#_Toc509690382)

[C. SSS’s Presented Reasons for Termination and the Negative Reference are Pretext Because They are Inconsistent and Do Not Suggest SSS Followed Policy, Which Strengthens the Causal Connection Between the Protected Activity and Adverse Action. 10](#_Toc509690383)

[II. MR. HERNANDEZ WAS DISCRIMINATED AGAINST BY SSS BECAUSE MR. HERNANDEZ’S REQUEST FOR A MODIFIED SCHEDULE WAS REASONABLE UNDER THE ADA, IT GAVE SSS KNOWLEDGE OF HIS DISABILITY AND WAS SPECIFIC, WOULD NOT HAVE IMPOSED UNDUE HARDSHIP. 12](#_Toc509690384)

[A. Mr. Hernandez Is Disabled Because Normal Cell Growth, Seeing, and Concentrating Are Major Life Activities That Are Impaired by Cancer, and SSS Had Knowledge of These Impairments as He Told His Supervisor About Them and His Potential Diagnosis. 13](#_Toc509690385)

[B. Mr. Hernandez’s Request for a Modified Schedule Was a Reasonable Request for Accommodations Because He Told His Employer of His Symptoms, Possible Diagnosis and Future Medical Appointments. 15](#_Toc509690386)

[C. Mr. Hernandez’s Request for A Modified Schedule Would Not Have Caused Undue Burden on SSS Because There Was an Employee of Similar Skill and Education That Could Have Covered Mr. Hernandez’s Duties, and Mr. Hernandez Believed He Could Finish His Work on Time with the Modified Schedule. 17](#_Toc509690387)

[CONCLUSION 19](#_Toc509690388)

[CERTIFICATE OF COMPLIANCE 20](#_Toc509690389)

[CERTIFICATE OF SERVICE 20](#_Toc509690390)

# TABLE OF AUTHORITIES

Cases

*Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) 13

*Allen v. SouthCrest Hosp.*, 455 Fed. Appx. 827 (10th Cir. 2011) 12

*Anderson v. Coors Brewing Co.*, 181 F.3d 1171 (10th Cir. 1999) 6

*Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193 (10th Cir. 2006) 9, 11

*Bartee v. Michelin N. Am., Inc.*, 374 F.3d 906 (10th Cir. 2004) 5

*Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) 15

*Beck v. Univ. of Wisconsin Bd. of Regents*, 75 F.3d 1130 (7th Cir. 1996) 17

*Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir.1996) 7

*Carter v. Pathfinder Energy Servs., Inc.*, 662 F.3d 1134 (10th Cir. 2011) 15, 16

*Cisneros v. Wilson*, 226 F.3d 1113 (10th Cir. 2000) 15, 16

*Davidson v. Am. Online, Inc.*, 337 F.3d 1179 (10th Cir. 2003) 13

*Dutton v. Johnson Cty. Bd. of Cty. Comm'rs*, 859 F. Supp. 498 (D. Kan. 1994) 13, 14, 18, 19

*E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028 (10th Cir. 2011). passim

*E.E.O.C. v. L.B. Foster Co.*, 123 F.3d 746 (3d Cir. 1997) 7

*Ellis v. University of Kansas Medical Center*, 163 F.3d 1186 (10th Cir. 1998) 8

*Foster v. Mountain Coal Co., LLC*, 830 F.3d 1178 (10th Cir. 2016) 6, 15, 17

*Freadman v. Metro. Prop. & Cas. Ins. Co*., 484 F.3d 91 (1st Cir. 2007) 13, 17

*Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir.1997) 7, 8

*Hashimoto v. Dalton*, 870 F. Supp. 1544 (D. Haw. 1994) 7

*Hennagir v. Utah Dep't of Corr.*, 587 F.3d 1255 (10th Cir. 2009) 15

*Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004) 7, 8

*Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114 (10th Cir. 2004) 15

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) 6

*Morgan v. Hilti, Inc.*, 108 F.3d 1319 (10th Cir. 1997) 10, 11

*New Hampshire v. Maine*, 532 U.S. 742 (2001) 18

*O'Neal v. Ferguson Const. Co.,* 237 F.3d 1248 (10th Cir. 2001) 9, 10

*Preeson v. Parkview Med. Ctr., Inc.*, No. 15-CV-02263-MSK-KMT, 2017 WL 1197298 (D. Colo. Mar. 30, 2017) 9, 10, 11

*Proctor v. United Parcel Serv.*, 502 F.3d 1200 (10th Cir. 2007) passim

*Punt v. Kelly Servs.*, 862 F.3d 1040 (10th Cir. 2017) 12, 15

*Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584 (10th Cir.1994) 8, 9

*Rascon v. US W. Commc'ns, Inc.*, 143 F.3d 1324 (10th Cir. 1998) 18

*Richmond v. ONEOK*, Inc., 120 F.3d 205 (10th Cir.1997) 9

*Sanchez v. Denver Pub. Sch.*, 164 F.3d 527 (10th Cir. 1998) 7, 12, 14

*Selk v. Brigham Young Univ.*, No. 2:13-CV-00326-CW, 2015 WL 150250 (D. Utah Jan. 12, 2015) 12, 16, 17

*Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.*, 180 F.3d 1154 (10th Cir. 1999) 16

*Spielman v. Blue Cross & Blue Shield of Kansas, Inc.*, 33 F. App'x 439 (10th Cir. 2002) 12

*Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995) 17

*Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205 (10th Cir. 2003) 11

Statutes

28 U.S.C. § 1291 (2012) 1

28 U.S.C. § 1331 (2012) 1

42 U.S.C. § 12102(1)(A) 16

42 U.S.C. § 12102(2)(B) 17

42 U.S.C. § 12111(10)(A) 22

42 U.S.C. § 12111(10)(B) 23

42 U.S.C. § 12111(9) 20

42 U.S.C. § 12112(b) 15

42 U.S.C. § 12112(b)(5)(A) 15

42 U.S.C. § 2000e-5(f)(3) (2012) 1

42 U.S.C. §§ 12112 – 12117 (2012) 1, 2

Miscellaneous

29 C.F.R. § 1630.12 (2017) 6

29 C.F.R. § 1630.15(d) 17

29 C.F.R. § 1630.2 (j)(1)(vii) 13

29 C.F.R. § 1630.2 (j)(3)(iii) 13

29 C.F.R. § 1630.2(h)(1) 13

29 C.F.R. § 1630.2(j)(2) 13

29 C.F.R. § 1630.2(o)(3) 16

29 C.F.R. § 1630.9(a) 13

# STATEMENT OF JURISDICTION

The United States District Court of Colorado has original jurisdiction over this case pursuant to 28 U.S.C. § 1331 (2012) and 42 U.S.C. § 2000e-5(f)(3) (2012) because it was a civil proceeding arising under an alleged violation of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12112 – 12117 (2012). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2012) because it is an appeal from the final judgment of the district court entered on February 8, 2018.

# STATEMENT OF THE ISSUES

1. Whether Stuart Stockton Systems’ actions retaliated against Erik Hernandez for filing an administrative claim with the Equal Employment Opportunity Commission (“EEOC”) when it terminated his employment and provided a prospective employer with a negative job reference, and whether the rationale of poor performance and absenteeism is merely a pretext.
2. Whether Stuart Stock Systems’ failure to provide Erik Hernandez with a modified work schedule was a failure to provide reasonable accommodations under the ADA, and thus discrimination when Plaintiff had cancer that caused headaches, blurry vision and nausea.

# STATEMENT OF THE CASE

Mr. Hernandez was wrongfully terminated and retaliated against by Stuart Stockton System, because Mr. Hernandez justly requested a modified work schedule to help him meet the demands of his work as he battled neuro glioblastoma, an aggressive form of brain cancer. This case arose out of Stuart Stockton Systems’ (“SSS”) termination of Erik Hernandez on January 24, 2017. Mr. Hernandez requested a modified work schedule to accommodate his illness, which was diagnosed as cancer. This request was denied, and Mr. Hernandez filed a discrimination charge with the EEOC on January 10, 2017. Two weeks later, SSS terminated Mr. Hernandez’s employment citing absences and missed deadlines. As Mr. Hernandez sought new employment SSS continued to retaliate against him by providing a negative reference. On January 2, 2018 Hernandez filed suit against SSS for discrimination and retaliation under the Americans with Disabilities Act. 42 U.S.C. §§ 12112 – 12117 (2012). Mr. Hernandez applied and was granted In Forma Pauperis and Appointment of Counsel. On February 8, 2018 the district court in the District of Colorado granted Summary Judgment for SSS holding that Mr. Hernandez failed to provide a prima facie showing for both retaliation and discrimination. Mr. Hernandez filed a timely appeal of the final judgement of the district court February 9, 2018, and the appeal is now before this Court.

# STATEMENT OF FACTS

On January 13, 2017 Erik Hernandez was diagnosed with neuro glioblastoma, an aggressive form of brain cancer. R. at 3. Prior to this diagnosis, Mr. Hernandez suffered from blurred vision, nausea and severe headaches, which he reported to his supervisor on December 9, 2016. R. at 2. Mr. Hernandez requested a modified schedule to accommodate his health concerns that was denied citing the upcoming software project. R. at 2. His attempt to seek assistance for his disability led to his termination and negative references from his supervisor. R. at 3.

Two years prior to Mr. Hernandez’s termination, in February 2015, Mr. Hernandez began work at SSS, as a software developer. R. at 2. In the same year, he began law school but was forced to discontinue his studies because of severe migraines. R. at 10; Pl.’s Appl. for In Forma Pauperis and Appointment of Counsel 2. As the severity of the headaches increased, Mr. Hernandez was unable to meet two project deadlines and missed a few days of work. R. at 2. This severe pain led him to seek medical attention and he received a neurological exam on November 17, 2016. R. at 2. On December 9, 2016 Mr. Hernandez met with his supervisor, Maeve Gryphon, to discuss his work performance. R. at 2. In the same meeting, Mr. Hernandez requested a modified work schedule to allow him to meet the requirements of the position and meet project deadlines as he struggled with his health, but Ms. Gryphon denied this request citing a new software project as justification for the refusal. R. at 2. On December 15, 2016 Mr. Hernandez’s colleague Samantha Smith became angry with him, accusing him of sabotaging the project because he had missed several meetings due to his illness. R. at 2.

On January 3, 2017 Ms. Gryphon met again with Mr. Hernandez to discuss his absence and requested he work better with his colleagues. R. at 3. Mr. Hernandez explained that his neurological exam had shown an alarming abnormality, which may be cancer, and requested the following week off. R. at 3. Mr. Hernandez took the week of January 9 – 14 off work, receiving a positive cancer diagnosis on January 13, 2017. R. at 3. Mr. Hernandez’s cancer symptoms flared the following week on January 16 and 17, causing extreme dizziness, nausea, and vomiting, preventing Mr. Hernandez from working on those days in addition to January 19 and 20. R. at 3. On January 24, 2017 SSS terminated Mr. Hernandez’s employment without warning or other formal disciplinary action. R. at 3, 13. SSS holds Mr. Hernandez responsible for the delay of its new software project, despite there being another employee with similar skills and education that could have helped the project when Mr. Hernandez’s cancer symptoms began to manifest. R. at 12, 16. At the time of his termination, Mr. Hernandez had almost completed his work on the project. R. at 12, 18.

On March 10, 2017 to pay medical bills and acquire health insurance for his treatment, Mr. Hernandez sought out new employment with E Building Solutions (“EBS”). R. at 3, 20; Pl.’s Appl. for In Forma Pauperis and Appointment of Counsel 2; Fin. Aff. for Appl. In Forma Pauperis and Appointment of Counsel 1. He passed through three rounds of interviews but was denied the position after Ms. Gryphon delivered a negative reference to Axel Rosenberg, COO of EBS on March 30, 2017, stating Mr. Hernandez had strong abilities, but that he missed several deadlines and been absent from work due to health, but neglected to mention his disability. R. at 3, 8, 19.

On January 2, 2018 Hernandez filed suit against SSS for discrimination and retaliation. R. at 4. Mr. Hernandez applied for and was granted In Forma Pauperis and Appointment of Counsel. Pl.’s Appl. for In Forma Pauperis and Appointment of Counsel 1. On February 8, 2018 the district court in the District of Colorado granted Summary Judgment for SSS holding that Mr. Hernandez failed to meet the prima facie cases for retaliation and discrimination. R. at 22. Hernandez filed a timely appeal of the final judgement of the district court February 9, 2018, and the appeal is now before this Court. R. at 23 – 24.

# SUMMARY OF THE ARGUMENT

The district court’s summary judgement for SSS should be reversed because there are several genuine issues of fact. The court’s finding that SSS did not retaliate against Mr. Hernandez should be reversed because terminating his employment and giving a negative reference to a potential employer was adverse action with strong causal connection to the EEOC filing. The causal connection can be shown both by temporal proximity and additional evidence. The same additional evidence shows that the reasons SSS gave for terminating Mr. Hernandez and giving a negative reference were merely pretext. For these reasons, SSS retaliated against Mr. Hernandez for filing an EEOC claim, and the district court’s ruling should be reversed.

Furthermore, SSS discriminated against Mr. Hernandez when it failed to reasonably accommodate his disability. The district court incorrectly held that the burden of proof to show that a reasonable accommodation would pose no undue hardship lay with the Plaintiff, instead of as an affirmative defense of the Defendant. SSS knew of Mr. Hernandez symptoms, which of themselves could be seen as disabilities, and was aware of his potential cancer diagnosis. Mr. Hernandez’s request for reasonable accommodations would not have caused undue hardship as it would have allowed him to finish his work, and there was another employee with similar skills and education who would have been able to cover Mr. Hernandez duties while he was ill.

# ARGUMENT

SSS’s termination and reference of Mr. Hernandez was retaliatory because Mr. Hernandez was an extremely qualified employee, and the termination and reference occurred within two weeks and less than three months of the EEOC filing. Furthermore, SSS discriminated against Mr. Hernandez because it knew of Mr. Hernandez’s disability and its symptoms that were disabling, his accommodation request was reasonable, and would not have caused undue hardship. The issues on review, whether the district court committed reversible error by granting summary judgment to the Defendant on Plaintiff’s claims of retaliation and discrimination, are issues of law and should thus be reviewed *de novo*. *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1205 (10th Cir. 2007); *Bartee v. Michelin N. Am., Inc.*, 374 F.3d 906, 916 (10th Cir. 2004). When reviewing a summary judgement, evidence and inferences must be viewed in the light most favorable to the nonmoving party and the judgement being affirmed unless there is a genuine issue of fact. *Proctor*, 502 F.3d at 1205*.* This brief will show that Mr. Hernandez’s termination and negative reference was retaliation for his EEOC filing and that SSS knew of Mr. Hernandez’s disability, his requested accommodation was reasonable and denied, and that it would impose no undue hardship on SSS.

## SSS RETALIATED AGAINST MR. HERNANDEZ FOR FILING AN EEOC COMPLAINT BY TERMINATING HIS EMPLOYMENT AND PROVIDING A NEGATIVE REFERENCE.

Retaliation occurs when an individual is discriminated against because he or she opposed any act or practice made unlawful under the Americans with Disability Act (“ADA”). 42 U.S.C. § 12203(a); 29 C.F.R. § 1630.12 (2017) . If direct evidence is not available, retaliation may be proven with only circumstantial evidence, *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1208 (10th Cir. 2007), and is analyzed with a burden shifting framework that requires the plaintiff to establish a prima facie case for retaliation and then if plaintiff can do so, the burden goes to the defendant to show that the action was not discriminatory. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Plaintiff must then show that the proffered reason is merely pretext. *Id.* A prima facie case for relation must show that: (1) employee participated in a protected activity; (2) there was adverse employment action; and (3) there was a causal connection between the protected activity and adverse action. *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1051 (10th Cir. 2011). Some courts require that a plaintiff show that he or she had a reasonable, good-faith belief they were disabled to prosecute a ADA retaliation claim. *Foster v. Mountain Coal Co., LLC*, 830 F.3d 1178, 1186 (10th Cir. 2016). Here, the first requirement of a prima facie case for retaliation is met: filing administrative charges with the EEOC is a protected activity. *Proctor*, 502 F.3d at 1208; *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999).

### SSS Committed an Adverse Employment Action Against Mr. Hernandez by Terminating His Employment and by Providing a Negative Job Reference that Contributed to His Unemployment.

The second element of a prima facie case, adverse employment action, has been liberally defined, requiring analysis on a case by case basis, and must meet the requirement of causing more than *de minimis* harm. *C.R. England*, 644 F.3d at 1040 (holding that “hiring, firing or failing to promote” rise to the level of adverse employment action); *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532 (10th Cir. 1998) (finding that an increase in commute time did not rise to the level of adverse action). An employment action is adverse if it causes harm to future employment prospects. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986–87 (10th Cir.1996) (finding that filing charges against a former employee may be adverse action); *Hillig v. Rumsfeld*, 381 F.3d 1028, 1031 (10th Cir. 2004) (holding a reference that prevented plaintiff from obtaining employment as adverse action); *E.E.O.C. v. L.B. Foster Co.*, 123 F.3d 746, 753 (3d Cir. 1997) (holding that refusing to give a reference can be adverse action); *Hashimoto v. Dalton*, 118 F.3d 671, 673 (9th Cir.1997) (holding that a negative reference was still adverse action despite that plaintiff would not have been hired in absence of the negative recommendation).

Mr. Hernandez’s termination and negative reference meet the requirements of the second element for a prima facie case of retaliation. Here, Mr. Hernandez’s employment was terminated, which meets the requirement of more than *de minimis* harm and is therefore an adverse action. *C.R. England*, 644 F.3d at 1040. Moreover, the negative reference of Ms. Gryphon was also retaliatory as demonstrated in *Hashimoto v. Dalton*, 870 F. Supp. 1544, 1554–55 (D. Haw. 1994), aff'd, 118 F.3d 671 (9th Cir. 1997), where plaintiff’s supervisor told a potential employer of attempts at counseling and suspensions and the future employer did not consider the plaintiff for employment. In *Hashimoto*, the court found that the potential employer would not have hired the plaintiff even in the absence of the negative recommendation but awarded plaintiff fees and costs. 118 F.3d 671. Here, Ms. Gryphon informed EBS that Mr. Hernandez missed work without authorization and missed several deadlines due to health reasons, which Mr. Rosenberg found problematic. Like in *Hashimoto*, it is not necessary for the reference to be the reason Mr. Hernandez was not hired, it is enough that the negative reference was given. Moreover, like the plaintiff in *Hillig v. Rumsfeld*, 381 F.3d 1028, 1035 (10th Cir. 2004), plaintiff was found to have suffered more than *de minimis* harm to future employment prospects from a negative reference when applying at the United States Attorney’s Office because the hiring authority at the Department of Justice testified that applicants with negative references would not be hired. Here, Mr. Hernandez received a negative reference which affected his future employment, as EBS may have extended an offer to Mr. Hernandez because his strong analytical abilities despite his lack of international experience if no negative reference had been given. Therefore, the both the termination and negative reference were retaliatory.

### Mr. Hernandez’s Termination and Negative Reference Have a Causal Connection to the EEOC Filing as Evidenced by the Temporal Proximity of Two Weeks and Three Months and Inconsistent Behavior From SSS.

The third prong, requiring causal connection between a protected activity and adverse employment action, may be shown via evidence that justifies an inference of a retaliatory motive, such as temporal proximity. *Proctor*, 502 F.3d at 1208. Closer temporal proximity may stand alone as a causal connection, but greater separation requires additional evidence to establish causation. *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 596 (10th Cir.1994)(stating that a one and one-half month period between protected activity and adverse action may, by itself, establish causation) overruled on other grounds by *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1194 – 97 (10th Cir. 1998); Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir.1997) (ruling that a three-month period, standing alone, is insufficient to establish causation); *Proctor*, 502 F.3d at 1208 (holding that “four months is too large a time gap to establish a causal connection”); *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193 (10th Cir. 2006) (holding that twenty-four days was enough to allow an inference of causal connection); *O'Neal v. Ferguson Const. Co.,* 237 F.3d 1248, 1254 (10th Cir. 2001) (finding that it need not consider if a period of two months and three weeks by itself is sufficient to support a prima facie cause of consideration because additional evidence was presented). The same evidence used to strengthen causal connection may also be used to establish that the defendant’s reasons for adverse action are pretext. *See Proctor*, 502 F.3d at 1209; *Preeson v. Parkview Med. Ctr., Inc.*, No. 15-CV-02263-MSK-KMT, 2017 WL 1197298, at \*1 (D. Colo. Mar. 30, 2017) (find that inconsistent upholding a policy about allowing employees to leave during their shift was evidence of pretext).

Here, there is a causal connection between Mr. Hernandez’s EEOC filing and the adverse action because two weeks is enough to support causal connection on its own, and the eleven-week period also shows a causal connection when supported with additional evidence. In *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 596 (10th Cir. 1994), a period of one and one-half months between the protected activity and adverse employment action was enough to show causation. In *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1202 (10th Cir. 2006), twenty-four days was enough to establish that a causal connection may exist. Here only two weeks passed from the time of filing to Mr. Hernandez’s termination on January 24, 2017 showing a sufficient causal connection between the two events.

In *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1209 (10th Cir. 2007), four months had passed between the protected action and adverse action and plaintiff was allowed to present additional evidence to support the causal connection. In *O'Neal v. Ferguson Const. Co.,* 237 F.3d 1248, 1253 (10th Cir. 2001), the court a held that two months and three weeks easily supported a prima facie case when supported with additional evidence that showed the employer’s reasons for lowering the employee’s hours and terminating were inconsistent. Here, just two more days passed between the protected activity and the negative reference than in *O’Neal*: eleven weeks and two days. 237 F.3d at 1253. In *Preeson v. Parkview Med. Ctr., Inc.*, No. 15-CV-02263-MSK-KMT, 2017 WL 1197298, at \*1 (D. Colo. Mar. 30, 2017), the plaintiff was warned that if her cancer related work absences could not be justified, she would be terminated. Here, SSS terminated Mr. Hernandez without formal disciplinary action, and without warning because its reasons for terminating his employment were retaliatory. Moreover, in *Preeson*, where the plaintiff presented evidence that her supervisor allowed other employees to leave work during their shifts, but disciplined the plaintiff for doing the same, the court upheld this was enough to show evidence of pretext. 2017 WL 1197298, at \*10. Here, like in *Preeson*,SSS did not consistently apply policy when it did not allow Mr. Hernandez a modified work schedule, an accommodation less burdensome than leave, but Mr. Hernandez noticed that others were able to take medical and family leave when required, supporting the causal connection between Mr. Hernandez’s EEOC filing and negative reference. *Preeson*,WL 1197298, at \*10; R. at 11.

### SSS’s Presented Reasons for Termination and the Negative Reference are Pretext Because They are Inconsistent and Do Not Suggest SSS Followed Policy, Which Strengthens the Causal Connection Between the Protected Activity and Adverse Action.

Pretext is established by evidence showing weaknesses, implausibilities, inconsistencies, or contradictions in the employer's explanation for its action that a reasonable factfinder could infer that the employer did not act for the asserted non-discriminatory reasons. *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) (showing that plaintiff was not able to raise an inference of pretext because her employer had issued warnings about the consequences of poor attendance both before and after plaintiff filed the charge of discrimination). Evidence proffered to strengthen causal connection over longer periods may also be used to establish that the defendant’s reasons for adverse action are pretext. *See Proctor*, 502 F.3d at 1209; *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1218 (10th Cir. 2003). To determine pretext, the facts are examined as they appear to employer, not the plaintiff’s subjective evaluation of the situation. *C.R. England*, 644 F.3d at 1044. The respective inquiry is not whether the employer’s reasons were fair or correct, but whether the employer believed those reasons and acted in good faith. *Proctor*, 502 F.3d at 1211.

SSS alleges it terminated Mr. Hernandez because of missed work, poor team relationships, and missed deadlines, however, these reasons are pretextual because of lack of normal disciplinary action and inconsistent policy. In *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1324 (10th Cir. 1997) an employer’s reason for termination was noted to be non-pretextual because there had been oral and written warnings about the consequences of absentism, showing an extended and detailed discplinary process. In *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1203 (10th Cir. 2006), the plaintiff’s performance had declined for nearly a year, and received repeated warnings about tardiness and failing to perform work. Here, unlike *Argo* and *Morgan*, there has been no formal disciplinary incidents at any time. *Argo*, 452 F.3d at 1203; *Morgan*, 108 F.3d at 1324. Ms. Gryphon and Mr. Hernandez discussed his absences before his EEOC filing, but there were no consequences named for his behavior, or formal disciplinary warnings at any time, and so the reasons for termination are pretextual. R. at 16. In *Preeson*, pretext was shown when a supervisor had inconsistenly upheld a policy that prohibited employees to leave during their shift. 2017 WL 1197298, at \*10. Here, there is no formal policy for flextime at SSS, but Mr. Hernandez has noticed other employees have been allowed to take time off for medical leave, while he was not able to be granted a modified schedule. R. at 11, 16. SSS’s inconsistent actions raises a genuine issue of fact which requires this issue to be remanded

## MR. HERNANDEZ WAS DISCRIMINATED AGAINST BY SSS BECAUSE MR. HERNANDEZ’S REQUEST FOR A MODIFIED SCHEDULE WAS REASONABLE UNDER THE ADA, IT GAVE SSS KNOWLEDGE OF HIS DISABILITY AND WAS SPECIFIC, WOULD NOT HAVE IMPOSED UNDUE HARDSHIP.

Under the ADA, discrimination occurs if an employer fails to grant a reasonable accommodation to an otherwise qualified individual with a disability, unless the employer can show that accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A). Under the ADA, to establish a prima facie case of disability discrimination for failure to accommodate a request for reasonable accommodations, a plaintiff must show that: (1) he is a disabled person as defined by the ADA and defendant knew of his disability; (2) the accommodations he requested and was denied were reasonable; and (3) the accommodations would pose no undue hardship on defendant’s business operations. 42 U.S.C. § 12112(b). The Court has used several different standards for what a plaintiff must establish for a prima facie case of failure to reasonably accommodate. *Selk v. Brigham Young Univ.*, No. 2:13-CV-00326-CW, 2015 WL 150250, at \*5 (D. Utah Jan. 12, 2015). The different tests vary, but generally require a plaintiff to show the following: (1) she is disabled; (2) she is otherwise qualified; and (3) she requested a plausibly reasonable accommodation. *Compare Punt v. Kelly Servs.*, 862 F.3d 1040, 1050 (10th Cir. 2017), *and* *Sanchez*, 695 F.3d at 1176., *with* *Spielman v. Blue Cross & Blue Shield of Kansas, Inc.*, 33 F. App'x 439, 443 (10th Cir. 2002), *and* Allen v. SouthCrest Hosp., 455 Fed. Appx. 827, 834 (10th Cir. 2011). Once a plaintiff establishes a prima facie case, the burden shifts to the defendant to rebut one or more elements of the case or establish an affirmative defense such as undue hardship. *Punt*, 862 F.3d at 1050. Failure to accommodate does not require discriminatory intent. *Id.* Under any of the tests, it can be shown that SSS failed to accommodate Mr. Hernandez. To be qualified under the second prong of the prima facie case, an individual must be able to perform the essential functions of a position, with or without reasonable accommodations. *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1190 (10th Cir. 2003) (finding a genuine issue of material fact whether “voicephone” experience was essential function of non-voicephone positions). Here, Mr. Hernandez has strong analytical abilities, and SSS believed him to be capable employee and his qualification is not at issue here.

### Mr. Hernandez Is Disabled Because Normal Cell Growth, Seeing, and Concentrating Are Major Life Activities That Are Impaired by Cancer, and SSS Had Knowledge of These Impairments as He Told His Supervisor About Them and His Potential Diagnosis.

A disability is a “physical or mental impairment that substantially limits one or more major life activities”, including normal cell growth, seeing, concentrating, interacting with others, and working. 42 U.S.C. § 12102(1)(A), (2)(B); 29 C.F.R. § 1630.2(h)(1). In bringing a prima facie case, employees must show substantial limitations of major life activities, but not inabilities. Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565 (1999) (holding that vision that was effectively monocular was a substantial limitation). Three factors are considered when determining a substantially limiting impairment: (1) its nature and severity; (2) how long it will last or is expected to last; and (3) its permanent or long-term impact or expected impact. 29 C.F.R. § 1630.2(j)(2); *Dutton v. Johnson Cty. Bd. of Cty. Comm'rs*, 859 F. Supp. 498, 506 (D. Kan. 1994). Cancer substantially limits normal cell growth, even in remission. 29 C.F.R. § 1630.2 (j)(1)(vii) & (3)(iii). Employers must know of the disability to accommodate it. 29 C.F.R. § 1630.9(a); *C.R. England*, 644 F.3d at 1050 (holding that a fleeting reference by the plaintiff to seeing the doctor not enough to place his employer on notice); *Freadman v. Metro. Prop. & Cas. Ins. Co*., 484 F.3d 91, 103 (1st Cir. 2007)(holding that a request to take time off because the employee was starting to not feel well was not sufficient for the employer to know it was referring to employee’s disability).

SSS had notice of Mr. Hernandez’s disability which substantially limits normal cell growth, affects his ability to see and concentrate due to severe migraines. In *Dutton v. Johnson Cty. Bd. of Cty. Comm'rs*, 859 F. Supp. 498, 506 (D. Kan. 1994), summary judgment was denied because defendant was unable to establish genuine issue of material fact to show that the plaintiff was not disabled when the plaintiff suffered intermittent severe and debilitating headaches, which prevented the plaintiff from driving or doing normal everyday tasks. Here, like in *Dutton*,Mr. Hernandez suffers similarly debilitating migraines as a direct result of his cancer, that caused him to pause his legal education and be unable to work, and so, like in *Dutton*, the summary judgement of the lower court was inappropriate because Mr. Hernandez’s headaches are a disability. 859 F. Supp. At 506. In *Sanchez v. Vilsack*, 695 F.3d 1174, 1179 (10th Cir. 2012), plaintiff’s field of vision had been reduced by half after an accident and was ruled as substantially limiting and therefore a disability. Here, like in *Sanchez*, Mr. Hernandez’s neuro glioblastoma directly affects his vision, causing blurred vision and migraines which substantially limits his ability to see, therefore his blurred vision alone is a disability. 695 F.3d at 1179.

In *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1050 (10th Cir. 2011), the plaintiff informed his employer he was leaving because he couldn’t handle the stress, and was going to his family’s house in Florida, which is where his doctor was. This “fleeting reference” to his doctor was deemed insufficient to put C.R. England on notice he needed time for his disability (his positive HIV status). *Id.* Unlike the plaintiff in *C.R. England*, Mr. Hernandez has made it clear he was requesting a modified schedule because of severe symptoms that may be caused by cancer. 644 F.3d at 1050. In *Foster v. Mountain Coal Co., LLC*, 830 F.3d 1178, 1189 (10th Cir. 2016), Foster told his employer that he had an appointment the next day to schedule an imminent surgery, which was enough to put the company on notice. Here, like in *Foster*, Mr. Hernandez told SSS of his upcoming medical appoint and neurological scan. 830 F.3d 1189. Despite SSS not knowing of Mr. Hernandez’s official cancer diagnosis, Mr. Hernandez’s request for a modified schedule, which included information about his severe symptoms, which alone were disabling, his doctor’s belief he may have cancer, and an upcoming medical appointment, was sufficient to put SSS on notice for his disability and its need to accommodate it.

### Mr. Hernandez’s Request for a Modified Schedule Was a Reasonable Request for Accommodations Because He Told His Employer of His Symptoms, Possible Diagnosis and Future Medical Appointments.

Reasonable accommodations enable an employee to perform essential functions of his job presently, or in the near future. *Cisneros v. Wilson*, 226 F.3d 1113, 1129 – 30 (10th Cir. 2000) overruled on other grounds by [Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001172281&pubNum=708&originatingDoc=I92956d9b567e11e1b1bac17b569b34b6&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); *Hennagir v. Utah Dep't of Corr.*, 587 F.3d 1255, 1264 (10th Cir. 2009). Reasonable accommodations may include modified work schedules, reassignment, or modification of equipment. 42 U.S.C. § 12111(9); *Carter v. Pathfinder Energy Servs., Inc.*, 662 F.3d 1134, 1146 (10th Cir. 2011) (finding a part time work schedule could be a reasonable accommodation because it allowed the employee to arguably complete the essential functions of his job). Accommodations are only deemed reasonable if they are needed because of the disability. *Punt*, 862 F.3d at 1050. A request to be relieved of an essential function of a position is not a reasonable accommodation. *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1123 – 24 (10th Cir. 2004) (stating that as attendance is essential at most jobs, a request to work from home is unreasonable).

To determine appropriate accommodations, it may be necessary for the employer to initiate an interactive process with the disabled employee, identifying the precise limitations and potential reasonable accommodations. 29 C.F.R. § 1630.2(o)(3). This process should begin with the employee providing notice to the employer of the disability and any resulting limitations. *Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.*, 180 F.3d 1154, 1171 (10th Cir. 1999). A request for accommodation must be direct and specific enough to give the employer notice that the employee needs a special accommodation; no particular language is required. *Smith*, 180 F.3d at 1172 (finding that no magic words are required; an employee need not mention the ADA or reasonable accommodations). An employee is required to inform the employer of the “*expected duration of the impairment* (not the duration of the leave request).” *Cisneros*, 226 F.3d at 1129 – 30.

Mr. Hernandez’s request for a modified schedule was a reasonable request for accommodation because he engaged SSS about his needs was as specific as he was able. In *Carter v. Pathfinder Energy Servs., Inc.*, 662 F.3d 1134, 1146 (10th Cir. 2011) a request for part time work to rest from long shifts was ruled as a reasonable accommodation. Here, Mr. Hernandez requests not to be excused from his work, but to be able to work at times of day when his symptoms are not impairing his functions. His requested accommodation is less burdensome to his employer than in *Carter*, and so should be ruled as reasonable. 662 F.3d at 1146. In *Selk v. Brigham Young Univ.*, No. 2:13-CV-00326-CW, 2015 WL 150250 (D. Utah Jan. 12, 2015), the employee and employer entered into a good faith interactive process when Selk approached his employer with a request, and then again when the previous accommodation was no longer available. Here, unlike *Selk*, SSS did not allow the interactive process to take place because it refused to consider accommodations without specifics, which Mr. Hernandez was unable to give at that time, nor potentially ever give, as the duration of cancer and manifestation of its symptoms cannot be foretold. 2015 WL 150250 at \*6.

In *Freadman v. Metro. Prop. & Cas. Ins. Co*., 484 F.3d 91, 103 (1st Cir. 2007), an employee request in which she told her direct supervisor that she “needed to take some time off because [she was] starting not to feel well” was ruled insufficient because she did not say when she would need time off. In *Foster v. Mountain Coal Co., LLC*, 830 F.3d 1178, 1189 (10th Cir. 2016), Foster told his employer that he had an appointment the next day to schedule an imminent surgery. Here, unlike *Freadman* and like *Foster*, Mr. Hernandez has been specific as he was able, notifying his employer of his upcoming appointment and immediate symptoms. *Freadman*, 484 F.3d at 103; *Foster*, 830 F.3d at 1189. Mr. Hernandez’s request was reasonable because it notified SSS of his upcoming medical appointment, his potential diagnosis, and his symptoms, which substantially limits of major life activities.

### Mr. Hernandez’s Request for A Modified Schedule Would Not Have Caused Undue Burden on SSS Because There Was an Employee of Similar Skill and Education That Could Have Covered Mr. Hernandez’s Duties, and Mr. Hernandez Believed He Could Finish His Work on Time with the Modified Schedule.

A defendant may show a requested accommodation would impose an undue hardship on the operation of the defendant’s business. 29 C.F.R. § 1630.15(d). Undue hardship requires significant difficulty or expense and must be considered in light of an employer’s resources, size, nature and cost of the accommodation, and the impact of the accommodation. 42 U.S.C. § 12111(10)(A) & (B). However, the employer must be willing to consider making changes to its ordinary rules, facilities, terms and conditions to enable a disabled individual to work. *Beck v. Univ. of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) (quoting *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995)). The employer bears the burden of persuasion on whether an accommodation would impose undue hardship. *Rascon v. US W. Commc'ns, Inc.*, 143 F.3d 1324, 1334 (10th Cir. 1998) (holding an extended leave with the employee’s duties covered by others did not cause undue hardship) overruled on other grounds by [New Hampshire v. Maine, 532 U.S. 742 (2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001440935&pubNum=0000708&originatingDoc=Ic4321a84e77311e3b4bafa136b480ad2&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

The reasonable accommodations requested by Mr. Hernandez would not cause undue hardship because there was an employee suitable to assist in covering his duties, and the modified schedule would have allowed Mr. Hernandez to finish his work on time. In *Rascon v. US W. Commc'ns, Inc.*, 143 F.3d 1324, 1334 (10th Cir. 1998), the employer argued that the leave it granted its employee, Rascon, was an extraordinary accommodation that it had provided with difficulty because other employees had to cover Rascon’s responsibilities, however the leave was less accommodating that than company policy required. The court held that co-workers covering the duties for Mr. Rascon for a period of several months was not undue hardship. *Id.* at 1335. Here, there is no formal policy for flex time or working from home, but Mr. Hernandez has seen other employees take medical issues and parental leave, so allowing Mr. Hernandez a modified work schedule would not cause undue hardship.

SSS also contends that it believed Mr. Hernandez was the only employee capable of performing his tasks and blames him delays in the project. R. at 17 – 18. However here, like *Rascon*, another employee, Joey Piper, has the same education and training as Mr. Hernandez and would have been able to take Mr. Hernandez’s place on the project, allowing Mr. Hernandez’s duties to be covered without hardship. *Rascon*,143 F.3d 1334; R. at 12. In *Dutton v. Johnson Cty. Bd. of Cty. Comm'rs*, 859 F. Supp. 498, 506 (D. Kan. 1994), the employer was not able to produce evidence showing that the employee’s absences resulted in essential work not be completed in a timely manner. Here, unlike *Dutton*, SSS may point to the delays in its project, however these delays may have been avoided if SSS had allowed Mr. Hernandez a modified schedule, as he was almost done with his work at the time of his termination and the modified schedule could have allowed him to work after hours or other times when he normally would not be able. *Dutton*, 859 F. Supp. At 506;R. at 12, 18. Mr. Hernandez’s request would not have caused undue hardship because there was an employee of similar skill that could have covered Mr. Hernandez’s duties if necessary, and because Mr. Hernandez’s modified schedule could have allowed the project to be released without delays.

# CONCLUSION

For the foregoing reasons, Appellant requests that summary judgement be reversed.

Respectfully submitted,

Dated: March 25, 2018 /s/ 4909

Student’s Anonymous Identifier  
1800 Broadway,

Boulder, CO 80302

(303) 473-2700

Attorney for Appellant

# CERTIFICATE OF COMPLIANCE

I certify that

1. this document has been prepared using Microsoft Word, Times New Roman, 12-point

and

1. this document contains: 5975 words.

/s/ 4909

Student’s Anonymous Identifier

# CERTIFICATE OF SERVICE

I hereby certify that on this date, the 26 of March, 2018, a copy of the foregoing Brief for Appellant was served on opposing counsel via email

/s/ 4909

Student’s Anonymous Identifier