No. 17-0264

**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

Student’s Anonymous Identifier

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TABLE OF CONTENTS

[TABLE OF AUTHORITIES ii](#_Toc507315636)

[STATEMENT OF JURISDICTION 1](#_Toc507315637)

[STATEMENT OF THE ISSUE 1](#_Toc507315638)

[STATEMENT OF THE CASE 1](#_Toc507315639)

[STATEMENT OF FACTS 1](#_Toc507315640)

[SUMMARY OF THE ARGUMENT 1](#_Toc507315641)

[STANDARD OF REVIEW 1](#_Toc507315642)

[ARGUMENT 1](#_Toc507315643)

[I. SSS RETALIATED AGAINST MR. HERNANDEZ BECAUSE SSS TOOK ADVERSE ACTION BY TERMINATING HIS EMPLOYEMENT AND PROVIDING A NEGATIVE REFERENCE, THE ADVERSE ACTION WAS TWO WEEKS AND MONTHS AFTER THE PROTECTED ACTIVITY, AND ITS REASONS FOR TERMINATION WERE INCONSISTENT SHOWING THEY WERE PRETEXTUAL. 3](#_Toc507315644)

[II. SSS DRIMINATED AGAINST MR. HERNANDEZ BECAUSE IT HAD KNOWLEDGE OF HIS DISABILITY, HIS REQUEST FOR ACCOMMODATION WAS REASONABLE AND WAS DENIED, AND WOULD NOT HAVE IMPOSED UNDUE HARDSHIP. 6](#_Toc507315645)

[CONCLUSION 6](#_Toc507315646)

[CERTIFICATE OF COMPLIANCE 7](#_Toc507315647)

[CERTIFICATE OF SERVICE 7](#_Toc507315648)

# TABLE OF AUTHORITIES

Cases

*Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999) 4, 5

*Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986–87 (10th Cir.1996) 4

*E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1051 (10th Cir. 2011). 2, 3, 4

*Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir.1997) 5

*Hillig v. Rumsfeld*, 381 F.3d 1028, 1031 (10th Cir. 2004) 4, 5

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) 2, 3

*Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1324 (10th Cir. 1997) 3, 5

*Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1208 (10th Cir. 2007) 3, 4, 5

Statutes

. 42 U.S.C. § 12111(9). 2

28 U.S.C. § 1291 (2017) 1

28 U.S.C. § 1331 (2012) 1

42 U.S.C. § 12102(2)(A) & (B) 2

42 U.S.C. § 12111(10) 2

42 U.S.C. § 12111(8) 2

42 U.S.C. § 12112(b) 2

42 U.S.C. § 12112(b)(5)(A) 2

42 U.S.C. § 12203(a) 2, 3

42 U.S.C. §§ 12112 – 12117 (2017) 1

42 U.S.C. §12102(1)(A) 1

# STATEMENT OF JURISDICTION

The United States District Court of Colorado had original jurisdiction over this case pursuant to 28 U.S.C. § 1331 (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 (2017). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2017) because it is an appeal from the final judgment of the district court entered on February 8, 2018.

# STATEMENT OF THE ISSUE

# STATEMENT OF THE CASE

# STATEMENT OF FACTS

# SUMMARY OF THE ARGUMENT

# STANDARD OF REVIEW

# ARGUMENT

Stuart Stockton Systems (“SSS”) discriminated against Erik Hernandez because it knew of Mr. Hernandez’ disability, his accommodation request was reasonable, and would not have caused undue hardship. Further SSS’s termination and reference of Mr. Hernandez was pretextual for retaliation because Mr. Hernandez was an extremely qualified employee, and the termination and reference occurred within two weeks and three months of the EEOC filing. Under the Americans with Disability Act (“ADA”), a disability is a “physical or mental impairment that substantially limits one or more major life activities”. 42 U.S.C. §12102(1)(A). Major life activities include seeing, concentrating, thinking, working, and bodily functions such as normal cell growth. 42 U.S.C. § 12102(2)(A) & (B). Discrimination occurs if an employer fails to grant a reasonable accommodation with an individual with a qualified individual, unless the employer can show that accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A). Qualified individuals are those who with or without reasonable accommodation can perform the essential functions of the employment position held. 42 U.S.C. § 12111(8). Reasonable Accommodations may include modified work schedules, reassignment, or modification of equipment. 42 U.S.C. § 12111(9). Undue hardship requires significant difficulty or expense and must be considered in light of an employer’s resources, size, and the impact of the accommodation. 42 U.S.C. § 12111(10). To establish a prima facie case of disability discrimination for the 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). Under the ADA, employers may not retaliate against individuals who have opposed unlawful practices. 42 U.S.C. § 12203(a). Retaliation is analyzed using a burden shifting framework which requires Plaintiff to bring a prima facie case for retaliation and then if Plaintiff is able to do so, 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 this reason is merely pretext. *Id.* A prima facie case for relation must be shown 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). Here only the causal connection is at issue for termination, as filing with the EEOC is a protected activity and termination is adverse action, however all three are at issue regarding the negative reference given by Mr. Hernandez’s supervisor. 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 accommodations were reasonable and denied, and that they would impose no undue hardship on SSS.

## SSS RETALIATED AGAINST MR. HERNANDEZ BECAUSE SSS TOOK ADVERSE ACTION BY TERMINATING HIS EMPLOYEMENT AND PROVIDING A NEGATIVE REFERENCE, THE ADVERSE ACTION WAS TWO WEEKS AND MONTHS AFTER THE PROTECTED ACTIVITY, AND ITS REASONS FOR TERMINATION WERE INCONSISTENT SHOWING THEY WERE PRETEXTUAL.

Retaliation is discrimination against an individual because such individual has opposed any act or practice made unlawful under the ADA. 42 U.S.C. § 12203(a). It is sometimes required for a plaintiff to show that they had a reasonable belief that they are disabled before a retaliation complaint can be made. [CITATION]. Retaliation is shown with a burden shifting framework. *McDonnell*, 411 U.S. at 802. A plaintiff must establish a prima facie case for discrimination by showing: (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.*, 644 F.3d at 1051. If plaintiff is able to do this the burden shifts to the defendant to provide reason for the adverse action, and the plaintiff must then show this reason was pretextual. *McDonnell*, 411 U.S. at 802. Retaliation may be proven with only circumstantial evidence. *Compare* *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1208 (10th Cir. 2007) (allowing plaintiff to establish a causal connection between filing of administrative charges and his discharged by evidence of circumstances), *with Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1324 (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).

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). A factor showing adverse employment action is if it causes harm to future employment prospects. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986–87 (10th Cir.1996); *Hillig v. Rumsfeld*, 381 F.3d 1028, 1031 (10th Cir. 2004). The Court has liberally defined “adverse employment action”, analyzing factors on a case by case basis. *E.E.O.C.*, 644 F.3d at 1040. “Acts that constitute a significant change in employment status such as hiring, firing or failing to promote” are adverse employment action and must cause more than *de minimis* harm. *Id*. Negative references can be adverse action, even if the recommendation is the not the sole reason for a potential employer rejecting the plaintiff, and the action does not need to preclude a particular employment prospect. *Hillig*, 381 F.3d at 1033 (holding that a negative reference was still adverse action despite that plaintiff would not have been hired in absence of the negative recommendation). Negative references may be oral or written. *Id.* at 1035.

A causal connection between a protected activity and adverse employment action may be shown via evidence that justifies 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. *Anderson*, 181 F.3d at 1179 (stating “that a one and one-half month period between protected activity and adverse action may, by itself, establish causation”, but a three-month period standing alone is insufficient); *Proctor*, 502 F.3d at 1208 (holding that “four months is too large a time gap to establish a causal connection”). 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* *id.* at 1209. Pretext is established by evidence showing “weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.” *Morgan*, 108 F.3d at 1323. The 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.

[RA: EEOC is protected activity; termination is adverse; negative reference is adverse (doesn’t have to be the only reason job not awarded).] Mr. Hernandez easily meets the requirements of a prima facie case showing retaliation. Mr. Hernandez filed with the EEOC on January 10, 2017, a protected activity. *Proctor*, 502 F.3d at 1208; *Anderson*, 181 F.3d at 1178. SSS committed an adverse employment action by terminating Mr. Hernandez. In *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir.1997), plaintiff alleged she received a negative job reference from defendant in retaliation of protect activities. The district 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. In *Hillig v. Rumsfeld*, 381 F.3d 1028, 1035 (10th Cir. 2004), plaintiff suffered more than de minimis harm to future employment prospects from a negative reference when applying at the United States Attorney’s Office. 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 at Building E Solutions. Mr. Rosenberg states that the reference was not dispositive, but problematic. Mr. Axel notes that the company determined to go into international expansion and so chose a candidate with multilingual abilities. Like in *Hashimoto*, it is not necessary for reference to be the reason Mr. Hernandez was not hired, it is enough that the negative reference was given. 118 F.3d 671.

[RA: Causation: Termination is only 3 weeks, Negative Reference is 3 months, so possible, but need more evidence.]

[Do I need to deal with the burden shifting paradigm separately? Integrate it?]

## SSS DRIMINATED AGAINST MR. HERNANDEZ BECAUSE IT HAD KNOWLEDGE OF HIS DISABILITY, HIS REQUEST FOR ACCOMMODATION WAS REASONABLE AND WAS DENIED, AND WOULD NOT HAVE IMPOSED UNDUE HARDSHIP.

[RE]

[RA]

# CONCLUSION

For the foregoing reasons, the district court [DID SOMETHING NOT GREAT]. Appellant requests [SOMETHING GOOD].

Respectfully submitted,

Dated: March 25, 2018 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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# CERTIFICATE OF COMPLIANCE

I certify that

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

and

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\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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# CERTIFICATE OF SERVICE

I hereby certify that on this date, the \_\_\_\_ of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2014, a copy of the foregoing Brief for Appellant was served on opposing counsel via email

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