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

Student’s Anonymous Identifier

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# STATEMENT OF JURISDICTION

The United States District Court of Colorado had original jurisdiction over this case pursuant to 28 U.S.C. § 1331 (2012) and 42 U.S.C. § 2000e-5(f)(3) (YEAR) 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 (2012) because it is an appeal from the final judgment of the district court entered on February 8, 2018.

# STATEMENT OF THE ISSUE

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 prospective employers with negative job references, 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 discriminatory.

# STATEMENT OF THE CASE

This case arose out of Stuart Stockton System’s (“SSS”) termination of Erik Hernandez on January 24, 2017. Mr. Hernandez requested a modified work schedule to accommodate his illness, that was diagnosed as cancer. This request was denied, and Mr. Hernandez filed a discrimination charge with the EEOC on January 10, 2017. SSS terminated Mr. Hernandez’s employment citing absences and missed deadlines. On January 2, 2018 Hernandez filed suit against SSS for discrimination and retaliation. 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 meet the prima facie cases for retaliation and discrimination. 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 on 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. R. at 2. Mr. Hernandez requested a modified schedule to accommodate his health concerns that was denied, R. at 2, and was eventually terminated from SSS and received a negative reference from his supervisor, R. at 3.

Two years previously, in February 2015 Mr. Hernandez began work at SSS, a software developer. R. at 2. Later that he would begin law school but discontinued 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 and so sought medical attention, receiving a neurological exam on November 17, 2016. R. at 2. On December 9, 2016 he 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. R. at 2. On December 15, 2016 Mr. Hernandez’s colleague Samantha Smith became angry at 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 request he work better with his colleagues. R. at 3. Mr. Hernandez explained that his neurological exam had shown an 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 and 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. 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. 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

# 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 three months of the EEOC filing. Further, SSS discriminated against Erik Hernandez because it knew of Mr. Hernandez’ disability, 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*, applying the same standards as the district court. *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 accommodations were reasonable and denied, and that they would impose no undue hardship on SSS.

## SSS RETALIATED AGAINST MR. HERNANDEZ BY TERMINATING HIS EMPLOYMENT AND PROVIDING A NEGATIVE REFERENCE TWO WEEKS AND THREE MONTHS RESPECTIVELY AFTER FILING AN EEOC COMPLAINT AND ITS REASONS FOR TERMINATION WERE INCONSISTENT.

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). When there is no direct evidence of retaliation, retaliation is analyzed with a burden shifting framework that requires Plaintiff to establish 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 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 fist 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 Adverse Employment Action Against Mr. Hernandez by Terminating His Employment, and by Providing a Reference that Contributed to E Building Solutions Not Employing Mr. Hernandez.

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. *E.E.O.C.*, 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). 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 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 the refusal of a reference can be adverse action). Negative references can be adverse action, even if the recommendation is not the sole reason for a potential employer rejecting the plaintiff. *Hashimoto v. Dalton*, 118 F.3d 671 (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). ~~Negative references may be oral or written.~~ *~~Id.~~* ~~at 1035.~~

Mr. Hernandez meets 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 minimus* harm and is therefore adverse action. *E.E.O.C.*, 644 F.3d at 1040. The negative reference of Maeve Gryphon was also retaliatory. In *Hashimoto v. Dalton*, 870 F. Supp. 1544, 1554–55 (D. Haw. 1994), aff'd, 118 F.3d 671 (9th Cir. 1997), plaintiff received a negative job reference from when plaintiff’s supervisor told a potential employer of attempts at counseling and suspensions and the future employer did not consider the plaintiff for employment. Here, Ms. Gryphon informed EBS that Mr. Hernandez missed work without authorization and missed severally deadlines due to health reasons, which Mr. Rosenberg found problematic. 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. Here, Mr. Rosenberg states that the reference was not dispositive, but problematic. Mr. Rosenberg states the company determined to go into international expansion and so chose a candidate with multilingual abilities. R. at 20. 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. 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 because the hiring authority at the Department of Justice testified that applicants with negative references would not be hired. *Id.* Here, Mr. Hernandez received a negative reference which affected his future employment at EBS, 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.

### The Termination and Negative Reference Have a Causal Connection to the EEOC Filing Because the Termination Occurred Two Weeks After, and the Negative Reference Occurred Three Months Later and is Supported by 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, 1202 (10th Cir. 2006) (holding that twenty-four days was enough to allow an inference of 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 Proctor*, 502 F.3d at 1209; *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1218 (10th Cir.2003) (considering evidence of pretext in analyzing the causation element of a prima facie case of retaliation under Title VII).

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 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. Here, the three months that passed between Mr. Hernandez’s EEOC filing and the negative reference alone may not establish a causal connection, however evidence offered below shows SSS’s reasons for termination are pretext and strengthen the connection.

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

If direct evidence is not available, 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). 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*, 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.

To SSS alleges it terminated Mr. Hernandez because of missed work, poor team relationships, missed deadlines. R. at 7. However, these reasons are pretextual. 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; R. at 13. Ms. Gryphon and Mr. Hernandez discussed his absences before his EEOC filing, but there were no consequences named for his behavior, or formal written warnings, which would show adhesion to policy and so the reasons for termination are pretextual. R. at 16.

In *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1211 (10th Cir. 2007), the Court suggests that a non-uniformly implemented termination policy would suggest pretext. Here, Mr. Hernandez has noticed other employees have been allowed to take time off for medical leave, and he was not able to be granted a modified schedule. R. at 11. In *O'Neal v. Ferguson Const. Co.,* 237 F.3d 1248, 1254 (10th Cir. 2001), the employer’s reason for adverse action was deem pretextual because it, claimed less work was available for the plaintiff and so reduced the plaintiff’s hours, however, other employees testified that other employees were not being sent home without work or having hours reduced, and that other employees wanted the plaintiff’s help. Here, like in *O’Neal*, SSS claims that the project was delayed because of Mr. Hernandez, however there was another similarly trained employee that could have helped with the project and resulted in the project being completed on time. 237 F.3d at 1254; R. at 12, 18.

Here, SSS claims that co-worker frustrated contributed to his termination, but Mr. Rosenburg noted Mr. Hernandez had strong attitude toward team work and relationship building. R. at 18 – 19.

[*SSS claims that Mr. Hernandez requested the week of 4 – 10, instead of 9 - 14. Both claim that it he requested the “following / next” week off. Seems strange for him not to take a calendar week off. This would make it seem like Mr. Hernandez missed more work than he did.* ]

These inconsistentcies show that SSS’s reasons for termination and negative reference of Mr. Hernandez are merely pretext, and strengthen the causal connection between his EEOC filing, and both adverse actions.

## 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.

Under the ADA, discrimination occurs if an employer fails to grant a reasonable accommodation to an otherwise qualified individual with disability, unless the employer can show that accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A). 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).

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). A disability is a “physical or mental impairment that substantially limits one or more major life activities”, including normal cell growth. 42 U.S.C. §12102(1)(A) & (2)(B). 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).

### Disabled

### Is Qualified

### Plausibly Request Reasonable Accommodation

### No Undue Hardship

# CONCLUSION

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

Respectfully submitted,

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

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# CERTIFICATE OF COMPLIANCE

I certify that

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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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