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 EEOC claim, 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. After filing a discrimination charge with the EEOC on January 10, 2017, SSS terminated Mr. Hernandez’s employment after continued absences and missed deadlines. On January 10, 2018 Hernandez filed suit against SSS for discrimination and retaliation. 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 from 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.

In February 2015 Mr. Hernandez started 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; motion memo documents. 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, who told him of his missed deadlines and Mr. Hernandez requested a modified work schedule to allow him to meet the requirements of the position and meet project deadlines that was denied because of 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 and notified him of several missed deadlines, and that he had been absent from work without notifying her and asking him to work better with his colleagues. R. at 3. Mr. Hernandez explained that his neurological exam had some an abnormality, which may be cancer, and so 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 for his treatment, Mr. Hernandez sought out new employment with E Building Solutions (“EBC”). R. at 3, 20. He passed through three rounds of interviews, but was denied the position after Ms. Gryphon delivered a negative reference to Axel Rosenberg, COO of EBC on March 30, 2017. R. at 3, 8, 19.

# SUMMARY OF THE ARGUMENT

# ARGUMENT

Stuart Stockton Systems 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”), 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).

Under the ADA, employers may not retaliate against individuals who have opposed unlawful practices. 42 U.S.C. § 12203(a). If there is no direct evidence, 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 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). The issues on review 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, THE ADVERSE ACTION WAS TWO WEEKS AND THREE MONTHS AFTER FILING AN EEOC COMPLAINT, AND ITS REASONS FOR TERMINATION WERE INCONSISTENT SHOWING THEY WERE PRETEXTUAL.

Retaliation occurs when an individual has opposed any act or practice made unlawful under the ADA and is discriminated against because of this action. 42 U.S.C. § 12203(a). 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). 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. 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).

Filing administrative charges with the EEOC is a protected activity, the fist requirement of a prima facie case for retaliation. *Proctor*, 502 F.3d at 1208; *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999). The second prong, 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). 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); *Hillig v. Rumsfeld*, 381 F.3d 1028, 1031 (10th Cir. 2004). Negative references can be adverse action, even if the recommendation is not the sole reason for a potential employer rejecting the plaintiff. *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.

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”, 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”) overruled on other grounds by *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1194–97 (10th Cir.1998). 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. 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.

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 *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. 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. Having established the elements of a prima facie case, SSS may assert its reason for terminating Mr. Hernandez was his poor attendance, poor team relationships, and that the new software was delayed because of his underperformance. 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. Here, unlike *Morgan*, there has been no detailed extended displinary process. 108 F.3d at 1324. While Ms. Gryphon and Mr. Hernandez did discuss his absences before his EEOC filing, 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. [*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.* ] [REFUTE DELAY OF PROJECT REASON: In blank, something happened. Here, Mr. Hernandez’s skills were not unique, Joey Piper is trained in the same technologies and methodologies as Mr. Hernandez and could have taken his place on the project, and the project was also complete at the time of Mr. Hernandez’s termination]. [REFUTE TEAM BUILDING Axel Rosenberg noted that the Mr. Hernandez had a strong attitude toward team work and relationship building. ] [conclusion sentence. maybe related back to the Proctor standard believing its reasons and acting in good faith. ]

The negative reference of Maeve Gryphon was also retaliatory. 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 EBC. Mr. Rosenberg states that the reference was not dispositive, but problematic. Mr. Axel Rosenberg 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. [Address counter arguments to negative reference as adverse action]. [Show causal connection]. [Address counter to causal connection].

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

## 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]

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).

[RA]

# 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

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

and

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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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