

IN THE SUPREME COURT OF TENNESSEE  
AT KNOXVILLE

TIMMY SYKES and CURTIS GREENE,	)	
	)	
Plaintiffs/Appellants,	)	
	)	No. E2008-00525-SC-R3-CV
v.	)	
	)	Hamilton County Circuit
CHATTANOOGA HOUSING AUTHORITY	)	No. 05C556
AND JEFF HAZELWOOD,	)	
	)	
Defendants/Appellees.	)	

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***AMICUS CURIAE* BRIEF ON BEHALF OF TENNESSEE EMPLOYMENT  
LAWYERS ASSOCIATION (TENNELA)**

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**FOR TENNELA, AS AMICUS CURIAE**

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## INTEREST OF AMICUS CURIAE

The Tennessee Employment Lawyers Association (TENNELA) is a professional membership organization comprised of practitioners from all parts of the state of Tennessee who represent employees in labor, employment, and civil rights disputes. TENNELA lawyers work on behalf of clients with claims of unlawful treatment, including retaliation, in the workplace. TENNELA lawyers litigate regularly in state courts across the State of Tennessee, as well as in federal district courts, the Sixth Circuit Court of Appeals, and the United States Supreme Court (where seminal employment cases such as *Crawford v. Metro. Govt. of Nashville and Davidson County, Tenn.*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 846 (2009), *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), have been litigated by TENNELA lawyers). TENNELA submitted an *amicus curiae* brief in *Kinsler v. Berkline*, 320 S.W.2d 786 (Tenn. 2010) arguing that *McDonnell Douglas* was incompatible with Tennessee's summary judgment jurisprudence. This Court adopted that position in *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777 (Tenn. 2010), released the same day as *Kinsler*. Most recently, TENNELA submitted

a brief as *amicus curiae* in the case of *Webb v. Nashville Area Habitat for Humanity, Inc.*, No. M2009-01552-SC-R11-CV, which is currently pending before the Court.

Of particular importance in this case, TENNELA is intimately familiar with the evidentiary burdens in retaliation lawsuits, the difficulty in ascertaining and proving an employer's actual motivation in terminating an employee, and the value and importance of evidence of a close temporal proximity between protected activity and an employee's termination. TENNELA is, therefore, uniquely positioned to provide its perspective on the issue of the use of evidence of temporal proximity in evaluating summary judgment motions in retaliation cases.

## **STATEMENT OF THE ISSUE**

Should this Court adopt a bright line rule on the weight to be given to temporal proximity evidence in a retaliatory discharge case, or, as the Sixth Circuit Court of Appeals has done, adopt a flexible approach that depends on the closeness of the timing and other circumstantial factors?

## ARGUMENT

### **THIS COURT SHOULD DECLINE TO ADOPT AN INFLEXIBLE BRIGHT LINE RULE THAT EVIDENCE OF CLOSE TEMPORAL PROXIMITY IS NEVER SUFFICIENT TO CREATE AN ISSUE OF FACT ON CAUSATION IN A RETALIATION CASE**

#### **A. The Flexible Approach of the Sixth Circuit**

The Sixth Circuit Court of Appeals wisely avoids an “all or nothing” approach to temporal proximity.<sup>1</sup> In Sixth Circuit jurisprudence, if an employer takes an adverse employment action against an employee shortly after the employee has engaged in protected activity, the closeness in time between the protected activity and the adverse action may alone be sufficient to create an inference of causation in a retaliation case. *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 523-26 (6th Cir. 2008); *Lindsay v. Yates*, 578 F.3d 407, 418-419 (6th Cir. 2009) (two day separation sufficient); *DiCarlo v. Potter*, 358 F.3d 408, 421 (6th Cir. 2004) (twenty one day separation sufficient); *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 563 (6th Cir. 2004)

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<sup>1</sup> Tennessee has parted company with the *McDonnell Douglas* test used by federal courts, including the Sixth Circuit Court of Appeals. *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777 (Tenn. 2010). However, whether evidence of temporal proximity is evaluated in the plaintiff’s *prima facie* case under *McDonnell Douglas*, or considered in determining whether there is an issue of fact on the element of causation under *Gossett*, suspicious timing is recognized and accepted as circumstantial evidence of retaliatory motive. *Gossett*, 320 S.W.3d at 784; *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 523, 525 (6th Cir. 2008); *Lindsay v. Yates*, 578 F.3d 407, 418 (6th Cir. 2009).



(three month separation sufficient).

Similarly, where the adverse action occurs long after the protected activity, the lack of temporal proximity *may* absolve an employer of liability, but *cannot always* do so where there is other evidence of causation sufficient to infer a retaliatory motive. In the Sixth Circuit, for example, an employer will not be absolved of liability for unlawful retaliation by “wait[ing] for a legal, legitimate reason to fortuitously materialize, and then us[ing] it to cover up his true, longstanding motivations for firing the employee.” *Hamilton v. General Electric*, 556 F.3d 428, 436 (6th Cir. 2009) (*quoting Jones v. Potter*, 488 F.3d 397, 408 (6th Cir. 2007)).<sup>2</sup>

Additionally, in *Mickey* the Sixth Circuit acknowledged “some ‘confusion in the case law . . . on this issue,’” but found that “the two lines of cases are fully reconcilable.” *Mickey*, 516 F.3d at 525. The court explained that “[w]here an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal

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<sup>2</sup> In *Hamilton*, the court held that evidence that the employer increased its surveillance of the plaintiff’s work and waited for a reason to fire him, along with evidence contesting the factual basis for the termination, was all evidence from which “a reasonable fact-finder could determine that [the employer] waited for, and ultimately contrived, a reason to terminate Hamilton to cloak its true, retaliatory motive for firing him.” 556 F.3d at 436.

proximity between the events is significant enough to constitute evidence of a causal connection . . . .” *Id.* Yet it also stated, “But where some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality.” *Id.* The court then explained why a plaintiff *must* be able to rely on evidence of temporal proximity to establish causation in some cases:

The reason for this distinction is simple: if an employer immediately retaliates against an employee upon learning of his protected activity, *the employee would be unable to couple temporal proximity with any such other evidence of retaliation because the two actions happened consecutively, and little other than the protected activity could motivate the retaliation.* Thus, employers who retaliate swiftly and immediately upon learning of protected activity would ironically have a stronger defense than those who delay in taking adverse retaliatory action. Moreover, such a holding would accord with cases from other circuits, which recognize that, in rare cases, temporal proximity alone may suffice to show a causal connection.

*Id.* (emphasis added) (listing cases); *see also Allen v. McPhee*, 240 S.W.3d 803, 822 (Tenn. 2007) (“Temporal proximity of the adverse action to the complaint, a pattern of antagonism following a complaint,

or other circumstantial evidence supporting causation are all relevant to a determination of causation.”). The Court should follow this reasonable approach and hold that evidence of close temporal proximity may be enough to establish causation in some cases, and that such evidence is a relevant factor in a court’s analysis of the ultimate issue of causation in retaliation cases.

## **B. Appellees’ Inflexible Approach**

Appellees’ Opening Brief asks this Court to eliminate what it calls “the Gossett + Allen v. McPhee ‘guarantee’” and hold that close temporal proximity alone “cannot be deemed to create a showing of causation.” (Opening Brief of Appellees, at p. 30). In making this argument, however, Appellees overstate this Court’s decision in *Gossett v. Tractor Supply, Inc.*, 320 S.W.3d 777 (Tenn. 2010). They assert that the “combination” of *Gossett* and *Allen v. McPhee*, 240 S.W.3d 803 (Tenn. 2007) “**guarantees** a jury trial to any employee who makes a complaint under the THRA and then is terminated closely thereafter, regardless of the reason for the termination.” (Brief of Appellees at p. 22) (emphasis in original). Calling this “combination” a “perfect storm,” Appellees then posit a parade of horrors that would follow from this

(incorrect) proposition: a “\$50,000 to \$100,000 ‘guaranteed’ attorney-fee price tag,” the impossibility for employers to make termination decisions, the “automatic” denial of summary judgment motions, and “fast running” employees seeking to make a complaint in advance of termination. (Brief of Appellees at pp. 23-29).

This miasma of fear holds no truth. *Gossett* brought summary judgment practice in Tennessee employment law cases in line with summary judgment practice in all other types of cases in Tennessee, consistent with *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1 (Tenn. 2008). This Court used the *Allen v. McPhee* case as an example of how the compartmentalizing of evidence under the *McDonnell Douglas* evidentiary framework can improperly skew a summary judgment analysis in favor of the employer. 370 S.W.3d at 783-784. In *Gossett*, this Court did not rely on evidence of close temporal proximity in holding that summary judgment was properly denied by the trial court. 320 S.W.3d at 787. Thus, to say that *Gossett* is part of a “perfect storm” that guarantees a trial and large expenditures of attorney’s fees when there is evidence of close temporal proximity is an unwarranted exaggeration.

To establish a bright line rule that close temporal proximity is *never* enough to create an issue of fact as to causation would improperly remove from a trial court its traditional function of evaluating the entire record on summary judgment and construing the evidence in a light most favorable to and drawing all reasonable inferences in favor of the non-moving party. *See Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76, 84 (Tenn. 2008).

Like the Sixth Circuit approach, Tennessee courts may still, but need not always, accept temporal proximity evidence alone as sufficient evidence upon which a fact finder may infer a retaliatory motive. *See Wisdom v. Wellmont Health System*, 2010 Tenn. App. LEXIS 772, at \*12 (Tenn. Ct. App. Dec. 10, 2010)(two days between protected activity and adverse action)(copy attached). When an adverse action closely follows protected activity, a jury should be free to infer retaliatory motive unless the employer demonstrates that no reasonable jury could reach such an inference from the evidence. The strength of the inference to be drawn from evidence of close temporal proximity and the ability of that inference to create a genuine issue of material fact in a particular case are matters that are best left to the trial court to determine. If the

adverse action occurs immediately upon the employer's learning of the employee's protected activity, then the inference of unlawful motive may be a strong one, as in *Wisdom v. Wellmont Health System*. In such a case, the trier of fact determines the employer's actual motivation.

Although the parties in this case disagree over the weight to be afforded to evidence of temporal proximity *alone*, their efforts are misdirected because evidence of temporal proximity will rarely exist in isolation from other facts in the case and will typically be viewed in the context of other evidence, such as whether the employee had a good employment history with the employer. See *Mason v. Seaton*, 942 S.W.2d 470, 473-474 (Tenn. 1997). ("The evidence of a good work history presented by the plaintiff, in the context of the facts and circumstances of this case, is sufficient to establish a causal relationship between her reporting of the suspected illegal activity at her place of employment and her discharge.") Likewise, even very close temporal proximity will typically not be considered in isolation from the reason offered by the employer for the adverse action. For example, if the employer offers no credible reason for taking an adverse action against an employee with a good track record, that is a very different case from an employer who

claims it promptly fired an employee for bringing a gun to work the day after the employee filed an EEOC charge. Thus, the premise of Appellees' argument is unrealistic because courts rarely assess evidence of temporal proximity "alone," or in isolation from other facts and evidence, in considering the ultimate issue of the employer's motivation.

Courts must be free to evaluate the evidence of temporal proximity in the context of the facts of each case, and they must be free to find that in some contexts, evidence of close temporal proximity is sufficient for a jury to infer a retaliatory motive with little else. As the length of time between the protected activity and the adverse action increases, the need for other evidence of retaliatory motive may increase. In other words, the shorter the time between the protected activity and the employer's adverse action, the stronger the inference that the two events are causally connected and indicative of retaliatory motive.

Nevertheless, if the evidence on summary judgment is such that no rational trier of fact could conclude, even with evidence of close temporal proximity, that the termination was retaliatory, then summary judgment would be proper. To draw on an example posited by

Appellees (Brief of Appellees at p. 26), if the undisputed evidence establishes that a termination decision had been made *before* the employee's protected activity and simply had not been carried out for purely administrative reasons, then perhaps a trial court could conclude that the inference of unlawful motive created by the timing evidence is unreasonable and grant summary judgment to the employer. But to recognize that, in certain cases, evidence of close temporal proximity *might* be insufficient to create a fact issue is not to say, as Appellees do, that in *every* case such evidence should be declared insufficient.

The “no rational trier of fact” standard allows for judicial flexibility in the complicated arena of employer motivation. For example, the United States Supreme Court recognizes that evidence of causation, along with evidence sufficient to refute an employer's articulated non-discriminatory reason for an adverse action, is not *always* adequate: “Certainly there will be instances where . . . no rational factfinder could conclude that the action was discriminatory.” *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148 (2008). In



summary, factual context is critical.<sup>3</sup> As the Supreme Court has further observed, “Context matters. ‘The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.’” *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 69 (2006) (citation omitted). This principle should hold true with respect to the issue of temporal proximity in retaliation cases, as well.

### CONCLUSION

The ultimate point is that the inquiry into an employer’s actual motivation is fact-intensive, especially where a plaintiff relies on circumstantial evidence of causation. Because evidence of close temporal proximity between protected activity and an adverse employment action has long been recognized and accepted as

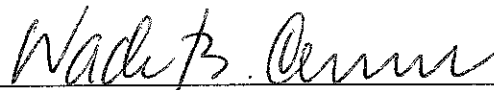
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<sup>3</sup> Factual context can change everything, even in the example above where the employer appears to have an obviously legitimate reason for terminating the employee who brings a gun to work, despite evidence of very close temporal proximity. Consider additional facts that the employee is a police officer, or had been bringing his gun to work with permission from the employer for decades, but was fired for doing so the day after the employer learned of his protective activity. Fact-intensive cases require a flexible rule where evidence of close temporal proximity, when viewed in context with other facts, may be sufficient to support a factfinder’s inference of retaliatory motive. Such evidence may be the most important piece of the puzzle that tips the scale, but it will rarely be the only piece.

circumstantial evidence of retaliatory motive, this Court should decline Appellees' invitation to hold that close temporal proximity alone can never be sufficient to create a fact issue regarding the employer's motives.

The better, more reasoned approach is one of judicial flexibility depending upon the closeness of the timing and other factors. This approach allows a summary judgment where "no rational trier of fact" could find a causal connection, while preserving the right of jury trial where the circumstantial evidence warrants it.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Wade B. Cowan", is written over a horizontal line.

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### **CERTIFICATE OF SERVICE**

I certify that on this 2<sup>nd</sup> day of January, 2011, a true and correct copy of the foregoing has been served by U.S. Mail, postage prepaid, on the following:

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# APPENDIX



1 of 100 DOCUMENTS

## ANGELA SUSAN WISDOM v. WELLMONT HEALTH SYSTEM

No. E2010-00716-COA-R9-CV

## COURT OF APPEALS OF TENNESSEE, AT KNOXVILLE

2010 Tenn. App. LEXIS 772

October 5, 2010, Session

December 10, 2010, Filed

**PRIOR HISTORY:** [\*1]

*Tenn. R. App. P. Rule 9* Appeal; Judgment of the Circuit Court Affirmed and Remanded. Appeal from the Circuit Court for Sullivan County. No. C37045(C). Hon. John S. McLellan, III., Judge.

**DISPOSITION:** Judgment of the Circuit Court Affirmed and Remanded.

**COUNSEL:** Stephen M. Darden and Jimmie C. Miller, Johnson City, Tennessee, for the appellant, Wellmont Health System.

F. Braxton Terry, Morristown, Tennessee, Douglas T. Jenkins, Rogersville, Tennessee, and William Lewis Jenkins, Jr., Dyersburg, Tennessee, for the appellee, Angela Susan Wisdom.

**JUDGES:** HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and JOHN W. MCCLARTY, J., joined.

**OPINION BY:** HERSCHEL PICKENS FRANKS**OPINION**

The Trial Judge ruled against defendant's Motion for Summary Judgment because there were disputed issues of material fact. The Trial Court authorized an interlocutory appeal, which we granted. Upon consideration of the case, we conclude, as did the Trial Judge, there are disputed issues of material fact, affirm the Judgment of the Trial Court and remand.

**OPINION**

Plaintiff, Wisdom, sued her employer, Wellmont Health System, alleging that she was the victim of retaliatory discharge. She averred that prior to 1989, she [\*2] worked for Holston Valley Community Hospital, which was subsequently acquired by Wellmont. She stated that in August 2003, she applied for the position of Nurse Manager of Surgery at Bristol Regional, and was employed in that capacity on October 13, 2003. She stated that she immediately found herself in a difficult position, with different groups of personnel in the surgery department being very antagonistic toward one another, and she felt that the antagonism threatened proper patient care. She stated that with the approval of her supervisors, she began to implement changes to improve the situation, and that from October 2003 to November 2004, she received many positive comments from her supervisors, but that she experienced resistance from the surgical staff she supervised, but was encouraged by her supervisors to continue on this course.

Plaintiff averred that on November 22, 2004, she was summoned to a meeting with her supervisor, Diana Holloway, and others, to meet with a state inspector. She stated that she was questioned at the meeting about violations of HIPAA which were alleged to have been occurring at the hospital, and she refused to remain silent about these violations, [\*3] but reported the same to the inspector, telling her that she had knowledge of the violations, had reported them to Ms. Holloway, and expected that they would be addressed. Plaintiff stated that she also reported that the surgical schedules were distributed to other areas of the hospital which had no need for the information, and was deemed to be a violation. She averred that she always performed her duties in accordance with company policy and met or exceeded her supervisors' expectations, but was ultimately terminated

on November 24, 2004. She charged that her termination was in retaliation for her numerous reports of violations of law and policy, as well as her reports of HIPAA violations to the state inspector.

Defendant answered, denying the material allegations of the Complaint, and filed a Motion for Summary Judgment, alleging that plaintiff was an employee at-will, that defendant could negate one or more of the elements of plaintiff's claim of retaliatory discharge, and that defendant had articulated a legitimate, non-discriminatory basis for its actions. Defendant attached excerpts from plaintiff's deposition, wherein she testified that she had applied for other positions but [\*4] had not gotten the same due to her termination by defendant, and that she had applied for 3-4 transfers during the 30-day window she was given by defendant to find another job.

In her deposition regarding the HIPAA violations, plaintiff stated that she did not know why the state investigator came to the hospital, and was not aware that she was coming. Plaintiff testified that she only met the investigator once when Ms. Holloway came and told her that they needed to go talk to an investigator. Plaintiff explained that Holloway told her en route to the meeting that it was best if she didn't say anything. Plaintiff testified that the investigator asked her questions about a violation that she knew about and had previously reported, and that she answered honestly about it. Also in her deposition, plaintiff identified a document which stated that she was terminated effective December 24, 2004, and which stated that she could be considered for any staff nurse position at any Wellmont facility except Bristol Regional. This document states her reason for removal as "unable to function effectively in management role." An affidavit of Suzanne Rollins was filed by defendant, as well as a deposition. [\*5] In the affidavit Rollins said her decision to remove plaintiff as manager was the result of overwhelming negative comments by staff members during a meeting on November 22, 2004. Rollins stated that she knew plaintiff alleged that her removal was due to her comments to a state investigator during a meeting on November 22, 2004, but she denied this was a factor. Rollins stated that when she made the decision to remove plaintiff, she did not know that plaintiff had spoken to the investigator. Rollins stated that she did not consider the other "issues" raised by plaintiff, and did not have any knowledge of them.

Defendant also filed several affidavits of personnel which buttressed defendant's position that plaintiff created controversies and low morale and was not an effective supervisor.

Defendant filed a Statement of Undisputed Material Facts. Plaintiff then filed a Response, stating that the reasons advanced by defendant for her discharge were

pretextual, as she received no complaints about her job performance from her supervisors until she began to be insistent about policy, patient care, and legal violations by Wellmont. She stated that she always received positive comments about her [\*6] performance, but was terminated within a day or two of reporting HIPAA violations to a state inspector.

She stated that, around November 11, 2004, when she realized the animosity she was starting to face, she applied for a transfer to another position, but Ms. Rollins and several employees asked her to please stay, so she did. Plaintiff stated that the state inspector came a few days later, and she was asked by Holloway to attend the meeting.

In response to the Motion for Summary Judgment, the Trial Court entered an Order denying summary judgment, finding that there were material facts in dispute, and then on the Motion of defendant for an Interlocutory Appeal, the Trial Court granted the appeal and the appeal was accepted by this Court.

The issue presented for review is:

1. Did the Trial Court err in failing to grant summary judgment to Wellmont?

When reviewing the denial of a motion for summary judgment, this Court must review the trial court's decision *de novo*, and reviews the entire record to make a "fresh determination concerning whether or not the requirements of Tenn. R. Civ. P. 56 have been met." *Blair v. West Town Mall*, 130 S.W.3d 761 (Tenn. 2004). The Court must determine if there [\*7] is a genuine issue concerning any material fact, and whether the moving party is entitled to judgment as a matter of law. *Id.* A fact is "material" if it must be decided in order to resolve the substantive claim at which the motion is directed. *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1992). The evidence must be viewed in favor of the nonmoving party, and all reasonable inferences to be drawn from the evidence must be drawn in the nonmoving party's favor. *Id.*

To demonstrate that a case presents no genuine issue of material fact, the moving party must produce evidence "that affirmatively negates an essential element of the nonmoving party's claim or shows that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008). To negate an essential element, the moving party must "point to evidence that tends to disprove a material factual allegation made by the nonmoving party." *Id.* If the moving party cannot do so, summary judgment is not warranted. *Id.*

Defendant argues that plaintiff cannot prove a *prima facie* case of either statutory or common law retaliatory discharge, and that defendant has affirmatively negated

[\*8] essential elements of plaintiff's claims. A statutory claim under *Tenn. Code Ann. §50-1-304* requires a showing that:

1. The plaintiff is an employee of the defendant employer;
2. That she refused to participate in, or remain silent about, "illegal activities" as defined in the statute;
3. That she was terminated from her employment; and
4. That an exclusive causal relationship exists between her refusal to participate in/remain silent about illegal activities and her termination.

*Voss v. Shelter Mut. Ins. Co.*, 958 S.W.2d 342 (Tenn. Ct. App. 1997).

"Illegal activities" are defined in the statute as "activities that are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety or welfare." *Tenn. Code Ann. §50-1-304(a)(3)*. Similarly, to recover on a claim of common law retaliatory discharge, the plaintiff must show:

1. That she was an employee at-will;
2. That she was discharged;
3. That the reason for the discharge was that she attempted to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory [\*9] provision; and
4. That the employee's exercise of protected rights or compliance with clear public policy was a substantial factor in the employee's discharge.

*Crews v. Buckman Labs Int'l, Inc.*, 78 S.W.3d 852 (Tenn. 2002).

Defendant argues that it has negated elements of both the statutory and common law retaliatory discharge claims. First, that plaintiff cannot show that she engaged in protected activity or refused to remain silent about illegal activities, and has pointed to no clear constitutional, statutory, or regulatory provisions that were violated. A review of the activities which plaintiff claims to

be illegal and that she reported to her supervisors show that for the incidents involving the use of bleach, the patient being anesthetized too early or the anesthesiologist leaving the room during the procedure, or the surgeon's assistant scrubbing in for the mere purpose of adding unnecessary charges, plaintiff has pointed to no clear violation of a constitutional, statutory, or regulatory provision. Plaintiff makes general allegations regarding statutory provisions regarding billing practices for TennCare and fraud in contractual arrangements, but has not shown that these statutes [\*10] were violated. It has often been held that an action for retaliatory discharge will not lie where the only matters involved are those involving "internal management issues". See *Burnett v. America's Collectibles Network, Inc.*, 2010 Tenn. App. LEXIS 146, 2010 WL 669246 (Tenn. Ct. App. Feb. 25, 2010).

The allegation which plaintiff has made arising to the level of an "illegal activity" or one violating a clear constitutional, statutory, or regulatory provision is the statement that plaintiff reported violations of HIPAA to the state inspector. Plaintiff alleged that she was instructed that it would be "best" not to say anything when she and Ms. Holloway were on their way to the meeting (to be questioned about the known violation where the surgical schedule found its way to the home of Mr. Tickle), but that she spoke openly about her knowledge of the situation. Plaintiff stated that she informed the inspector that surgical schedules were routinely distributed to hospital departments that did not have the need for such information, which was an additional HIPAA violation of which the inspector was previously unaware, and that she was then discharged a day or two later.

Defendant argues that it has negated these claims [\*11] by presenting the testimony of Ms. Rollins, the supervisor who ultimately made the decision to discharge plaintiff, that she was unaware that this meeting had taken place with the state inspector at the time she decided to terminate plaintiff, thus establishing that it was not a factor. Defendant also relies upon the legitimate, non-discriminatory reasons that it has advanced for terminating plaintiff, i.e., that she was not performing effectively in her managerial role.

As the Supreme Court has recently recognized, however, it is improper at the summary judgment stage to engage in the *McDonnell Douglas* framework that is applicable at trial, i.e., that the employer can show a legitimate, non-discriminatory reason for the discharge and the employee must then show that said reason is pretextual. *Gossett v. Tractor Supply Company, Inc.*, 320 S.W.3d 777, 2010 WL 3633459 (Tenn. 2010). The Court recognized that application of this type of burden shifting at the summary judgment stage may result of trial courts

disposing of factual questions on summary judgment, which is improper. *Id.*

The proper analytical framework on summary judgment is that if the moving party can affirmatively negate an essential [\*12] element, then the burden of production shifts to the nonmoving party to show that a genuine issue of material fact exists. *Hannan*, p. 8. The Court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. *Gossett*. Thus, taking the strongest view of the evidence in plaintiff's favor and drawing all reasonable inferences in her favor, and discarding all countervailing evidence, plaintiff has shown that she spoke out at a meeting with the state inspector about violations of HIPAA (a clear statutory provision involving patient privacy rights), which had occurred at the hospital, and she was fired within two days. The clear inference to be drawn is that plaintiff's action at the meeting resulted in her discharge from employment. Defendant disputes this was a factor in plaintiff's termination, but this is the very essence of a disputed material fact. The only way the Court could grant summary judgment on this issue would be to weigh the evidence and make a credibility determination in favor of Ms. Rollins, which is not appropriate at the summary judgment stage. [\*13] We hold the Trial Court properly denied the Motion for Summary Judgment to defendant.

Defendant further argues that plaintiff cannot state a *prima facie* claim of retaliatory discharge because plaintiff was not actually terminated, as she was given the

opportunity to find another position within 30 days and did not do so. Plaintiff stated, however, that she tried to find another position and was thwarted in her efforts by the administration. Once again, plaintiff has presented an issue of disputed material fact regarding the effect of the employment action taken against her. If she was given thirty days to find another position within the system but then thwarted in her efforts to do so by the administration, she was then effectively discharged.

Finally, defendant argues that it should have been granted summary judgment on plaintiff's statutory claim of retaliatory discharge, because the claim requires that plaintiff show that the sole cause for her discharge was her refusal to remain silent about illegal activities, as opposed to it merely being a substantial factor. Defendant argues that since plaintiff testified in her deposition that her refusal to remain silent was not the sole cause [\*14] of her discharge, she has effectively negated an element of this claim. However, we reiterate plaintiff has stated sufficient facts to show that a genuine issue exists with regard to the motivation for her discharge by defendant, which is all that she must do at this stage. Whether plaintiff's subjective belief that other factors may have also influenced the decision is ultimately borne out by the factual evidence is an issue which must be determined by the trier of fact.

We affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Wellmont Health System.

HERSCHEL PICKENS FRANKS, P.J.