IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

GERRY G. KINSLER,

Plaintiff/Appellee,

v. Case No. E2007-02602-SC-R11-CV

BERKLINE, LLC,

Defendant/Appellant.

BRIEF OF AMICUS CURIAE TENNESSEE EMPLOYMENT LAWYERS ASSOCIATION (TENNELA)

Justin Gilbert #17079
GILBERT RUSSELL MCWHERTER PLC
101 N. Highland
Jackson, TN 38308
731/664-1340
For Tennessee Employment Lawyers Association

Donald A. Donati #8633
William B. Ryan #020269
DONATI LAW FIRM, LLP
1545 Union Avenue
Memphis, TN 38104
901/278-1004
For Tennessee Employment Lawyers Association

Wade B. Cowan #9403
150 Second Avenue North, Ste, 225
Nashville, TN 37201
615/256-8130
For Tennessee Employment Lawyers Association
Amicus Committee Chairperson

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page No.**

Statutes

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 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.*, 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).

Of particular importance in this case, TENNELA is intimately familiar with the way in which lower courts have traditionally allocated burdens of proof at the summary judgment stage under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and this Court's more recent summary judgment annunciation under *Hannan v. Alltel Publishing Co.,* 270 S.W.3d 1 (Tenn. 2008) and *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008). TENNELA is, therefore, well positioned to suggest how causation should be analyzed in Tennessee common law retaliation cases at the summary judgment stage.

STATEMENT OF THE ISSUE

Do *Hannan v. Alltel Publishing Co.,* 270 S.W.3d 1 (Tenn. 2008) and *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008) require a departure from the traditional *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) burden shifting analysis at summary judgment? If so, do they modify the analysis relied on in both *Allen v. McPhee*, 240 S.W.3d 803, 823 (Tenn. 2007) and *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d 646, 648 (Tenn. 1995) in Tennessee retaliatory discharge cases?

SUMMARY OF THE ARGUMENT

This case involves the fourth element of the cause of action for retaliatory discharge: whether plaintiff's assertion of rights under the Tennessee Worker's Compensation Law was a "substantial factor" in his termination. See *Anderson v. Standard Register Co.,* 857 S.W.2d 555, 558 (Tenn. 1993). The Court of Appeals and the parties' briefs in this case rely on the burden shifting framework first expressed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Thus, they evaluate the evidence by asking whether, in the first instance, plaintiff has "stated a prima facie case" of retaliatory discharge. (Court of Appeals' Slip Opinion at p. 5).

TENNELA has requested leave to participate in this case as *amicus* because it believes that this Court's decisions in *Hannan v. Alltel Publishing Co.,* 270 S.W.3d 1 (Tenn. 2008) and *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008) require a different burden shifting analysis on summary judgment in a common law retaliatory discharge case, such that the cumbersome and confusing tripartite *McDonnell*

Douglas test is no longer appropriate.

Under *Hannan* and *Martin*, a defendant in a retaliatory discharge case may no longer base a request for summary judgment on the assertion that the plaintiff cannot establish a prima facie case (the first premise of *McDonnell Douglas*). As a result, the question of whether evidence of temporal proximity alone is sufficient to establish a prima facie case of causation in a retaliation case is no longer a relevant inquiry. Compare *Allen v. McPhee*, 240 S.W.3d 803, 823 (Tenn. 2007) (under the THRA, temporal proximity alone is sufficient for prima facie case of causal connection); with *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d 646, 648 (Tenn. 1995) (under common law, temporal proximity alone is not sufficient for prima facie case).

Instead, under *Hannan* and *Martin*, a defendant moving for summary judgment must in the first instance *affirmatively negate* the essential element of plaintiff's cause of action that retaliation was a "substantial factor" in the decision to terminate plaintiff. *Hannan*, 270 S.W.3d at 9; *Martin,* 271 S.W.3d at 83-84. If the defendant does not produce competent, admissible evidence affirmatively negating this element, summary judgment is inappropriate. If the defendant does produce such evidence, the burden then shifts to the plaintiff to produce evidence creating a genuine issue of fact on the issue, which he may do by presenting direct or circumstantial evidence in a variety of forms. *Newcomb v. Kohler Company*, 222 S.W.3d 368, 391 (Tenn. App. 2006).

Essentially, *Hannan* and *Martin* require a change in the evaluation of evidence by the trial court on summary judgment. They displace the tripartite analysis and prima facie case requirements of *McDonnell Douglas*. And in so doing, *Hannan* and *Martin*

smartly avoid much of the confusion that has embroiled federal courts under *McDonnell Douglas.* Under *Hannan* and *Martin*, the analysis of this case, and cases like it, is much more straightforward. For example, in support of its motion for summary judgment, Berkline offered plaintiff's physical inability as the sole reason for Kinsler's discharge. Kinsler countered that evidence through a variety of acceptable methods, including by producing evidence of close temporal proximity between the protected activity and adverse action, by challenging the veracity of the defendant's contention about his physical condition, and by showing he was treated differently than a similarly situated employee. Accordingly, summary judgment was properly denied, though the *Hannan/Martin* framework should control the outcome, not the tripartite *McDonnell Douglas* framework.

LAW AND ARGUMENT

In *Allen v. McPhee*, 240 S.W.3d 803 (Tenn. 2007), this Court utilized the familiar *McDonnell Douglas* framework for assessing a retaliation claim under the Tennessee Human Rights Act, Tenn. Code. Ann. §§ 4-21-101 *et. seq.* In doing so, the Court placed "causal connection" in the plaintiff's prima facie case, as the fourth element. *Allen*, at 820. Further, the Court found that evidence of "close temporal proximity between protected activity and a materially adverse action is sufficient to establish a prima facie case of causation." *Id.* at 823. This arguably created a conflict with *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d 646, 648 (Tenn. 1995), where this Court held that close temporal proximity alone was insufficient to establish causation under *McDonnell Douglas*.

Recently, in a split-panel decision, the Sixth Circuit in *Ellis v. Buzzi Unicem USA*, 293 Fed. Appx. 365 (6th Cir. 2008) disagreed over whether *Allen* overruled *Conatser* on whether evidence of temporal proximity alone may satisfy the fourth prong of the plaintiff's prima facie case. *See Id.* at 379 n. 3 (Moore, J., dissenting). Subsequently, the Tennessee Court of Appeals in this case rejected the Sixth Circuit majority's decision in *Ellis* by adopting the reasoning of *Allen* to control this common law retaliation case. *Kinsler v. Berkline*, 2008 WL 4735310, *5 (Tenn. App. 2008).

In this case at bar, Kinsler argues that the Court of Appeals was correct and that *Allen* should be applied to this common law retaliation claim. Berkline argues otherwise, attempting to distinguish the statutory THRA claim in *Allen* from this common law retaliation claim. In contrast to positions urged by the parties, TENNELA contends that use of the *McDonnell Douglas* test at summary judgment, which is the premise of both parties, as well as *Allen* and *Conatser*, does not survive this Court's more recent holdings in *Hannan v. Alltel Publishing Co.,* 270 S.W.3d 1 (Tenn. 2008) and *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008).

I. ***HANNAN V. ALLTEL* AND *MARTIN V. NORFOLK SOUTHERN RAILWAY* REQUIRE A DEPARTURE FROM THE TRADITIONAL *McDONNELL DOUGLAS* ANALYSIS**

The common law cause of action for discharge in retaliation for asserting a worker's compensation claim has four essential elements: (1) The plaintiff was an employee of the defendant at the time of the injury; (2) the plaintiff made a claim against the defendant for worker's compensation benefits; (3) the defendant terminated plaintiff's employment; and (4) the claim for worker's compensation benefits was a substantial

factor in the employer's motivation to terminate the employee's employment. *Anderson v. Standard Register Co.,* 857 S.W.2d 555, 558 (Tenn. 1993).

The parties' principal briefs assume that, at summary judgment, the *plaintiff* has the initial burden of proving each element of his prima facie case of retaliation, including the causation element, and, if he does, the burden of production then shifts to the defendant to articulate a non-discriminatory reason. Further, if that non-discriminatory reason is articulated by the defendant, then the plaintiff has a further burden of proving pretext. These assumptions are taken from the familiar tripartite test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and followed by this Court in *Allen v. McPhee*, 240 S.W.3d 803 (Tenn. 2007).

Respectfully, TENNELA submits that the summary judgment burdens in the *McDonnell Douglas* framework do not comport with the summary judgment burdens required by *Hannan v. Alltel Publishing Co.,* 270 S.W.3d 1 (Tenn. 2008) and *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008). This Court made it crystal clear in both *Hannan* and *Martin* that in deciding summary judgment, the movant may not place the initial burden upon the plaintiff by arguing that his evidence is *insufficient* to establish an essential element of the cause of action. *Hannah,* at 7; *Martin*, at 83. Instead, "a moving defendant may shift the burden of production to the nonmoving party by showing that the nonmoving party cannot establish an essential element of the claim at trial." *Hannah,* at 8-9; *Martin*, at 83-84. As this Court explained, "it is not enough for the moving party to challenge the nonmoving party to 'put up or shut up' or even to cast doubt on a party's ability to prove an element at trial." *Hannan.* at 8.

Even prior to *Hannan* and *Martin,* this Court made clear that an initial burden may not be placed upon the non-movant:

> The court, however, bypassed the moving parties' initial burden and addressed only the sufficiency of the non-moving parties' opposing evidence. We find that the court erred in focusing on the non-moving parties' burden without first addressing whether the burden was actually triggered.

McCarley v. West Quality Food Serv., 960 S.W.2d 585, 587-88 (Tenn. 1998).

The *McDonnell Douglas* framework (and *Allen v. McPhee*), therefore, is incompatible with *Hannan* and *Martin.* At summary judgment, a Tennessee *plaintiff* no longer has the burden of proving a prima facie case in order to shift a burden of production to the defendant (as *McDonnell Douglas* would have it). Rather, the *defendant* bears the burden of affirmatively negating an essential element of the plaintiff's claim. For example, in a retaliatory discharge case, the *defendant* would bear the burden of *affirmatively negating* the element of causal connection (disproving "substantial factor," in this case), rather than the *plaintiff* bearing the burden of *proving* causal connection.

Under *Hannan, Martin*, and *Anderson v. Standard Register Co.,* a defendant may "affirmatively negate" causation by showing that the discharge was motivated by a legitimate, non-pretextual reason. *Anderson*, 857 S.W.2d at 559. Importantly, because a plaintiff prevails if an unlawful motivation was *a "substantial factor"* in the discharge, to affirmatively negate causal connection on summary judgment, the defendant must show that its asserted non-pretextual reason was the *sole* reason for the plaintiff's termination. Without showing it was the *sole* reason, it cannot be said that Defendant has *affirmatively*

negated retaliation as a possible "substantial factor."

If the defendant proffers such evidence, it would be entitled to summary judgment *only if* its proffer is left unrebutted by the plaintiff. "The [plaintiff] may satisfy its burden of production by: (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06." *Martin,* at 84 (citing *McCarley*, 960 S.W.2d at 588).

In the context of a retaliation case, where the defendant shows a non-pretextual reason is the sole motivating reason for the termination (thereby affirmatively negating retaliation as a "substantial factor"), the plaintiff may then resort to well established methods of demonstrating a dispute of fact with direct or circumstantial evidence, including evidence of pretext. Although there is no set formula, close proximity between the protected activity and the adverse action should generally be sufficient for a jury to find unlawful retaliation. S*ee, e.g., Mickey v. Zeidler Tool*, 516 F.3d 516, 525 (6th Cir. 2008) (explaining in detail why close temporal proximity is generally sufficient to establish causation); see also*, Allen v. McPhee*, 240 S.W.3d 803, 823 (Tenn. 2007) (acknowledging temporal proximity as evidence of causation at the prima facie stage). Other examples of circumstantial evidence relevant to establish causation include, but are not limited to: "[T]he employer's knowledge of the compensation claim, the expression of a negative attitude by the employer toward an employee's injury, the employer's failure

to adhere to established company policy, discriminatory treatment when compared to similarly situated employees, sudden and marked changes in an employee's performance evaluations after a workers' compensation claim, or evidence tending to show that the stated reason for discharge was false." *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 391 (Tenn. App. 2006). Shifting explanations or an employer's changing rationale for making an adverse employment decision is also evidence of pretext. *Thurman v. Yellow Freight Systems, Inc.,* 90 F.3d 1160, 1167 (6th Cir. 1996), citing *Edwards v. U.S. Postal Service,* 909 F.2d 320, 324 (8th Cir. 1990) and *Schmitz v. St Regis Paper Co.,* 811 F.2d 131, 132-133 (2d Cir. 1987); see also, *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846 (4th Cir. 2001)(summary judgment reversed; employer offered different justifications at different times for failure to hire plaintiff). And, of course, it is well settled that a plaintiff can create a triable issue of fact by casting sufficient doubt upon the defendant's explanation. *Reeves v. Sanderson Plumbing,* 530 U.S. 133 (2000)*; Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). If the employer's explanation is cast into sufficient doubt or shown to be untrue, then "the inference that the real reason was a forbidden one … may rationally be drawn. … The point is only that if the inference of improper motive *can* be drawn, there must be a trial." *Versa v. Policy Studies, Inc.* 45 S.W.3d 575, 582 (Tenn. App. 2000) (citing *Shager v. Upjohn Co.,* 913 F.2d 398, 401 (7th Cir. 1990)).

II. *HANNAN* AND *MARTIN* AVOID THE CONFUSION AND DUPLICATIVE EVIDENTIARY BURDENS OF A *McDONNELL DOUGLAS* ANALYSIS

Under *Hannan* and *Martin,* a plaintiff does not have the initial burden on summary judgment of producing evidence sufficient to make out a prima facie case under *McDonnell Douglas.* And, under *Hannan* and *Martin*, the defendant must do more than simply "articulate" a non-discriminatory reason. It must show by competent, admissible evidence that retaliation was *not* a "substantial factor" in its termination decision.

Hannan and *Martin* wisely avoid a serious problem with *McDonnell Douglas,* one that has plagued the federal courts – namely, the *misplacement* of "causal connection" within the prima facie portion of the plaintiff's case. In the original *McDonnell Douglas* framework, "causal connection" was not a part of the plaintiff's prima facie case because causation is the ultimate issue. Instead of "causal connection," the final element was whether the employee was replaced by someone outside the protected class. See *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2748 (1993). But the "replacement" element was problematic, too, because retaliation can occur regardless of whether someone is actually replaced. And, more recently, "replaced by someone outside the class" has been specifically rejected as having limited, if any, utility by the United States Supreme Court. *O'Conner v. Consolidated Coin*, 116 S.Ct. 1307, 1310 (1996).

Instead of "replacement" as the final element of the prima facie case, a trend developed of moving *causal connection* to the final element of the prima facie case of retaliation. Courts became divided over whether close temporal proximity was sufficient for the prima facie stage. When the ultimate issue of causation is placed in the plaintiff's

prima facie case, the defending employer invariably makes two overlapping arguments (as Berkline does in this case): (1) the plaintiff cannot prove "causal connection" in his *prima facie* case; and (2) even if he can, the plaintiff cannot prove the employer's non-discriminatory reason is pretextual. Instead of the rejected "pretext plus" requirement, some courts now use a similarly incorrect burden that might be termed "causation plus."

Allen v. McPhee, 240 S.W.3d 803 (Tenn. 2007), a retaliation case under the Tennessee Human Rights Act, is an example of a case placing causal connection in the plaintiff's prima facie case pursuant to *McDonnell Douglas.* *Allen*, at 820. Assessing causation within the prima facie case, the Court held that "close temporal proximity of a complaint and a materially adverse action are sufficient to establish a prima facie case of causation." *Id.* at 823. This Court noted that close temporal proximity is not the *only* way of proving the fourth element – in fact, it specifically listed "a pattern of antagonism following a complaint, or other circumstantial evidence supporting causation" as other means. *Id*. at 822. Yet, once the plaintiff establishes this type of evidence in a "substantial factor" case, the ultimate issue for trial has been shown. Evidence of pretext, too, takes the plaintiff beyond what is required.

Rather than simply focusing on the ultimate issue of causation, federal courts in the Sixth Circuit allow the same types of evidence to satisfy the plaintiff's prima facie case of causal connection as well as pretext. See*, e.g., Cantrell v. Nissan North America, Inc.*, 145 Fed.Appx. 99, 107 (6th Cir. 2005); *see also, Wooley v. Madison County, Tenn.*, 202 F.Supp.2d 836, 848 (W.D. Tenn. 2002) (the same evidence the plaintiff offered to establish causation as part of the plaintiff's prima facie case was also sufficient to

establish pretext); *but see*, *Ellis v. Buzzi Unicem USA*, 293 Fed. Appx. 365, 374-75 (6th Cir. 2008) (temporal proximity is relevant only in the first stage, not the pretext stage).

Well-respected judges have commented on the problems with and confusion of placing causal link in the prima facie stage of a retaliation case. For example, in *Bourbon v. Kmart Corp.*, 223 F.3d 469, 476 (7th Cir. 2000), Judge Richard Posner of the Seventh Circuit recognized in a concurring opinion that the "causal link" requirement is the ultimate issue in a retaliation case and to put it in the plaintiff's prima facie case risks rendering the *McDonnell Douglas* analysis "sheer muddle."

Subsequently, the Seventh Circuit rejected the "causal link" element in the prima facie case altogether in retaliation cases because:

> If the plaintiff has produced evidence that he was fired because of his protected expression, **he has gone beyond McDonnell Douglas** by producing actual evidence of unlawful conduct-evidence that the firing was in fact retaliation for his complaining about discrimination. The fact that the defendant may be able to produce evidence that the plaintiff was fired for a lawful reason just creates an issue of fact: what was the true cause of the discharge?

Stone v. City Indianapolis Public Utilities Div., 281 F.3d 640, 643 (7th Cir. 2002) (Posner, J.) (emphasis added).

Similarly, in *Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1225 (10th Cir. 2003), Judge Hartz traced the history of *McDonnell Douglas* in his majority opinion. Yet, in a highly unusual move, Judge Hartz then wrote separately to disagree with the majority analysis (which he wrote) on the grounds that *McDonnell Douglas* is a "distraction" from the real issue. *See Id.* (Hartz, J. writing separately).

> Rather than concentrating on what should be the focus of attention — whether the evidence supports a finding of unlawful discrimination — courts focus on the isolated components of the *McDonnell Douglas* framework, losing sight of the ultimate issue. In particular, by always commencing the analysis with an examination of whether the plaintiff established a prima facie case, instead of whether the evidence as a whole could support a verdict in favor of the plaintiff, judicial opinions imply that the court's task is simplified by first looking at just the prima facie case. The sense is conveyed that unfounded claims can be disposed of more readily if one can concentrate on the prima facie case and determine whether the plaintiff can leap that hurdle. But how could that be so? Is it really possible that *McDonnell Douglas* — which was viewed at the time as a plaintiff-friendly opinion — could require judgment against a plaintiff when the evidence as a whole would support a plaintiff's verdict but the plaintiff somehow has not made out a prima facie case?
>
> . . .
>
> It is time for this circuit to devote our attention to "the ultimate question of discrimination *vel non.*" *Aikens,* 460 U.S. at 714, 103 S.Ct. 1478. Even if we must pay lip service to *McDonnell Douglas,* let us clear our minds of technical distractions by employing *Aikens* at the summary-judgment stage. I doubt that our ultimate conclusions will be different in any significant number of cases. But our task will be easier because we will have fewer technical barriers to the application of common sense; and there is always the risk that imposing needless complexity on our work will increase the chance of error.

Id.

Additionally, Judge Kavanaugh of the District of Columbia Circuit explains that *McDonnell Douglas* is an "unnecessary sideshow:"

> Much ink has been spilled regarding the proper contours of the prima-facie-case aspect of *McDonnell Douglas*. But as we read the Supreme Court precedents beginning with *Aikens*, the prima facie case is a largely unnecessary sideshow. It has not benefited employees or employers; nor has it simplified or expedited court proceedings. In fact, it has done exactly the opposite, spawning enormous confusion and wasting litigant and judicial resources.

> Lest there be any lingering uncertainty, we state the rule clearly: In a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not -- *and should not* -- decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*. Rather, in considering an employer's motion for summary judgment or judgment as a matter of law in those circumstances, the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin? *See Hicks*, 509 U.S. at 507-08, 511; *Aikens,* 460 U.S. at 714-716.

Brady v. Office of Sgt. at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008). Now, the D.C. Circuit holds that a prima facie case is irrelevant at summary judgment once an employer asserts a non-discriminatory/retaliatory reason; the issue is simply whether the employee's evidence creates a material dispute on the ultimate issue of retaliation. *Jones v. Bernanke*, 557 F.3d 670, 678 (D.C. Cir. 2009).

Much like *Brady, Hannan* and *Martin* wisely avoid all of this confusion. If the defendant affirmatively negates retaliation as a substantial factor in the discharge, the plaintiff may then rebut defendant's proof to establish a dispute of fact by presenting evidence sufficient to allow an inference that retaliation was a substantial factor motivating the adverse action. And, under *Versa v. Policy Studies, Inc.,* "[t]he point is only that if the inference of improper motive *can* be drawn, there must be a trial." 45 S.W.3d at 582. Thus, under *Hannan* and *Martin,* courts will focus on the ultimate issue without the distraction of assessing a prima facie case – that is, whether defendant's competent, admissible evidence affirmatively negates retaliation, and, if it does, whether

plaintiff's evidence is sufficient to draw a contrary inference that a retaliatory motive was a substantial factor in the defendant's decision.

III. SUMMARY JUDGMENT WAS PROPERLY DENIED TO BERKLINE UNDER A *HANNAN/MARTIN* ANALYSIS

Applying this more straightforward analysis required by *Hannan* and *Martin*, Berkline has argued the sole nonpretexual reason for Kinsler's termination was his physical inability to perform the job. Kinsler then created a dispute of fact for trial through: (1) evidence of close temporal proximity between his protected activity (declining the settlement) and his discharge; (2) evidence casting doubt on the employer's contention that he was physically unqualified to perform the job; and (3) evidence that a similarly situated individual who did not exercise workers' compensation rights was not disqualified by Berkline. Such proof easily fits within established methods of casting doubt upon the employer's stated reason: (1) the proffered reason has no basis in fact, (2) the proffered reason—even if true—did not actually motivate the employer's decision, or (3) the proffered reason was insufficient to warrant the challenged decision. *Johnson v. Kroger Co.*, 319 F.3d 858, 866-67 (6th Cir. 2003). Accordingly, the court of appeals was correct in reversing the summary judgment to Berkline.

CONCLUSION

Hannan v. Alltel Publishing Co., 270 S.W.3d 1 (Tenn. 2008) and *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008) require a different analysis at summary judgment than previous retaliation cases relying upon *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Therefore, *Hannan* and *Martin* modify the analysis

relied on in both *Allen v. McPhee*, 240 S.W.3d 803, 823 (Tenn. 2007) and *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d 646, 648 (Tenn. 1995). Instead of first looking to see whether the plaintiff established a prima facie case, it is the *defendant* who must first affirmatively negate the essential element of plaintiff's cause of action that retaliation was a "substantial motivating factor" in his discharge. If the defendant cannot make this showing, summary judgment is inappropriate. If the defendant does make this showing, the plaintiff may rebut it by producing direct or circumstantial evidence in a variety of forms, including evidence of pretext, sufficient to permit the trier of fact to draw an inference that retaliation was a substantial factor motivating the adverse action.

The Court of Appeals' decision denying summary judgment should be affirmed even though it did not reach the result through a *Hannan/Martin* analysis. Berkline offered evidence that plaintiff's alleged physical inability to perform the job was the sole cause for the termination. Kinsler adequately rebutted that evidence with his evidence of close temporal proximity, evidence contradicting the defendant's reason, and evidence that he was treated differently from similarly situated employees who had not engaged in protected activity. Accordingly, Kinsler's evidence is sufficient to permit a trier of fact to draw an inference that retaliation was a substantial factor in defendant's discharge decision, and summary judgment was appropriately denied.

Respectfully submitted,

By: /s Justin S. Gilbert

Justin S. Gilbert #17079
GILBERT RUSSELL MCWHERTER PLC
101 N. Highland
Jackson, TN 38308
731/664-1340
For Tennessee Employment Lawyers Association

Donald A. Donati #8633
William B. Ryan #20269
DONATI LAW FIRM, LLP
1545 Union Avenue
Memphis, TN 38104
901/278-1004
For Tennessee Employment Lawyers Association

Wade B. Cowan #9403
150 Second Avenue North, Ste, 225
Nashville, TN 37201
615/256-8130
For Tennessee Employment Lawyers Association

CERTIFICATE OF SERVICE

I certify that on this 21st day of August, 2009, a true and correct copy of the foregoing has been served by U.S. Mail, postage prepaid, on the following attorneys:

Mr. W. Lewis Jenkins, Jr.
Wilkerson Gauldin Hayes & Jenkins
112 West Court Street
P.O. Box 220
Dyersburg, TN 38025

Mr. Mark S. Stapleton
Stapleton Law Office
225 S. Depot Street
Rogersville, TN 37857

Attorneys for Plaintiff/Appellee

and

Ms. Kelly A. Campbell
Wimberly Lawson Seale Wright & Daves, PLLC
929 West First North Street
P.O. Box 1066
Morristown, TN 37816-1066

Attorney for Defendant/Appellant

/s Justin S. Gilbert
Justin S. Gilbert