**GARY M. GOSSETT v. TRACTOR SUPPLY COMPANY, INC.**

**No. M2007-02530-SC-R11-CV**

**SUPREME COURT OF TENNESSEE, AT NASHVILLE**

**320 S.W.3d 777; 2010 Tenn. LEXIS 869; 31 I.E.R. Cas. (BNA) 437**

**February 11, 2010, Session**
**September 20, 2010, Filed**

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

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Affirmed. Appeal by Permission from the Court of Appeals, Middle Section Chancery Court for Davidson County. No. 04-1484-IV. Richard H. Dinkins, Chancellor.

Gossett v. Tractor Supply Co., 2009 Tenn. App. LEXIS 135 (Tenn. Ct. App., Mar. 2, 2009)

**DISPOSITION:** Judgment of the Court of Appeals Affirmed.

**COUNSEL:** Douglas Ray Pierce and James Andrew Farmer, Nashville, Tennessee, for the appellant, Tractor Supply Company, Inc.

Wade Bonham Cowan, Nashville, Tennessee, for the appellee, Gary M. Gossett.

**JUDGES:** JANICE M. HOLDER, C.J., delivered the opinion of the Court, in which GARY R. WADE, and SHARON G. LEE, JJ., joined. CORNELIA A. CLARK, J., filed a separate opinion dissenting in part and concurring in the judgment, in which WILLIAM C. KOCH, JR., J. joined.

**OPINION BY:** JANICE M. HOLDER

**OPINION**

[*779] The employee brought an action for common law retaliatory discharge against his employer for refusal to participate in an allegedly illegal activity. The employer moved for summary judgment, presenting evidence of a legitimate reason for the employee's discharge pursuant to the framework announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The employer also argued that summary judgment was warranted pursuant to Collins v. AmSouth Bank, 241 S.W.3d 879 (Tenn. Ct. App. 2007), [**2] because the undisputed facts showed that the employee did not report the alleged illegality. The trial court granted summary judgment, which the Court of Appeals reversed. We hold that the McDonnell Douglas framework is inapplicable at the summary judgment stage because it is incompatible with Tennessee summary judgment jurisprudence. We also hold that an employee alleging retaliatory discharge for refusal to participate in an illegal activity need not report the illegality. We therefore affirm the judgment of the Court of Appeals.

**OPINION**

I. Facts and Procedure

Defendant Tractor Supply Company, Inc., (Tractor Supply) employed Gary Gossett as an "Inventory Control Manager" in its General Accounting Department until his discharge. As Inventory Control Manager, Mr. Gossett prepared the inventory reserve analysis, which calculates the amount of money Tractor Supply must reserve each fiscal quarter to account for excess or slow-moving inventory. Each dollar reserved proportionately decreases Tractor Supply's earnings. After completing the inventory reserve analysis, Mr. Gossett delivered it to his immediate supervisor, Vice President-Controller David Lewis, for use in Tractor Supply's quarterly [**3] earnings report to the Securities & Exchange Commission. The process was overseen by Tractor Supply's Chief Financial Officer, Calvin Massmann.

According to Mr. Gossett, during the first week of October 2003, Mr. Massmann instructed him to remove products from the inventory reserve. Mr. Gossett contends that this action would have artificially increased the quarterly earnings statement in violation of the Securities Exchange Act of 1934 and related federal securities regulations. Mr. Gossett specifically alleges that Mr. Massmann "wanted [Mr. Gossett] to look at all the various categories that made up the Company's inventory mix and find creative ways to remove products that seemed to be creating the greatest need for additional reserves." Mr. Gossett states that he refused to participate in the allegedly illegal activity, which displeased Mr. Massmann, and submitted an accurate inventory reserve analysis to Mr. Lewis. On November [*780] 7, 2003, after consulting with Mr. Massmann and Tractor Sup-

ply's human resource manager, Mr. Lewis discharged Mr. Gossett.

Mr. Gossett brought an action for common law retaliatory discharge based on a violation of public policy. He specifically alleged that [**4] Tractor Supply discharged him for refusing to participate in Mr. Massmann's allegedly illegal activity. Tractor Supply moved for summary judgment, arguing that Mr. Gossett could not prove the essential causation element of his claim at trial. The trial court found that the case presented genuine issues of material fact, denied Tractor Supply's motion, and set a date for trial.

Six weeks before trial, however, Tractor Supply filed a motion requesting that the trial court reconsider and revise its order denying summary judgment in light of Collins v. AmSouth Bank, 241 S.W.3d 879 (Tenn. Ct. App. 2007). In reconsidering its order, the trial court observed that, pursuant to Collins, "reporting the alleged illegal activity is an essential element of a cause of action for retaliatory discharge." The trial court granted summary judgment because it was undisputed that Mr. Gossett did not report Mr. Massmann's allegedly illegal activity to anyone.

The Court of Appeals reversed the grant of summary judgment. We granted Tractor Supply's application for permission to appeal.

II. Analysis

The issue before us is whether Tractor Supply is entitled to summary judgment as to Mr. Gossett's retaliatory discharge [**5] claim. The granting or denying of summary judgment is a question of law, which we review de novo. Blair v. W. Town Mall, 130 S.W.3d 761, 763 (Tenn. 2004).

A.

Tractor Supply argues that summary judgment is warranted when the motion for summary judgment is analyzed pursuant to the framework announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Our analysis of this argument requires that we first describe the McDonnell Douglas framework, this Court's similar but distinct framework adopted in Anderson v. Standard Register Co., 857 S.W.2d 555, 559 (Tenn. 1993), and the frameworks' application in Tennessee.

In McDonnell Douglas, the United States Supreme Court set forth for use at trial the "basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). Pursuant to McDonnell Douglas, if an employee proves a prima facie case of discrimination or retaliation, the employee creates a rebuttable presumption that the employer unlawfully discriminated or retaliated against him or her. Burdine, 450 U.S. at 254. The burden of production shifts to the employer to articulate [**6] a legitimate and nondiscriminatory or nonretaliatory reason for the action. Id. at 252-53. If the employer satisfies its burden, the presumption of discrimination or retaliation "drops from the case," id. at 255 n.10, which sets the stage for the factfinder to decide whether the adverse employment action was discriminatory or retaliatory. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-15, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983). The employee, however, "must . . . have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but [*781] were a pretext for discrimination." Burdine, 450 U.S. at 253. Tennessee courts have applied this evidentiary framework to statutory employment discrimination and retaliation claims. See e.g., Allen v. McPhee, 240 S.W.3d 803, 819-23 (Tenn. 2007); Barnes v. Goodyear Tire & Rubber Co., 48 S.W.3d 698, 708-09 (Tenn. 2000).

For common law retaliatory discharge cases such as the one before us, this Court has adopted an analysis similar to but distinct from the McDonnell Douglas framework. At trial, the employee has the burden of proving the four elements of the claim:

> (1) that an employment-at-will relationship [**7] existed;
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> (2) that the employee was discharged;
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> (3) that the reason for the discharge was that the employee 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 provision; and
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> (4) that a substantial factor in the employer's decision to discharge the employee was the employee's exercise of protected rights or compliance with clear public policy.

Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 862 (Tenn. 2002) (citations omitted). Proof of a causal link between the employee's exercise of a protected right or compliance with clear public policy and the employer's decision to discharge the employee then "imposes upon the employer the burden of showing a legitimate, non-pretextual reason for the employee's discharge."

Anderson, 857 S.W.2d at 559. No opinion of this Court addressing common law retaliatory discharge, however, has described how an employee must respond to the employer's proffered reason. [1] Nor have we been called on, until now, to demonstrate how the employer's burden of showing a legitimate reason for discharge applies at the summary judgment [**8] stage. [2]

1 We have addressed the common law retaliatory discharge cause of action in twelve opinions. Guy v. Mut. of Omaha Ins. Co., 79 S.W.3d 528 (Tenn. 2002); Crews, 78 S.W.3d 852; Fahrner v. SW Mfg., Inc., 48 S.W.3d 141 (Tenn. 2001); Stein v. Davidson Hotel Co., 945 S.W.2d 714 (Tenn. 1997); Coffey v. Fayette Tubular Prods., 929 S.W.2d 326 (Tenn. 1996); Conatser v. Clarksville Coca-Cola Bottling Co., 920 S.W.2d 646 (Tenn. 1995); Reynolds v. Ozark Motor Lines, Inc., 887 S.W.2d 822 (Tenn. 1994); Anderson, 857 S.W.2d 555; Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992); Harney v. Meadowbrook Nursing Ctr., 784 S.W.2d 921 (Tenn. 1990); Chism v. Mid-South Milling Co., 762 S.W.2d 552 (Tenn. 1988); Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984).

2 Guy v. Mutual of Omaha Insurance Co., Anderson v. Standard Register Co., Harney v. Meadowbrook Nursing Center, and Chism v. Mid-South Milling Co. addressed motions for summary judgment, but all four opinions disposed of the motions without addressing how an employee must respond after an employer articulates a legitimate reason for the discharge. Anderson v. Standard Register Co. provides examples of legitimate, non-pretextual reasons, [**9] as the separate opinion correctly observes. However, the Court ultimately granted summary judgment in Anderson because the employee failed to show a prima facie case of retaliatory discharge, 857 S.W.2d at 559, and the Court therefore did not apply any of the provided examples of legitimate, non-pretexutal reasons.

B.

This case presents us with an opportunity to consider the continued viability of the McDonnell Douglas and the Anderson frameworks (collectively the McDonnell Douglas framework) at the summary judgment stage. We therefore review the McDonnell Douglas framework in the context of Tennessee summary judgment law, particularly in light of our recent [*782] clarification of summary judgment in Hannan v. Alltel Publishing Co., 270 S.W.3d 1, 8-9 (Tenn. 2008).

Summary judgment operates to dispose of a case only when it presents no genuine issue of material fact and when the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04. Rule 56 therefore precludes trial courts from deciding issues of material fact in ruling on a motion for summary judgment. Mills v. CSX Transp., Inc., 300 S.W.3d 627, 631 (Tenn. 2009). To show that a case presents no genuine issue of material [**10] fact, a party moving for summary judgment must produce evidence or refer to evidence in the record "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." Id. (citing Hannan, 270 S.W.3d at 8-9). "To affirmatively negate an essential element of the nonmoving party's claim, [the moving party] must point to evidence that tends to disprove a material factual allegation made by the nonmoving party." Id. (citing Martin v. Norfolk S. Ry. Co., 271 S.W.3d 76, 84 (Tenn. 2008)). If the moving party fails to satisfy this burden of production, summary judgment is not warranted. Id.

Evidence satisfying an employer's burden of production pursuant to the McDonnell Douglas framework does not necessarily demonstrate that there is no genuine issue of material fact. The McDonnell Douglas framework requires only that an employer offer evidence establishing a legitimate alternative to the reason for discharge alleged by the employee. Burdine, 450 U.S. at 254. A legitimate reason for discharge, however, is not always mutually exclusive of a discriminatory or retaliatory motive and thus does [**11] not preclude the possibility that a discriminatory or retaliatory motive played a role in the discharge decision. Cf. Anderson, 857 S.W.2d at 558 (adopting the "substantial factor" test that an employee need only show a protected action "constituted an important or significant motivating factor for the discharge," not the exclusive or determinative factor, to establish a prima facie retaliatory discharge claim). Indeed, Title VII of the Civil Rights Act recognizes that an adverse employment action may be the result of both a legitimate reason and a discriminatory motive. See Desert Palace, Inc. v. Costa, 539 U.S. 90, 94-95, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). Furthermore, evidence showing a legitimate reason for discharge can satisfy the requirements of the McDonnell Douglas framework without tending to disprove any factual allegation by the employee. An employer therefore may meet its burden of production pursuant to McDonnell Douglas without satisfying the burden of production set forth in Tennessee Rule of Civil Procedure 56.04 for a party moving for summary judgment. See, e.g., Mills, 300 S.W.3d at 631; Martin, 271 S.W.3d at 83; Hannan, 270 S.W.3d at 5; Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 88 (Tenn. 2000); [**12] McCarley v. W. Quality Food Serv., 960 S.W.2d 585, 588 (Tenn. 1998); Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn. 1993).

The facts of this case illustrate why evidence of a legitimate reason for discharge does not necessarily show that there is no genuine issue of material fact. In support of its motion for summary judgment, Tractor Supply points to a deposition by Mr. Lewis in which he states that he discharged Mr. Gossett to reduce Tractor Supply's workforce. This reason satisfies Tractor Supply's burden of production pursuant to the McDonnell Douglas framework. See, e.g., Barnes v. GenCorp Inc., 896 F.2d 1457, 1465 (6th Cir. 1990). [*783] Mr. Lewis's statements show that reducing Tractor Supply's work force was one reason for discharging Mr. Gossett. Mr. Lewis's statements do not show, however, that reducing its work force was the exclusive reason for discharging Mr. Gossett. Mr. Lewis's statements do not show an absence of a retaliatory motive. Nor do Mr. Lewis's statements tend to disprove any of Mr. Gossett's factual allegations. Even if we take Mr. Lewis's statements as true, there remains a question of fact as to whether the retaliatory motive alleged by Mr. Gossett amounted to a substantial [**13] factor in Tractor Supply's discharge decision. See Guy, 79 S.W.3d at 535. Tractor Supply therefore has satisfied its burden of production pursuant to the McDonnell Douglas framework without satisfying its burden of production for summary judgment. See Hannan, 270 S.W.3d at 8-9.

Furthermore, when applied at the summary judgment stage, the shifting burdens of the McDonnell Douglas framework obfuscate the trial court's summary judgment analysis. The McDonnell Douglas framework "is intended to progressively sharpen the inquiry into the elusive factual question of intentional discrimination" or retaliation. Burdine, 450 U.S. at 254 n.8. Although such inquiry is particularly appropriate at trial, it is ill-suited for the purpose of determining whether "there is no genuine issue as to any material fact." Tenn. R. Civ. P. 56.04. The burden-shifting analysis explained in Hannan, for example, "can be an important tool in deciding whether summary judgment is appropriate," Mills, 300 S.W.3d at 634, because it specifically operates to show that there is no genuine issue of material fact as to an essential element. See id. at 631. In contrast, the McDonnell Douglas framework is a tool that trial [**14] courts use "to evaluate the evidence in light of common experience as it bears on the critical question of discrimination" or retaliation. Aikens, 460 U.S. at 715 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978)). Instead of demonstrating the absence of any genuine issue of material fact, the framework focuses on the "sensitive and difficult" factual question of whether an employer's decision to discharge an employee was discriminatory or retaliatory. Id. at 716.

Because of this difference, the inquiries required by the McDonnell Douglas framework may result in trial courts disposing of factual questions on summary judgment. This unintended result is particularly obvious when a court is assessing whether the employer's proffered reason for an adverse employment action is pretextual. In addressing the issue of pretext, a court may fail to consider the facts alleged by the employee to show a prima facie case. As explained by Judge Tymkovich of the United States Court of Appeals for the Tenth Circuit, "the [**15] compartmentalization of evidence causes courts to put on blinders, looking at categories of evidence narrowly while the totality of the evidence may point to discrimination." Timothy M. Tymkovich, The Problem with Pretext, 85 Denv. U. L. Rev. 503, 519 (2008); see Wells v. Colo. Dept. of Transp., 325 F.3d 1205, 1225 (10th Cir. 2003) (Hartz, J., concurring). When focusing solely on whether the employee showed a genuine issue of material fact regarding the employer's proffered reason, a court may overlook the employee's evidence establishing the prima facie case. This oversight causes a court to contravene our instruction that evidence must be construed in a light most favorable to the employee as the nonmoving party, see Martin, 271 S.W.3d at 84, and can result in an improper grant of summary judgment.

In Allen v. McPhee, for example, this Court separated the evidence supporting [*784] the employee's prima facie case, close temporal proximity, from our consideration of whether the employee presented evidence of pretext. See 240 S.W.3d at 823. The matter was before us on the employee's retaliation claim under the Tennessee Human Rights Act. Applying the McDonnell Douglas framework, we first held [**16] that a reasonable jury could conclude that the employee, Allen, established a prima facie case of retaliation. We then stated that her employer "is entitled to summary judgment if it can articulate a legitimate, non-discriminatory reason for transferring Allen and if Allen is unable to present evidence that raises a genuine dispute over whether the proffered reason is pretextual." Id. (citing Young v. Dillon Cos., 468 F.3d 1243, 1249 (10th Cir. 2006)). The employer "contend[ed] that it reassigned Allen . . . to protect her from further harassment" from her supervisor, whom Allen had reported for sexual harassment. Id. In granting summary judgment, we held "that Allen has failed to demonstrate the existence of a genuine issue of material fact regarding [her employer's] motivation for the reassignment." Id.

Without the McDonnell Douglas framework, our summary judgment analysis in Allen would have reached a different outcome. Under well-established law, a court considering a summary judgment motion "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." Blair, 130 S.W.3d at 768 [**17] (quoting Byrd, 847 S.W.2d at 210-11). Summary judgment is warranted if the facts and inferences from those facts "permit a reasonable person to reach only one conclusion." Staples, 15 S.W.3d at 89. When we discard the countervailing evidence that Allen's employer reassigned her to protect her from further harassment, the record in Allen v. McPhee showed that Allen was reassigned shortly after reporting that her supervisor had sexually harassed her. From this fact and reasonable inferences from this fact construed in favor of Allen, a reasonable person can reach more than one conclusion as to whether the employer transferred Allen in retaliation. Summary judgment therefore was inappropriate. However, the parties in Allen did not question the applicability of the McDonnell Douglas framework at the summary judgment stage in Tennessee, and we were not called on to consider its continued viability. Our reaffirmation of longstanding Tennessee law on summary judgment, however, convinces us that our application of the McDonnell Douglas framework in Allen skewed our summary judgment analysis in favor of the employer.

As Allen demonstrates, applying the McDonnell Douglas framework at the summary [**18] judgment stage can result in the grant of a summary judgment despite the presence of genuine issues of material fact. Ironically, the McDonnell Douglas framework was not designed to be an obstacle to trial for the employee. "The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the '[employee] has his day in court despite the unavailability of direct evidence.'" Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)).

Furthermore, the McDonnell Douglas framework was designed to permit the trier of fact to better evaluate the evidence as to whether the employer was motivated by a discriminatory or retaliatory intent, see, e.g., Aikens, 460 U.S. 711, 715, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983), not to remove genuine issues of material fact [*785] from a trier of fact. Our decision therefore does not, as the separate opinion argues, make obtaining summary judgment "needlessly more difficult" in employment discrimination and retaliation cases. Rather, it makes summary judgment available equally to all litigants.

Based on the foregoing reasons, we hold that the McDonnell Douglas framework is inapplicable at the summary [**19] judgment stage because it is incompatible with Tennessee summary judgment jurisprudence. [3]

3 While opinions of federal intermediate appellate courts are only persuasive authority and not binding on us, see Leggett v. Duke Energy Corp., 308 S.W.3d 843, 871 (Tenn. 2010), we observe that the McDonnell Douglas framework has been the subject of much confusion and criticism in the federal circuit courts of appeals. See e.g., Zamora v. Elite Logistics, Inc., 478 F.3d 1160, 1167 (10th Cir. 2007) (Hartz, J., concurring) ("I continue to believe that we should not apply the framework of McDonnell Douglas . . . to review a summary judgment when the existence of a prima facie case is not disputed. . . . Applying that framework is inconsistent with Supreme Court authority, adds unnecessary complexity to the analysis, and is too likely to cause us to reach a result contrary to what we would decide if we focused on 'the ultimate question of discrimination *vel non*.'" (citations omitted)); Wright v. Murray Guard, Inc., 455 F.3d 702, 716-21 (6th Cir. 2006) (Moore, J., concurring) (concluding that the McDonnell Douglas framework is "ill suited to the analysis of mixed-motive claims" at summary judgment [**20] and stating that "[i]nquiries regarding what actually motivated an employer's decision are very fact intensive and thus will generally be difficult to determine at the summary judgment stage"); Griffith v. City of Des Moines, 387 F.3d 733, 746-48 (8th Cir. 2004) (Magnuson, J., sitting by designation, concurring specially) (stating that "the Supreme Court has gradually chiseled McDonnell Douglas away from its original failing framework to an analysis that still fails to give effect to the language of the Civil Rights Act," and opining that it should not be used to analyze Title VII claims at trial or at summary judgment); Liu v. Amway Corp., 347 F.3d 1125, 1140 n.6 (9th Cir. 2003) (Pregerson, J., dissenting in part) ("'[T]he process dictated by the Civil Rights Act of 1991 [in § 2000e-2(m)] is more useful than the analysis required by McDonnell Douglas.'" (quoting Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991 (D. Minn. 2003))); Dunaway v. Int'l Bhd. of Teamsters, 310 F.3d 758, 762-63, 354 U.S. App. D.C. 36 (D.C. Cir. 2002) (stating that in a summary judgment motion on employee's claim of employment discrimination in which an employer has articulated a legitimate reason for the adverse employment [**21] action, "the proper question now is whether the employer unlawfully discriminated against the plaintiff," not pretext); Tymkovich, supra, at 505, 529 ("[T]his focus on pretext has shifted the emphasis of an employ-

ment discrimination case away from the ultimate issue of whether the employer discriminated against the complaining employee," and "it may now be time to replace the framework with a simpler, more direct method of determining the question of discrimination."). For an example of the current state of the McDonnell Douglas framework in federal courts, White v. Baxter Healthcare Corp. provides a survey of the "widely differing approaches to the question of how to analyze summary judgment challenges in Title VII mixed-motive cases" among the federal courts of appeals. 533 F.3d 381, 398-99 (6th Cir. 2008)

C.

In light of the above analysis, we find the separate opinion's additional arguments for retaining the McDonnell Douglas framework at the summary judgment stage to be unpersuasive. We expect that our holding today will engender less uncertainty than retaining the McDonnell Douglas framework because our holding allows courts to conduct the same summary judgment analysis in all cases. [**22] We also disagree that removing the McDonnell Douglas framework from the summary judgment stage will "sharply reduce[] the quantum of proof that a plaintiff needs to survive summary judgment," as the separate opinion contends. A plaintiff requires no proof to survive summary judgment unless the defendant moving for summary judgment first [*786] shows there is no genuine issue as to any material fact on an essential element, in which case all plaintiffs share the same burden of production to show a genuine issue of material fact as to that element. Martin, 271 S.W.3d at 84; Hannan, 270 S.W.3d at 5. Removing the McDonnell Douglas framework from the summary judgment stage instead requires defendants seeking summary judgment in discrimination and retaliation claims to produce evidence in accordance with Tennessee Rule of Civil Procedure 56 and longstanding Tennessee law, like all other litigants. See e.g., Mills, 300 S.W.3d at 631.

We also are undeterred by the separate opinion's caution that removing the McDonnell Douglas framework at the summary judgment stage "may ultimately impact the viability of the framework at trial." The separate opinion states that the reasoning behind our decision may [**23] undercut "an employer's motion for directed verdict at the conclusion of the proof, based on uncontradicted evidence that the employee was discharged for a legitimate, non-pretextual reason." We disagree.

While motions for summary judgment and directed verdict are considered in the same manner, Blair, 130 S.W.3d at 768, a court's grant of summary judgment must be more deliberate because it occurs before the nonmoving party has had the opportunity to present all evidence at trial. Mills, 300 S.W.3d at 632 n.3 (citing Hamrick v. Spring City Motor Co., 708 S.W.2d 383, 389 (Tenn. 1986)). In contrast, when an employer moves for directed verdict, the employee has had the opportunity to present his or her case in full. See Tenn. R. Civ. P. 50.01. "Uncontradicted evidence that the employee was discharged for a legitimate, non-pretextual reason" at the directed verdict stage shows that the employee did not present any proof at trial of a retaliatory reason for the discharge. The employer therefore would be entitled to directed verdict because the strongest legitimate view of these facts in favor of the employee, with all evidence construed in the employee's favor and all countervailing evidence [**24] discarded, permits a reasonable person to reach only one conclusion on the essential causation element. See Johnson v. Tenn. Farmers Mut. Ins. Co., 205 S.W.3d 365, 370 (Tenn. 2006).

Additionally, the separate opinion's concern reflects confusion about our holding. As the United States Supreme Court explained in Aikens, evidence of a legitimate reason for the discharge, combined with the employee's evidence of a prima facie case, generally presents a question of fact for the factfinder. 460 U.S. at 715 (quoting Burdine, 450 U.S. at 253). Therefore, an employer that has satisfied its burden of production for the McDonnell Douglas framework likely has not satisfied its burden of production for summary judgment. However, our holding does not exclude the possibility of summary judgment when an employer presents *undisputed* evidence that a legitimate reason was the *exclusive* motivation for discharging the employee. In such a case, the employer has demonstrated that the employee cannot show that a discriminatory or retaliatory reason was a substantial factor in the discharge decision and therefore has met its burden of production for summary judgment. Because no genuine issue of material fact [**25] exists on an essential element, either summary judgment or directed verdict may be granted.

D. We further observe that summary judgment must be denied in this case because Mr. Gossett has clearly identified genuine issues of material fact. In Mills [*787] v. CSX Transportation, Inc., we stated that when a nonmoving party has clearly identified a genuine issue of material fact on the element that the moving party is attempting to negate, a court need not decide whether the party moving for summary judgment has satisfied its burden of production pursuant to Tennessee Rule of Civil Procedure 56. 300 S.W.3d at 634. Without regard to whether a moving party has met its burden of production, summary judgment is not warranted when there is a gen-

uine issue of any material fact as to the contested element. Tenn. R. Civ. P. 56.04.

Tractor Supply, in its summary judgment motion, pointed to evidence contesting Mr. Gossett's ability to establish at trial that a retaliatory motive was a substantial factor in Tractor Supply's decision to discharge him. Mr. Gossett in turn proffered evidence showing genuine issues of material fact about whether Tractor Supply's motive for discharging Mr. Gossett was in fact [**26] retaliatory. Specifically,

> . Mr. Gossett points to the deposition testimony of Accounts Payable Manager John Trotter, who assumed the Inventory Control Manager responsibilities in addition to his own responsibilities. Mr. Trotter described the two job responsibilities as "dramatically different," raising a genuine issue of material fact as to whether redundancy between the two positions actually motivated Mr. Gossett's discharge as Mr. Lewis maintained.
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> . Mr. Gossett points to John Trotter's statement that Mr. Lewis said shortly after discharging Mr. Gossett that he was discharged for "unacceptable performance," not because of a redundancy in management, raising a genuine issue of material fact about Tractor Supply's motivation behind Mr. Gossett's discharge.
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> . Mr. Gossett points to a newspaper advertisement published the Sunday before he was discharged in which Tractor Supply sought a financial analyst for Mr. Gossett's department, raising a genuine issue of material fact as to whether Tractor Supply actually intended to reduce its workforce by discharging Mr. Gossett.
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> . Mr. Gossett points to facts showing that his predecessor was demoted instead of discharged when Tractor Supply decided [**27] to remove him from the Inventory Control Manager position, raising a genuine issue of material fact as to why Tractor Supply discharged rather than demoted Mr. Gossett.

These genuine issues of material fact about Tractor Supply's proffered motivation preclude summary judgment. Id. at 634-35; cf. White, 533 F.3d at 393 n.6 ("The question of whether the employer's judgment was reasonable or was instead motivated by improper considerations is for the *jury* to consider.").

E.

Tractor Supply next argues that summary judgment is warranted pursuant to Collins because Mr. Gossett did not report to an authority within or outside Tractor Supply that Mr. Massmann had asked him to perform an illegal activity. It is undisputed that Mr. Gossett did not report the activity, and we therefore address only whether reporting is an essential element of Mr. Gossett's claim.

The elements of a common law retaliatory discharge action can apply to many distinct factual scenarios. See Chism, [*788] 762 S.W.2d at 556. We have stated that it can arise when an employee is discharged either for refusing to remain silent about an illegal activity or for refusing to participate in an illegal activity. Anderson, 857 S.W.2d at 556; [**28] see Chism, 762 S.W.2d at 556. When an employee is discharged for *refusing to remain silent* about an illegal activity, the employee must show that his or her reporting of the illegal activity furthered a clear public policy. See Guy, 79 S.W.3d at 537 & n.4. Without this showing, the claimant cannot establish the third element of the common law retaliatory discharge action, which requires proof of the clear public policy that the employer violated by the discharge. See Crews, 78 S.W.3d at 862.

We have never held that an employee alleging retaliatory discharge for *refusing to participate* in an illegal activity must report the illegality to show that the employer violated a clear public policy. Cf. Reynolds, 887 S.W.2d 822 (upholding a verdict in favor of truckers claiming retaliatory discharge for refusing to drive uninspected trucks in violation of federal and state laws without considering whether the truckers reported their employer's illegal activity). Tractor Supply asserts that pursuant to Collins, 241 S.W.3d at 885, reporting the allegedly illegal activity is essential to showing the third element in a case for common law retaliatory discharge based on refusing to participate in [**29] an illegal activity.

In Collins, the employee "alleged that she was fired solely because she refused to go along with [her supervisor's] illegal instructions." Id. at 882. The Court of Appeals affirmed the summary judgment on the employee's statutory and common law retaliatory discharge claims and held that "[p]ersons asserting either a statutory or common law whistleblowing claim must prove" that "their employer violated a law or regulation" and that their efforts to report "an illegal or unsafe practice furthered an important public policy interest." Id. at 885 (citing Guy, 79 S.W.3d at 538 n.4). It found summary judgment proper because the employee failed to demon-

strate that her supervisor's request was illegal and because she "failed to present any proof that she reported or attempted to report [her supervisor's] request to other bank officials or regulators." Id. at 885-86.

Although we agree with the statement in Collins concerning the requirements of whistleblowing claims, Collins involved a plaintiff who refused to participate in an allegedly illegal activity, not a plaintiff who refused to remain silent about it. In a "whistleblowing" case, in which a failure to remain silent [**30] is alleged, the nature of the claim asserts that silence was broken. The employee has no cause of action unless the employee shows that the reporting furthered some clear public interest. A case alleging a refusal to participate does not require that silence be broken for a claim to exist, and reporting therefore is not integral to the claim. For the purposes of the common law retaliatory discharge cause of action, we decline to hold that an employee's refusal to violate the law never furthers a clear public policy unless the employee reports the employer's attempted violation. The Court of Appeals therefore incorrectly applied the reporting element to the employee's action for common law retaliatory discharge for refusing to participate in an illegal activity.

Our decision not to add a reporting requirement will not expand the use of the common law retaliatory discharge cause of action or cause the retaliatory discharge exception to swallow the employment-at-will doctrine that Tennessee courts have long recognized. Chism, 762 S.W.2d at 555-56. Claimants alleging common law retaliatory discharge must identify "'an unambiguous constitutional, statutory or regulatory provision'" as evidence [**31] of the public policy that the employee's discharge violates. Guy, 79 S.W.3d at 535 (quoting Chism, 762 S.W.2d at 556); Crews, 78 [*789] S.W.3d at 862. This element sufficiently limits the retaliatory discharge cause of action to only those cases in which a discharge violates public policy. Chism, 762 S.W.2d at 557. Collins, for example, properly affirmed summary judgment because the employee alleging retaliatory discharge failed to identify an unambiguous constitutional, statutory, or regulatory provision evincing a clear public policy that the employee furthered by refusing to follow her supervisor's instruction. 241 S.W.3d at 885-86 & n.4.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the Court of Appeals reversing the trial court's grant of summary judgment to Tractor Supply. Costs are assessed against the appellant, Tractor Supply Company, Inc., for which execution may issue if necessary.

JANICE M. HOLDER, CHIEF JUSTICE

**CONCUR BY:** CORNELIA A. CLARK (In Part)

**DISSENT BY:** CORNELIA A. CLARK (In Part)

**DISSENT**

CORNELIA A. CLARK, J., concurring in part and dissenting in part.

I concur in part II of the majority opinion, holding that the reporting of an illegal activity is not an essential element of an employee's [**32] claim of retaliatory discharge for refusing to participate in an illegal activity, and, as I explain subsequently, I ultimately concur in the judgment denying the defendant's motion for summary judgment. Nonetheless, I write separately to dissent from the majority's decision in part I to dispense with the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), at the summary judgment stage in all employment discrimination and retaliation cases.

The McDonnell Douglas framework is compatible with our summary judgment framework as set forth in the Tennessee Rules of Civil Procedure and Hannan v. Alltel Publishing Co., 270 S.W.3d 1 (Tenn. 2008). Pursuant to Rule 56.04, a moving party obtains summary judgment by "show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As that rule is interpreted in Hannan, a party moving for summary judgment and "seek[ing] to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove [**33] an essential element of the claim at trial." 270 S.W.3d at 8-9. A moving party cannot merely "challenge the nonmoving party to 'put up or shut up' or . . . cast doubt on a party's ability to prove an element at trial." Id. at 8.

To establish the employer's liability for retaliatory discharge of an at-will employee at common law, the employee must prove that (1) the employee's discharge violated a clear public policy and (2) said violation of clear public policy was a substantial factor in the employee's termination. Guy v. Mutual of Omaha Ins. Co., 79 S.W.3d 528, 535 (Tenn. 2002); Chism v. Mid-South Milling Co., 762 S.W.2d 552, 556 (Tenn. 1988). In a motion for summary judgment, when an employer submits evidence that the plaintiff-employee was discharged for a legitimate, non-pretextual reason, the employer affirmatively negates the final element of the cause of action for retaliatory discharge. To put it another way, the employer shows that the plaintiff cannot prove that the violation of clear public policy was a substantial factor in the termination decision because the employer has

pointed to the legitimate factor that actually prompted the decision. When the [*790] employer supports this [**34] assertion with evidence from the record, the employer does more than identify deficiencies in the non-moving party's evidence or tell the non-moving party to "put up or shut up." Instead, the employer makes an affirmative showing that shifts the burden of production to the non-moving plaintiff.

Admittedly, as the majority opinion points out, our Court has not reached, in the context of a summary judgment motion on a common-law claim for retaliatory discharge, the question of what the employee must do after the employer has proffered a legitimate reason for the discharge. [1] Nonetheless, in other causes of action for employment discrimination and retaliation, such as a claim brought under the Tennessee Human Rights Act ("THRA"), we have held that the employee must then "present evidence demonstrating that the articulated reason is pretextual and that the defendant's action was actually motivated by a desire to retaliate against the employee." Allen v. McPhee, 240 S.W.3d 803, 821 (Tenn. 2007). The employee can meet the burden of production through evidence that (1) the employer's reason lacks a basis in fact, (2) the employer's reason was not the actual motivation for the discharge, or [**35] (3) the employer's reason is not sufficient to warrant a discharge. Id. at 823 (citing Carter v. Univ. of Toledo, 349 F.3d 269, 274 (6th Cir. 2003)).

1 The majority also states that, in the common-law retaliatory discharge context, we have never "been called on . . . to demonstrate how the employer's burden of showing a legitimate reason for discharge applies at the summary judgment stage." A review of the cited cases suggests otherwise. Through an excerpt from a prominent secondary authority, we have given examples of legitimate, non-pretextual reasons. Anderson v. Standard Register Co., 857 S.W.2d 555, 559 (Tenn. 1993) (quoting 2A A. Larson, The Law of Workmen's Compensation § 68.36(d), at 188-91 (1990)). Our quotation from Larson's treatise specifically explained that, when the employer invoked general business conditions as the legitimate reason, evidence of other layoffs unrelated to retaliation would be a particularly appropriate showing to substantiate that reason. Id. We have also explained that defendants will obtain summary judgment in such cases "only when the facts and inferences drawn from those facts permit a reasonable person to reach only one conclusion," ultimately denying [**36] summary judgment where the employer had cited a legitimate reason for discharge but the evidence allowed the trier of fact to infer that a retaliatory motive was a substantial factor in the employee's discharge. Guy, 79 S.W.3d at 534, 539.

Although the majority criticizes the McDonnell Douglas framework as applied to motions for summary judgment, we do not need to abrogate that framework in order to deny summary judgment in this case. Here, the employer predicated its motion for summary judgment on the testimony of its vice-president and controller, David Lewis, who stated that he terminated the plaintiff because plaintiff's position was redundant and the employer desired to reduce its workforce. Eliminating redundancies and reducing the workforce are legitimate reasons to terminate employees. Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 350-51 (6th Cir. 1998); Brenner v. Textron Aerostructures, 874 S.W.2d 579, 588 (Tenn. Ct. App. 1993). Nonetheless, the record is replete with evidence that the employer's stated reasons for discharging plaintiff were pretextual: the testimony of plaintiff's successor concerning the "dramatically different" job responsibilities of plaintiff's [**37] position, Lewis's statement to plaintiff's successor that plaintiff was terminated for "unacceptable performance," a newspaper advertisement for a position in plaintiff's department that ran earlier in the week when plaintiff was terminated, and the demotion rather than discharge of plaintiff's predecessor. This evidence suggests that the employer was not actually eliminating redundancies or [*791] reducing its workforce but discharged the plaintiff for some other reason. Accordingly, there is a genuine issue of material fact whether plaintiff's refusal to participate in allegedly illegal activity was a substantial reason for plaintiff's termination.

Therefore, applying the McDonnell Douglas framework to this record, I readily concur that we should affirm the judgment of the Court of Appeals and deny the employer's motion for summary judgment. Nonetheless, my conclusion begs the question of why the majority has chosen this case to depart from McDonnell Douglas. The suitability of the McDonnell Douglas framework for the analysis of these facts makes it unnecessary, in my view, to use this case as a vehicle for upending summary judgment practice in all of the employment discrimination and retaliation [**38] cases in Tennessee's courts.

Indeed, the McDonnell Douglas framework has served Tennessee courts long and well in employment law cases, even in cases decided since we began to depart from the federal summary judgment standard. Fewer than three years ago, we capably applied the McDonnell Douglas framework to analyze a THRA retaliation claim at the summary judgment stage in Allen, a decision that the majority opinion unduly maligns today. In that case, among other issues, we were able to conclude that the employer was entitled to summary judgment on the

plaintiff's retaliation claim. Id. at 823. Although the plaintiff made out a prima facie case of retaliation by showing that she had been reassigned shortly after she filed a sexual harassment complaint, the employer articulated a legitimate, non-discriminatory reason for the transfer: protecting the plaintiff from further sexual harassment. Id. We then concluded the plaintiff lacked any evidence that her employer's motive was pretextual. Id. We specifically concluded, "While a reasonable person could conclude that [the plaintiff] has been assigned to a position that is less desirable than her previous position, her reassignment is clearly [**39] superior to the alternative of remaining in a position in which she would be forced to interact closely with her harasser." Id.

Our decision in Allen validated the merit of the McDonnell Douglas framework as "'a sensible, orderly way to evaluate the evidence . . . as it bears on the critical question of discrimination'"--a function that the framework serves just as well at the summary judgment phase as it does at trial. See George v. Leavitt, 407 F.3d 405, 411, 366 U.S. App. D.C. 11 (D.C. Cir. 2005) (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983)) (other internal quotation omitted). Applying the McDonnell Douglas framework in Allen allowed us to evaluate, in logical sequence, (1) the circumstantial evidence of causation, which was limited to the close temporal proximity between plaintiff's sexual harassment complaint and the reassignment; (2) the employer's legitimate reason for reassigning the plaintiff; and (3) the absence of evidence to show that the employer's reason was pretextual, that is, not the real reason for the reassignment.

Our analysis in Allen withstands the criticisms that the majority levels against it here. Application of the McDonnell Douglas framework [**40] in Allen did not "skew[] our summary judgment analysis in favor of the employer," as the majority asserts. Instead, we concluded that, given the employer's unrebutted intent to protect the plaintiff from further harassment, there was no genuine issue of material fact as to whether the plaintiff was reassigned in retaliation against her protected activity. Similarly, in Allen we did not "separate[] the evidence supporting the employee's [*792] prima facie case . . . from our consideration of whether the employee presented evidence of pretext" when we concluded that the plaintiff had done nothing to contradict the evidence that her employer had reassigned her as protection against further sexual harassment. Even in making out her prima facie case, the plaintiff's only evidence of causation was an inference predicated on the temporal proximity between the filing of her sexual harassment complaint and her reassignment. Under those circumstances, no genuine issue remained for trial on the ultimate question of retaliation.

Given our longstanding reliance on the McDonnell Douglas framework, we should be more deliberate about the decision to abandon it. Before Allen, this Court and the Court of Appeals [**41] had issued a long line of published decisions applying McDonnell Douglas at the summary judgment stage. Indeed, the framework was first used by our Court of Appeals more than a quarter-century ago to affirm the dismissal of a THRA age discrimination claim. Bruce v. W. Auto Supply Co., 669 S.W.2d 95, 97 (Tenn. Ct. App. 1984). Since that time, the McDonnell Douglas framework has been used in at least twenty-five published decisions of this court or the Court of Appeals, including eighteen cases involving motions for summary judgment. Allen, 240 S.W.3d at 819 (summary judgment); Barnes v. Goodyear Tire & Rubber Co., 48 S.W.3d 698, 708 (Tenn. 2000); Phillips v. Interstate Hotels Corp. No. L07, 974 S.W.2d 680, 684 (Tenn. 1998) (summary judgment); Marpaka v. Hefner, 289 S.W.3d 308, 313 (Tenn. Ct. App. 2008) (summary judgment); Bundy v. First Tenn. Bank Nat'l Ass'n, 266 S.W.3d 410, 416-17 (Tenn. Ct. App. 2007) (summary judgment); Frye v. St. Thomas Health Servs., 227 S.W.3d 595, 610 (Tenn Ct. App. 2007) (summary judgment); Oates v. Chattanooga Publ'g Co., 205 S.W.3d 418, 425 (Tenn. Ct. App. 2006) (summary judgment); Frame v. Davidson Transit Org., 194 S.W.3d 429, 434-35 (Tenn. Ct. App. 2005) [**42] (summary judgment); Arnett v. Domino's Pizza I, L.L.C., 124 S.W.3d 529, 540 n.6 (Tenn. Ct. App. 2003); Miller v. City of Murfreesboro, 122 S.W.3d 766, 776 (Tenn. Ct. App. 2003) (summary judgment); Dennis v. White Way Cleaners, L.P., 119 S.W.3d 688, 694 (Tenn. Ct. App. 2003) (summary judgment); Fox v. Baptist Mem'l Hosp. Tipton, 148 S.W.3d 903, 906 (Tenn. Ct. App. 2002) (summary judgment); Davis v. Reliance Elec., 104 S.W.3d 57, 62-63 (Tenn. Ct. App. 2002); Wilson v. Rubin, 104 S.W.3d 39, 50-51 (Tenn. Ct. App. 2002) (summary judgment); Moore v. Nashville Elec. Power Bd., 72 S.W.3d 643, 651-52 (Tenn. Ct. App. 2001) (summary judgment); Perlberg v. Brencor Asset Mgmt., Inc., 63 S.W.3d 390, 394-95 (Tenn. Ct. App. 2001) (summary judgment); Versa v. Policy Studies, Inc., 45 S.W.3d 575, 580-81 (Tenn. Ct. App. 2000) (summary judgment); Spann v. Abraham, 36 S.W.3d 452, 465 (Tenn. Ct. App. 1999); Smith v. Bridgestone/Firestone, Inc., 2 S.W.3d 197, 200-01 (Tenn. Ct. App. 1999) (summary judgment); Frazier v. Heritage Fed. Bank for Sav., 955 S.W.2d 633, 636 (Tenn. Ct. App. 1997); Mangrum v. Wal-Mart Stores, Inc., 950 S.W.2d 33, 39 (Tenn. Ct. App. 1997) (summary judgment); Newsom v. Textron Aerostructures, 924 S.W.2d 87, 96 (Tenn. Ct. App. 1995) [**43] (summary judgment); Loeffler v. Kjellgren, 884 S.W.2d 463, 469 (Tenn. Ct. App. 1994); Brenner, 874 S.W.2d at

583 (summary judgment); Silpacharin v. Metro. Gov't, 797 S.W.2d 625, 629-30 (Tenn. Ct. App. 1990).

The experience of other jurisdictions confirms that the abandonment of McDonnell Douglas does not inevitably accompany a departure from the federal summary judgment standard. A recent scholarly article on summary judgment in Tennessee identified eight other states that, like us, [*793] have rejected the federal standard set forth in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (plurality opinion): Alaska, Connecticut, Florida, Indiana, Kentucky, New Mexico, Oklahoma, and Texas. [2] Judy M. Cornett, Trick or Treat? Summary Judgment in Tennessee After *Hannan v. Alltel Publishing Co*., 77 Tenn. L. Rev. 305, 344 (2010). At least two of these states have adopted a summary judgment regime that imposes even greater burdens on the moving party and/or lesser burdens on the non-moving party than does Tennessee. Id. at 344-45. All of these states, however, continue to apply the McDonnell Douglas framework at the summary judgment stage in employment cases. Mahan v. Arctic Catering, Inc., 133 P.3d 655, 660 (Alaska 2006); [**44] Ford v. Blue Cross & Blue Shield of Conn., Inc., 216 Conn. 40, 578 A.2d 1054, 1060-61 (Conn. 1990); Byrd v. BT Foods, Inc., 948 So. 2d 921, 927 (Fla. Dist. Ct. App. 2007); Purdy v. Wright Tree Serv., Inc., 835 N.E.2d 209, 213 (Ind. Ct. App. 2005); Bohl v. City of Cold Spring, S.W.3d , 2009 Ky. App. LEXIS 221, 2009 WL 3786633, at *3 (Ky. Ct. App. Nov. 13, 2009); Juneau v. Intel Corp., 2006 NMSC 2, 139 N.M. 12, 127 P.3d 548, 551 (N.M. 2005); Buckner v. Gen. Motors Corp., 1988 OK 73, 760 P.2d 803, 806-07 (Okla. 1988); Tex. Dep't of Human Servs. v. Hinds, 904 S.W.2d 629, 636 (Tex. 1995). Furthermore, the majority's decision places Tennessee among a small minority of jurisdictions, as we become only the fourth state to abandon wholesale the McDonnell Douglas framework in all employment discrimination and retaliation causes of action at the summary judgment stage. [3]

2 By amending its summary judgment rule in 1997 to add a no-evidence motion that allows the moving party to obtain summary judgment without presenting evidence, Texas "obviated, to some extent, the differences in summary judgment procedure" between the Texas and federal systems. Huckabee v. Time Warner Entm't Co., 19 S.W.3d 413, 421 (Tex. 2000) (discussing Tex. R. Civ. P. 166a(i)).

3 At summary judgment [**45] the McDonnell Douglas framework remains viable throughout the federal courts and is used in at least some aspect of employment law by every state except Missouri, Hill v. Ford Motor Co., 277 S.W.3d 659, 664-65 (Mo. 2009), Oregon, Lansford v. Georgetown Manor, Inc., 192 Ore. App. 261, 84 P.3d 1105, 1115 (Or. Ct. App. 2004), and Virginia, Jordan v. Clay's Rest Home, Inc., 253 Va. 185, 483 S.E.2d 203, 206-08 (Va. 1997).

Going forward, the majority's abandonment of the McDonnell Douglas framework is likely to engender uncertainty among both courts and counsel as to when defendants can obtain summary judgment in employment discrimination and retaliation cases filed in Tennessee courts. The majority maintains that, consistent with Hannan, the employer must set forth evidence affirmatively negating an essential element of the plaintiff's claim or show that the plaintiff cannot prove an essential element of the claim at trial. However, when the employer submitted evidence in this case of its legitimate, non-retaliatory reason for discharging the plaintiff, the majority dismissed this proof as insufficient because it failed to show that the non-retaliatory reason "was the exclusive reason for discharging Mr. Gossett" and because [**46] it does not show "an absence of a retaliatory motive." However, the majority provides little, if any, specific guidance as to how employers could otherwise shift the burden of production onto the plaintiff at the summary judgment phase. If proof of a legitimate explanation for the employee's termination (or other adverse employment action) can no longer affirmatively negate, or show that the plaintiff cannot prove, the causation element of the plaintiff's claim, then the majority has foreclosed perhaps the most common argument among defendants seeking summary judgment [*794] in employment discrimination and retaliation cases. See Ann C. McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 B.C. L. Rev. 203, 244-45 (1993) (explaining that a defendant "will not wait for the plaintiff to establish a prima facie case in response to the motion" for summary judgment but instead, "in the moving papers, . . . will attempt to articulate a legitimate, non-discriminatory reason for the employment decision"); see also Christopher R. Hedican et al., McDonnell Douglas: Alive and Well, 52 Drake L. Rev. 383, 424 (2004) (describing the instance [**47] when a plaintiff cannot make the prima facie showing as an "unusual case").

The majority's commentary on our prior decision in Allen only heightens this uncertainty. In citing Allen as a textbook example of the flaws of the McDonnell Douglas framework, and specifically criticizing it as "skewed . . . in favor of the employer," the majority states unequivocally that the case would have come out differently if it had been analyzed without reference to that framework. In so doing, the majority's opinion has gone beyond circumscribing defendants' ability to obtain summary judgment and has also sharply reduced the quan-

tum of proof that a plaintiff needs to survive summary judgment. In Allen, the only evidence of causation was an inference created by the temporal proximity between the filing of the sexual harassment complaint and the reassignment. A majority of the federal courts of appeals have affirmatively rejected the proposition that, where the employer has set forth a legitimate, non-discriminatory reason for its action, temporal proximity alone is sufficient evidence of pretext to survive summary judgment. See, e.g., Mariani-Colon v. Dep't of Homeland Security ex rel. Chertoff, 511 F.3d 216, 224 (1st Cir. 2007); [**48] Aryain v. Wal-Mart Stores Texas LP, 534 F.3d 473, 487 (5th Cir. 2008); Asmo v. Keane, Inc., 471 F.3d 588, 598 (6th Cir. 2006); Bourbon v. Kmart Corp., 223 F.3d 469, 473 (7th Cir. 2000); Green v. Franklin Nat'l Bank of Minneapolis, 459 F.3d 903, 916 (8th Cir. 2006); Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997); Annett v. Univ. of Kan., 371 F.3d 1233, 1241 (10th Cir. 2004); Wascura v. City of S. Miami, 257 F.3d 1238, 1244-45 (11th Cir. 2001). Here, the majority has not cited a single case from any jurisdiction finding that temporal proximity alone is sufficient to create a genuine issue of material fact for the purpose of denying an employer's summary judgment motion in a retaliatory discharge case.

By simultaneously eliminating the McDonnell Douglas framework and repudiating our analysis in Allen, the majority opens the door for an employee to survive summary judgment on the causation element through temporal proximity alone, even where the employer affirmatively shows from the record that it took an adverse employment action for a legitimate reason apart from discrimination or retaliation. In other words, an employer advancing a legitimate reason for its personnel action may [**49] now fail at the summary judgment stage even if the employee has no evidence of pretext. This sweeping change in our law will make it needlessly more difficult for defendants to obtain summary judgment in employment discrimination and retaliation cases, leaving chancery and circuit courts to bear the brunt of heavier trial calendars. [4]

4 We should also be cautious about the effects--both intended and unintended--of discarding the McDonnell Douglas framework. Three potential effects are worth mentioning here. First, the framework remains intact in summary judgment proceedings in Tennessee's federal courts. Harris v. Metro. Gov't, 594 F.3d 476, 484-85 (6th Cir. 2010); Clark v. Hoops, LP, 709 F. Supp. 2d 657, 2010 U.S. Dist. LEXIS 32422, 2010 WL 1417744, at *5-6 (W.D. Tenn. Apr. 1, 2010). Defendants will, therefore, continue to be able to obtain summary judgment in federal court on grounds that are foreclosed by the majority opinion. The likely upshot of the majority's opinion is different outcomes in employment discrimination and retaliation cases in Tennessee, depending on whether those cases are decided in state or federal court. This divergence marks an abrupt change in our jurisprudence, which, up to this point, [**50] has drawn on the corresponding federal law to interpret our own discrimination and retaliation statutes. See, e.g., Allen, 240 S.W.3d at 820; Parker v. Warren County Util. Dist., 2 S.W.3d 170, 176 (Tenn. 1999); Newsom, 924 S.W.2d at 96; Bruce, 669 S.W.2d at 97. This overlap is consistent with one stated purpose of the THRA: to "[p]rovide for execution within Tennessee of the policies embodied in the federal Civil Rights Acts of 1964, 1968, and 1972, the Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967, as amended." Tenn. Code Ann. § 4-21-101(a)(1) (2005).

Second, though not at issue in this case, the impact of the majority's analysis may extend farther than intended and raise issues pertinent to the trial of employment discrimination and retaliation cases. One example is the viability of an employer's motion for directed verdict at the conclusion of the proof, based on uncontradicted evidence that the employee was discharged for a legitimate, non-pretextual reason. The majority has determined that such a motion is inappropriate at the summary judgment phase, and the reasoning behind that decision may likewise undercut this kind of motion at trial. In [**51] other words, the elimination of McDonnell Douglas at the summary judgment stage may ultimately impact the viability of the framework at trial. We need not decide that issue today.

Third and finally, Tennessee is firmly a "right-to-work" state that recognizes the employment-at-will doctrine. See Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 899 (Tenn. 1992) ("this Court has no intention of creating unwarranted judicial exceptions to the general rule of employment at will"). At least with regard to retaliatory discharge claims like the ones involved here, this Court has cautioned that such claims are "very exceptional tort action[s]," Chism, 762 S.W.2d at 556, that should be "narrowly applied and not be permitted to consume the general rule," Stein v. Davidson Hotel Co., 945 S.W.2d 714, 717 n.3 (Tenn. 1997). The majority's decision today does not undermine the principle that retaliatory discharge claims are narrow exceptions to the employment-at-will doctrine.

[*795] In arguing for the preservation of the McDonnell Douglas framework at the summary judgment phase, I do not purport to maintain that our lower courts have always applied the framework perfectly. Indeed, there are surely instances of [**52] the "rigid, mechanized, or ritualistic" application of the framework that the United States Supreme Court has warned against. Aikens, 460 U.S. at 715 (internal quotation omitted). The McDonnell Douglas framework was never intended to preclude courts from considering evidence in the pretext analysis that was also relevant to establishing the plaintiff's prima facie case. See, e.g., Longs v. Ford Motor Co., 647 F. Supp. 2d 919, 937 (W.D. Tenn. 2009); Smith, 2 S.W.3d at 200-01. Similarly, because of the fact-intensive nature of employment disputes, they are typically less amenable to summary judgment than other types of cases. See Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555, 564 (6th Cir. 2004). But see Elizabeth M. Schneider, The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases, 158 U. Pa. L. Rev. 517, 549-50 (2010) (presenting empirical evidence that federal district courts grant summary judgment in employment discrimination cases at a higher rate than any other type of civil case). Nothing in the McDonnell Douglas framework permits courts to weigh evidence when there is a genuine issue of material fact [**53] as to whether the employer acted out of a discriminatory or retaliatory motive.

Potential flaws in the way that courts apply the McDonnell Douglas framework [*796] provide no justification, however, for dispensing with that framework altogether. The United States Supreme Court has described the framework as a "procedural device," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 521, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), that is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination," Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The framework provides an orderly structure for managing the complexities of employment discrimination and retaliation cases, and trial courts have become comfortable with this framework after many years of usage. See Brown v. Packaging Corp. of Am., 338 F.3d 586, 597 (6th Cir. 2008) (Clay, J., concurring) (quoting Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 200 (1st Cir. 1987)). Furthermore, summary judgment itself remains "a helpful device, in appropriate cases, for the just, speedy, and inexpensive resolution of litigation," Byrd v. Hall, 847 S.W.2d 208, 216 (Tenn. 1993), and "a screening device used to identify those [**54] cases that are not trial-worthy," Cornett, 77 Tenn. L. Rev. at 337. In this case we could have re-educated our lower courts on the proper application of the framework in the summary judgment context. Instead, the majority has simply written McDonnell Douglas out of our summary judgment law.

In conclusion, I believe the procedures that we set forth in Hannan are consistent with the McDonnell Douglas burden-shifting framework for resolving employment discrimination and retaliation cases at the summary judgment phase. The record in this case contains adequate evidence of pretext to affirm the judgment of the Court of Appeals. Instead of adhering to the framework that has guided Tennessee decisions in employment discrimination and retaliation law for over a quarter-century, however, the majority concludes that our law should move in a new direction. I do not believe that this change has been adequately justified or explained, and I believe that it will engender considerable uncertainty in this area of the law going forward. Therefore, I respectfully dissent.

I am authorized to state that Justice Koch concurs in this opinion.

CORNELIA A. CLARK, JUSTICE

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