



Tennessee Supreme Court Modifies Summary Judgment Standard

By Matthew C. Lonergan

In a 3-2 decision issued by the Tennessee Supreme Court on September 20, 2010, the Court changed the standard under which employment discrimination claims are reviewed on summary judgment under Tennessee state law. In *Gossett v. Tractor Supply Company*, 2010 West Law 3633459, (TN), Gossett filed a lawsuit alleging that he had been terminated in retaliation for refusing to participate in alleged illegal activity. Gossett worked as an Inventory Control Manager, and claimed that in preparing the inventory reserve analysis he was instructed by the CFO to remove certain products from the inventory reserve. Gossett claimed this action would artificially increase the quarterly earnings statements in violation of the Securities Exchange Act. Gossett refused to find “creative ways” to remove the products that needed additional reserve, but instead submitted an accurate inventory reserve to his supervisor. Shortly thereafter, Gossett was terminated as part of a department reduction.

Gossett brought a lawsuit for common law retaliatory discharge alleging that Tractor Supply discharged him for refusing to participate in the alleged illegal activity as suggested to him by the CFO. The trial court granted Tractor Supply’s Motion for Summary Judgment on the basis that Collins had not reported the alleged illegal activity which was deemed an essential element of a retaliatory discharge case. The Court of Appeals for Tennessee reversed the grant of summary judgment and application to appeal was granted by the Tennessee Supreme Court.

In analyzing the standard for granting summary judgment, Tractor Supply submitted that the framework announced by the 1973 United Supreme Court decision *McDonnell Douglas Corp v. Green* provided the proper analysis. In *McDonnell Douglas*, if the employee proves a *prima facie* case of discrimination or retaliation, the burden of production shifts to the employer to articulate a legitimate non-discriminatory or non-retaliatory reason for discharge. If the employer satisfies this burden, the burden shifts back to the employee to prove that the legitimate reason offered by the employer for the discharge was not the true reason but a pretext for discrimination. The retaliatory discharge standard previously applied required that: the employee show there was an employment-at-will relationship; he was discharged; the reason for the discharge was the employee’s attempt to exercise a statutory or constitutional right or for some other reason that violated clear public policy; and a substantial factor in the decision to discharge was the employee’s exercise of the protected right or compliance with clear public policy.

Confirming that summary judgment operates to dispose of a case only when no genuine issue of material fact exists, the Court took issue with the *McDonnell Douglas* framework that required the employer only to articulate a legitimate alternative to the reason for discharge as alleged by the employee, which is not a “mutually exclusive reason” and does not preclude the possibility that discrimination or retaliation played a role in the discharge. The Court stated that the employer’s evidence of a legitimate reason for discharge under the *McDonnell Douglas* framework does not necessarily disprove the factual allegations of the employee’s discrimination charge. Specifically, Tractor Supply’s explanation that Gossett was terminated as a part of a reduction in workforce, did not necessarily preclude or establish that it was the exclusive reason for his discharge as the evidence indicated there may have been a retaliatory motive. For example, there was evidence indicating that the person who inherited Gossett’s duties worked in a very different position, raising a genuine issue as to whether there was actual redundancy between the two positions as claimed. There was also a statement made shortly after Gossett’s discharge that he was let go for “unacceptable performance” and not because of redundancy in management. There was also a newspaper advertisement published just before Gossett’s discharge seeking a financial analyst

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position in his department thereby raising questions about the need to reduce staff. Finally, Gossett's predecessor had been demoted instead of discharged thereby raising a material factual issue of why he was discharged instead of demoted.

In reviewing the framework for Tennessee summary judgment, the Court concluded that summary judgment is warranted only if the facts and inferences from those facts permit a reasonable person to reach only one conclusion. The Court opined that the *McDonnell Douglas* framework did not reach such a level thereby allowing the possibility that there may be retaliatory and discriminatory motives still at play outside of the alleged reduction in force reason. In this case, the material facts did not disprove Gossett's factual allegations of discrimination as looking at whether the offered reason is pre-textual fails to take into consideration all of the facts alleged by the employee in establishing his *prima facie* case. While there may have been some need to reduce the workforce, the additional allegations regarding Gossett's supervisor provided a basis to determine whether retaliation, in fact, motivated the decision for the reduction. The Court stated that its holding did 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.

As to the second element on review, the Court concluded that common law retaliatory discharge exists when an employee is discharged either for refusing to remain silent about an illegal activity or refusing to participate in illegal activity. The Court ruled that when an employee alleges that he has been

discharged for refusing to participate in illegal activity, that he is not required to "report the illegality" to show that the employer violated the clear public policy. On the other hand, if the employee refuses to remain silent, the employee does not have cause of action unless he shows that his reporting of the illegal activity furthered a clear public interest.

A sharply divided dissent disagreed with the majority opinion and its abandonment of the *McDonnell Douglas* framework, stating that if a legitimate explanation for the employee's termination can no longer affirmatively negate the plaintiff's *prima facie* case, then the Court has foreclosed the most common argument among defendants seeking summary judgment in employment discrimination and retaliation cases. In essence, the majority's opinion seems to require the employer to effectively rebut all potential allegations of discrimination even in the context that there may have only been one true reason for the alleged adverse action. The minority also disagreed with the majority's assessment that the existing framework had skewed summary judgment unnecessarily in favor of employers and indicated the new decision is likely to create uncertainty among the courts and counsel as to when employers can obtain summary judgment in these cases.

Critics of the decision are concerned that this will once again increase the filings of employee discrimination and retaliation claims and make it virtually impossible for employers to successfully seek summary judgment even when they have established legitimate non-discriminatory reasons for their actions.

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