IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE - EASTERN DIVISION

Jackie J. Phinnessee
Plaintiff,

vs. NO. 1:09-cv-01084-JDB-egb

Young Touchstone Company,
Defendant.

Defendant's Supplemental Brief Addressing the
Impact of *Gossett v. Tractor Supply Co., Inc.* and *Kinsler v. Berkline, LLC* on
Young Touchstone's pending Motion for Summary Judgment

Young Touchstone Company hereby submits its Supplemental Brief discussing the impact of *Gossett v. Tractor Supply Co., Inc.,*[1] and *Kinsler v. Berkline, LLC*[2] — two Tennessee Supreme Court decisions that clarify state summary judgment procedures for Tennessee common law retaliatory discharge claims. Neither *Gossett* nor *Kinsler* diminish Young Touchstone's ability to obtain summary judgment in this case for three reasons:

1. *Gossett* and *Kinsler* do not change Tennessee's substantive law governing common law retaliatory discharge, only the procedure applying to summary judgment motions, which in federal diversity cases is governed by federal precedent and Rule 56 of the Federal Rules of Civil Procedure;

2. Young Touchstone's original Motion for Summary does not depend on applying the *McDonnell Douglas*[3] burden-shifting framework; and

3. Even if the Court were to apply Tennessee's procedural standard for summary judgment, this Court should grant summary judgment to Young Touchstone because it has affirmatively negated an essential element of Plaintiff's claim for retaliatory discharge.

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[1] *Gossett v. Tractor Supply Co., Inc.,* No. M200702530SCR11CV, 2010 WL 3633459 (Tenn. Sept. 20, 2010).

[2] *Kinsler v. Berkline, LLC,* No. E200702602SCR11CV, 2010 WL 3633456 (Tenn. Sept. 20, 2010).

[3] The "*McDonnell Douglas* burden-shifting framework" refers to the standard that the United States Supreme Court developed in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), to allocate burdens and the presentation of proof in a Title VII discrimination case. The Tennessee Supreme Court adopted a similar framework in *Anderson v. Standard Register Co.*, 857 S.W.2d 555 (Tenn. 1993), but Tennessee courts have continued generally referring to the standard under the *McDonnell Douglas* name.

This Supplemental Brief will first address the apparent conflict between Tennessee summary judgment procedure and the *McDonnell Douglas* burden-shifting framework, including an explanation of how *Gossett* and *Kinsler* resolved this conflict. The second part of this Supplemental Brief will address why *Gossett* and *Kinsler* do not affect this case's outcome and why Young Touchstone should be entitled to summary judgment.

I. *Gossett* and *Kinsler* resolved a conflict between Tennessee summary judgment procedure and the *McDonnell Douglas* burden-shifting framework, which Tennessee courts often applied to common law retaliatory discharge claims.

In *Gossett* and *Kinsler*, the Tennessee Supreme Court identified a potential conflict that arises when state courts apply the *McDonnell Douglas* burden-shifting analysis to decide a motion for summary judgment in a retaliatory discharge case.[4] Specifically, the *Gossett* Court asserted that it was possible for an employer to satisfy its burden under *McDonnell Douglas* — thereby obtaining summary judgment — without ever satisfying Tennessee's procedural summary judgment requirements.[5] Conversely, there is no inconsistency with applying *McDonnell Douglas* in federal court so long as the case does not involve a "mixed motive."[6] This partly results because of the difference between the law interpreting Rule 56 of the Tennessee Rules of Civil Procedure and the federal law interpreting the corresponding Federal Rule.[7] Accordingly, *Gossett* and *Kinsler* found that the *McDonnell Douglas* should not apply to summary judgment motions in state court.[8]

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[4] *See Gossett*, 2010 WL 3633459 at *4 ("An employer therefore may meet its burden of production pursuant to *McDonnell Douglas* without satisfying . . . Tennessee Rule of Civil Procedure 56.04 for a party moving for summary judgment."); *Kinsler*, 2010 WL 3633456 at *4.

[5] *See Gossett*, 2010 WL 3633459 at *4.

[6] *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008)(refusing to extend application of the *McDonnell Douglas* framework to summary judgment motions beyond "single-motive claims" to include mixed motive claims.)

[7] *See Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1, 5–6 (Tenn. 2008).

[8] *See Gossett*, 2010 WL 3633459 at *4; *Kinsler*, 2010 WL 3633456 at *4.

A. To obtain summary judgment in Tennessee state court, a moving party must satisfy a higher standard than in federal district courts.

In Tennessee's seminal case on summary judgment, *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993), the Tennessee Supreme Court diverged from the federal court summary judgment standard adopted in *Celotex Corporation v. Catrett*.[9] Rather than following *Celotex's* plurality, it was Justice Brennan's dissent that influenced the *Byrd* Court,[10] which Tennessee state courts have naturally followed and further refined.[11] Federal courts, on the other hand, have nearly all followed *Celotex's* plurality's reasoning.[12]

There is a significant difference between the two summary judgment standards.[13] Both standards involve burden-shifting, although what is required to shift the burdens differs substantially under each.[14] For example, a moving party in federal court may shift the burden of production to the nonmovant by merely *asserting* that "there is an absence of evidence to support the nonmoving party's case."[15] Unless the nonmovant can produce sufficient evidence to show that a material fact is in dispute, the moving party will prevail.[16] Tennessee state courts, on the other hand, require more.[17] To prevail under the

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[9] *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986)(plurality opinion); *see Hannan,* 270 S.W.2d at 5–6.

[10] *See Hannan*, 270 S.W.2d at 6 (citing *Celotex*, 477 U.S. at 331 (Brennan, J., dissenting)).

[11] *See, e.g., Hannan*, 270 S.W.2d at 6; *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998).

[12] *See, e.g., Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 644, 671 (10th Cir. 1998); *Russ v. Int'l Paper Co.*, 943 F.2d 589, 592 (5th Cir. 1991); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989).

[13] *See also Hannan,* 270 S.W.3d at 5–6.

[14] *Compare Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1478 (6th Cir. 1989) *with Hannan,* 270 S.W.3d at 5.

[15] *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986)(plurality opinion).

[16] *See Street,* 886 F.2d at 1478.

[17] *See Hannan,* 270 S.W.3d at 6

state summary judgment standard, the movant must "either conclusively establish an affirmative defense or 'affirmatively negate an essential element of the nonmoving party's claim' to shift the burden of production to the nonmoving party."[18] This difference explains to some extent why *McDonnell Douglas* clashes with Tennessee's summary judgment standard while fitting neatly with the federal standard.

Like both the state and federal summary judgment standards, the *McDonnell Douglas* analysis involves burden-shifting.[19] The *McDonnell Douglas* framework functions by allowing a plaintiff to establish a prima facie case of discrimination, which shifts the burden to the employer to articulate a legitimate reason for his actions.[20] Much like the federal summary judgment standard — where the movant shifts the burden by asserting that the nonmovant has insufficient evidence to prove an essential element of his claim — an employer may shift the burden of production to the employee under the *McDonnell Douglas* framework in a similar way.[21] By producing evidence showing a legitimate reason for its actions, an employer shifts the burden back to the employee who must then produce evidence showing that the employer's stated reason was merely a pretext for discrimination — in other words, evidence tending to show that the employer's stated reason was not its true reason, but a ruse to hide its discriminatory motives.[22]

In this way, the *McDonnell Douglas* framework is very similar to how the Sixth

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[18] *See id.* (quoting *Byrd v. Hall*, 847 S.W.2d 208, 215 n.5 (Tenn. 1993)).

[19] *McDonnell Douglas*, 411 U.S. 792; *see also Texas Dep't of Comm. Affairs v. Burdine,* 450 U.S. 248 (1981)(clarifying and further explaining the *McDonnell Douglas* framework).

[20] *See White v. Baxter Healthcare Corp.,* 533 F.3d at 391.

[21] *See id.*

[22] *See Burdine*, 450 U.S. at 256 ("She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.")

Circuit has articulated the federal summary judgment standard.[23] In *Street v. J.C. Bradford & Co.*, the Sixth Circuit described federal summary judgment as a "put up or shut up" standard, which allows the moving party to challenge the nonmovant to "put up or shut up" on an essential element of its claim.[24] The movant's challenge shifts the burden of production to the nonmovant, who must "put up" evidence showing that a material fact is disputed.[25] Similarly, *McDonnell Douglas* allows an employer to "put up" his legitimate reason for discharging the employee, which then requires a plaintiff to "demonstrate by a preponderance of the evidence that the legitimate reason offered by the defendant was not its true reason, but instead was a pretext designed to mask retaliation."[26] This similarity between *McDonnell Douglas* and the federal summary judgment standard allows federal courts to apply the two concepts in a complimentary fashion.

Conversely, Tennessee courts outright reject the "put up or shut up" summary judgment standard.[27] In *McCarley v. West Quality Food Services,* 960 S.W.2d 585 (Tenn. 1998), for example, the Tennessee Supreme Court reversed summary judgment in favor of a movant who "supported its motion with only the allegation that the nonmoving party could not prove an essential element of its case at trial."[28] Although the movant had questioned an essential element of the plaintiff's claim, *McCarley* found that the movant failed to fully negate the element.[29] Further underscoring its differences with the federal standard,

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[23] *See Street,* 886 F.2d at 1478.

[24] *Street*, 886 F.2d at 1478.

[25] *See id.*

[26] *Imwalle v. Reliance Med. Products, Inc.*, 515 F.3d 531, 544 (6th Cir. 2008).

[27] *See Hannan,* 270 S.W.3d at 6 ("This Court did not adopt a 'put up or shut up' approach to burden-shifting in *Byrd* or in subsequent cases.").

[28] *Hannan,* 270 S.W.3d at 7 (citing *McCarley v. W. Quality Food Serv.,* 960 S.W.2d 585 (Tenn. 1998)).

[29] *McCarley*, 960 S.W.2d at 588.

McCarley declared that a "conclusory assertion that the non-moving party has no evidence is clearly insufficient."[30] In light of this rejection of the federal summary judgment standard, it's understandable that *Gossett* and *Kinsler* sought to reject *McDonnell Douglas* insofar as it would alter Tennessee's summary judgment motion analysis.

B. *Gossett* and *Kinsler* held that applying *McDonnell Douglas* burden-shifting when considering a summary judgment motion placed a burden on the plaintiff in contravention of Tennessee's summary judgment jurisprudence.

Neither of *Gossett's* reasons for rejecting *McDonnell Douglas* should apply here because *Gossett* based both of its reasons on the alleged conflict between *McDonnell Douglas* and Tennessee summary judgment jurisprudence. Interestingly, *Gossett* seems to unfairly characterize *McDonnell Douglas* in order to enhance its reasoning for rejecting it. For example, *Gossett's* first reason — that it's possible for an employer to satisfy its burden under *McDonnell Douglas* without satisfying Tennessee's summary judgment standards — relies on an example from a mixed motive case to reject *McDonnell Douglas*.[31] The problem with that is, as the Sixth Circuit recognized in *White v. Baxter Healthcare Corporation,* 533 F.3d 381 (6th Cir. 2008), courts should not apply *McDonnell Douglas* to mixed motive claims. Likewise, *Gossett's* second reason — that *McDonnell Douglas* could cause a trial court to disregard material facts that were not part of whatever stage the trial court was analyzing — also depends upon strictly applying *McDonnell Douglas*, contravening the very spirit of *McDonnell Douglas,* which was devised to be flexible.[32] Regardless, neither *Gossett's* characterizations nor its reasons for rejecting *McDonnell Douglas* apply here.

In considering the first of these reasons, the *Gossett* Court concluded that applying the *McDonnell Douglas* framework at summary judgment leaves the possibility open that

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[30] *Id.*

[31] *See Gossett,* 2010 WL 3633459 at *4; *Hannan,* 270 S.W.3d at 7.

[32] *See Gossett*, 2010 WL 3633459 at *5.

discrimination played a role in the employment decision.[33] *Gossett* stated that *McDonnell Douglas* required an employer to offer only a "legitimate alternative" to the employee's allegation, opining that alternative reasons do exclude potential discriminatory motives.[34] As an example, the *Gossett* Court cited *Desert Palace v. Costa*, which recognized that "an adverse employment action may be the result of both a legitimate reason and a discriminatory motive" — in other words, a mixed motive case.[35] But *Gossett* either failed to recognize or failed to state its recognition that not even federal courts, including those in the Sixth Circuit, apply *McDonnell Douglas* to mixed motive claims.[36]

The *Gossett* Court also reasoned that "evidence showing a legitimate reason for discharge can satisfy the requirements of the *McDonnell Douglas* framework without tending to disprove any actual allegation by the employee."[37] Here, *Gossett* was again focused on the inconsistency between the state summary judgment standard and *McDonnell Douglas*. To illustrate its point, *Gossett* explained that the employer's statement in that case that it discharged the plaintiff to reduce its workforce failed to show that "was the exclusive reason for discharging" the plaintiff.[38] Thus, the Court concluded that the employer's statements did not "disprove any of [the plaintiff's] factual allegations" — in other words, it failed to negate an element as the summary judgment standard required.[39]

Gossett was also concerned that the "compartmentalized" framework of *McDonnell*

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[33] *See id.* at *4.

[34] *See id.*

[35] *See id.* at *4 (citing *Desert Palace v. Costa*, 539 U.S. 90, 94–95 (2003)).

[36] *See White*, 533 F.3d at 400 (refusing to extend application of the *McDonnell Douglas* framework to mixed motive claims.)

[37] *See Gossett*, 2010 WL 3633459 at *4.

[38] *See id.*

[39] *Id.*

Douglas could obfuscate the trial court's analysis, leading it to improperly resolve factual disputes prematurely.[40] *Gossett* pointed out that summary judgment is ultimately concerned with uncovering issues of fact, while *McDonnell Douglas* focuses instead on discovering discrimination.[41] The Court reasoned that looking only at the prima facie case or evidence of pretext — to the exclusion of other evidence — contravenes state law requiring courts to construe evidence in a light most favorable to the nonmovant.[42]

But the *Gossett* Court's description of such a rigid *McDonnell Douglas* framework goes against the very nature of *McDonnell Douglas* itself. To be sure, "[T]he *McDonnell Douglas* test is not to be applied mechanically."[43] In *Grosjean v. First Energy Corporation,* the Sixth Circuit described the framework's flexibility and the relationship between the steps: "In some cases, plaintiff's evidence establishing the prima facie case can also be sufficient to meet one or more of the elements necessary to rebut the defendant's proffered non-discriminatory reasons."[44] This flexible formulation of *McDonnell Douglas* differs substantially from the one described in *Gossett*, which seems to have unfairly characterized *McDonnell Douglas* in such a way that is not only unpalatable, but is perhaps unrecognizable to federal courts.[45] For that and many other reasons, *Gossett* should not influence the decision in this case.

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[40] *See id.* at *5.

[41] *See id.*

[42] *See id.*

[43] *Harmon v. Earthgrains Baking Cos., Inc.*, 2009 WL 332705 at *6 (6th Cir. Feb. 11, 2009); *see also Blackwell v. Sun Elec. Corp.,* 696 F.2d 1176, 1179–80 (6th Cir. 1983)(rejecting a rigid application of *McDonnell Douglas* and finding that *McDonnell Douglas* elements are "guidelines" and not "exclusive criteria").

[44] *Grossjean v. First Energy Corp.,* 349 F.3d 332, 335 (6th Cir. 2003)(citing *Reeves v. Sanderson Plumbing Prods.,* 530 U.S. 133, 149 (2000)).

[45] *See Gossett*, 2010 WL 3633459 at *5 ("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.")

II. *Gossett* and *Kinsler* should not alter this case's outcome because they are procedural decisions, not substantive alterations of Tennessee law; accordingly, Young Touchstone should be entitled to summary judgment.

The Tennessee Supreme Court's decisions in *Gossett* and *Kinsler* should not affect the outcome of this case because of the *Erie* doctrine and because Young Touchstone has already supplied enough evidence to negate an essential element of the Plaintiff's claim. Under the *Erie* doctrine, only state law decisions that change the substantive law and alter the outcome of litigation apply to federal courts sitting in diversity jurisdiction; neither *Gossett* nor *Kinsler* affect Tennessee's substantive law governing common law retaliatory discharge.[46] Furthermore, Young Touchstone's motion for summary judgment does not depend on the Court applying the *McDonnell Douglas* analysis. Nevertheless, even if the Court were to apply Tennessee procedural law in considering its motion, Young Touchstone has negated an essential element of the Plaintiff's claim.

A. *Gossett* and *Kinsler* do not change Tennessee's substantive law governing common law retaliatory discharge, only the procedure applying to state summary judgment motions, which in federal diversity cases is governed by federal precedent interpreting Rule 56 of the Federal Rules of Civil Procedure.

Federal law governs procedural issues such as the availability of summary judgment in a federal court sitting in diversity.[47] "Under the *Erie* doctrine, federal courts sitting in diversity apply the substantive law of the forum state and federal procedural law."[48] Because *Gossett* and *Kinsler* affect only Tennessee's procedures concerning summary judgment motions and not the substantive law of retaliatory discharge, the *Erie* doctrine and other Sixth Circuit precedent show that *Gossett* and *Kinsler* do not apply here.

The *Erie* doctrine commonly refers to the test that the Supreme Court devised in

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[46] *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Gasperini v. Ctr. for Humanities, Inc.,* 518 U.S. 415, 427 (1996).

[47] *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 374 (6th Cir. 2009)(citing *Erie*, 304 U.S. 64).

[48] *See id.* (citing *Erie*, 304 U.S. 64; *Gasperini,* 518 U.S. 415).

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), where the Court set out to define when federal courts were to apply state rather than federal law. The "twin aims" of the *Erie* Court were to discourage forum shopping and to avoid inequitable administration of the laws.[49] Although the Court held that federal courts were to follow federal procedural law and state substantive law when sitting in diversity jurisdiction, even that test proved tricky because "[t]he line between 'substance' and 'procedure' shifts as the legal context changes."[50]

The *Erie* doctrine's most recent permutation occurred in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), where the Court rephrased the inquiry as "whether federal courts can give effect to the substantive thrust [of the state law] without untoward alteration of the federal scheme for the trial and decision of civil cases."[51] In addition to considering *Erie's* "twin aims," the *Gasperini* Court determined that courts must also consider whether the law in question is closely related to the state's substantive policy.[52] Moreover, even if the law is outcome determinative and enacted for substantive reasons, the court must evaluate whether the federal interests still outweigh the state interests.[53]

Although the Supreme Court has never analyzed the *McDonnell Douglas* burden-shifting framework under the *Erie* doctrine, the Court has indicated that it views the framework as procedural.[54] For instance, in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 521 (1993), the Court indicated that "the *McDonnell Douglas* presumption is a procedural

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[49] *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

[50] *See id.* (citing *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945)).

[51] *Gasperini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 427 (1996).

[52] *See id.* at 428–31.

[53] *See id.* at 437.

[54] *See St. Mary's Honor Ctr. V. Hicks*, 509 U.S. 502, 521 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000).

device, designed only to establish an order of proof and production."[55] Likewise, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Court again spoke of *McDonnell Douglas* as procedural tool that "established an allocation of the burden of production and an order for the presentation of proof . . . ."[56] But while the Supreme Court has not analyzed *McDonnell Douglas* under *Erie*, the Sixth Circuit has undertaken similar analyses that are important to consider here.

For example, several appellants have unsuccessfully argued in the Sixth Circuit that state law summary judgment procedures should have controlled their case because the application of a particular summary judgment standard may be outcome determinative.[57] In *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453 (6th Cir. 1986), for example, the plaintiff argued on appeal that "Sears would not have qualified for summary judgment under Michigan law and that the outcome of a diversity case should not be different in a federal court than it would have been in the state whose substantive law controls."[58] There, the Sixth Circuit properly determined that federal procedure governs cases in federal court:

> This argument fails to recognize the difference between procedural rules and substantive law. The Federal Rules of Civil Procedure are the rules of practice which apply to civil actions in the federal courts . . . . Summary judgment is a procedural device for deciding a case without the necessity of a full-blown trial. When there is a motion for summary judgment in a diversity case, the provisions of [Federal] Rule 56 control its determination. The fact that the Michigan procedure for summary judgment has different requirements from [Federal] Rule 56 is immaterial. The requirements of

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[55] *See St. Mary's Honor Ctr.*, 509 U.S. at 521.

[56] *Reeves*, 530 U.S. at 142.

[57] *See, e.g., Reid v. Sears, Roebuck and Co.*, 790 F.2d 453 (6th Cir. 1986)(applying federal summary judgment procedures to decide state law discrimination claim despite plaintiff's argument that result would be different under state summary judgment procedures).

[58] *See id.* at 459.

[Federal] Rule 56 control, and they were met by Sears.[59]

The Sixth Circuit has also made similar statements upholding federal district courts that have properly applied Federal Rule of Civil Procedure 56 in diversity matters.[60] For instance, in *Biegas v. Quickway Carriers, Inc.,* 573 F.3d 365 (6th Cir. 2009), the Sixth Circuit stated that "the availability of summary judgment in diversity actions is governed by the federal standard, embodied in Fed. R. Civ. P. 56, rather than by state law."[61] There, the court relied on Wright, Miller, and Kane's Federal Practice and Procedure, which states that "in diversity-of-citizenship actions questions relating to the availability of summary judgment, such as whether there is a disputed issue of fact that is sufficient to defeat the motion, are procedural and therefore governed by Rule 56, rather than by state law."[62]

It's crucial to the *Erie* analysis to recognize that the *Gossett* Court focused its opinion solely on this last point: "whether there is a disputed issue of fact that is sufficient to defeat the motion."[63] *Gossett* was specifically concerned with whether a trial court would overlook a genuine issue of material fact by applying *McDonnell Douglas* to a summary judgment motion.[64] *Gossett* surmised that an employer could satisfy its burden under *McDonnell Douglas*, while never meeting Tennessee's standard for summary judgment.[65] In other words, *Gossett* rooted its decision in the procedural policy of the state — i.e. whether an employer has sufficiently satisfied his burden under Tennessee's summary

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[59] *Id.*

[60] *See Kahl v. The Mueller Co., a Tyco Int'l Ltd. Co.*, 173.3d 855 (6th Cir. 1999); *Biegas*, 573 F.3d at 374.

[61] *See Biegas,* 573 F.3d at 374.

[62] 10A Charles Alan Wright, et al., Federal Practice and Procedure § 2712 (3d ed. 1998).

[63] *Id.*; *see Gossett*, 2010 WL 3633459 at *4–5.

[64] *Gossett*, 2010 WL 3633459 at *4–5.

[65] *See id.*

judgment jurisprudence — as opposed to substantive policy.[66] Indeed, even *Gossett's* holding underscores its procedural roots: "Based on the foregoing reasons, we hold that the *McDonnell Douglas* framework is inapplicable at the summary judgment stage because it is incompatible with Tennessee summary judgment jurisprudence."[67] In light of *Gasperini* — which teaches that courts must evaluate whether a law is rooted in the state's substantive policy — *Gossett's* reasoning strongly indicates that this Court should apply federal procedure since *Gossett* is rooted firmly in procedural as opposed to substantive concerns.[68]

Although it could be argued that *McDonnell Douglas* is at times substantive as Judge Posner found in *Gacek v. American Airlines, Inc.*, 614 F.3d 298, 302–03 (7th Cir. 2010), this argument should not apply because of the fundamental differences between Tennessee and Illinois law. As opposed to *Gossett*, which rooted its decision to reject *McDonnell Douglas* in procedure, the Illinois Supreme Court rejected *McDonnell Douglas* for purely substantive reasons.[69] The Illinois Supreme Court in *Clemons v. Mechanical Devices Company,* 704 N.E.2d 403 (Ill. 1998), rejected *McDonnell Douglas* because it desired to not "expand the tort of retaliatory discharge by reducing plaintiff's burden of proving the elements of the tort."[70] As Judge Posner correctly observed in *Gacek*, "*Clemons* makes clear that the rule adopted in that case (rejecting *McDonnell Douglas*) is grounded in substantive rather than procedural principles — in a desire as we said to assimilate

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[66] *Compare id.* at *6 (holding that *McDonnell Douglas* is incompatible with Tennessee's summary judgment principles) *with Gasperini*, 518 U.S. at 428–31 (reasoning that courts must consider whether the state law in question is closely related to the state's substantive policy as opposed to merely procedural concerns).

[67] *See id.* at *6.

[68] *See Gasperini*, 518 U.S. at 428–31.

[69] *See Gacek v. American Airlines, Inc.,* 614 F.3d 298, 302–03 (7th Cir. 2010) (citing *Clemons v. Mech. Devices Co.,* 704 N.E.2d 403, 407–08 (Ill. 1998)).

[70] *See Clemons,* 704 N.E.2d at 408.

retaliatory discharge to other torts."[71]

Likewise, Virginia rejected *McDonnell Douglas* for substantive reasons in *Jordan v. Clay's Rest Home, Inc.*, 483 S.E.2d 203, 207 (Va. 1997). Again, in contrast to the procedural concerns that motivated *Gossett*, Virginia's Supreme Court rooted its decision securely in the substantive law of the state, reasoning that *McDonnell Douglas* did not properly focus on the employment-at-will doctrine:

> Given the Commonwealth's strong commitment to the employment-at-will doctrine, and because we conclude that Virginia's procedural and evidentiary framework for establishing a prima facie case is entirely appropriate for trial of wrongful discharge cases, we reject plaintiff's invitation to adopt the *McDonnell Douglas* indirect, burden shifting idea. . . . There was no focus [in *McDonnell Douglas*], as here, on the employment-at-will doctrine. Indeed, in none of the Supreme Court cases is there even a passing reference to the doctrine, except in *Burdine* where there is a mention of "traditional management prerogatives.[72]

Thus, like *Clemons,* which Judge Posner cites in *Gacek*, *Jordan* rejects *McDonnell Douglas* for substantive reasons — i.e. the Commonwealth's "strong commitment to the employment-at-will doctrine."[73]

But *Clemons* and *Jordan* also share another critical factor that differs from *Gossett* and is fundamental to the *Erie* analysis of whether *Gossett* is substantive or procedural. Both *Clemons* and *Jordan* outright reject *McDonnell Douglas* because it conflicts with state substantive law; *Gossett*, on the other hand, actually retains *McDonnell Douglas* once litigation proceeds past the summary judgment stage of litigation.[74] Indeed, the *Gossett* majority addresses the separate opinion's concern that *Gossett* will "undercut an employer's

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[71] *See Gacek*, 614 F.3d at 300.

[72] *Jordan v. Clay's Rest Home, Inc.,* 483 S.E.2d 203, 207 (1997).

[73] *See id.*

[74] *See Gossett,* 2010 WL 3633459 at *6–7.

motion for directed verdict" by responding that at the time for directed verdict, "an employee has had the opportunity to present his or her case in full," implying that *McDonnell Douglas* is again appropriate once the plaintiff's proof is entered.[75] Again, *Gossett* was careful in its holding to reject *McDonnell Douglas* only for summary judgment: "[W]e hold that the *McDonnell Douglas* framework is inapplicable *at the summary judgment stage* because it is incompatible with Tennessee summary judgment jurisprudence."[76] Given the opinion's focus on procedure and the explicit directive limiting its rejection of *McDonnell Douglas* to summary judgment, a proper *Erie* analysis should determine that *Gossett* does not apply beyond the Tennessee state courts.

B. Young Touchstone's original Motion for Summary Judgment does not depend on applying the *McDonnell Douglas* analysis.

Young Touchstone's Motion for Summary Judgment opened its argument by asserting that Tennessee law requires more to establish a prima facie case than *McDonnell Douglas* requires.[77] Based on a case out of this Court, Young Touchstone contrasted a plaintiff's relatively "light" burden under *McDonnell Douglas* with Tennessee's common law retaliatory discharge prima facie case, which places a "formidable burden" in establishing a prima facie case.[78] For this reason, Young Touchstone argued that the Plaintiff had not met his burden under Tennessee law — independent of the *McDonnell Douglas* framework.

Notably, *Gossett* and *Kinsler* left the elements of retaliatory discharge unchanged, while rejecting *McDonnell Douglas* for purposes of summary judgment.[79] Arguably, in

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[75] *See id.* at *7.

[76] *See id.* at *6 (emphasis added).

[77] (*See* Young Touchstone's Mem. Support Summ. J. (Doc. No. 13-1) at 6.)

[78] (*See id.* (citing *Clark v. Hoops, LP,* 2010 WL 1417744 at *10 (W.D. Tenn. April 1, 2010) (quoting *Hill v. Perrigo of Tenn.*, 2001 WL 694479 at *5 (Tenn. Ct. App. June 21, 2001)).)

[79] *Gossett,* 2010 WL 3633459 at *6; *Kinsler*, 2010 WL 3633456 at *4.

doing so, *Gossett* and *Kinsler* may have made it more difficult for a plaintiff to survive summary judgment since the fourth element of a plaintiff's retaliatory discharge prima facie case requires proof of causation — i.e. that the claim for workers' compensation was a *substantial* factor in the employer's decision.[80] That's because *McDonnell Douglas* is intended to *benefit* plaintiffs by making it easier to prove discrimination through indirect evidence instead of requiring direct evidence, which is often difficult for plaintiffs to obtain.[81] Indeed, the very reason that Illinois rejected *McDonnell Douglas* in *Clemons* was because it did not want to give plaintiffs the *benefit* of the *McDonnell Douglas* inference that arises once a plaintiff establishes a prima facie case.[82] One commentator noted this very point when she said, "Applying the *McDonnell Douglas* burden-shifting analysis in federal court on a state law claim from [Illinois or Virginia] would give the plaintiff an advantage that he would not have in state court under the traditional order of proof."[83] Thus, an employer may have an easier time undermining a plaintiff's retaliatory discharge prima facie case post-*Gossett* since plaintiffs will no longer be entitled to the *McDonnell Douglas* inference.

C. Even if the Court were to apply Tennessee's procedural standard for summary judgment, this Court should grant summary judgment to Young Touchstone because it has affirmatively negated an essential element of Plaintiff's claim for retaliatory discharge.

Nothing in *Gossett* or *Kinsler* changed Tennessee's substantive law concerning retaliatory discharge or overruled the Tennessee Court of Appeal's decision in *Reed v.*

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[80] *See Gossett,* 2010 WL 3633459 at *3.

[81] *See McDonnell Douglas*, 411 U.S. 792; *Burdine,* 450 U.S. 248.

[82] *See Clemons,* 704 N.E.2d at 408.

[83] Melissa Kotun, *Applying the Erie Doctrine and the McDonnell Douglas Burden-Shifting Analysis When a Conflict with State Law Arises Through a Retaliatory Discharge Claim*, 35 Ga. L. Rev. 1251, 1274 (2001).

Alamo Rent-A-Car, Inc., 4 S.W.3d 677 (Tenn. Ct. App. 1999), which dismissed a plaintiff's retaliatory discharge claim because she "was unable to establish the final element of her retaliatory discharge claim, that of causation."[84] The *Reed* court decided — independent of a *McDonnell Douglas* analysis — that a plaintiff must establish causation "by presenting direct evidence of the necessary causal link or by introducing compelling circumstantial evidence of such a link."[85] Although *Reed* was decided after a bench trial, nothing in the opinion prevents an employer from making the same challenge at a summary judgment motion, as Young Touchstone has done here.

Young Touchstone argued in its original Motion that the Plaintiff had failed to submit sufficient evidence to create a genuine issue of material fact as to causation — the fourth element of the plaintiff's case. Under *Reed,* the Plaintiff must show "direct evidence of the necessary causal link or . . . compelling circumstantial evidence of such a link" to prove causation, and no such evidence exists in this case.[86] As argued initially, the Plaintiff never showed a link between his claim for benefits and the alleged discrimination:

- "I feel that things changed after the surgery to the hands and after I hurt my hands."[87]
- "Only thing I can say about [whether the Company told the truth about the reasons for Plaintiff's termination], sir, is things changed after I hurt myself out there at that factory working on those machines. That's all I can say about that."[88]
- "I couldn't possibly tell you all the ways [things changed], sir, I can't remember all of them. . . But as far as I can

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[84] *Reed v. Alamo Rent-A-Car, Inc.,* 4 S.W.3d 677, 684 (Tenn. Ct. App. 1999).

[85] *Id.* at 685.

[86] *See id.*

[87] (Pl. Dep. 103:8–10 (March 5, 2010).)

[88] (*See id.* at 106:21–24.)

> remember . . . it changed with me and Mr. Deacons [sic] there. Before when I would go talk to him and ask him questions about certain things, he was more kind and nice to me. Sort of kind of nice. But later on he became kind of short and somewhat rude."[89]

Not only could he not give "all the ways" that things changed, he could not give any examples of how his terms and conditions of employment changed. In light of *Reed* and *Gossett*, this is insufficient to create a genuine issue of material fact as to causation.

The plaintiffs in *Gossett* produced substantially more proof. For example in *Gossett*, the plaintiff pointed to conflicting testimony between two managers: one who claimed the employer eliminated the position because it was redundant; the other claiming that the positions were "dramatically different."[90] Along with evidence that the company also claimed that it discharged the plaintiff for "unacceptable performance," the *Gossett* Court found that this created a genuine issue concerning the employer's actual motivation for discharging the plaintiff.[91] Likewise, the *Gossett* plaintiff cast doubt on the employer's claims that it discharged him to "reduce its workforce" by pointing to a newspaper advertisement — published the Sunday before the company discharged the plaintiff — seeking to hire a financial analyst in the plaintiff's department.[92] No similar evidence questioning Young Touchstone's motivations exists in this case.

Similarly, the plaintiff in *Kinsler* presented much more compelling proof that discrimination played a role in the employer's decision.[93] First off, the plaintiff in *Kinsler* was discharged three days after rejecting a settlement offer from the employer, creating a

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[89] (*See id.* at 110:3–12.)

[90] *See Gossett,* 2010 WL 3633459 at *8.

[91] *See id.*

[92] *See id.* at *9.

[93] *See Kinsler,* 2010 WL 3633456 at *3.

strong inference that the employer acted in retaliation.[94] In contrast, here several months passed after the Plaintiff claimed workers' compensation benefits. Furthermore, Young Touchstone discharged Plaintiff only after investigating his alleged "excused" absence from work when Young Touchstone learned from the Plaintiff's doctor's office that the doctor had *not* taken Plaintiff off work as he had claimed.

Also in *Kinsler*, the company claimed — just as Young Touchstone has here — that the plaintiff could not perform his job, but the plaintiff there presented mountains of evidence contradicting the employer's position.[95] For instance, the *Kinsler* plaintiff showed that he and others often used "tow motors" to lift heavy loads before his injury, that others in the department often helped each other, and most damagingly, a memorandum showing that the plaintiff had been operating under similar lifting restrictions since 1984 — meaning that he had been working under nearly identical restrictions for 21 years before the company decided to fire him *because of* the restriction.[96] No similar evidence exists here that would cause doubt as to Young Touchstone's motivations. To start, Young Touchstone never claimed to have fired the Plaintiff because he could not perform the job, only that under *Leatherwood v. United Parcel Service*, 708 S.W. 2d 396 (Tenn. Ct. App. 1985), the Plaintiff must be able to prove that he could perform the job to maintain his action for retaliatory discharge. Here the Plaintiff admits that he was completely unable to perform his job until September 24, 2008, and as of March 5, 2010, was still unsure if he could perform the job.[97] Thus, even applying the *Gossett* and *Kinsler* standard, this Court should find that Young Touchstone is entitled to summary judgment.

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[94] *See id.*

[95] *See Kinsler*, 2010 WL 3633456 at 3.

[96] *See id.*

[97](*See* Pl.'s Dep. 26, 81–82; Bullock Dep. 7–9, 32–33.)

Conclusion

While *Gossett* and *Kinsler* change the Tennessee's procedural law regarding summary judgment, nothing in those decisions diminishes Young Touchstone's ability to obtain summary judgment here. *Gossett* and *Kinsler* were concerned — however improbably — that applying *McDonnell Douglas* to summary judgment motions would allow employers to subvert the burdens that Tennessee's summary judgment jurisprudence demands be satisfied before a trial court may grant summary judgment. Because these decisions are rooted firmly in procedural rather than substantive considerations, *Erie* and *Gasperini* dictate that federal summary judgment jurisprudence should continue to apply. In the unlikely event that the Court would be moved to apply Tennessee state court procedure, Young Touchstone has nevertheless produced sufficient evidence to satisfy either standard. For these and the reasons in Young Touchstone's earlier Memorandum, we respectfully urge the Court to grant Young Touchstone's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Timothy A. Perkins, hereby certify that a copy of the foregoing document has been filed and served electronically via the Court's CM/ECF electronic filing system this 7th day of October, 2010 upon Plaintiff's Counsel Art D. Wells, 115 North Liberty Street, Post Office Box 1401, Jackson, Tennessee 38302-1401, and Justin Gilbert and Jonathan Bobbitt, 101 N. Highland Ave., Jackson, Tennessee 38301.

s/Timothy A. Perkins