The Governor's Council for Judicial Appointments
State of Tennessee
Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am currently the Executive Director of the Tennessee Bar Association ("TBA") and the Tennessee Legal Community Foundation ("TLCF").

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

Licensed in 2001.

BPR Number: 021710.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

District of Columbia (2010) – Bar Number – 994098.

I obtained my license in order to grow my practice while at my first law firm. I maintain this license but am not currently active because my work at TBA does not require an active license outside of Tennessee.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Associate, Boult Cummings Conners & Berry, PLC (2001 - 2009)

Partner, Bradley Arant Boult Cummings (2009 - 2013)

Shareholder, Littler Mendelson (2013 - 2017)

Executive Director, Tennessee Bar Association (2017 - present)

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I am currently the Executive Director of the TBA and TLCF. I am required to maintain an active law license and my primary role is managing all aspects of bar services including policy positions, membership, board governance, educational programming and business affairs of TBA and TLCF. TBA currently has 33 practice group sections that touch on all areas of the law. The TBA provides educational, networking, advocacy and practice management resources for over 12,000 members across the state. I am responsible for administration of TLCF including management of the TBA Building (formerly owned by TLCF) and supervision of CLE programs. The full scope of my duties is found in response to Question No. 8.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

The combination of my experiences as a practicing attorney and my time as Executive Director of the TBA and TLCF has provided me with a multifaceted point of view as well as the knowledge, skill, temperament and leadership qualities necessary to serve on the Tennessee Court of Appeals. I have extensive experience analyzing cases, drafting briefs and comments to the Tennessee Supreme Court, reviewing prior opinions and making recommendations based on

relevant law, bylaws, and policies to clients and my board. My specific experience and qualifications are outlined below in greater detail:

2001-2017

I worked as an associate and partner at Boult Cummings/Bradley for 12 years before moving to Littler as a shareholder in 2013. I worked primarily as an employment and general litigation attorney handling civil matters. I also worked on several cases in a supportive role including research, drafting necessary motions and pleadings and deposing relevant witnesses. Those cases span not only labor and employment related matters but also include the following types of matters:

- representing multiple victims in car accident cases in negotiations and actions with insurance companies,
- assisting in probate matters for clients and in filing conservatorship petitions and related pleadings,
- representing interests of multiple homeowners in actions against moving companies based on alleged damages,
- assisting in drafting motions for temporary restraining orders and injunctions and responding to similar motions on behalf of corporate clients with noncompetition concerns, and;
- responding to garnishment orders on behalf of local clients in General Sessions Court.

Due to the nature of my employment practice specifically, I was primarily responsible for handling administrative charges for small and large clients related to workplace practices. I routinely managed 25-30 Title VII administrative charges annually which included responding to and serving as a representative for clients, participating in fact-finding conferences throughout the country related to those charges, participation in mediations and, where relevant, participation in probable cause hearings related to those charges. I also worked on a number of commercial litigation matters including a two-year dispute from 2005-2007 in which I represented a company as second chair in an injunction against a former employee for tort and contract claims. This matter involved multiple depositions, dispositive motions, issuance of subpoenas and a bench trial.

I devoted a significant amount of time advising employers on all aspects of immigration law, especially on issues concerning I-9 compliance and E-Verify laws. I also worked with employers to obtain nonimmigrant and immigrant visas for their employees.

I have appeared as lead, second chair or co-counsel in at least 50 federal and state lawsuits, 30 administrative charges and multiple arbitrations throughout my career. As outlined in my response to question No. 9 below, I have successfully served as co-counsel of record in matters upheld on appeal by the Tennessee Court of Appeals and the Sixth Circuit Court of Appeals (*See Counce v. Ascension Health*, 2010 WL 786001, (NO. M200900741COAR3CV) (Tenn. Ct. App. Mar 08, 2010), rehearing denied (Mar 31, 2010), appeal denied (Oct 25, 2010) and *Light v. MAPCO Petroleum, Inc.*, 2005 WL 1868766, (NO. 3:04-0460) (M.D. Tenn. Aug 04, 2005)). A copy of the appellate brief in the *Counce* matter is attached as Attachment 2 in response to Question No. 35.

2017 - present

My experience is further enhanced by my current role as Executive Director of the TBA and TLCF. Since starting in 2017, I have been exposed to additional practice areas, skillsets, and experiences from practitioners representing matters across the state, providing perspective on issues of importance to members including law students, solo practitioners, small firms, large firms, corporations, government agencies, legal services organizations and young lawyers.

My specific experience includes:

A. **Directing, supervising the development of TBA policies, TBA positions on matters of concern to the legal profession, TBA's legislative agenda, and general bar services.**

My work at TBA covers a variety of executive actions that require reviewing factual circumstances, bylaw provisions, legislative actions, existing policy positions and legal precedent for analysis and application to current set of circumstances governing the TBA. I am required daily to evaluate consistency of positions and viability of actions based on precedent of how the bar has historically been governed. This analysis flows through all financial, government affairs, technological and general membership areas of the TBA.

When TBA makes updates to the bylaws, I work with the board to evaluate prior clauses and proposed changes to determine the practical effect of those changes on staff and the TBA, evaluating the intent and the application of the original language and proposed language in conjunction with the objectives of the TBA. When TBA reviews financials through its annual audit, I am responsible for the analysis of current information as compared to previous years as well as the financial viability of the TBA. When a new program is proposed, I analyze and review all relevant prior information related to similar programs and provide advice and counsel to the board and staff. When TBA takes positions on new rules from the Tennessee Supreme Court, I work with our government affairs team to review prior positions, changes in the law and file relevant petitions and/or comments based on that precedent and objectives of the board.

B. **Directing implementation of TBA Programs** – TBA produces wide-ranging CLE annually because of the hard work of our committees, sections and our CLE team. I supervise all aspects of association programming and the Director of CLE reports to our Assistant Executive Director who reports to me. I serve at times as an advisor, troubleshooter and facilitator of communication between TBA leadership and program coordinators. TBA also produces several programs independent of CLE such as the Tennessee Public Service Academy which provides training for lawyers interested in running for local offices. I serve as a staff liaison for that program, working with the steering committee, handling registrants, working with speakers and general program administration.

C. **Directing the management of TBA Human Resources** – I supervise 20 employees within the TBA. I also work closely with our Human Resources coordinator on hiring, terminations, policy changes, evaluations, performance plans, and general trainings for staff. I facilitate opportunities for staff to network with members and with each other and I have supervised changes to our payroll systems, health insurance and other benefits relevant to our team members.

D. **Serving as Leader in National Organizations** - In addition to my work at the state level, I have also taken on national leadership roles in a broader scope of responsibilities to the TBA. I am a member of the Board of the National Association of Bar Executives, where we represent the interests of local, state and affinity bar associations across the country. I was elected to the position of Vice President last year. I am scheduled to serve as President in 2023. This position provides an opportunity to share the legal issues important to Tennessee lawyers and residents while also learning how other states are handling similar concerns.

E. **Managing operations and strategic objectives of TLCF** - I supervised the management of the TBA offices (owned by TLCF) including tenant relations. When TLCF's board determined that they were interested in exploring a sale of the building, I reviewed previous documentation, legal opinions and analysis when the TBA moved 20 years ago. I engaged counsel to make determinations on relevant information on accounting, relevant regulations and required steps to move forward with a sale by a 501(c)(3). I provided detailed analysis to the TLCF building committee and board to make necessary decisions on next steps for the sale. I supervised multiple lawyers, financial advisors, communications to both the TBA and TLCF boards, reviewed multiple agreements and supervised the collection of documents and affidavits for filing with the Attorney General's office. I am also responsible for upcoming management of the moving process into TBA's new space while maintaining operations for the board and TBA members.

In sum, my current and prior work experiences support my ability to handle the academic rigor associated with this role. I have been required throughout my career to thoughtfully engage in critical analysis similar to what is necessary to effectively serve as an appellate judge.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Counce v. Ascension Health, 2010 WL 786001, (NO. M200900741COAR3CV) (Tenn. Ct. App. Mar 08, 2010), rehearing denied (Mar 31, 2010), appeal denied (Oct 25, 2010). This is a matter involving 12 claims asserted by Plaintiff including retaliatory discharge, age and sex discrimination, sexual harassment, violation of wage and hour laws, and violation of the Americans with Disabilities Act. The trial court summarily dismissed all of the claims. This matter was appealed to the Tennessee Court of Appeals and is significant because the Court upheld the dismissal of all 12 claims. I served as co-counsel on this case and drafted all filings with the lower and appellate court.

Carlos Coca v. Alta Vista Regional Hospital, HRD No. 07-02-0131 (N.M. 2008). I served as lead attorney in New Mexico hearing before Administrative Law Judge securing dismissal of all charges of discrimination against the Hospital. This matter was significant because it involved several witnesses and was one of the largest administrative matters I handled prior to becoming a partner in my first law firm. I handled all documents, witnesses on my own including a full

hearing in New Mexico.

Light v. MAPCO Petroleum, Inc., 2005 WL 1868766, (NO. 3:04-0460) (M.D. Tenn. Aug 04, 2005). This matter determined an important aspect of the application of the Fair Labor Standards Act (FLSA) and standard for exemption from the overtime rules as well as a claim for retaliation under the FLSA. The Middle District Court dismissed the claims. The Sixth Circuit Court of Appeals affirmed summary judgment in 2006. I was co-counsel on this matter with two other partners in my law firm, took the lead on case law research and assisted in drafting arguments for the briefs.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not applicable.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

Not applicable.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I applied for a Third Circuit Court vacancy in 2011 with the Tennessee Judicial Nominating Commission. The public hearing took place on December 5, 2011 and my name was not

submitted to the Governor as a nominee.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Howard University, B.A. Political Science (1994-1998) – Washington, D.C.

-Dean's List, Phi Beta Kappa, Honors Program, Pi Sigma Alpha

Vanderbilt Law School, J.D. (1998-2001) – Nashville, TN

-Journal of Entertainment Law & Practice - Music Notes Editor and Author: *Changes in the Ticket Distribution Industry: Is this the Beginning of the End for Ticketmaster?* – 3 Vand. J. Ent. L. & Prac. 53, Winter 2001

-Moot Court Board – Member and Associate Justice for Intramural Competition, 2001

-First Place Winner: Vanderbilt Intramural Moot Court Competition, 2000

PERSONAL INFORMATION

15. State your age and date of birth.

45; [redacted]1976

16. How long have you lived continuously in the State of Tennessee?

I have lived in Tennessee since 1998.

17. How long have you lived continuously in the county where you are now living?

I have lived in Davidson County since 1998.

18. State the county in which you are registered to vote.

Davidson County

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court

and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

- **Metropolitan Nashville Airport Authority**

  -Commissioner, 2020 – present

  -Secretary, 2021 - present

- **AgeWell Tennessee** (formerly Council on Aging of Greater Nashville)

  -Past President, Treasurer, 2012 – 2014

- **Delta Sigma Theta Sorority, Incorporated.**

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

a. Delta Sigma Theta Sorority, Incorporated (founded in 1913) is an organization of college educated women committed to the constructive development of its members and to public service. I became a member in 1996. I have been active on and off as a member-at-large since that time.

(b) The organization is one which promotes scholarship and service and there are comparable fraternities which serve similar purposes. I have not been actively involved in recent years. The nature of the organization is one in which members do not resign but instead choose to contribute financially through the payment of dues each year.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

- **Harry Phillips American Inn of Court**
  -Master of the Bench, 2017 – present
  -Associate Member, 2006-2008

- **National Association of Bar Executives**
  -Vice President, 2021 – present
  -Board Member, 2019 – present
  -Co-Chair, Webinar Committee, 2018 - 2019

- **Tennessee Bar Foundation**
  -Fellow, 2018

- **Nashville Bar Association**
  -President, 2016
  -Board Member, 2013 – 2017

- **Leadership Nashville**
  -Member, Class of 2014

- **Lawyers' Association for Women - Marion Griffin Chapter**
  -President, 2011
  -Board Member
  -Member, 2001 to present

- **Nashville Bar Foundation**
  -Fellow, 2011

- **Tennessee Bar Association**
  -Member, 2001 to present
  -Leadership Law Class, 2008

- **Nashville Bar Association**
  -Member, 2001 to present

- **Knoxville Bar Association**
  -2020 to present

- **Memphis Bar Association**
  -2020 to present

- **Napier Looby Bar Association**
  -Member, 2001 to present

- **American Bar Association**
  -Member, 2001 to present

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

- Recipient, Nashville Business Journal Women of Influence Award, 2022
- Recipient, J.C. Napier Trailblazer Award, Napier Looby Bar Foundation, 2017
- Named, The Best Lawyers in America©, 2016, 2017
- Nominated, Nashville Athena Awards, 2017
- Selected to Super Lawyers, 2016
- Named, In Charge – Legal, Nashville Post Magazine, 2016
- Recipient, Nashville Emerging, Leader Award, Young Professionals Nashville and Nashville Area Chamber of Commerce, 2015
- Named, Best of the Bar - Nashville Business Journal, 2013-2016
- Selected to Rising Stars, Mid-South, Super Lawyers, 2013-2015
- Recipient, Nashville Athena Young Professional Leadership Award, 2013
- Named, Top Forty Under 40 - Nashville Business Journal, 2011

30. List the citations of any legal articles or books you have published.

Vanderbilt University Law School Journal of Entertainment Law & Practice.

- Author: *Changes in the Ticket Distribution Industry: Is this the Beginning of the End for Ticketmaster?* – 3 Vand. J. Ent. L. & Prac. 53, Winter 2001

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Better Right Now, Panel 1, TBA Annual Convention - June 17, 2021 (CLE produced by TBA's Attorney Well Being Committee)

Diversity at Work, ACC – August 12, 2020 (CLE produced by the Association of Corporate

Counsel in Tennessee)

Preparing Your Workplace for 2017's Impending Legal Challenges - February 16, 2017 (CLE produced by Littler for clients)

As a member of the Harry Phillips American Inn of Courts, I am required to produce CLE with a team each year on a topic assigned by the programs committee. Here are the most recent presentations to date:

- **ABA Resolution No. 115: Improving Access to Justice? Or Handing Over the Reins of Civil Litigation to Special Interests** – November 17, 2020
- **Legal Aid Society of Middle Tennessee and the Cumberlands: Looking Back Over the First Fifty Years** – September 17, 2019
- **Proposition: This House Believes That the Proposed Amendment to Tenn. Sup. Ct. R. 8, RPC 8.4 Violates the First Amendment and Tenn. Const. Art. I §19** – February 19, 2019
- **Sovereign Citizens: Does the Posse Ride Again?** – March 20, 2018

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not applicable.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

Yes. When I started my role as Executive Director of the TBA I registered as a lobbyist because traditionally the Executive Director also served as the chief in-house lobbyist for the TBA. I hired someone to fill that role and later withdrew my registration.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Attachment 1: *Changes in the Ticket Distribution Industry: Is this the Beginning of the End for Ticketmaster?* – 3 Vand. J. Ent. L. & Prac. 53, Winter 2001.

Attachment 2: Appellate Brief from *Counce v. Ascension Health*, 2010 WL 786001, (NO. M200900741COAR3CV) (Tenn. Ct. App. Mar 08, 2010), rehearing denied (Mar 31, 2010), appeal denied (Oct 25, 2010) (matter referenced in response to Question No. 9 above).

Both attachments are my primary work. Attachment 2 received comment and suggested edits

from co-counsel in that litigation.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

My unique experiences and background have prepared me for the task of fairly and justly discharging the duties and responsibilities associated with being an appellate judge. I strongly believe judicial service is one of the most important forms of service to the legal profession and the community as a whole. My career is built on a foundation of leadership, integrity and helping others. I believe that this is the right position at the right time in my career where I can use my talents and skills to provide service to my community at the highest level. I believe that I would be an asset to the bench based on my extensive work as a litigator, bar leader, executive and mentor.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

My current responsibilities include supervising TBA's work with Access to Justice. TBA has been a proud partner with several leading local, state and national organizations over the years. We work collaboratively with agencies that provide services to the community so that when there is a flood, tornado pandemic or other emergency, people have access to information and can reach attorneys to help them during some of the most turbulent times in their lives. I am fortunate that in my current role as Executive Director, I am able to work with our members, courts, local leaders to advocate for equal justice including additional funding for the legal services organizations. In my 21 years as a licensed attorney, I have taken on pro bono cases, participated in legal clinics and panels, served on boards that provided opportunities for direct and indirect service to the community and contributed financially to legal aid organizations.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

The judgeship is for the Tennessee Court of Appeals – Middle Grand Division. The Court of Appeals hears appeals in civil cases from trial courts and certain state boards and commissions. The court has 12 members who sit in panels of three. All decisions made by the Court of Appeals may be appealed, by permission, to the Tennessee Supreme Court. The current vacancy replaces Judge Richard H. Dinkins who has served on the court since 2008. I believe my unique perspective, significant legal and practical experiences as an attorney and as a bar leader would provide an important lens and enhance the already diverse backgrounds currently on the court.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

Service is key to my growth and development as an attorney and, if appointed, it would remain integral to my professional work. Looking at my career, I have dedicated a large number of volunteer hours to working with bar associations, advocating for the legal profession and mentoring law students and young lawyers. I am proud of my bar work and the service it has allowed me to provide through community projects, educational and training opportunities and professional development. I also routinely speak on panels for law students and provide advice on how to navigate the legal profession. Another one of my passions is helping families who are struggling with aging family members and caregiving. I had the privilege of serving as a caregiver for my father very early in my career and channeled that energy after he passed into working with the Council on Aging of Greater Nashville (now known as "AgeWell Tennessee") so that I could work on solutions to help older adults and caregivers like me. I served for several years on the board and as president for two years. I am still a big advocate and supporter of their work. If appointed to this judgeship and it is appropriate, I will continue to support issues affecting families and caregivers, as well as my mentoring efforts, bar service, and speaking engagements including serving on panels for law student associations.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

The key to understanding who I am as a person and who I would be as a judge is found by examining my professional and service life. I have represented individuals in small claims matters, immigration petitions, large and medium sized corporations in commercial and employment litigation and arbitrations. I learned a completely new practice area—immigration law—in order transform my practice, develop business and lead a small team. After 12 years of service and making partner at one firm, I later became a shareholder in one of the largest labor and employment law firms in the world. While growing in my practice, I also served and continue to serve in significant roles in several legal and civic organizations both locally and nationally while also finding time to mentor and support law students across the state. In my current role, I lead a bar association with over 12,000 members and manage the agenda, budget, strategic plan and staff of 20 employees, advocating daily for the support of legal services, indigent representation funding, wellness and supporting the agenda of the TBA President and the Board of Governors. At every stage of my career I have adapted and exceled at the tasks in front of me while maintaining respect for our legal profession and processes. I hope the Council views my work ethic, temperament, discipline and tenacity as assets to the bench. I welcome the opportunity to serve.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. Practicing labor and employment law provided me with many opportunities to evaluate matters involving conduct that I may have subjectively disagreed with, but, objectively, based on the law, was not actionable or unlawful. My role as an attorney in discrimination cases required that I put my personal views aside and effectively represent the interests of my clients in accordance with the law. This practice also required the delicate counseling of clients regarding legal rights and responsibilities in matters where the emotional bandwidth of parties is strained. My job was to represent the best interests of my clients and to argue the law in every case. I always advocated vigorously regardless of any personal opinion because the rule of law is the cornerstone of our legal system. As a current example, the TBA actively lobbies on behalf of its members and routinely comments on legislation or Tennessee Supreme Court Orders based on recommendations of TBA's practice group sections as approved by the board. My personal views do not factor into TBA's advocacy work because my job is to represent the interests of our members and execute on decisions of the board. Based on my background, broad litigation practice and current non-partisan advocacy work on behalf of the TBA, I am fully capable of upholding the law regardless of personal opinions on the substance of the law.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Luther Wright, Jr., Attorney, Ogletree, Deakins, [redacted] Nashville, TN 37219. [redacted]
B. Jennifer Robinson, Attorney and Former Nashville Office Managing Shareholder, Littler, [redacted] Nashville TN 37219. Telephone: [redacted]
C. Russell Morgan, Attorney, Bradley, [redacted] Nashville, TN 37203. Telephone: [redacted]
D. Stephen Barnett, Rear Admiral, U.S. Navy (Commander, Navy Region Southwest) [redacted] San Diego, CA 92132. Telephone: [redacted]
E. Grace Sutherland Smith, Executive Director, Age Well Middle Tennessee, [redacted] Nashville, TN 37215. Telephone: [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] **Court of Appeals – Middle Section** of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 23, 2022.

Jocelyn A. Hensley
Signature

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Student Notes

*53 CHANGES IN THE TICKET DISTRIBUTION INDUSTRY: IS THIS THE BEGINNING OF THE END FOR TICKETMASTER?

Joycelyn Stevenson

The music industry, born and sustained by its consumers, has been less than "consumer-friendly" over the years. The burgeoning electronic ticket distribution industry provides a perfect example of a domain that has created a conflict between consumer choice and industry standards. While technological improvements have allowed for important developments in ticket sales and distribution, increased prices and massive service charges have tempered newfound convenience with added frustration. A prime target for complaints, the so-called "Ticketmaster monopoly" routinely draws the ire of not only consumers, who bear the burden of non-competition in the form of high prices, but also the entertainers themselves, who continue to lose control over the production of their concerts.

Ticketmaster's size makes it an easy, if not an appropriate, target. Currently, Ticketmaster is by far the top distributor of concert tickets in the country, serving approximately eighty-five percent of the largest venues in the United States. [FN1] *54 It maintains its dominance primarily through "exclusive dealing" agreements with such venues, where it also installs servers and terminals, adding to its apparent ubiquity. [FN2] In all, the ticketing giant has twenty-four call centers, 3400 points of distribution, and can claim per-quarter revenues near $60 million for its online units alone. [FN3]

This Note aims to explore the legal underpinnings of consumer frustration with Ticketmaster and the rest of the ticket distribution industry as it moves into the electronic age. First, this Note introduces Ticketmaster and examines its use of exclusive dealing agreements with local venues. It then discusses the relevant federal antitrust statutes affecting the industry and the market in which distributors operate. It also analyzes the role exclusive dealing agreements play in stifling competition. Next, this Note discusses the challenges—both legal and economic—to the industry's most visible member. It then discusses Ticketmaster as a possible product of competition in light of some of the new competitors that have entered the marketplace. Finally, this Note shows Ticketmaster as the aggressor in recent lawsuits against potential competitors and addresses the competing values of short-term price decreases versus a more long-term consumer-friendly market. Lastly, it summarizes the challenges facing the ticket distribution industry and recommends possible avenues for a compromise beneficial to all sides of the debate.

THE BIRTH OF TICKETMASTER

The first major ticket distribution company in the United States was New York based Ticketron (also known

as Ticket Reservation Systems), which handled tickets for about one hundred large venues. [FN4] Ticketron introduced the option of buying tickets at a local outlet instead of at the box office. [FN5] A household name in the late 1970's, Ticketron soon encountered great difficulties in the market. [FN6] When consumers purchased tickets, they could not be sure exactly where the seats they purchased were located because they were only allowed to purchase the "best available seat," instead of purchasing a specific seat they wanted. [FN7] In addition, "the best seats often were available only through the box office," which made it cumbersome for consumers to retrieve seats to the most popular events via Ticketron. [FN8]

During Ticketron's prominence, Ticketmaster was virtually unknown. When the former began to falter in the market, however, Ticketmaster purchased its competitor and went about trying to refine its business model. Leading the charge was Fred Rosen, who took control of the company in 1982, [FN9] and immediately began to improve the ticket distribution system pioneered by Ticketron. [FN10] Some of the changes introduced included a heavier emphasis on concert promotion rather than sporting events, and a dramatic increase in the $1 service charge that Ticketron had originally charged for its tickets. [FN11] Ticketmaster executives also invented a profit-sharing scheme whereby event venues received a piece of the service charge, levied against consumers. [FN12] Critics likened this scheme to a form of "kickbacks;" supporters hailed the payments as a form of royalties on an investment. [FN13] Venues, on the other hand, were almost universally behind Ticketmaster's innovative and creative entry into a previously unutilized market. [FN14] As Ticketmaster poured millions into developing its distribution system, other companies gradually found themselves unable to compete. [FN15]

The perceptions of Ticketmaster as a monopolistic entity grew out of the takeover of Ticketron and the exclusive deals that emerged. Though the United States Justice Department approved Ticketmaster's request to purchase Ticketron, some critics insisted the merger was illegal. [FN16] With only one major player in the ticket distribution game in the early 1990's, they argued, it was unlikely that service fees would decrease for many years to come--a belief that has proven true. [FN17] Ticketmaster currently "sells tickets for eighty-five percent of the largest venues in the United States." [FN18] The company's relationship with these venues arose out of exclusive dealing agreements, whereby a venue agrees to allow Ticketmaster—and only Ticketmaster—to distribute tickets to its events. These contracts usually last around five to seven years, depending on the circumstances. [FN19] Not only does the company give venues a portion of the service fees it charges, it also provides venues with "servers, terminals and other equipment which can be useful in distributing tickets to consumers." [FN20]

Ticketmaster's fees and exclusive deals with venues have sparked a debate about the extent to which the ticket distribution industry can be considered competitive. [FN21] The company's reputation also has sparked a large amount of litigation, though investigations arising under federal antitrust law have routinely failed to find proof behind allegations regarding the company's alleged monopolistic hold over competition.

*55 FEDERAL ANTITRUST STATUTES

Anti-competitive claims brought against businesses have historically arisen under §1 or §2 [FN22] of the Sherman Act. [FN23] As one commentator noted, "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise ... the freedom guaranteed each and every business is the freedom to compete." [FN24] The Supreme Court also announced the purpose of the Sherman Act in Apex Hosiery v. Leader:

> The end sought was the prevention of restraints to free competition in business and commercial transactions, which tended to restrict production, raise prices or otherwise control the market to the detriment

of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury. [FN25]

Price predation has been a part of the antitrust debate for the last twenty years. [FN26] The classic example of a predator is an entity "of such unequalled size and financial strength that [could use] a drastic cut in price ... [to] eliminate a smaller competitor ... and recoup its losses in that local market." [FN27] Any corporation's possible predatory practices should be analyzed under the Sherman Act, which then necessarily entails an inquiry into the relevant market for indications of relative market power.

THE SHERMAN ACT

Section 1

Section 1 of the Sherman Act states that "every contract, combination ... or conspiracy in restraint of trade among the several States is illegal." [FN28] To prevail under a §1 claim, the plaintiff must prove not only the requisite concerted action, but also that the conduct resulted in a restraint of trade. [FN29] There has been rigorous debate as to how much of a restraint is necessary for a violation. Clearly, however, §1 does not cover actions by single entities due to the "concerted activities" language in the statute. Thus, market dominance alone is not enough to infer that an entity is engaged in monopolistic practices. [FN30] Rather, violations occur as a result of activity between two or more entities acting together with a single purpose which negatively affects trade. [FN31] Evidence must "tend to exclude the possibility that the alleged conspirators acted independently." [FN32]

With whom could Ticketmaster conspire in order to be in violation of §1 of the Act? Three possibilities exist: (1) competitors, (2) promoters, or (3) venues. The first two possibilities are highly unlikely because neither group stands to gain from Ticketmaster's practices, and both have been leaders in the fight against the company. Thus, collusion with the venues seems most likely, due to the exclusive dealing arrangements through which Ticketmaster offers software and services in exchange for the exclusive rights to sell tickets. There has been no evidence, however, that concert venues have in any way conspired with Ticketmaster to cheat consumers.

Moreover, Ticketmaster's actions with respect to venues probably do not run afoul of §1 because the exclusive dealing arrangements are not part of a "conspiracy" to restrain trade. When Ticketmaster acquired Ticketron, it became the only full-service ticket distribution entity in the market, and many venues felt they lacked viable alternatives at the time they decided to enter into these agreements. Collusion and conspiracy to restrain trade were hardly the aims of the venues, which had a motive to enter the agreements entirely separate from Ticketmaster's. True, the venues also were interested in the exclusive agreements because of the benefits they would receive. But vendors are not necessarily concerned with whom they have exclusive agreements or what the other side might hope to achieve; they simply contract with distributors that give them the best deal. Therefore, §1 claims simply do not apply in such a case.

Section 2

Section 2 of the Sherman Act prohibits actual and attempted monopolization by a single entity. [FN33] The Supreme Court has defined the offense of unlawful monopolization under §2 as having two elements: "(1) the possession of monopoly power (i.e., the power to control prices or exclude competition in a relevant market);

and *56 (2) an element of deliberateness (i.e., the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident)." [FN34] Simplified, the two elements can be viewed as an inquiry into both market dominance and the conduct establishing it. In order to demonstrate attempted monopolization, a plaintiff must prove: "(1) a specific intent to monopolize; (2) predatory or anti-competitive conduct; and (3) a dangerous probability of success in achieving monopoly power." [FN35]

Nevertheless, opinions diverge when it comes to deciding how and when monopolies form. [FN36] One side of the debate focuses on the disparity of power between large, dominant firms and their smaller competitors. [FN37] This side argues that the dominant-firm setting lacks the creative process necessary to drive competition. [FN38] As one commentator notes, "Small firms must endure extreme degrees of pressure and risk, while the dominant firm faces only light pressure." [FN39] However, another school of thought believes that "monopolies do not in fact exist [and that] ... any high market shares merely embody efficiency." [FN40] Dominance accusations are viewed as justifying superior efficiency by the accused. [FN41]

This "efficiency school" has been successful in blocking many §2 actions since the middle of the 1970's, [FN42] and could explain Ticketmaster's continued dominance. The successes of Ticketmaster may merely stem from business efficiency and the idea that success comes to those who produce the best product. Based on the test set forth in §2, it is arguable whether or not Ticketmaster intended to monopolize the concert ticket distribution industry. Most critics believe that the lack of competition over the last ten years is a testimony to Ticketmaster's monopolization. However, it is much more likely that Ticketmaster offered consumers a better alternative through improved electronic ticketing access. Viewed this way, while they do prevent other companies from providing ticket distribution services at certain venues, exclusive dealing agreements are not per se anticompetitive.

Nevertheless, in order to investigate claims of monopolistic action, courts have consistently studied the relevant market in which alleged monopolies operate. Only through determining the relevant product and geographic markets in which a company operates can courts measure the market power of dominant firms in relation to smaller competitors, and thus make realistic determinations of monopolistic power.

Relevant Market

"The relevant market is the area of effective competition within which the defendant conducts business." [FN43] This market is usually defined in terms of products or geographic region. [FN44] A product market analysis examines possible substitutes for the product and whether competitors have been excluded from the market. [FN45] Geographic market analysis, however, looks at the "area in which the seller operates and to which the purchaser can practicably turn for supplies or services." [FN46] It is against both of these markets that Ticketmaster's power should be assessed.

The Supreme Court articulated the standard for determining the relevant product market in United States v. E.I. du Pont de Nemours & Co. [FN47] There, the court faced the issue of whether, if cellophane and other wrapping materials were neither fungible nor priced similarly, the market for other wrappings could be considered distinct from the cellophane market. [FN48] The court held that because the facts established that "cellophane was functionally interchangeable with other flexible packaging materials, there was no cellophane market separate and distinct from other flexible packaging materials," making it less likely that a monopoly was at work. [FN49] The Court also took into account other factors, such as price of services, use, and quality, in de-

terminiing if there was a §2 violation. [FN50]

Similarly, in International Boxing Club of New York, Inc. v. United States, [FN51] the Supreme Court determined that "the relevant market was specifically the promotion of championship boxing rather than all professional boxing events." [FN52] The Court believed that "non-championship fights are not reasonably interchangeable for the same purpose as championship contests and there exists a separate identifiable market for championship boxing contests." [FN53] More recently the same reasoning was applied in NCAA v. Board of Regents of University of Oklahoma, in which the Supreme Court found that "intercollegiate football telecasts constitute a separate market because they generate an audience uniquely attractive to advertisers," and "competitors are unable to offer programming that can attract a similar audience." [FN54]

Unlike the dichotomy between "championship boxing" and all "professional boxing," the distinctions between concert tickets, sports tickets, and theater tickets*57 is not clear when debating possible monopolization in the ticketing industry. Ticket distribution companies primarily compete by soliciting exclusive agreements to distribute all types of tickets for particular venues. Those who argue that Ticketmaster's product market should be limited to those exclusive agreements with concert venues do so because this is where Ticketmaster garners most of its income. [FN55] The premise is that Ticketmaster has targeted large venues that have products for which an inelastic demand exists, comprised of people who go to certain events no matter the cost. In other words, if only thirty venues can handle the concerts everyone wants to see, and Ticketmaster has exclusive deals with twenty-five of them, it is effectively closing off the possibility of competition. This reasoning explains why defining the precise product market to which Ticketmaster caters is critical to determine if Ticketmaster has engaged in monopolistic behavior.

Critics of Ticketmaster have characterized its relevant market as a small, regional one consisting only of ticketing services to concerts. Ticketmaster, on the other hand, has pushed for a broader market consideration, given that it sells tickets to all kinds of events outside of the concert category. One could argue that the concert ticket industry is not interchangeable with that for sporting events and other forms of entertainment, and therefore a separate, identifiable market exists. Ticketmaster's characterization of its product market as a broad one, if accepted, lessens the likelihood that it would be considered a monopoly. Accordingly, Ticketmaster has argued that its product market encompasses "all tickets sold for entertainment events in the United States." [FN56] Thus, any effect Ticketmaster has on concert ticketing is small when compared to other events where consumers purchase tickets directly from the venue itself or even a competitor. For instance, even if the relevant product market is characterized as entertainment events held at stadiums, arenas, and auditoriums, Ticketmaster's market share is only thirty-seven percent. [FN57]

An alternative analysis involves examining a relevant geographic market. Geographic market is the "area in which the seller operates, and to which the purchaser can practicably turn for supplies." [FN58] The court in American Football League v. National Football League held that it is "appropriate to limit the relevant geographic market to the area which the defendant sought to appropriate to itself." [FN59] As a result, some argue that Ticketmaster's geographic market is local because it is on the local level that Ticketmaster finds competitors trying to break its exclusive arrangements with venues. However, one could also contend that Ticketmaster is a national enterprise that operates throughout the United States. Moreover, as the Supreme Court stated in Brown Shoe Co. v. United States, the geographic market selected must "both correspond to the commercial realities of the industry and be economically significant." [FN60] Ticketmaster's reality is that it serves countless venues and consumers nationwide. Given the caliber of the services offered by Ticketmaster, it seems unrealistic to label its geographic market as merely local solely because competitors have only been able to compete on that

level. The purpose of competition is to have other entities rise to the level of the industry leader in order to give consumers more efficient and effective alternatives.

Once courts define the relevant market, monopolistic power must then be proven. [FN61] The Supreme Court has determined that a party has monopoly power if it has "a power of controlling price or unreasonably restricting competition." [FN62] Monopoly power usually involves even more than "extraordinary commercial success." [FN63] It involves "the use of means which [make] it impossible for other persons to engage in fair competition." [FN64]

Nevertheless, the defendant's market share can be a factor in inferring a monopoly. Also, even if a company's market share is less than seventy-five percent, if there are significant barriers to market entry, courts can still find a monopoly.

It has long been argued that exclusive dealing arrangements are a barrier to entry because they necessarily prevent competitors from gaining a share of the market. [FN65] Such agreements allow a venue to maintain a business relationship with only one particular ticket distributor for the entire period set forth in the contract. But these agreements are a vital feature of the current *58 ticket distribution system because they minimize the risk of conducting business in uncertain markets. [FN66] In addition, they reduce transaction costs, as venues and distributors can avoid needless negotiations of separate contracts for separate ventures. [FN67]

Still, exclusive dealing agreements remain subject to antitrust law, and hence must be analyzed under both the Sherman and Clayton Acts. [FN68] As a basic matter, selling a product on the condition that the purchaser cannot purchase or associate with a competing product is not permitted if the restriction negatively affects competition. [FN69] In United States Healthcare v. Healthsource Inc., the First Circuit Court of Appeals found that "[a]n exclusive arrangement may foreclose so much of the available *59 supply or outlet capacity that existing competitors or new entrants may be limited or excluded ... [reinforcing] market power and [raising] prices for consumers." [FN70]

When suppliers can only transact with one distributor, other distributors are foreclosed from transacting with these specific suppliers. Accordingly, if one distributor monopolizes the big suppliers in the industry, this exclusive distributor is virtually untouchable. [FN71]

The Supreme Court first addressed the legality of exclusive dealing arrangements in Standard Oil Co. v. United States. [FN72] There, the Court used a "quantitative substantiality" test to decide the validity of such agreements. The Court found that the effects on commerce could show the likelihood that the defendant would stifle competition. [FN73] Oddly, the Court failed to take into account the number and strength of other competitors or barriers to entry in that case. [FN74] However, the Court did abstractly analyze the number of competitors and entry barriers that can arise out of exclusive dealings. [FN75] This focus was illustrated when the Supreme Court held:

> In evaluating the substantiality of the market foreclosure in any given case, the court reasoned that it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the strength of the parties, the proportionate volume of commerce involved and the probable immediate and future effects which preemption of that share of the market might have on effect competition therein. [FN76]

Therefore, precedent shows that in deciding the validity of exclusive dealing arrangements, courts will focus on the relevant market of the accused entity because anti-competitiveness can only be measured against the spe-

cific market in which the entity is competing. [FN77] Put another way, if the entity is not competing in a particular market, then obviously it is not exerting a monopolistic hold in that market. Rather, "the relevant market is the area of competition within which the defendant conducts business." [FN78]

Defining relevant market becomes even more essential when formal charges have been filed against a company. [FN79] This bias is reflected in the belief that "market definition is intended to determine whether competitors have been foreclosed unreasonably such that other firms in the same market do not have the ability to keep the dominant firm from raising prices to supercompetitive levels." [FN80] Given the structure of the ticketing industry and Ticketmaster's position therein, what began as criticism has predictably resulted in formal allegations of monopolization being brought against the company not only by consumers, but by artists as well.

TICKETMASTER UNDER FIRE: ALLEGATIONS OF MONOPOLIZATION

Despite Ticketmaster's success, charges of monopolistic behavior have been an almost constant cloud over the company. Sources estimate that "in the post-Ticketron era, for every dollar of service fee increase passed along to consumers, seventy-five cents goes to Ticketmaster." [FN81] Some ticket buyers have argued that Ticketmaster "squashed any way of getting around service fees" by convincing venues not to open their windows the day shows go on sale. [FN82] Other criticism has come from concert artists, the very groups for whom the tickets are sold.

THE PEARL JAM FACTOR

On May 6, 1999, the band Pearl Jam filed a memorandum with the United States Department of Justice alleging that Ticketmaster's business practices amounted to anti-competitive, monopolistic action in violation of the Sherman Act. [FN83] Pearl Jam argued that Ticketmaster's overwhelming share of the ticket distribution market robbed consumers of free market choice. [FN84] The band also asserted that the company prevented them from using other distributors because of its exclusive dealing arrangements with nearly all of the major venues in the United States. [FN85]

The dispute began with Pearl Jam's Summer Tour in 1993, when the band requested that Ticketmaster list its service fee separately on the ticket so that customers would know what the band was actually charging. [FN86] Pearl Jam also tried to distribute tickets on their own, but ultimately failed because their promoter could not circumvent Ticketmaster's exclusive distribution agreements. [FN87] Unable to compromise privately, on June 30, 1994, Pearl Jam and Ticketmaster representatives testified before a subcommittee of the House Committee on Government Operations. [FN88] As a result of the ensuing debate, Representative John Dingell (D-Mich) proposed a bill "requiring ticket distributors to disclose the fee they add to the price of each ticket." [FN89] The bill eventually died, but Pearl Jam's resentment of Ticketmaster's operation did not. Years of small, non-Ticketmaster venue touring were followed by a brief period where the band *60 simply ceased playing live concerts entirely. Finally, Pearl Jam had enough and filed its action with the Department of Justice.

The D.O.J. investigation centered on the service fee that Ticketmaster divides among the major venues and promotion firms and the exclusive contracts with the venues. [FN90] In analyzing whether or not Ticketmaster constituted a monopoly by virtue of these practices, the Department of Justice used §2 of the Sherman Act as its reference point. [FN91] The Department found that to prove a violation of §2, [FN92] "the complainant must show that the firm possess monopoly power in a relevant market and that it willfully holds that power." [FN93]

In addition to market share, some other factors that the D.O.J. analyzed included: "a decline in market share over time, testimony that the market was very competitive, a dominant firm's decision to lower its price in an effort to hold its market share, a substantial number of competitor's entering the market, and high technology and research costs." [FN94]

During the proceedings, it did not matter if Ticketmaster necessarily intended to monopolize the industry. Commentators have stated, "General intent is not an essential element of monopolization." [FN95] Pearl Jam relied on Lurian Bros. & Co. v. FTC, in which the Supreme Court held that agreements that on their face may not stifle competition, could still violate §2 of the Act. [FN96] The band claimed that Ticketmaster's dominance left no alternatives for them to use, causing the band to subsequently cancel its 1994 summer concert tour---a detriment to the band and to the consumers wanting to see them perform. [FN97] Ultimately, the case boiled down to a single issue, namely whether Ticketmaster's behavior was anticompetitive or if the company's rise to dominance in the business was a product of pure competition. [FN98] Pearl Jam suggested, "Ticketmaster acted like a predator when it reduced its profits in the short term in order to limit the growth of the alternative ticket distribution services." [FN99]

In the end, the D.O.J. found no wrongdoing on the part of Ticketmaster. But Ticketmaster's problems did not end with the D.O.J.'s ruling. A group of consumers subsequently filed an action against the company alleging price fixing violations and anticompetitive behavior. Although the case result did not cripple Ticketmaster, it did mark a pivotal point in the Ticketmaster reign and also may have exposed Ticketmaster's vulnerable spots to the rest of the world.

CAMPOS V. TICKETMASTER CORPORATION

In Campos v. Ticketmaster Corp., a group of consumers sued Ticketmaster for damages and injunctive relief related to anti-competitive business practices. [FN100] The complaint alleged a violation of §1 of the Sherman Act for "engaging in price fixing with various concert venues and promoters and [for] boycotting the band Pearl Jam." [FN101] The complaint also added allegations of "monopolizing or attempting to monopolize the market for ticket distribution services." [FN102] Finally, the plaintiffs cited a violation of §7 of the Clayton Act for Ticketmaster's attempt to acquire its competitors. [FN103]

The district court held that the plaintiffs lacked standing to sue because they were indirect purchasers in the market. [FN104] The court reasoned that the venues are the parties in a direct contractual relationship with Ticketmaster, not the consumers, and therefore only the venues would have standing to sue. [FN105] The court lastly held that the consolidated cases were "improperly venued" and thus dismissed the suit. [FN106]

STANDING

The Supreme Court held in Illinois Brick Co. v. Illinois [FN107] that "only the direct purchaser from a monopoly supplier could sue for damages under §4 of the Clayton Act." Additionally, "indirect purchasers generally lack standing under the antitrust laws and so cannot bring suits for damages." [FN108] Thus, in deciding who has standing to sue, defining a direct purchaser is important in the antitrust analysis. Commentators have observed that "an indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another independent purchaser ... [and] such indirect purchasers may not sue to recover damages for the portion of the overcharge they bear." [FN109]

The justification for the dichotomy between a direct and indirect purchaser is that a monopoly overcharge can injure direct purchasers and those who deal derivatively with a monopolist. [FN110] For example, a direct purchaser could deal directly with a monopolist and in turn pass on the consequences of this relationship (i.e. increased prices) to indirect purchasers (i.e. consumers). Although the indirect purchaser has still been affected by the monopolistic power, this is generally considered an example of "incidence analysis." [FN111] However, if indirect and direct purchasers both had standing to sue, courts would have to apportion payment of overcharges between the *61 two types of purchasers. Alternatively, they would have to allow duplicative recovery—which the Supreme Court has expressly and continuously rejected.

The consumers in Campos claimed that they were in fact direct purchasers of "ticket distribution services" from Ticketmaster, given that Ticketmaster's service fees are paid directly to the company. [FN112] The Court of Appeals, however, found billing practices to be indeterminate of purchaser status, holding that "plaintiffs' inability to obtain ticket delivery services in a competitive market is simply the consequence of the antecedent inability of venues to do so." [FN113] While performers and entertainers cater to the needs of consumers, the ticket distribution industry serves the needs of venues. Moreover, consumers buy the tickets from Ticketmaster only after the venues have first bought distribution service. Given these facts, the court concluded, "Such derivative dealing is the essence of indirect purchaser status, and it constitutes a bar under the antitrust laws to the plaintiffs' suit for damages." [FN114] Accordingly, the Campos court dismissed plaintiffs' claims for damages under §4 of the Clayton Act. [FN115]

But that holding was far from the end of the case. While consumers cannot sue for damages under §4, "indirect purchaser status does not bar the plaintiffs from seeking injunctive relief under §16 of the Clayton Act" because there is no need to trace damages when injunctive relief is sought. [FN116] Consequently, the court rejected Ticketmaster's argument that no antitrust plaintiff can seek injunctive relief unless he also may seek damages. [FN117] Instead, the court held that the payment of service fees by plaintiffs established standing to pursue a claim for injunctive relief and remanded the case based on this holding.

The Court of Appeals lastly addressed the district court finding that pursuant to §12 of the Clayton Act, Ticketmaster was not transacting business in Georgia, Washington, or Michigan "because it did not exercise 'day to day' control over the operations of its subsidiaries located in those districts." [FN118] The Court of Appeals held that the district court applied the wrong venue standard in the case. Section 12 of the Clayton Act provides in part, "any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business." [FN119] When a parent company is brought into a suit based on the activities of a subsidiary, the court usually focuses on "whether the parent exercises sufficient control over its subsidiary to cause the parent to transact business." If the parent company exercises such control, it is virtually impossible to argue that the parent is not conducting business in the state where the subsidiary is located. Of particular importance is the parent company's ability to influence decisions of the subsidiary.

The Campos decision was troubling because it virtually precluded any consumers in the Eighth Circuit from being able to seek damages from Ticketmaster based on anticompetitive and monopolistic principles. Relying heavily on the Illinois Brick indirect purchaser analysis, the Court of Appeals found that the venues, not the consumers, were within the direct chain of purchasing with Ticketmaster, and thus the consumer could not be afforded a remedy in this situation.

However, the consumers' relationship with Ticketmaster is not necessarily through the venues. The venue

does not purchase the tickets from Ticketmaster to sell to the consumer; the consumer purchases tickets directly through Ticketmaster. In fact, consumers may not even know which venue a particular concert is in until they buy the tickets. In other words, the venues are not true middlemen in the direct/indirect purchasers' sense. Ticketmaster, not the venue, bills the service charges directly to the consumer. Moreover, since the venues, under their contract with Ticketmaster, receive a cut of the service charges on the ticket, they are not merely "passing along" costs to the final purchaser.

This point highlights another flaw with the decision. Under the court's reasoning, the venues would have to bring suit in order to sustain an action for monetary damages. However, it is highly improbable that a venue would ever bring suit against Ticketmaster when they receive software, servers, and portions of huge service charges from the company. Thus, consumers are completely barred from even being able to argue the right to some form of monetary compensation, while the venues that can sue benefit from not doing so.

On January 19, 1999, the U.S. Supreme Court denied the consumer's petition for a writ of certiorari from the United States Court of Appeals for the Eighth Circuit. [FN120] As a result, once again, the merit of whether or not Ticketmaster exerts a monopolistic stronghold over the ticket distribution industry remained undecided. Of course, that the Campos decision is troubling does not automatically mean that Ticketmaster is a monopoly. It may be that Ticketmaster is just another company in the *62 ticket distribution industry vying for a large share of the market. Even so, consumers should still have the right to challenge these practices and have their concerns litigated on the merits.

Given the strict governance of the dichotomy between indirect and direct purchasers, however, the issue of Ticketmaster's power may never be litigated. The Justice Department could still independently investigate the alleged monopolistic behavior of the company, but even this possibility seems unlikely. After all, the consumers who brought the suit against Ticketmaster alleged that the company's 1991 purchase of Ticketron gave the company a monopoly. [FN121] Even back then, critics had echoed such concerns given that there were no other real competitors in the industry, and that the acquisition would allow Ticketmaster to dominate the ticket distribution industry. But the D.O.J. approved the purchase nonetheless. Given that the Justice Department was aware of the potential domination of the company when it approved Ticketron's acquisition, it is unlikely that the D.O.J. would be moved today to declare the company a monopoly. But almost nine years after the D.O.J. hearings, it remains necessary to at least discuss whether competition exists to support the argument that Ticketmaster's dominance is more a product of the market than a pure monopoly.

Most critics of Ticketmaster argue that the company's practices meet §2 of the Sherman Act criteria for monopolization or attempted monopolization. They argue that Ticketmaster has acquired and maintained its power through deliberate anticompetitive conduct. It may be more realistic, however, to suggest that Ticketmaster is a product of the market, not the illegal dominator of it. In other words, if one looks at the new companies poised to challenge Ticketmaster, it becomes clear that Ticketmaster's rise and ten-year reign on top is a product of competitive market forces, not necessarily anti-competition.

Inquiries into Ticketmaster's continued domination of the ticket-distribution industry must also be sensitive to the critical developments within that industry. Many of these new changes are due to the Internet. More promoters, and even some venues, are viewing the web as an untapped channel through which to sell tickets to consumers. [FN122] Commentators suggest that, "now that ticketing companies are emerging to meet their needs with different business strategies, competition is back in the ticketing industry." [FN123]

In all, several new and old entities have the potential to give consumers viable alternatives to Ticketmaster's alleged monopoly. [FN124] These entities also further advance the arguments that only in certain conditions will a suit against a dominant firm prove successful. [FN125] In order to illustrate Ticketmaster as a mere product of competition, one must examine some of the potential market threats to Ticketmaster's dominance, in the wake of allegations of monopolization.

COMPETITORS

TICKETWEB

TicketWeb proclaims itself as a "proconsumer" company that "exploits the efficiencies of the Web and computerized voice-mail to reduce service charges." [FN126] For the last three years, the company has promoted itself as an alternative to Ticketmaster, and successfully secured large-scale events at the Louvre, Wimbledon, and Premier Parks. [FN127] One year after Pearl Jam went head-to-head against Ticketmaster, the CEO of TicketWeb decided to "kill service charges using the web." [FN128] The strategy of the company is to go after "nightclubs, film festivals, performing arts centers"—virtually any place where "anti-monopoly sentiment and regional distinctions make it more difficult for Ticketmaster to infiltrate." [FN129] TicketWeb has even ventured to South Africa, landing a deal with the 30,000-seat Dome in Johannesburg. [FN130] As a result, the company netted $4.5 million in 1999 ticket sales and is expected to jump to $22 million at the end of 2000. [FN131]

But TicketWeb is no longer exactly a competitive threat to Ticketmaster, which announced on May 30, 2000, that it is acquiring TicketWeb for about $35 million in stock. [FN132] TicketWeb will keep its website and customers will be able to link to the company's site through Ticketmaster's webpage. In the end, TicketWeb will receive much more exposure for smaller-scaled events, while Ticketmaster increases in dominance in the industry.

TICKETS.COM

In June 1996, a Connecticut-based ticketing software company, Hill Arts and Entertainment purchased nine ticketing companies and created "Tickets.com." [FN133] This new entity in turn acquired two types of companies: "software-licensing firms and ticketing distributors." [FN134] Like Ticketmaster, Tickets.com offers venues hardware and software, and charges high services charges for its tickets.*63 In June of 1999, the company filed to go public, positioning itself as "Ticketmaster's first competitor with any real muscle." [FN135] The company has a website offering links to artists and events. If one searches for a particular entertainer, not only will he or she get information on the artist, but if the company is not handling the shows personally, the consumer will also get links to brokers that have the artist's tickets and the ticketers that sell the tickets—"even if it's the competition." [FN136]

With the launch of its Virtual Wristband service, Tickets.com now offers another alternative for consumers. [FN137] Under the program, consumers who register for hot ticket events during a window period are assigned numbers and given seat selections through a lottery system. [FN138] At present, it is impossible to predict what impact such an innovation will have on the industry, but it should be recalled that it was only through such types of innovations that Ticketmaster became the dominant player it is today.

SFX ENTERTAINMENT

SFX is probably in the best position to tackle Ticketmaster's power. The new concert-business conglomerate "threatens to transform the $1.3 billion livemusic industry." [FN139] It is the first nationwide concert promoter. Last year, SFX began buying a handful of the best-run, most powerful independent concert promotion companies, and it now controls forty-two major concert venues and more than one hundred clubs and theaters. [FN140] SFX has also purchased several concert sites in the New England area, furthering rumors that it is setting the stage to take over all concert events. [FN141]

Ticketing is another arena in which SFX is trying to make a dent. While Ticketmaster has overshadowed many of the smaller, unfamiliar ticket distributors, SFX may prove more of an adversary. SFX acquired the company, "Contemporary Group," which operates its own regional ticketing operation. [FN142] Insiders at SFX have alluded to plans to directly challenge Ticketmaster's operation.

Interestingly, SFX is coming under fire in much the same way as Ticketmaster. SFX has been accused of trying to dominate not only the ticket distribution industry, but also the concert industry as a whole. Of particular concern to industry observers is SFX's alignment with the Marquee Group. [FN143] The current head of SFX, Robert Sillerman, is also chairman of Marquee, "a New York based agency that brokers corporate sponsorship deals for arenas." [FN144] Big sponsorship typically delivers blocks of seats to big companies who pay for logo placement. As a result, average ticket buyers lose out in many of the best seats.

SFX hopes to become a "vertically integrated" company, with the capability "to produce shows, book tours, manage and book artists, cut deals on its purchases of concession goods and other supplies, and lastly sell tickets." [FN145] The company has the potential of being a one-stop shopping conglomerate. On February 29, 2000, Clear Channel Communications Inc. acquired SFX Entertainment Inc. [FN146] Through this deal, Clear Channel will own radio stations, outdoor advertising properties, and live entertainment venues in more than half of the top fifty U.S. markets. [FN147] Clear Channel, the world's largest billboard company, also owns 400 radio stations in one hundred markets in the United States and Puerto Rico. [FN148]

When CEO Sillerman was asked if Ticketmaster should be worried, he replied that SFX has invested a large amount of capital development in the ticketing business. [FN149] Sillerman also noted that Ticketmaster has had the benefit of relatively sparse competition over the past few years. [FN150] Insiders argue that it will take at least a year for the savings of SFX to trickle down to the consumer, if and when it decides to tackle Ticketmaster's dominance. [FN151] But with $1.3 billion spent by consumers in North America alone on concert tickets in 1999, the savings may be worth the wait.

OTHER SMALL COMPANIES

There are other smaller companies that have not reached the level of SFX, but nonetheless remain key to the debate on the market power of ticket distribution agencies. One of these companies is BASS Corporation. BASS is a San Francisco Bay area vendor that handled the ticketing for Billy Graham Presents. [FN152] In 1986, BASS was the dominant computerized ticketing service in Northern California. [FN153] The company entered into a licensing agreement with Ticketmaster, which allowed BASS to use Ticketmaster's computer system and its name in advertising. [FN154] Ticketmaster also allocated the Northern market exclusively to BASS. [FN155]

Another small company is ETM, the company Pearl Jam turned to during its battle with Ticketmaster in

1994. [FN156] "ETM builds interactive kiosks in grocery stores where consumers can buy tickets that carry a fraction of Ticketmaster's service charge." [FN157] The company *64 operates in fourteen major markets with exclusive contracts with ten major-league sports teams. [FN158]

Launch.com and CultureFinder.com are two more web-based companies offering information about artists as well as tickets to consumers at lower prices. Launch.com is a music website offering news about bands, interviews, videos, etc. [FN159] The company is contemplating selling tickets online to the already popular base it has established. Similarly, CultureFinder.com is a website that offers a database of listings for various events. [FN160] Plug in the name of an event or city, and CultureFinder calls the venue and reserves tickets for the consumer at the box office. [FN161]

THE FUTURE OF TICKETMASTER

The foregoing companies make up the short list of competitors that have the potential to threaten Ticketmaster's dominance. Many are in the position similar to that of Ticketmaster years ago when Ticketron was on its way out of the distribution game. The rise of competitors has left Ticketmaster on the defensive, not nearly as untouchable as it had been in the past. Part of this defensive stance is evident in the increased amount of Ticketmaster-initiated litigation in the last couple of years.

Recently, Ticketmaster has filed a series of lawsuits against entities that deep-link to its website. For example, Ticketmaster sued Tickets.com, accusing it of "illegally linking into Ticketmaster's web pages and providing false and misleading ticket price information to the public." [FN162] On April 28, 1997, Ticketmaster also sued Microsoft for including a link to the Ticketmaster home page on Microsoft's Seattle Sidewalk entertainment site. [FN163] Ticketmaster argues that a company needs a formal license agreement in order to link to its site. The linking problem ultimately stems from the contracts that Ticketmaster has with certain advertisers, requiring them to display certain ads on Ticketmaster's main web page. When consumers log onto Ticketmaster's website, they go through several pages of ads before getting to the page where one purchases tickets. When other entities link directly to the purchasing page, they bypass the advertisements, violating Ticketmaster's deals with various advertisers.

One could argue that Ticketmaster's attempt to prohibit "deep-linking" onto its site is yet another example of the company's attempt to monopolize the ticket distribution industry by crippling the competition. However, no proof of such a motive exists. Alternatively, Ticketmaster's efforts could be aimed at trying to preserve its existing legal trademark and sponsorship deals. Given that the exclusive deals Ticketmaster engages in are perfectly legal, and that new competition is entering the market, it is less likely that the deep-linking controversy would be construed as sufficient evidence of the company's monopoly over the ticketing industry.

CONSUMER POLICY

The controversies surrounding the ticket distribution industry inherently implicate two competing values that consumers, promoters, venues, and ticketing companies must tackle—short-term price decreases versus a long-term better market. The short-term/long-term price dichotomy stems from the service charges that Ticketmaster and even some new entities are using. These service charges can be extremely high, especially with high-selling tickets. As mentioned, consumers in the United States have been virtually precluded by the Supreme Court from receiving relief from these sometimes exorbitant fees. The Department of Justice also concluded that Ticketmas-

ter's actions do not meet the stringent test of being monopolistic. Both conclusions beg the question of what remedy, if any, the consumer has with respect to the purchasing of tickets.

There is, however, a bigger issue besides the short-term benefit of lower service charges. Antitrust laws aim to protect competition and the ability of different types of companies to fill certain needs in the marketplace. When Ticketmaster bought Ticketron in 1991, there were no comparable entities in the market to challenge the company's power. However, the Justice Department allowed the Ticketron acquisition, and subsequent courts have been unwilling to label Ticketmaster a monopoly because of the importance of a better long-term market. Today, Ticketmaster is being challenged by entities that are able to capitalize on Ticketmaster's poor reputation and pick *65 up some of the exclusive deals that are expiring between Ticketmaster and some larger venues. Also, there are hundreds of untapped, smaller venues not under contract with Ticketmaster, that competitors can utilize to gain market share. Some companies are using these smaller venues to build up their base so that when exclusive deals begin to expire with Ticketmaster, they are in a position to fill the void.

The individuals who are usually overlooked in the long-term market scenario are the consumers. In theory, the concert industry and most conglomerates cater to the needs of the consumers who purchase the music and concert tickets, thereby creating the popularity of many artists. Concern for consumer welfare was one the factors motivating Pearl Jam's actions back in 1994. But as those actions have continued to fail, so too does the consumer continue to bear the brunt of the service charges that many of these ticket distribution companies charge. As a result, the issue today is not so much whether there is a monopoly in the ticket distribution industry that negatively affects consumer choice, but what consumers and the industry can do in the short-term to lessen any negative affects of a long-term better market.

The emergence of new players in the ticket distribution industry will not automatically break up the alleged Ticketmaster monopoly. But they do call into question whether or not Ticketmaster can maintain both its dominance and its consumer relations on equal footing. Ticketmaster would not be what it is today if consumers had not availed themselves of its services. The question is whether consumers use Ticketmaster because they have no choice or because of the convenience of Ticketmaster's service. The answer, clearly, is key in this ongoing monopolization debate.

Antitrust law is traditionally viewed in terms of the black letter law and the Supreme Court's treatment of the Sherman Act. But recently, another perspective has evolved that investigates how consumer policy fits into the antitrust debate. [FN164] Some believe that too much protection "fosters too much dependence ... that [in turn] undermines consumer sovereignty and discourages individual judgment." [FN165] The idea is that companies/sellers who provide the best service will be amply rewarded. [FN166] The marketplace presupposes a semblance of equality of power between sellers and buyers. [FN167] Consumers, thus, bear some responsibility in how the market treats them. In the words of one commentator:

> Unceasing vigilance on behalf of consumer rights is—and must remain—a hallmark of market improvement policy. At the same time, the pendulum must not be allowed to swing all the way from letting the buyer beware to letting the seller alone to do so ... this would lead to market replacement substituting for market improvement. [FN168]

ENCORE! ENCORE!

Over the past decade, the market, the courts, and increased competition have all provided indications that Ticketmaster was and is not a monopoly aimed at stifling competition in the ticket distribution industry. While

the cost to consumers has been relatively high in the wake of increased service charges and fees, efficiency sometimes comes at a price. After acquiring Ticketron, Ticketmaster became, and still is, the premier ticket distribution outlet for concerts and sporting events in the United States. This power and dominance has sparked allegations that the company attempted to monopolize, and in some instances had held a monopoly on, the ticketing industry due to the decade-long lack of real competition in the industry. This dominance could be explained partly by the exclusive dealing agreements entered into with several large venues, making the company the sole distributor for these venues for five to seven years at a time.

Antitrust violations are typically analyzed under §1 and §2 of the Sherman Act. Ticketmaster has not conspired with competitors, promoters, or venues to cheat consumers or other competitors out of their share of the market; therefore, §1 should not apply. Section 2 does cover attempted and actual monopolization of an industry by a single entity, however no proof exists that Ticketmaster has the predatory conduct necessary to fall under this rule. Additionally, market realities suggest that Ticketmaster's relevant market should be viewed as a broad one, encompassing all entertainment ticketing instead of mere concert ticket sales on a local level. A huge part of determining relevant market is determining in which arena a particular company intended to be bound. Narrowing Ticketmaster's market to concert ticket distribution unfairly breaks the conglomerate into marginalized parts solely for the benefit of competitors in local arenas.

In addition, while the exclusive dealing agreements prevent other competitors from dealing with certain venues for a period of years, most of these agreements have *66 been judged perfectly legal. Considering that many of these deals were entered into in the early 1990's, it is now possible for competing companies to fill the void if they offer a more efficient and effective alternative to Ticketmaster. SFX Entertainment is a prime example of an enterprise that is able to introduce a new type of ticket distribution methodology to consumers. SFX not only distributes tickets, but also promotes and sponsors actual concerts—a "one-stop shopping" approach. Of course, a big concern is that SFX is almost worse than Ticketmaster in that a large number of businesses will be unable to compete with the large-scale events and ticketing devices.

In the end, the consumer ultimately controls the market. If consumers were less willing to pay for events at any cost, then companies like Ticketmaster and SFX would not be able to sustain their dominance for so long. But at least for now, efficiency seems more important to the consumer than price. Ticketmaster has succeeded because a consumer can purchase a ticket online, view where they are sitting, and link to a similar site all at the same time. Any competitor wanting to displace Ticketmaster will have to provide at least that much to attract any substantial number of consumers. After all, while the Campos decision did not allow consumers to directly sue Ticketmaster for damages, consumers are still able to sue for injunctive relief if they choose to do so. The fact that the plaintiffs in Campus did not pursue that option is a testament to the apathy many feel in connection with the ticketing industry. Competitors who have been complaining for the past ten years about Ticketmaster will also have to be more aggressive and innovative in their approach to needs in the market. Ticketmaster was able to takeover Ticketron because of innovation and increased efficiency in the method of ticket distribution offered to consumers. Since "consumer friendliness" is the objective, making it easier for consumer to retrieve tickets may be the wave of the future. Ticketmaster pioneered the most efficient way to purchase tickets; a system allowing consumers to print tickets from home could be the next big move in the industry. It should come as no surprise then that Ticketmaster, along with rival Tickets.com, is currently working on providing such a service to consumers. [FN169]

A more drastic solution, but perhaps a necessary one, is to eliminate exclusive dealing agreements from the ticket distribution industry altogether. Exclusive dealing agreements, while not illegal, are technically unfair to

those competitors who do not operate their businesses on such a large-scale. Granted, the venues with which Ticketmaster has exclusive agreements were not necessarily strong-armed into these agreements. And to Ticketmaster's credit, it has generally provided the best service to consumers, while providing venues service equipment, terminals, and monetary benefits in exchange for the ability to be the sole distributor for their events. Nevertheless, if venues were able to switch companies when they grew dissatisfied with particular distribution services, it would give smaller competitors the opportunity to get into the ticketing game much sooner. Venues should be allowed to enter into a contract with a distributor that works for them, without having to stipulate that it will not hire someone else for several years, even if they are dissatisfied with the service.

For now, however, the bottom line is that Ticketmaster continues to dominate because it builds the best mousetrap, so to speak. High service charges are simply a byproduct of marketing efficiency—one that consumers appear willing, if not always happy, to accept. The emergence of new competitors in the marketplace will test whether this compromise remains a viable one in the future. Just as Ticketron was eliminated by Ticketmaster in the early 1990's, it is quite possible for other entities to threaten Ticketmaster's dominance as well. Ultimately, only time will tell if Ticketmaster's reign has come to an end and what the future holds for the entire ticket distribution industry—and for the millions of music, sports, and theater fans it purports to serve.

The Proper Aims of Antitrust?

As recent high-profile telecommunications mergers have spawned more support for increased antitrust regulation, old debates about the true purpose of antitrust regulation have returned in kind. Whom do antitrust laws strive to protect? When should that protection properly displace normal market forces? And to what extent? At times, there seems to be a different set of answers from each theorist confronting these questions.

Some commentators argue that instead of helping consumers, most antitrust laws only hurt in the long run. Others argue that antitrust regulation was never intended to protect consumers at all. Instead, they contend, such laws were intended to shield some firms from the efficiency of other large firms— completely eliminating the consumer from the equation. [FN1] Still others place consumer concerns at the forefront, claiming that antitrust is necessary to break up market concentration and to achieve maximum competitive benefits for the consumer. [FN2]

Responding to this debate, one school of though rejects the legitimacy of antitrust regulation altogether. Critical of the ambiguity inherent in factors used to justify regulatory interference, members of the Austrian School of Economics believe that "real-world departures from perfect competition [are] not necessarily examples of market failure, nor [do] such departures rationalize antitrust intervention." [FN3] For instance, these scholars point to the inevitable problems involved with trying to measure abstract concepts such as "monopoly power" or "social loss." They suggest that, rather than summarily concluding monopoly power exists where large firms exist, "business organizations [with] above-normal profits [are] simply more efficient at managing risk, discovering preferences, and reducing costs over the long run." [FN4] As a result, the Austrian School argues that antitrust regulations unambiguously lower the efficiency of the market process and thus should be repealed.

On one hand, this sort of extremism seems to provide little in the way of practical guidance for antitrust analysis. On the other hand, however, theories such as that advocated by the Austrian School may lend some insight into the troubles with properly administering the regulations currently in place. Thus, while repealing the Sherman and Clayton Acts might ultimately be as unwise as it is unlikely, continued attention to divergent opinions about the proper aims of antitrust law is necessary to ensure that some sort of efficiency concerns are applied to

the decisions to enforce those laws as they are to the subjects of enforcement themselves.

[FN1]. Lessley Anderson, *Tickets! Please*, THE INDUSTRY STANDARD, Oct. 4, 1999, at 3.

[FN2]. See id. at 1.

[FN3]. Id.

[FN4]. Id.

[FN5]. Eric Boehlert, *Ticketmaster is Under Fire; How David Became The Industry's Goliath*, BILLBOARD, July 9, 1994, at 2.

[FN6]. See id.

[FN7]. Id.

[FN8]. See id.

[FN9]. See id. at 1.

[FN10]. See id. at 2. ("Ticketmaster set out to improve [the] system so that all tickets, drawn from the same computers, would be availbe at satellite locations as well as the box office. The move represented a marked improvement for customers.").

[FN11]. See Boehlert, *supra* note 5, at 3.

[FN12]. See id.

[FN13]. See id.

[FN14]. See id. at 4.

[FN15]. See id. at 5.

[FN16]. Id.

[FN17]. See Boehlert, *supra* note 5, at 6 ("A 1991 survey by the New York State Consumer Protection Board found that fees vary widely, with some climbing as high as 55% of the ticket price.")

[FN18]. See *Ticket Distribution Industry: Hearings on Pearl Jam's Antitrust Complaint: Questions About Concert, Sports, and Theatre Ticket Handling Charges and Other Practices Before the Subcomm. on Information, Justice, Transportation and Agriculture of the House Comm. on Government Operations*, 103rd Cong., 2d Sess. 18 (1994) (statement of Tim Collins, manager of rock and roll band Aerosmith).

[FN19]. Matthew K. Finkelstein & Colleen Lagan, *"Not for You"; Only for Ticketmaster: Do Ticketmaster's Exclusive Agreements with Concert Venues Violate Federal Antitrust Law?*, 10 ST. JOHN'S J. LEGAL COMMENT 403, 417 (1995).

[FN20]. See id. at 430 n. 192.

[FN21]. See Boehlert, *supra* note 5.

[FN22]. 1 THE ANTITRUST IMPULSE: AN ECONOMIC, HISTORICAL, AND LEGAL ANALYSIS 606 (Theodore P. Kovaleff ed. 1994).

[FN23]. 15 U.S.C. § 1 (1994).

[FN24]. Kovaleff, *supra* note 22, at 608.

[FN25]. See Kovaleff, *supra* note 22, at 611 n.22. (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940)).

[FN26]. Id. at 612.

[FN27]. Id. at 613.

[FN28]. See 15 U.S.C. § 1 (1994) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.").

[FN29]. 1 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REG. (MB)))))) § 12.01 (2d ed. 1996 & Supp. 2000).

[FN30]. In Standard Oil Co. v. United States, 221 U.S. 1 (1911), the Court specifically held that only unreasonable restraints are prohibited by Section 1. Interestingly, in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), the Court seemed to initially adopt the position that the Sherman Act prohibits every agreement that restrains trade, no matter the form of the restraint, its purpose or effect. 1 VON KALINOWSKI, *supra* note 29, at § 12.01.

[FN31]. See 15 U.S.C. § 2 (1994) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court.").

[FN32]. See id.

[FN33]. See id.

[FN34]. 2 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REG. (MB)))))) § 25.02 (2d ed. 1996 & Supp. 2000). Additionally, a private plaintiff seeking damages also must demonstrate "antitrust injury" caused by the monopolization. The ban against monopoly applies to buyers, as well as to sellers. The offense of unlawfully obtaining monopoly power by buyers is known as monopsony. Id.

[FN35]. While the language of Section 2 establishes the substantive offense of monopolization, that Section does not define the offense. Nor does any other Section of the Sherman Act provide a definition. Some commentators have opined that Congress intentionally chose not to draft an antimonopoly statute that delineated the types of conduct outlawed. These commentators believe Congress purposely drafted a broad statute, whose meaning would be provided by the courts in light of the evils at which the legislation was aimed, in order to prevent creative monopolists from escaping liability by adopting even new forms of combinations or anticompetitive conduct. The Supreme Court has agreed with this view. The courts, therefore, have had to define the offense and the elements of actual monopolization, as well as of the other Section 2 offenses, attempts and conspiracies to monopolize. 2 VON KALINOWSKI, *supra* note 34, at § 25.01.

[FN36]. See United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[FN37]. See Advanced Health-Care Servs. v. Radford Community Hosp., 910 F.2d 139, 147 (4th Cir. 1990).

[FN38]. See Kovaleff, *supra* note 22, at 1011.

[FN39]. Wanda Jane Rogers, *Beyond Economic Theory: A Model For Analyzing the Antitrust Implications of Exclusive Dealing Arrangements*, 45 DUKE L.J. 1009, 1015 (1996).

[FN40]. See Kovaleff, *supra* note 22, at 1015.

[FN41]. Id.; But see id. at 1019 ("But because the new economic exonerations of market dominance are logically flawed and lacking in empirical support, the supposed economic case against section 2 is largely weightless.").

[FN42]. See id. at 1015.

[FN43]. Id.

[FN44]. See Tampa Elec. Co. v. Nashville Coal Co. 365 U.S. 320 (1961).

[FN45]. See Brown Shoe Co. v. United States, 370 U.S. 294, 297 (1962); United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 379-81 (1956).

[FN46]. Tampa Elec. Co., 365 U.S. at 327.

[FN47]. E.I. Du Pont de Nemours, 351 U.S. 377.

[FN48]. Id. at 378.

[FN49]. Id. at 404. ("No more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce", monopolization of which may be illegal."); Id. at 395.

[FN50]. Id. ("The Supreme Court held that cellophane's interchangeability with other materials sufficed to make it a part of the flexible packaging material market and that the manufacturer of cellophane lacked monopoly control over that market.").

[FN51]. See Int'l Boxing Club of New York v. U.S., 358 U.S. 242, 251 (1959).

[FN52]. Id. at 249.

[FN53]. Id. at 249-50.

[FN54]. NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 111 (1984).

[FN55]. Matthew K. Finkelstein & Colleen Lagan, *"Not for You"; Only for Ticketmaster: Do Ticketmaster's Exclusive Agreements with Concert Venues Violate Federal Antitrust Law?*, 10 ST. JOHN'S J. LEGAL COMMENT 403, 417 (1995).

[FN56]. Id. at 418.

[FN57]. Id. at 419.

[FN58]. Rogers, *supra* note 39, at 1037. See also Tampa Elec. Co., 365 U.S. at 327.

[FN59]. See American Football League v. National Football League, 323 F.2d 124, 129 (4th Cir. 1963) (stating "[i]f the relevant market [for professional football teams] is not limited to [New York, Dallas, San Francisco/Oakland and Los Angeles], it must be, geographically, at least as broad as the United States ...").

[FN60]. See Brown Shoe, 370 U.S. at 327.

[FN61]. 1 VON KALINOWSKI, *supra* note 29, at § 12.01.

[FN62]. E.I. Du Pont de Nemours & Co., 351 U.S. 377; See also Standard Oil, 221 U.S. at 51.

[FN63]. E.I. Du Pont de Nemours & Co., 351 U.S. at 390; See also Standard Oil, 221 U.S. 1.

[FN64]. Id. (quoting debates on the definition of "monopoly" in 21 Cong. Rec. 3151).

[FN65]. Finkelstein, *supra* note 55, at 403.

[FN66]. Rogers, *supra* note 39, at 1015 (1996).

[FN67]. See id. at 1018.

[FN68]. See 38 Stat. 730 § 3 (1913) (Clayton Act).

[FN69]. See id.

[FN70]. United States Healthcare v. Healthsource, Inc., 986 F.2d 589, 595 (1st Cir. 1993).

[FN71]. See Rogers, *supra* note 39, at 1019.

[FN72]. See Standard Oil Co. v. United States, 337 U.S. 293 (1949). This case is also known as "Standard Stations".

[FN73]. Id. at 314.

[FN74]. Id.

[FN75]. See Tampa Elec. Co., 365 U.S. 320. The Supreme Court adopted a test in order to detrermined whether execlusive dealing contracts "foreclose competition in a substantial share of the line of commerce affected" in a relevant market. Id. at 327.

[FN76]. See Rogers, *supra* note 39, at 1024.

[FN77]. See Tampa Electric Co., 365 U.S. at 329.

[FN78]. See id. at 328.

[FN79]. See Rogers, *supra* note 39, at 1033.

[FN80]. See id.

[FN81]. Id.

[FN82]. Lessley Anderson. *Tickets! Please*, THE INDUSTRY STANDARD. Oct. 4, 1999, at 1.

[FN83]. Memorandum of Pearl Jam to the Antitrust Division of the United States Department of Justice Concerning Anticompetitive Actions Engaged in by Ticketmater Holdings Group Ltd. (May 6, 1994) [hereinafter May Memorandum]; Richard C. Reuben, *Ticketmaster in a Jam: Rock Group, Lawsuits Claim Antitrust Violations*, 80 A.B.A. J. 17 (1994).

[FN84]. Matthew A. Ryen. Comment, *Jamming Ticketmaster: Defining the Relevant Market in the Pearl Jam-Ticketmaster Controversy*, 4 COMMLAW CONSPECTUS 119, 124 (1996).

[FN85]. See Reuben, *supra* note 83, at 17.

[FN86]. See *Ticket Distribution Industry: Hearings on Pearl Jam's Antitrust Complaint: Questions About Concert, Sports, and Theatre Ticket Handling Charges and Other Practices Before the Subcomm. on Information, Justice, Transportation and Agriculture of the House Comm. on Government Operations*, 103rd Cong., 2d Sess. 18 (1994) (statement of Chuck Morris, president of Morris, Bleitner and Associates).

[FN87]. See Ryen, *supra* note 84, at 120.

[FN88]. See id. at 121.

[FN89]. Id. at 122 (quoting Chuck Philips, *Bill Would Require Ticket Fee Disclosures*, L.A. TIMES. Aug. 12, 1994. D4.).

[FN90]. Id. at 122. See also 15 U.S.C. § 2 (1994) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ...").

[FN91]. 15 U.S.C. §2 (1994)

[FN92]. See Ryen, *supra* note 84, at 122-23.

[FN93]. See id. at 123.

[FN94]. See id.

[FN95]. See id. at 124.

[FN96]. See Ryen, *supra* note 84, at 124 (citing Luria Bros. & Co. v. F.T.C., 389 F.2d 847, 860 (3d Cir. 1968), *cert. denied*, 393 U.S. 829 (1968)).

[FN97]. See Ryen, *supra* note 84, at 124.

[FN98]. See *Ticket Distribution Industry: Hearings on Pearl Jam's Antitrust Complaint: Questions About Concert, Sports, and Theatre Ticket Handling Charges and Other Practices Before the Subcomm. on Information, Justice, Transportation and Agriculture of the House Comm. on Government Operations*, 103rd Cong., 2d Sess. 18 (1994) (statement of Gary Condit, Subcommittee Chairman).

[FN99]. See Ryen, *supra* note 84, at 124.

[FN100]. Campos v. Ticketmaster Corp, 140 F.3d 1166 (1998), *cert. denied*, 525 U.S. 1102 (1999).

[FN101]. See id. at 1168.

[FN102]. See id.

[FN103]. See id.

[FN104]. Id.

[FN105]. See id.

[FN106]. See Campos, 140 F.3d at 1168.

[FN107]. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[FN108]. See Campos, 140 F.3d at 1169.

[FN109]. See id.

[FN110]. See id. at 1170.

[FN111]. See id.

[FN112]. See id. at 1171.

[FN113]. Campos, 140 F.3d at 1171.

[FN114]. See id.

[FN115]. See id. at 1170

[FN116]. See id. at 1172.

[FN117]. See id.

[FN118]. See id. at 1173.

[FN119]. 15 U.S.C. § 22 (1994); see also U.S. v. Scophony Corp., 333 U.S. 795, 808 (1948) ("The practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character' [is] the test of venue.") (quoting Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 373 (1927)).

[FN120]. See Campos v. Ticketmaster Corp., 525 U.S. 1102 (1999).

[FN121]. See *Company Town Justices Reject Lawsuit Against Ticketmaster Consumers: Supreme Court, Finding that Buyers Have No Clam to Damages, Leaves Earlier Ruling Intact*, L.A. TIMES. Jan. 20 1999. C5 (reporting the outcome of Campos, 140 F.3d 1166, *cert. denied*, 525 U.S. 1102).

[FN122]. See id.

[FN123]. Id.

[FN124]. See Anthony Ramirez, *Ticketmaster's Mr. Tough Guy*, L.A. TIMES, Nov. 6, 1994. S3 ("History repeats itself," said Laurence F. Schwartz, founder of Hill Arts and Entertainment Systems, which sells ticketing software to Ticketmaster rivals. Ticketmaster, with 1970's technology, defeated Ticketron, which had 1960's technology. And people like us, with our more advanced technology, will defeat Ticketmaster by the year 2000.").

[FN125]. See Kovaleff, *supra* note 22, at 1030; see also id. at 1031 ("Section 2 worked best against a fading but still profitable dominant firm, which has committed evident abuses and is inept in its defense, when the prosecution and judges are unusually competent, and when a clear and easy basis for remedy exists.").

[FN126]. Anderson, *supra* note 1, at 1.

[FN127]. See id. at 2.

[FN128]. Id.

[FN129]. See id.

[FN130]. See id.

[FN131]. See id.

[FN132]. Jennifer Couzin, *Two Tickets to Paradise*, THE STANDARD, May 30, 2000, at 1.

[FN133]. Anderson, *supra* note 1, at 4.

[FN134]. See id.

[FN135]. Id.

[FN136]. Id.

[FN137]. Entertainment/Business Editors, *Tickets.com Pioneers Virtual Wristbands to Improve Ticket Distribution for High Demand Concerts*, BUSINESS WIRE, Oct. 6, 1999, at 1.

[FN138]. See id. at 1.

[FN139]. Ted Drozdowski, *SFX Entertainment is Buying Up the Nation's Concert Industry. What Will the Slide Toward Rock Monopoly Mean for Those Who Play--and Go See--Live Music?*, THE BOSTON PHOENIX, Mar. 23, 1998, at 1.

[FN140]. See id.

[FN141]. See id. at 2.

[FN142]. See id. at 3.

[FN143]. See id.

[FN144]. Id.

[FN145]. Drozdowski, *supra* note 139, at 4.

[FN146]. See also *Clear Channel to Buy SFX for about $3.3 Billion*, CHICAGO SUN-TIMES. Feb. 29, 2000, at Financial 4.

[FN147]. Id.

[FN148]. Id.

[FN149]. Drozdowski, *supra* note 139, at 13.

[FN150]. See id.

[FN151]. See id.

[FN152]. See id.

[FN153]. Kevin E. Stern, *The High Cost of Convenience: Antitrust Law Violations in the Computerized Ticketing Services Industry*, 16 HASTINGS COMM. & ENT. L.J. 349, 355 (1994).

[FN154]. See id.

[FN155]. See id.

[FN156]. Anderson, *supra* note 1, at 4.

[FN157]. Id.

[FN158]. See id.

[FN159]. See id.

[FN160]. See id. at 6.

[FN161]. See id.

[FN162]. Brian Garrity, *Internet Upstarts Find Lawsuits the Price of Success*, IPO REPORTER, Aug. 23, 1999, at 1.

[FN163]. *Ticketmaster Sues Microsoft over Web Site Link*, MEDIA DAILY, Apr. 29, 1997, at 1.

[FN164]. Kovaleff, *supra* note 22, at 974.

[FN165]. Id. at 975.

[FN166]. See id. ("Consumer policy is not only the logical but the indispensable complement of antitrust in an overall open market policy.").

[FN167]. Id.

[FN168]. Id.

[FN169]. Couzin, *supra* note 132, at 2.

[FN1]. D.T. Armentano, *Ideas on Liberty* (visited Feb. 2, 2000) <http:// www.fee.org/freeman/94/Armentano.html>.

[FN2]. See id. at 1.

[FN3]. Id. at 3.

[FN4]. Id. at 4.
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ATTACHMENT 2

IN THE TENNESSEE COURT OF APPEALS
FOR THE MIDDLE SECTION
AT NASHVILLE

SAUNDRA J. COUNCE, R.N. Plaintiff-Appellant, v. ASCENSION HEALTH; SETON CORPORATION; SAINT THOMAS HEALTH SERVICES; and BAPTIST HOSPITAL, Defendants-Appellees.	)	Case No.: M2009-00741-COA-R3-CV

DEFENDANTS/APPELLEES' BRIEF

On appeal from Davidson County Circuit Court, Case No. 06 C 2137, the Honorable Judge Hamilton Gayden

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I. STATEMENT OF THE ISSUE PRESENTED

The dispositive issue presented for our review is whether the trial court erred by awarding Summary Judgment to Ascension Health; Seton Corporation; Saint Thomas Health Services; and Baptist Hospital.

II. STATEMENT OF THE CASE

Appellant/Ms. Counce, Sandra Counce (hereinafter "Ms. Counce") filed a lawsuit against Baptist, Ascension Health and St. Thomas Health Services on November 2, 2005 (the "Lawsuit"). (R. Vol I, p. 1). In the Lawsuit, alleging that Defendants were liable to her under the following causes of action relating to her termination of employment on November 2, 2005: (i) retaliatory discharge/wrongful termination; (ii) negligent hiring; (iii) implied contract exception; (iv) good faith exception; (v) public policy exception; (vi) age discrimination; (vii) sexual harassment; (viii) victim of favoritism; (ix) wage and hour laws; (x) racial discrimination; (xi) Americans with Disabilities Act; and (xii) libel. See (R. Vol. I, p. 1).

All Defendants filed a Motion for Summary Judgment on May 1, 2009 requesting that the trial court dismiss all of Ms. Counce's claims in full. (R. Vol. II, p. 167-283; Vol. III, p. 284-420). After a hearing held on October 17, 2008, the Court granted Defendants' Motion on November 12, 2008 and issued several findings of fact. (R. Vol. VII, p. 870) (R. Vol. XI, pp. 1604-1605). Ms. Counce filed a Motion to Alter or Amend the Judgment (R. Vol. VII, p. 876, 1046) which was denied by the Court on March 13, 2009 (R. Vol. XI, pp. 1563-1567). Ms. Counce subsequently filed her Notice of Appeal on April 6, 2009, requesting that this Court reverse the trial court's decision and overturn the dismissal of her action. (R. Vol. XI, p. 1568).

III. THE STANDARD OF REVIEW

The standards governing appellate review of the trial court's rulings of law on summary judgment are well settled. This Court reviews an award of summary judgment de novo, with no presumption of correctness afforded to the trial court. Guy v. Mut. of Omaha Ins. Co., 79 S.W.3d 528, 534 (Tenn. 2002).

Summary judgment is appropriate only when the moving party can demonstrate that there are no disputed issues of material fact, and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn.1993). The party moving for summary judgment must affirmatively negate an essential element of the nonmoving party's claim, or conclusively establish an affirmative defense. McCarley v. West Quality Food Serv., 960 S.W.2d 585, 588 (Tenn.1998). In determining whether to award summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. Staples v. CBL & Assocs., 15 S.W.3d 83, 89 (Tenn.2000). The court should award summary judgment only when a reasonable person could reach only one conclusion based on the facts and the inferences drawn from those facts. Id.

IV. STATEMENT OF FACTS

A. THE PARTIES

In January 2002, Baptist Hospital and Saint Thomas Hospital merged and, as a result of the merger, both organizations became subsidiaries of Saint Thomas Health Services. (R. Vol. IV, p. 421). Baptist Hospital ("Baptist") is one of five facilities that are members of the Saint Thomas Health Services Network. Id. Saint Thomas Health Services is a member of Ascension Health. Id. At all times relevant to this lawsuit, Ms. Counce was an employee of Baptist Hospital. (R. Vol. IV, p. 422).

B. MS. COUNCE'S EMPLOYMENT HISTORY

Appellant/Plaintiff Saundra Counce began her employment with Baptist in August 2004 as a registered nurse. (R. Vol. IV, p. 422). Prior to working at Baptist, Ms. Counce had worked as a nurse for four other hospitals. (R. Vol. IV, p. 423). She has been a Registered Nurse serving in Intensive Care Units since 1972. (R. Vol. IV, p. 423). Ms. Counce was interviewed for her position at Baptist by Esther Hoover, who at that time was the Clinical Nurse Manager. (R. Vol. IV, p. 423). Ms. Counce worked in five units as a part of her employment with Baptist. (R. Vol. IV, p. 423). Most of these areas were supervised by Ms. Hoover. Specifically Ms. Counce worked in the coronary care unit, the medical ICU, the neuro ICU, surgical ICU and step-down ICU. (R. Vol. IV, p. 424).

Ms. Counce's resume indicated that her areas of proficiency were ICU, ITCU, CCU, PACU, MCCU, Telemetry and ER. (R. Vol. IV, p. 424). Ms. Counce was hired into the Flexpool at the Hospital which meant that she worked on an *as needed basis*, such that if a particular unit was short-handed, the Hospital would contact someone in the Flexpool. (R. Vol. IV, p. 424). Ms. Counce could have gone to any of the units in the Hospital on any particular day. She was not prescheduled into any specific area. (R. Vol. IV, p. 424).

After Ms. Counce began her employment she received a 90-day evaluation. (R. Vol. IV, p. 425, 460, 469-475). In this evaluation, Ms. Counce received scores of 1 out of 2 which, pursuant to the terms in the evaluation, indicated there was an opportunity for improvement in the following areas:

> Performs and documents assessments/reassessments of patients using appropriate age specific techniques thoroughly, accurately and in a timely manner.
>
> Assesses patients continuing care needs in preparation for discharge.
>
> Documents patient assessment, physician orders, and patient care precisely, clearly and in a systematic nature in the patient record.
>
> Verifies patient/family's understanding of education provided.
>
> Functions independently with treatments, procedures and equipment appropriate to the area as evidenced by adherence to established policy and procedure.
>
> Appropriately selects and utilizes computerized, manual and telecommunication systems to prioritize, document and communicate all pertinent information accurately and in a timely manner.
>
> Adheres to hospital and departmental education and meeting requirements.
>
> Shows creativity and innovation in development solutions to problems and improving the work process actively participates in and supports the Performance Improvement process and continually seeks to reduce costs while maintaining quality.
>
> Works to build strong relationships with all members of the healthcare team and serves as a preceptor/resource person.

(R. Vol. IV, p. 425). Ms. Counce received a score of 86 out of a possible 100. (R. Vol. IV, p. 426). As a part of her employment, Ms. Counce signed an RN Premium Pay Agreement which is designed to help the Hospital meet the operating needs of nursing units. (Id.). Nurses working these plans provide experienced personnel to meet short-term staffing needs when full or part-

time staff is unavailable. (Id.). Work availability is not guaranteed under the plan and the plan employees work at a premium rate of pay in lieu of benefits. (Id.). The Premium Pay Agreement is not a contract but an agreement that when work is available and Ms. Counce is engaged to work, she would be paid a premium rate for her services. (R. Vol. IV, p. 427).

Ms. Counce was placed on orientation (a staff development period where a person begins his or employment and adjusts to the hospital's working requirements) when she began working at Baptist making a salary of $18.00 per hour. (Id.). At the completion of her orientation, Ms. Counce received $28.00 per hour pursuant to the Premium Pay Agreement. (Id.). Ms. Counce was supervised by the Flex Pool Manager Terri Graves as well as Esther Hoover, who was the Clinical Nurse Manager of several of the units through which Ms. Counce rotated. (R. Vol. IV, p. 428, 460) (R. Vol. II, p. 171, 182-182).

1. September 2005 Associate Conference Report

During Ms. Counce's employment, several of the issues raised in her 90-day evaluation resurfaced as issues. (Id.). On September 13, 2005, Ms. Counce was informed by Clinical Manager Esther Hoover and Float Pool Manager, Terri Graves that she was being placed on probation effective September 19, 2005 to December 19, 2005 for unsatisfactory work performance. (Id.). The issues discussed with Ms. Counce were detailed in a written Associate Conference Report. (Id.). The probation stemmed in part from a verbal warning Ms. Counce had been given in April 2005 by a charge nurse in MICU regarding charting omissions. (R. Vol. IV, p. 429). It also stemmed from other issues that had come to their attention and other incidents in August and September of 2005 that had come to light. (Id.). The patients listed as examples in this Report experienced charting and serious medication errors for which Ms. Counce was accountable. (R. Vol. IV, p. 430). The violations were serious omissions and infractions in violation of several nursing standards. They also compromised patient safety. Underwood (Id.).

As a part of the September 13, 2005 Associate Conference Report, Ms. Counce was given performance improvement objectives. She was also informed that she would return to staff development for a period of time and would be paid the lower staff development pay rate. (Id.). Ms. Counce was also informed that failure to improve her performance could result in further disciplinary action, up to an including termination of employment. (R. Vol. IV, p. 431).

Staff members and employees are always instructed to keep disciplinary procedures confidential to avoid third-party interference with disciplinary process. (Id.). The confidential instruction was given in this case as well. Ms. Counce was allowed to write written comments on the September 13, 2005 Associate Conference Report and she wrote the following: "Thank you very much for the opportunity to show my dedication to my fellow employees." (R. Vol. IV, p. 432). As a result of her performance, Ms. Counce's salary was reduced to the rate that it was during her orientation at the Hospital a year before--$18.00 per hour. (Id.). The September 13, 2005 Report was signed by both Ms. Hoover and Ms. Graves. (Id.).

2. November 2005 Associate Conference Report

After Ms. Counce was placed back in orientation, she still did not demonstrate the level of competency required of registered nurses at Baptist. (Id.). Specifically, (1) verbal orders were not written for changes in medication, (2) Ms. Counce had difficulty with titration of drips, (3) there were issues with problems with multi-tasking and priority setting, (4) statements that Ms. Counce made that she was always assigned the easiest patients, (5) Ms. Counce was unfamiliar with bedside monitors and could not operate them with ease, (6) Ms. Counce gave inappropriate information to family concerning swelling of hands and restraints, (7) Ms. Counce repeatedly asked same questions of both preceptors and (8) the preceptors were never comfortable leaving patient in Ms. Counce's total care. (R. Vol. IV, p. 433). Based on the foregoing, Ms. Counce's employment was terminated with Baptist via letter dated November 2,

2005. (R. Vol. IV, p. 434). This letter was signed by both Ms. Hoover and Ms. Graves and outlined the issues listed above. (Id. at 434, 458-463); (R. Vol. II, pp. 273-275).

3. **Aftermath Of Ms. Counce's Termination**

Ms. Counce indicated on the November 2, 2005 Associate Conference Report that she would provide a follow-up comment to the report by the following Wednesday. (Id.). After her termination, Ms. Counce went to the Human Resources department and met with Martha Underwood who explained the appeal process to her. (Id.). Ms. Underwood asked to see the paperwork that she had been given during the termination process and provided Ms. Counce with the Problem Resolution policy. (R. Vol. IV, p. 435). Ms. Underwood explained that after Ms. Counce brought her appeal she would pass it along to Susan Jones, the Associate Chief Nursing Officer, who would review it. (Id.). On November 7, 2008, when asked by Ms. Underwood if she had something related to the appeal, Ms. Counce stated she could only speak with Liz Johnson, the Chief Nursing Officer. (Id.). Ms. Underwood explained that the appeal would need to go through her first then go to Susan Jones as they had previously discussed. (R. Vol. IV, p. 436). Initially, Ms. Counce refused to turn in the appeal. Ms. Johnson, Ms. Underwood and Ms. Jones explained the appeals process to Ms. Counce. (Id.). Ms. Counce was told again that the appeal should go to Ms. Jones first. Ms. Counce finally turned over the appeal and explained that Ms. Johnson was the only Christian woman at Baptist and she knew she could trust her. (Id.).

4. **Ms. Counce's Addendum To November 2005 Report**

Ms. Counce's internal appeal of the Associate Conference Report was dated November 8, 2005.[1] (R. Vol. IV, p. 437, 458-463). For the first time in the internal appeal, Ms. Counce raised issues related to alleged discrimination . (Id.). Notably, prior to her termination and even after she was placed on probation in September 2005, Ms. Counce never alleged discrimination. (Id.). Ms. Counce has also complained about her salary reduction for the first time on appeal. (R. Vol. IV, p. 438, 458-463).

While Ms. Counce raised concerns with one of her co-workers (Diane Cooper) and conversations that she had with Esther Hoover regarding Ms. Cooper in her internal appeal, she did not raise these issues prior to her termination. (Id.) (R. Vol. II, p. 269). Ms. Counce lists "quotes from associates" as a part of the evidence supporting the internal appeal. (R. Vol. IV, p. 438-439; (R. vol. II, p. 215-216). However, the Record reveals that this "evidence" is based solely on her memory and not any written summary or materials that she received from any employees. (Id). Ms. Counce also indicates in her internal appeal that Terri Graves (the Flexpool Manager, who signed both the September and November 2005 Reports), was "in no way involved in any wrongdoing, whatsoever." (Id.)

Ms. Counce's internal appeal also referenced conversations that she allegedly had with Employee Counselor, Pat Hutchinson. (Id.). Ms. Hutchinson approached Ms. Underwood with concerns about a reference that Ms. Counce had made to a meeting with Ms. Hutchinson on November 7, 2005 in her appeal. (R. Vol. IV, p. 440). Ms. Hutchinson felt the information in the internal appeal was incorrect and sent a reply to Ms. Counce on this subject. (Id.). Ms. Hutchinson's email to Ms. Counce sets forth statements within Ms. Counce's November

[1] The letter mistakenly references "2003" instead of 2005, however a review of the letter leaves no doubt that it pertains to the November 2, 2005 Associate Conference Report.

2005 internal appeal with which Ms. Hutchinson took issue. (Id.). The copy of Ms. Counce's addendum to the internal appeal received by Martha Underwood did not contain the suggested changes of Ms. Hutchinson. (R. Vol. IV, p. 441, 458-463).

5. Response To Ms. Counce's Addendum

Ms. Underwood turned over Ms. Counce's written response to her termination to Susan Jones, the Associate Chief Nurse Officer. (Id.). Ms. Jones made a review of Ms. Counce's written response as well as all other information related to Ms. Counce's termination and issued a written decision dated November 15, 2005. (Id.). Based on her review, Ms. Jones made the decision to uphold the termination. (R. Vol. IV, p. 442). Ms. Jones upheld the termination because Ms. Counce had not demonstrated the necessary proficiency required for safe patient care, under Baptist's internal standards, nor the Tennessee Board of Nursing standards. (Id.).

6. Ms. Counce's Disability Allegation

On Friday, November 18, 2005—over ten days after her termination, Ms. Counce submitted a Disability Internal Grievance Form ("Grievance") to the Baptist Section 504 Coordinator, Martha Underwood. (Id.). In her Grievance, Ms. Counce alleged that she was discharged for asking questions about screens and pathways on the computer. (R. Vol. IV, p. 443). Ms. Underwood sent Ms. Counce a written response to her Grievance on December 1, 2005 explaining that she should provide a complete description of the factual basis for the Grievance and any supporting documentation within seven days of Ms. Underwood's letter. (Id.). Ms. Counce submitted a letter to Ms. Underwood dated December 15, 2005 explaining that she had a problem with the font selection used at Baptist. (Id.). Ms. Underwood reviewed Ms. Counce's letter and provided a written response on December 27, 2005. (Id.). Ms. Underwood informed Ms. Counce that upon careful review of her Grievance, the Hospital found no evidence of disability discrimination. (Id.). Ms. Underwood also informed Ms. Counce that at

no point during her employment with Baptist did she notify her supervisor or anyone in Human Resources that she had a physical or mental limitation for which she needed an accommodation. (R. Vol. IV, pp. 443-444). Ms. Underwood also reminded Ms. Counce that she never indicated any limitation during any conferences with her supervisor regarding performance problems or regarding her discharge. (R. Vol. IV, p. 444).

C. MS. COUNCE'S CHARGE OF DISCRIMINATION

Ms. Counce filed a Charge of Discrimination with the Tennessee Human Rights Commission on May 16, 2006 naming only Baptist in the Charge of Discrimination. (R. Vol. IV, p. 444). Ms. Counce signed her charge of discrimination and declared under penalty of perjury that the information contained within was true and correct. (R. Vol. IV, p. 445). Ms. Counce's claim of discrimination was limited to the following:

> On August 5, 2005 a new nurse supervisor was rude to me by cutting me off when I was asking her important questions about the particular ICU I had been assigned. She raised her voice impatiently and angrily in front of the staff. I reported her behavior to the Flexpool supervisor, who reported it to the Supervisor of ICU. They apologized for the supervisor and stated it would not happen again. Everything was wonderful until I reported rude and unkind behavior of a supervisor. On September 7, 2005, in MICU, we were short of nurses because of Hurricane Katrina. The patient load was enough but Diane Cooper was causing unnecessary diversion of my attention to the necessary work, she focused on me and my every move. I noticed she was hyperactive and agitated. On September 19, 2005, I was called in for counseling. Ms. Hoover had audited my charts and found deficiencies as far back as April 2005. I was placed in reorientation. When asked where I would like to go for the reorientation, I said SICU or NICU, Ms. Hoover placed me back in MICU. I suggested that Ms. Hooper get a drug screen on Ms. Cooper. On November 3, 2005 I was terminated.

(Id.). The Investigator handling Ms. Counce's claim issued a recommendation dismissing the charge two days later. (R. Vol. IV, p. 447).

V. ARGUMENT

A. SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04. Summary judgment is proper in virtually any civil case that can be resolved on the basis of legal issues alone. See Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993).

"The party seeking a summary judgment bears the burden of demonstrating that no genuine dispute of material fact exists and that it is entitled to a judgment as a matter of law." Ferguson v. Nationwide Prop. & Cas. Ins. Co., 218 S.W.3d 42, 48 (Tenn. Ct. App. 2006) (citing Shadrick v. Coker, 963 S.W.2d 726, 731 (Tenn. 1998)). To be entitled to summary judgment, the movant must carry the initial burden of convincing the court that there are no genuine material factual disputes. Byrd, 847 S.W.2d at 214. To do this, the movant must either: (1) affirmatively negate an essential element of the non-moving party's claim; or (2) illustrate that the non-moving party cannot prove an essential element of its claim. Hannan v. Alltell Publ'g Co., 270 S.W.3d 1, 8-9 (Tenn. 2008).

Once the movant makes a properly supported motion, the burden shifts to the non-moving party to show with specificity that there are disputed material facts that need to be determined by a trier of fact and that warrant a trial. Byrd, 847 S.W.2d at 215. "Mere conclusory generalizations will not suffice." Ferguson, 218 S.W.3d at 48 (citing Cawood v. Davis, 680 S.W.2d 795, 796-97 (Tenn. Ct. App. 1984)). In order for there to be a genuine triable issue of material fact, the non-moving party must properly introduce evidence upon which a reasonable trier of fact could legitimately resolve in favor of the non-moving party. Byrd, 847

S.W.2d at 215. Absent such a showing, summary judgment in favor of the movant is appropriate. Id.

Applying this standard here, the Court is entitled to uphold the finding of summary judgment in favor of Defendants as a matter of law because there are no genuine issues of material fact, and Ms. Counce cannot put forth any evidence to prove that any exist.

B. THE TRIAL COURT CORRECTLY HELD THAT DEFENDANTS ASCENSION AND SAINT THOMAS HEALTH SERVICES WERE NOT PROPER DEFENDANTS AND SHOULD BE DISMISSED FROM THIS LAWSUIT.

1. Ascension and Saint Thomas Health Services are not employers for purposes of Ms. Counce's claims.

Ascension and Saint Thomas Health Services are not employers for purposes of Ms. Counce's claims. (R. Vol. 1, p. 69). Ms. Counce's checks were signed by Seton Corporation d/b/a Baptist. (R. Vol. II, p. 171). Ms. Counce did not file separate charges of discrimination against either Saint Thomas or Ascension prior to filing her lawsuit: (Id.). In sum, Ms. Counce cannot offer any evidence to contradict the fact that her only employer was Baptist Hospital. Thus, Ascension and Saint Thomas Health Services should be dismissed from this lawsuit with prejudice.

2. Ms. Counce failed to exhaust her administrative remedies with respect to Defendants Ascension and Saint Thomas Health Services.

Ms. Counce does not indicate in her Complaint whether or not she is asserting a cause of action under Title VII of the Civil Rights Act of 1964, as amended or the Tennessee Human Right Act. The Tennessee state legislature intended for the THRA "to be coextensive with federal law." Parker v. Warren County Util. Dist., 2 S.W.3d 170, 172 (Tenn. 1999); see also Bredesen v. Tenn. Judicial Selection Comm'n, 214 S.W.3d 419, 430 (Tenn. 2007). Further, "[t]he policy of interpreting the THRA coextensively with Title VII is predicated upon a desire to maintain continuity between state and federal law." Parker, 2 S.W.3d at 173; see also

Campbell v. Fla. Steel Corp., 919 S.W.2d 26, 31 (Tenn.1996); Allen v. McPhee, 240 S.W.3d 803 (Tenn. 2007).

Generally, in order to satisfy the prerequisites to an employment discrimination action, a claimant must: (1) file a timely charge of discrimination with the Equal Employment Opportunity Commission (EEOC); and (2) receive and act upon the EEOC's notice of right to sue. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq. Sain v. American Red Cross, 233 F.Supp.2d 923, 927 (S.D. Ohio 2002). Under principles of administrative exhaustion, judicial employment discrimination complaint must be limited to the scope of the Equal Employment Opportunity Commission (EEOC) investigation reasonably expected to grow out of the charge of discrimination. Civil Rights Act of 1964, § 706(d), as amended, 42 U.S.C.A. § 2000e-5(e).

Ms. Counce has explicitly made a claim under the Age Discrimination in Employment Act ("ADEA") which clearly has an administrative exhaustion requirement. 29 U.S.C. § 626(d) provides in pertinent part:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed ... within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 626(d). "The purpose of the longer [300 day] limitation period is to give deferral states time to act upon the ADEA complaint, in accordance with Congress's intent that "informal methods of conciliation, conference, and persuasion" be used to eliminate the discriminatory practice before an action is initiated in the courts." Jackson v. Richards Medical Co., 961 F.2d 575, 578 (6th Cir.1992) (quoting 29 U.S.C. § 626(b) (1985)). Tennessee is a deferral state. T.C.A. § 4-21-101 (1991).

The Record is clear that Ms. Counce did not file a separate charge or joint charge against Defendants Ascension and Saint Thomas Health Services. (R. Vol. II, p. 171). Her charge was filed solely against Defendant Baptist on May 16, 2006. The latest date listed in her charge for the last date of discriminatory activity was November 3, 2005, which would make the time for filing a charge no later than August 30, 2006. (Id.). Thus any claims under Title VII or the ADEA that Ms. Counce is alleging that require exhaustion of administrative remedies would not be applicable to Defendants Ascension and Saint Thomas Health Services since they never were named in or defended themselves in an administrative charge filed by Ms. Counce. Thus all claims brought under statutes requiring administrative exhaustion should be dismissed against Defendants Ascension and Saint Thomas Health Services.

C. THE TRIAL COURT CORRECTLY HELD THAT MS. COUNCE CANNOT ESTABLISH A *PRIMA FACIE* CASE OF RETALIATION[2]

In order to establish a *prima facie* case of retaliatory discharge under the THRA or Title VII, a plaintiff must prove the following:[3] (1) the plaintiff engaged in a protected activity; (2) the exercise of the plaintiff's protected civil rights was known to the defendant; (3) the defendant thereafter took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. Haynes v. Knoxville Utilities Bd., No. 03A01-9209-CH-362, 1993 WL 104639, at *2 (Tenn. App. April 8,

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[2] The Court should note that Ms. Counce's charge of discrimination does not list race as a basis for discrimination. The box "national origin" is checked instead. Ms. Counce's claim of race discrimination should be dismissed for failure to exhaust administrative remedies in addition to the other reasons set forth within this Memorandum.

[3] To prevail on a claim of *common law* retaliatory discharge, an employee must prove (1) that an at-will employment relationship existed between the employee and the employer, (2) that the employee was discharged, (3) that the employee was discharged for attempting to exercise a statutory or constitutional right, or for any other reason that violates a clear public policy, and (4) that such action was a substantial factor in the employer's decision to discharge the employee. See Bright v. MMS Knoxville, Inc., No. M2005-02668-COA-R3-CV, 2007 WL 2262018, *3 (Tenn. Ct. App. Aug. 7, 2007); Guy v. Mut. of Omaha Ins. Co., 79 S.W.3d at 535; see also Anderson v. Standard Register Co., 857 S.W.2d 555, 557-58 (Tenn. 1993). To the extent Ms. Counce is making a claim under the common law, her claim for retaliatory discharge should also be dismissed for the reasons set forth above.

1993) (copy attached); see also Canitia v. Yellow Freight Sys., Inc., 903 F.2d 1064, 1066 (6th Cir.1990), *cert. denied,* 498 U.S. 984, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990) (holding that a plaintiff must prove these same four elements to establish a retaliatory discharge in violation of Title VII).

Once a plaintiff establishes a *prima facie* case of retaliation, the burden of production shifts to the defendant to "articulate some legitimate, non discriminatory reason ..." for discharging the plaintiff. Canitia, 903 F.2d at 1066 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973)). The burden then shifts back to the plaintiff to demonstrate that the employer's proffered reason for termination was merely pretextual and that the adverse employment decision was motivated by a desire to retaliate against the employee. Canitia, 903 F.2d at 1066. A plaintiff may present direct evidence of a causal link in order to meet this request. Thomason v. Better-Bilt Aluminum Prods., Inc., 831 S.W.2d 291, 293 (Tenn. App. 1992). To maintain action for retaliatory discharge, employee must present evidence that his exercise of protected rights was causally related to his subsequent discharge, and employee cannot meet this burden merely by showing that his participation in protected activity was followed by a discharge from employment, even where the proximity in time between the two events is very short. Austin v. Shelby County Government, 3 S.W.3d 474, 481 (Tenn. Ct. App. 1999).

1. Ms. Counce never engaged in protected activity.

Ms. Counce provides a detailed explanation of the "report" that she made that she contends supports her claim for retaliatory discharge. (R. Vol. II, p. 171). Ms. Counce's argument is that because she reported the rudeness of one of her coworkers, her charts were audited, triggering her reorientation. (Id.). In her Appellate Brief, Ms. Counce alleges for the first time that she reported the theft of drugs and use of drugs by Diane Cooper and that she was

discriminated against because of this report. See Appellant Brief, at p. 3. Ms. Counce's EEOC Charge, however referenced reports about Ms. Cooper "needing a drug screen" *after* she was already placed back into orientation. (R. Vol. II, p. 171). More importantly, Ms. Counce's Complaint, which is the basis of this appeal, makes no such specific allegation and Ms. Counce does not reference it directly in her deposition testimony when specifically asked the bases for her claims of retaliation. (Id.).

Ms. Counce testified that Ms. Cooper had no patience with her and always seemed agitated with her because of Ms. Counce's difficulties working with complex patients. (Id.). However, at no time has Ms. Counce referenced reporting or alleged drug theft or abuse, or made reference to seeing Ms. Cooper "shooting it into herself' as she now alleges in her Appellant Brief. (Id.). Ms. Counce has never before made any allegations about Ms. Cooper related to her retaliation claim. More importantly, Ms. Counce has provided no basis for any court to find a violation of her rights based on an alleged report of illegal activity and certainly has not provided any evidence to show that the legitimate, nondiscriminatory reason raised by Defendants for her termination is pretextual.

As indicated in the deposition testimony and other evidence in the Record , Ms. Counce's retaliation claimed stemmed solely from a report of rude behavior by Tara Boyd. (R. Vol. IV, pp. 516-518). Ms. Counce has not provided any evidence of a causal connection between any alleged report of Ms. Boyd or her allegations related to Ms. Cooper. Ms. Counce cannot allege facts in her Appellate Brief that were not raised in the trial court. See generally Heatherly v. Merrimack Mutual Fire Ins. Co., 43 S.W.3d 911, 916 (Tenn.Ct.App.2000) ("As a general matter, appellate courts will decline to consider issues raised for the first time on appeal that were not raised and considered in the trial court.").

Ms. Counce's basis for her claim of retaliatory discharge is not based on a protected activity. At most this claim is based on Ms. Counce's lack of appreciation for how a coworker spoke to her. Tennessee courts are clear that "**disagreement with a management style alone, without evidence of a discriminatory intent or motive, no matter how disagreeable that style may be, is simply insufficient to warrant protection under the THRA.**" Frye v. St. Thomas Health Services, 227 S.W.3d 595, 609 (Tenn. Ct. App. 2007) (emphasis added).

Since Ms. Counce was not engaged in protected activity, she also fails to meet the second prong of the *prima facie* case for retaliatory discharge as there was no exercise of any protected civil right that was known to the Defendant Baptist.

2. Ms. Counce cannot establish causal connection between any protected activity and her termination.

The justification for Ms. Counce's termination was clearly set forth in the September 13, 2005 Associate Conference Report which listed several instances where charting or other medical errors had been made by Ms. Counce during the course of her employment. (R. Vol. IV, pp. 428-430). Ms. Counce's response to that report was not that she felt retaliated against but the following: "Thank you very much for the opportunity to show my dedication to my fellow employees." (R. Vol. IV, p. 432). The November 2, 2005 Associate Conference Report detailing the reasons for her termination is based on Ms. Counce's failure to perform as directed under the September 2005 report. (R. Vol. IV, p. 422, SUMF, at ¶ 34). Ms. Counce's failure to perform as directed is a legitimate, nondiscriminatory justification for her termination. Ms. Counce has provided no basis of showing that those reasons are pretext for discrimination based on age, sex, race, disability or any other reason. While the act of reporting the rudeness of a supervisor is not a "protected activity," even if the Court applied the test to that act, Ms. Counce has no evidence that there was a causal connection between reporting the rudeness of Tara Boyd and her subsequent termination. Even if the Court were to consider Ms. Counce's new claim that

she reported drug use of a coworker, she presented no evidence of any causal connection between her termination and any report that she allegedly made. Her claim for retaliatory discharge is thus without merit and was properly dismissed.

D. THE TRIAL COURT CORRECTLY HELD THAT BAPTIST DISPLAYED NO NEGLIGENCE IN HIRING ESTHER HOOVER.

Ms. Counce is unable to state a claim for negligent hiring with respect to any of her supervisors and specifically to named supervisor, Esther Hoover. The Tennessee Court of Appeals delineated the three elements that a plaintiff must prove in order to recover under a theory of negligent hiring: "(1) evidence of unfitness for the particular job, (2) evidence that the applicant for employment, if hired, would pose an unreasonable risk to others, (3) evidence that the prospective employee knew or should have known that the historical criminality of the applicant would likely be repetitive." Gates v McQuiddy Office Prods., No. 02A01-9410-CV-00240, 1995 WL 650128, at *2 (Tenn. Ct. App. Nov 2, 1995); Phipps v. Walker, No. 03A01-9508-CV-00294, 1996 WL 155258, at *3. (Tenn. Ct. App. Apr. 4, 1996). The "risk" referred to must be foreseeable:

> Foreseeability is the test of negligence. If the injury [that] occurred could not have been reasonably foreseen, the duty of care does not arise, and even though the act of the defendant in fact caused the injury, there is no negligence and no liability. (citation omitted) "[T]he plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote possibility, and that some action within the [defendant's] power more probably than not would have prevented the injury." (citation omitted) Foreseeability must be determined as of the time of the acts of omissions claimed to be negligent.

Doe v Linder Const. Co., Inc., 845 S.W.2d 173, 178 (Tenn. 1992) (citations omitted). "[N]egligent hiring arises only when a particular unfitness of a job applicant creates a danger of harm to third persons which the employer should have known...." Borg v. J.P. Morgan Chase &

Co., No. 04-2874 MI/V, 2006 WL 2052856, at 11 (W.D. Tenn. July 21, 2006) (Tenn. Ct. App. Nov. 2, 1995) (R. Vol. III).

Ms. Counce has provided no evidence to support a claim for negligent hiring and cannot meet the three elements set forth in Tennessee law to substantiate this claim. Ms. Counce's Complaint makes a generic statement that "agents" of the hospital have demonstrated that they are untrained on hospital policies. (R. Vol. I, p. 1). In her deposition, she admits that the only person she is claiming was negligently hired was Esther Hoover. (R. Vol. II, p. 171). Thus, Ms. Counce's deposition testimony about disliking how Ms. Hoover disciplined her is the sole basis for the claim of negligent hiring. Testimony that Ms. Hoover did not discipline Ms. Counce in the way that she would have liked (1) does not constitute evidence that Ms. Hoover was unfit for her job, (2) that Ms. Hoover posed an unreasonable risk to others and (3) that there was any historical criminality on the part of Ms. Hoover that Baptist should have been aware of in hiring her. Ms. Counce alleges no criminality whatsoever. Ms. Counce's claim fails to meet the required standard for a negligent hiring claim and was properly dismissed.

E. THE TRIAL COURT CORRECTLY HELD THAT MS. COUNCE FAILED TO SET FORTH A RECOGNIZABLE CLAIM FOR "IMPLIED CONTRACT EXCEPTION" OR BREACH OF IMPLIED CONTRACT UNDER TENNESSEE LAW.

Ms. Counce's implied contract claim fails as she has produced no evidence of the existence of any contract with any of the Defendants, specifically with her employer Defendant Baptist. Tennessee court have held, "that a contract can be expressed, implied, written, or oral, but an enforceable contract must, among other elements, result from a meeting of the minds and must be sufficiently definite to be enforced." Lay v. Fairfield Development, 929 S.W.2d 352, 356 (Tenn. App. 1996) (citing Johnson v. Central National Ins. Co. of Omaha, Neb., 210 Tenn. 24, 356 S.W.2d 277, 281 (1962); Price v. Mercury Supply Co., Inc., 682 S.W.2d 924 (Tenn.

App. 1984)). Further, "the contemplated mutual assent and meeting of the minds cannot be accomplished by the unilateral action of one party, nor can it be accomplished by an ambiguous course of dealing between the two parties from which differing inferences regarding continuation or modification of the original contract might reasonably be drawn." Id. at 356. ("In addition, a mere expression of intent or a general willingness to do something does not amount to an 'offer.'") (citing Talley v. Curtis, 23 Tenn. App. 181, 129 S.W.2d 1099 (1939)).

Ms. Counce's Complaint alleges "Implied Contract Exception" as a cause of action, however Defendants are unaware of the existence of such a claim or the elements to prove such a claim under Tennessee law. To the extent Ms. Counce is making a claim for breach of contract, her own deposition testimony clearly shows that she is unable to state a viable claim based on the first prong of the test. (R. Vol. IV, p. 423). Ms. Counce argues that the implied contract was based on Ms. Hoover saying the following to her in response to Ms. Counce not having the critical care class for RNs: "Don't be offended that you will not be receiving the more complex patients." (R. Vol. II, p. 171). When she started working at Baptist she worked in five units, one of them being the MICU. (R. Vol. IV, p. 424). In fact, she had being working in the MICU among other departments prior to the September 7, 2005 date that she lists in her complaint as the date of breach of the alleged implied contract. (R. Vol. 1); (R. Vol. II, p. 171). Her Complaint is not related to the numerous other instances where she worked in MICU but purely based on being assigned there on September 7, 2005. (R. Vol. II, p. 171, Counce Depo. at 120:13-19). Ms. Counce is unable to provide evidence that there was a meeting of the minds or mutual assent with respect to her not being hired to do complex ICU work, especially in light of her own resume which touts her areas of proficiency as ICU, ITCU, CCU, PACU, MCCU, Telemetry and ER. (R. Vol. IV, p. 424). Further, Ms. Counce's own testimony fails to provide any evidence that her employment was conditioned on not getting complex ICU assignments, as

evidenced by her statements that she worked complex ICU on several occasions after she was hired---she only had a problem on September 7, 2005. Based on the foregoing, Ms. Counce's claim for implied contract exception or breach of contract was properly dismissed by the Trial Court.

F. THE TRIAL COURT CORRECTLY HELD THAT MS. COUNCE IS UNABLE TO STATE A CLAIM OF BREACH OF GOOD FAITH AND FAIR DEALING.

Ms. Counce's Complaint alleges "Good Faith Exception" as a cause of action, however Defendants are unaware of the existence of such a claim or the elements to prove such a claim under Tennessee law. To the extent Ms. Counce is making a claim for breach of the implied duty of good faith and fair dealing, such a claim fails as a matter of law because there is no cause of action for breach of the implied duty of good faith and fair dealing in situations involving the discharge of employment of an at-will employee. see Randolph v. Dominion Bank, 826 S.W.2d 477, 479 (Tenn. Ct. App. 1991)(holding that employers do not breach implied duty of good faith and fair dealing when they discharge employee-at-will)(citing Whittaker v. Care-More, Inc., 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981)). Employees-at-will have no contract right or expectation of continued, indefinite employment because they can be terminated at any time for any reason. Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 858 (Tenn. 2002); Baines v. Wilson County, 86 S.W.3d 575, 578 (Tenn. Ct. App. 2002). Ms. Counce was an at-will employee who was not hired for any particular duration. (R. Vol. II, p. 171, Counce Depo., Ex. 1 (*Employment Application)*). Accordingly, because Tennessee does not recognize a claim for breach of the implied duty of good faith and fair dealing with respect to the discharge of at-will employees, Ms. Counce's claim fails as a matter of law and was properly dismissed.

G. THE TRIAL COURT CORRECTLY HELD THAT MS. COUNCE CANNOT ESTABLISH THE ELEMENTS NECESSARY TO SUPPORT A CLAIM PURSUANT TO T.C.A. § 50-1-304 OR THE COMMON LAW.

Ms. Counce's Complaint merely states a claim for "Violation of the Public Policy Exception" as a cause of action without delineating between the common law or whether she is asserting a claim under the Tennessee Public Protection Act. (R. Vol. 1, p. 1). Based on her own testimony Ms. Counce cannot state a claim under either the common law or the statute.

Under Tennessee Code Annotated § 50-1-304, commonly referred to as the whistleblower statute, an employee is protected from being discharged for refusing to remain silent about illegal activities. The pertinent language of Tenn. Code Ann. § 50-1-304(a) reads: "No employee shall be discharged or terminated ***solely*** for refusing to participate in, or for refusing to remain silent about, illegal activities."(emphasis added). "Illegal activities" are defined as "activities which are in **violation of the criminal or civil code of this state or of the United States**, or of **any regulation intended to protect the public health, safety, or welfare**." Tenn. Code Ann. § 50-1-304(b) (emphasis added). In Griggs v. Coca-Cola Employees' Credit Union, 909 F. Supp. 1059 (E.D. Tenn. 1995), the court codified the four elements needed to state a *prima facie* case under the Statute:

> (1) the plaintiff's status as an employee of the defendant;
>
> (2) the plaintiff's refusal to participate in, or to remain silent about, illegal activities;
>
> (3) the employer's discharge of the employee; and
>
> (4) an exclusive causal relationship between the plaintiff's refusal to participate in or remain silent about illegal activities and the employer's termination of the employee.

See also Hill v. Perrigo of Tenn., No. M2000-02452-COA-R3-CV, 2001 WL 694479, at *3 (Tenn. Ct. App., 2001) (R. Vol. III). It is clear that in order to satisfy the burden of proof in this

matter, the employee must refuse to remain silent or participate in illegal activity. Additionally, a fear of dismissal must necessarily play a role in a plaintiff's decision to report allegedly illegal activities. Finally, this report must be the sole cause of the decision to terminate Ms. Counce.

According to the Tennessee Supreme Court, the only meaningful distinction between the statutory and the common law cause of action relevant here is that under a common law theory, a plaintiff need only show that the alleged whistleblowing activities were a "substantial factor in" rather than the "sole cause" of the termination. See generally, Guy v. Mutual Omaha Insurance Co., 79 S.W.3d 528 (Tenn. 2002). Defendants contend that Ms. Counce cannot establish a claim under the Statute or common law because Ms. Counce has not sufficiently alleged and cannot satisfy the essential elements of either claim. Those essential elements are the second element: the plaintiff's refusal to participate in, or to remain silent about, illegal activities, and the fourth element: an exclusive causal relationship between the plaintiff's refusal to participate in or remain silent about illegal activities and the employer's termination of the employee.

1. **Ms. Counce cannot show that she reported or refused to remain silent about illegal activity within the meaning of the Statute or common law.**

As established with respect to her claim of retaliatory discharge, there was no protected activity. Here, under the public policy exception, the standard is even higher as the employee must refuse to remain silent or participate in illegal activity. Being rude to a fellow employee is not an "illegal activity" under the tenets of the statute or common law.

Ms. Counce's argument that some notion of public offensiveness supports her claim is erroneous and misguided. The whistleblower statute and the common law action are not premised on notions of generalized public welfare. Rather, both actions require a contextualized exploration of the "illegal activity" and the relationship between the employer and the employee where this activity is concerned. A general allegation of an act serving the public good does not allow a claim to proceed. Rather, Ms. Counce is required to show that there were illegal actions

being perpetrated by her employer and that her report of such led to her termination. Here, Ms. Counce cannot show that her employer was involved in any illegal activity.

2. **Ms. Counce cannot establish an exclusive causal relationship between her refusal to participate in or remain silent about illegal activities and the employer's termination of the employee.**

As established above, Ms. Counce must show that the report of illegal activity was the sole cause (under the Statute) or a substantial factor (under the common law) to support a whistleblower action. See generally Guy v. Mutual Omaha Insurance Co., 79 S.W.2d 528 (Tenn. 2002). The justification for Ms. Counce's termination was clearly set forth in the September 13, 2005 Associate Conference Report which listed several instances where charting or other medical errors had been made by Ms. Counce during the course of her employment, and in the subsequent November 2005 report terminating her employment for the continued problems. (R. Vol. II, p. 269-275). Ms. Counce has no other evidence to counter this justification and no evidence showing that her report of the rude behavior of a coworker was the sole or substantial factor related to her termination or any other discipline that she received. According to Tennessee case law, Ms. Counce would have needed to have a fear of dismissal contemporaneous with her decision of reporting information. Ms. Counce never mentioned such a fear even in her response to the September 13, 2005 Associate Conference Report in which she thanked the individuals completing her report, which took place a month after she raised an issue about Tara Boyd. (R. Vol. 1, p. 1); (R. Vol. II, p. 171, 269-275); (R. Vol. IV, p. 432). Based on the foregoing, Ms. Counce is unable to meet her burden under a common law or statutory theory of public policy and thus her claim was properly dismissed.

II. THE TRIAL COURT CORRECTLY HELD THAT MS. COUNCE COULD NOT ESTABLISH A *PRIMA FACIE* CASE OF AGE DISCRIMINATION.

Ms. Counce explicitly states that she is claiming age discrimination under the Age Discrimination in Employment Act ("ADEA"). In order to prevail in an age discrimination

claim under the ADEA, a complainant must generally show (1) membership in the group of persons protected under the ADEA (i.e., persons age 40 or over); (2) that the complainant was subjected to an adverse employment action; and (3) that the complainant was disadvantaged in favor of a younger person. Simpson v. Midland-Ross Corp., 823 F.2d 937 (6th Cir. 1987). The younger person need not be outside the protected group, but must be sufficiently younger than the complainant to permit an inference of discrimination. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 313 (1966). Tennessee Courts have applied the four-step "McDonnell Douglas Test" to evaluate whether or not a person could establish a *prima facie* case of age discrimination. See Moore v. Nashville Elec. Power Bd., 72 S.W.3d 643 (Tenn. Ct. App. 2001).[4]

In the instant matter, Ms. Counce will likely be able to show that she is in the protected age group under the ADEA and was terminated so she will be able to meet the showing of an adverse action. Ms. Counce fails to meet the third prong of the *prima facie* case that she was disadvantaged in favor of a younger person. Ms. Counce does not even have evidence that a younger person received any benefit that she did not receive. She does not even allege that she asked for a benefit not given to a younger individual. The crux of her claim is that she wanted to attend the Vanderbilt critical care class for RNs and that her supervisor kept sending younger nurses. (R. Vol. II, p. 171, Counce Depo. at 123:5-10). When asked the identity of those younger nurses, Ms. Counce testified, **"I don't know their names."** (R. Vol. II, p. 171, Counce Depo. at 123:13). When asked the ages of the individuals she claimed attended the class she testified that she did not know their ages for a fact but instead offered a guess. (R. Vol. II, p.

[4] Under the Tennessee Human Rights Act, Ms. Counce would have to show the following in order to establish a prima facie case of age discrimination: (1) she was at least 40 years of age at the time of the alleged discrimination ("a member of a protected class"); (2) she was subjected to adverse employment action; (3) she was qualified for the position; and (4) she was replaced by a younger person. Moore, 72 S.W.3d 652.

171, Counce Depo. at 124:6-12). She admits however, that her supervisor never made any comments to her about her age. (R. Vol. II, p. 171, Counce Depo. at 124:24).

In further support of her age claim, Ms. Counce argues that she was not offered a position in another part of the hospital and was not given opportunity to resign without fault. (R. Vol. II, p. 171, Counce Depo. at 125:16-24), (R. Vol. I, p. 1). She fails, however, to provide any evidence or basis that younger nurses were given those opportunities over her and that she was disadvantaged. She admits that she never asked to be transferred to another department. (R. Vol. II, p. 171, Counce Depo. at 142:24-25;143:1-9). Her Complaint merely states that these things were not "offered" to her. (R. Vol. I, p. 1). For the foregoing reason, Ms. Counce's age claim must fail.

Even if the Court looks beyond the *prima facie* case, Ms. Counce cannot show that Defendant Baptist's legitimate, non-discriminatory reasons for her termination are merely a pretext for age discrimination. See Monette, 90 F.3d at 1186. Defendant Baptist clearly outlined Ms. Counce's deficiencies when it provided with an Associate Conference Report on September 13, 2005 and placed her on probation. Ms. Counce did not make any allegations based on age discrimination at that time and never made such allegations to Human Resources prior to her termination. (R. Vol. IV, p. 458).

Ms. Counce has offered no evidence that the reasons for her discipline and termination were merely pretext for discrimination. Ms. Counce is required to show pretext by proving that: 1) Defendant Baptist's proffered reason has no basis in fact; 2) the stated reason did not actually motivate its decision; or 3) the reason was never used in the past. See Smith v. Chrysler Corp., 155 F.3d 799, 805-06 (6th Cir. 1996); Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 883 (6th Cir. 1996). Ms. Counce cannot, however, rely on mere allegations and/or her subjective belief that she was discriminated against in order to survive summary judgment. See Mitchell v. Toledo

Hosp., 964 F.2d 577, 585 (6th Cir. 1992) (stating that plaintiff's denial of legitimate reason for employment action without substantiation of the denial is legally insufficient to survive motion for summary judgment); see also Hartsel v. Keys, 87 F.3d 795, 802 (6th Cir. 1996); Betkerur v. Aultman Hosp. Ass'n., 78 F.3d 1079, 1085 (6th Cir. 1996).

Furthermore, Ms. Counce cannot merely rely on the allegations made in her Complaint to survive summary judgment. See Celotex Corp., 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)(stating "[r]ule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves"). Ms. Counce bears the burden of coming forward with some objective evidence, beyond mere allegations, that would support a reasonable finding that she was discriminated against based on her age. Because Ms. Counce has offered no evidence beyond her subjective allegation of discrimination, Ms. Counce cannot show that Baptist's legitimate non-discriminatory reasons for her discipline and termination were merely a pretext for age discrimination. Therefore, Defendants were properly entitled to summary judgment as a matter of law with respect to this claim.

I. THE TRIAL COURT CORRECTLY HELD THAT MS. COUNCE IS UNABLE TO ESTABLISH SAME-SEX SEXUAL HARASSMENT UNDER TITLE VII AND HER CLAIM SHOULD BE DISMISSED.

a. Framework for Title VII Same-Sex Sexual Harassment Cases

Ms. Counce's claim of sexual harassment fails as it based on comments and behavior allegedly made by a female coworker to a group of employees about her personal life. (R. Vol. II, p. 171, Counce Depo. at 132-134), (R. Vol. 1, p. 1, ¶ 45). In order to establish same-sex sexual harassment under Title VII[5], Ms. Counce must show that: (1) she is a member of a

[5] Ms. Counce does not indicate whether her claim is under Title VII or based on the THRA. The Tennessee state legislature intended for the THRA "to be coextensive with federal law." Parker v. Warren County Util. Dist., 2

protected class, (2) she was subjected to unwelcome sexual harassment, (3) the harassment was based on her sex, (4) the harassment created a hostile work environment, and (5) the employer failed to take reasonable steps to prevent and correct any sexually harassing behavior. See Bowman v. Shawnee State Univ., 220 F.3d 456, 462-63 (6th Cir.2000). If Ms. Counce fails to satisfy any one of these elements, Ms. Counce's sexual harassment claim fails as a matter of law. Id.

The United States Supreme Court addressed the issue of same-sex harassment in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). The Court in reviewing Oncale's allegations held that Title VII's text indicates that the critical inquiry is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Id. (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295) (1993)). The Court explained "whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination **because of sex.**" Oncale, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (emphasis added). The Oncale Court further illustrated circumstances under which an employee might be able to prove that she was "exposed to disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed" by providing the following examples: (1) in the case of same-sex harassment, the harasser making sexual proposals to the plaintiff is homosexual; (2) a female victim is harassed in "such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace;" or (3) the plaintiff could offer "direct

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S.W.3d 170, 172 (Tenn.1999). Thus to the extent her claim are based on the THRA or Title VII, they should be dismissed under both statutes.

comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." Id.

The Sixth Circuit has similarly analyzed claims of same-sex harassment. EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001). The Harbert-Yeargin case involved a male employee who claimed he had been subjected to various forms of lewd and gross conduct by a male supervisor. Id. at 501-502. This conducted consisted of touching, poking and prodding in the plaintiff's genital areas. Id. The Sixth Circuit acknowledged the vulgar nature of the conduct but found that Title VII was intended only to prevent discrimination or animus against gender in the workplace, not sexually hostile work environments. Id. at 520. ("If the environment is just sexually hostile without an element of gender discrimination, it is not actionable."). See also Johnson v. Hondo, Inc., 125 F.3d 408 (7th Cir. 1997) ("Besides the sexual content of the remarks there is absolutely nothing in this record that supports a reasonable inference that the remarks were directed at plaintiff on account of his gender. Although explicit sexual content or vulgarity may often take a fact finder a long way toward concluding that harassing comments were in fact based on gender . . . this need not necessarily be the case."); English v. Pohanka of Chantilly, *Inc.*, 190 F. Supp. 2d 833 (E.D. Va. 2002) (holding that a male employee could not rely on the sexual nature of co-worker's conduct to establish harassment "because of sex," "absent some plausible evidence that conduct was driven by hostility to male employees.")

b. Ms. Counce Is Unable To Show That The Alleged Harassment Was Sexual In Nature Or Sufficiently Severe And Pervasive To Form A Valid Harassment Claim.

Ms. Counce's claim of sexual harassment fails because the harassment Ms. Counce alleges is not sexual in nature and, if even considered sexual, falls far short of severe and pervasive harassment as required by the law. The United States Supreme Court in Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367 (1993) reaffirmed that "conduct that is not

severe or pervasive enough to create an objectively hostile or abusive work environment---an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." Id. at 23. The environment at issue must be one that a reasonable person would perceive as being hostile or abusive. Id. The Sixth Circuit has held that "isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms or conditions of employment." Bowman v. Shawnee State University, 220 F.3d 456, 463 (6th Cir. 2000) (citing Morris v. Oldham County Fiscal Court, 201 F.3d 784, 790 (6th Cir.2000)).

Ms. Counce's specific claims of harassment are that she believes one her coworker was homosexual and she felt that this coworker discussed homosexuality with the entire staff and she did not like it. (R. Vol. II, p. 171, Counce Depo. at pp. 132-134). She claims that Diane Cooper was impatient with the staff particularly if she felt an employee did not agree with her alleged "homosexual views." (R. Vol. II, p. 171, Counce Depo. at 134). Ms. Counce also indicated she never expressed an opinion one way or the other on the issue of homosexuality. (R. Vol. II, p. 171, Counce Depo. at p. 132).

None of the foregoing allegations, even if true, have anything to do with sex or sexual connotations involving Ms. Counce or anyone else. Ms. Counce claims that these alleged discussion about homosexuality were not directed at her personally but were discussions that the entire staff would have heard. Ms. Counce cannot show any pervasive or abusive sexual behavior by Defendants and her sexual harassment claim fails for this reason alone.

c. Ms. Counce Cannot Establish Harassment "Because of Sex".

In addition, Ms. Counce cannot establish a *prima facie* case because she cannot establish that she was subjected to sexual harassment because of her gender. In order to prove that the alleged harassment she endured was "because of sex," Ms. Counce would have to show that her supervisor was homosexual, that other female employees were harassed in such sex-specific and

derogatory terms by her supervisor as to make it clear that her supervisor was motivated by general hostility to the presence of women in the workplace or that her supervisor treated women comparatively worse than men. Oncale, 523 U.S.75, 118 S.Ct. 998, 140 L.Ed.2d 201.

Ms. Counce cannot establish any of the above – she has no evidence that her gender played any role in the alleged harassment. As described above, Ms. Counce claims the following in support of her sexual harassment claim—that Ms. Cooper subjected her to stories about her views on homosexuality and that she heard about fights between Ms. Cooper an alleged significant other. (R. Vol. II, p. 171, Counce Depo. at 132-134). All of these allegations, even if taken as true, are insufficient to demonstrate Ms. Counce was harassed "because of her sex." Ms. Counce has offered no evidence that her gender played any role in the alleged harassing acts committed by Ms. Cooper. Ms. Counce's claim of sexual harassment fails for this reason as well and thus was properly dismissed by the Trial Court.

J. THE TRIAL COURT CORRECTLY HELD THAT MS. COUNCE'S CLAIM FOR FAVORITISM FAILS TO SET FORTH A RECOGNIZABLE CLAIM UNDER TENNESSEE LAW.

Ms. Counce has alleged a cause of action for Favoritism which Defendants submit is not an actual cause of action. (R. Vol. 1, p. 7). A search of the relevant law finds that in remote circumstances some plaintiffs would be able to state a claim for "Sexual Favoritism," however the factual basis to support such a claim does not exist in this case since Ms. Counce's sexual harassment cause of action is not based on conduct directed towards Ms. Counce individually based on her sex. As such this non-existent cause of action was properly dismissed.

K. THE TRIAL COURT CORRECTLY HELD THAT MS. COUNCE'S ALLEGATIONS FAIL TO SET FORTH A RECOGNIZABLE CLAIM FOR VIOLATION OF WAGE AND HOUR LAWS UNDER TENNESSEE OR FEDERAL LAW.

Ms. Counce's Complaint states that "wage and hour laws may have been violated" with respect to her employment. (R. Vol. 1, p. 1, Complaint, ¶ 47). Ms. Counce does not state what wage and hour laws have been violated, whether they are state or federal. She makes no allegation of any failure of Baptist to comply with hourly wage and overtime provisions. Ms. Counce cites that she was placed in re-orientation and her pay was reduced. (R. Vol. 1, p. 1, Complaint, ¶ 47). Ms. Counce's own Complaint admits the basis for the change in pay. (Id.) Further, Ms. Counce's pay during her orientation period was $18.00 per hour. (R. Vol. IV, p. 427, ¶ 17). When she was placed back on reorientation as a part of the September 13, 2005 Associate Conference Report, she was informed that she would be receiving the salary of a person in orientation and therefore her pay was changed to reflect the salary at that time. (R. Vol. IV, p. 432, ¶ 32).

Ms. Counce's response to the September 13, 2005 Associate Conference Report in which the reorientation was ordered, was the following: "Thank you very much for the opportunity to show my dedication to my fellow employees." (R. Vol. IV, p. 432, ¶ 31; R. Vol. II, p. 269-272). Ms. Counce makes no claim or allegation protesting being placed in reorientation or having her pay changed to reflect her change in job status. Ms. Counce has not stated a claim of violation of wage and hour laws and this claim was properly dismissed.

L. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFF CANNOT ESTABLISH A *PRIMA FACIE* CASE OF RACE DISCRIMINATION.

Ms. Counce has alleged race discrimination in her employment but fails to state a *prima facie* case for such discrimination or to disprove Defendant Baptist's legitimate,

nondiscriminatory reason for any actions taken against her.[6] In McDonnell Douglas Corp v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), the Supreme Court set forth a methodology for evaluating evidence in discrimination cases. In Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981), the Supreme Court summarized the McDonnell Douglas methodology as follows: First, a plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employees rejection", ... Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but was a pretext for discrimination. 450 U.S. at 252-53.

Under McDonnell Douglas, Ms. Counce can meet her burden of establishing a *prima facie* case of race discrimination by satisfying the following elements: (1) that she belongs to a protected class; (2) that she performed her job satisfactorily; (3) that she suffered an adverse action; and (4) a comparable non-protected person was treated better. McDonnell Douglas, 411 U.S. at 802; Mitchell v. Toledo Hospital, 964 F.2d 577, 582-83 (6th Cir. 1992).

Ms. Counce's race claim essentially is that she wanted a meeting with Chief Nursing Officer, Liz Johnson to discuss the Associate Conference Report that she received in September 2005 and that Ms. Johnson refused to physically meet with her. (R. Vol. 1, p. 1, Complaint, ¶ 48). Martha Underwood, the Human Resources Director at Baptist, also corroborates that Ms. Counce wanted to meet with Ms. Johnson as a part of her appeal, but was told that the proper

[6] Ms. Counce's charge of discrimination filed solely against Baptist did not list race discrimination as a basis for her charge. Her claim should thus be dismissed on this basis alone. Further, Ms. Counce did not state in her Complaint whether her claim was based on Title VII or under the THRA. Since the analysis under both is similar, Defendants submit she is unable to state a claim under both statutes.

procedure was to have the Assistant CNO, Susan Jones review her appeal first. (R. Vol. IV, p. 435-436, ¶¶ 42, 44). Ms. Counce eventually turned over her written comments related to her termination. Susan Jones eventually received and reviewed Ms. Counce concerns. (R. Vol. IV, p. 441, ¶¶ 60-61). Ms. Counce alleges that Ms. Johnson, an African-American female allowed an African-American nurse to voice a complaint about a personal matter and that Ms. Counce was not allowed to do so. (R. Vol. II, p. 171, Counce Depo. at 150-152). Her complaint is not that her issues were not reviewed, but that she did not get a chance to talk to Ms. Johnson personally. (R. Vol. II, p. 171, Counce Depo. at 153:2-8).

With respect to the necessary elements to make a *prima facie* showing, Ms. Counce states that she is an employee of Hispanic origin, which is a protected class and thus meets the first prong. (R. Vol. II, p. 171, 261 Counce Depo., Ex. 3). With respect to second prong of satisfactory job performance, Charging Party has produced no evidence that she performed her job satisfactorily, particularly in light of the Associate Conference report dated September 13, 2005 that outlined several issues that required improvement. (R. Vol. II, p. 171, 269-272). Ms. Counce was terminated so arguably the third prong could be met by Ms. Counce.

With respect to the last prong requiring evidence that a comparable non-protected person was treated better, Ms. Counce has no such evidence. First, Ms. Counce has not alleged any discriminatory activity on the part of Defendant Baptist. Her displeasure that she did not get to verbally discuss a written document that was reviewed and responded to by management is not evidence of discrimination. She has admitted that the only thing she was told was that Liz Johnson already had her Complaint. More importantly, the person to whom she is comparing herself is an African American female, who is also a "protected employee." Thus Ms. Counce fails to meet the aspect of the test stating that a non-protected, comparable person was treated

more favorably. Ms. Counce has offered no evidence that she and the African-American employee were even "comparable" for purposes of making a comparison.

In order for two or more employees to be considered similarly situated for the purpose of creating an inference of disparate treatment in a Title VII case, the Ms. Counce must prove all of the relevant aspects of her employment situation are 'nearly identical' to those of the [non-minority] employees who she alleges were treated more favorably. The similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances. Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 802 (6th Cir. 1994 (internal citations omitted). In Mitchell, supra, the Court stated that "the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it", 964 F.2d at 583.

Ms. Counce testified in generalities as to one individual whose discussions with Liz Johnson had nothing to do with her employment but about a grant that she did not receive because her school did not get certain information. (R. Vol. II, p. 171, Counce Depo. at 149). Ms. Counce does not even testify to personal knowledge of any conversations between this employee and Liz Johnson, only speaking to what the employee told her about the conversation. (Id.). Ms. Counce presents no evidence that her employment situation is 'nearly identical' to those of a non-protected person. She is unable to show that her circumstances were nearly identical to the minority female to whom she actually is comparing herself. Even if she could, this incident does not rise to the level of stating a *prima facie* case for racial discrimination.

In addition to the foregoing, Ms. Counce told Martha Underwood that Ms. Johnson was a person she knew she could trust. (R. Vol. IV, p. 436, 461). Ms. Counce cannot on one hand

think Ms. Johnson is the only trustworthy person at Baptist and at the same time think she has been discriminated against by Ms. Johnson for not meeting with her. As such, the documentation of work performance outlined in the September 13, 2005, which Ms. Counce signed and thanked the supervisors, along with the November 2, 2005 follow-up and termination provide a legitimate, non-discriminatory reason for which Ms. Counce has provided no evidence to show a pretext for discrimination.

M. THE TRIAL COURT CORRECTLY HELD THAT MS. COUNCE WAS UNABLE TO ALLEGE A CAUSE OF ACTION FOR LIBEL AND THE CLAIM WAS PROPERLY DISMISSED.

In order to state a claim for libel or defamation under Tennessee law, Ms. Counce must show the following:

1) a false and defamatory statement;

2) publication of the defamatory statement; and either

3) knowledge that the statement is false and defamatory;

4) reckless disregard for whether the statement is false and defamatory;

5) negligence in failing to ascertain whether the statement is false and defamatory.

Wagner v. Fleming, 139 S.W.3d 295, 302 (Tenn. Ct. App. 2004). Truth is a defense to a defamation claim, so the publisher of a statement is not liable if the facts stated, or implied as justification for an opinion stated, are true. Id.

a. Ms. Counce is unable to prove defamation as there was no publication.

In support of her claim of libel against Defendants, Ms. Counce claims that she was defamed by a letter Susan Jones sent to her responding to Ms. Counce's appeal of her November 2005 termination. (R. Vol. 1, p. 1, Complaint, ¶ 50 (Ex. J)); (R. Vol. II, p. 171 ,Counce Depo. at 187, Ex. 7, 12). Ms. Counce does not allege that Ms. Jones sent this letter to other third parties but instead that she "libeled Ms. Counce when she stated in the letter that Ms. Counce "did not

demonstrate the necessary proficiency required for safe patient care, both by our hospital and by the Tennessee Board of Nursing." (R. Vol. 1, p. 1, Complaint, ¶ 50). Ms. Counce has failed to state a cause of action against Defendants because she has failed to allege that there was any unprivileged publication by anyone employed by Defendants to a third person. Spicer v. Thompson, NO. M200203110COAR3CV, 2004 WL 1531431, at *3 (Tenn. Ct. App. Jul 07, 2004). She has merely alleged that Susan Jones responded to Ms. Counce's request for consideration by indicating that Ms. Counce did not meet the necessary standards. These allegations alone are not enough to prove a cause of action for defamation if there is no publication. See Smith v. Jones, 335 So.2d 896 (Miss. 1976) ("to be actionable, communication of a defamatory utterance must be in presence of one or more other parties who heard utterance and understood it to be defamatory. Speaking of defamatory words only to plaintiff is not a publication that will support an action for slander"). Since Ms. Counce cannot meet one of the substantive elements of a claim for defamation, the claim must be dismissed.

b. Defendant Baptist's actions are protected by a qualified privilege.

Even if the Court found that Ms. Counce could state a claim for defamation, that claim would be covered under a qualified privilege that exists in the employment context. The law provides that a "communication made in good faith on a matter of common interest between an employer and an employee is protected by a qualified privilege from claims of defamation." Stearns v. Ohio Savings Assn. 472 N.E.2d 372, 374-375 (Ohio App. 1984). Here, Ms. Counce has admitted that the letter on which she bases her claim was written in response to a letter from Ms. Counce herself to Baptist related to her employment. (R. Vol. II, Counce Depo. at 186-187). Ms. Counce cannot now claim defamation as a result of her disagreement with the opinions espoused in a response by Ms. Jones that Ms. Counce solicited.

N. THE TRIAL COURT CORRECTLY HELD THAT MS. COUNCE'S ADA CLAIM FAILS AS A MATTER OF LAW

1. Framework of proof under the ADA.

Ms. Counce has specifically alleged a claim under the Americans with Disabilities Act. (R. Vol. 1, p. 1, Complaint, ¶49). The ADA prohibits a "covered entity" from discriminating against a "qualified individual with a disability" because of the disability. See 42 U.S.C. § 12112(a). In order to recover on a claim of discrimination under the ADA, Ms. Counce must show that: 1) she is an individual with a disability; 2) she is "otherwise qualified" to perform the job requirements, with or without reasonable accommodation; and 3) she was discharged or suffered an adverse employment action *solely by reason of her disability*. See Pruett v. Wal-Mart Stores, Inc., NO. 02A01-9610-CH-00266, 1997 WL 729260, (Tenn. Ct. App. Nov 25, 1997); Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1178 (6th Cir. 1996) (citations omitted)(emphasis added). A plaintiff may make this showing through either direct or circumstantial evidence of discrimination. Id. In order to survive summary judgment under the circumstantial proof method,[7] a plaintiff must present sufficient evidence on each element to support a finding in his or her favor at trial. See Burns v. City of Columbus, Dept. of Public Safety, 91 F.3d 836, 843 (6th Cir. 1996).

If a plaintiff establishes a *prima facie* case of discrimination, the burden of production shifts to the defendant to articulate a legitimate non-discriminatory reason for the adverse employment action. See Monette, 90 F.3d at 1186. If the employer articulates such a reason, the burden shifts back to the plaintiff to show that the employer's proffered reason is merely a pretext for unlawful discrimination. Id.

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[7] Ms. Counce has offered absolutely no direct evidence of discrimination and, therefore, the Memorandum addresses the appropriate framework for circumstantially-based claims. However, Defendants reserve the right to respond to any claim Ms. Counce may make that he has offered direct evidence of discrimination.

a. **Ms. Counce has failed to set forth a *prima facie* case of disability discrimination as a matter of law.**

(1) Ms. Counce has failed to offer sufficient evidence to support a finding that she is disabled within the meaning of the ADA.

In order to satisfy the first prong of a *prima facie* case of disability discrimination, a plaintiff must show that he or she is "disabled" within the meaning of the ADA. An individual is "disabled" under the ADA if he or she: 1) has a physical or mental impairment that substantially limits one or more major life activities; 2) has a record of such impairment that limits one or more major life activities; or 3) is regarded as having such an impairment. See 42 U.S.C. § 12102(2).

(2) Ms. Counce has no evidence that she has a physical or mental impairment that substantially limits one or more major life activities or has a record of such impairment.

In her Complaint, Ms. Counce states that she was discriminated against for a reading disability that required a small accommodation of "slowing down just a bit with certain fonts selected for the computers and print outs." (R. Vol. 1, p. 1, Complaint, ¶ 49). In her deposition she testified that she had a reading disability that she discovered in 1968 when a doctor came to her high school and identified self-esteem issues associated with not reading as well as other in her class. (R. Vol. II, p. 171, Counce Depo. at 81:1-10). Ms. Counce never went to a doctor on her own after this intern visited her high school in 1968. (R. Vol. IV, p. 448, SUMF, ¶ 77), (R. Vol. II, Counce Depo. at 82:22-25; 83:3-7). She was not even diagnosed with any medical condition at the high school visit back in 1968. (R. Vol. IV, p. 448, SUMF, ¶ 77 - ¶80), (R. Vol. II, Counce Depo. at 83:1-12; 84:7-11). When she applied for a job at Baptist, she never disclosed that she needed some type of accommodation for any type of disability. (R. Vol. IV, p. 449, SUMF, ¶ 78); (R. Vol. II, Counce Depo. at 83:8-12); (R. Vol. IV, 462, ¶31).

Ms. Counce indicated that she had no issues with a reading disability between 1968 and 2004 when she began working at Baptist. (R. Vol. IV, p. 449, SUMF, ¶ 79); (R. Vol. II, Counce Depo. at 83:8-12). Ms. Counce does not state in her Complaint, discovery responses or deposition testimony how this condition limited one or more major life activity beyond not being able to perform her nursing duties. A plaintiff bears the burden of proving that, on the facts of the particular case the ailment at issue constitutes a disability for the purposes of the ADA. See also Roush v. Weastec, Inc., 96 F.3d 840, 845 (6th Cir. 1996)(plaintiff must offer evidence that ailment substantially limited major life activity); Ennis v. National Ass'n. Of Bus. and Educ. Radio, Inc., 53 F.3d 55, 60 (4th Cir. 1995)(plaintiff must rely on specific evidence of how disease affected one's daily activities). Furthermore, if a plaintiff claims that the limited activity is the ability to work, he or she must show that there is a limited ability to work at a broad range of jobs. See Watson v. Cencom Cable Income Parners, 993 F. Supp. 1149, 1151-52 (M.D. Tenn. 1997)(Higgins, J.)(impairment must significantly restrict claimant's ability to perform a class of jobs or a broad range of jobs in certain classes)(quoting Hall v. Shelby County Govt., No. 96-6506, 1997 WL 468328 at *2 (6th Cir. August 13, 1997)); see also McKay v. Toyota Manufacturing, USA, Inc., 110 F.3d 369, 372 (6th Cir. 1997)(same).

(3) Ms. Counce has no evidence that she is regarded as having an impairment.

Ms. Counce also has failed to offer sufficient evidence to show that Defendants regarded her as disabled. To show that a person is regarded as disabled, the individual must show that: she has an impairment that does not substantially limit her in a major life activity, but she is perceived as having a substantially limiting impairment; she has an impairment, which, only because the adverse attitudes of others, appears substantially limiting; or she does not have an impairment, but is regarded as having a substantially limiting impairment. 29 C.F.R. § 1630.2(l).

Ms. Counce has offered no evidence that Baptist's perception of her condition was based upon anything at all. Ms. Counce herself admits that Baptist would not have known of any disability, perceived or otherwise until she mentioned it after her termination.. (R. Vol. IV, p. 449, SUMF, ¶ 78); (R. Vol. II, Counce Depo. at 83:8-12). Ms. Counce does not provide any other instances where a disability, perceived otherwise, was an issue during her employment.

In sum, Ms. Counce has failed to produce evidence sufficient to state an actionable claim of disability discrimination because she has failed to show that she is "disabled" within the meaning of the ADA. She has produced no evidence that her alleged "reading disability" precludes her from performing a wide range of jobs, nor has she shown that Baptist regarded her condition as substantially limiting. There is absolutely no evidence in the record that would support a finding that Ms. Counce is disabled within the meaning of the ADA. Therefore, summary judgment was appropriate.

2. **Ms. Counce failed to set forth a *prima facie* case of disability discrimination as a matter of law.**

As Ms. Counce admitted that she has not been diagnosed with any disability, that she was not regarded as having one and that Baptist was never on notice of one, she is unable to meet the remaining prongs in the *prima facie* case analysis. Specifically, she is not able to show that she is "otherwise qualified" to perform the job requirements, with or without reasonable accommodation; and that she was discharged or suffered an adverse employment action *solely by reason of her disability*. Based on her inability to meet the remaining prongs, her disability claim should be dismissed.

3. **Even if she could make out a *prima facie* case of discrimination, Baptist has articulated a legitimate, nondiscriminatory reason for its discipline and termination of her employment.**

The justification for Ms. Counce's termination was set forth in the September 13, 2005 Associate Conference Report which listed several instances where charting or other medical

errors had been made by Ms. Counce during the course of her employment. (R. Vol. II, p. 171, Counce Depo., Ex. 7). Ms. Counce's response to that report was not that she felt discriminated against based on a disability but the following: "Thank you very much for the opportunity to show my dedication to my fellow employees." (R. Vol. IV, p. 432, ¶ 31). The November 2, 2005 Associate Conference Report detailing the reasons for her termination is based on Ms. Counce's failure to perform as directed under the September 2005 report. (R. Vol. IV, p. 432, ¶¶ 31, 34). Ms. Counce's failure to perform as directed is a legitimate, nondiscriminatory justification for her termination. Ms. Counce has provided no basis of showing that those reasons are pretext for discrimination based on disability.

Ms. Counce is unable to show that the legitimate, nondiscriminatory reasons given for her termination were pretexts for discrimination. Ms. Counce submitted a Disability Internal Grievance Form to the Baptist's Section 504 Coordinator, Martha Underwood. (R. Vol. IV, p. 442, ¶ 64). Ms. Counce also submitted a letter to Ms. Underwood dated December 15, 2005 explaining that she had a problem with the font selection used at Baptist. (R. Vol. IV, p. 443, ¶ 66). Ms. Underwood reviewed Ms. Counce's letter and informed Ms. Counce that upon careful review of her grievance, the Hospital found no evidence of disability discrimination and reminded Ms. Counce that she at no time alerted Baptist to any disability that she may have had. (R. Vol. IV, pp. 443-444, ¶ 67). Ms. Counce herself admits that she never mentioned any disability to Baptist prior to her being employed. (R. Vol. IV, p. 449, ¶ 79). Thus Ms. Counce is unable to prove that the real reason for her termination was disability discrimination particularly since Baptist was unaware that she had a disability. (R. Vol. IV, p. 449, ¶ 79).

Because Ms. Counce has offered no evidence beyond her subjective allegation of discrimination, Ms. Counce cannot show that Baptist's legitimate non-discriminatory reasons for

her discipline and termination were merely a pretext for disability discrimination. Therefore, Defendants were entitled to summary judgment as a matter of law.

O. MS. COUNCE HAS NO EVIDENCE OF DISCRIMINATION SUFFICIENT TO OVERCOME THE POWERFUL PRESUMPTION OF NON-DISCRIMINATION ARISING FROM THE "SAME ACTOR" INFERENCE

The "same actor inference" allows the court or fact finder to infer a lack of discriminatory intent from the fact that the same individual hired and fired an employee. Buhrmaster v. Overnite Transp. Co., 61 F.3d 461 (6th Cir. 1995). The inference rests on the logic that a claim that animus exists in termination but not in hiring is irrational and that it does not make sense that one would hire workers from a group one dislikes only to fire them after they are on the job. See id. at 463-64. (citing Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991)); see also Hartsel v. Keys, 87 F.3d 795, 804 n.9 (6th Cir. 1996)(reaffirming the circuit's endorsement of the "same actor inference").

Ms. Counce has alleged that Esther Hoover made the decision with respect to her hiring and bases her claims of breach of contract on statements Ms. Hoover allegedly made to her when she was hired. (R. Vol. IV, p. 423, ¶ 6, Counce Depo. at 37-39). Ms. Hoover also was one of the two people who signed the November 2, 2005 Associate Report terminating Ms. Counce's employment. (R. Vol. IV, p. 432, 434, ¶¶ 32, 38). The Flex Pool Manager, Terri Graves was the other. (Id.) Based on the same actor inference found in the interpretation of cases brought under Title VII, Ms. Counce is unable to show that the same person involved in her hiring made the decision to fire her two years later based on her race, age, alleged disability or other protected reason. The other person who signed Ms. Counce's termination notice in November 2005—Terri Graves—is a person the Ms. Counce has explicitly stated was not involved in any act of discrimination. (R. Vol. IV, p. 439, ¶ 53) (R. Vol. II, pp. 171, 278-281, Counce Depo. at 181, Ex. 10).

P. THE TRIAL COURT CORRECTLY HELD MS. COUNCE IS NOT ENTITLED TO BACK PAY DAMAGES AFTER NOVEMBER 2, 2005.

If successful in this action, Ms. Counce will likely seek back pay from November 2, 2005, the date she was terminated, through the date of trial. There is no question that Ms. Counce bears the burden of proving, as one of the essential elements of her claim for damages, her entitlement to back pay through the date of trial.

However, anti-discrimination laws are not designed to "catapult [a plaintiff] into a better position than [he/she] would have enjoyed in the absence of discrimination." Ford Motor Co. v. EEOC, 458 U.S. 219, 234, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (1982). Generally in determining an award for back pay damages, a court analyzes the "amount of money an employee would have earned had the employer not dismissed him/her, less what would have been earned or might have been earned, in some other employment, by the exercise of reasonable diligence." Frye v. Memphis State University, 806 S.W.2d 170, 173 (Tenn. 1991).

In this matter, Ms. Counce was clear in her deposition testimony that she has failed to adequately look for another position. She indicated that she voluntarily did not apply at Vanderbilt and Saint Thomas and that the other hospitals where she looked for RN positions required the Vanderbilt Critical Care Course that she did not have prior to working at Baptist. (R. Vol. II, p. 171, Counce Depo. at 197-198). Ms. Counce did not look anywhere else because it was her understanding that she was not required to take a position that was less than what she had. (R. Vol. II, p. 171, Counce Depo. at 200). Ms. Counce admits that she could have been a sitting or home health care nurse for $20.00 per hour—two dollars more than what she was making at the time she was terminated. (R. Vol. II, p. 171, Counce Depo. at 204:10-11); (R. Vol. IV, p. 458, ¶ 15). She did not apply for these positions. (R. Vol. II, p. 171, Counce Depo. at 200). She alleges that she applied for travel nursing positions, but received job opportunities

in other states that she could not take. (R. Vol. II, p. 171, Counce Depo. at 201). Ms. Counce states that she could have worked in home health or nights but chose not to because it paid less and she did not want to work nights. (R. Vol. II, p. 171, Counce Depo. at 201, 204). Ms. Counce's decisions with respect to seeking employment after her termination were personal, not mitigating ones. She could have taken positions making slightly more than what she was making at the time of her termination. See Griffin v. Four Seasons Resorts and Hotels, LTD, No. 96 CIV. 4759 JSR1999 WL 212679, *1 (S.D.N.Y. 1999) (copy attached) (noting that "a decision to forego comparable employment for personal reasons, however understandable, constitutes a failure to mitigate damages as a matter of law," and citing case law from various jurisdictions."). Any award of back pay should be denied as Ms. Counce voluntarily chose not to seek comparable employment and, in some cases turned down positions that she did not want to perform.

Q. THE APPELLATE COURT SHOULD IGNORE REFERENCES TO STATUTES AND LAWS THAT HAVE NO BEARING ON THIS LAWSUIT.

As in the trial court, Ms. Counce makes several references to Baptist Hospital's violation of JCAHO regulations and Medicaid/Medicare laws. As the Court is aware, this forum is improper for the determination of a Hospital's alleged violations of any standards for the accreditation of hospitals. Ms. Counce did not raise these issues in initial response to summary judgment, did not raise these issues in her complaint, has not indicated that she has standing to state of claim for these issues and has not filed any corresponding and appropriate action with any governing medical body. These issues were not considered by the lower court and should not be used by the Appellate Court to determine the correctness of the trial court's summary judgment decision.

SHORT CONCLUSION

The trial court correctly granted Defendants' Motion for Summary Judgment on all issues. Ms. Counce's Appeal lacks merit and this matter and this matter and her appeal should be summarily dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to

on this the 21st day of October, 2009.

Joycelyn A. Stevenson