

IN THE COURT OF APPEALS OF TENNESSEE  
AT JACKSON  
January 10, 2023 Session

**FILED**  
04/18/2023  
Clerk of the  
Appellate Courts

**DAVID BURNS v. FORD CONSTRUCTION COMPANY**

**Appeal from the Circuit Court for Dyer County**  
**No. 20-CV-33      Mark L. Hayes, Judge**

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**No. W2022-00492-COA-R3-CV**

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Appellant/employee brought this retaliatory discharge case against Appellee, his former employer. Appellant alleged that he was fired in retaliation for claiming workers' compensation benefits. The trial court granted summary judgment in favor of the employer, finding that Appellant failed to meet his burden to show a causal connection between the filing of his workers' compensation claim and the termination of his employment. Discerning no error, we affirm and remand.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court**  
**Affirmed and Remanded**

KENNY ARMSTRONG, J., delivered the opinion of the court, in which W. NEAL MCBRAYER, J., and ROY B. MORGAN, JR., SP. J., joined.

Charles L. Holliday, Jackson, Tennessee, for the appellant, David Burns.

James L. Cresswell, Jr. and Logan A. Klauss, Memphis, Tennessee, for the appellee, Ford Construction Company.

**OPINION**

**I. Background**

Appellee Ford Construction Company ("Ford Construction") builds and repairs highways and bridges. In September 2017, Ford Construction hired Appellant David Burns as a laborer. Soon after, Mr. Burns was promoted to a carpenter position on a bridge crew. Working as a carpenter on a bridge crew for Ford Construction is a physically demanding job that requires employees to lift heavy objects, stoop, bend over, use their backs, and

stand for prolonged periods of time for up to ten hours per day.

On December 14, 2018, Mr. Burns injured his back on the job. That same day, Mr. Burns notified Ford Construction of his injury. Subsequently, he filed a workers' compensation claim for the injury, which Ford Construction accepted. Ford Construction provided Mr. Burns with a panel of doctors for treatment, and Mr. Burns selected Dr. Timothy Sweo. On February 15, 2019, Mr. Burns had an MRI of his back, which showed a central caudal disc extrusion at T11-T12 and a posterior central shallow disc protrusion at L2-L3. Dr. Sweo prescribed a lumbar epidural steroid injection block to address the radicular symptoms. Thereafter, Mr. Burns was placed on "light duty," and he worked with restrictions. Mr. Burns' light duty work included flagging traffic, using a weed eater around the office, painting crane booms, and sweeping the mechanic shops. Mr. Burns complained to Ford Construction management and his doctor that these light-duty tasks also hurt his back.

On his complaint of persistent symptoms, Mr. Burns was referred to neurosurgeon Dr. John Brophy. On July 10, 2019, Dr. Brophy placed Mr. Burns on a twenty-pound lifting restriction for one week and a thirty-pound lifting restriction for the following week. On July 24, 2019, Dr. Brophy returned Mr. Burns to full duty with no restrictions and no permanent impairment. Mr. Burns informed Ford Construction of his release, but he also told the company that he disagreed with Dr. Brophy's opinion and requested that Ford Construction's insurer provide him with a second opinion. On July 26, 2019, Ford Construction's manager, Sam Baggett, issued Mr. Burns a Separation Notice, stating that he was being permanently separated due to "lack of work."

On August 22, 2019, Ford Construction posted job notifications on its Facebook page. Those jobs included carpenters. On September 4, 2019, Mr. Burns returned to Ford Construction and reapplied for his carpenter job. After Mr. Burns filled out an employment application, the front office worker spoke with Mr. Baggett, then returned to Mr. Burns, and advised him that there were no carpenter jobs available.

On October 22, 2019, the workers' compensation adjuster notified Ford Construction that Mr. Burns submitted a demand in his workers' compensation case, and that she expected Mr. Burns to file a petition to seek mediation and/or litigation. On January 22, 2020, Mr. Burns settled his workers' compensation claim with Ford Construction.

On July 23, 2020, Mr. Burns filed a complaint for wrongful discharge in the Dyer County Circuit Court ("trial court"). In the complaint, Mr. Burns alleged that his discharge for "lack of work" was pretext and that the real reason for the termination of his employment was retaliation because he was pursuing a workers' compensation claim. On August 17, 2020, Ford Construction filed its answer.

On January 3, 2022, Ford Construction filed a motion for summary judgment. On February 14, 2022, Mr. Burns filed a response in opposition to the motion for summary judgment. Ford Construction filed a reply to Mr. Burns' response on March 16, 2022.

On March 21, 2022, the trial court heard the motion for summary judgment, and, on March 23, 2022, the trial court entered an order granting Ford Construction's motion. Mr. Burns filed a timely notice of appeal.

## II. Issue

The sole issue on appeal is whether the trial court erred in granting Ford Construction's motion for summary judgment.

## III. Standard of Review

A trial court's decision to grant a motion for summary judgment presents a question of law. Therefore, our review is *de novo* with no presumption of correctness afforded to the trial court's determination. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997). This Court must make a fresh determination that all requirements of Tennessee Rule of Civil Procedure 56 have been satisfied. *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 103 (Tenn. 2010). When a motion for summary judgment is made, the moving party has the burden of showing that "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Tenn. R. Civ. P. 56.04. When the party moving for summary judgment does not bear the burden of proof at trial, "the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim, or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense." *Rye v. Women's Care Center of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015) (italics omitted). Furthermore,

"[w]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" at the summary judgment stage "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. [574,] 586, 106 S. Ct. 1348 [(1986)]. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.

*Rye*, 477 S.W.3d at 265.

#### IV. Analysis

Tennessee is an “at-will” employment state. This means that “either the employer or the employee may terminate the employment relationship with or without cause.” *Yardley v. Hosp. Housekeeping Sys., LLC*, 470 S.W.3d 800, 804 (Tenn. 2015) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 899 (Tenn. 1992)). “One exception to the employment-at-will doctrine is that an at-will employee may not be fired for taking an action encouraged by public policy.” *Yardley*, 470 S.W.3d at 804 (citing *Williams v. City of Burns*, 465 S.W.3d 96, 108-09 (Tenn. 2015)). The Tennessee Supreme Court has held that “[f]iling a workers’ compensation claim is an action encouraged by public policy.” *Yardley*, 470 S.W.3d at 804 (citing *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 444-45 (Tenn. 1984)). Accordingly, “an employer may not lawfully discharge an employee for filing a workers’ compensation claim,” and any “employee who believes that she has been fired for filing a workers’ compensation claim may bring a claim for retaliatory discharge.” *Yardley*, 470 S.W.3d at 804 (citing *Clanton*, 677 S.W.2d at 445).

The elements required to establish a common law cause of action for a workers’ compensation retaliatory discharge claim are:

- (1) the plaintiff was an employee of the defendant at the time of the injury;
- (2) the plaintiff made a claim against the defendant for workers’ compensation benefits;
- (3) the defendant terminated the plaintiff’s employment; and
- (4) the claim for workers’ compensation benefits was a substantial factor in the employer’s motivation to terminate the employee’s employment.

*Yardley*, 470 S.W.3d at 805 (citing *Anderson v. Standard Reg. Co.*, 857 S.W.2d 555, 558 (Tenn. 1993)). In a retaliatory discharge claim, the employee bears the burden of proving the foregoing *prima facie* elements.<sup>1</sup> *Anderson*, 857 S.W.2d at 558. If the employee

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<sup>1</sup> The United States Supreme Court set out the above burden-shifting paradigm in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-04 (1973). In its 1993 opinion, *Anderson v. Standard Register Company*, the Tennessee Supreme Court adopted a framework similar to that outlined in *McDonnell Douglas* for cases decided on summary judgment where an employee asserted retaliatory discharge for a workers’ compensation claim. 857 S.W.2d at 558-59. As explained more thoroughly in this Court’s opinion, *Yount v. FedEx Express*, No. W2015-00389-COA-R3-CV, 2016 WL 1056958 (Tenn. Ct. App. Mar. 17, 2016), “[b]etween 1993 and 2008, the Tennessee Supreme Court and this Court applied the *McDonnell Douglas* framework at the summary judgment stage in at least eighteen published decisions.” *Id.* at \*6. However, in the Tennessee Supreme Court’s 2008 opinion, *Hannan v. Alltel Publishing Company*, 270 S.W.3d 1, 8 (Tenn. 2008), the Court expressly declared Tennessee’s departure from the federal standard. *Yount*, 2016 WL 1056958, at \*6. Two years later, in *Gossett v. Tractor Supply Company, Inc.*, 320 S.W.3d 777 (Tenn. 2010), the Tennessee Supreme Court examined “the continued viability of the *McDonnell Douglas* and the *Anderson* frameworks (collectively the *McDonnell Douglas*

establishes each of the foregoing elements, the burden shifts to the employer to articulate a reason for the discharge that was legitimate and non-retaliatory. *Id.* at 559. If the employer provides a legitimate, non-retaliatory reason for the discharge, then the burden shifts back to the employee to prove that the employer’s proffered reason was pretext. *Smith v. Bridgestone/Firestone, Inc.*, 2 S.W.3d 197, 200 (Tenn. Ct. App. 1999) (citing *McDonnell Douglas Corp.*, 411 U.S. at 804). The parties do not dispute that the first three elements are satisfied. Thus, this case turns on the fourth element, *i.e.*, whether Mr. Burns’ claim for workers’ compensation benefits was a substantial factor in the termination of his employment from Ford Construction.

This Court is “cognizant of the fact that, ‘[w]here, as here, the claim is one alleging retaliatory discharge and the essential factor to be determined is the employer’s motivation, direct evidence of that motivation is rarely within the plaintiff’s possession.’” *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 391 (Tenn. Ct. App. 2006) (quoting *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002)). Thus, a causal connection between a workers’ compensation claim and a subsequent discharge can be shown through either direct evidence or compelling circumstantial evidence. *Thomason v. Better-Bilt Aluminum Prod., Inc.*, 831 S.W.2d 291, 293 (Tenn. Ct. App. 1992). Circumstantial evidence can include: (1) “the employer’s knowledge of the compensation claim”; (2) “the expression of a negative attitude by the employer toward the employee’s injury”; (3) “the employer’s failure to adhere to established company policy”; (4) “discriminatory treatment when compared to similarly situated employees”; (5) “sudden and marked changes in an employee’s performance evaluations after a workers’ compensation claim”; or (6) “evidence tending to show that the stated reason for discharge was false.” *Newcomb*, 222 S.W.3d at 391. However, “[a] plaintiff’s subjective beliefs, mere speculation, or testimony

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framework) at the summary judgment stage.” *Id.* at 781-82. In *Gossett*, the Tennessee Supreme Court determined that the *McDonnell Douglas* framework was inconsistent with the summary judgment standard the Court adopted in *Hannan*, and it declared the *McDonnell Douglas* framework inapplicable at the summary judgment stage in Tennessee, thereby overruling *Anderson*. *Id.* at 785; *see also Yount*, 2016 WL 1056958, at \*6. One year after the *Gossett* decision, the Tennessee General Assembly enacted Tennessee Code Annotated 20-16-101, “with the stated purpose ‘to overrule the summary judgment standard for parties who do not bear the burden of proof at trial set forth in *Hannan*[], its progeny, and the cases relied on in *Hannan*[,]’” *Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18, 25 n.2 (Tenn. 2011) (quoting Act of May 20, 2011, ch. 498, § 2 Tenn. Pub. Acts 1471). In 2015, the Tennessee Supreme Court again addressed the summary judgment standard in Tennessee in *Rye v. Women’s Care Center of Memphis, M PLLC*, discussed above. In *Rye*, the Tennessee Supreme Court concluded that the *Hannan* standard was incompatible with Tennessee Rule of Civil Procedure Rule 56, and the Court returned Tennessee to a summary judgment standard that was consistent with the standard employed in the federal system. *Rye*, 477 S.W.3d at 261; *see also Yount*, 2016 WL 1056958, at \*6. In light of the Tennessee Supreme Court’s decision in *Rye* to overrule *Hannan*, this Court has concluded that the *McDonnell Douglas* framework, and, consequently, *Anderson*, once again applies in Tennessee to analyze discrimination or retaliatory discharge claims at the summary judgment stage. *Yount*, 2016 WL 1056958, at \*6; *see also Foltz v. Barnhart Crane & Rigging Co.*, No. W2018-02198-COA-R3-CV, 2019 WL 6842375, at \*4 (Tenn. Ct. App. Dec. 16, 2019); *Hilliard v. Dolgencorp, LLC*, No. E2018-00312-COA-R3-CV, 2019 WL 1377263, at \*14 (Tenn. Ct. App. Mar. 26, 2019).

that the employee can think of no other reason for the discharge cannot, in and of themselves, create the requisite causal relationship.” *Id.* (citing *Reed v. Alamo Rent-A-Car, Inc.*, 4 S.W.3d 677, 685 (Tenn. Ct. App. 1999)).

In the motion for summary judgment, Ford Construction argued that Mr. Burns could not prove that his workers’ compensation claim was a substantial factor in Ford Construction’s decision to terminate his employment. Ford Construction argued that “the primary factor in [the company] laying off Mr. Burns permanently was that it could not determine whether Mr. Burns could safely do his job because he repeatedly complained that he could not do light-duty tasks, and even after seeing Dr. Brophy, continued to say that he could not work without experiencing pain.” In its statement of undisputed material facts, Ford Construction submitted the following:

8. [In his deposition,] Mr. Burns described the job of carpenter as physically demanding, and it required him to lift heavy objects, stoop, bend over, use his back, and stand for prolonged periods of time in the elements for up to 10 hours a day.

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11. Mr. Burns disagreed with Dr. Brophy’s opinion [that Mr. Burns could return to full duty, and Mr. Burns] requested that Ford [Construction]’s insurance provide him with a second opinion shortly after his only visit with Dr. Brophy.

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23. When asked to describe what evidence he has that Ford [Construction] terminated him because he filed a workers’ compensation claim, Mr. Burns responded, “***I believe that, you know, I was let go because of my injury to my back.*** I mean, I have, you know, proof somewhat of that being the case. But it’s funny how, you know, when you hire on with a company, and everyone is saying, yeah man, he’s doing good, you know, he’s doing good. I get a wire through my finger, go get a tetanus shot and come back to work, you know, everything is still fine. ***But then soon as I have a serious injury to my back, and I can no longer go out there and do that, you know, bend over and stoop and everything,*** and then you get pushed off of your crew and get put at the office where you’re not used to working. And you know, for it to be midsummer for a company like Ford Construction and there being a lack of work in the summertime, that’s kind of hard to believe, as much work as they have out there.”

24. When asked [in his deposition] what proof he has to support his claim in

this lawsuit, [Mr. Burns] responded, “Well, I don’t know if you would be able to exactly say, maybe, proof. But it does—it does show the fact that after they laid me off because of lack of work, that they did hire a carpenter, a few carpenter positions right after I was laid off.”

(Emphasis in original and emphases added). Ford Construction attached the relevant portions of Mr. Burns’ deposition to support the foregoing facts. In his response to Ford Construction’s statement of undisputed material facts, ***Mr. Burns did not dispute any of the above facts.*** As such, Mr. Burns effectively admitted that his back injury in 2018 left him unable to perform the job of carpenter, *i.e.*, to “go out there and . . . bend over and stoop and everything.” Despite the foregoing, in his response to the motion for summary judgment, Mr. Burns argued that the stated reason for his discharge, *i.e.*, that Ford Construction was unsure he could do his job safely, was false.

Mr. Burns concedes that he has no direct evidence concerning Ford Construction’s motivation for discharging him. However, he alleges that he presented sufficient circumstantial proof at the summary judgment stage to show that his workers’ compensation claim was a substantial factor in the termination of his employment. Turning to his response to the motion for summary judgment, Mr. Burns alleged that the following evidence showed that Ford Construction’s stated reason for Mr. Burns’ discharge was false and established his *prima facie* case:<sup>2</sup>

The undisputed evidence in this case shows that the workers’ compensation doctor, Dr. John Brophy, returned Mr. Burns to work full duty effective July 24, 2019. (internal citation omitted). Mr. Burns went to the employer to be put back to work two days in a row and would have reported to whatever job they had assigned him. (internal citation omitted). Instead of returning Mr. Burns to work, Ford [Construction] issued a [S]eparation [N]otice showing that his last day of work was July 24, 2019, and that he had been permanently discharged for lack of work. (internal citation omitted). Ford [Construction], through its designated representative [Ms. Lisa Keeling, Ford Construction’s Human Resources Director], however, testified that at the time the Separation Notice was issued there was not a lack of work for carpenters, there simply was a lack of work for Mr. Burns. (internal citation omitted).

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<sup>2</sup> On appeal, Mr. Burns also argues that this case “presents an extremely close temporal proximity between Mr. Burns’ protected activity . . . and [Ford Construction] discharging him.” On this Court’s review, Mr. Burns did not present this argument to the trial court. “[I]t is well settled that issues not presented to the trial court may not be presented for the first time on appeal.” *Taylor v. Beard*, No. W2000-02768-COA-R3-CV, 2002 WL 1751342, at \*2-3 (Tenn. Ct. App. Feb. 6, 2002) (declining to consider appellants’ new summary judgment arguments on appeal when appellants made different arguments before the trial court). Because Mr. Burns did not present his “temporal proximity” argument to the trial court, we decline to consider it on appeal.

In making this argument, Mr. Burns wholly ignored his own deposition testimony that he was unable to perform the job duties of a carpenter after his injury in 2018.

Contrary to Mr. Burns' argument, Ms. Keeling's testimony that there was a lack of work for Mr. Burns does not provide compelling circumstantial evidence that Mr. Burns was fired due to his workers' compensation claim. Rather, Ms. Keeling's testimony advances Ford Construction's argument. Turning to her deposition, attached as an exhibit to Ford Construction's statement of undisputed material facts, Ms. Keeling testified that Mr. Burns was not discharged because he was pursuing a workers' compensation claim. Rather, she stated that he was let go because, despite his medical release to full duty, Mr. Burns continued to complain of his back hurting, even when he performed light-duty tasks. Accordingly, Ford Construction "didn't feel that it was safe for him or the rest of [the] workers to put him back out on the job" of carpenter. Specifically, Ms. Keeling testified:

He said that weed eating was hurting his back and that flagging was hurting his back. So with those simple tasks—if he can't do those without his back hurting, we're certainly not going to put him back out on the job where he's lifting a hundred pounds—you know, unloading equipment and that kind of stuff. It wouldn't be safe to him or the people that he was working with.

Ms. Keeling also testified regarding Ford Construction's concerns that, despite complaining about light-duty tasks hurting his back, Mr. Burns was seen lifting heavy objects, which was contrary to his work restrictions. When describing what instances Ford Construction investigated that led to the termination of Mr. Burns' employment, Ms. Keeling testified:

Well, him, you know, working outside of his work restrictions on the job site so when, you know, we—you know, we investigated that and talked to his crew and his supervisor, they said that he had been lifting heavy things. The Safety Director had noticed him lifting heavy things that were outside of his work restrictions. Then the fact that he came to us and said his back was hurting from light duty work, it just had us just make the decision it just wasn't good to keep him employed. So it wasn't a disciplinary action . . . so to say. It was just a safety [thing] for him and other workers not to have him on the job.

Mr. Burns did not present any evidence to contradict Ms. Keeling's testimony.

Mr. Burns also argued that, even if he did not establish a *prima facie* case, and even if Ford Construction articulated a legitimate and non-retaliatory reason for his discharge, Mr. Burns could still show that the company's proffered reason, *i.e.*, that Ford Construction was unsure Mr. Burns could safely perform his job, was pretext. See *Smith v.* 2 S.W.3d at



200 (citing *McDonnell Douglas Corp.*, 411 U.S. at 804). “To establish pretext, a plaintiff may show ‘that the [c]ompany’s reasons have no basis in fact, or if they have a basis in fact, by showing that they were not really factors motivating the discharge, or, if they were factors, by showing that they were jointly insufficient to motivate the discharge.’” *Foltz*, 2019 WL 6842375, at \*7 (quoting *Davis v. Reliance Elec. Indus. Co.*, 104 S.W.3d 57, 63 (Tenn. Ct. App. 2002) (citing *Moore v. Nashville Elec. Power Bd.*, 72 S.W.3d 643, 652 (Tenn. Ct. App. 2001))). To further his pretext argument, Mr. Burns argued that: (1) evidence of him working above his restrictions supports the conclusion that he could perform his carpenter job;<sup>3</sup> (2) Ford Construction’s manager, Mr. Baggett, made crude comments towards Mr. Burns while he was on light duty, showing that the company “had a problem with [Mr. Burns] . . . [only] after his injury”; (3) emails between Ford Construction employees “calls into question its purported reason for termination.” As to the first argument, the fact that Mr. Burns worked outside his restrictions did not show that he could perform the job of carpenter. To the contrary, the record shows that, even while Mr. Burns worked within his restrictions, he consistently complained that his back hurt. The fact that Mr. Burns chose to work outside his restrictions, despite complaining of pain, does not demonstrate that he was capable of performing the essential duties of a carpenter, or that he could perform such duties in a safe manner. Concerning Mr. Burns’ second argument, in his deposition, Mr. Burns testified that Mr. Baggett made crude comments towards him when Mr. Burns complained that the light duty was hurting his back. Even taking such testimony in the light most favorable to Mr. Burns, on this Court’s review, this testimony fails to show that Ford Construction had a negative attitude towards Mr. Burns *as a result of his workers’ compensation claim*.

Concerning Mr. Burns’ third argument, the emails between Ford Construction employees involve discussions about Mr. Burns’ injury and his workers’ compensation claim. At the summary judgment stage, Mr. Burns argued that the “emails provide[d] strong circumstantial evidence showing Ford [Construction’s] negative company culture toward employee[s] who pursue a workers’ compensation claim.” Turning to the emails, in April 2019, Ford Construction employees discussed Mr. Burns’ injury and the fact that he was working with restrictions. One employee noted that “[Mr. Burns] never complains on the jobsite and doesn’t have any issues but when he goes to the doctor he indicates he is worse.” That employee stated that she was concerned Mr. Burns was “malingering.” Another employee noted that Mr. Burns had filed three workers’ compensation claims with Ford Construction within a 3-to-4-month time frame and questioned whether it would be

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<sup>3</sup> Mr. Burns also argued that Ford Construction failed to follow its own policy of progressive discipline, and that the company could have “fired Mr. Burns for violating his doctor’s restrictions but it didn’t.” We presume Mr. Burns briefly argued this point because an “employer’s failure to adhere to established company policy” can provide circumstantial evidence to show a causal connection between a workers’ compensation claim and a subsequent discharge. See *Newcomb*, 222 S.W.3d at 391. Although Mr. Burns failed to develop this argument, as the Ford Construction notes in its appellate brief, its failure to follow its own policy actually benefitted Mr. Burns because his employment was not terminated at an earlier date.

appropriate to assign a nurse case manager to assess Mr. Burns' claim. On April 11, 2019, one Ford Construction employee emailed that Mr. Burns called Ms. Keeling and Ford Construction's Safety Consultant "to complain about his light duty working conditions." The email noted that Mr. Burns "is complaining that he is standing all day flagging which is hurting his back[, h]owever, his direct supervisors and fellow crew members disbelieve all of his claims and have offered him breaks and he isn't taking them[.]" The email also stated that Mr. Burns' crew members witnessed Mr. Burns "picking up heavy items and tried to stop him from doing so, but he continues to pick them up." The email noted that Mr. Burns presented "conflicting stories" to management/his doctors and to his supervisor/crew members. In pertinent part, the email concluded by stating that Ford Construction wanted "to be sure that [it was] doing what [it] need[ed] to do—correctly and legally—to protect Ford . . . , as well as to protect the employee from further injury."

On June 5, 2019, a Ford Construction employee emailed the workers' compensation claim representative regarding Ford Construction's concerns about Mr. Burns' inconsistent reporting of his condition. The email stated that "Mr. Burns appears to be fine while at work but once he attends his doctor appointments he indicates something entirely different and mentions things to the physician that are never reported to management or HR by Mr. Burns." According to the email, the day after Mr. Burns received injections for his back, he reported that "[t]hey didn't work." In response, the workers' compensation claim representative replied that she was working on having surveillance assigned to Mr. Burns' claim. On June 13, 2019, the workers' compensation claim representative reported that Mr. Burns attended an appointment with Dr. Sweo and reported that he was "still in a lot of pain to his low back rated 5/10 that is constant and burning." According to the email, Mr. Burns reported that he had pain radiating down both legs that was burning, and he complained about "having to use a weed eater to cut grass for 11 hours per day [because] it is hurting his back and making him stiff when he gets up in the morning." The email stated that Dr. Sweo provided physical therapy and gave Mr. Burns injections, but that there was nothing more Dr. Sweo could do to help. At that time, Mr. Burns requested to see a neurosurgeon, and he chose Dr. Brophy. As discussed above, Dr. Brophy returned Mr. Burns to full duty on July 24, 2019. Mr. Burns does not dispute that he disagreed with Dr. Brophy's assessment that he could return to full duty or that he requested a second opinion. Other follow up emails from Ford Construction employees continued to reiterate that Mr. Burns was inconsistently reporting his physical condition, and that Ford Construction "want[ed] to be sure [it was] doing everything possible to mitigate [Mr. Burns' workers' compensation] claim, prevent litigation, and do what [it could] in the best interest of the employee's health." Similar to Ms. Keeling's testimony, the foregoing emails do not provide compelling circumstantial evidence that Ford Construction's reason for discharging Mr. Burns was false. Rather, the emails again advance Ford Construction's argument that Mr. Burns' employment was terminated because the company was unsure whether Mr. Burns safely could perform the job requirements of a carpenter.

In its final order, the trial court concluded that Mr. Burns could not "demonstrate

proof of an essential element of his case—that his workers’ compensation claim was a substantial factor in his termination by Ford [Construction].” In pertinent part, the trial court found that: (1) Mr. Burns complained that he was unable to perform his light-duty work; (2) Ford Construction was concerned, based on Mr. Burns’ statements, that Mr. Burns would be unable to physically manage the full-duty work, that Mr. Burns might re-injure himself, and that he posed a threat to the safety of co-workers and the public; (3) the Separation Notice stating that termination was for “lack of work” was irrelevant to the resolution of the case based on the reasons provided, in the record, for the termination of Mr. Burns’ employment ; (4) email communications among administrative employees and emails with the workers’ compensation insurance adjuster discussed and voiced concerns regarding Mr. Burns’ condition, the workers’ compensation claim, possible litigation, and Mr. Burns’ job at Ford Construction; and (5) none of the emails indicated that Ford Construction intended to retaliate against Mr. Burns for making a workers’ compensation claim. As discussed above, the evidence Mr. Burns relies on to support his retaliation argument supports the trial court’s findings, *supra*.

We affirm the trial court’s grant of Ford Construction’s motion for summary judgment. It was Mr. Burns’ burden to show a causal connection between his workers’ compensation claim and the termination of his employment. *Anderson*, 857 S.W.2d at 558. From the record, Mr. Burns failed to present compelling circumstantial evidence to show that his claim for workers’ compensation benefits, as opposed to his injury, was the substantial reason for Ford Construction’s decision to terminate his employment. *See Reed*, 4 S.W.3d at 685. Rather, Mr. Burns’ own proof advances Ford Construction’s argument that it was unsure whether Mr. Burns could perform the duties of a carpenter due to his inconsistent reports about his condition. Mr. Burns’ own actions, deposition testimony, and responses to Ford Construction’s statement of undisputed material facts lend further support to Ford Construction’s argument. As discussed above, when Dr. Brophy returned Mr. Burns to full duty, Mr. Burns disputed the assessment and requested a second opinion. In his deposition, Mr. Burns described the job of carpenter as physically demanding in that it required him to lift heavy objects, stoop, bend over, use his back, and stand for prolonged periods of time. Mr. Burns also testified that the “serious injury to [his] back” resulted in him being unable to “go out there and do that, you know, bend over and stoop and everything[.]” In effect, Mr. Burns conceded that there was a lack of work for him as a carpenter because he was unable to perform the duties of that job.<sup>4</sup> In short, there is no evidence that Mr. Burns’ filing of a workers’ compensation claim led to the termination of his employment. The undisputed material facts show that Ford Construction terminated Mr. Burns’ employment because it was unsure whether Mr. Burns could safely perform the job of carpenter. Ford Construction’s decision was not retaliatory because Mr. Burns’ inability to perform the job of carpenter constituted a “legitimate nonpretextual

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<sup>4</sup> We note that an employer is under no legal obligation “to furnish [a] disabled employee some other job which he may be able to perform.” *Leatherwood v. United Parcel Serv.*, 708 S.W.2d 396, 402 (Tenn. Ct. App. 1985).

nonretaliatory reason for the discharge.” *Anderson*, 857 S.W.2d at 559.

Aside from Mr. Burns’ failure to provide compelling circumstantial evidence, this Court has concluded that when an employee cannot perform the essential job functions as a result of his or her injury, the employee fails to prove the fourth element of his or her claim for retaliatory discharge for filing a workers’ compensation claim, and the retaliatory discharge claim fails as a matter of law. See *Hilliard*, 2019 WL 1377263, at \*14. Here, Mr. Burns conceded that he could not perform the essential job functions of a carpenter as a result of his back injury. As such, his retaliatory discharge claim fails as a matter of law, and summary judgment in favor of Ford Construction was appropriate.

## V. Conclusion

For the foregoing reasons, we affirm the trial court’s order. The case is remanded for such further proceedings as are necessary and consistent with this opinion. Costs of the appeal are assessed to the Appellant, David Burns, for all of which execution may issue if necessary.

s/ Kenny Armstrong  
KENNY ARMSTRONG, JUDGE