IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 13, 2014

PAUL L. McMILLIN v. TED RUSSELL FORD, INC. ET AL.

Appeal from the Circuit Court for Knox County
No. 1-134-12 Dale C. Workman, Judge

No. E2013-01782-COA-R3-CV-FILED-JULY 31, 2014

In 2011, for approximately four months, Plaintiff worked as a car salesman for Ted Russell Ford ("the dealership") in Knoxville. After he was fired in November 2011, he brought this action against the dealership and others alleging, among other things, retaliatory discharge under the common law and the Tennessee Public Protection Act, Tenn. Code Ann. § 50-1-304 (2008 & Supp. 2013). Plaintiff alleged that his former employer fired him because he (1) refused to be involved when prospective customers test drove vehicles and (2) informed his supervisor that the dealership was breaking the law when it allowed test drives in cars that did not have dealer license plates or adequate proof of financial responsibility. The trial court granted the defendants summary judgment, holding that plaintiff did not establish a prima facie case because, in the court's words, the plaintiff "did not engage in protected activity by refusing to take test drives without a license plate on the vehicle or proof of registration or insurance in the vehicle." The trial court held that these infractions did not implicate "a matter of fundamental or significant public concern, such as would overcome Tennessee's employment-at-will doctrine." Alternatively, the court held that the person responsible for firing plaintiff was not aware, prior to the firing, that plaintiff had refused to participate in test drives. The court held that "[t]he allegedly protected activity was not the basis of the adverse employment action taken against Plaintiff." We affirm the trial court's grant of summary judgment and its dismissal of plaintiff's action.

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

CHARLES D. SUSANO, JR., C.J., delivered the opinion of the Court, in which D. MICHAEL SWINEY and JOHN W. MCCLARTY, JJ., joined.

Paul L. McMillin, Knoxville, Tennessee, appellant, pro se.

Jerome D. Pinn and Rebecca B. Murray, Knoxville, Tennessee, for the appellees, Ted Russell Ford, Inc., Ted Russell Management, Inc., Ted Russell, Gene Morris, Tim Shaw, and Stuart Brabston.

OPINION

I.

Plaintiff began working at the dealership on July 8, 2011. Eight days later, plaintiff, while driving a vehicle owned by the dealership, was stopped by a law enforcement officer because the vehicle did not have a license plate. Plaintiff, who had worked as a law enforcement officer for over 25 years, was well aware of what one had to do in order to legally drive a vehicle. Shortly after he was stopped, plaintiff told his supervisor, Gene Morris, that he "would not perform test drives without plates due to the unlawfulness of the activity."

Plaintiff's son, Michael McMillin, also worked at the dealership. Plaintiff and his son shared a desk and cubicle, and worked as a team to sell cars. Michael McMillin testified that, from his father's first day on the job, Michael[1] was the one who went with customers on test drives. The son said that his father never gave a test drive. Stuart Brabston, the dealership's general manager, testified by affidavit that plaintiff "and other salespersons at Ted Russell Ford were not required to take test drives, as many of them worked on teams" where one salesperson would work on sales documents while the other team member would accompany the customer on a test drive.

In late September of 2011, Michael McMillin drilled holes in the work desk he shared with his father and attempted to install steel plates and latches on the desk so he could attach padlocks to secure the desk. According to plaintiff, his son used the wrong size rivets and didn't install them properly. Plaintiff drilled through the rivets and helped his son properly install the rivets, lock hasps, and three padlocks on the desk. Supervisor Morris stated that he first observed the padlocks on November 21, 2011. Morris testified that plaintiff told him that plaintiff put the locks on the desk. Morris said that there were at least 19 holes drilled into the desk and that, in his view, there were "three big, ugly, hideous padlocks [attached] to Mr. [Ted][2] Russell's desk drawer."

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[1]The first name is sometimes used to differentiate the two McMillins. No disrespect is intended.

[2]Ted Russell is the principal of Ted Russell Ford. The desk was not the owner's personal desk. The statement by Mr. Morris was simply to indicate that Ted Russell, as the owner of the dealership, was the owner of the desk.

Morris instructed the sales manager, Timothy Shaw, to take pictures of the desk. Morris then contacted Joe Jackson, the human resources executive for the dealership, to inform him of the damage to the desk. Jackson made the decision to terminate plaintiff's employment for destruction of company property. It is undisputed that no one told any member of management, prior to the plaintiff's firing, that Michael McMillin had any involvement in the installation of the padlocks. Jackson stated as follows in his affidavit:

> Ted Russell Ford did not end Paul McMillin's employment because he refused to take test drives with the dealership's customers.
>
> Rather, the Company terminated Mr. McMillin's employment on November 21, 2011, after it was reported to me, as Human Resources Executive, that he appeared to have drilled holes and affixed padlocks to a Company-owned desk at the Parkside Drive location.
>
> I decided to terminate Mr. McMillin's employment for destruction of Company property.
>
> When I made the decision to end Mr. McMillin's employment on November 21, 2011, I was not aware that he had refused to go on test drives without registration plates, or without proof of registration or proof of insurance in the vehicle.
>
> * * *
>
> I decided to terminate Paul McMillin's employment based upon my belief that he had wilfully damaged a desk belonging to the Parkside dealership.
>
> The Parkside facility's General Manager, Gene Morris, reported the damage to me on the morning of November 21, 2011.
>
> Mr. Morris asked me what he should do.
>
> When Mr. Morris reported to me what Mr. McMillin appeared to have done to the desk, I was shocked.
>
> I reviewed photos of the desk that were taken that morning.

> After receiving this report and reviewing the photos, I took some time (about an hour or two) to decide on the appropriate disciplinary response. I decided that termination of Mr. McMillin's employment was appropriate.
>
> I am not aware of a single instance in which someone has without prior permission defaced or damaged Company property and not had their employment terminated.
>
> It was only when Michael McMillin's deposition was taken in this case on October 29, 2012 that I learned that he claims to have placed the locks on the desk with his father's (Paul McMillin's) assistance.
>
> At the time that Paul McMillin's employment was terminated, on November 21, 2012 [sic: 2011], it was believed that he had placed the locks on the desk by himself.

(Numbering in original omitted.)

Plaintiff filed this action on March 19, 2012, alleging retaliatory discharge under both common law and the Tennessee Public Protection Act, commonly referred to as the "Whistleblower Act," Tenn. Code Ann. § 50-1-304; negligence, and "fraud by misrepresentation." Defendants filed a motion to dismiss and/or for summary judgment. The trial court granted the motion, stating as follows in pertinent part:

> On the Defendants' motion to dismiss Plaintiff's claims for common law retaliatory discharge and retaliatory discharge under the Tennessee Public Protection Act ("TPPA"), the Court finds that the Plaintiff did not engage in protected activity by refusing to take test drives without a license plate on the vehicle or proof of registration or insurance in the vehicle. The Court finds that this is not a matter of fundamental or significant public concern, such as would overcome Tennessee's employment-at-will doctrine.
>
> * * *
>
> In addition, with regard to the Defendants' alternative motion for summary judgment on the Plaintiff's claims for common law

> retaliatory discharge and retaliatory discharge under the TPPA, if the Plaintiff had been able to state a claim for retaliatory discharge, the Court finds, based upon the evidence in the record, that Joe Jackson was the person who decided to terminate Plaintiff's employment, and Mr. Jackson was not aware that Plaintiff refused to take test drives without a license plate or proof of registration or insurance, the alleged protected activity in this case. The allegedly protected activity was not the basis of the adverse employment action taken against Plaintiff. Therefore, Defendants are entitled to summary judgment on these retaliation claims, if a claim had been stated.[3]

Plaintiff, who has proceeded pro se throughout this litigation, timely filed a notice of appeal.

II.

The issue on appeal is whether the trial court correctly granted summary judgment to defendants on plaintiff's retaliatory discharge claims. Plaintiff presents the following issues, as quoted from his brief :

> 1. Whether the court abused its discretion when it accepted the 11th hour submission of a sworn affidavit from Joe Jackson attesting to the fact that he (Jackson) was the person who made the decision to terminate [plaintiff].
>
> 2. Whether the court erred in failing to recognize that defendants'. . . proffered reason for plaintiff's . . . termination was a pretext to avoid a claim of . . . retaliatory discharge[.]
>
> 3. Does the concealment of the identity of a decision maker in a[n] employment termination complaint (until the filing of a motion for summary judgment by the defendants), prejudice the plaintiff . . . and provide indefensible grounds for dismissal of any termination case?
>
> 4. Did the court err in ruling that [plaintiff's] refusal to take test drives without a license plate on the vehicle or proof of

[3]The trial court also granted defendants' motion with regard to plaintiff's claims of fraud and negligence. The issue of the correctness of these rulings has not been raised by plaintiff on appeal.

> registration or insurance in the vehicle was not a matter of fundamental public concern[?]

As an initial matter, we briefly address plaintiff's assertion, presented in the first and third issues above, that the defendants "concealed" the identity of the person who made the decision to fire plaintiff, human resources executive Joe Jackson, until the "11th hour" when defendants filed their motion to dismiss and/or for summary judgment. Plaintiff has made no supporting argument, citation to the record, or citation to authority regarding this issue in his brief. There is no indication in the record that plaintiff raised below the issue of untimely filings by the defendants under the Rules of Civil Procedure or other applicable rules. By the same token, the plaintiff does not argue that defendants failed to respond to his discovery requests. Our review of the 873-page technical record indicates that Plaintiff did ask the trial court for additional time, which the court granted. Plaintiff filed a "response" that states:

> On May 17, 2011, the parties appeared before the Court. During the hearing, the Court ruled that Plaintiff had not sufficient time to prepare responses to a multitude of documents filed by the Defendants at the eleventh hour, and thereafter ordered that Plaintiff should be given the necessary time to do so.

Any argument that defendants improperly "concealed" Joe Jackson's identity, or somehow unfairly delayed providing information to plaintiff, has been waived for failure to raise it at the trial level. ***Black v. Blount***, 938 S.W.2d 394, 403 (Tenn. 1996) ("Under Tennessee law, issues raised for the first time on appeal are waived"); *accord* ***Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.***, 395 S.W.3d 653, 670 (Tenn. 2013).

III.

A.

In his brief, plaintiff cites no authority other than certain applicable section numbers of the Tennessee Code Annotated. We are mindful that plaintiff has proceeded pro se throughout this litigation. Regarding our review of a pro se litigant's claims, we have observed the following standards and applicable principles:

> Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between fairness to a pro

> se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.
>
> The courts give pro se litigants who are untrained in the law a certain amount of leeway in drafting their pleadings and briefs. Accordingly, we measure the papers prepared by pro se litigants using standards that are less stringent than those applied to papers prepared by lawyers.
>
> Pro se litigants should not be permitted to shift the burden of the litigation to the courts or to their adversaries.

Marceaux v. Thompson, 212 S.W.3d 263, 267 (Tenn. Ct. App. 2006) (quoting ***Young v. Barrow***, 130 S.W.3d 59, 62-63 (Tenn. Ct. App. 2003)).

In ***Chiozza v. Chiozza***, 315 S.W.3d 482, 489 (Tenn. Ct. App. 2009), we reiterated the following well-established principles that are pertinent here:

> Our Courts have "routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as described by [Tenn.] Rule [App. P] 27(a)(7) constitutes a waiver of the issue[s] [raised]." ***Bean v. Bean***, 40 S.W.3d 52, 55 (Tenn. Ct. App. 2000). In ***Bean***, we went on to hold that "an issue is waived where it is simply raised without any argument regarding its merits." ***Id.*** at 56; *see also* ***Newcomb v. Kohler Co.***, 222 S.W.3d 368, 401 (Tenn. Ct. App. 2006) (holding that the failure of a party to cite to any authority or to construct an argument regarding his or her position on appeal constitutes waiver of that issue). As we stated in ***Newcomb***, a "skeletal argument that is really nothing more than an assertion will not properly preserve a claim." ***Newcomb***, 222 S.W.3d at 400. It is not the function of this Court to verify unsupported allegations in a party's brief or to research and construct the party's argument. ***Bean***, 40 S.W.3d at 56.

See also ***Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc.***, 131 S.W.3d 457, 474 (Tenn. Ct. App. 2003) ("Failure to cite authority for propositions in arguments submitted on

appeal constitutes waiver of the issue"); ***Worley v. White Tire of Tenn., Inc.***, 182 S.W.3d 306, 311 (Tenn. Ct. App. 2005). Consequently, a holding that plaintiff in this case has waived the remaining issues on appeal is appropriate. However, "there are times when this Court, in the discretion afforded it under Tenn. R. App. P. 2, may waive the briefing requirements to adjudicate the issues on their merits."[4] ***Chiozza***, 315 S.W.3d at 489. Exercising our discretion, we will proceed to evaluate the merits of the issue of the correctness of the trial court's summary judgment on plaintiff's retaliatory discharge claims.

B.

Because the complaint was filed after July 1, 2011, Tenn. Code Ann. § 20-16-101 (Supp. 2013) applies to our analysis of summary judgment in this case. That statute provides:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
>
> (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
>
> (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

See also ***Harris v. Metro. Dev. & Housing Agency***, No. M2013-01771-COA-R3-CV, 2014 WL 1713329 at *3 (Tenn. Ct. App. M.S., filed Apr. 28, 2014); ***Wells Fargo Bank, N.A. v. Lockett***, No. E2013-02186-COA-R3-CV, 2014 WL 1673745 at *2 (Tenn. Ct. App. E.S., filed Apr. 24, 2014). As we observed in ***Harris***,

> Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

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[4]Tenn. R. App. P. 2 provides, in relevant part:

> For good cause, including the interest of expediting decision upon any matter, the . . . Court of Appeals . . . may suspend the requirements or provisions of any of these rules in a particular case on motion of a party or on its motion and may order proceedings in accordance with its discretion.

> issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04.
>
> Summary judgments do not enjoy a presumption of correctness on appeal. ***BellSouth Adver. & Publ'g Co. v. Johnson***, 100 S.W.3d 202, 205 (Tenn. 2003). The resolution of a motion for summary judgment is a matter of law, thus, we review the trial court's judgment de novo with no presumption of correctness. ***Martin v. Norfolk Southern Ry. Co.***, 271 S.W.3d 76, 84 (Tenn. 2008). The appellate court makes a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. ***Hunter v. Brown***, 955 S .W.2d 49, 50-51 (Tenn. 1977).

2014 WL 1713329 at *4. In making this determination,

> We must view all of the evidence in the light most favorable to the nonmoving party and resolve all factual inferences in the nonmoving party's favor. ***Martin v. Norfolk S. Ry. Co.***, 271 S.W.3d 76, 84 (Tenn. 2008); ***Luther v. Compton***, 5 S.W.3d 635, 639 (Tenn. 1999); ***Muhlheim v. Knox Cnty. Bd of Educ***., 2 S.W.3d 927, 929 (Tenn. 1999). If the undisputed facts support only one conclusion, then the court's summary judgment will be upheld because the moving party was entitled to judgment as a matter of law. See ***White v. Lawrence***, 975 S.W.2d 525, 529 (Tenn. 1998); ***McCall v. Wilder***, 913 S.W.2d 150, 153 (Tenn. 1995).

Wells Fargo Bank, 2014 WL 1673745 at *2.

Furthermore, because this action accrued on November 21, 2011, Tenn. Code Ann. § 50-1-304(g), an amendment to the Whistleblower Act applicable to retaliatory discharge actions accruing on or after June 10, 2011, governs here. *See* 2011 Tenn. Pub. Acts 461; ***Sykes v. Chattanooga Housing Authority***, 343 S.W.3d 18, 26 n.4 (Tenn. 2011). According to that statute,

> In any civil cause of action for retaliatory discharge brought pursuant to this section, or in any civil cause of action alleging retaliation for refusing to participate in or remain silent about illegal activities under Tennessee common law, the plaintiff shall have the burden of establishing a prima facie case of

> retaliatory discharge. If the plaintiff satisfies this burden, the burden shall then be on the defendant to produce evidence that one (1) or more legitimate, nondiscriminatory reasons existed for the plaintiff's discharge. The burden on the defendant is one of production and not persuasion. If the defendant produces such evidence, the presumption of discrimination raised by the plaintiff's prima facie case is rebutted, and the burden shifts to the plaintiff to demonstrate that the reason given by the defendant was not the true reason for the plaintiff's discharge and that the stated reason was a pretext for unlawful retaliation. The foregoing allocations of burdens of proof shall apply at all stages of the proceedings, including motions for summary judgment. The plaintiff at all times retains the burden of persuading the trier of fact that the plaintiff has been the victim of unlawful retaliation.

In Tennessee, the general rule governing employment relationships that do not involve a contract for a definite term is the long-established employment-at-will doctrine. ***Guy v. Mut. of Omaha Ins. Co.***, 79 S.W.3d 528, 534-35 (Tenn. 2002); ***Sykes***, 343 S.W.3d at 26. This doctrine "recognizes the concomitant right of either the employer or the employee to terminate the employment relationship at any time, for good cause, bad cause, or no cause at all, without being guilty of a legal wrong." ***Coleman v. Humane Society of Memphis***, No. W2012-02687-COA-R3-CV, 2014 WL 587010 at *17 (Tenn. Ct. App. W.S., filed Feb. 14, 2014). "The employment-at-will doctrine is a bedrock of Tennessee common law." ***Franklin v. Swift Transp. Co.***, 210 S.W.3d 521, 527 (Tenn. Ct. App. 2006). The rule is not absolute, however; the Supreme Court and the General Assembly have recognized certain restrictions on the right of an employer to discharge an employee. In ***Chism v. Mid-South Milling Co.***, 762 S.W.2d 552 (Tenn. 1988), the Court, discussing the tort of retaliatory discharge, stated the following:

> Both by statute and case law in this and other states some restrictions have been imposed upon the right of an employer to terminate an employee, usually for reasons of well-defined public policy. For example, in Tennessee any right to terminate an employee for service on a jury has been eliminated, and statutory sanctions for violation have been provided. *See* T.C.A. § 22-4-108(f). There are restrictions upon employment or termination of persons for discriminatory reasons involving race, creed, color, sex, age, religion or national origin. *See* T.C.A. § 4-21-401(a). There are similar restraints to prevent

> discrimination in the hiring and termination of handicapped persons. See T.C.A. § 8-50-103; see also ***Plasti-Line, Inc. v. Tennessee Human Rights Comm'n***, 746 S.W.2d 691 (Tenn. 1988).
>
> * * *
>
> It is obvious that the exception cannot be permitted to consume or eliminate the general rule. Corporate management, in cases such as this, must be allowed a great deal of discretion in the employing or discharging of corporate officers, where the latter are not employed for a definite term and have no formal contract of employment. ***Whittaker v. Care-More, Inc.***, 621 S.W.2d 395, 397 (Tenn. App. 1981). To be liable for retaliatory discharge in cases such as this, the employer must violate a clear public policy. Usually this policy will be evidenced by an unambiguous constitutional, statutory or regulatory provision.

762 S.W.2d at 555, 556. In ***Chism***, the Supreme Court, holding that "[i]n order to state a claim for relief for this very exceptional tort action, the pleader must show clear violation of some well-defined and established public policy," provided examples of actionable causes, such as when an employee was discharged "for refusing his employer's demand that he commit perjury before a legislative committee," "because [the employee] insisted upon obeying a lawful subpoena," because the employee "insisted upon testifying truthfully in litigation," "for honoring a subpoena to jury duty," "for not seeking to be excused from jury duty," and "for refusing to falsify records or to acquiesce in the mislabelling of unsafe or defective products." ***Id.*** at 556.

The legislature has also created a statutory retaliatory discharge action, the Whistleblower Act, codified at Tenn. Code Ann. § 50-1-304, that is cumulative to a common law action.[5] ***Guy***, 79 S.W.3d at 539. The statute provides in pertinent part as follows:

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[5] *See* 2014 Tenn. Laws Pub. Ch. 995, enacted May 22, 2014, amending Tenn. Code Ann. § 50-1-304(g) to delete the phrase "under Tennessee common law" and enacting subsection (h) to provide: "This section abrogates and supersedes the common law with respect to any claim that could have been brought under this section." This amendment takes effect and "shall apply to all actions accruing on or after" July 1, 2014. Hence, it is not applicable here.

> (b) No employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities.
>
> * * *
>
> (d)(1) Any employee terminated in violation of subsection (b) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be entitled.

Tennessee courts have emphasized that the retaliatory discharge "exception to the employment-at-will doctrine must be narrowly applied." ***Stein v. Davidson Hotel Co.***, 945 S.W.2d 714, 717 n.3 (Tenn. 1997); ***Chism***, 762 S.W.2d at 556; ***Sykes***, 343 S.W.3d at 26 (describing the Whistleblower Act as a "narrowly crafted exception"); ***Franklin***, 210 S.W.3d at 530 ("the earliest Tennessee cases recognizing retaliatory discharge have emphasized that it is an important, but narrow, exception to the employment-at-will doctrine").

A plaintiff asserting a common law retaliatory discharge claim has the burden of proving the following four elements:

> (1) that an employment-at-will relationship existed;
>
> (2) that the employee was discharged;
>
> (3) that the reason for the discharge was that the employee attempted to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision; and
>
> (4) that a substantial factor in the employer's decision to discharge the employee was the employee's exercise of protected rights or compliance with clear public policy.

Webb v. Nashville Area Habitat for Humanity, 346 S.W.3d 422, 437 (Tenn. 2011).

The elements of a claimant's action for statutory retaliatory discharge – violation of the Whistleblower Act – are similar; a plaintiff must prove the following four elements:

> (1) the plaintiff was an employee of the defendant;
>
> (2) the plaintiff refused to participate in or remain silent about illegal activity;
>
> (3) the defendant employer discharged or terminated the plaintiff's employment; and
>
> (4) the defendant terminated the plaintiff's employment *solely* for the plaintiff's refusal to participate in or remain silent about the illegal activity.

Id. at 437; ***Sykes***, 343 S.W.3d at 27 (emphasis added). Although there are several distinctions between the two causes of action, a primary difference between the common law and statutory claims is that to demonstrate a violation of the Whistleblower Act, a plaintiff must prove "the essential element of an *exclusive causal relationship* between the plaintiff['s] whistleblowing activity and [his or her] discharge." ***Sykes***, 343 S.W.3d at 21 (emphasis added). To prevail on a common law action, a plaintiff need only demonstrate that his or her exercise of protected rights or compliance with clear public policy was a substantial factor in the employer's decision to discharge the employee. ***Guy***, 79 S.W.3d at 535.

In this case, general manager Brabson candidly admitted the following in his affidavit:

> Although there are Tennessee statutes regarding the display of motor vehicle registration plates, and the carrying of vehicle registration and proof of insurance when driving vehicles, Ted Russell Ford did not always comply with these laws.
>
> The reason why dealer plates were not attached to vehicles on test drives was that dealer plates are attached by magnet and, in the past, Ted Russell dealerships had their dealer plates lost or stolen. It was feared that some plates might be obtained by criminals who could use[] them in the commission of crimes.
>
> Instead of using the Tennessee dealer plates, each vehicle taken on a test drive had a Ted Russell Ford plastic tag in the license plate area.

> Most vehicles also had a Ted Russell Ford license plate frame, a Ted Russell Ford emblem, and/or a Ted Russell Ford preferred customer sticker.
>
> In the last 22 years, I am not aware of any mishap involving a Ted Russell Ford vehicle being test driven in which it was not clear to law enforcement that the vehicle belonged to the dealership.
>
> If an issue ever arose with regard to vehicle registration or financial responsibility, these documents were kept at the dealership.
>
> Ted Russell Ford vehicles are not taken on test drives without any identifying tags. Even when dealer plates are not used, Ted Russell Ford tags are attached and displayed in the license plate area.

The owner of the dealership, Ted Russell, similarly testified in his deposition as follows:

> Q: Are the sales employees required to take customers on test drives without these plates?
>
> A: Yes.
>
> * * *
>
> Q: So in your opinion, is taking those test drives without dealer plates a violation of law?
>
> A: Yes.
>
> Q: Okay. And you're aware that the employees engage in this?
>
> A: Yes.
>
> Q: Okay. And you don't disallow it?
>
> A: No.

Plaintiff argues that his refusal to take test drives in cars that did not have the required dealer license plates[6] and proof of insurance[7] is a protected activity, and that he was furthering a clear public policy interest in pointing out the violations of statutes requiring these items. The trial court recognized the dealership's statutory violations, but held that they did not implicate "a matter of fundamental or significant public concern, such as would overcome Tennessee's employment-at-will doctrine." The issue is whether plaintiff has established the following related and similar elements of a prima facie case – for common law retaliatory discharge, a showing that a substantial factor in the employer's decision to discharge him was his exercise of protected rights or compliance with clear public policy, *see* ***Webb***, 346 S.W.3d at 437; and for statutory retaliatory discharge, a showing that his employer fired him "solely for [his] refusal to participate in or remain silent about . . . illegal activity." ***Id.*** We addressed these elements at length in ***Franklin***, a case where a commercial truck driver was fired for refusing to drive with a *copy* of the required registration document, as allowed by state statute, instead of the *original* document, which was required by a state regulation. We analyzed the claim as follows:

> Under the Public Protection Act, it must be found that the violation by the employer constitutes an "illegal activity," defined as "activities that are in violation of the criminal or civil code of this state or the United States or [a] regulation intended to protect the public health, safety or welfare." T.C.A. § 51-1-304(c). Under the common law, the motivating factor for the discharge must be the employee's compliance with "a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision." ***Crews***, 78 S.W.3d at 862. The issue becomes whether [defendant's] regulatory violation rises to this level.
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> * * *

[6] *See* Tenn. Code Ann. § 55-4-101 (providing that "[a]s a condition precedent to the operation of any motor vehicle upon the streets or highways of this state, the motor vehicle shall be registered as provided in this chapter"); § 55-4-110 (requiring that "[t]he registration plate issued for passenger motor vehicles shall be attached on the rear of the vehicle").

[7] *See* Tenn. Code Ann. § 55-12-139 ("It is an offense to fail to provide evidence of financial responsibility pursuant to this section" when requested by an officer "[a]t the time the driver . . . is charged with any violation[,] . . . any other local ordinance regulating traffic; or at the time of an accident").

Under [the applicable] statute, the owner of the vehicle is permitted to keep in the vehicle either the original certificate of registration or a copy of it. T.C.A. § 55-4-108(a) (1998).

The requirement for proof of registration is narrowed, however, by a regulation issued by the Tennessee Department of Safety. The regulation states that . . . [f]or a vehicle proportionally registered, it is required that the original of the Cab Card be in the cab of the vehicle during its operation." Thus, while the statute appears to allow a copy of the proof of registration, the regulation requires that the *original* IRP [International Registration Plan] cab card be kept in the vehicle.

* * *

[Defendant] notes that this infraction, carrying a photocopy of the IRP cab card instead of the original cab card, is not a "violation of the criminal or civil code" of Tennessee. *See* T.C.A. § 50-1-304(c) (definition of "illegal activities"). Rather, it is a violation of a regulation which [defendant] contends does not implicate "the public health, safety or welfare" under the Public Protection act and does not rise to the level of a clear public policy evidenced by an unambiguous regulatory provision. ***Id.***; *see* ***Guy***, 79 S.W.3d at 535.

* * *

[Plaintiff] is . . . correct in his assertion that the law of retaliatory discharge stems from Tennessee public policy that an employee should not be placed in the moral, ethical and legal dilemma of being forced to choose between reporting or participating in illegal activities and keeping his job. That does not, however, end the inquiry. Under both the Public Protection Act and the common law, the "illegal activity" or violation by the employer must implicate important public policy concerns as well.

* * *

> Under the reasoning urged by [plaintiff], *any* regulatory infraction by an employer, no matter how minor, can justify an employee's refusal to perform his assigned duties. Indeed, it is hard to imagine a more *de minimus* regulatory violation than the infraction on which [plaintiff] bases his claim of retaliatory discharge in this case, namely, having a photocopied cab card instead of the original. The Court in ***Guy v. Mutual of Omaha*** stated clearly that we do not simply look at whether a law or regulation has been violated, but "rather, our inquiry focuses on whether some important public policy interest embodied in the law has been furthered" by the employee's actions. 79 S.W.3d at 538.
>
> Finding that *any* regulatory infraction by an employer, no matter how minor, can support a claim of retaliatory discharge would be a clear extension of the law, well beyond the boundaries of any prior Tennessee decision.
>
> * * *
>
> [I]n this case, operating a commercial vehicle with a photocopied cab card does not implicate "important public policy" concerns for which retaliatory discharge actions have heretofore been recognized in Tennessee. *See* ***Guy***, 79 S.W.3d at 538. Franklin was "not asked to perform an act hazardous to his health or safety." . . . Tenn. Comp. R. & Regs. 1340–5–2–.02, requiring a commercial vehicle to carry the original cab card as opposed to a photocopy, can only be characterized as one of the many regulations that impose "requirements whose fulfillment does not implicate fundamental public policy concerns."

Franklin, 210 S.W.3d 521, 528-30, 532-33 (Tenn. Ct. App. 2006) (some internal citations omitted).

In the present case, defendants, relying on ***Franklin***, argue that the dealership's infractions, *i.e.*, allowing salespersons to take customers on test drives without dealer license plates and proof of insurance, are analogous to defendant's regulatory infractions in ***Franklin***. Defendants point out that each test-driven vehicle is clearly marked as being owned by the Ted Russell dealership, and that there is no evidence that its infractions have

caused an increased health or safety risk to plaintiff or the general public. Plaintiff argues in his brief that "the laws of Tennessee are supposed to be guides for the conduct of the citizens" and "enforcement of those laws is absolutely mandatory."

We hold, as a matter of law, that the dealership's policy and actions with respect to test drives – while violations of statutory prescriptions – do not implicate a matter of fundamental or significant public concern so as to overcome the well-established Tennessee employment-at-will doctrine. Certainly, (1) the fact that the vehicle should be "registered," *see* Tenn. Code Ann. § 55-4-101; (2) "the registration plate" itself, ***id.***; and (3) proof of insurance, *see* Tenn. Code Ann. § 55-12-139, are important matters to law enforcement and individuals involved in automobile accidents. Vehicles need to be matched to owners and persons damaged in an accident need information about "the financial responsibility" of the negligent individuals. *See* ***id***. In the case at bar, however, cars test driven by customers of the dealership are clearly "marked" in a number of ways as being within the dealership's inventory of vehicles. In a city the size of Knoxville, it is reasonable to assume that law enforcement is aware of the identity and location of a Ford dealer. Therefore, the responsible "owner" of such a vehicle is no mystery. In addition to knowing the identity of the driver and occupants of a test-driven vehicle, one involved in an accident with such a vehicle can readily identify the owner of the vehicle.

The statutes implicated by the facts of this case are important and, like all laws, need to be obeyed. That, however, is not the issue before us. The issue is whether these statutory prescriptions, under the facts of this case, are a matter of fundamental or significant public concern. In this case, it seems clear to us that the consequences of violations by the dealership are negligible. The ability of law enforcement to identify the ownership of a violating vehicle is, without question, easy. The same can be said for one damaged in an accident with such a vehicle. When these minimal consequences are considered, we cannot say that the subject statutes fall within the category of fundamental or significant public concern. Hence, they do not trump Tennessee's employment-at-will doctrine under the facts of this case; but, even if this were not the case, there is another basis upon which the trial court's grant of summary judgment was and can be based. We will now discuss this other ground.

Our review of the record persuades us that the trial court correctly held that the evidence is insufficient to create a genuine issue of material fact as to another essential element of plaintiff's claim – whether the alleged exercise of a protected activity was either the sole factor or a substantial factor in the employer's decision to terminate his employment. Joe Jackson, who made the decision to fire plaintiff, testified by affidavit that "[w]hen I made the decision to end [plaintiff's] employment on November 21, 2011, I was not aware that he had refused to go on test drives without registration plates, or without proof of registration

or proof of insurance in the vehicle." Plaintiff has produced no evidence tending to create a genuine issue of material fact as to the truthfulness of Jackson's assertion. In his response to defendants' Tenn. R. Civ. P. 56.03 statement of material facts, plaintiff admits he "was not privileged to the conversation, if any, between Gene Morris and Joe Jackson regarding the happenings of November 21, 2011." Furthermore, plaintiff agreed that the following statements of material fact were undisputed for summary judgment purposes:

> When Morris notified Jackson about what Plaintiff appeared to have done to the desk, Jackson was shocked.
>
> Jackson reviewed photos of the desk that were taken that morning.
>
> Morris reported to Jackson that Plaintiff had drilled holes in the desk drawers, attached steel plates and latches, and fastened big locks to the desk drawers.
>
> Jackson decided that termination was appropriate.
>
> It was only when Michael McMillin's deposition was taken in this case on October 29, 2012, that Defendants learned that he claims to have placed the locks on the desk with his father's assistance.
>
> At the time that Plaintiff's employment was terminated, on November 21, 2012 [sic: 2011], it was believed that Plaintiff had placed the locks on the desk by himself.
>
> When Plaintiff's employment was terminated, neither Plaintiff nor his son indicated that anyone other than Plaintiff had put the locks on the desk.

Because Jackson was unaware, when he fired plaintiff, of plaintiff's refusal to take test drives or his complaint about the unlawfulness of the dealership's practice of allowing vehicles to be driven without license tags or proof of insurance documentation, plaintiff's conduct in this regard cannot have been a factor in the decision to terminate his employment. Moreover, defendants have demonstrated that "a legitimate, nondiscriminatory reason existed for the plaintiff's discharge." Tenn. Code Ann. § 50-1-304(g). The burden thereby "shift[ed] to the plaintiff to demonstrate that the reason given by the defendant was not the true reason[] for the plaintiff's discharge and that the stated reason was a pretext for unlawful

retaliation." ***Id.*** Plaintiff failed to produce any evidence tending to suggest that the reason given for his discharge – destruction of company property – was not the true reason and was actually a pretext for unlawful retaliation. Consequently, the trial court correctly dismissed plaintiff's retaliatory discharge claims.

IV.

The summary judgment of the trial court is affirmed. Costs on appeal are assessed to the appellant, Paul L. McMillin. The case is remanded for collection of costs below, pursuant to applicable law.

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CHARLES D. SUSANO, JR., CHIEF JUDGE