

Tennessee Judicial Nominating Commission
Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: Brandon Owen Gibson

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(including county)

Home Phone: [REDACTED] [REDACTED]

INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. 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 Commission 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 word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website <http://www.tncourts.gov>). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) **and** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Attorney/Partner with Pentecost & Glenn, PLLC, Jackson, TN

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

I became licensed to practice law in Tennessee in 2001. My bar number is 021485.

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.

In addition to Tennessee, I am licensed to practice law in Texas (Bar Number 24027395). I received my Texas law license in November, 2000, and I have continuously maintained my Texas license since that time.

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).

Upon completion of the Texas bar exam, I worked for Potter Minton, P.C., a law firm in Tyler, Texas. My work there consisted primarily of medical malpractice defense and auto liability defense work.

In 2001, I moved back to Tennessee, and after completing the Tennessee bar exam in July, 2001, I began working for Waldrop & Hall, P.A. in Jackson, Tennessee. At Waldrop & Hall, I gained a wide variety of experience in all areas of civil litigation including, but not limited to, workers' compensation, employment, and governmental entity litigation.

In July 2003, I moved to the newly formed office of Pentecost, Glenn & Rudd, PLLC (now

Pentecost & Glenn, PLLC). My practice at Pentecost & Glenn includes multiple areas of civil litigation, commercial litigation, and commercial transactions.

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.

My current practice consists primarily of civil rights defense (30%), employment litigation (30%), Governmental Tort Liability Act defense (20%), commercial litigation (10%), and transactional work (10%). My civil rights defense practice includes cases in both federal and state court and often involves a relatively large number of cases against *pro se* plaintiffs. My firm represents almost all the counties in West Tennessee in litigation, and we also handle inmate litigation for numerous private prisons in the area. My employment practice also includes cases in both federal and state court and includes cases dealing with appeals from decisions of county civil service commissions, as well as cases dealing with the First Amendment, whistleblower statutes, Public Employee Political Freedom Act, and federal and state discrimination and harassment statutes. My firm also represents many local and/or regional businesses, and I often handle those businesses' employment matters, both in litigation and in consultation with management. My transactional practice includes business formation, lease negotiations, asset purchases, and limited real estate work.

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 Commission 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 Commission. Please provide detailed information that will allow the Commission 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. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

One large area of my practice is defending local county governments in West Tennessee in lawsuits filed against them. As such, I have appeared before practically every judge in Western Tennessee on a variety of cases. Defending local county governments provided me the opportunity to be involved in cases dealing with alleged violations of federal Constitutional rights, alleged violations of federal and state employment statutes, Governmental Tort Liability Act (GTLA) claims, and the technicalities of county governance and operation of civil service commissions.

I have appeared on numerous occasions before the Tennessee Court of Appeals (Western Division), and I have a large practice in the United States District Court for the Western District of Tennessee and a small practice before the United States District Court for the Middle District of Tennessee. I also currently represent clients in the United States District Court for the Northern District of Texas and in state courts in Texas, and I am admitted to practice in the United States District Courts in the Western and Eastern Divisions of Arkansas. I have appeared as counsel of record in over 170 federal cases.

In my employment litigation experience, I have appeared before the Equal Employment Opportunity Commission and the Tennessee Human Rights Commission in addition to representing employers in those cases in court proceedings. My employment litigation experience includes cases dealing with: the Fair Labor Standards Act, state whistleblower statutes, the Public Employees Political Freedom Act, First Amendment issues, and Title VII and state law discrimination and sexual harassment cases.

I am personally involved in all aspects of the cases in which I appear.

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

I defended clients in three cases in which petitions for writ of certiorari were filed with the United States Supreme Court. Petitions were denied in all three cases.

I have handled several interesting cases that have been appealed to the Sixth Circuit Court of Appeals. They include: *Beecham v. Henderson County*, 422 F.3d 372 (6th Cir. 2005) (dealing with First Amendment rights to political association and intimate association); *Perez v. Wade*, 652 F.Supp.2d 901 (W.D.T.N 2009) (dismissing a Fourth Amendment claim against a county government arising from a traffic stop and extended detention), and; *Wilhite v. Corrections Corp. of America*, 498 Fed. Appx. 499 (6th Cir. 2012) (analyzing incompetence in tolling the statute of limitations). I also handled the following cases of note with my law partner, Jon York: *Fields v. Henry County*, 701 F.3d 180 (6th Cir. 2012) (holding that a county's use of a pre-set bond schedule did not violate the Eighth Amendment) and *Tucker v. Hardin County*, 539 F.3d 526 (6th Cir. 2008) (affirming the District Court's grant of summary judgment to a county government arising out of the use of reasonable accommodations for deaf and mute arrestees in the county jail).

Often, the most challenging cases with which I deal are *pro se* cases. Defending a case against a *pro se* plaintiff, many of whom are also incarcerated at the time they are pursuing their cases,

requires an extraordinary amount of patience and a detailed understanding of the rules of civil procedure.

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.

I am a Rule 31 listed mediator, but I have not served as a mediator in a professional capacity.

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

I served as Administrator for my grandmother's estate and was a successor Administrator for my cousin's estate.

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

When I was a sophomore in high school, I began working at a law firm in the afternoons (and occasional evenings). There, I learned about the law, the practice of law, and the respect attorneys have for the courts. While copying pleadings or discovery for paralegals and attorneys, I would read the pages I was copying. Often, I would ask questions about the documents I was copying or filing, and the staff was always willing to explain the "why" or "how" behind the files.

After my first year of law school, I interned for United States Magistrate Judge Judith Guthrie, United States Magistrate Judge Harry McKee, and United States District Judge John Hannah, Jr. (now deceased) in the Eastern District of Texas at Tyler. The summer in Tyler gave me immense experience and provided the judges with the free legal research and writing skills of a law school student. All three of these judges allowed me unfettered access to their cases, their courtrooms, and their legal knowledge. While each of the three administered their courtrooms in very different ways, they each helped hone my abilities to identify issues, analyze them thoroughly, and write about them clearly.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor 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.

Not applicable.

EDUCATION

14. List each college, law school, and other graduate school which 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.

Mississippi State University, 1993-1996, Bachelor of Science degree (summa cum laude), Agribusiness major (graduated in three years)

Mississippi State University, 1996-1997, Master's of Agribusiness Management (summa cum laude)

Southern Methodist University School of Law, 1997-2000, Juris Doctorate degree (Jackson Walker Moot Court, Best Brief finalist (1998); Jackson Walker Moot Court Board (1998-2000); Pace Environmental Moot Court team (1999))

PERSONAL INFORMATION

15. State your age and date of birth.

37; October 17, 1975

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

I have lived in Tennessee since 2001. I was born in Tennessee and left the state to attend college and law school, and to work in Texas for one year prior to returning home.

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

I have lived in Crockett County continuously since 2001.

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

Crockett 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 are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

I have received parking tickets from the City of Jackson as a result of over-staying my welcome in two hour parking spaces in downtown Jackson. I do not have the dates of those infractions, but I have always paid the \$5 fine immediately.

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. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

Not applicable.

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.

My mother's maiden name was "Brandon," and since I was the second and last child, my mother demanded that I be called "Brandon" (she lost that battle with respect to my older brother). She had no idea how difficult it would be for a female, once married, to continue to be called her middle name, especially in the security-conscious 21st century. Thus, in 2011, I filed a petition to change my name formally from Elizabeth Brandon Owen Gibson to Brandon Owen Gibson. An order granting my petition for name change was signed by the Crockett County General Sessions Court on May 17, 2011.

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 which you have held in such organizations.

Crockett County Chamber of Commerce Board of Directors (Secretary July 2012- May 2013)
Crockett County Imagination Library Foundation Board of Directors (Secretary 2012-2013)
Daughters of the American Revolution
Alamo City School PTO (Treasurer 2011-present)
The Huguenot Society of the Founders of Manakin in the Colony of Virginia
First Baptist Church, Alamo, Tennessee (serving in a variety of capacities, including adult Sunday School teacher, youth Sunday School teacher, and member and chair of church Personnel Committee)

27. Have you ever belonged to any organization, association, club or society which 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.
- If so, list such organizations and describe the basis of the membership limitation.
 - 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.

The Daughters of the American Revolution necessarily limits its membership to females. I

would not intend to resign from the organization unless required to do so by the Rules of Judicial Conduct, since there is a “brother” organization called the “National Society, Sons of the American Revolution.” The Daughters of the American Revolution support worthy goals of civic education and responsibility, patriotism, and the preservation of the history of the American Revolution.

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 which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

Federal Bar Association, Memphis/Mid-South Chapter (2004-present); Board of Directors (2010-present); Coordinator of annual Jackson seminar (2009-2013)

Tennessee Bar Association (2001-present)

Tennessee Bar Association Leadership Law (Class of 2012)

Tennessee Bar Association Law Office Management and Technology Section (2011-present); Executive Council Member (2011-present); Executive Council Chair (2012-2013)

Board of Professional Responsibility of the Supreme Court of Tennessee, District Committee Member, District 8 (2012-present)

American Bar Association (2001-2012)

Howell Edmunds Jackson American Inns of Court, Barrister (2010 Charter Member-present)

State Bar of Texas (2000-present)

Defense Research Institute (approximately 2005-present)

Tennessee Defense Lawyers Association (approximately 2008-present)

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

Mid-South Super Lawyers Rising Star, 2012

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

None.

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.

In 2012, I taught one course of POST Commission-approved training in report writing for local law enforcement.

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.

I serve on the Tennessee Post-Conviction Defender Oversight Commission and was appointed to that position August 29, 2011. I have also served on that Commission's audit committee since 2011.

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

No.

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

See attached writing samples, both of which are my own work.

ESSAYS/PERSONAL STATEMENTS

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

One day, my daughter, who was seven or eight years old at the time, asked me "Mom, what do you *do* at work?" The question caused me to quickly evaluate what I actually *did* every day. Finally, I told her "Mom helps other people solve problems."

I believe my duty and my opportunity is to serve others, in part because serving and helping others brings me fulfillment and satisfaction. Simply put, this position gives me an opportunity to serve and help more people. As a lawyer, I have the opportunity to serve every single client and do so to the best of my ability. In my community, I seek ways to serve where my contribution can make a difference and be most effective. Being a judge gives me the opportunity to truly serve the public at large and make a contribution and difference in and through the judicial system.

36. State any achievements or activities in which you have been involved which 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)*

I regularly provide pro bono service to charitable organizations, including my church and local charitable initiatives. I also provide reduced-rate legal services to 501(c)(3) designated organizations on employment and management concerns. I have, in the past, volunteered my time through legal services and have assisted with adoption petitions on a pro bono basis.

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 for which I am applying is for the intermediate appellate court for the Western Division of Tennessee. Currently, the Court is comprised of four (4) judges, and the Court handles direct appeals of civil matters from Circuit and Chancery Courts in West Tennessee. My selection would enable the Court of Appeals to continue the timely and quality review of trial court decisions.

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)*

Since my mother passed away from lymphoma in 2007, I have been very involved in Relay for Life through the American Cancer Society. I served as Crockett County's event chair in 2010, as sponsorship chair in 2011, and I was selected to serve on the Tennessee State Leadership Council for 2012/2013. I have also been actively involved with Crockett County's Imagination Library program, which feeds my inner educator. Through the help of many dedicated volunteers, we have formed the Crockett County Imagination Library Foundation, a 501(c)(3) organization, and we are well on our way to endowing that program to continue to provide age-appropriate books for Crockett County's pre-school children. I also enjoyed working on the Board of Directors of the Crockett County Chamber of Commerce, where I assisted with business expos and strategic planning for the Chamber of Commerce and Crockett County's business development and long-range planning.

If I am appointed judge, my fundraising efforts for the American Cancer Society would cease. While I would not be able to raise funds for the Crockett County Imagination Library Foundation endowment, I would like to continue my involvement on the Foundation's board of directors if allowed by the Code of Judicial Conduct. I also would like to be involved in civics education programs that might be allowed by the Code of Judicial Conduct.

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

I have worked practically all my life. I grew up on a working farm, and I spent many summers on the back of a four row planter in the June (and sometimes July) heat assisting with soybean planting. As soon as I was coordinated enough to drive a tractor, I drove the hay trailer while my father and brother hauled hay. During high school, I began working at a law firm in the afternoons. When I went to college, my parents thought it best that I not work during my first semester, as they thought I needed to adjust to the rigors of college study. I was bored and was excited to work my second semester and every semester thereafter, even while taking an 18 to 19 hour course load and maintaining high grades. During graduate school, I worked as a research assistant. During my first year of law school, I worked part-time at a retail clothing store in order to avoid having to borrow for living expenses in addition to tuition. My parents taught me that hard work is good, honorable, and expected. I am dedicated, appreciate timeliness, and have a good work ethic.

I also love to write. While most of my writing these days seems to be in the form of letters, email, or discovery responses, I enjoy analyzing, thinking, and writing. I would thoroughly enjoy the opportunity to make my life's work analyzing, thinking through, and writing about legal issues presented to the Court of Appeals.

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)*

Upon taking office, a judge takes an oath to "support the Constitution of the United States of America and the Constitution of the State of Tennessee," to "administer justice without respect of persons," and to "faithfully and impartially discharge" his/her duties as a judge. I am a firm believer in the separation of powers doctrine, and I believe it is the responsibility of the judiciary to apply the law as written by the legislative branch of government. I may not always agree that the application of a statute or rule is "fair" (in the layman's understanding of the word), but my obligation to my clients is to obtain the best possible result.

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 Commission or someone on its behalf may contact these persons regarding your application.

A. Hon. Joe G. Riley (Ret.), 175 Toyota Plaza, Suite 810, Memphis, TN 38103;
[REDACTED]

B. James I. Pentecost, Partner, Pentecost & Glenn, PLLC, 106 Stonebridge Blvd., Jackson,

TN 38305; 731.668.5995, jpentecost@pgandr.com
C. Michael Russell, Partner, Gilbert, Russell & McWherter, 5409 Maryland Way, Suite 150, Brentwood, TN 37027; 615.354.1144, mrussell@gilbertfirm.com
D. Charles Richard Jerman, III, CPA, Harber Laman, LLC, 15 S. Bells Street, Alamo, TN 38001, 731.696.4670, cjerman@harberlaman.com
E. Stephanie Krug, Safety Engineering Concepts, 111 Hazel Path, Hendersonville, TN 37075; 615.826.4274; skrug@sectn.com

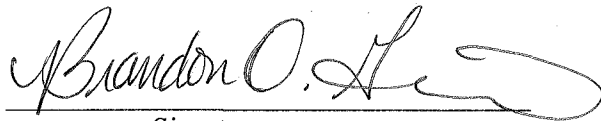
AFFIRMATION CONCERNING APPLICATION

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 of Appeals of Tennessee, and if appointed by the Governor, 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 questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

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

Dated: June 17, 2013.



Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



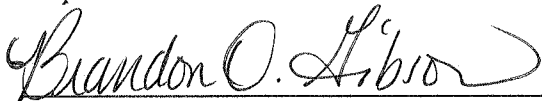
TENNESSEE JUDICIAL NOMINATING COMMISSION
 511 UNION STREET, SUITE 600
 NASHVILLE CITY CENTER
 NASHVILLE, TN 37219

**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS**

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the state of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

Brandon O. Gibson
Type or Printed Name


Signature

June 17, 2013
Date

021485
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

<u>State Bar of Texas, Texas, 24027395</u>

Writing Samples

001-133-00

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

SUZANNE RUDDELL,)
)
 Plaintiffs,)
)
 v.)
)
 WEAKLEY COUNTY SHERIFF'S)
 DEPARTMENT)
)
 Defendant(s).)

No.: 07CV01159-JDB
JURY DEMANDED

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY
JUDGMENT

Defendant presents this Memorandum in Support of its Motion for Summary Judgment and shows the Court the following:

STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendant presents the following statement of material facts which are, solely for the purposes of this motion, undisputed:

1. Suzanne Ruddell ("Plaintiff") began working as a correctional officer at the Weakley County Sheriff's Department on October 24, 2005. Depo. Ruddell, p. 38, l. 1-8.
2. Plaintiff was terminated from her employment as a correctional officer at the Weakley County Sheriff's Department on March 31, 2006. Complaint, ¶ 8.
3. Officer James Bossow was Plaintiff's supervisor one night in March 2006. Depo. Ruddell, p. 53, l. 14-23.

4. During Plaintiff's entire employment, Bossow was Plaintiff's supervisor on two occasions, one of which was March 26, 2006. Declaration of Jim Phelps.
5. Plaintiff and James Bossow began a romantic relationship in November of 2005. Depo. Ruddell, p. 73, l. 15-23.
6. Plaintiff's relationship with Bossow became a sexual relationship in late November 2005. Depo. Ruddell, p. 74, l. 6-8.
7. Plaintiff did not make anyone at the Sheriff's Department aware of her dating relationship with Bossow in November or early December of 2005. Depo. Ruddell, p. 74, l. 13-16.
8. Plaintiff and Bossow ended their relationship in mid-December 2005. Depo. Ruddell, p. 76, l. 22-23.
9. Plaintiff and Bossow attempted to renew their relationship in late January or early February of 2006. Depo. Ruddell, p. 77, l. 20-23.
10. Plaintiff and Bossow again started seeing each other romantically in mid-March and broke up again on March 25, 2006. Depo. Ruddell, p. 186, l. 11-12; l. 22-4; p. 187, l. 3-6.
11. Plaintiff never told Jim Phelps or Mike Wilson that she and Bossow were dating again in mid-March. Depo. Ruddell, p. 152, l. 4-18.
12. After Plaintiff and Bossow terminated their relationship, she was still able to work amicably with him. Depo. Ruddell, p. 84, l. 14-16.
13. A jailer is supposed to be in the control room at the Weakley County Detention Center at all times. Depo. Ruddell, p. 91, l. 20-24.

14. Plaintiff was counseled by Jail Administrator Jim Phelps in January 2006 for leaving the control room unattended. Depo. Ruddell, p. 110, l. 14-23.
15. On March 19, 2006, Plaintiff, who was not on duty, stopped by the Weakley County Detention Center to see what was going on and to invite Officer Bossow to her home to watch movies after work. Depo. Ruddell, p. 185, l. 17-24; p. 186, l. 1-24; p. 187, l. 12-17.
16. On March 19, 2006, while Plaintiff was visiting the Weakley County Detention Center, but not on duty, Bossow removed his penis from his pants and showed it to Plaintiff. Complaint, ¶ 5.
17. Jail Administrator Jim Phelps received a call from Officer Pugh on March 26, 2006 regarding an incident at the jail involving Suzanne Ruddell leaving the control room unattended. Depo. Phelps, p. 29, l. 8-11; Depo. Ruddell, p. 136, l. 19-23.
18. Between the time Ruddell left the control room and the end of her shift on March 26, 2006, there were no unpleasantries or harsh words exchanged between her and Bossow. Depo. Ruddell, p. 138, l. 13-18.
19. Sheriff Mike Wilson received a report from Officer Pugh on the morning of March 27, 2006 regarding an incident on March 26, 2006, wherein Pugh alleged that Suzanne Ruddell left the control room unmanned. Depo. Wilson, Vol. I, p. 64, l. 11-24; p. 72, l. 15-23; p. 73, l. 3-10; Declaration of Mike Wilson.
20. Sheriff Wilson met with Suzanne Ruddell to determine what happened on March 26, 2006. Depo. Wilson, Vol. I., p. 73, l. 14-24; p. 74, l. 1-24; p. 75, l. 1-10.

21. Sheriff Wilson spoke with Bossow regarding the events of March 26, 2006 and Ruddell's behavior at work that day. Depo. Wilson, Vol I., p. 65, l. 1-24.
22. Before making the decision to terminate Plaintiff, Sheriff Wilson spoke with Jeff Pugh, Bossow, Ruddell, and was informed of the inmates' statements regarding the incident on March 26, 2006. Depo. Wilson, p. 81, l. 17-24; p. 82, l. 1-15; Declaration of Mike Wilson.
23. Plaintiff never expressed any complaints or allegations of harassment to Sheriff Wilson until March 27, 2006, at the earliest. Depo. Ruddell, p. 121, l. 13-18.
24. Sheriff Wilson made a decision to terminate Suzanne Ruddell's employment after speaking with Jeff Pugh, James Bossow, Ruddell, and after considering inmate statements. Depo. Wilson, Vol. I, p. 10, l. 16-18; p. 75, l. 16-20; p. 81, l. 17-24; p. 82, l. 1-3.
25. Ruddell claims Bossow was the harasser referenced in her Complaint. Depo. Ruddell, p. 213, l. 9-11.
26. Ruddell made no complaints to the Equal Employment Opportunity Commission (EEOC) regarding any co-employee or supervisor other than James Bossow. Depo. Ruddell, p. 185, l. 5-16; Charge of Discrimination (attached to the Declaration of Mike Wilson).
27. Ruddell's EEOC Charge states that the discrimination took place between January 10, 2006 and March 31, 2006. Declaration of Mike Wilson; Charge of Discrimination.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) states that a, “judgment sought should be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party; if the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211-12 (1986). When ruling on a motion for summary judgment, mere existence of a scintilla of evidence in support of the plaintiff’s position will not be sufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *See Anderson* at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

Federal Rule of Civil Procedure 56(e) states that, “when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.” Rule 56(e) requires the opposing party to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 274 (1986).

ARGUMENT

Plaintiff, in her Complaint, alleges that, while she was employed as a corrections officer, she suffered sexual harassment. Complaint, D.E. 1, ¶¶ 4, 5. She goes on to claim that on or about March 25, 2006, “the harasser” threatened her job and that on March 26, 2006, “the harasser” was made a temporary supervisor and he “falsely accused Plaintiff of leaving a control room unoccupied.” *Id.* at ¶¶ 6, 7. On or about March 31, 2006, Plaintiff was terminated from Defendant’s employment. *Id.* at ¶ 8. In Plaintiff’s deposition, Plaintiff acknowledged that “the harasser” referenced in her Complaint was James Peter Bossow (referred to herein as “Bossow”), with whom she was having or had a sexual relationship. Depo. Ruddell, p. 213, l. 9-11. Plaintiff now seeks compensation under Title VII for sexual harassment, retaliatory harassment, and retaliation.

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s ... sex.” 42 U.S.C. § 2000e-2(a)(1). This prohibition encompasses two types of sexual harassment. First, it forbids *quid pro quo* harassment, which occurs when an employee’s submission to unwanted sexual advances becomes either a condition for the receipt of job benefits, or the means to avoid an adverse employment action. *See Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461 (6th Cir. 2000). Title VII also “affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult,” and, to enforce this right, prohibits conduct that creates a “hostile environment.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). Plaintiff’s Complaint only states that she is bringing a “sexual harassment” claim, so Defendant will address both *quid pro quo* and hostile work environment in turn.

1. *Quid Pro Quo*

When a sexual harassment plaintiff experiences a “tangible employment action,” a plaintiff may prevail in a claim against the employer upon proof of the following:

(1) that the employee was a member of a protected class; (2) that the employee was subjected to unwelcomed sexual harassment in the form of sexual advances or requests for sexual favors; (3) that the harassment complained of was on the basis of sex; (4) that the employee’s submission to the unwelcomed advances was an express or implied condition for receiving job benefits or that the employee’s refusal to submit to the supervisor’s sexual demands resulted in a tangible job detriment; and (5) the existence of respondeat superior liability.

Highlander v. K.F.C. Nat’l Management Co., 805 F.2d 644, 648 (6th Cir. 1986).

a. Respondeat Superior Liability

To prevail on a *quid pro quo* claim, a plaintiff must demonstrate the existence of respondeat superior liability. “Under the theory of respondeat superior, employers are held strictly liable for conduct of supervisory personnel who have plenary authority to hire, fire, promote, and discipline employees.” *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 186 (6th Cir. 1992). Plaintiff alleges that Bossow was made a temporary supervisor over her. See Complaint, ¶7. However, Plaintiff cannot provide any evidence that Bossow was able to hire, fire, promote, or discipline employees. It is undisputed that Sheriff Mike Wilson made the decision to terminate Plaintiff’s employment. The Declaration of Sheriff Mike Wilson makes clear that James Peter Bossow did not have, in his capacity as acting shift supervisor, the authority to hire, fire, promote, or discipline employees. In fact, Bossow did not suspend Plaintiff; rather, the Sheriff suspended her and ultimately terminated her employment. Depo. Wilson, Vol. I, p. 75, l. 16-20; p. 81, l. 17-24; p. 82, l. 1-3. Without a showing that Bossow had some authority over her, Plaintiff’s claim must fail.

b. Tangible Job Detriment Resulting from Refusal

Plaintiff also must demonstrate that her “submission to unwelcomed advances was an express or implied condition for receiving job benefits or that her refusal to submit to sexual demands resulted in a tangible job detriment.” Thus, Plaintiff may prevail only if she demonstrates that she experienced an adverse employment action, and that this action occurred because of her refusal to submit to sexual demands. *See Bowman* at 461. Plaintiff, however, is unable to make this showing. Plaintiff’s own testimony demonstrates that she and Bossow had a good working relationship on March 26, 2006. Plaintiff testified that there was no animosity between them. Plaintiff, in fact, testified that it was Bossow who came to relieve her from the control room when Officer Pugh refused to do so. The undisputed evidence in this case demonstrates that it was Officer Pugh, not Bossow, who made a complaint about Ruddell’s behavior at work on March 26, 2006 to Jail Administrator Jim Phelps and to Sheriff Mike Wilson. Furthermore, the undisputed evidence in this case is that Sheriff Wilson made the decision to terminate Plaintiff’s employment – Plaintiff is wholly unable to establish that she was terminated because of her refusal to submit to any kind of sexual demands. The testimony of Sheriff Wilson makes it clear that Plaintiff was terminated as a result of her failure to man the control room, not as a result of her failure to submit to sexual advances.

2. Hostile Work Environment

For any sexual harassment preceding an employment decision to be actionable, the conduct must be severe or pervasive. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998). Except in cases of truly egregious conduct, a workplace does not become a hostile work environment on the basis of isolated incidents of harassment. Rather, Plaintiff must show that her workplace was “permeated with discriminatory intimidation, ridicule, and insult that is

sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

In addition, “[b]oth an objective and a subjective test must be met: the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive and the victim must subjectively regard that environment as abusive.” *Bowman*, 220 F.3d at 463. Factors to consider in evaluating a hostile environment claim include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unnecessarily interferes with an employee’s work performance.” *Harris*, 510 U.S. at 23.

Plaintiff claims only three individuals made what she deems to be inappropriate comments – Nick Denton, Chuck Stegall, and James Bossow. Depo. Ruddell, p. 47, l. 8-15. Plaintiff claims that she was subjected to harassment in the form of a question asked on December 5, 2005. She claims that Officer Nick Denton said “Doritos Chip, landing strip or Brazilian.” Depo. Ruddell, p. 60, l. 9-10. Plaintiff also claims that Chuck Stegall asked her every Sunday if she wanted to have sex with him. Depo. Ruddell, p. 61, l. 1-24. The comment from Officer Nick Denton was an isolated incident, and Plaintiff made no complaint that Officer Denton made any other comments to her in this regard. Plaintiff has also failed to establish that the comment interfered with her work performance. Plaintiff admits that she and Chuck Stegall had an amicable working relationship, and she admits she hosted him and his family at her home for dinner on at least one occasion. Depo. Ruddell, p. 84, l. 21-24; p. 85, l. 1-4; p. 162, l. 19-24. Plaintiff’s testimony demonstrates that the single comment from Nick Denton was merely an offensive utterance, as opposed to humiliating and pervasive sexual harassment.

With respect to Officer Bossow, Plaintiff is unable to specifically demonstrate how he created a hostile work environment. Plaintiff testified that co-workers treated her differently during her relationship with him, but she merely complains that she was not selected for overtime and that co-workers were not as friendly to her after she and Bossow ended their relationship. Depo. Ruddell, p. 83, l. 8-24; p. 84, l. 1-7. However, Plaintiff admits that she and Bossow were able to work together amicably. Depo. Ruddell, p. 84, l. 14-20. Therefore, Plaintiff is simply unable to establish that she suffered from a hostile working environment at the Weakley County Detention Center.

3. Retaliation and Retaliatory Harassment

In addition to claiming sexual harassment, Plaintiff claims that she was retaliated against. Title VII also forbids employers from retaliating against an employee because the employee either opposed any practice Title VII makes unlawful, or filed a charge under Title VII. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 56 (2006). To establish a *prima facie* case of retaliation under Title VII, Plaintiff must establish that: "(1)[s]he engaged in activity protected by Title VII; (2) the exercise of h[er] civil rights was known to the defendant; (3) thereafter, the defendant took an employment action adverse to [Plaintiff]; and (4) there was a causal connection between the protected activity and the adverse employment action." *Arendale v. City of Memphis*, 519 F.3d 587, 606 (6th Cir. 2008). To establish that an employer's conduct constitutes severe or pervasive retaliatory harassment, the plaintiff must show that "the workplace is permeated with discrimination, intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment. . ." *Harris v. Forklift Sys., Inc.*, 510 U.S 17, 21 (1993).

It is undisputed that Sheriff Mike Wilson made the decision to terminate Plaintiff's employment. Depo. Wilson, Vol. I, p. 10, l. 16-18. Even Plaintiff admits that she never expressed any complaints or allegations of harassment to Sheriff Wilson until March 27, 2006, at the earliest. Depo. Ruddell, p. 121, l. 13-18. Plaintiff has failed to establish that she was harassed after making her complaints to the Sheriff on March 27, 2006. Plaintiff is also unable to establish that her termination was related in any way to the complaints she allegedly made to Sheriff Wilson. Rather, Sheriff Wilson's testimony is that he made the decision to terminate Plaintiff based on the statements of the Plaintiff, Officer Pugh, Officer Bossow, and inmates. Depo. Wilson, Vol. I, p. 75, l. 16-20; p. 81, l. 17-24; p. 82, l. 1-3. Plaintiff is merely left to assume and suppose that the complaints she allegedly made were the reason she was terminated. In making such an assumption, Plaintiff wholly ignores the fact that she was counseled in January 2006 regarding the door to the control room and that the information provided to Sheriff Wilson indicated that she had again failed to properly man the control room. Depo. Ruddell, p. 110, l. 14-23. What Wilson was told in his investigation regarding the happenings on March 26, 2006 should be considered in this case. Obviously, Ruddell disputes the substance of the information that was provided to Wilson. However, the information provided to Wilson about the events of March 26, 2006 demonstrate the state of mind of the Sheriff when he discharged Plaintiff. See *Michael V. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 598 (6th Cir. 2007). Plaintiff's disagreement with the facts uncovered in the Sheriff's investigation does not create a genuine issue of material fact that defeats summary judgment "as long as an employer has an honest belief in its proffered nondiscriminatory reason." *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1107, 1117 (6th Cir. 2001). The key inquiry is whether the employer "made a reasonably informed and considered decision" before the termination. *Smith v. Chrysler*

Corp., 155 F.3d 799, 807 (6th Cir. 1998). An employer has an honest belief in its rationale when it “reasonably relied on the particularized facts that were before it at the time the decision was made.” *Majewski*, 274 F.3d at 1117 (citation omitted). The testimony here is that, after receiving a written complaint from Pugh, Sheriff Wilson spoke to Bossow, who also worked on the same shift, and to Ruddell herself. In Sheriff Wilson’s opinion, Ruddell did not deny that she left the control room unmanned. In addition, Sheriff Wilson reviewed statements provided to him by inmates. These steps demonstrate that the Sheriff had an honest belief in his rationale for terminating Ruddell. Given this honest belief, Plaintiff’s claim for retaliation and retaliatory harassment must fail.

4. The Court lacks subject matter jurisdiction over Plaintiff’s claims of sexual harassment from other co-employees or supervisors.

As a prerequisite to bringing suit under Title VII, a claimant must exhaust his or her administrative remedies. *See Weigel v. Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 379 (6th Cir. 2002). The policy or purpose of the exhaustion requirement “is to trigger an investigation, which gives notice to the alleged wrongdoer of its potential liability and enables the EEOC to initiate conciliation procedures in an attempt to avoid litigation.” *Dixon v. Ashcroft*, 392 F.3d 212, 217 (6th Cir. 2004) (citation omitted). The EEOC charge is liberally construed to encompass all claims “reasonably expected to grow out of the charge of discrimination.” *Haithcock v. Frank*, 958 F.2d 671, 675 (6th Cir. 1992).

In this case, Plaintiff’s charge of discrimination filed with the EEOC makes no allegations whatsoever with respect to any co-employee or supervisor, other than James Bossow, nor does it deal with any allegations of harassment prior to January 10, 2006. Depo. Ruddell, p. 185, l. 12-16; *See also* EEOC Charge, attached to the Declaration of Mike Wilson. Plaintiff’s EEOC charge mentions Bossow, and only Bossow. In fact, Plaintiff’s Complaint only mentions

one “harasser,” who Ruddell identified as Bossow. Depo. Ruddell, p. 213, l. 1-11. Plaintiff is unable to show that she prepared her Charge of Discrimination *pro se*. Thus, Plaintiff cannot take advantage of the courts’ leniency to *pro se* parties who fill out the EEOC charge without the assistance of counsel. Therefore, Plaintiff’s claims, made for the first time in her deposition in this case, that other officers (other than Bossow) also made sexually inappropriate comments to her¹, should be barred for failure to exhaust administrative remedies. In addition, Plaintiff’s claims of harassing or sexually inappropriate comments made before January 10, 2006 should also be barred for failure to exhaust administrative remedies.

Respectfully submitted,

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¹ In her deposition, Plaintiff claimed that Officers Nick Denton and Chuck Stegall made inappropriate comments within the workplace, but Plaintiff never mentions either of these two officers in her Complaint or in her EEOC Charge, which contains very precise factual allegations relating to her working relationship with Officer Bossow. *See* Depo. Ruddell, p. 47, l. 8-15.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of this pleading via ECF or by mail upon:

Justin Gilbert
Michael Russell
101 North Highland Ave.
Jackson, TN 38301

This the 12th day of January, 2009.

PENTECOST & GLENN, PLLC

By: s/Brandon O. Gibson
Brandon O. Gibson (#21485)

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

DANIEL SANDERS,)	
)	
Plaintiff/Appellant)	
)	
v.)	No.: W2008-01832-COA-R3-CV
)	Trial Court No.:
HENRY COUNTY, TENNESSEE,)	
)	
Defendant/Appellee)	

BRIEF OF APPELLEE HENRY COUNTY TENNESSEE

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the Circuit Court of Henry County appropriately grant summary judgment to Defendant/Appellee Henry County, when Plaintiff failed to establish any “illegal act,” as defined by Tennessee Code Annotated § 50-1-302(c)?

STATEMENT OF THE CASE

On September 28, 2006, Plaintiff/Appellant, Daniel Sanders, filed suit against Defendant/Appellee Henry County, Tennessee, claiming both statutory and common law retaliatory discharge. T.R. 1-2. Appellant claims that he “observed his immediate supervisor using a computer terminal owned by Henry County for personal purposes, and to view hardcore pornography, on county time and in the course and scope of his employment.” T.R. 1-2. Appellant also claims that he was “fired solely because he reported wrongdoing on the part of his immediate supervisor as aforesaid.” T.R. 2.

On April 4, 2007, the Circuit Court of Henry County granted Appellee’s Motion to Dismiss the common law claim for retaliatory discharge. T.R. 15-16. On February 5, 2008, Appellee filed a Motion for Summary Judgment. T.R. 20. On June 6, 2008, the trial court granted Defendant’s Motion for Summary Judgment. T.R. 174-178.

STATEMENT OF FACTS

Plaintiff/Appellant Daniel Sanders was employed at the Henry County Recycling Center, which is owned and operated by Henry County, Tennessee. T.R. 46. Alvin Misker was Sanders' supervisor at the Recycling Center. T.R. 46. Appellant claims he witnessed Misker viewing hardcore pornography on a county owned computer. Henry County does not have a county-wide policy dealing with the content or subject matter of information viewed on county-owned computers. T.R. 47.

In late November or early December 2005, the County Mayor, Brent Greer, held a meeting between Sanders and Misker to discuss problems Sanders was having with his work or co-workers. T.R. 47. During this meeting, Sanders alleged for the first time that he had witnessed Misker using his work computer to view non-work related emails. T.R. 48. During early 2006, Misker continued to have problems with Sanders' work performance. T.R. 48. Misker demoted Sanders in early May of 2006. T.R. 49. On May 24, 2006, Misker terminated Sanders' employment. T.R. 49. It is his termination from employment that gave rise to this lawsuit and, ultimately, this appeal.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN AWARDING SUMMARY JUDGMENT TO DEFENDANT/APPELLEE.

Appellant's claim on appeal is that the trial court improperly granted summary judgment to Henry County on his claim of violation of the Tennessee Whistleblower Act, codified at Tennessee Code Annotated § 50-1-304. Appellant takes no issue with the trial court's dismissal of his common law retaliatory discharge claim.

Tennessee Code Annotated § 50-1-304(a) provides that “[n]o employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities.” Courts in Tennessee apply a burden shifting analysis to claims of retaliatory discharge. First a plaintiff has the affirmative burden of proof to establish a *prima facie* case of retaliatory discharge by showing that: (1) he was an employee of the defendant employer; (2) he refused to participate in, or remain silent about, illegal activities as defined under the Act; (3) he was terminated; and (4) an exclusive causal relationship existed between his refusal to participate in or remain silent about illegal activities and his termination. *See Franklin v. Swift Transp. Co.*, 210 S.W.3d 521, 528 (Tenn. Ct. App. 2006). Elements (2) and (4) are substantial hurdles for employees. *See Darnall v. A+ Homecare, Inc.*, No. 01-A-01-9807-CV-00347, 1999 Tenn. App. LEXIS 339 (Tenn. Ct. App. June 2, 1999) (copy attached).

a. Plaintiff failed to allege and/or prove the existence of any illegal act.

The Whistleblower Act, by its very terms, requires the existence of an illegal act. The code even defines “illegal act.” Tennessee Code Annotated § 50-1-304(c) provides that “illegal activities” means “activities that are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety or welfare.” The courts have even held that not *every* violation of a law or regulation by an employer will support

a claim for retaliatory discharge. *See Franklin v. Swift Transp. Co.*, 210 S.W.3d 521, 528 (Tenn. Ct. App. 2006).

Plaintiff's Complaint claims that the "illegal act" that he allegedly reported was his supervisor's viewing of pornography on a county owned computer. T.R. 2. Plaintiff further testified in his deposition that the sole reason for his termination was the reporting of the viewing the pornography. T.R. 63-64. However, this activity is not "illegal" as defined by Tenn. Code Ann. § 50-1-304(c). Appellant would have this Court expand the statutory definition of "illegal act" simply because he believes it is not the most prudent use of time. Such an expansion of the legislature's definition of "illegal act" is certainly not warranted and is, in fact, rather dangerous. Should the Court agree with Appellant's position, suddenly activities like taking a personal phone call at work or checking personal e-mail at work fall under the umbrella of "illegal acts." Such far-reaching implications are certainly not within the legislature's intent. Appellant further argues that, because society in general looks unfavorably on pornography, pornography itself falls within the statute's definition of an "illegal act." However, viewing pornography is not in violation of any "criminal or civil code" of Tennessee or of the United States or in violation of "any regulation intended to protect the public health, safety or welfare." Tenn. Code Ann. § 50-1-304(c). Appellant simply failed to make the requisite showing in the court below, and, thus, summary judgment in favor of Henry County was appropriate.

b. Appellant failed to demonstrate how the provision of tires was an "illegal act."

In this Court, Appellant claims that the purchase of new tires for his trailer, *which the County used*, was an additional "illegal act" that he allegedly reported and for which he was allegedly terminated. However, Appellant's own deposition testimony and the language of his

Complaint demonstrates that he believes he was terminated solely for reporting the viewing of the pornography. T.R. 2, 63-64. Furthermore, even in his brief to this Court, Appellant has wholly failed to demonstrate how new tires on his trailer, but that the County was using, is an “illegal act.” Appellant’s “feelings”¹ are irrelevant. Appellant presented absolutely no *evidence* to the trial court to demonstrate how the provision of new tires was illegal. Rule 56 of the TENNESSEE RULES OF CIVIL PROCEDURE specifically states that an adverse party “may not rest upon the mere allegations or denials of the adverse party’s pleading.” Appellant has failed to demonstrate what statute or regulation has been violated by the provision by the County of replacement tires for a trailer that the County used. Therefore, and for the reasons asserted in Appellee’s Motion for Summary Judgment, Memorandum in Support, Reply to Plaintiff’s Response to the Motion for Summary Judgment, and the Response to Plaintiff’s Motion to Alter or Amend the Judgment, the trial court’s award of summary judgment to Henry County should be affirmed.

c. There was no causal connection between Appellant’s complaint regarding “illegal conduct” and his termination.

Appellant has re-stated in his brief his argument that there is a causal connection between his complaint of illegal conduct and his termination. Appellant’s Brief, p. 18. However, the trial court did not grant summary judgment to Henry County on the causal connection argument. T.R. 177-178. Rather, the trial court granted summary judgment on Plaintiff’s failure to satisfy element (2) of the prima facie case. Nonetheless, Appellant has raised the issue on appeal.

Summary judgment should have been granted on the fourth element of the prima facie case as well. Appellant failed to satisfy the formidable, affirmative burden of proof to show that an *exclusive* causal connection existed between his complaint and his termination. *See Franklin,*

¹ Appellant’s Brief, p. 17.

210 S.W.3d at 528. A plaintiff's mere belief or understanding as to the reason he was terminated is insufficient to create a genuine issue of material fact. *See Newsom v. Textron Aerostructures*, 924 S.W.2d 87 (Tenn. Ct. App. 1995). Appellant failed to show in the trial court that there was any temporal connection between his complaints and his termination, and he also failed to demonstrate that he was ever put in the position of contemplating the choice between remaining silent or reporting what he alleges is illegal activity. The summary judgment evidence demonstrated that appellant was never discouraged from voicing his complaints about his supervisor's actions. *See. i.e., Bridgestone/Firestone, Inc. v. Orr*, No. M2006-2638-COA-R3-CV, 2008 Tenn. App. LEXIS 5 (Tenn. Ct. App. January 7, 2008) (holding that Plaintiff had failed to show that he was terminated for not remaining silent about alleged illegal activity when the evidence clearly showed that his employer encouraged him to voice his concerns) (copy attached). The proof presented in the County's motion for summary judgment demonstrated that Appellant was terminated for reasons other than his alleged whistleblowing activity. Therefore, summary judgment in favor of the County on this ground would have been appropriate because Appellant failed to establish an exclusive causal connection between his alleged whistleblowing and his termination, thus failing to satisfy the fourth element of a *prima facie* case.

For all the reasons set forth above, and for the reasons set forth in the record on appeal, Appellee respectfully requests that the Court affirm the trial court's award of summary judgment to Defendant/Appellee Henry County.

CONCLUSION

For the reasons set forth above, the Court should affirm the circuit court's Order granting summary judgment to Defendant/Appellee Henry County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I served a copy of this paper or pleading personally or by mail upon each attorney or firm of attorneys appearing of record for each adverse party on or before the filing date thereof.

DATE: This the _____ day of January 2009.

PENTECOST & GLENN, PLLC

By:

Brandon O. Gibson

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ADDENDUM

Darnall v. A+ Homecare, Inc., No. 01-A-01-9807-CV-00347, 1999 Tenn. App. LEXIS 339
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