

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
October 22, 2008 Session

**SYNTHIA M. DURHAM v. CRACKER BARREL OLD COUNTRY
STORE, INC.**

**Direct Appeal from the Circuit Court for Sevier County
No. 2007-0129-I Ben W. Hooper, II, Judge**

Filed January 5, 2009

No. E2008-00708-WC-R3-WC Mailed December 3, 2008

The employee sought workers' compensation for a knee injury suffered in a fall. While acknowledging compensability for the claim, the employer sought to cap the award at 1.5 times the disability rating. See Tenn. Code Ann. § 50-6-241(d)(1)(A) (2008). The trial court held that the employee was terminated due to her injury rather than her misconduct but applied the 1.5 cap on the award. The evidence does not preponderate against the trial court's factual findings, but its application of the cap was in error. The judgment of the trial court is reversed in part and the cause is remanded.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court
Reversed in Part and Remanded**

GARY R. WADE, J., delivered the opinion of the court, in which DONALD P. HARRIS, SP. J., and WALTER C. KURTZ, SP. J., joined.

George R. Garrison, Sevierville, Tennessee, for the appellant, Synthia M. Durham.

James T. Shea IV, Knoxville, Tennessee, for the appellee, Cracker Barrel Old Country Store, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

Synthia M. Durham ("Employee") was employed by Cracker Barrel Old Country Store, Inc. ("Employer") for nine years. On November 25, 2005, the Employee held the position of associate manager at the Employer's restaurant in Pigeon Forge, Tennessee. While working that night, the Employee slipped on grease and injured her right knee. After performing arthroscopic surgery on the Employee's knee three months later, Dr. Richard Cunningham assigned 7% permanent anatomical impairment to the right leg as a result of the injury.

Prior to the date of the injury, Employee had been involved in a series of practical jokes involving another associate manager, Jason King. Shortly before her fall, the Employee planned with another employee, waitress Cindy Truitt, for Truitt to change into a costume (made of foam rubber or a similar substance) of an obese woman in a bikini with tassels on her top. As part of the prank, the Employee had allegedly arranged for some of her co-workers to gather near the restaurant cooler, where King was conducting an inventory, so as to watch. Ms. Truitt approached Mr. King from behind, touched him on the shoulder and back, and performed a suggestive dance. The Employee recorded the event with her video camera. After the prank, the Employee resumed her work duties. Shortly thereafter, the Employee slipped, fell, and injured her knee.

On the next day or the day thereafter, Steve Sprouse, who had assisted King with the inventory, informed Dale Allen, the general manager of the restaurant, of the prank. A few hours later, Allen also received a telephone call from a district manager who expressed concern about the nature of the prank and directed Allen to conduct an investigation. Allen took statements from King and other witnesses and forwarded a report to both the district manager and the employee relations department.

The report identified the Employee as the planner and organizer of the prank. Upon the instructions of the Employer, Allen informed the Employee of her termination. Ms. Truitt, who wore the costume, was reprimanded. As a result of her discharge, the Employee never returned to work for the Employer following her surgery and recovery. She did, however, accept employment with a different restaurant chain performing similar duties.

At trial, King, Allen, and other employees confirmed that the prank violated the Employer's dress code, rules against behavior unbecoming of the company image, and rules prohibiting the encouragement of physical contact among employees. King testified that he was embarrassed by the incident. The Employee, who had signed a document agreeing to abide by the anti-harassment policy, conceded that if the prank encouraged other employees to act disrespectfully towards King, that would also have been a violation of Employer policy.

It was the Employee's contention that she was terminated not for her participation in the prank, but for sustaining an injury related to her employment. The record establishes that the management staff received bonuses based upon the income of the restaurant. For bonus calculation purposes, however, the Employer deducted ten thousand dollars from the actual income of the restaurant when an employee filed a workers' compensation claim involving an absence of more than five days of work due to the injury.

The Employer did not contest the compensability of the Employee's injury, but argued that her award was required by Tennessee Code Annotated section 50-6-241(d)(1)(A) to be capped at one and one-half times her medical impairment. At the conclusion of all of the proof, the trial court specifically held that the Employee "lost [her] job because of having hurt [her]self . . . [and not] because of . . . misconduct." Citing our ruling in Carter v. First Source Furniture Group, 92 S.W.3d 367 (Tenn. 2002), the trial court nevertheless limited the Employee's recovery to one and one-half times the impairment, and awarded a permanent partial disability of 10.5% (7% x 1.5) to the right leg.

Standard of Review

The standard of review of issues of fact in workers' compensation cases is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). When credibility and weight to be given testimony are involved, considerable deference must be given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

“The Tennessee Workers' Compensation statute sets caps on an employee's permanent partial disability award, with the level of the cap dependent on whether or not the pre-injury employer returns the employee to work at a wage equal to or greater than the employee's pre-injury wage.” Carter, 92 S.W.3d at 370. Tennessee Code Annotated section 50-6-241(d)(1)(A), which applies to injuries occurring after July 1, 2004, imposes a cap of 150% of an employee's medical impairment rating for employees with permanent partial disability who are returned to employment by their pre-injury employer at a wage equal to or greater than their pre-injury wage. Tennessee Code Annotated section 50-6-241(d)(2)(A), however, imposes a much higher cap of 600% of a similarly injured and disabled employee's medical impairment rating if “the pre-injury employer did not return the injured employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury.”

In Carter, our Supreme Court considered the applicability of Tennessee Code Annotated section 50-6-241(a)(1), which establishes a similar but higher cap regime for employees whose injuries occurred before July 1, 2004, to an employee who suffered an injury, continued working prior to surgery for the injury, but was terminated prior to the surgery for gross misconduct. Although the employee in Carter never returned to her employment after the surgery, the Court held that she should be treated as if she had made a meaningful return to work at an equal or greater wage, thus subjecting her to the lower cap. The Court reasoned that, “the General Assembly, by passage of section 50-6-241(a), did not intend to require an employer to make an offer of re-employment to an employee previously fired for violating workplace rules.” Carter, 92 S.W.3d at 371. While the employee argued that such a rule would encourage discharges by employers so as to benefit from the lower cap, the Supreme Court concluded that “the law of retaliatory discharge protects employees from this behavior.” Id. at 372.

We see nothing in the text or history of Tennessee Code Annotated section 50-6-241(d)(1)(A) that warrants any departure from the course charted in Carter. Although neither section 50-6-241(a) nor section (d)(1)(A) explicitly addresses the issue of employees dismissed for misconduct, the legislation governing post-2004 injuries is, if anything, less inclined to reward an employee terminated for misconduct than the pre-July 1, 2004 statutory scheme. Section 50-6-241(d)(1)(B) permits motions for reconsideration by employees who are at first made subject to the (d)(1)(A) cap because they returned to work, but who then leave their employment within 400 weeks thereafter. Tennessee Code Annotated section 50-6-241(d)(1)(B)(iii)(b), however, specifically denies this right of reconsideration to employees whose loss of employment was due to “[t]he employee's misconduct

connected with the employee's employment." It follows, then, that the rule announced in Carter regarding employees terminated for misconduct is applicable to cases governed by section 50-6-241(d).

Under the Carter ruling, courts are authorized to examine the reasons for an employee's discharge when determining which cap to apply. Although the ground, not the reasonableness, of termination was the determinative issue under Carter, we do believe that some evaluation of the reasonableness of an employer's action can and should be part of courts' attempts to discern the validity of that employer's professed motivation for terminating the employee. The rule crafted in Carter was not designed to protect an employer's right to terminate an employee at will with no consequence. In this regard, the trial court misstated the law. If the Employee was terminated due to her injury, Carter simply does not apply.

When applying the Carter limitation on recovery, courts must determine (1) that the actions allegedly precipitating the employee's dismissal qualified as misconduct under established or ordinary workplace rules and/or expectations; and (2) that those actions were, as a factual matter, the true motivation for the dismissal.

In Moore v. Best Metal Cabinets, No. W2003-00687-WC-R3-CV, 2004 WL 2270751 (Tenn. Workers' Comp. Panel Oct. 7, 2004), for example, the Panel considered whether to apply the 250% cap to a case where employee made a reasonable return to work for an equal or greater salary after an injury that occurred prior to July 1, 2004. The employer argued that the employee had been terminated for insubordination. The Panel, however, held that the employee's supervisor terminated the employee in a fit of anger unrelated to insubordination or misconduct. Moore, 2004 WL 2270751, at *3. The Panel held that because the evidence did not support a finding of termination for misconduct, the exception established by Carter did not apply, and the case was governed by the general rule established by Tennessee Code Annotated section 50-6-241(a). Id. In Davis v. Avron Truss Co., No. W2000-00780-WC-R3-CV, 2001 WL 767014 (Tenn. Workers' Comp. Panel July 5, 2001), on the other hand, a Panel reversed an award in excess of the relevant cap on grounds that the evidence showed that the claimant had been properly dismissed for misconduct on the job.

In our view, the evidence establishes that the Employee engaged in some misconduct. Other employees confirmed that the Employee's behavior violated both the official rules of the Employer and the general expectations that the Employer held for its employees. In consequence, unless that misconduct was merely a pretext for her dismissal, the Employee should be subject to the lower cap.

The Employee points out that pranks were common at the restaurant and other restaurants under shared management. There is testimony to support that. By all appearances, none of the other pranks resulted in significant employee discipline. For example, in one instance, a manager brought a dead rat into a Cracker Barrel restaurant as a practical joke on another manager. Although the managers' supervisor – Allen's district manager – witnessed the incident, no one was suspended for that prank. There were numerous other pranks, none of which resulted in a dismissal. The Employee also points out that the individual who actually wore the inappropriate costume was not terminated and received only a written reprimand. While Allen contended that the Employee had directed Truitt to participate in the prank, the Employee testified that the prank had been Truitt's

idea. The trial judge, who saw each witness and heard the testimony first hand, explicitly accredited the testimony of the Employee. On appeal, that assessment is entitled to “considerable deference.” Whirlpool Corp., 69 S.W.3d at 167. Moreover, the Employer’s policy of tying manager bonuses to missed time by workers’ compensation claimants provides some insight. The fact finder was entitled to draw reasonable inferences from that testimony in assessing the actual cause of the termination.

The Employee had been employed by Cracker Barrel for nine years. She had worked her way up from server to associate manager. Prior to her termination, she had been selected for and was undergoing further management training. Although a prankster, the Employee had not been disciplined for any prior misdeed. While none of these facts preclude a firing for misconduct, they do, however, tend to support the finding by the trial court that the Employee, who had demonstrated both dedication to the Employer and competence in her job performance, was discharged for reasons other than the prank. Lesser steps, such as a warning or reprimand, might have been reasonable ways to provide discipline for her misconduct. That the Employer chose to terminate the Employee during her recovery period from a work-related injury rather than impose a lesser sanction gives credence to the conclusions made by the trial court. The Employee, therefore, set forth a plausible circumstantial case that her termination was motivated by her injury rather than her inappropriate behavior.

As the Supreme Court observed in Carter, 92 S.W.3d at 372, the law of retaliatory discharge provides a framework of protections for employees. The question in this case, however, is not whether the Employee’s firing was improper, but whether it was motivated by employee misconduct, the specific ground addressed by Carter. As stated, the trial court specifically held that the firing was not so motivated, implying instead that she was discharged as a result of her injury. Although a close question, we hold that the evidence does not preponderate against that finding. The Employer’s inconsistent treatment of other incidents, combined with the timing of the dismissal and the Employee’s longstanding satisfactory service, supports the finding that the termination was not for the misconduct.

Although we affirm the trial court’s determinations of fact, we must reverse its judgment on a matter of law. The rule enunciated in Carter does not extend to cases where an employer professes that termination was motivated by misconduct but the facts show that it was not. Thus, the 150% cap should not have been applied on that ground. On remand, the trial court may consider an award from 150% up to 600% as permitted by Tennessee Code Annotated section 50-6-241(d)(2)(A).

Conclusion

The judgment of the trial court is, therefore, reversed as to the amount of disability awarded to the Employee and the cause is remanded for proceedings in accordance with this opinion. Costs are taxed to the Employer, Cracker Barrel Old Country Store, Inc., for which execution may issue if necessary.

GARY R. WADE, JUSTICE

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE, TENNESSEE

**SYNTHIA M. DURHAM V. CRACKER BARREL OLD COUNTRY STORE,
INC.**

**Sevier County Circuit Court
No. 2007-0129-I**

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No. E2008- 00708-WC-R3-WC

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellee, Cracker Barrel Old Country Store, Inc. and their surety, for which execution may issue if necessary.