

THE SUPREME COURT OF ARKANSAS HELD THAT AN EMPLOYEE WHO IS TERMINATED FOR MISCONDUCT IS NOT VOLUNTARILY REFUSING SUITABLE EMPLOYMENT OFFERED TO HIM.

In *Tyson Poultry, Inc. v. Narvaiz*,<sup>1</sup> the Supreme Court of Arkansas held that an employee does not refuse suitable employment when he is terminated for misconduct.<sup>2</sup> Francisco Narvaiz, Appellee, was injured while working for Tyson Poultry, Inc., Appellant.<sup>3</sup> While working on light duty, Narvaiz insulted his supervisor by calling her a “mother-f- -king bitch.”<sup>4</sup> Narvaiz was suspended and then terminated based on insubordination and gross misconduct.<sup>5</sup> Narvaiz’s claim for temporary-total-disability was denied by the administrative law judge (“ALJ”) through the end of his disability period.<sup>6</sup>

The ALJ’s decision was reversed by the Commission which ruled that “termination for misconduct is not a sufficient basis for a finding that the employee refused suitable employment under Ark. Code Ann. § 11-9-256 (Rep. 2002).”<sup>7</sup> This reversal relied on *Superior Industries v. Thomaston*,<sup>8</sup> which determined that termination of an employee due to misconduct does not constitute the employee’s refusal of employment.<sup>9</sup> Tyson appealed to the court of appeals where the decision in *Thomaston* was limited to its facts without much further explanation.<sup>10</sup> The Supreme Court granted review, however the court only reviews the case as an appeal from the Commission.<sup>11</sup>

Tyson first states that the Commission’s finding that Narvaiz was entitled to temporary-total-disability benefits was not supported by the evidence.<sup>12</sup> Section 11-9-526 of the Arkansas Code Annotated requires an injured employee to accept employment that he can perform with his injury if it is offered to him or else lose out on benefits.<sup>13</sup> The commission interpreted that section of the statute in *Thomaston* and found that by being terminated, an employee was not refusing employment.<sup>14</sup>

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1. 2012 Ark. 118, 388 S.W.3d 16.
  2. *Id.* at 9, 388 S.W.3d 22.
  3. *Id.* at 2, 388 S.W.3d 18.
  4. *Id.*, 388 S.W.3d 18.
  5. *Id.*, 388 S.W.3d 18.
  6. *Id.*, 388 S.W.3d 18.
  7. *Narvaiz*, 2012 Ark. 118, at 2, 388 S.W.3d 18.
  8. 72 Ark. App. 7, 32 S.W.3d 52 (2000).
  9. *Narvaiz*, 2012 Ark. 118, at 2, 388 S.W.3d 18.
  10. *Id.* at 3, 388 S.W.3d 18.
  11. *Id.*, 388 S.W.3d 18.
  12. *Id.*, 388 S.W.3d 18–19.
  13. *Id.*, 388 S.W.3d 19 (citing ARK. CODE ANN. 11-9-526).
  14. *Id.* at 4–5, 388 S.W.3d 19 (citing *Thomaston*, 72 Ark. App. at 11, 32 SW.3d 52).

The court in *Thomaston* went on to recite Section 11-9-1001 of the Arkansas Code Annotated where the legislature specifically stated that the courts, the Commission, and the ALJs were not to broaden or erode the purpose of the workers' compensation laws.<sup>15</sup> Instead, the legislature stated that if anything needed to be changed, or if any court decisions needed to be overruled, that they were the ones to do it.<sup>16</sup> The Supreme Court noted that since *Thomaston* was decided over twelve years ago and no legislature had overturned the interpretation of Section 11-9-526 by rewriting the statute, that the statute must have been interpreted correctly.<sup>17</sup>

Since the Commission was correct in determining that an employee was not refusing employment when he was terminated for misconduct,<sup>18</sup> the Supreme Court went on to determine if there was substantial evidence to show that Narvaiz was entitled to temporary-total-disability benefits. To receive benefits, the injured must be unable to earn wages and must be in his healing period.<sup>19</sup> "The healing period is 'that period for healing of an injury resulting from an accident.'"<sup>20</sup> The period where the injured cannot earn any wages due to the injury is the temporary-total-disability period.<sup>21</sup>

Narvaiz was injured on August 22, 2007 and received medical treatment on August 28, 2007.<sup>22</sup> At this time, Narvaiz was put on light duty work due to the injury.<sup>23</sup> It was determined later that Narvaiz was not at "maximum medical improvement" until August 6, 2008.<sup>24</sup> Narvaiz's misconduct and suspension occurred on December 22, 2007.<sup>25</sup> Following the suspension, Narvaiz returned to work only to be terminated.<sup>26</sup> However, since Narvaiz was already in his healing period, the court held that Tyson owed Narvaiz temporary-total-disability benefits until he made a maximum recovery.<sup>27</sup>

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15. *Narvaiz*, 2012 Ark. 118, at 6–7, 388 S.W.3d 20 (citing *Thomaston*, 72 Ark. App. at 11–12, 32 SW.3d at 54–55).

16. *Id.*, 388 S.W.3d 20 (citing *Thomaston*, 72 Ark. App. at 11–12, 32 SW.3d at 54–55).

17. *Id.* at 7, 388 S.W.3d 21.

18. *Id.* at 9, 388 S.W.3d 22.

19. *Id.* at 4, 388 S.W.3d 19 (citing Ark. State Hwy. & Transp. Dep't v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981); St. Joseph's Mercy Med. Ctr. v. Redmond, 2012 Ark. App. 7, 388 S.W.3d 45).

20. *Id.*, 388 S.W.3d 19 (quoting ARK. CODE ANN. § 11-9-102(12) (Supp. 2011)).

21. *Narvaiz*, 2012 Ark. 118, at 4, 388 S.W.3d 19 (citing *RPC, Inc. v. Hargues*, 2011 Ark. App. 264, 2011 WL 1319384).

22. *Id.* at 5, 388 S.W.3d 20.

23. *Id.*, 388 S.W.3d 20.

24. *Id.* at 6, 388 S.W.3d 20.

25. *Id.* at 5, 388 S.W.3d 20.

26. *Id.* at 5–6, 388 S.W.3d 20.

27. *Narvaiz*, 2012 Ark. 118, at 9, 388 S.W.3d 22.

Tyson also raised an issue with the credibility of Narvaiz’s testimony used to prove that he was entitled to wage-loss benefits.<sup>28</sup> “The wage-loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood.”<sup>29</sup> The Commission looks at “medical evidence, the appellant’s age, education, experience,”<sup>30</sup> along with “motivation to return to work.”<sup>31</sup> However, the Commission is charged with determining the credibility of witnesses, not the Supreme Court.<sup>32</sup>

The Commission took note that Narvaiz was a sixty-year-old male, did not have a GED or high school diploma, held an eighth grade education, worked in manual labor for thirty-five years, and learned some supervisory skills.<sup>33</sup> He was injured on the job, retained a two-percent impairment after healing, and still felt pain in his shoulder.<sup>34</sup>

The issue of credibility was left up to the Commission, and so based on the information the Commission took as true, the court upheld its decision on the wage-loss disability issue.<sup>35</sup>

Finally, Tyson raised the issue that Narvaiz is not due attorney’s fees under Arkansas Code Annotated Section 11-9-715 since it believed Narvaiz had not proven the other two issues.<sup>36</sup> However, based on the court’s ruling on the first two issues, the court held that Narvaiz was statutorily entitled to attorney’s fees.<sup>37</sup>

This case reinforced the mandate set out by the state legislature for the courts not to broaden or erode workers’ compensation laws. Tyson asked the court to alter its interpretation of Section 11-9-526 and the court upheld the earlier interpretation based on the legislature’s reluctance to override that precedent. Based on the earlier interpretation, an employee who is terminated for misconduct is not therein refusing to accept suitable employment offered to him.

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28. *Id.*, 388 S.W.3d 22.

29. *Id.*, 388 S.W.3d 22 (citing *Lunday v. Entergy Ark. Inc.*, 2012 Ark. App. 169, \_\_\_ S.W.3d \_\_\_).

30. *Id.* at 10, 388 S.W.3d 22 (citing *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961)).

31. *Id.*, 388 S.W.3d 22 (citing *Lunday*, 2012 Ark. App. 169, \_\_\_ S.W.3d \_\_\_).

32. *Id.*, 388 S.W.3d 22–23.

33. *Narvaiz*, 2012 Ark. 118, at 10, 388 S.W.3d 23.

34. *Id.* at 10–11, 388 S.W.3d 23.

35. *Id.* at 11, 388 S.W.3d 23.

36. *Id.*, 388 S.W.3d 23.

37. *Id.* at 11–12, 388 S.W.3d 23.