IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 27, 2012 Session

DONALD PLUNK v. GIBSON GUITAR CORPORATION

Appeal from the Chancery Court for Davidson County
No. 081066IV Russell T. Perkins, Chancellor

No. M2012-00882-COA-R3-CV - Filed May 31, 2013

Former sales associate brought wrongful termination suit against his former employer, alleging that his termination was in breach of contract and violated the Tennessee Disability Act. When the employer failed to answer the complaint, the trial court granted the employee a default judgment on liability; the court subsequently entered an order granting the employee judgment for $184,437.50. The Employer filed various motions seeking to have the judgments set aside; the court declined to set aside the default judgment but set aside the monetary award. Following a hearing, the court awarded the employee back pay in the sum of $55,590.74 and counsel fees totaling $60,107.25. Employer and employee appeal. Finding no error, we affirm the judgment of the trial court.

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

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M. S. and ANDY D. BENNETT, J., joined.

Tim Harvey, Nashville, Tennessee, for the appellant, Gibson Guitar Corp.

Richard Stephen Doughty, Hendersonville, Tennessee, and Stephen Orme Nunn, Nashville, Tennessee, for the appellee, Donald Plunk.

OPINION

Donald Plunk, a former sales associate at Gibson Guitar Corporation's ("Gibson") Memphis store, filed this action alleging that his termination from employment violated the Tennessee Disability Act, Tenn. Code Ann. § 8-50-103, and was in breach of contract.

Mr. Plunk filed suit on May 13, 2008; by agreed order entered June 17, Gibson was given until June 30 to answer. When no answer was filed, on July 18 Mr. Plunk filed a

motion for default judgment on the issue of liability; the motion was set for hearing on August 8.[1] On July 23, then counsel for Gibson filed a motion to withdraw, stating in the motion that "General Counsel for Gibson has advised this firm that it has retained another law firm to defend the claims against it in this matter"; copy of the motion to withdraw was served on Gibson's general counsel. On August 20 the court entered an order (1) granting counsel's motion to withdraw and (2) granting Gibson up to and through September 8 to answer; the order also set the motion for default for hearing on September 12, in the event Gibson failed to timely file an answer. When Gibson did not respond to the complaint, the court entered an order on September 18 granting Mr. Plunk a default judgment on the issue of liability and reserving damages and counsel fees.[2]

On February 11, 2009, Mr. Plunk filed a motion for judgment in accordance with his Tenn. R. Civ. P. 54.03 demand in the amount of $184,437.50 or, alternatively, for summary judgment; his affidavit and a statement of material facts were filed in support of the motion. The record does not reflect that Gibson filed a response or opposition to the motion. The motion was heard on March 27, and on April 7 the court entered an order granting Mr. Plunk judgment in the amount of $184,437.50 and granting him leave to file an application for counsel fees. On April 21, Gibson filed various motions seeking to have the judgment set aside. On June 8, the court entered an order which denied the motion to set aside the default judgment awarded in the September 18, 2008 order and granted the motion to set aside the April 7, 2009 money judgment. A hearing on damages was held on July 20, 2010 and on March 20, 2012, the court entered an order awarding Mr. Plunk back pay in the sum of $55,590.74; by order of May 8, the court awarded counsel fees totaling $60,107.25.

Both parties appeal. Gibson assigns as error the court's denial of its motion for judgment on the pleadings and motion to set aside the default judgment, the award of back pay to Mr. Plunk and award of counsel fees, and the court's asserted failure to compel Mr. Plunk to produce tape recordings made regarding his termination. Mr. Plunk appeals the failure of the court to award him recovery based on lost commissions and failure to include the value of health benefits in the award of damages.

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[1] The motion for default stated in pertinent part:

> On or about July 7, counsel for Defendant advised counsel for Plaintiff that counsel for defendant was no longer authorized to represent the defendant. However, as of the present date, no motion to withdraw or notice of substitution of counsel has been filed, nor has counsel for Plaintiff been otherwise advised or notified with respect to Defendant's plans to move forward with this litigation.

[2] The record reflects that both the August 20 and September 18 orders were served on Gibson's General Counsel.

DISCUSSION

I. Default Judgment

Initially, we address Gibson's contention that the trial court erred in not setting aside the default judgment as to liability.

Tenn. R. Civ. P. 55.02 allows a trial court to set aside a default judgment "in accordance with Rule 60.02," under which the burden is on the movant "to set forth, in a motion or petition and supporting affidavits, facts explaining why the movant was justified in failing to avoid the mistake, inadvertence, surprise or neglect." *Tenn. Dep't. of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985) (citing *Tenn. State Bank v. Lay* 609 S.W.2d 525 (Tenn. Ct. App. 1980)). In deciding whether to set aside a default judgment, courts consider three criteria: (1) whether the default was willful; (2) whether the defendant has asserted a meritorious defense; (3) the amount of prejudice which may result to the non-defaulting party. *Id.* at 866 (citing *Davis v. Musler,* 713 F.2d 97, 915 (2nd Cir. 1983)). Whether a default judgment should be set aside lies within the sound discretion of the trial court. *Id.* at 866. Accordingly, we review the trial court's action for an abuse of discretion. *Reynolds v. Battles*, 108 S.W.3d 249, 251 (Tenn. Ct. App. 2003).

In the order entered June 8, 2009 denying the motion to set aside the default judgment, the court stated:

> The Court finds that Defendant has failed to demonstrate that good cause exists for setting aside the judgment by default on the issue of liability. The judgment is not void as argued by the Defendant as the Complaint upon which default was taken adequately sets forth causes of action. Further, Defendant has failed to show any good reason or adequate cause for its failure to respond to the complaint, or to take prompt action to set aside the default judgment as to liability. Defendant failed over a period of months and after receiving multiple notices to take any action whatsoever to set aside the judgment on liability. Other than general assertions about a turnover in the staffing of the position of general counsel for the Defendant, Defendant has failed to address the multiple particular notices leading up to the entry of the judgment by default as to liability and has not denied receiving the notices of the hearing nor the notice of the actual entry of the order.

The affidavit of Barbara O'Connell, an attorney who was elevated from the position of Gibson's Assistant General Counsel to General Counsel in July 2008 was filed in support of the motion to set aside the default judgment and addresses Gibson's failure to file an answer to the complaint; in pertinent part, she states:

> Max Marx was the General Counsel before me and in May 2008 when Mr. Plunk filed the above-captioned lawsuit. Mr. Marx was also the General Counsel when the firm of King & Ballow entered an appearance. He was responsible for the company's litigation matters. Although I was an assistant General Counsel while Mr. Marx was with the company, I was not involved in litigation matters, and I do not have a litigation background. When Mr. Marx was terminated, I became the sole in-house lawyer of Gibson. Although Gibson conducts business throughout the world, since July 2008, I have been its only in-house counsel. I rely on outside counsel for litigation matters.

The affidavit does not set forth facts explaining why the change in counsel justified or excused Gibson's failure to respond; the mere circumstance of there being a change in Gibson's General Counsel does not excuse Gibson's failure to timely attend to the matters before the court. The record shows that either Mr. Marx or Ms. O'Connell was copied on pertinent pleadings and orders and Ms. O'Connell does not state that the documents were not received; had Gibson responded it would have avoided the default. It is also noteworthy that Gibson was represented in the litigation by outside counsel and chose to change counsel before an answer was filed. In the absence of any further explanation or the proffer of any reason for the failure of Gibson to timely respond to the complaint, we are left to conclude that the failure rose to the level of willfulness. *See Discover Bank v. Morgan*, 363 S.W.3d 479 (Tenn. 2012) ("Willfullness also includes 'conduct that is flagrant and unexplained.'")).

Our holding that, under the record presented, Gibson's failure was willful obviates the necessity that we consider the additional criteria of whether Gibson asserted a meritorious defense and whether Mr. Plunk would be prejudiced by setting the default aside. *See Discover Bank*, 363 S.W.3d at 494 ("If the court finds that the defaulting party has acted willfully, the judgment cannot be set aside on excusable neglect grounds, and the court need not consider the other factors."). Accordingly, we affirm the denial of Gibson's motion to set aside the default judgment on liability.

II. Judgment on the Pleadings

Gibson contends that the trial court erred in denying its motion for judgment on the pleadings, asserting that the allegations of the complaint are insufficient to state a cause of action such as to support the liability judgment. Inasmuch as we have affirmed the grant of the default judgment, we find no error in the court's denial of this motion. Even if the motion were properly before the court, we would affirm the court's holding that the factual allegations of the complaint are sufficient to sustain the default judgment.[3]

[3] Tenn. R. Civ. P. 8.01 requires that a pleading which sets forth a claim of relief "shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for

III. The Award of Back Pay

Gibson argues that the award of back pay to Mr. Plunk was not proper because he was guilty of unclean hands and inequitable conduct and because of his failure to mitigate damages; it also argues that the court erred in its calculation of back pay because Mr. Plunk had decided to leave his employment prior to being terminated.

A. Unclean Hands and Inequitable Conduct

Gibson contends that the fact that Mr. Plunk did not report income he paid himself as his mother's conservator to the Internal Revenue Service and that he allegedly misrepresented his finances to the court in several particulars constitutes unclean hands and inequitable conduct that should disqualify him from receiving the equitable remedy of back pay. The doctrine of unclean hands derives from the maxim of equity that one who seeks equity must come with clean hands; it prevents one whose conduct has been inequitable in matters related to that upon which the party seeks equitable relief from receiving such relief. *Coleman Mgmt., Inc. v. Meyer*, 304 S.W.3d 340, 351 (Tenn. Ct. App. 2009). The application of the doctrine in a given case is an issue within the trial court's discretion and will not be reversed absent an abuse of that discretion. *Id.* at 348.[4]

With respect to Mr. Plunk's conduct, the trial court stated:

> [T]he court concludes that Mr. Plunk came to court with clean hands, despite the existence of some apparent discrepancies in certain of his

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judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded." "A complaint 'need not contain detailed allegations of all the facts giving rise to the claim,' but it 'must contain sufficient factual allegations to articulate a claim for relief.'" *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 427 (Tenn. 2011) (quoting *Abshure v. Methodist Healthcare–Memphis Hosps.*, 325 S.W.3d 98, 103–04 (Tenn. 2010)). Rule 8.01 does not require the degree of specificity which Gibson contends Mr. Plunk's complaint lacks; we have reviewed the complaint and agree with the trial court that it contains sufficient factual allegations in support of the asserted causes of action for breach of contract and violation of the Tenn. Code Ann. § 8-50-103.

[4] Furthermore, the application of the doctrine is clearly within the discretion of the trial court:

> "Decisions regarding the proper application of the doctrine of unclean hands are heavily fact-dependent and are addressed to the considerable discretion of the trial court. Accordingly, credibility determinations can be pivotal, and the trial court is in the best position to make these determinations because it has the opportunity to view the witnesses as they are testifying." *In re Estate of Boote,* 265 S.W.3d 402, 418 (Tenn. Ct. App. 2007).

Coleman Mgmt., Inc. v. Meyer, 304 S.W.3d 340, 353 (Tenn. Ct. App. 2009)

> statements and submissions. To illustrate, the fact that Mr. Plunk did not report as taxable income the $22,000 he received for tending to his mother does not mean that he came to this Court with unclean hands. Mr. Plunk admitted that he received these funds and that he stopped actively searching for employment during this period.

We have reviewed the testimony and exhibits which Gibson argues constitutes the inequitable conduct, as well as that cited by Mr. Plunk in response. Viewed in context, the entire evidence supports the court's holding that Mr. Plunk came into court with clean hands; the trial court did not abuse its discretion in not applying the doctrine.

B. Mitigation of Damages

In connection with the award of back pay, the trial court made factual findings relative to Mr. Plunk's efforts to secure employment following his termination in May 2007 and concluded that he had made reasonable efforts to mitigate his damages; specifically, other than the period that he was serving as his mother's caregiver (which the court held was also mitigation), that he "used a variety of methods to consistently seek employment". Gibson contends that the that court's holding that Mr. Plunk made reasonable efforts to mitigate his damages by seeking employment after his termination is not supported by the evidence, that the court erred in limiting the testimony of its vocational expert witness, and in excluding other evidence relevant to mitigation and the availability of backpay.

The standards applicable to mitigation of damages in a wrongful termination case are set forth in *Frye v. Memphis State Univ.*:

> When an employee has been wrongfully terminated, the measure of damages is the amount the employee would have earned had the employer not dismissed him, less what would have been earned, or might have been earned, in some other employment, by the exercise of reasonable diligence. *State ex rel. Chapdelaine v. Torrence*, 532 S.W.2d 542, 550 (Tenn. 1975); *Godson v. Macfadden*, 162 Tenn. 528, 39 S.W.2d 287, 288 (1931). While the employee may recover the loss of wages, there is a duty to minimize this loss by seeking other employment. *Polk v. Torrence*, 218 Tenn. 680, 405 S.W.2d 575, 577 (1966); *Wise v. City of Knoxville*, 194 Tenn. 90, 250 S.W.2d 29, 30 (1952). The employee is not required to accept any offer of employment, or abandon his home or place of residence to seek other employment, but is only required to exercise reasonable diligence in seeking other employment of a similar or comparable nature. *News Publishing Co. v. Burger*, 2 Tenn.Ct.Civ.App. 179, 190 (1911). "An employee is not required to go to heroic lengths in attempting to mitigate his damages, but only to take reasonable steps to do so." *Ford v.*

> *Nicks*, 866 F.2d 865, 873 (6th Cir.1989). The burden is on the employer to establish that the employee failed to exercise reasonable diligence in mitigating damages. *Chapdelaine*, 532 S.W.2d at 550. The employee is not required to mitigate damages by accepting a position that is not comparable or is, in effect, a demotion. *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 231, 102 S.Ct. 3057, 3065, 73 L.Ed.2d 721 (1982) ("[mitigation] requires the claimant to use reasonable diligence in finding other suitable employment. Although the [employee] need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied."). It is the employer's responsibility to establish that equivalent positions are available with "virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status." *Rasimas v. Michigan Dept. of Mental Health,* 714 F.2d 614, 624 (6th Cir.1983). We agree with the Sixth Circuit approach that the employer must prove both the availability of suitable and comparable substitute employment and a lack of reasonable diligence on the part of the employee. *Rasimas,* 714 F.2d at 624. In determining whether reasonable diligence was used, the individual characteristics of the claimant and the job market must be considered. *Id.*

Frye, 806 S.W.2d at 173 (footnote omitted).

The evidence does not preponderate against the court's factual findings of efforts Mr. Plunk made to secure other employment. *See* Tenn. R. App. P. 13(d). Those findings, in turn, support the holding that Mr. Plunk mitigated his damages by working as a caretaker for his mother and by seeking other employment. As set forth in *Frye*, the standard is whether the efforts he expended were reasonable; the fact that Mr. Plunk was not successful in securing other employment or that other jobs may have been available is not dispositive of the mitigation issue, particularly in the absence of proof that he refused employment offered.

Somewhat related to Gibson's mitigation argument is its contention that the court erred in calculating back pay because, at the time of his termination, Mr. Plunk was planning to leave Memphis and return to Nashville to care for his mother. Gibson argues that Mr. Plunk's plan to leave his employment to take care of his mother was a "supervening act" which cut off Gibson's liability for back pay. We do not agree. Gibson's contention rests solely on Mr. Plunk's testimony that, prior to his termination, it was his intention to leave his employment to take care of his mother, rather than focusing on what he actually did after his termination. The trial court found that Mr. Plunk remained in Memphis following his termination in May of 2007 and actively sought employment there. He secured employment with Saint Blues Guitar until December of that year, when he moved to Nashville to take care of his mother and, in the process, began receiving compensation which reduced the award

of back pay. We fail to see how, under the facts presented, a plan that Mr. Plunk had prior to his termination limited his entitlement to back pay.

C. Testimony of Expert Witness

Gibson complains that the court erred in not allowing its vocational expert witness, Michael Galloway, to express an opinion as to the reasonableness of Mr. Plunk's efforts to mitigate his damages.[5]

After the voir dire of Mr. Galloway, the court stated:

> THE COURT: I'll tell both sides what my concern is about this witness, because - - and in the course of reading motions, I read his report. So I already know what he's going to say. Well, I have an outline of what he's going to say.
>
> I - - this witness is qualified to testify about vocational, rehab - - rehabilitation counseling and that he can testify and give expert opinion about availability of work. And he can talk about availability of work in light of the plaintiff's education, qualifications, work history and so forth. What I'm concerned about is I have not heard anything that - - that convinces me that he is qualified to testify about whether the plaintiff's efforts were reasonable or not in this case.
>
> One, I think that's a legal issue that the Court has to decide; and, two, I did not hear that that was covered at UT in his master's program or that he's otherwise qualified to do that. It seems like his experience has been in other areas. So I'll throw that out for argument to both sides.

After hearing argument from counsel, the court ruled:

> THE COURT: Well, I'm going to allow him to testify as a vocational rehabilitation counselor who can provide expert testimony. The Court is going to allow him to talk about the want ads and whatever procedures he used, but there may be - - you might be able to lay some inroads on cross about what weight the Court can give to that, Mr. Doughty. And he can talk

[5] We note at the outset that Gibson did not make an offer of proof of the testimony it asserts the court erroneously excluded. While this failure would normally preclude our consideration of this issue, *see* Tenn. R. Evid. 103(a), Mr. Galloway's report, which includes the opinion which he was not permitted to give through testimony, was introduced as an exhibit; we will, consequently, proceed to consider this issue.

about availability of work and whether - - and offer opinions, based on the records review he had, as to what the plaintiff - - whether he is a suitable candidate, at least on paper, for those positions that he's talked about.

I really am not interested in hearing about a conclusion concerning whether Mr. Plunk was - - his efforts were reasonable or not, because I just don't think that's going to be helpful.

Mr. Galloway then proceeded to testify at length regarding his assessment of potential jobs Mr. Plunk might be able to perform, based on his education, skill set, and employment history. After identifying a number of jobs which he determined were comparable to that Mr. Plunk held at Gibson and discussing the availability of such jobs in the Nashville metropolitan standard statistical area, he expressed the following opinion without objection:

My opinion would be, certainly, as evidenced by the job opening we've seen, a variety of jobs within that skill set, variety of employers that were available. In particular, I guess in comparing the list from the Tennessean in that time period, versus, I guess, the list that Mr. Plunk had provided, one interesting thing I'd take note of was that none of those jobs was on his list of jobs.

The reason I found that interesting is it's a very accessible was of finding work, is going through the newspaper, either manually or via the Internet; readily accessible. So I found that to be an interesting comparison, if you will, from the types of jobs that I saw. But, again, a variety of jobs in his skill set base, and I think that's certainly representative of the types of jobs in those industries.

Mr. Galloway's nine page report reflected his testimony and set forth Mr. Plunk's educational background and employment history (including earnings), the places where Mr. Plunk sought employment after his termination, and a listing of job openings Mr. Galloway found in The Tennessean newspaper on selected dates in 2007, 2008, and 2009 which he deemed comparable to the Gibson position.

Questions regarding the admissibility, qualifications, relevancy, and competency of expert testimony are left to the discretion of the trial court. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263 (Tenn. 1997). On review, we do not substitute our judgment for that of the trial court but, rather, determine whether the court abused its discretion in excluding the testimony. *Hunter v. Ura*, 163 S.W.3d 686, 703 (Tenn. 2005). A trial court abuses its discretion when it applies an incorrect legal standard or reaches a decision that is contrary to logic or reasoning and that causes an injustice to the party complaining. *Mercer v.*

Vanderbilt University, Inc., 134 S.W.3d 121, 131 (Tenn. 2004) (citing *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)).

Upon our review of Mr. Galloway's testimony and report, we cannot conclude that the court abused its discretion in not considering Mr. Galloway's opinion as to the reasonableness of Mr. Plunk's efforts. While Mr. Galloway's testimony and report provided factual information, the court determined that his opinion would not be of substantial assistance in the determination of the reasonableness of Mr. Plunk's efforts; we find no abuse of discretion in the court's ruling. *See* Tenn. R. Evid. 702.

D. Other Evidence

Gibson next contends that the court erred in excluding other evidence which it contends is relevant to mitigation, including evidence of Mr. Plunk's job performance, evidence that he believed his manager "was intimidated by him and did not like him", and evidence of a "lack of sustainable employer relations." The court determined that the evidence would not be of probative value in determining damages. Gibson made an offer of proof, which we have reviewed; Gibson argues that the evidence shows that Mr. Plunk's employment "would not have continued regardless of any purported discrimination" and, consequently, was relevant on the issue of back pay.

Under *Frye*, the back pay calculation is based on what the employee would have made had he or she not been dismissed, less what the employee would have earned, or might have earned, in some other employment, by the exercise of reasonable diligence. *Frye*, 806 S.W.2d at 173. While the testimony Gibson cites may have had probative value on the issue of whether grounds existed for Mr. Plunk's termination, that was not the inquiry before the court; rather, the court was considering what Mr. Plunk would have earned had his employment continued at Gibson minus what he actually earned. We do not agree that the evidence "strongly suggest[s]" that Mr. Plunk's employment would have ended due to his work history; such a conclusion would be speculative at best and of no probative value to the issue at hand.

E. Production of Tape Recordings

Gibson next complains that the trial court erred in denying its motion to compel Mr. Plunk to produce audio tapes of several meetings he had with various of Gibson's supervisory personnel around the time of his termination. In denying the motion, the court held that the tapes were "not within the scope of discovery on the issue of damages."

Because decisions regarding pretrial discovery are inherently discretionary, they are reviewed using the "abuse of discretion" standard of review. *Doe 1 ex rel. Doe 1 v. Roman*

Catholic Diocese of Nashville, 154 S.W.3d 22, 42 (Tenn. 2005); *Benton v. Snyder,* 825 S.W.2d 409, 416 (Tenn. 1992); *Loveall v. Am. Honda Motor Co.***,** 694 S.W.2d 937, 939 (Tenn. 1985). In *Boyd v. Comdata Network, Inc.*, we set forth the standards applicable to a trial court's consideration of a motion to compel discovery:

> [T]he party seeking discovery, as the party seeking an order compelling discovery under Tenn. R. Civ. P. 37.01, has the burden of establishing that it is entitled to discover the documents or other materials withheld by its adversary. To carry its burden, the party seeking discovery must establish (1) that the material being sought is relevant to the subject matter involved in the pending action, (2) that the material being sought is not otherwise privileged, and (3) that the material being sought consists of documents or other tangible things. *Toledo Edison Co. v. G A Techs., Inc.,* 847 F.2d at 339. *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000); *Miller v. Federal Express Corp.*, 186 F.R.D. 376, 387 (W.D. Tenn. 1999).

Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 220 (Tenn. Ct. App. 2002) (footnotes omitted).[6]

We have reviewed the deposition of Mr. Plunk when the matter of the tapes arose and the discourse between counsel relative to their production. At the deposition, Gibson contended that the tapes were relevant to the defense of unclean hands; on appeal, Gibson repeats this contention and also asserts that the tapes should have been produced because "they may have confirmed that Plunk had no viable claim at all, and that his complaint was a fraud." We have earlier discussed Gibson's defense of unclean hands to the back pay claim and reiterate our holding that the evidence supports the holding that Mr. Plunk came into court with clean hands. Moreover, it is apparent that the primary purpose for which the tapes were sought was to discover evidence related to liability. Recordings made prior to Mr. Plunk's termination would have little, if any, relevance to the back pay calculation under the *Frye* standard. The court did not abuse its discretion in denying Gibson's motion to compel the production of the tapes.

[6] The *Boyd* court noted that relevancy in the discovery stage is "more loosely construed than it is at trial."

IV. Attorneys Fees

The trial court awarded fees totaling $60,107.25 to Mr. Plunk's counsel pursuant to authority at Tenn. Code Ann. §§ 8-50-103(c)(2)[7] and 4-21-311(b).[8] Gibson contends that counsel fees should not have been awarded; that Mr. Plunk did not prove the factors under R.P.C. 1.5 of Tennessee Supreme Court Rule 8; and that the award was excessive in that the total award exceeded the award of monetary relief to Mr. Plunk and because of duplication of services between Mr. Plunk's two lawyers. We address these issues in order.

While Gibson acknowledges that the statute authorizes an award of fees, it contends that the trial court abused its discretion because the "the discrimination laws anticipate fees in cases where a jury has determined wrongful discriminatory conduct on the merits" whereas liability here "exists only because the court deemed the facts in the complaint true." Gibson cites no authority–and we know of none–for its argument that, because this case proceeded on a default judgment, the relief available to Mr. Plunk under the statute is in any way limited; there is no basis for this argument and to hold otherwise would be to undermine the enforcement of rights guaranteed by Tenn. Code Ann. § 8-50-103. For the same reason, Gibson's argument that an award of fees was inappropriate because the material it filed in seeking to have the default judgment set aside "indicate that Plunk had little chance of success had the merits been litigated" is not well-taken. Once liability was established, by whatever means, Mr. Plunk was entitled to the relief authorized by the statute and, as discussed previously, the material filed by Gibson was considered in proper context by the trial court.

Mr. Plunk was represented by two counsel, each of which submitted an affidavit of their professional qualifications and time spent in representing Mr. Plunk in support of the

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[7] Tenn. Code Ann. §§ 8-50-103(c) states:

> (c)(1) Any person claiming to be aggrieved by a discriminatory practice prohibited by this section may file with the Tennessee human rights commission a written sworn complaint stating that a discriminatory practice has been committed, setting forth the facts sufficient to enable the commission to identify the persons charged.
>
> (2) Upon receipt of such complaint, the commission shall follow the procedure and exercise the powers and duties provided in §§ 4-21-302 -- 4-21-311, and the person shall have all rights provided therein.

[8] Tenn. Code Ann. § 4-21-311(b) provides in pertinent part that, in an action brought under the Disability Act, "the court may . . . award to the plaintiff . . . the costs of the lawsuit, including a reasonable fee for the plaintiff's attorney of record, all of which shall be in addition to any other remedies contained in this chapter."

application for fees and requested an hourly rate of $350; also filed with the application were affidavits from three Nashville lawyers opining to the reasonableness of the hourly rates, time expended and services rendered. Gibson filed a memorandum responding to the application but did not submit counter-affidavits. Gibson does not contend that the hourly rate is inappropriate or the application otherwise inadequate but, rather, argues that the record does not support an award based on the factors at R.P.C. 1.5 of Tennessee Supreme Court Rule 8. We have reviewed the entire application filed by Mr. Plunk's counsel as well as the court's order and find no error in the court's consideration of the factors at R.P.C. 1.5[9]; we concur that the affidavits and statements of time filed with the application are in compliance with the rule and support the award. It is not necessary, as Gibson implies, for the court to make a specific finding as to each factor.

The order awarding fees reflects that the court reduced Mr. Doughty's time by 5% and Mr. Nunn's time by 20% specifically for duplication of efforts between counsel; the effect of the percentage deduction was to reduce Mr. Doughty's time by 5.8 hours, with corresponding reduction in fee of $2,031.75 and to reduce Mr. Nunn's time by 15.36 hours with a corresponding reduction in fee of $5,376.00. We have reviewed the specific matters identified by Gibson in its brief as constituting the duplicative services and do not agree, on the record before us, that the time and efforts cited were either excessive or unnecessary. Mr. Plunk was represented by two counsel and the record reflects substantial efforts expended by Mr. Plunk's counsel in responding to Gibson's efforts to get the default set aside and in litigating the issue of relief to Mr. Plunk. It is clear that the trial court considered the question of duplication of services and we are not persuaded that the number of hours which the court reduced for each counsel was inadequate or inappropriate.

Gibson's contention that the entire award should be reduced by 50% because Mr. Plunk only received relief relative to the Tennessee Disability Act claim is without merit. The majority of the time spent by Mr. Plunk's counsel was in responding to Gibson's motions to have the default judgment set aside and in litigating the back pay issue, services which would have been rendered in any event. The Disability Act authorizes the fee award and there is nothing in the Act to suggest that the fee should be limited because his action included a claim under another theory which was not litigated.

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[9] In the order granting the fees, the court stated that it considered "all appropriate factors as set forth in . . . RPC 1.5 of Tennessee Supreme Court Rule 8." Not all factors in R.P.C. 1.5 will be relevant in a given case. *See Connors v. Connors*, 594 S.W.2d 672, 676–77 (Tenn. 1980).

V. Additional Relief to Mr. Plunk

Mr. Plunk contends that the court erred in failing to award him damages for lost commissions and in failing to include the value of his lost benefits in the damage award. Gibson contends that the award includes compensation for commissions.

In the order granting Mr. Plunk back pay, the court held that Mr. Plunk "would have earned approximately $100,000.00 from the date of his termination through the trial date."[10] With respect to Mr. Plunk's claim for unpaid commissions, the court stated in pertinent part:

> Mr. Plunk is claiming that he was not paid in full on commissions earned. He relies on proof of commissions paid to a Gibson employee (Mr. Kinon Kiplinger) after he was discharged. . . . After a careful review of the evidence, the Court concludes that Mr. Plunk did not meet his burden of proof on this issue. The Court declines to speculate that Mr. Plunk actually earned the same amount in commissions as did Mr. Kiplinger.

The court thereupon used the $100,000.00 as the starting point for its calculation of back pay, deducting $44,409.26,[11] and reaching the net of $55,590.74.

The evidence in the record on this issue, consisting of the testimony of Mr. Plunk, an earnings summary for Mr. Plunk identified as for the period December 25, 2006 to December 25, 2007, and an earnings summary for Mr. Kiplinger for the same time period, does not preponderate against the trial court's ruling.[12] We agree as Gibson contends, that the court's "starting point" of $100,000.00 includes commission income.

Lastly, Mr. Plunk contends that the court erred in failing to include the value of lost health benefits in the award of damages. As Mr. Plunk notes, the purpose of an award of back pay is to make the person whole for injuries suffered on account of the discrimination. *See Barnes v. Goodyear Tire & Rubber Co.*, No. W2000-01607-COA-RM-CV, 2001 WL 568033 (Tenn. Ct. App. May 25, 2001). In the absence of proof either that, after his

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[10] The court did not identify the specific source of its finding; in a footnote, the court noted that "[t]here is some uncertainty given the hourly rate plus commission scenario."

[11] No issue is raised as to the amount of Mr. Plunk's earnings during the period from his termination to the date of trial

[12] The summary for Mr. Plunk shows a total income of $20,383.43 (composed of $7090.63 "reg"; $302.40 "hol";$150.00 "abns";$704.65 "ovt";$10378.05 "comm"; $151.20 "pers"; $1606.50 "vac"). The summary for Mr. Kiplinger shows a total income 0f $40,344.07 (composed of $12977.20 "reg"; $240.00 "hol";$550.00 "abns";$120.50 "ovt";$25676.37 "comm"; $180.00 "pers"; $540.000 "vac"; $60.00 "sick").

termination, Mr. Plunk actually incurred the cost for replacement insurance or suffered some monetary loss as a result of not having health benefits, he did not suffer a compensable injury in this regard.

Mr. Plunk has requested that the case be remanded for an award of attorneys fees incurred on appeal. As noted above, such an award is authorized under the Tennessee Disability Act.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed in all respects. The case is remanded to the Chancery Court for an award of fees to Mr. Plunk's counsel for the appeal of this matter.

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RICHARD H. DINKINS, JUDGE