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NO. 15-114199-A

IN THE COURT OF APPEALS
FOR THE STATE OF KANSAS

STANTON D. BARKER,
Plaintiff/Appellant,

vs.
KANSAS DEPARTMENT OF LABOR,
and CREATIVE CONSUMER CONCEPTS
Defendants/Appellees.

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County, Kansas
The Honorable Richard D. Anderson, District Judge
District Court Case No. 14 C 546, Div. No. 7

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NATURE OF THE CASE

This is an appeal from the judgment of the District Court of Shawnee County, Kansas, Hon. Richard D. Anderson, denying the Plaintiff/Appellant's Petition for Review of Agency Action. The Plaintiff had requested that the district court find error in the proceedings before the Kansas Department of Labor concerning a wage claim.

STATEMENT OF ISSUES

I. Whether the Kansas Department of Labor erroneously interpreted or applied the law when it concluded that Mr. Barker's "at-will" employment status precluded a recovery of commissions payable after the termination of his employment?

II. Whether the Kansas Department of Labor erroneously construed the comprehensive commission plan when it concluded that continued employment was a condition precedent to payment under the commission plan?

III. Whether the Kansas Department of Labor erroneously failed to determine Mr. Barker's entitlement to wages under the 2011 amended commission plan?

STATEMENT OF FACTS

On or about July 8, 2009, Stanton D. Barker began employment with Creative Consumer Concepts, Inc. ("C3"). (R. Vol. 1, 33, at ¶1). At the time, C3 was engaged in the business of, relevantly, creating and providing child-entertainment packages to restaurants, *e.g.* crayons, play-doh, and activity books. See (R. Vol. 1, 48); and (R. Vol. 1, 153-54). Mr. Barker was the only employee doing his type of work at C3, to wit: "business development." See (R. Vol. 1, 33, at ¶2); and (R. Vol. 1, 48). Mr. Barker's essential function as "Director of Business Development" was to search for new business leads, qualify the new business, and then pass the account to a client service person. See (R. Vol. 1, 33, at ¶2); and (R. Vol. 1, 48).

When C3 extended a job offer to Mr. Barker, it offered him a base salary plus a "Comprehensive Commission Plan based on Gross Profit." (R. Vol. 1, 33, at ¶3); see also (R. Vol. 1, 48) (the initial plan). This "plan" allowed for commissions to be paid to Mr. Barker as follows: "5% of Gross Profit paid for the first year – 1% of Gross Profit residual commission for years 2-5." (R. Vol. 1, 48). The "plan" continued that:

> "This commission plan pertains to our core business where we work under the 'value added model' and ultimately provide collateral items and/or premiums for our clients. We will have to create a different commission plan for new products/services that would fall outside this model. (examples being Design Services, Agency Retainers, Online Projects, etc....). The year is defined as the first twelve months that product is actually shipped (i.e. beginning shipping product to client Nov, 2009, so the first year of commission would be defined as Nov, 2009 – Oct, 2010). This commission will be paid on a quarterly basis; the month following the calendar year quarter."

(R. Vol. 1, 48).

This initial plan was amended on January 1, 2011, to extend the 5% of Gross Profit paid during the first year to include the second year. (R. Vol. 1, 34, at ¶4); see also (R. Vol. 1, 50) (the amended plan). The ancillary language from the initial plan, quoted above, remained the same. (R. Vol. 1, 50).

Sometime in early 2012, the plan was amended again to reflect an additional change. (R. Vol. 1, 34, at ¶5). However, this third plan was not signed by the chief executive officer of C3, Bob Cutler. (R. Vol. 1, 34 at ¶5); and (R. Vol. 1, 36, at ¶¶8-9). Because this plan was not signed by Bob Cutler, the Administrative Hearing Officer refused to give its terms effect. (R. Vol. 1, 36, at ¶¶8-9). Mr. Barker initially appealed this ruling, but he abandoned this claim in district court proceedings. See (R. Vol. 1, 8, at ¶6.3); and (R. Vol. 2, 30-39).

Sometime in the middle of 2012, Mr. Barker requested a "draw" on money from his future commission payments. (R. Vol. 1, 34, at ¶6); and *see* (R. Vol. 1, 260-261) (supporting documentation – email exchange). Upon this request, Bob Cutler, C3 CEO,

sent an email to Mr. Barker and Ginny Harris, controller for C3, on this subject. (R. Vol. 1, 260-61). Mr. Cutler explained that "there are two kinds of draws, recoverable and non-recoverable." *Id.* at 260. Mr. Cutler further declared that:

> "This is a recoverable draw. Meaning if you leave the organization or are asked to leave the amount of the draw not due based on actual documented sales as of that date are to be returned to the company.
>
> One could say we have a liability of the smart sales guy quit one the day of his paycheck and we had no recourse [sic]
>
> The good news is we are not that stupid and we will have you sign this email with Ginny so you know what your getting into [sic]
>
> Especially given you are in the midst of a career change...."

(R. Vol. 1, 261). Upon receiving this declaration, Mr. Barker responded: "I have chosen to hold off on this draw." (R. Vol. 1, 34, at ¶7); (R. Vol. 1, 260).

On or about March 6, 2012, Mr. Barker was given a C3 employee handbook. (R. Vol. 1, 34, at ¶8); see also (R. Vol. 1, 57-143) (the handbook). On page 5 of the handbook is a section containing certain acknowledgements. See (R. Vol. 1, 34, at ¶8); (R. Vol. 1, 61) (the referenced page). Those acknowledgements include:

> "**I have received and read a copy of the C3 handbook**...." (emphasis in original).
> ...
> "**I further understand that my employment is terminable at will**, either **by myself or C3**..." (emphasis in original).
> ...

> "I understand that **no contract of employment other than 'at will' has been expressed or implied**, and that no circumstances arising out of my employment will alter my 'at will' employment relationship unless expressed in writing, with the understanding specifically set forth and signed by myself and the CEO of Creative Consumer Concepts, Inc." (emphasis in original).

(R. Vol. 1, 34, at ¶8); (R. Vol. 1, 61).

On August 31, 2012, Mr. Barker ended his employment with C3. See (R. Vol. 1, 468). On January 8, 2013, he filed a claim for wages against C3 with the Kansas Department of Labor. *Id.* Mr. Barker alleged that C3 wrongfully failed to pay him commissions for business that he procured as Director of Business Development for C3. (R. Vol. 1, 469). Mr. Barker's theory was that (1) he brought certain business into C3 prior to the end of his employment, (2) he bargained to be paid a commission for the business he brought into C3 -- as evidenced by the commission plans, and (3) C3 failed to pay him a commission for the business he brought into C3 prior to the end of his employment. *See id.*

On January 23, 2013, C3 filed its response to Barker's claim for wages. (R. Vol. 1, 458-66). C3 denied that it owed any commissions and stated, materially, that "[a]ll compensation for all employees cease when employment terminates." *Id.* at 461. The parties litigated this essential dispute and many related matters before the Kansas Department of Labor. See (R. Vol. 1, generally). On March 20, 2014, the Kansas Department of Labor issued its initial order denying Mr. Barker's wage claim. (R. Vol. 1, 33-39). On April 7, 2014, Mr. Barker filed his Petition for Review of Initial Order. (R. Vol.

1, 30-32). On May 8, 2014, the Kansas Department of Labor issued its final order denying Mr. Barker's wage claim. (R. Vol. 1, 21-22). Importantly, the Agency Final Order "adopt[ed] the findings of fact and conclusions of law of the Presiding Officer [in the Initial Order]," and "included [them therein] by reference." (R. Vol. 1, 21).

On June 9, 2014, Mr. Barker filed his Petition for Review of Agency Action with the Shawnee County, Kansas District Court (R. Vol. 2, 3-17). The Kansas Department of Labor filed its answer on June 17, 2014. (R. Vol. 2, 18-19). C3, as interpleader, filed its answer on August 11, 2014 (R. Vol. 2, 26-29). At the district court level, the parties, through their respective counsel, entered into stipulations for the purposes of judicial review -- and consistent with K.S.A. 77-620(c). (R. Vol. 1, 61-64). Those stipulations, although largely duplicative of the facts above, were as follows:

> "These stipulations, which follow, were made in lieu of a transcript of the administrative hearing in this matter, and they were entered into to supplement the Agency Record previously filed with the Court:
>
> 1. The 2012 commission structure document signed by Shad Foos was not binding on C-3. (Plaintiff enters this stipulation with the caveat that he believes this is a stipulation of law, not binding on the Court. See, e.g. In re Dawson, 162 B.R. 329, 333 (Bankr. D. Kan. 1993))
>
> 2. The CEO of C-3, admitted that he signed the first two commission structure documents.
>
> 3. The third commission structure document was signed by Shad Foos, "executive team," in 2012.
>
> 4. Shad Foos was not the CEO of C-3 at the time he signed the third commission structure agreement.
>
> 5. At the Agency hearing on this matter, Robert Cutler, the CEO of C-3 in 2012, testified that he did not negotiate the terms of the 2012 commission structure with Claimant.

"6. When the job offer was extended to the claimant from Creative Consumer Concepts, Inc., he was offered the base salary plus a Comprehensive Commission Plan Based on Gross Profits. This plan allowed for commissions to be paid to the claimant at the rate of 5% of gross profit for the first twelve months that product was shipped for an account. For years 2-5, the gross profit commission was dropped to 1%.

7. The original commission agreement was amended on January 1, 2011, to extend the 5% of gross profit paid during the first year to include the second year.

8. Sometime in early 2012, the claimant requested an additional change to his comprehensive commission plan. On or about April 10, 2012, the claimant drafted what is entitled Commission Structure. This agreement indicates 5% of gross profit paid for the first year of full program system wide in place, and 1% residual for life of account. This Commission Structure is signed by Shad Foos and the claimant.

9. Sometime in the middle of 2012, the claimant requested that he be able to draw monies from his future salary and commissions. On July 26, 2012, President and CEO, Bob Cutler, sent an e-mail to his controller, Ginny Harris. The e-mail instructs Ms Harris to prepare a paycheck off of a commission draw for the claimant. The e-mail goes on to say that this draw would be reconciled against the claimant's next quarter commission statement. Further, the e-mail explains to the claimant that this draw would be a recoverable draw, meaning that if he left the organization before the draw was repaid, the amount of money paid to him not based on actual documented sales would be returnable to the company.

10. In response to the above identified e-mail, the claimant chose to hold off on this draw.

11. The claimant was employed "at will" by the respondent. The claimant received a base salary and commissions.

12. The C3 handbook states that "no one other than the CEO of C3 may alter or modify any of the policies in this handbook. No statement or promise by a supervisor, Executive Team member, or department head may be interpreted as a change in policy, nor will it constitute an agreement with a colleague."

13. The C3 handbook states that "I understand that no contract of employment other than "at will" has been expressed or implied, and that no circumstances arising out of my employment will alter my at will" employment relationship unless expressed in writing,

> "with the understanding specifically set forth and signed by myself and the CEO of C3."

(R. Vol. 2, 61-64). On June 8, 2015, the district court denied Mr. Barker relief. (R. Vol. 2, 89-102). Mr. Barker filed a notice of this appeal on July 8, 2015. (R. Vol. 2, 103-04).

ARGUMENT AND AUTHORITIES

I. The Kansas Department of Labor erroneously interpreted or applied the law when it concluded that Mr. Barker's "at-will" employment status precluded a recovery of commissions payable after the termination of his employment.

STANDARD OF REVIEW: This Court's review of plaintiff's appeal is controlled by the Kansas Judicial Review Act, K.S.A. 77-601, *et seq.* See *Golden Rule Ins. Co. v. Tomlinson*, 300 Kan. 944, 953, 335 P.3d 1178, 1187 (2014). Relevantly, under the Act:

> **"(a) The burden of proving the invalidity of agency action is on the party asserting invalidity; and the validity of agency action shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken."**
>
> **...**
>
> **"(c) The court shall grant relief only if it determines any one or more of the following:**
>
> **...**
>
> **(3) the agency has not decided an issue requiring resolution;**
>
> **(4) the agency has erroneously interpreted or applied the law;**
>
> **...**
>
> **(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or**
>
> **(8) the agency action is otherwise unreasonable, arbitrary or capricious."**
>
> **...**
>
> **"(d) 'in light of the record as a whole' means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record**

> **cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its "material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review.**
>
> **...**
>
> **" (e) In making the foregoing determinations, due account shall be taken by the court of the rule of harmless error."**

K.S.A. 77-621. With regard to questions of law, this Court exercises *de novo* review. *Cf. Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 559, 293 P.3d 723, 728 (2013) ("To be crystal clear, we unequivocally declare here that the doctrine of operative construction, as described in Syllabus ¶ 3 and on page 448 of the Court of Appeals' opinion (*Douglas,* 42 Kan.App.2d 441, 213 P.3d 764), has been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal.").

In its ruling, the Kansas Department of Labor (the "Agency") found that plaintiff's claim to "residual and perpetual payments on accounts he initiated for the employer/respondent" was "in direct conflict with the express terms of the appellant's 'at-will' employment as set forth in the Creative Consumer Concepts, Inc. Handbook." (R. Vol. 1, 36, ¶9). Mr. Barker submits that this conclusion was an error of law.

A. The fact that Mr. Barker was "at-will" should not limit C3's liability for unpaid, but earned, wages under Kansas law.

At-will employment is the general rule in Kansas. *Flenker v. Willamette Indus., Inc.*, 266 Kan. 198, 200, 967 P.2d 295, 298 (1998). "[I]n the absence of a contract, expressed or implied, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party." *Johnston v.*

Farmers Alliance Mutual Ins. Co., 218 Kan. 543, 546, 545 P.2d 312 (1976). The foregoing is the full extent of the at-will employment doctrine, however. The C3 handbook does not purport to alter or expand the concept of employment at-will; it simply incorporates that concept by reference. (R. Vol. 1, 34, at ¶8); (R. Vol. 1, 61).

Mr. Barker's theory is that he earned commissions prior to the termination of his employment through his labor and services to his employer; however, those commissions were incalculable until a later event, to wit: the realization of gross profit by C3, or "shipment." This later event occurred after the termination of Mr. Barker's employment. The Agency concluded that because the later event did not occur before Mr. Barker's employment was terminated, the "at-will" employment doctrine eliminated the obligation of C3 to pay Mr. Barker for the labor and services he provided during his employment.

Mr. Barker alleges that the Agency's error here was its implicit conclusion that Mr. Barker must both: (1) provide labor and services to the employer, and (2) have the payable commission be reduced to a calculable amount, prior to the termination of his employment in order to be eligible for the payment of the commission. The at-will employment doctrine simply does not logically demand this conclusion. Mr. Barker's claim to wages emerges from his service to his employer that occurred fully within the period of his employment.

B. At least two other jurisdictions that have considered this precise issue agree with Mr. Barker's theory of recovery notwithstanding the application of the at-will employment doctrine.

Mr. Barker has been unable to locate any controlling Kansas cases in support of his theory of relief in the context of "at-will" employment. However, he has located persuasive authority from other jurisdictions covering this scenario. In *Schackleton v. Federal Signal Corp.*, the Illinois Court of Appeals addressed a similar fact scenario. Gary Schackleton sold signs. *Schackleton v. Fed. Signal Corp.*, 196 Ill. App. 3d 437, 439, 554 N.E.2d 244, 246 (1989). He received sales commissions as compensation through a structured payment plan, dependent upon the type of sale contract involved. *Id.* at 440. In some instances, he would receive one-half of his commission when the contract was accepted by his employer and the balance after the sign was installed and the customer billed. *Id.* Schackleton was "at-will," and he was fired by his employer. *Id.* Schackleton filed suit, claiming a right to receive allegedly earned but unpaid commissions. *Id.* at 442-43. The Court of Appeals rejected the employer's argument that Schackleton's "at-will" status precluded the suit:

> "On appeal, defendant first argues that plaintiff's cause of action for unpaid commissions should not be recognized since plaintiff was an at-will employee and was subject to termination with or without cause, unless the discharge violates a clearly mandated public policy. [citations omitted]. While we agree with the general proposition set forth above by defendant, the issue involved in this case does not address itself to a wrongful discharge cause of action, but rather a breach of contract action for unpaid commissions based upon defendant's 'Pricing and Commission Policy.' No dispute exists that plaintiff was an at-will employee and that defendant could terminate him at any time. Plaintiff's "at-will status,

> "however, does not affect his breach of contract claim for unpaid commissions."
>
> "Under the procuring-cause rule[1], it is established that a party may be entitled to commissions on sales made after the termination of employment if that party procured the sales through its activities prior to termination. [citations omitted]. This principle of law protects a salesman discharged prior to culmination of a sale, after he has done everything necessary to effect the sale. [citation omitted]. The rule applies unless a contract between the parties expressly provides when commissions will be paid.[citations omitted]."

Schackleton v. Fed. Signal Corp., 196 Ill. App. 3d 437, 443, 554 N.E.2d 244, 248 (1989). As demonstrated by the proceedings below and the findings of the hearing officer, Plaintiff's commissions were the 'procuring-cause' of sales made after his termination and for which he had bargained for commissions. In light of the sound logic of the 'procuring cause' rule, and in light of its consistency with Kansas law, it should be recognized as applicable in Kansas cases as Kansas law.

Similarly, Mr. Barker relies upon *Singer Sewing Mach. Co. v. Brewer*, an Arkansas Supreme Court case, as persuasive authority. 78 Ark. 202, 93 S.W. 755 (1906). In *Singer*, a salesman named W.F. Brewer was a direct-to-customer salesman, but he had a commission plan under an at-will employment agreement that was strikingly similar to Mr. Barker's plan, to wit:

> "Third. The company agrees to pay the said party of the second part for all his services the following compensation with the restrictions and limitations hereinafter expressed: (a) A salary at the rate of twelve dollars per week, lost time to be deducted, which shall include the use and

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[1] *See also* 3 C.J.S., Agency, § 187, p. 88.

> "keeping of horse and wagon. (b) A commission of fifteen per cent. of the value of all sales or leases of family machines at retail list prices made by said company, said commission to be computed on the net value after all deductions for old machines or discounts shall have been made. This commission shall be payable only as payments in cash are made on said sales and leases, and paid over to said company, and shall be at the rate of fifty per cent. of such cash payments until the full amount of commission shall have been paid, except on leases where the first payment is less than $5.00, then commission shall be payable from the second and subsequent payments. (c) A remitting commission of five per cent. on the actual amount of money remitted by him from said suboffice, and said remittances are to be made only from money remaining on hand after payment of the running expenses of said suboffice, and any advances from Division or Department headquarters for expenses are to be deducted from such remittance in computing this percentage. Fourth. It is expressly understood and agreed between the parties hereto that the foregoing compensation shall be full payment and satisfaction for all services of every kind and nature rendered by said party of the second part, and that all his claims therefor shall cease immediately upon the termination of this agreement. Tenth. This agreement may be terminated at the pleasure of either party." (emphasis added).

Singer Sewing Mach. Co. v. Brewer, 78 Ark. 202, 93 S.W. 755, 756 (1906). When Singer refused to pay Brewer for commissions payable after the term of Brewer's employment, he sued. *Id.* at 755. The Arkansas Supreme Court agreed he was due those post-employment commissions notwithstanding the at-will nature of his employment:

> "It is evident that the commission of 15 per cent. was intended as compensation for the sales and leases and was earned when the sales or leases were consummated, though payment of the commission was to be postponed until the collections were made. Not so, however, as to the remitting commission of 5 per cent. That commission was not earned until the money was collected and actually remitted to the company. The selling commission having been earned by the agent while in service, he could not by discharge be deprived of it, even though the payment was, under the contract, postponed until the money should be collected. His right to it depended upon the prices or rentals of the machines which he

> "had sold or leased being finally collected, but it was not essential that the collections should be made during his period of service. We do not think that the language of the contract quoted above was meant to work a forfeiture, upon termination of the period of service, of compensation already earned. Forfeitures are not favored in the law, and in order to be enforced they must be plainly and unambiguously provided in the contract. It is the duty of courts, when contracts are fairly susceptible of more than one construction, to adopt such as will not work a forfeiture of the acquired rights of either party." (emphasis added).

Singer Sewing Mach. Co. v. Brewer, 78 Ark. 202, 93 S.W. 755, 756 (1906); *see also Queen Ins. Co. of Am. v. Excelsior Mill Co.*, 69 Kan. 114, 76 P. 423, 424 (1904) ("Forfeitures are not favored, and ordinarily will not be found or enforced unless specifically and definitely provided for in the contract."); and *Richardson v. St. Mary Hosp.*, 6 Kan. App. 2d 238, 241, 627 P.2d 1143, 1146 (1981) ("Wages and vacation time earned and due to an employee pursuant to an employment contract may not be forfeited.").

For the foregoing reasons, the Agency erroneously interpreted or applied the law, and this Court should declare that the law is contrary to the Agency's interpretation, and the matter should be remanded for reconsideration in light of such determination.

II. The Kansas Department of Labor erroneously construed the comprehensive commission plan when it concluded that continued employment was a condition precedent to payment under the commission plan.

STANDARD OF REVIEW: This Court's review of plaintiff's appeal is controlled by the Kansas Judicial Review Act, K.S.A. 77-601, *et seq.* See *Golden Rule Ins. Co. v. Tomlinson*, 300 Kan. 944, 953, 335 P.3d 1178, 1187 (2014). Relevantly, under the Act:

> **"(a) The burden of proving the invalidity of agency action is on the party asserting invalidity; and the validity of agency action shall be determined in accordance with the standards of judicial review**

"provided in this section, as applied to the agency action at the time it was taken."

...

"(c) The court shall grant relief only if it determines any one or more of the following:

...

(3) the agency has not decided an issue requiring resolution;

(4) the agency has erroneously interpreted or applied the law;

...

(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

(8) the agency action is otherwise unreasonable, arbitrary or capricious."

...

"(d) 'in light of the record as a whole' means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its "material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review.

...

" (e) In making the foregoing determinations, due account shall be taken by the court of the rule of harmless error."

K.S.A. 77-621. With regard to questions of law, this Court exercises *de novo* review. *Cf. Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 559, 293 P.3d 723, 728 (2013) ("To be crystal clear, we unequivocally declare here that the doctrine of operative construction, as described in Syllabus ¶ 3 and on page 448 of the Court of Appeals' opinion (*Douglas,* 42 Kan.App.2d 441, 213 P.3d 764), has been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal.").

Further, "[t]he interpretation of a written instrument is a question of law, and regardless of the construction given to a written instrument by the trial court, [an appellate court] may construe the instrument and determine its effect." *Marquis v. State Farm Fire & Cas. Co.*, 265 Kan. 317, 324, 961 P.2d 1213, 1219 (1998).

In its ruling, the Kansas Department of Labor determined that:

> "It is clear that the employer/respondent never intended for a comprehensive commission plan to extend beyond the 'at-will' employment of the claimant. This is demonstrated by the employer's response to the claimant's request for a draw against future commissions. The employer explained in an email to the claimant dated July 26, 2012, that if a draw was given to the claimant and he left or was asked to leave the company, monies not due the claimant based on documented sales were to be returned to the company. This demonstrated that it was never the employer/respondent's intent that the commission arrangement would be paid in perpetuity to the claimant, but once his employment ended, he would no longer earn commissions. This also indicates that the employer and claimant did not have an agreement, or meeting of the minds, regarding the claimant receiving perpetual commissions."

(R. Vol. 1, 18, ¶10).

A. Neither the documents tendered to the Agency nor the conduct of employer and employee evidence a contractual condition precedent of "continued employment," contrary to the Agency's conclusion.

This is not a completely novel wage claim case; indeed every wage claim contemplates that an employee has earned a wage that was not paid at the appropriate, later time. The apparently novel element of Mr. Barker's wage claim is that his commission-wage was undetermined in amount at the time it was earned because the calculation of the commission-wage depended on the subsequent realization of gross profit by C3 on the new business. On that basis, C3 has heretofore argued that the subsequent realization of gross profit by Employer on the new business was a condition

precedent to Mr. Barker "earning" his commission-wage under Kansas law. C3's argument, which was endorsed by the Agency below, should fail as being inconsistent with Kansas law.

"In the case of nonsalary wages such as vacation pay, they become wages when 'the conditions required for entitlement, eligibility, accrual or earning have been met by the employee'." *A.O. Smith Corp. v. Kansas Dep't of Human Res.*, 36 Kan. App. 2d 530, 541, 144 P.3d 760, 768 (2005). "K.S.A. 44-319(a) does not prohibit at-will employee pay cuts announced before wages are earned." *Salon Enterprises, Inc. v. Langford*, 29 Kan. App. 2d 268, 271, 31 P.3d 290, 293 (2000). However, the KWPA embeds within its provisions a public policy of protecting wage earners' rights to their unpaid wages and benefits. *Campbell v. Husky Hogs, L.L.C.*, 292 Kan. 225, 234, 255 P.3d 1, 7 (2011); *cf. also* K.A.R. 49-20-1(d) ("Conditions subsequent to such entitlement, eligibility, accrual or earning resulting in a forfeiture or loss of such earned wage shall be ineffective and unenforceable.").

Reconciling these contrary rules, the Federal District Court for the District of Kansas has said "Kansas law provides that although an employer is permitted to impose a condition precedent on its obligation to pay an employee wages, once an employee's right to earned wages becomes absolute, a condition subsequent cannot impose a forfeiture." *Hart v. Sprint Commc'ns Co., L.P.*, 872 F. Supp. 848, 857 (D. Kan. 1994); *accord Richardson v. St. Mary Hosp.*, 6 Kan. App. 2d 238, 241, 627 P.2d 1143, 1146 (1981) ("Wages and vacation time earned and due to an employee pursuant to an

employment contract may not be forfeited."). "In determining whether a wage is earned, a court's task is 'one of deciding whether the documents drafted by the employer place a condition precedent on entitlement to the [wage] or whether they attempt to impose a forfeiture'." *Id., quoting Morton Bldgs., Inc. v. Department of Human Resources*, 10 Kan.App.2d 197, 695 P.2d 450, 453 (1985).

Mr. Barker submits that after reviewing the employment documents, even when considered together with the parties' conduct thereon, no reasonable person could conclude that the evidence supports the existence of a contractual condition precedent.

First, the documents. The Employee Handbook in this case does not cover the payment of commissions to employees like Mr. Barker. See (R. Vol. 1, 57-143). Therefore, it cannot support the conclusion that continued employed is necessary for Mr. Barker's earned commissions to "become[] absolute." However, the commission plans, initial and amended, do contain the terms for the earning and payment of commissions to Mr. Barker. See (R. Vol. 1, 48) (the initial plan); and (R. Vol. 1, 50) (the amended plan). The commission plans each state that commissions were payable upon the realization of gross profit by Employer. *Id.* The commission plans also impliedly contemplate that the realization of gross profit is an event subsequent to the Claimant's "work," in securing new business clients. *See id.* ("The year is defined as the first twelve months that product is *actually shipped*.") (emphasis added). However, despite this understanding, the commission plans contain absolutely no language requiring Mr. Barker to remain employed in order to be entitled to his commissions. *Id.* To the

contrary, the terms of the commission plans are simple and finite in terms of C3's obligation to pay and Mr. Barker's entitlement to payment. *See* (R. Vol. 1, 50) ("5% of Gross Profit paid for the first year – 1% of Gross Profit residual commission for years 2-5.").

Under Kansas law:

> "To constitute a meeting of the minds there must be a fair understanding between the parties which normally accompanies mutual consent and the evidence must show with reasonable definiteness that the minds of the parties met upon the same matter and agreed upon the terms of the contract."

Sidwell Oil & Gas Co., Inc. v. Loyd, 230 Kan. 77, 84, 630 P.2d 1107, 1113 (1981). The evidence before the Agency was a series of clear, unambiguous written agreements between the parties on the subject of commissions, including when they were payable. The Agency's conclusion that there was no "meeting of the minds" on entitlement to commissions beyond the period of employment ignores these written agreements and injects a contractual condition precedent where one does not exist.

Second, the parties' conduct. This was the focus of the Agency's determination. (R. Vol. 1, 18, ¶10). The Agency placed tremendous emphasis on an email exchange between Mr. Barker and Mr. Cutler (the C3 CEO) that occurred when Mr. Barker requested a "draw" on his future commissions. *Id.* The Agency found and concluded that:

> "[t]he employer explained in an email to the claimant dated July 26, 2012, that if a draw was given to the claimant and he left or was asked to leave the company, monies not due the claimant based on documented

> "sales were to be returned to the company. This demonstrated that it was never the employer/respondent's intent that the commission arrangement would be paid in perpetuity to the claimant, but once his employment ended, he would no longer earn commissions. This also indicates that the employer and claimant did not have an agreement, or meeting of the minds, regarding the claimant receiving perpetual commissions."

(R. Vol. 1, 18, ¶10). The email is contained in the Agency record, and this Court is equally equipped to analyze its contents as a written document. Mr. Barker submits that the Agency's analysis arbitrarily disregards important details about this exchange.

The Agency disregarded that this exchange occurred several years after the parties entered into the initial commission plan. *Compare id.* (citing "...an email to the claimant dated July 26, 2012..."); *with* (R. Vol. 1, 48) (the initial plan, sent July 2, 2009). The Agency disregarded that this exchange took place after Mr. Barker had announced he may be leaving C3, and that Mr. Cutler's email was sent in express contemplation of that fact. See (R. Vol. 1, 261) ("Especially given you are in the midst of a career change."). The Agency disregarded that Mr. Cutler simply declared that this was a nonrecoverable draw after announcing that there are recoverable and nonrecoverable draws, to wit:

> "Dan there are two kinds of draws, recoverable and nonrecoverable.
>
> This is a recoverable draw. Meaning if you leave the organization or are asked to leave the amount of the draw not due based on actual documented sales as of that date are to be returned to the company."

(R. Vol. 1, 261). And the Agency disregarded that Mr. Barker declined to take the draw, suggesting his lack of acquiescence in a modification the existing arrangement. (R. Vol. 1, 260).

Furthermore, this exchange was a non-sequitur on the ultimate question. Any subjective thought on the part of Mr. Cutler as to the legal effect or intent of the parties is irrelevant parol evidence where the parties' complete and unambiguous agreement was contained in written commission plans. See *Branstetter v. Cox*, 209 Kan. 332, 334, 496 P.2d 1345, 1347 (1972) ("When a contract is complete, unambiguous and free of uncertainty, parol evidence of a prior or contemporaneous agreement or understanding, tending to vary or substitute a new and different contract for the one evidenced by the writing is inadmissible.").

Neither the documents tendered to the Agency nor the parties conduct suggested the existence of a valid condition precedent to Mr. Barker's entitlement to commissions. Mr. Barker did the work; C3 failed to pay for the work.

B. At least one other court that has considered the application of the Kansas Wage Payment Act to analogous facts has sided with Mr. Barker's theory of relief over C3's theory of defense.

In *Smith v. TCI Telecommunications Corp.*, 755 F.Supp. 354, 358 (D. Kan. 1990), the Federal District Court for the District of Kansas encountered a very similar issue. Employees of MCI sued the telemarketing service for wages, contending that they had sold MCI service to customers and became vested with the right to receive a commission for those sales. *Id.* at 358-59. MCI defended, arguing that there were two

unsatisfied conditions precedent to the payment of those commissions: (1) the amount of the commission was to be determined by the customer's actual use of the service for a billing period and whether such usage was sufficient under the employment agreement, and (2) continued employment with MCI. The Court rejected these contentions under circumstances paralleling the instant case:

> "MCI asserts that two valid conditions precedent preclude plaintiff from entitlement to the claimed commissions. First, MCI contends that commissions did not achieve the status of "earned wages" until (1) the MCI customer had used the service for a billing period and the amount of customer usage was determined and billed and (2) the customer's usage of the service was sufficient to satisfy as a "qualifying sale." MCI, however, can point to no provision in the contract which defines commissions in this manner. Instead, the contract expressly provides that commissions are earned upon *sales* and that the amount of commissions is to be determined *based upon* the first month's billings."
>
> "More significantly, the court finds MCI's interpretation of the contract unrealistic in light of the realities of MCI's commercial telemarketing business. It is undisputed that the average period of a class member's employment was approximately six to eight months. It is further undisputed that telemarketers sold service several months before MCI could begin providing service in a particular area and that an additional period of time would necessarily elapse before the customer would be billed and usage could be determined. Given these facts, MCI's interpretation of the contract would result in consistent non-payment of commissions for sales made, an outcome clearly violative of the spirit of the Wage Payment Act. The court therefore finds that MCI employees became vested with the right to receive undetermined scheduled commissions, as earned wages, at the time they sold MCI service. The fact that the various scheduled payments could not be calculated until several months after service was sold does not impair this vested right."
>
> "Second, MCI argues that the employment contracts mandated continued employment as a valid condition precedent to the receipt of commissions, due to the requirement that employees continue to service their accounts post sale. Although MCI concedes that the express terms

> "of the employment contract control the determination of the rights of the parties, again MCI can point to nothing in the contract which supports this argument."

Smith v. MCI Telecommunications Corp., 755 F. Supp. 354, 358-59 (D. Kan. 1990). On these bases, the Court found that MCI employees became vested with the right to receive undetermined scheduled commissions, as earned wages, at the time they sold MCI service. *Id.* Mr. Barker requests that the same conclusion be reached in this matter because the facts are analogous.

As in *Smith*, in this case C3 has failed to point to any provision of the employee handbook or any part of the commission plan(s) themselves to support its contention that "[a]ll compensation for all employees cease[s] when employment terminates." (R. Vol. 1, 461). As in *Smith*, Mr. Barker performed his essential function well before C3 shipped its products to customers, making the commission-wage calculable. As in *Smith*, an interpretation of the employment agreement that would excuse the employer from having to pay the commission-wage would cause an inequitable result. Here, the parties clearly bargained for Mr. Barker to be paid a commission for a period of time as a result of his work in securing new accounts. It would be no injustice to require C3 to hold up its 'executory' end of the bargain when Mr. Barker provided C3 with the benefit

of his labor[2]. Notwithstanding the departure of Mr. Barker, C3 retains the profit-generating new business that was the result of Mr. Barker's work. If C3 replaces Mr. Barker with another employee, C3 won't face double liability, because Mr. Barker's "new business" clients would not be "new business" for the replacement employee. Instead, C3 would be unjustly enriched if no payment was required to be made to Mr. Barker for this same reason. Similarly, Mr. Barker realizes no windfall from the payment of commissions after his departure from employment. He put in all the work expected by C3 for the payment of those commissions. Principles of equity support the result requested by Mr. Barker.

III. The Kansas Department of Labor erroneously failed to determine Mr. Barker's entitlement to wages under the 2011 amended commission plan.

STANDARD OF REVIEW: This Court's review of plaintiff's appeal is controlled by the Kansas Judicial Review Act, K.S.A. 77-601, *et seq.* See *Golden Rule Ins. Co. v. Tomlinson*, 300 Kan. 944, 953, 335 P.3d 1178, 1187 (2014). Relevantly, under the Act:

> **"(a) The burden of proving the invalidity of agency action is on the party asserting invalidity; and the validity of agency action shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken."**
> **...**

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[2] This line of argument accords with decisions made under the wage claim act of Pennsylvania and elsewhere. See, e.g. *Little v. USSC Grp., Inc.*, 404 F. Supp. 2d 849, 854 (E.D. Pa. 2005) ("The entitlement to commissions is not affected by the fact that payment may be delayed.... Furthermore, an employee's right to an earned commission is not forfeited upon the termination of the employee unless the contract of employment provides otherwise or further work is required by the employee to secure the commission."); and *Kaiser Motors Corp. v. Savage*, 229 F.2d 525, 534 (8th Cir. 1956) ("...although the goods were not delivered or paid for, or even where the goods were not received by the principal, until after the termination of the relationship. If the contract contemplates that the agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency.") (citing 3 C.J.S., Agency, § 187, p. 88).

"(c) The court shall grant relief only if it determines any one or more of the following:

...

(3) the agency has not decided an issue requiring resolution;

(4) the agency has erroneously interpreted or applied the law;

...

(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

(8) the agency action is otherwise unreasonable, arbitrary or capricious."

...

"(d) 'in light of the record as a whole' means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its "material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review.

...

" (e) In making the foregoing determinations, due account shall be taken by the court of the rule of harmless error."

K.S.A. 77-621. With regard to questions of law, this Court exercises *de novo* review. *Cf. Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 559, 293 P.3d 723, 728 (2013) ("To be crystal clear, we unequivocally declare here that the doctrine of operative construction, as described in Syllabus ¶ 3 and on page 448 of the Court of Appeals' opinion (*Douglas,* 42 Kan.App.2d 441, 213 P.3d 764), has been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal.").

The Agency found that there were three different commission plans potentially affecting the right of Mr. Barker to receive commissions from C3. See (R. Vol. 1, 33-34, ¶¶3-5). There was an initial 2009 commission plan. (R. Vol. 1, 33, at ¶3); see also (R. Vol. 1, 48) (the initial plan). There was an amended 2011 commission plan. (R. Vol. 1, 34, at ¶4); see also (R. Vol. 1, 50) (the amended plan). There was a third 2012 commission plan. (R. Vol. 1, 34 at ¶5); see also (R. Vol. 1, 51) (the third plan).

The Agency analyzed Mr. Barker's claim to relief solely through the "lens" of the third amended plan, which entitled Mr. Barker to "residual and perpetual commissions on accounts he initiated for the employer/respondent." (R. Vol. 1, 36, ¶9); see also (R. Vol. 1, 51) (entitling Mr. Barker to "5% of Gross Profit paid for the first year of full program system wide in place. 1% residual for life of account."). The Agency determined that Mr. Barker was not entitled to "residual and perpetual commissions on accounts he initiated for the employer/respondent" via the third commission plan because:

> "First, the Commission Structure addresses the way commissions will be paid to the claimant. It does not address his status as a contractual employee or employee at will. *Second, the Commission Structure is not signed by the CEO of Creative Consumer Concepts, Inc., thereby rendering the term of the Commission Structure which the claimant argues allows him earnings beyond 'at will' employment is unenforceable.* [sic]" (emphasis added).

(R. Vol. 1, 36, ¶9). The "first" rationale is addressed at Issue I, above, and the analysis is the same no matter which commission plan is utilized. Mr. Barker is not aggrieved for this reason. The "second" rationale, however, is unique to the third commission plan.

Unfortunately, the Agency did not consider or decide whether any of the preceding commission plans was effective in light of the unenforceability of the third plan. Also, the Agency did not consider or decide whether any of the preceding commission plans would allow payment of commissions beyond the term of Mr. Barker's employment.

Mr. Barker attempted to raise this issue with the Agency in his "Petition for Review of Initial Order." (R. Vol. 1, 30, ¶3.1). Mr. Barker also attempted to raise this issue with the district court in his Petition for Judicial Review. (R. Vol. 2, 5, ¶6.2). The Agency has failed to make necessary contingent findings, and Mr. Barker should be entitled to relief and remand to allow these findings to be made *if* relief is granted pursuant to Issues I and II, above. If relief is not granted pursuant to Issues I and II, above, the request is moot.

CONCLUSION

Mr. Barker requests that this court reverse the judgment of the District Court and enter its Order granting Mr. Barker relief on his Petition for Review, as originally prayed, and consistent with the argument herein, and for such other and further Orders as are just and proper in the premises.

Respectfully submitted,

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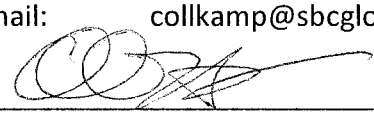

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant was mailed to each of the following named persons at their respective addresses, by depositing same in the United States mail, postage prepaid, on the 9th day of December, 2015:

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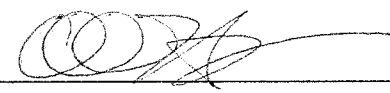

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