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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 CONCEPTS
Defendants/Appellees

BRIEF OF APPELLEE

Appeal from the District Court of Shawnee County, Kansas
The Honorable Richard D. Anderson, Judge of the District Court
District Court Case No. 14-CV-003364

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BRIEF OF APPELLEE

Appeal from the District Court of Shawnee County, Kansas
The Honorable Richard D. Anderson, Judge of the District Court
District Court Case No. 14-CV-003364

NATURE OF THE CASE

This is an appellate review of a district court decision under the Kansas Judicial Review Act, (K.S.A. 77-601 *et seq.*), affirming the Kansas Department of Labor's denial of Plaintiff's wage claim under the Kansas Wage Payment Act. (K.S.A. 44-313 *et seq.*)

STATEMENT OF ISSUES

I.

The Kansas Department of Labors determination that upon termination of an employment-at-will relationship the employer is under no duty to pay wages not earned prior to termination of the relationship, was not an erroneous interpretation or misapplication of the law.

II.
The Plain Error Rule and rule that an issue may not be raised for the first time on appeal, prevent review of the Agency's alleged failure to consider alternative theories of recovery on Plaintiff's wage claim.

STATEMENT OF FACTS

This case was tried to the Court on an agreed set of stipulated facts. As this Court's review is on the same record as that of the District Court, (*Kansas Department of Revenue v. Powell,* 290 Kan. 564, 567, 232 P.3d 856 (2010)) those facts are as follows:

The parties hereby stipulate:

1. The 2012 commission structure document signed by Chad 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. The parties stipulate, for the purpose of this appeal, that this is true.
3. The third commission structure document was signed by Chad Foos, "executive team," in 2012.
4. Chad 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. (emphasis added).

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. II, pp. 61- 64)

14. Because the April 10, 2012 Plan was not signed by the CEO, “the Administrative Hearing Officer refused to give its terms effect. Mr. Barker initially appealed this ruling but he abandoned this claim in district court proceedings.” (*Brief of Appellant*. p.5)

15. The district court in its *Memorandum Decision and Order*, affirmed the KDOL’s administrative order and denied judicial review. (R. Vol. II, pp. 89 - 102)

ARGUMENTS AND AUTHORITIES

I.

The Kansas Department of Labors determination that upon termination of an employment-at-will relationship the employer is under no duty to pay wages not earned prior to termination of the relationship, was not an not erroneous interpretation or misapplication of the law.

Scope of Review

This Court’s scope of review under the Kansas Act for Judicial Review, K.S.A. 77-601 *et seq.*, (“KJRA”) is the same statutorily limited review as that of the district court under the KJRA “as though the appeal had been made directly to this court.” The party asserting the invalidity of the agency’s action bears the burden of proof. Review of questions of law are unlimited with no deference to the agency’s interpretation. (*Kansas Department of Revenue v. Powell*, 290 Kan. 564,

567, 232 P.3d 856 (2010))

The scope of review is mandated by K.S.A. 77-621(c) which provides eight circumstances wherein this Court can grant relief. Plaintiff relies on two of them: KDOL erroneously interpreted or applied the law (K.S.A. 77-621(c)(4)), and KDOL failed to decide an issue requiring resolution (K.S.A. 77-621(c)(3)).

Standard of Review

As with he district court, this Court reviews the agency factual findings to see whether substantial evidence supports them in light of the whole record, considering evidence supporting and opposing those findings.

> The amended statute [K.S.A. 2009 Supp. 77-621] finally reminds us that we do not reweigh the evidence or engage in de novo review, in which we would give no deference to the administrative agency's factual findings. Indeed, the administrative process is setup to allow an agency and its officials to gain expertise in a particular field thus allowing the application of that expertise in the fact-finding process. But we must now consider all of the evidence-including evidence that detracts from an agency's factual findings-when we assess whether the evidence is substantial enough to support those findings. Thus, the appellate court must now determine whether the evidence supporting the agency's decision has been so undermined by cross-examination or other evidence that it is insufficient to support the agency's conclusion. (*Wiebe v. Kissick Constr. Co.,* 43 Kan. App. 2d 732, 742, 323 P.3d 866 (2010))

A.

KDOL Did Not Misapply or Misinterpret the Law

KDOL did not misapply or misinterpret the law when it found that under the comprehensive compensation plan commissions were earned when the product is "actually shipped", that Plaintiff had been paid for all commissions earned, and the termination of the employment-at-will relationship ended the employer's duty to pay any compensation not earned prior to the termination of the relationship.

The Kansas Wage Payment Act ("KWPA") K.S.A. 44-312 *et seq*., provides that upon the termination of employment "the employer shall pay the employee's earned wages not later than the next regular payday. (K.S.A. 44-315(a)). (Emphasis added). KDOL does not take issue with the argument that an at-will employee is still entitled to be paid for any wages that were "earned" prior to termination, however the end of the at-will employment prevents the employee from earning any more wages, i.e. commissions. Plaintiff would have this Court find that the compensation plan survived the termination of employment and Plaintiff would be allowed to continue to "earn" commissions.

The Key in determination of this case, as recognized by the district court, is when were the commissions earned, and to determine this, KDOL and the district court looked to the Comprehensive Compensation Plan ("Plan").

In determining which Plan to construe, the Court should note that Plaintiff's claim before the agency was that the compensation plan dated April 10, 2012 ("April 10 Plan") was a contract of employment that entitled him to receive residual and perpetual wages related to commissions on accounts he initiated while in the employment of the respondent (R. VI. pp. 469). This particular plan had been drafted by Plaintiff, and signed by himself and one Shad Foos who was not the CEO of the employer. As reflected by the stipulations of the parties "no circumstances arising out of my employment will alter my agreement to alter the "at will" employment relationship unless expressed in writing, with the understanding specifically set forth and signed by myself and the CEO of C3." (*sic;* the company).

Because the April 10 Plan was not signed by the CEO, "the Administrative Hearing Officer refused to give its terms effect. Mr. Barker initially appealed this ruling but he abandoned this claim

in district court proceedings." (*Brief of Appellant*. p.5) (Emphasis added). The April 10 Plan, however , is still relevant to show Plaintiff's acknowledgment of the "actually shipped" requirement, as when he unilaterally drafted the April 10 Plan he removed this requirement and had someone other than the CEO sign the plan.

If Plaintiff has any claim that survives after abandoning his appeal of the April 10 Plan, it must be the January 1, 2011 Plan ("2011 Plan").

The 2011 Plan provided:

> 5% of Gross Profit paid for first year - 1% of Gross Profit residual commission for years 2 - 5. 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. I, p. 50)

The interpretation and legal effect of written instruments are matters of law over which an appellate court exercises unlimited review. (*Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 763, 27 P.3d 1 (2001); *Miller v Westport* 288 Kan. at 27, 32, 200 P.3d 4193 (2009)).

It is clear from the reading of the 2011 Plan that the triggering factor for when a commission is earned is when the product is "actually shipped". Plaintiff disputes this interpretation and claims that as soon as he turned a lead over to the sales staff he had earned his commission irrespective of whether the lead resulted in a contract or sale. As the district court found, this is an unreasonable interpretation, and courts will not apply interpretations that are unreasonable. (*Jackson v. Farmer,* 225 Kan. 732, 739, 594 P.2d 177 (1979)).

B.

The Procuring-Cause Rule

Plaintiff asks this Court to adopt the "procuring-cause rule" , and cites the Illinois case of *Schackleton v. Fed. Signal Corp.*, 196 Ill. App.3d 437, 443, 554 N.E.2d 244, 248 (1989). The "procuring-cause rule" by definition does not apply to this case and does not help Plaintiff.

> "Under the procuring-cause rule, 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** of employment. This principle of law protects a salesman discharged prior to culmination of a sale, **after he has done everything necessary to effect the sale.** The rule applies unless a contract between the parties expressly provides when commissions will be paid. *(Id.)* (Emphasis added)

The facts of the case indicate that Plaintiff procured leads, he did not "procure sales". He did not make the sales, or procure contracts. More than a passage of time was required before the commission was earned, in fact before there was anything to base a commission on.

Likewise *Singer Sewing Mach. Co. v. Brewer*, 78 Ark. 202, 93 S.W. 755, 757 (1906) does not supply the authority desired by Plaintiff.

> The language referred to must be construed to mean, not that compensation already earned should be forfeited, but that either party should have the right to terminate the contract at any time and stop the earning of further compensation, and that upon such termination no further compensation should be claimed except that stipulated in the contract and already earned at that time.

As with the Kansas cases, the forfeiture of wages was not enforceable, (K.S.A. 33-3211, K.A.R. 49-21-2(b)(6); See *Weinzirl v. Wells Group, Inc.*, 677 P.2d 1004, 1008 (Kan.1984)) . The distinction being, in *Singer* the agent had already made the sales and was collecting on installment payments, here the commissions had not been earned as the product had not been "actually shipped" prior to termination. *Singer* is in accord with the decisions below that "either party should have the right to

terminate the contract at any time and stop the earning of further compensation."

C.

KDOL did not determine that continued employment was a condition precedent to payment under the commission plan, but rather that "once the employment ended, Plaintiff would no longer earn commissions", and thus did not misinterpret the law

Again we have the word "earned" :

> 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. (R. VI, 18 ¶ 10) (Emphasis added)

This is consistent with Kansas law and the decisions below that wages "earned", but unpaid, must be paid, but that termination of the employment-at-will relationship stops the employee's ability to earn any more commissions. (*See Singer supra*).

Plaintiff argues that his commissions were earned when he turned in a lead to the Sales Department. The compensation plan however provides for a condition precedent, i.e. "actually shipped". A pointed out at the agency and district court level, both parties were aware of the various "contingencies" that could happen between the referral and actually getting a contract and the product out the door, thus the requirement that the commission was dependant on shipment, and paid in the quarter after shipment.

Conditions precedent are allowed in Kansas. *(See Speer v. Sammons Trucking,* 35 Kan.App.2d 132, 145, 128 P.3d 984 (2006), "A condition precedent is an event or action, other than the passage of time, that must occur or take place before a duty of performance arises.") (See also *Weir v. Anaconda Co.,* 773 F.2d 1073, 1084 (10th Cir.1985); *Smith v. MCI Telecommunications Corp.,* 755 F.Supp. 354, 358 (D. Kan.1990); and *Weinzirl v. Wells Group, Inc.,* 677 P.2d 1004, 1008

(Kan.1984)). This type of employment contract has been upheld as valid by the Kansas courts. (See *Kephart v. Data Systems Intern., Inc.*, 243 F.Supp.2d 1205, 1226–27 (D. Kan.2003)).

It was not continued employment that was the condition precedent, but rather the shipping of the product. Plaintiff had been paid all commissions due through the third quarter of 2012, the termination of his employment-at-will ended his ability to earn more commissions.

II.

The Invited Error Rule and rule prohibiting raising an issue for the first time on appeal, prevent review of the Agency's alleged failure to consider alternative theories of recovery on Plaintiff's wage claim.

Scope of Review

This Court's scope of review under the Kansas Act for Judicial Review ("KJRA") is the same statutorily limited review as that of the district court under the KJRA "as though the appeal had been made directly to this court" . The party asserting the invalidity of the agency's action bears the burden of proof. Review of questions of law are unlimited with no deference to the agency's interpretation. (*Kansas Department of Revenue v. Powell, supra*)

The scope of review is mandated by K.S.A. 77-621(c) which provides eight circumstances wherein this Court can grant relief. Plaintiff relies on K.S.A. 77-621(c)(3) asserting KDOL failed to decide an issue requiring resolution.

Plaintiff invited error when he argued that the April 10 Plan controlled, and is prohibited from assigning error to the KDOL's failure to consider other compensation plans.

Plaintiff filed his wage claim with the KDOL claiming that he was owed in excess of fifty thousand dollars by virtue of a compensation plan that entitled him to a 1% residual commission on any account he brought into the company for as long as the account remained with the company. He argues that the April 2012 Plan controlled, and by its terms survived the termination of his

employment.

The record discloses the Plaintiff's claim below:

Plaintiff filed his claim for an estimated $50K for the third quarter of 2012 "and ongoing". (*Plaintiff's Initial Wage Claim,* R. Vol. I, p. 469)

"Under a proper reading of the employment agreement, however, such commissions were earned at the time of the sale. *See* 04/10/2012 "Commission Structure" agreement. (*Petitioner's Pretrial Questionnaire, ¶*4 **Theory of claim or defense**, R. Vol. I, pp. 426-427)

"The issue is whether the claimant is entitled to receive residual and perpetual wages related to commissions on accounts he initiated while in the employment of the respondent."

"The claimant believes the April 10, 2012 commissions structure entitled him to residual, perpetual commissions from the employer/respondent beyond the claimant's employment with the employer/respondent." (*Initial Order,* **Discussion**, ¶¶ 1, 6, R. Vol. I, pp. 35-36)

Because the April 10 Plan was not signed by the CEO, "the Administrative Hearing Officer refused to give its terms effect. Mr. Barker initially appealed this ruling but he abandoned this claim in district court proceedings." (*Brief of Appellant.* p.5) (Emphasis added).

"The agency framed the issue as whether the claimant was entitled to receive residual or perpetual commissions on accounts he initiated while in employment. The agency found that the commission structure agreement did not continue beyond the termination of employment. (*Memorandum Decision and Order,* R. Vol. I, p.95)

Mr. Barker argues that the agency erred by not giving effect to the prior commission structure agreements. He argues the presiding officer did not consider the effect of the earlier agreements purporting to pay commission for a five-year term. The agency argues that Mr. Barker did not raise the argument before the agency and that the issue is not properly reviewable. Indeed, Mr. Barker argued before the agency that he was entitled to commission for the lifetime of the accounts based upon the third version of the structured commission agreement, which was intended to replace the prior commission structure agreements. (*Memorandum Decision and Order,* R. Vol. I, p.95)

When a party has invited error, the party cannot complain of the error on appeal. (See

Evergreen Recycle LLC v. Indiana Lumbermens Mutual Insurance Co., 51 Kan.App.2d 459, 350 P3d 1091, (2015) citing *Thoroughbred Assocs. v. Kansas City Royalty Co.,* 297 Kan. 1193, 1203, 308 P.3d 1238 (2013); (See also *City of Neodesha, Kansas, v. BP Corporation North America, Incorporated et al.*, 50 Kan.App.2d 731, 334 P3d 830, (2014) "A party may not invite error and then complain of that error on appeal. In accord, *Greer ex rel Farbo v. Greer,* 50 Kan.App.2d 180, 324 P3d 310 (2014)).

Plaintiff argued his case to the KDOL that the April 2012 Plan assured him perpetual commissions. That plan was not controlling because it attempted to change a term or condition of employment and not signed by the CEO as required. Plaintiff acknowledged the administrative ruling and appealed that ruling, but in his own words "abandoned this claim in district court proceedings."

This appeal should have been over at that point. Where a party procures a court to proceed in a particular way thereby inviting a particular ruling, that party is precluded from assailing such proceeding and ruling on appellate review. (See *Walker v. Regehr,* 41 KA2d 352, 361, 202 P3d 712, (2009); See also *Lee v. Fisher,* 14 KA2d 236, 202 P3d 57, (2009) "Where a party's strategic choices at trial have adverse consequences, we have refused to grant relief on appeal from those same choices. See *State v. Gray,* 235 Kan. 632, 635–36, 681 P.2d 669 (1984)".

Once the Plaintiff abandoned his appeal of an adverse decision regarding whether the April 2014 Plan entitled him to perpetual commissions after the termination of his employment, he was asserting new claims on appeal. Issues not raised at the trial level are not allowed to be raised for the first time on appeal. (See *Graceland College Center for Professional Development and Lifelong Learning, Inc. v. Swafford* 234 P.3d 866 (Table) (2010); *Miller v. Bartle,* 283 Kan. 108, 119, 150

P.3d 1282 (2007)).

The Invited Error Rule and prohibition on raising an issue for the first time on appeal, prevent review of the Agency's alleged failure to consider alternative theories of recovery on Plaintiff's wage claim.

CONCLUSION

Review of an administrative agency under the KJRA is limited. Only eight considerations are available to this Court, of these Plaintiff challenges the agency and district court orders on two theories, First, that the KDOL misinterpreted or misapplied the law and secondly that KDOL erred in not determining Plaintiff's commission entitlements under earlier versions of the commission plan. Plaintiff bears the burden of proving error. He has failed to do so.

While Plaintiff argues that the KDOL and district court erred in holding that Plaintiff's commissions were forfeit because he was an employee-at -will, this was not the law of the case as determined by KDOL and the district court. Both decisions below hold quite correctly that once an employer has paid all earned wages/commissions, the termination of the at-will-employment prohibits the employee from earning any more wages/commissions. The authorities cited by both parties are in agreement with this holding.

Both KDOL and the district court found that the compensation plans prior to the April 2012 Plan contained a condition precedent i.e. that the commissions were not earned until there was an "actual" shipment of the product. This is a perfectly legitimate provision in a commission wage plan. Plaintiff did not negotiate contracts or make sales, he provided leads. Whether there was ultimately a sale and actual shipment was not under Plaintiff's control or due to his efforts. Something more than the passage of time was required for Plaintiff to earn a commission.

Having abandoned his appeal of the refusal of the ALJ to give effect to the April 2012 Plan, Plaintiff assumes a new tack, i.e. that the KDOL committed error because it failed to determine Plaintiff's entitlement to wages under the previous compensation plans.

Both the agency and the district court found that Plaintiff had been paid all commissions earned at the time of his resignation. Plaintiff does not appear to take issue with this decision in his appeal other than to say the KDOL failed to determine his entitlement under the earlier versions of the compensation plan. The court should not "devine" a case from the facts for the Plaintiff. Although the district court found that the ALJ had in fact determined the entitlement under the earlier plans by applying the "actually shipped" requirement, any error due to the claimed omission was invited error.

At the administrative level, Plaintiff put all his "eggs in one Basket", the April 2012 Plan and that it entitled him to commissions as long as the "account" was with the company. He did not seek alternative relief. Plaintiff sought to avoid the expense of the transcript of the administrative hearing, thus the facts of that case are the stipulations above. The ALJ heard the case presented by Plaintiff. Plaintiff did not prevail. He now seeks to raise a new issue on appeal, claiming error that he invited.

Claimant has failed to show error in the decisions below under K.S.A. 77-621. He has not met his burden of proof. The order appealed from is correct in application of applicable law, and all issues necessary for the determination of the claim were addressed by the agency. The orders should be affirmed in all respects.

Respectfully submitted,

/s/ Glenn Griffeth

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CERTIFICATE OF FILING AND SERVICE

I, the undersigned hereby certify that original of the above and foregoing ***Brief of Appellee*** was filed on this the 11th day of January, 2016 as follows:

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