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No. 116322-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DIANA SABATINO

Petitioner/Appellee

vs.

THE KANSAS DEPARTMENT OF LABOR EMPLOYMENT SECURITY BOARD OF REVIEW

Respondent/Appellant

BRIEF OF APPELLANT

Appeal from the District Court of

Shawnee County, Honorable Franklin R. Theis, Judge

District Court Case No. 2015-CV-000053

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NATURE OF CASE

This is an appeal of a judicial review granting summary judgment to the Appellee and reversing the Kansas Department of Labor's ("KDOL") denial of unemployment benefits due to misconduct.

ISSUES ON APPEAL

A State Agency charged by law with determining eligibility for public benefits, and having determined that an individual is disqualified from receiving such benefits based upon the facts presented to the agency by the employer, is not bound on appeal of that determination by an agreement between the employer and employee in settlement of a collateral civil service appeal, to change the "reason" given for termination of employment, when the underlying facts supporting misconduct do not change.

FACTUAL STATEMENT

The operative facts are not in dispute.

Petitioner was employed by the Kansas State Fire Marshall's Office ("Employer") from approximately March 13, 2000, until approximately July 28, 2014, when her employment was terminated by the Employer. (R., Vol. I, pp. 46-7, 49) Pursuant to K.S.A. 77-2949 the reasons given to Petitioner for her dismissal were:

> During our investigation, you admitted that on June 26, 2014, you were sitting at a picnic table in a roadside park in Westmoreland typing the report from the jail that you had just finished inspecting. As you know, in May of 2011 you were instructed that if you are doing any sort of paperwork it is to be done here in the Topeka office. You were reminded of this again on June 29, 2011, and again on July 7, 2011. This was addressed again in your unsatisfactory Performance Review for the period 4/11/2011 to 12/27/2011. On September 3, 2013, your current supervisor addressed this issue with you in an e-mail. You received a written letter of reprimand on November 15, 2013, which stated again that if you are typing reports you are supposed to be doing so at your assigned office, which is the Topeka office. On June 5, Brenda McNorton, Prevention Division Chief sent an e-mail to all Prevention Staff reminding everyone that "effective immediately all paperwork is to be completed in the following places only! The facility you are inspecting, your assigned office (NOT your home), your hotel room during your regular work hours only." You responded to this e-mail stating "I understand". You violated these repeated directives by typing your report in a roadside park.
>
> In addition, one of the objectives on your performance. review covers the timely completion of inspection reports. You have received a needs improvement rating on this objective since April 2011, On November 15, 2013, you received a letter of reprimand stating that you will be required to complete your paperwork the day of inspection or next working day if inspection runs late into the afternoon. You continue to struggle with this objective. On Wednesday, July 9, 2014, you performed an inspection at JJA New Direction. You were off work on July 10th and 11th but returned to work on Monday, July 14th. You did not complete the paperwork for this inspection until Tuesday, July 15th . This is in violation of the directive that you were given on November 15, 2013." (R., Vol. I, pp. 58-9)

Prior to the final incident that led to her termination, Petitioner had written warnings on November 15, 2013 (R. Vol. I, pp. 74, 80) and July 24, 2014 (R. Vol. I, pp. 60,73) The "location" of preparing reports was in part due to a previous incident where Petitioner had been preparing a report at a McDonalds restaurant and slipped and injured herself. Apparently there was an issue in the resulting workers compensation claim as to whether Petitioner was injured in the course of her employment. (R.,Vol. I, p.26)

Following her termination, Petitioner timely filed a claim for unemployment benefits. (R., Vol. I, p. 1) The Employer's answer stated the reason for discharge was "continued pattern of refusal/failure to follow agency directives in conducting inspections and preparing reports (insubordination)." (R.,Vol. I. pp. 46-7, 49) Based upon the information provided, the Claims Examiner denied her application for unemployment benefits. (R.,Vol. I, p. 1) Petitioner timely appealed the denial to an unemployment insurance referee. (R.,Vol. I, pp. 5-10) Contemporaneously thereto she appealed her termination to the Kansas Civil Service Board. (R., Vol. I, pp. 26, 34, 188)

At some point prior to the referee hearing, the Employer agreed to change the reason for termination to inefficiency or incompetency in return for dismissal of the civil service appeal. (R., Vol. I, pp. 19-20) The Appeal hearing was held on November 14, 2014. During the hearing, the Employer testified as to the agreement reached, however also testified that there were quite a few instances that led to Plaintiff's dismissal, (R.,Vol. I, p.25), and that the **factual basis** for the original reason for termination, continued pattern of refusal/failure to follow agency directives in conducting inspections and preparing reports

(insubordination)" had not changed because of the agreement. (R., Vol. I, p. 24)

On November 17, 2014, the Appeals Referee issued a written decision denying the appeal and upholding the Examiner's determination. (R., Vol. I, pp. 11 - 13) Petitioner timely appealed the Referee's decision to the Board of Review. (R., Vol. I, pp. 14 - 1) On December 22, 2014, the Board of Review mailed its written decision denying the appeal. (R.,Vol. I, p. 31)

On petition for judicial review, the District Court reversed the Board's decision finding that in light of the agreement between the parties, the decision was not supported by substantial evidence and was arbitrary and capricious. (R.,Vol. I, p. 182)

ARGUMENTS AND AUTHORITIES

The District Court committed reversible error when it reweighed the facts of the administrative decision and substituted its judgement for that of the Agency charged by law to determine qualifications for the receipt of unemployment benefits.

Evidence, on appeal of a determination that Petitioner was disqualified from receiving unemployment benefits, that employer subsequently agreed to change its stated reason for termination of employment as a condition of a settlement agreement, without a change in the factual basis for said termination, does not support a finding that the evidence supporting the agency's decision has been so undermined by cross-examination or other evidence that it is no longer sufficient to support the agency's conclusions. Neither does the Agency's failure to so find render the decision unreasonable, arbitrary and capricious.

Scope of Review

This is a action filed under the Kansas Act for Judicial Review, and as such the scope of review is limited by K.S.A. 77- 621. It's essential provisions are that the burden of proving the invalidity of agency action is on the party asserting invalidity, (*See* K.S.A. 77-621(a)(1)). The court shall grant relief only if it determines any one or more of eight specific reasons exist. (*See* K.S.A. 77-621(c)(1)-(8)). Notwithstanding, this Court's review of questions of law is unlimited.

Standard of Review

When reviewing the decision of the trial court, which reviewed an agency action, the Court of Appeals must first determine whether the trial court observed the requirements and restrictions placed upon it in reviewing the agency action and then make the same review of the agency's action as did the trial court. (*Redline Express v. Employment Security B'rd of Review,*27 Kan.App. 2d 1067, 1070, 11 P.3d 85, (2000))

The District Court, and thus 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. In doing so, the Court considers whether the evidence supporting the agency's decision has been so undermined by cross-examination or other evidence that it is no longer sufficient to support the agency's conclusions. Evidence is substantial — and thus sufficient to support such conclusions — when a reasonable person would accept it as sufficient to support that conclusion. The district court can not "substitute its judgement" for that of the agency on factual questions. Although deference to an agency's

interpretation of a law it is charged with enforcing is no longer required, deference to the agency factfinding process is still required. (*See* K.S.A. 77–621(c)(7),(d); *Herrera–Gallegos v. H&H Delivery Inc.*, 42 Kan.App.2d 360, 362-3, 212 P.3d 239, (2010))

> **A State Agency charged by law with determining eligibility for public benefits, and having determined that an individual is disqualified from receiving such benefits based upon the facts presented to the agency by the employer, is not bound on appeal of that determination by an agreement between the employer and employee in settlement of a collateral civil service appeal, to change the "reason" given for termination of employment, when the underlying facts supporting misconduct do not change.**

I.

> **The District Court committed reversible error when it reweighed the facts of the administrative decision and substituted its judgement for that of the Agency charged by law to determine qualifications for the receipt of unemployment benefits.**

A cooperative federal-state program of benefits to unemployed workers.

The Federal Unemployment Tax Act, ("FUTA") was originally enacted as part of the Social Security Act of 1935, (49 Stat. 639), and in response to the widespread unemployment that accompanied the Great Depression. It called for a cooperative federal-state program of benefits to unemployed workers. (*See St. Martin Evangelical Luthern Church v. South Dakota*, 451 U.S. 772, 774, 101 S.Ct. 2142, 68 L.Ed.2d 612, (1981));

> FUTA imposes an excise tax on "wages" paid by an "employer" in covered "employment," 26 U.S.C. § 3301, as these terms are statutorily defined. § 3306 (1976 ed. and Supp.III). An employer, however, is allowed a credit of up to 90% of the federal tax for "contributions" paid to a state fund established under a federally approved state unemployment compensation law. § 3302 (1976 ed. and Supp.III). The requirements for federal approval are contained

> in 3304 and 3309 (1976 ed. and Supp.III), and the Secretary of Labor must annually review and certify the state plan. 3304(a) and (c) (1976 ed. and Supp.III). All 50 States have employment security laws implementing the federal mandatory minimum standards of coverage. A State, of course, is free to expand its coverage beyond the federal minimum without jeopardizing its federal certification. (*St. Martin, supra, ftnte 3*)

Kansas in turn enacted the Kansas Employment Security Law, ("KESL") for similar purposes and to allow employers to take advantage of the credits against FUTA tax. (K.S.A. 44-702). The KESL however is still subject to the minimum requirements set out in 42 U.S.C. §503.

The KDOL, is charged by law to enforce the Kansas Employment Security Law

The KDOL is "administered under the direction and supervision of the secretary of labor . . .". (K.S.A. 2015 *Supp.* 75-5701) Within, and as part of the KDOL, is the division of employment and security which is "administered" by the secretary of labor. (K.S.A. 2015 *Supp.* 75-5705). When it is raised or appears that there may be an issue of disqualification, the secretary "shall examine and apply" the provisions of K.S.A. 44-706 to determine if an individual "shall be disqualified for benefits". (K.S.A. 2015 *Supp.* 44-706) One disqualifying reason is if "the individual has been discharged or suspended for misconduct connected with the individual's work." (K.S.A. 2015 *Supp.* 44-706) The determination of eligibility or qualification for unemployment benefits is a governmental function. (*See, In re Oliver*, 547 B.R. 423, (2016), " The management of the unemployment benefit system in Kansas is undoubtedly a function performed by the government to benefit the public welfare." (Citing *Ex rel. Schneider v. McAfee*, 2 Kan. App. 74, 578 P2.d 281, (1978)) The KESL is

administered through the police powers of the State. (K.S.A. 44-702)

The Claims Process
K.S.A. 44-709

When a claim for unemployment is filed an "Examiner" reviews the claim and based upon the facts presented to the Examiner by the claimant, makes an initial determination as to the validity of the claim. If the Examiner finds that the claim is valid, he or she notifies the last employing unit "who shall respond within 10 days by providing the examiner all requested information including all information required for a decision under K.S.A. 44-706, and amendments thereto." If the employing unit fails to respond, it "shall" be deemed to have waived its standing as a party to the proceedings. (K.S.A. 44-709(b)(1)) As will be discussed below, the employer while a "proper" party it is not a "necessary" party. The Examiner's determination becomes final if not appealed within sixteen (16) days. (K.S.A. 44-709(b)(3))

Before the 16th day, either party may appeal to an unemployment Referee, who " after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the examiner." (K.S.A. 44-709(c)) Further appeal is to the Employment Security Board of Review, (K.S.A. 44-709(f)(7)) and the District Court pursuant to the Kansas Judicial Review Act ('KJRA"), (K.S.A. 77- 601 *et seq.*)

The District Court Reweighed the Facts and Substituted Its Judgement for that of the KDOL

Condensed from above, the Petitioner was dismissed from the civil service for inability to perform her job **and** misconduct (insubordination). She applied for

unemployment and the Employer responded that she had been terminated for misconduct. The Employer provided supporting documentation. Based upon the information provided, the Examiner determined that Petitioner was disqualified from unemployment benefits because she had been discharged for misconduct.

Petitioner appealed. At the hearing, the parties announced that Petitioner had appealed her termination to the Kansas Civil Service Board, and that the parties had entered into an agreement to change the stated reason for termination to inefficiency in return for Petitioner dismissing the civil service appeal. It is clear that the parties were of the opinion that their agreement would remove the disqualification for unemployment benefits. The Referee informed the parties that their agreement in the civil service settlement was not binding upon him as to the reason for Petitioner's discharge, and continued to take testimony from the parties. The Referee in his decision affirmed the Examiner's original determination that Petitioner's discharge had been for misconduct and that she was disqualified from receiving unemployment benefits. That decision was subsequently upheld by the Board.

On judicial review the District Court found that the subsequent agreement between the parties negated the substantial evidence relied upon by the Examiner, therefore the decision was not supported by substantial evidence, and the Referee's failure to give effect to the agreement rendered his decision arbitrary and capricious.

While acknowledging that the Court is bound by the constraints of K.S.A. 77-621, the District Court formulated the issue to allow it to reweigh the evidence and substitute its judgement for that of the agency:

> The issue at hand is whether the Appeals referee and Board of Review Decisions have been so undermined by the Employer's altered reasons for the Petitioner's termination, that the evidence supporting the Board's [d]ecision to disqualify her from receiving benefits is insufficient. (R., Vol. I, p. 198)

The District Court further reasoned that although the factual basis for the determination of misconduct had not changed, The Employer could not carry its burden to establish misconduct because "this stipulation undermines the previous reasons given for terminating the Petitioner's employment." (R., Vol. I, p. 202). This reasoning is flawed, it confuses labels with evidence, and infringes upon the Secretary's statutory authority to determine who does or does not receive unemployment benefits.

The Parties to a Claim for Unemployment Benefits Can Not Bind the Department of Labor to Qualify a Former Employee for Unemployment Benefits by Agreement

The determination as to whom is entitled to unemployment benefits is vested in the Secretary of Labor. Unemployment benefits are public benefits and the determination surrounding the entitlement to benefits is a governmental function (*In re Oliver*, *supra*; K.S.A. 44-702) Private parties cannot agree to contravene the Legislature for their personal conveniences. Parties can agree that an employer will not contest unemployment, but that is not binding upon the KDOL, nor does it, as Petitioner suggests, mean *ipso facto* that misconduct can not be established, (an argument that is immaterial to the present appeal, as misconduct had been established by the Employer, thus the reason for appeal to the Referee).

The District Court's decision if left to stand, would allow the parties to determine whether or not an employee receives unemployment benefits. While counsel has not come across a case directly on point in Kansas, those jurisdiction that have addressed the issue of

whether the parties can agree to receipt of unemployment benefits have found that such agreements are not binding upon the agency tasked with administering unemployment benefits (*See, Turner v. Unemployment Compensation Board of Review,* 381 A.2d 223, 224 (Pa.Cmwlth.1978). "It is for the referee and Board to determine a claimant's eligibility for benefits in unemployment compensation cases by determining the facts and applying the law. It is not for an employee and employer to determine eligibility for benefits by agreement."; *In Accord, Lawson v. Unemployment Compensation Board of Review*, 2013 WL 3960845, (Pa. Cmwlth, 2013), *unpublished.* See Also, *In Re: Claim of Neil*, 238 A.D.2nd 660, 667 (1997) "The settlement agreement "does not 'preclude the Board from determining the factual basis for claimant's discharge' " *In Accord, In Re: Claim of Walli* 275 A.D. 2d 845, (2000)). Kansas law would support the same conclusion.

Substantially the same issue arose in *Erickson v. General Motors Corp. et al.*, 177 Kan. 90, 276 P.2d 376, (1954). There the issue was whether holiday pay during a temporary shut down was "wages" under the employment security law that was to be deducted from unemployment benefits paid for the same time period. Of the several arguments made by the Appellants two arguments went directly to the agreement between the parties, i.e. the collective bargaining agreement between the UAW-CIO and the employer did not classify it as wages, and the union and the corporation had agreed that holiday pay is not wages. The Court rejected these arguments;

> We need not discuss the contention that the corporation and the union agreed that holiday pay was not wages for whether that holiday pay is deductible from benefits to be paid out of the employment security fund in the custody of the

> state treasurer is to be determined, not from the above agreement, but from the statute. *Id* @ 98

The *Erickson* Court further made it clear that while the employer in an unemployment hearing is a proper party, it is not a necessary one, and "appellants' rights arise only under its [*sic.* the Employment Security Act] provisions and that the claim asserted is against the employment security fund administered by the commissioner and not against the corporation." *Id* @ 93-4 *Erickson* is still good law in Kansas, and dictates that Petitioner's entitlement to unemployment benefits must be determined by application of the facts to the statute, rather than agreement of the parties.

Substantial Evidence supports the Referee's Decision

> Evidence is substantial — and thus sufficient to support such conclusions — when a reasonable person would accept it as sufficient to support that conclusion. (*Herrera–Gallegos, supra*).

The District Court's analysis assumes that the employer had submitted sufficient evidence to establish misconduct, (otherwise there would be nothing to "undermine"). Independently however, misconduct had already been determined by the Examiner based upon the information provided by the Employer. Evidence that is substantial.

Misconduct Under the KESL

The purpose of unemployment insurance is well stated: "to prevent economic insecurity resulting from *involuntary* unemployment." (*Redline Express v. Employment Security B'rd of Review,*27 Kan.App. 2d 1067, 1070, 11 P.3d 85, (2000)). (Emphasis original) The pivotal word however is "involuntary", and dismissal for misconduct is not

recognized as an involuntary separation qualifying an individual for unemployment:

> The provisions of an unemployment compensation statute relating to the disqualification to receive unemployment compensation benefits in the case of a discharge for misconduct are intended to deny unemployment compensation to a claimant who is discharged because of misconduct, regardless of when or where it occurred, so long as such misconduct is in law connected with the employee's work *National Gypsum v. KESBOR*, 244 Kan. 678, 686, 722 P2d. 786 (1989)

Legislative intent regarding misconduct as a disqualifying factor is reflected in the more recent changes in legislation. Prior to amendments in 1995, to show "misconduct" under K.S.A. 44-706 required a showing of "willful and intentional", "substantially adverse to the employer's interests," "carelessness or negligence," "to show wrongful intent or evil design." The Supreme Court has found that the removal of these terms indicates that the Legislature clearly sought to lower the standard for finding "misconduct" under 44–706(b)(1). (*See Pouncil v. Kansas Employment Security Board of Review*, 268 Kan. 470, 479, 997 P2d 715 (2000) *citing* SB 106 Bill Summary, Minutes of the House Committee on Business).

Under this "relaxed" definition, the statutory elements of "misconduct" under the Kansas Employment Security Law are; 1) The individual knew or should have known about the rule; 2) the rule was lawful and reasonably related to the job; and 3) the rule was fairly and consistently enforced. The record before the Examiner consisting of the employer's response and Petitioner's response established misconduct.

First, the response of the Employer to the claim for benefits indicates:

Discharged/Fired ✓

> **Details of final incident that lead to discharge:** Continued pattern of refusal/failure to follow agency directive in conducting inspections and preparing reports (insubordination). (R., Vol. I, p. 61)

Since Petitioner was a classified employee within the state civil service system, she was entitled to notice of the reasons for the proposed disciplinary action setting forth the reasons and factual basis therefor. (K.S.A. 77-2949(b))

The letters required by K.S.A. 77-2949 were included with the Employer's response, and specified (as to the misconduct charge):

> During our investigation, you admitted that on June 26, 2014, you. were sitting at a picnic table in a roadside park in Westmoreland typing the report from the jail that you had just finished inspecting. As you know, in May of 2011 you were instructed that if you are doing any sort of paperwork it is to be done here in the Topeka office. You were reminded of this again on June 29, 2011, and again on July 7, 2011. This was addressed again in your unsatisfactory Performance Review for the period 4/11/2011 to 12/27/2011. On September 3, 2013, your current supervisor addressed this issue with you in an e-mail. You received a written letter of reprimand on November 15, 2013, which stated again that if you are typing reports you are supposed to be doing so at your assigned office, which is the Topeka office. On June 5, Brenda McNorton, Prevention Division Chief sent an e-mail to all Prevention Staff reminding everyone that "effective immediately all paperwork is to be completed in the following places only! The facility you are inspecting, your assigned office (NOT your home), your hotel room during your regular work hours only." You responded to this e-mail stating "I understand". You violated these repeated directives by typing your report in a roadside park. R., Vol. I, pp. 72-3.

The letter of intent was dated August 1, 2014, however due to several continuances at Petitioner's request, the meeting with the Employer and Petitioner did not occur until August 29, 2014. By letters dated September 5, 2014, a little over a month later, the Employer indicated that after meeting with the Petitioner and the union representative, he

saw no reason not to proceed with the termination based upon the reasons given on August 1, 2014. (R. Vol. I pp. 63, 66)

> During our meeting you stated that you felt your discrepancies had been corrected since November 2013 except for the June 24 2014 incident when you typed an inspection report at a roadside park. When asked whether you had contacted your supervisor to get permission to complete your report somewhere other than where directed, your reply was "no". (R. Vol. I, p. 66)

Again, there were two distinct "tracks" the inefficiency which Petitioner felt that she had corrected, and the misconduct, "insubordination" regarding doing the reports at a place other than allowed. The emphasis on the reason for termination clearly was the failure to follow the directive on where inspection reports were to be completed after being counseled regarding such conduct and warnings of disciplinary conduct for future violations. This type of conduct is not due to failure to understand or inability to physically do so.

Also in the documentation provided was Petitioner's separation statement (KBEN 3110) wherein she acknowledged that there was a policy regarding where reports were to be prepared (indicating that it was because of workers compensation issues), that she was aware of the policy, had been previously given a written notice regarding violation of the policy and warned that future violations would result in disciplinary action, and that she had in fact been fired for violating that policy again when she typed out a report at a roadside park in violation of that policy. (R., Vol. I, pp.144 - 47)

Petitioner knew about the directive, had been previously warned, and was aware that violation could result in disciplinary action, i.e. "The individual knew or should have known about the rule." The purpose of the rule related to potential workers compensation claims,

and issues of whether the employee was injured in the coarse of employment, as well as the employer's right to direct where the work is to be performed, i.e. "the rule was lawful and reasonably related to the job". Finally all of the "Prevention Staff had been informed as to where reports were to be completed, i.e. "the rule was fairly and consistently enforced."

Without having to stretch the imagination, substantial evidence supported the Examiner's determination that Petitioner had been discharged for misconduct.

A Rose By Any Other Name . . .

This evidence did not go away simply because the parties agreed to what the Referee described as a "fiction" as to why Petitioner was terminated. The District Court took exception to the Referee's characterization of the "amended" reason for discharge as a "fiction", finding that the Employer simply changed its mind, and that the employer's failure to withdraw the evidence supporting misconduct "does not mean that the overall reasoning for terminating the Petitioner's employment could not have been inefficiency without insubordination - which was precisely what the State Fire Marshal's representative testified to at the [H]earing." (R., Vol. I, pp. 36 - 7)

Actually "fiction" is an accurate description of the reason for Petitioner's termination at the appeal hearing. The term is defined by *Webster* as:

> 1. An imaginative creation or a pretense. 2. The act of inventing an imaginative creation or a pretense. 3. A lie. (*Webster's II New College Dictionary*, Houghton Mifflin Co. 1995)

Fictio juris non est ubi veritas
(Where truth is, fiction of law does not exist)

The only reason given by the Employer at the Referee appeal, for changing the reason for termination to inefficiency, was to settle the civil service appeal, and allow Petitioner to draw unemployment benefits. The substantial evidence upon which the Examiner's determination was based, and upon which the Referee based his original decision, remained the same. At the time Petitioner's employment was terminated, she was terminated for misconduct. This is not a "now for then" situation, the employer didn't testify that it had made a mistake originally, and that Petitioners termination letter should have stated inability to perform her duties, it agreed to amend after the fact.

Substantial evidence supports the Department's decision. Plaintiff's attempts to change that determination after the fact in order to resolve the civil service appeal, and in essence have the KDOL pay a settlement by paying unemployment benefits to which the Plaintiff was not entitled.

II.

THE REFEREE'S DECISION IS NOT ARBITRARY AND CAPRICIOUS

Subsection 8 of K.S.A. 77-621 has been interpreted as:

> Focusing on subsection (8) of the statute quoted above, we consider "unreasonable" to be an action taken without regard to the benefit or harm of all interested parties which is so wide of the mark that its unreasonableness lies outside the realm of fair debate. *Combined Investment Co. v. Board of Butler County Comm'rs,* 227 Kan. 17, 28, 605 P.2d 533 (1980). "An agency's action is 'arbitrary and capricious' if it is unreasonable or 'without foundation in fact.' " *Zinke & Trumbo, Ltd. v. Kansas Corporation Comm'n,* 242 Kan. 470, 475, 749 P.2d 21 (1988).

In re Emporia Motors Inc., 30 Kan.App.2d 621, 624, 44 P.3d 1280, (2002)

The District Court determined that since the Referee found that the altered reason for termination was not relevant, the resulting decision was arbitrary and capricious. This issue goes to the weight of the evidence which is in the realm of the fact finder. Moreover, the Referee addressed the issue in his decision:

> Whatever fiction the parties have agree to as a modification to the reasons for the claimant's [*sic termination*] is not germane to the inquiry as it related to the claimant's qualification for unemployment insurance benefits. Regardless of what has occurred after the fact, at the time the claimant was discharged on September 6, 2014, the employer based the determination to terminate the employment relationship based upon the conduct of the claimant. The claimant was directed to submit reports in a timely manner and the claimant was given specific instructions as to where she was to perform her work. The claimant worked for the employer for over 14 years before her discharge, therefore the "modified" reason for discharge due to claimant's inability or incompetency is not supported by the evidence on the record. Whether an employer wishes to challenge a claim for benefits has nothing to do with whether a claimant may be qualified or disqualified for benefits pursuant to the guidelines of the Kansas Employment Security Law.

There is no misstatement of the law, or the facts. There is no abuse of discretion. The District Court took exception to the Referee's comment that "claimant worked for the employer for over 14 years before her discharge, therefore the "modified" reason for discharge due to Petitioner's inability or incompetency is not supported by the evidence on the record", but such a conclusion by the District Court is a reweighing of the evidence. The Referee obviously did consider the argument, and found it lacking, particularly in the absence of any evidence that the **original** termination was not based upon misconduct.

In view of the entire record, it can not be said that the Referee's decision is beyond

the realm of fair debate. The district court erred in finding that the Referee's decision was arbitrary and capricious.

CONCLUSION

According to the notice given by the employer to the Petitioner terminating her employment, she was being terminated for misconduct, as well as incompetency . Each was based on its own separate set of facts. The Employer responded to the KDOL that Petitioner was discharged for misconduct (insubordination), and submitted evidence that supported that determination. Based upon the evidence from all the parties, the Examiner determined that Petitioner had been discharged for misconduct and was therefore disqualified from receiving benefits. At the time the decision was made, the Employer still maintained that Petitioner was discharged based upon misconduct. After Petitioner appealed that determination, and appealed her separation to the civil service board, the Employer chose to "settle" by changing the "reason" for termination for the purpose of allowing the Petitioner to draw unemployment benefits.

The underlying facts upon which the determination was made did not change. The district court's decision attempts to take the eligibility for unemployment benefits out from under the purview of the Secretary of Labor by allowing the parties to decide who gets unemployment benefits and who does not. The court apparently felt that the Petitioner did not get the benefit of her bargain, i.e. unemployment benefits in return for dismissal of the civil service appeal, and fashioned a "remedy" that would allow Petitioner her benefits.

The remedies allowed under the KJRA are specifically listed in K.S.A. 77-621. There

is no broad "catch-all" remedy. Even section (b)8 "otherwise unreasonable, arbitrary or capricious" has judicially imposed standards. (*In re Emporia Motors Inc.*, *supra.*)

The District Court did not apply the correct test, resulting in reweighing the evidence and giving controlling weight to the Employer's agreement to change the reason for discharge to overturn the agency decision. The Referee got it right. The testimony at the hearing was a "fiction" to allow settlement of the civil service appeal. In light of the substantial evidence supporting the original determination, this "fiction" does not so undermine by cross-examination or other evidence, the substantial evidence supporting the agency's decision so that it is no longer sufficient to support the agency's conclusions.

The District Court's finding of arbitrary and capricious is off the mark. The standard is "unreasonable" or "without foundation in fact". The decision is correct in law and in fact. The "agreed reason" after the fact does not void the substantial evidence upon which the agency determination was made that Petitioner was dismissed for misconduct at the time the employment relationship was terminated. This was not an error that was corrected. The Employer in its reasons for proposing termination told Petitioner it was for misconduct. When they terminated her employment several weeks later it was for misconduct. When they responded to KDOL regarding Petitioner's claim for unemployment, it was for misconduct. They did not appeal the Examiner's determination that Petitioner was terminated for misconduct. At the hearing itself they testified that the underlying facts had not changed. In his decision the Referee explained why he gave little if any consideration to the change of mind. There is nothing about the decision that is arbitrary, capricious and/or lacks factual

foundation.

The KDOL is responsible for administering the KESL. If can not do so effectively or efficiently if employers and employees can determine who is or is not eligible for unemployment by agreement. The District Court decision, if left to stand, allows such a deviation from the KESL. This decision was arrived at only by reweighing the evidence and substituting the Court's judgement for that of the agency and an unsubstantiated finding of arbitrary and capricious. Both of which are in error.

The District Court should be reversed and the order of the Board affirmed.

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on October 13, 2016, I electronically filed the foregoing *Appellant's Brief* with the Clerk of the Appellate Courts by using the Court's Electronic Filing System which will send notification to:

Scott L. Brown
BLAKE & UHLIG, P.A.
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and at the same time depositing two (2) true and correct copies of the same in the United

States mail, postage prepaid at Topeka, Kansas, addressed to;

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/s/ Glenn H. Griffeth
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