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Case No. 15-114199-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STANTON D. BARKER
Plaintiff-Appellant

v.

KANSAS DEPARTMENT OF LABOR AND
CREATIVE CONSUMER CONCEPTS, INC.

Defendants-Appellees

BRIEF OF APPELLEE CREATIVE CONSUMER CONCEPTS, INC.

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY
HONORABLE RICHARD D. ANDERSON, DISTRICT JUDGE
DISTRICT COURT CASE NO. 2014-CV-546

Robert A. Sheffield, #25732
LITTLER MENDELSON, P.C.
1201 Walnut Street, Suite 1450
Kansas City, MO 64106
Telephone: 816.627.4400
Facsimile: 816.627.4444
E-mail: rsheffield@littler.com
ATTORNEYS FOR APPELLEE
CREATIVE CONSUMER
CONCEPTS, INC.

TABLE OF CONTENTS

TABLE OF CONTENTS
(CONTINUED)

PAGE

TABLE OF CONTENTS
(CONTINUED)

PAGE

TABLE OF CONTENTS
(CONTINUED)

PAGE

STATEMENT OF ISSUES

I. Whether the Kansas Department of Labor ("KDOL") correctly concluded that Plaintiff Stanton Barker was an at-will employee who ceased earning compensation at the conclusion of his employment with Defendant Creative Consumer Concepts, Inc. ("C3").

II. Whether the KDOL correctly concluded that actual shipment of product was a condition precedent to Barker earning a commission.

III. Whether the KDOL's decision correctly determined Barker's entitlement to wages following his voluntary resignation under all available record evidence.

STATEMENT OF FACTS

I. BACKGROUND FACTS.

Plaintiff Stanton Barker ("Plaintiff" or "Barker") began working for Defendant Creative Consumer Concepts, Inc. ("C3"), as Director of Business Development on July 8, 2009. Agency Record of Department of Labor Wage Claim #130014-1 OAH # 13DL0233 CL ("A.R"), at 241. As Director of Business Development, Barker was responsible for contacting leads and generating interest in C3 products. A.R. at 330. Barker did not sell any C3 products to customers. A.R. at 330. Rather, Barker brought leads to C3 sales representatives who then attempted to sell C3 products to the customers. A.R. at 330. Barker was the only C3 employee performing this type of work. A.R. at 330.

A. C3's Handbook.

Barker was subject to the C3 Handbook, which he acknowledged in writing. A.R. at 246-248. The Handbook acknowledgment stated the following:

- "**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 C3." (Emphasis in original.)
- "I understand that **my signature** below validates that I have read and comprehend the above statements and that I understand and accept the responsibilities set by those statements." (Emphasis in original.)

A.R. at 247; Record of Case #2014-CV-546 ("A.R. Vol. 2"), at 63 (Stipulated Facts ¶¶12-13). Barker has stipulated that he was an at-will employee during his employment with C3. A.R. Vol. 2 at 63 (Stipulated Facts ¶11).

B. Barker's Initial and Amended Commission Structures.

Barker's compensation under his at-will employment included an annual salary and a "comprehensive commission plan based on gross profit" created by C3 CEO Robert Cutler. A.R. at 241; 238; 330. The commission structure was a term of Barker's employment, not a separate agreement or contract. A.R. at 241; 330-331. Barker's offer letter, which referenced the commission structure, noted that Mr. Barker's employment was at will. A.R. at 241.

Under the commission structure, Barker earned a commission when "product is actually shipped" to customers that developed from Barker's leads. A.R. at 238; 331. Commissions were payable "on a quarterly basis; the month following the calendar year quarter." A.R. at 238. The condition that "actual shipment" occurred before Barker earned a commission was important because C3 is paid by its customers only after product ships, not when an order or sale is placed. A.R. at 331. Product might ship days, weeks, or months after an order is placed, depending on the customer's needs and the product's availability. A.R. at 331. Product might also never ship at all if the customer cancels the sale. A.R. at 331.

1. Initial Commission Structure (2009).

The initial commission structure provided for commissions to be paid to Barker at the rate of 5% of C3's gross profits on actual shipments of products for the first year. A.R. at 238; A.R. Vol. 2 at 62 (Stipulated Facts ¶6). For years two through five, the commission was dropped

to 1% of C3's gross profits on actual shipments of products. A.R. at 238; A.R. Vol. 2 at 62 (Stipulated Facts ¶6).

2. First Amended Commission Structure (2011).

In 2011, the parties amended Barker's commission structure "to extend the 5% of Gross Profit paid during the first year to include the second year." A.R. at 251; A.R. Vol. 2 at 62 (Stipulated Facts ¶7). No other changes were made.

3. Second Amended Commission Structure (2012).

In early 2012, Barker requested a change to the 2011 commission structure. A.R. Vol. 2 at 62 (Stipulated Facts ¶8). Barker drafted the 2012 commission structure. A.R. Vol. 2 at 62 (Stipulated Facts ¶8). The 2012 commission structure provided for commissions to be paid at the rate of 5% of gross profit paid for the first year and 1% thereafter for the life of the account. A.R. at 258; A.R. Vol. 2 at 62 (Stipulated Facts ¶8). The 2012 commission structure was signed by Shad Foos, a member of C3's executive team. A.R. at 258; A.R. Vol. 2 at 61, 62 (Stipulated Facts ¶¶3-4, 8). CEO Cutler neither negotiated nor signed the 2012 commission structure. A.R. Vol. 2 at 61-62 (Stipulated Facts ¶¶3-5). Barker has stipulated that the 2012 second amended commission structure is not binding on C3 because it had not been signed by CEO Cutler. A.R. Vol. 2 at 61 (Stipulated Facts ¶1).

C. Discussions with CEO Cutler about Advance Commissions.

In late July 2012, Barker informed CEO Cutler that he was considering resigning from C3 to pursue a different career. A.R. at 331. Around this time, Barker asked for an advance on commissions not yet earned. A.R. at 331; A.R. Vol. 2 at 62 (Stipulated Facts ¶9). CEO Cutler explained to Barker by email that C3 could provide Barker an advance commission but it would

be "a recoverable draw. Meaning if you leave the organization . . . the amount of the draw not due based on actual documented sales as of that date are to be returned to the company." A.R. at 260-261; A.R. Vol. 2 at 62 (Stipulated Facts ¶9). Barker decided he would not take the advance commissions. A.R. at 260; A.R. Vol. 2 at 63 (Stipulated Facts ¶10).

D. Barker's Voluntary Resignation.

Barker voluntarily resigned his position with C3 effective August 31, 2012. A.R. at 319. Upon Barker's resignation, C3 timely paid Barker all wages and commissions he had earned through the last day of his employment. A.R. at 331.

II. PROCEDURAL HISTORY.

A. Wage Claim in the Kansas Department of Labor.

Barker initiated a claim with the Kansas Department of Labor ("KDOL") on or around January 8, 2013, alleging that C3 withheld commissions that Barker had earned during his employment. A.R. at 468-471. On March 6, 2014, the Office of Administrative Hearings conducted a full day hearing on Barker's claim. A.R. 353-354; 33-39.

On March 20, 2014, the Presiding Officer denied Barker's wage claim. The Presiding Officer held:

> The claimant was employed "at will" by the employer/respondent. There is no enforceable agreement between the claimant and the employer/respondent which would cause the employer/respondent to pay perpetual residual commissions to the respondent after the claimant's separation of employment from the respondent. Further, the employer/respondent paid all salary and commissions earned to the claimant as they would normally be scheduled to pay. This wage claim is hereby denied.

A.R. at 37.

On April 7, 2014, Barker petitioned the KDOL for review of the Initial Order. A.R. at 30-32. Barker argued that he earned commissions when his "essential function" was complete – *i.e.*, when he brought a lead to a C3 sales representative. According to Barker, he should receive commissions in perpetuity for all future shipments of product to any customer traceable to him, regardless of his employment status with C3. A.R. at 30-31.

On May 8, 2014, the KDOL issued its Agency Final Order denying Plaintiff's Petition for Review on the basis that the Presiding Officer's decision was "legally and factually correct." A.R. at 21-22.

B. District Court Proceeding.

Barker filed his Petition for Review of Agency Action with the District Court of Shawnee County on June 9, 2014. A.R. at 5-11; A.R. Vol. 2 at 3-10. Barker argued, again, that he earned commissions when his "essential function" was complete and he should receive commissions in perpetuity for all future shipments of product to any customer traceable to Barker. A.R. at 5-11; A.R. Vol. 2 at 3-10.

On June 8, 2015, the District Court entered its Memorandum Decision and Order denying Barker's petition for judicial review and affirming the KDOL's decision. A.R. Vol. 2 at 89-102. The District Court found that Barker was an at-will employee at all times and that "the employer's obligation to pay wages depended upon Mr. Barker's continuation of his employment. A.R. Vol. 2 at 97-98. The commission structure agreements were part of his compensation package." A.R. Vol. 2 at 93, 100. The District Court found "no evidence in this record suggesting that the employer had an obligation to pay wages beyond the end of the employment relationship." A.R. Vol. 2 at 98. Accordingly, the District Court "affirm[ed] the

agency finding that the earnings of commissions terminated when Mr. Barker voluntarily terminated his employment." A.R. Vol. 2 at 96.

Regarding Barker's earning of commissions, the District Court held that "a reasonable construction of these agreements establishes that commissions were not actually earned until product was shipped." A.R. Vol. 2 at 99-100. According to the District Court:

> The commissions paid were actually earned based upon gross profit on products shipped during the quarter. The record discloses that orders were sometimes canceled. Sometimes no orders were received from a customer. Or perhaps other reasons may have accounted for some unpredictability of orders. Accordingly, the formula for the calculation of payment of the quarterly commission depended upon actual product shipped during the quarter.

A.R. Vol. 2 at 97. As such, "Mr. Barker was not entitled to any residual commissions following his termination of employment because such commissions were not earned." A.R. Vol. 2 at 100. According to the District Court, "Mr. Barker is attempting to claim commissions on sales not yet made. Such a construction of the commission agreement is not reasonable." A.R. Vol. 2 at 100. Accordingly, the District Court denied Barker's petition for judicial review and affirmed the KDOL's decision.

This appeal followed.

ARGUMENTS AND AUTHORITIES

I. THE KANSAS DEPARTMENT OF LABOR CORRECTLY CONCLUDED PLAINTIFF WAS AN AT-WILL EMPLOYEE WHO CEASED EARNING WAGES, IN THE FORM OF COMMISSIONS, AT THE CONCLUSION OF HIS EMPLOYMENT WITH C3.

A. Standard of Review.

C3 agrees with Plaintiff that the Kansas Judicial Review Act ("KJRA"), K.S.A. § 77-601, *et seq.*, controls review of this case. Further, on appeal, the burden of proving the invalidity of

the agency action is on the party asserting such invalidity. K.S.A. § 77-621(a). Where the record reflects that the agency considered the evidence presented by both sides in making its factual determinations, the reviewing court is bound by the agency's fact-finding and cannot re-weigh the evidence. *In re Equalization Appeal of Krueger for Year 2010 in Woodson Cnty., KS*, Case No. 111,216, 333 P.3d 204, at *2 (Kan. Ct. App. 2014). The reviewing court reviews the evidence in the light most favorable to the prevailing party and does not reweigh competing evidence or assess credibility of witnesses. *Graham v. Dokter Trucking Grp.*, 284 Kan. 547, 547, 161 P.3d 695, 697 (Kan. 2007).

B. The KDOL Correctly Concluded That Plaintiff Was Always An At-Will Employee And Was Not Entitled To Continue Earning Commissions After He Voluntarily Resigned His Employment with C3.

Through this appeal, which relies on the same arguments Plaintiff has previously made, Plaintiff asks the Court to determine that, even though he voluntarily resigned his at-will employment with Defendant, he is perpetually entitled to earn wages -- in the form of commissions -- from C3. This argument is frivolous and there exists no good faith basis for a reversal of the decision of the District Court.

Plaintiff concedes he was always an at-will employee of C3. The crux of Plaintiff's argument, therefore, is that he earned commissions once he performed his job duties for C3, *i.e.*, contacting leads and generating interest in C3 products. This argument is based entirely on Plaintiff's opinion and finds no support in the record. The Presiding Officer found, in light of the testimony and other evidence adduced at the hearing, that under the terms of Plaintiff's compensation structure, Plaintiff *earned* commissions based on gross profits from actual shipments to C3 customers. A.R. at 33-35, ¶¶3, 9. Plaintiff ignores that irrefutable finding,

which is supported by clear and substantial evidence. Plaintiff's interpretation is not supported by the plain language of the commission structure. Nor does it find support in the case law or anywhere in the record.

First, as the KDOL correctly found, the commission structures allowed Plaintiff to earn commissions at the rate of 5% for the first twelve months that product was *actually shipped* to a customer. A.R. at 33-35, ¶¶3, 9. The amount earned on actual shipments was then to be paid on a quarterly basis the month following the calendar year quarter. A.R. at 34-35, ¶9. Plaintiff's argument that he "earned" unpaid commissions prior to his resignation is based solely on his own opinion and blatantly ignores the plain language of the commission structures. The KDOL Presiding Officer's finding of fact as to when Plaintiff earned his commission was based on her factual interpretation of the commission structures and is entitled to great deference. *Graham*, 284 Kan. at 547, 161 P.3d at 697 ("The court reviews the evidence in the light most favorable to the prevailing party and does not reweigh competing evidence or assess credibility of witnesses."). Indeed, the District Court agreed that Plaintiff's interpretation of the commission structures is "not reasonable." A.R. Vol. 2 at 100. Plaintiff, nevertheless, re-asserts his rejected factual theory here without a single shred of evidence as to why the KDOL erred.

Second, Plaintiff's argument that he earned commissions when he presented a lead to a C3 salesperson rather than as outlined in his commission structure, wholly ignores case law that allows an employer to condition an employee's right to earn commission on receiving full payment for the product sold. *See Graceland Coll. Ctr. v. Swafford*, Case No. 101,907, 234 P.3d 866, at *7 (Kan. Ct. App. July 23, 2010). In *Swafford*, the employees in question were account managers who sold training programs to businesses. *Id.* at *1. The employees' right to

commissions on those sales was conditioned on the sale being confirmed and the employer receiving full payment for the program. *Id.* at *9-10. The *Swafford* court held that the employer could lawfully condition the employees' receipt of commissions on the confirmation of the sale and the employer's receipt of full payment for the training program. *Id.* at *10. *Swafford* is directly on point here. Like the plaintiffs in that case, Plaintiff's right to receive commissions was conditioned on product actually being shipped to a customer. C3 was well within its right to draft the commission structure in the manner it did, especially in light of the fact that Plaintiff generated leads before any sales were made and before there was any guarantee that a customer would even place an order. *See Swafford*, Case No. 101,907, 234 P.3d 866, at *10; *see also Sastre v. Cessna Aircraft Co.*, Case No. 98-3330, 1999 U.S. App. LEXIS 33146, at *5 (10th Cir. 1999) (finding that a compensation plan which conditioned a representative's right to earn certain commissions on the acceptance and delivery of the aircraft sold did not effect a forfeiture under the Kansas Wage Payment Act). Here, the record is clear that "actual shipment" was required before Barker earned a commission because C3 is paid by its customers only after product ships, not when an order or sale is placed. A.R. at 331; A.R. Vol. 2 at 97. Product might ship days, weeks, or months after an order is placed, depending on the customer's needs and the product's availability. A.R. at 331; A.R. Vol. 2 at 97. Product might also never ship at all if the customer cancels the sale. A.R. at 331; A.R. Vol. 2 at 97.

Plaintiff does not discuss or present any reason why the Court should disregard the KDOL's factual finding that for the duration of his employment, his commissions were earned based on actual product shipped and then payable at the end of the quarter. A.R. at 37, ¶11. There is no dispute that after Plaintiff voluntarily resigned from C3, C3 paid Plaintiff all wages

owed to him, including commissions earned through the end of his employment. A.R. at 37, ¶11.

Plaintiff's citation to authority from other jurisdictions is unavailing. Contrary to Plaintiff's assertions, the *Shackleton* and *Brewer* cases do not address "this precise issue." Rather, the court in *Shackleton* addressed a situation where "a salesman [was] discharged prior to the culmination of a sale, after he ha[d] done everything necessary to effect the sale." *Shackleton v. Fed. Signal Corp.*, 554 N.E. 2d 244, 248 (Ill. App. 1989) (emphasis added). Plaintiff was not a salesman. Nor was he discharged. Rather, he carefully considered his resignation for over a month, during which time he attempted to take a draw against his salary and commissions and was notified that it would be a "recoverable draw." *See* A.R. at 34, ¶6; A.R. Vol. 2 at 93-94. Plaintiff, thus, voluntarily resigned his employment with the full understanding that he could not earn commissions post-employment on any accounts where product had not actually shipped. A.R. at 34, ¶6; 37, ¶10; A.R. Vol. 2 at 98. To permit Plaintiff to rely on *Shackleton* under these circumstances would turn the rule discussed in that case on its head and permit Plaintiff to resign but maintain a source of income to which he knew he was not entitled. The court's ruling in *Shackleton* was clearly designed as a shield, not the sword Plaintiff wishes it was.

Further, Plaintiff's job was to identify leads and then pass them to a salesperson whose job was to sell C3's product. A.R. at 33, ¶2; A.R. Vol. 2 at 97. Plaintiff was not a salesman. Plaintiff, therefore, had no reasonable expectation of a commission unless and until someone else – not him – made a sale and the product then actually shipped (*i.e.*, the customer did not cancel the order before it shipped). *See Moody Investments, Inc. v. Baldwin*, 12 Kan. App. 686, 690, 754 P.2d 810, 813 (1988) (finding that the entitlement to a commission under the procuring

cause rule requires a buyer who is "able, ready and willing" to purchase and discussing able to mean the financial ability of the purchaser to complete the transaction); *Ellsworth Dobbs, Inc. v. Johnson*, 236 A.2d 843, 853 (N.J. 1967) (finding that the broker's right to commissions under the procuring cause rule was not completed unless he has produced a willing buyer and the true test of a willing buyer is not met even if he agrees to purchase if at the time of the closing of the deal, the buyer does not perform). At the time he generated leads, Plaintiff had no indication that he had a "willing buyer."

Finally, as noted in *Shackleton*, the procuring-cause does not prohibit an employer from setting conditions precedent on its obligations to pay an employee for wages. *Shackleton*, 554 N.E.2d at 248 (holding that the procuring-cause rule applies unless the parties provide when commissions will be paid). Because actual shipment was provided here as a condition precedent, the procuring-cause rule does not apply. *See also Kephart v. Data Sys. Int'l, Inc.*, 243 F.Supp.2d 1205, 1229 (D. Kan. 2003) (noting that a court will honor and enforce terms of employment, including a condition on the employer's obligation to pay wages, as long as they are not contrary to law or unreasonable). The KDOL and District Court both found that C3 had implemented a valid condition precedent on Plaintiff's earning of wages. *See* A.R. at 34-35; AR. Vol. 2 at 97. Plaintiff's argument is baseless and his appeal warrants dismissal.

Plaintiff's citation to the 110 year-old *Singer Sewing Mach. Co. v. Brewer*, 93 S.W. 755, 756 (Ark. 1906), likewise fails to support his argument. As the court in *Brewer* stated, "[t]he 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." *Brewer*, 93 S.W. 755, 756 (1906) (emphasis added). Plaintiff was not a

salesperson and sold nothing to any C3 customer. Plaintiff generated leads that could turn into potential sales of C3's products, but were not guaranteed to do so. Because of the unpredictability of orders – orders were sometimes canceled, sometimes no orders were received from a customer – "[t]he commissions paid were actually earned based upon gross profits on products shipped during the quarter." A.R. Vol. 2 at 97. *Brewer*, like *Shackleton*, stands for the uncontroversial point that *earned* commissions must be paid. C3 takes no issues with that point of law and has complied by paying Plaintiff everything he earned through the date of his employment. Here, however, as the District Court noted, Plaintiff "is attempting to claim commissions on sales not yet made." A.R. Vol. 2 at 100. That position is "not reasonable." A.R. Vol. 2 at 100.

II. THE KANSAS DEPARTMENT OF LABOR CORRECTLY CONCLUDED THAT SHIPMENT OF PRODUCT WAS A CONDITION PRECEDENT TO PLAINTIFF EARNING A COMMISSION.

A. Standard of Review.

C3 agrees with Plaintiff that the Kansas Judicial Review Act ("KJRA"), K.S.A. § 77-601, et seq., controls review of this case. Further, on appeal, the burden of proving the invalidity of the agency action is on the party asserting such invalidity. K.S.A. § 77-621(a). Where the record reflects that the agency considered the evidence presented by both sides in making its factual determinations, the reviewing court is bound by the agency's fact-finding and cannot re-weigh the evidence. *In re Equalization Appeal of Krueger for Year 2010 in Woodson Cnty., KS*, No. 111,216, 333 P.3d 204, at *2 (Kan. Ct. App. 2014). The reviewing court reviews the evidence in the light most favorable to the prevailing party and does not reweigh competing evidence or assess credibility of witnesses. *Graham*, 284 Kan. at 547, 161 P.3d at 697.

B. The KDOL Appropriately Considered the Conditions Precedent to Plaintiff Earning a Commission.

Plaintiff continues to argue there was no condition precedent to him earning his commission and that he earned his commission simply by generating a lead. Plaintiff's position simply defies logic.

Contrary to Plaintiff's argument, Kansas law permits employers to impose conditions precedent to an employee's ability to earn wages. *See Kephart*, 243 F.Supp.2d at 1229 (noting that a court will honor and enforce terms of employment, including a condition on the employer's obligation to pay wages, as long as they are not contrary to law or unreasonable). As the District Court recognized, Plaintiff's suggestion that the agency order constitutes a condition subsequent causing an unlawful forfeiture was incorrect because "a reasonable construction of [commission] agreements establishe[d] that commissions were not actually earned until product was shipped. Mr. Barker is attempting to claim commissions on sales not yet made. Such a construction of commission agreements is *not reasonable*." A.R. Vol. 2 at 99-100 (emphasis added).

1. The KDOL correctly concluded that the relevant documents and the parties' conduct did not entitle Plaintiff to commissions in perpetuity.

Plaintiff first argues that there is no support for the generally understood point of law that compensation ceases when the at-will employment relationship ends because the C3 Handbook does not explicitly refer to commissions. Plaintiff's position, in essence, is that employee handbooks must affirmatively state the controlling law for controlling law to have any effect. Plaintiff, not surprisingly, offers no support for this novel argument. Plaintiff does not dispute that he was an at-will employee with no express or implied contracts of employment. The

Kansas Wage Payment Act, defines wages as "compensation earned for labor or services rendered by an employee, whether the amount is determined on a time, piece, *commission* or other basis less authorized withholding and deductions." K.S.A. § 44-313(c) (emphasis added). Further, K.S.A. § 44-315(a) provides that "whenever an employee quits or resigns, the employer shall pay the employee's earned wages not later than the next regular payday upon which he or she would have been paid if still employed." Notably, the statute requires that "earned wages" be paid to the employee "not later than the next regular payday." Implicit in the statutory language is that once the employment relationship ends, an employee cannot continue to "earn" wages. *See id.* Plaintiff's argument that he continued to earn wages after his employment ended is flawed, and the KDOL correctly concluded that this argument was "in direct conflict with the express terms of the appellant's at-will employment." A.R. at 36, ¶9.

Plaintiff then argues that the payment of commissions upon the realization of gross profit by C3 must be a condition subsequent because there was no express language in the commission plans stating that Plaintiff's right to earn commissions ended with his employment. As stated above, Plaintiff's commissions were part of his wages as an employee of C3, not a separate contractual relationship between the parties. That right to earn compensation ceased when Plaintiff voluntarily resigned his at-will employment. Furthermore, the KDOL correctly concluded that none of the commission agreements altered Plaintiff's at-will employment status because they did not satisfy the requirements in the employee handbook. *See* A.R. at 34, ¶8; 36, ¶ 9. Thus, Plaintiff's argument about "a *series* of clear, unambiguous agreements between the parties on the subject of commissions" is misplaced. The commission structures never did anything more than detail a component of Plaintiff's wages under his at-will employment status.

The commission structures were not contracts. They did not permit Plaintiff to earn commissions after his at-will employment ended.

Additionally, although presented as a legal issue, Plaintiff actually attacks a finding of fact by the Presiding Officer. The high deference accorded findings of fact dooms this argument. Shortly before Plaintiff resigned from C3, Plaintiff asked C3's CEO, Robert Cutler, for an advance on unearned commissions. In the email responding to Plaintiff's request, Mr. Cutler informed Plaintiff that any commission advance would be a recoverable draw and would need to be paid back if Plaintiff resigned (which he was contemplating at the time) before the commissions became earned. *See* A.R. at 34, ¶6; A.R. Vol. 2 at 62-63. Plaintiff declined to take the recoverable draw. *Id.* The Presiding Officer concluded, based on this email, witness testimony about the email, and other evidence adduced at the hearing, that "it was never [C3's] intent that the commission arrangement would be paid in perpetuity to [Plaintiff], but once his employment ended he would no longer earn commissions." A.R. at 37, ¶10.

Plaintiff now asks the Court to set aside the KDOL's factual finding and re-interpret the email in a light more favorable to Plaintiff for no reason other than that he disagrees with the KDOL's interpretation. The Court, consistent with its reviewing authority, should decline to do so. The KDOL's factual finding about the email and its significance to the parties' dispute is supported by substantial evidence and is entitled to high deference. *Graham*, 284 Kan. at 547, 161 P.3d at 697 ("The court reviews the evidence in the light most favorable to the prevailing party and does not reweigh competing evidence or assess credibility of witnesses."). That Plaintiff desires a different factual outcome does not demonstrate that the KDOL's factual determination was in error.

To the extent Plaintiff seeks to claim that the KDOL's consideration of this evidence was "irrelevant parol evidence," he is noting this as an issue before this Court for the very first time. This argument is not properly before the Court for consideration as he did not raise it before the agency, in his petition for review, or before the district court. *See Angle v. Ks. Dep't of Rev.*, 12 Kan. App. 756, 758, 758 P.2d 226, 235 (Kan. Ct. App. 1988) (stating that an argument that was not raised before the hearing officer, and thus went unchallenged, should not become an issue before the court).

2. The *Smith* case is inapposite and does not support Plaintiff's arguments.

Plaintiff continues to urge the reviewing bodies in this matter to consider the ruling in *Smith v. MCI Telecomm. Corp.*, 755 F. Supp. 354 (D. Kan. 1990), as supportive of his arguments. The *Smith* case helps C3, not Plaintiff. In *Smith*, the express terms of the commission plans at issue provided that commissions were *earned* on qualifying sales and would be paid during the first month of billing when the cost of service usage could be determined. *Id.* at 358. In *Smith*, the sale was already made and all that was left to determine was the amount of the commissions based on the cost of service usage by the customer. *Id.* at 358-359.

In this case, the commission structures unambiguously provided that Plaintiff earned commissions at a determined rate of the gross profits on *actually shipped product*. *See* A.R. at 33, ¶3; 34-35, ¶9; A.R. Vol. 2 at 97, 99-100. Unlike the employees in *Smith*, when Plaintiff concluded his duties with the customer, no sale had been made and no product had shipped. Not all leads materialize into customers. Not all customers end up placing orders. Some customers do not place orders for days, weeks, or months; and yet others may cancel their order. A.R. Vol. 2 at 97. Because the factual circumstances and the commission structure in this case differ vastly

from the facts and commission plan in *Smith*, the court's holding in *Smith* is irrelevant and does not provide a basis for the Court to find error in the KDOL's decision.

Plaintiff's argument that the principles of equity support the result he requests is unsupported by any authority and amounts to no more than his reasons as to why the Court should rule in his favor without pointing to any error by the KDOL. These arguments are frivolous and there is no good faith basis for a determination that the KDOL erred in in denying Plaintiff's wage claim.

III. THE KANSAS DEPARTMENT OF LABOR CORRECTLY EXAMINED PLAINTIFF'S ENTITLEMENT TO WAGES FOLLOWING HIS VOLUNTARY RESIGNATION UNDER ALL AVAILABLE RECORD EVIDENCE.

A. Standard of Review.

C3 agrees with Plaintiff that the Kansas Judicial Review Act ("KJRA"), K.S.A. § 77-601, et seq., controls review of this case. Further, on appeal, the burden of proving the invalidity of the agency action is on the party asserting such invalidity. K.S.A. § 77-621(a). Where the record reflects that the agency considered the evidence presented by both sides in making its factual determinations, the reviewing court is bound by the agency's fact-finding and cannot re-weigh the evidence. *In re Equalization Appeal of Krueger for Year 2010 in Woodson Cnty., KS*, No. 111,216, 333 P.3d 204, at *2 (Kan. Ct. App. 2014). The reviewing court reviews the evidence in the light most favorable to the prevailing party and does not reweigh competing evidence or assess credibility of witnesses. *Graham*, 284 Kan. at 547, 161 P.3d at 697.

B. The KDOL Correctly Concluded That The 2009 And 2011 Commission Structures Did Not Alter Plaintiff's At-Will Employment or Permit Him to Earn Commission After His Employment Ended.

Plaintiff next argues that the KDOL refused to consider the application of the previously-effective commission structures.[1] Plaintiff's argument is factually incorrect. The agency considered *all* commission structures and found they did not alter Plaintiff's at-will employment status and, thus, did not permit him to earn commissions after his employment ended. *See* A.R. at 33, ¶3 ("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."); A.R. at 34, ¶4 ("This 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."); A.R. at 35, ¶4 ("The original commission plan was modified in 2011 and signed by the claimant and Bob Cutler, CEO/President of Creative Consumer Concepts, Inc.").

After making these factual findings about the initial commission structure and the 2011 amended commission structure, the KDOL concluded, "[i]t is clear that the employer/respondent never intended for a comprehensive commission plan to extend beyond the 'at will' employment of the claimant." A.R. 37, ¶10 (emphasis added). Plaintiff presents no reason whatsoever for this Court to reject the KDOL's conclusion. The District Court also recognized that the KDOL "did decide the question of whether any residual or perpetual commission were earned after the

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[1] In fact, Plaintiff argued at the hearing only that the 2012 commission structure controlled the parties' dispute. He did not address either of the first two commission structures. Any claimed error, thus, is in fact Plaintiff's own for trying to litigate on appeal an issue he never raised at the hearing. *See Angle*, 12 Kan. App. at 767, 758 P.2d at 235 (stating that an argument that was not raised before the hearing officer, and thus went unchallenged, should not become an issue before the court).

employment relationship terminated," and held that no commission was earned after employment ended under any of the commission structures because Barker's "status of at-will employment was not changed by the third commission structure." A.R. Vol. 2 at 98-100. There is no error in the KDOL's conclusion.

IV. CONCLUSION.

The arguments made in Plaintiff's brief have been repeatedly examined and rejected. This appeal unreasonably draws out litigation for no proper purpose. The KDOL's decision in this case was supported by the overwhelming weight of the evidence and there exists no basis under law for this Court to reverse the decision of the KDOL. The District Court found that Plaintiff's interpretation of the commission structures was not reasonable, demonstrating that the conduct of Plaintiff and his counsel in pursuing this appeal, likewise, are not reasonable. Plaintiff, having failed at all previous levels of adjudication, and making unreasonable and frivolous arguments, as demonstrated herein, is proceeding without a reasonable basis to believe in the claimed errors by the KDOL and District Court. C3, accordingly, respectfully requests that the Court deny and dismiss Plaintiff's appeal, and award all such other relief to C3 as is deemed just and proper.

Respectfully submitted,

/s/ Robert A. Sheffield

Denise K. Drake (Bar No. 15800)
Robert A. Sheffield (Bar No. 25732)
Uzo N. Nwonwu (Bar No. 23492)
LITTLER MENDELSON, P.C.
1201 Walnut Street, Suite 1450
Kansas City, MO 64106
Telephone: 816.627.4400
Facsimile: 816.627.4444
ddrake@littler.com
rsheffield@littler.com
unwonwu@littler.com

ATTORNEYS FOR APPELLEE
CREATIVE CONSUMER CONCEPTS, INC.

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2016, a true and correct copy of the above and foregoing was filed with the Court and served via U.S. Mail, postage pre-paid, on the following:

Adam M. Hall, Esquire
Collister & Kampschroeder
3311 Clinton Parkway Court
Lawrence, KS 66047
Counsel for Plaintiff Stanton D. Barker

Glenn Griffeth, Esquire
Kansas Department of Labor
401 SW Topeka Blvd.
Topeka, KS 66603
Counsel for Defendant Department of Labor

/s/ Robert A. Sheffield
Attorney for Appellee
Creative Consumer Concepts, Inc.