

**No. 116,322**

**IN THE COURT OF APPEALS OF THE STATE OF KANSAS**

DIANA SABATINO

Petitioner/Appellee

vs.

THE KANSAS DEPARTMENT OF LABOR EMPLOYMNET  
SECURITY BOARD OF REVIEW

Respondent/Appellant.

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**BRIEF OF APPELLEE**

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**Appeal from the District Court of**

**Shawnee County, Honorable Franklin R. Theis, Judge**

**District Court Case No. 2015-CV-000053**

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## **STATEMENT OF ISSUES**

Petitioner/Appellee Diana Sabatino (hereinafter “Sabatino”) does not agree with the issue as set forth in the Brief of Respondent/Appellant Kansas Department of Labor Employment Security Board of Review (hereinafter “Appellant”). Sabatino states that the issue to be resolved by this Court for disposition of this appeal is whether the District Court properly found that the decision of Appeals Referee Spurgin was not supported by substantial evidence and/or was unreasonable, arbitrary, or capricious under K.S.A. 77-621(c)(7) and (8).

## **STATEMENT OF FACTS**

Sabatino agrees that the facts as stated in Appellant’s Brief are true and accurate.

## **STANDARD OF REVIEW**

Sabatino agrees that the standard of review provided in Appellant’s Brief and set forth in *Redline Express v. Employment Security Board of Review*, 27 Kan.App.2d 1067, 1069, 11 P.3d 85 (Kan.App.2000) and *Herrera-Gallegos v. H&H Delivery, Inc.*, 42 Kan.App.2d 360, 362-3, 212 P.3d 239 (Kan.App.2010) is appropriate.

## **ARGUMENT**

Appellant argues that the District Court improperly entered summary judgment in favor of Sabatino based on its finding that Appeals Referee Spurgin

violated K.S.A. 77-621(c)(7) and (8) in his decision to deny unemployment benefits to Sabatino on the basis of misconduct pursuant to K.S.A. 44-706. The thrust of Appellant's argument is that the District Court erred by inappropriately reweighing the evidence originally considered by the Appeals Referee to reach its decision.

Under *Redline Express*, this Court must determine whether the District Court observed the requirements placed upon it by K.S.A. 77-621(c)(7) and (8) and then make the same review of the Appeals Referee's decision as the District Court. In doing so, pursuant to *Herrera-Gallegos*, this Court must consider the record as a whole and examine the evidence both supporting and detracting from the Appeals Referee's decision to assess whether the evidence was substantial to support his findings.

**1. The District Court properly granted summary judgment in favor of Sabatino pursuant to K.S.A. 77-621(c)(7) and (8).**

A reviewing court shall grant relief where it finds that the agency action "is not supported to the appropriate standard of proof by evidence that is substantial." K.S.A. 77-621(c)(7). Additionally, a court shall grant relief where it determines that the agency action is "unreasonable, arbitrary or capricious." K.S.A. 77-621(c)(8). The Kansas Supreme Court has defined unreasonable action as action taken without regard to the benefit or harm of all interested parties. "An agency's

action is arbitrary and capricious if it is unreasonable or without foundation in fact.” *Farmland Industries, Inc. v. State Corp. Comm’n of State of Kan.*, 25 Kan.App.2d 849, 852, 971 P.2d 1213, 1217 (Kan.App.1999).

The District Court correctly overturned the Appeals Referee’s determination for two primary reasons. First, pursuant to *Lake v. Jessee Trucking*, 49 Kan. 820, 316 P.3d 796 (Kan.App.2013) and K.S.A. 77-621(c)(7), the District Court properly held that the stipulation of the Kansas State Fire Marshal’s Office (hereinafter “Employer”) on the record before the Appeals Referee which provided the modified reason for Sabatino’s termination was key substantial evidence.

In *Lake*, the court reversed a Board decision, noting that the Board was within its rights to discount an ALJ’s credibility determinations and provide reasons for its findings, but those findings must be supported by substantial evidence in light of the record as a whole. The court reasoned that the Board’s justification for its decision was not supported by substantial competent evidence, holding “[t]he law does not allow the Board to discount an ALJ’s credibility determination of a claimant based on presumptions, suppositions, and cherry-picked record references of questionable or limited evidentiary value.” *Lake v. Jessee Trucking*, 49 Kan. at 843.

As in *Lake*, the District Court correctly analyzed whether the Employer’s stipulated reason for Sabatino’s termination (inefficiency/incompetency)

constituted substantial evidence which undermined the evidence concerning Sabatino's termination for alleged misconduct. In performing its analysis pursuant to *Lake*, the District Court appropriately found that this was key substantial evidence which undermined the Employer's previous reasons given for Sabatino's termination. In so doing, the District Court rightly held that the Employer failed to meet its burden to establish Sabatino's disqualification for unemployment benefits as a result of insufficient evidence.

Under *Lake*, the District Court also appropriately found that the Appeals Referee had inappropriately cherry-picked Sabatino's alleged misconduct as the sole relevant reason for termination and ignored or disregarded the substantial evidence presented by the Employer at the hearing regarding inefficiency/incompetency. In doing so, the District Court specifically reasoned that the Employer originally discharged Sabatino for both inefficiency and insubordination but that the Employer's stipulation at the hearing left only Sabatino's inefficiency as the cause for termination. Further, the District Court repeatedly referenced the substantial key evidence presented by the Employer to the Appeals Referee at the hearing, to wit, the Employer's representative's specific testimony regarding Sabatino's inefficiency as the sole cause for her termination.

The District Court's finding did not constitute a reweighing of the evidence, but rather the correct analysis which was required under *Lake*. In performing the

*Lake* analysis, the District Court properly concluded that the Appeals Referee did not consider the substantial key evidence (“all of the evidence”) in making his decision. The District Court appropriately found that the Appeals Referee instead improperly made his own findings of fact and conclusions of law despite the Employer’s evidence presented which clearly indicated that the sole basis for Sabatino’s termination was inefficiency/incompetency. Therefore, the District Court correctly held that the Appeals Referee’s conclusions were not supported by substantial evidence viewed in light of the record as a whole as required under *Lake* and K.S.A. 77-621(c)(7).

Second, pursuant to *Sunflower Racing, Inc. v. Bd. Of Cnty. Comm’rs of Wyandotte Cnty.*, 256 Kan. 426, 431, 885 P.2d 1233 (Kan.1994) and K.S.A. 77-621(c)(8), the District Court properly found that the Appeals Referee’s decision was unreasonable or without foundation in fact and that the Appeals Referee took such action without regard to the benefit or harm of all interested parties.

In applying the *Sunflower Racing* standard, the District Court examined the Appeals Referee’s decision and correctly found it improper. In doing so, the Court noted that the Appeals Referee cherry-picked Sabatino’s 14 years of employment to dismiss inefficiency/incompetency as the reason for her termination. The District Court acknowledged that the Employer’s mere withdrawal of misconduct as a basis for termination, and instead offering only inefficiency/incompetency as



the reason for Sabatino's termination pursuant to a settlement agreement, *could* be deemed irrelevant if no facts supported such a position.

However, the District Court found that the Employer not only withdrew misconduct as a basis for Sabatino's termination but also presented substantial evidence at the hearing with respect to Sabatino's inefficiency/incompetency as the sole reason for her termination. In sum, under *Sunflower Racing*, the District Court properly found that the Appeals Referee refused to give the Employer's withdrawal full and proper consideration while instead viewing the Employer's evidence as an attempt by the parties to decide on their own whether Sabatino would receive unemployment benefits on the basis of a settlement agreement. Therefore, the District Court appropriately held the Appeals Referee's decision was unreasonable or without foundation in fact, without regard to the benefit or harm of all interested parties, and that the Appeals Referee failed to consider the record as a whole under *Sunflower Racing*.

As a result, under K.S.A. 77-621(c)(7) and (8), *Lake*, and *Sunflower Racing*, it is clear that the District Court properly held that the Appeals Referee acted improperly. The key facts to support the District Court's conclusion under this authority are (1) the Employer declined to oppose Sabatino's claim for benefits; (2) the Employer failed/declined to present evidence to establish its burden to prove Sabatino's alleged misconduct; and (3) the Appeals Referee cherry-picked

Sabatino's alleged misconduct and ignored substantial evidence presented by the Employer to show that the sole basis for Sabatino's termination was inefficiency/incompetency.

Pursuant to *Redline Express* and *Herrera-Gallegos*, this Court can reasonably reach the same conclusion(s) as that of the District Court. The District Court did not reweigh the evidence but simply considered the record as a whole and, in accordance with *Redline Express* and *Herrera-Gallegos*, gave weight to both the evidence favoring the Appeals Referee's decision and the evidence which detracted from it. As a result, under *Redline Express* and *Herrera-Gallegos*, this Court can perform the same appropriate analysis and reach the same proper result in order to affirm the District Court's correct decision.

**2. The authority relied upon by Appellant does not support a conclusion that the District Court erred in granting summary judgment in favor of Sabatino.**

It is important to note that Appellant's own brief clearly admits that it is unable to rely upon any binding Kansas authority which is directly on point. Instead, Appellant supports its position by citing to *Lawson v. Unemployment Comp. Board of Review*, 2013 WL 3960845 (Pa. Cmwlth 2013) and *Turner v. Unemployment Comp. Board of Review*, 318 A.2d 223 (Pa. Cmwlth 1978). These cases are relied upon by Appellant to support its position but both cases are

distinguishable from this case, and therefore inapplicable, for various reasons.

Most notably, and in contrast to the matter at hand, both *Lawson* and *Turner* involved appeals of unemployment benefit determinations in which the respective employees bore the burden of proof to show that the initial determination denying unemployment benefits were improper. The respective appeals officers only heard evidence presented by the terminated employees but did not consider evidence from the employers in making a decision because the employers did not appear or present evidence. The respective appeals officers' determinations were based only upon evidence presented by the terminated employees which was determined insufficient to satisfy the employee's burden of proof and require reversal of the prior determination. (See, *Lawson v. Unemployment Comp. Board of Review*, 2013 WL 3960845; and *Turner v. Unemployment Comp. Board of Review*, 318 A.2d 223).

This authority is not analogous to this case because here the employer bore the burden of proof to show Sabatino's alleged misconduct by a preponderance of the evidence. (See, *Farmland Foods, Inc. v. Board of Review*, 225 Kan. 742, 594 P.2d 194 (Kan. 1979)). Here, in contrast to *Lawson* and *Turner*, the District Court properly found that the Employer failed to meet its burden with respect to Sabatino's alleged misconduct and properly disregarded Sabatino's alleged misconduct as a reason for her termination by the Employer by weighing the

substantial evidence presented by the Employer on the record as a whole. Therefore, *Lawson* and *Turner* are clearly distinguishable from the facts and circumstances of this case and have no bearing here.

Even if the Court were to find that such cases are not factually distinguishable, *Lawson*, *Turner*, and *Matter of Walli*, 275 A.D.2d 845 (N.Y. App. 2000) are from jurisdictions which have no relation to the State of Kansas. These cases cited by Appellant are not binding upon this Court to require a conclusion that the District Court erred. As a result, the District Court's award of summary judgment in favor of Petitioner/Appellee must be affirmed.

### **CONCLUSION**

The District Court correctly entered summary judgment in favor of held that the Petitioner/Appellee pursuant to its finding that the Appeals Referee's decision violated K.S.A. 77-321(c)(7) and (8). The Appeals Referee's decision was not supported by substantial evidence, was unreasonable or without foundation in fact, and was issued without regard to the benefit or harm of all interested parties. Under the standard of review set forth above, this Court can (and should) properly come to the same conclusion as the District Court under the analysis of K.S.A. 77-321(c)(7) and (8), *Lake*, and *Sunflower Racing*. Further, Appellant has offered no binding authority on point to support its position. Accordingly, the District Court's judgment must be affirmed.

Respectfully submitted,

**BLAKE & UHLIG, P.A.**

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on the 11th day of January, 2017, that I electronically filed the foregoing with the Clerk of the Court using the ECF system and served a true and correct copy of the foregoing:

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