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**SUPEREME COURT GRANTED DISCRETIONARY REVIEW:  
OCTOBER 15, 2008  
(FILE NO. 2007-SC-000736-D)**

**Commonwealth of Kentucky  
Court of Appeals**

NO. 2006-CA-0004 02-MR  
&  
NO. 2006-CA-000535-MR

AT&T CORPORATION

APPELLANT/CROSS-  
APPELLEE

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT  
v. HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 04-CI-01560

BRIAN K. FOWLER AND RICHARD R. GRANT;  
MIDDLETON & REUTLINGER, P.S.C.,  
D/B/A MIDDLETON REUTLINGER;  
OFFICE OF WORKPLACE STANDARDS,  
DEPARTMENT OF LABOR, ENVIRONMENTAL  
AND PUBLIC PROTECTION CABINET

APPELLEES/CROSS-  
APPELLANTS

OPINION  
REVERSING AND REMANDING

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BEFORE: STUMBO AND VANMETER, JUDGES; PAISLEY,<sup>1</sup> SENIOR JUDGE.

<sup>1</sup> Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

PAISLEY, SENIOR JUDGE: AT&T Corporation appeals from orders of the Franklin Circuit Court entered on September 26, 2005, and February 1, 2006. The circuit court found that AT&T's policy of recouping the commissions of its employees, Brian K. Fowler and Richard R. Grant, pursuant to their compensation agreement, violated the provisions of Kentucky Revised Statutes (KRS) 337.060, which prohibit employers from deducting losses due to default of customer credit, or nonpayment for goods or services received by the customer, from the wages of their employees. The circuit court also awarded attorney's fees and costs to Fowler and Grant. On cross-appeal, Fowler and Grant argue that the circuit court erred in failing to award them liquidated damages. Having reviewed the record and the applicable law, we conclude that the circuit court erred in finding that the recovery of the commissions by AT&T violated the terms of the statute and, therefore, we reverse.

Brian K. Fowler worked for AT&T as a data network account executive, selling high speed data and Internet services. He earned a fixed salary, as well as additional compensation in the form of incentive commissions. Richard R. Grant was a technical specialist and consultant who benefited derivatively from sales made by Fowler. He also earned a fixed salary with additional remuneration from incentive commissions.

The terms of Fowler and Grant's employment were governed by a document entitled "The Growth Market Compensation Plan and Policy," which both Fowler and Grant acknowledged receiving. Under the terms of the Compensation Plan, AT&T paid half the anticipated incentive commission on a sale when a salesperson recorded it in the computer system. Within the next month or so, when the customer

received a bill, AT&T paid the second half of the commission. This step in the process was known as “bill validation.”

In April 2000, Fowler began selling services to Darwin Networks, Inc./Interquest, a company that resold AT&T’s high-speed Internet connections to hotels and apartment complexes. Fowler’s commissions on the sales to Darwin totaled approximately \$100,000.00. Grant also earned commissions on the sales. In October 2000, Fowler learned that Darwin was experiencing financial difficulties and by January 2001, Darwin had declared bankruptcy.

The dispute in this case began when AT&T invoked a section of the Compensation Plan entitled “Debiting Provisions.” It provided that AT&T could recoup or “charge back” commissions from employees when an account did not maintain a good payment history for twelve months. It states:

Under circumstances listed below, a Sales Associate may be debited for a sale that has been credited to them. This may be accomplished through debiting future commissions or the issuance of a certified personal check to AT&T by the sales associate.

....

All services must remain installed, billing and maintain an acceptable payment history (including meeting commitments) for 12 months. If all or part of the service comprising a sale is discontinued before that time, a Sales Associate will be debited.

It is undisputed that Darwin did not maintain an “acceptable payment history” for twelve months. In keeping with the “Debiting Provisions” of the Compensation Plan, AT&T initially charged back about \$96,000.00 in commissions from Fowler, and approximately \$9,000.00 from Grant. The charge backs were taken in the form of setoffs against their

future commissions. AT&T later received a payment from the Darwin bankruptcy proceedings, and credited some amounts to Fowler and Grant. Ultimately, Fowler netted approximately \$25,000.00 on the Darwin commissions, and Grant netted approximately \$4,000.00.

Fowler and Grant appealed the charge backs unsuccessfully through the internal appeals process at AT&T. They then filed a Petition for Fact Finding with the Division of Employment Standards of the Labor Cabinet (the predecessor of the Office of Workplace Standards, Department of Labor, Environmental and Public Protection Cabinet). They alleged that the charge back of their commissions violated KRS 337.060, which generally prohibits employers from recovering their losses from employees' wages. Following an administrative hearing held on July 2, 2004, the Hearing Officer issued his Findings of Fact, Conclusions of Law and Recommended Order, in which he held that the commissions paid to Fowler and Grant constituted "wages" under the definition found in KRS 337.010 and were therefore subject to the provisions of KRS 337.060. He further concluded, however, that the charge backs were not prohibited under the latter statute because the sums recouped were not deductions from employee wages for losses due to default or non-payment by the customer. Rather, the commissions were received by the sales executives contingent on AT&T realizing a certain expected income from the customer. The Hearing Officer characterized the commissions as immediate rewards to the sales executives, which were received on the understanding that they would be returned if the customer defaulted within the first year of the contract.

Fowler and Grant filed Exceptions to the Recommended Order. On October 25, 2004, the Commissioner of the Department of Labor entered an order

affirming the Hearing Officer's conclusion that the charge backs did not violate KRS 337.060. The case was remanded solely for a determination as to whether AT&T had recouped the proper amounts from Fowler and Grant. The parties then agreed to hold that matter in abeyance in order to allow Fowler and Grant to seek judicial review of the substantive decision from the Franklin Circuit Court. The circuit court issued an order on September 26, 2005, in which it agreed with the Labor Department that the commissions were wages as defined under KRS 339.010(1)(c), but found that the recoupment violated KRS 337.060(2)(e). The circuit court held that Fowler and Grant were entitled to a return of all commissions withheld, in the amounts of \$75,868.75 and \$6,269.14 respectively. In response to a motion to alter or amend made pursuant to CR 59.05, the court further ordered on February 1, 2006, that Foster and Grant be awarded costs, attorney's fees, and prejudgment interest. This appeal followed.

The basic scope of judicial review of an administrative decision is limited to a determination of whether the agency's action was arbitrary. If an administrative agency's findings of fact are supported by substantial evidence of probative value, they must be accepted as binding and it must then be determined whether or not the agency has applied the correct rule of law to the facts so found. The Court of Appeals is authorized to review issues of law involving an administrative agency decision on a de novo basis. In particular, an interpretation of a statute is a question of law and a reviewing court is not bound by the agency's interpretation of that statute.

*Liquor Outlet, LLC v. Alcoholic Beverage Control Bd.*, 141 S.W.3d 378, 381 (Ky.App. 2004).

KRS 337.060, the applicable statute, provides in pertinent part that:

**(1) No employer shall withhold from any employee any part of the wage agreed upon. . . .**

(2) Notwithstanding the provisions of subsection (1) of this section, **no employer shall deduct the following from the wages of employees:**

....

(e) Losses due to defective or faulty workmanship, lost or stolen property, damage to property, **default of customer credit, or nonpayment for goods or services received by the customer** if such losses are not attributable to employee's willful or intentional disregard of employer's interest.

(Emphasis supplied.)

“Wages” are defined for purposes of KRS Chapter 337 as

any compensation due to an employee by reason of his employment, including salaries, commissions, vested vacation pay, overtime pay, severance or dismissal pay, earned bonuses, and any other similar advantages agreed upon by the employer and the employee or provided to employees as an established policy. . . .

KRS 337.010(1)(c).

On appeal, AT&T argues that the circuit court erred in finding that the commissions paid to the appellees were wages and therefore subject to the provisions of KRS 337.060. AT&T contends that the amounts paid to the appellees were advances that were subject to recoupment if the conditions outlined in the Compensation Plan were not met, i.e., if the client did not maintain an acceptable payment history for twelve months. Under this interpretation, the advances did not ripen into “wages” until the condition was satisfied.

We find that argument unconvincing. The commissions were never deemed or described as “advances.” The appellees and AT&T agreed upon a commission arrangement whereby the total commission was paid to the employee in two

stages: half at the time of entry of the sale and half upon bill validation. The possibility that the commission could later be recouped under certain circumstances did not transform the commission into an advance.

However, even though the commissions were wages, the fact that they were recouped by the employer did not violate KRS 337.060. Under the plain language of KRS 337.060(1), an employer may not withhold any part of the wage **agreed upon**. Under the terms of the Compensation Plan, the appellees agreed that their commissions would be debited under certain circumstances, namely, if an account stopped paying within a twelve month period. Therefore, the wage that they had **agreed upon** included this provision for charge backs by the employer. AT&T did not withhold any part of the wage “agreed upon” when it recovered the Darwin commissions. The purpose of the statute is to prevent employers from recouping their losses from wages that they have agreed to pay their employees. By signing and acknowledging their acceptance of the Compensation Plan, the appellees agreed upon a particular wage which included a fixed salary plus commissions subject to certain conditions. This arrangement does not violate the letter or the spirit of the statute, since AT&T was not withholding any amounts that had not been agreed upon under the terms of the Compensation Plan.

For the foregoing reasons, the portion of the Franklin Circuit Court order of September 26, 2005, ordering a return of the Darwin commissions to Fowler and Grant is reversed. The portion of that order denying the appellees/cross-appellants' claim for liquidated damages is hereby affirmed. The portion of the order of February 1, 2006, ordering the payment of reasonable attorney's fees, costs, and prejudgment interest to the

appellees/cross-appellants is reversed. The portion of that order denying the appellees/cross-appellants' request for interest pursuant to KRS 360.010 is affirmed.

This matter is remanded to the Franklin Circuit Court with directions for further remand to the Office of Workplace Standards for a determination as to whether the amounts recouped were properly calculated.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:

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