

In the

Supreme Court of Ohio

JAMES A. LANG, TEDDY H. SHARP, AND	:	Case No. 11-1740
MARK A. LAIBE	:	
	:	On Appeal from the
Plaintiffs-Appellees,	:	Seneca County
	:	Court of Appeals,
	:	Third Appellate District
v.	:	
	:	
DIRECTOR, OHIO DEPARTMENT OF	:	Court of Appeals
JOB AND FAMILY SERVICES	:	Case Nos. 13-10-33, 13-10-34, 13-10-35
	:	
Defendant-Appellant	:	

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF PLAINTIFFS-APPELLEES
JAMES A. LANG, TEDDY H. SHARP, AND MARK A. LAIBE**

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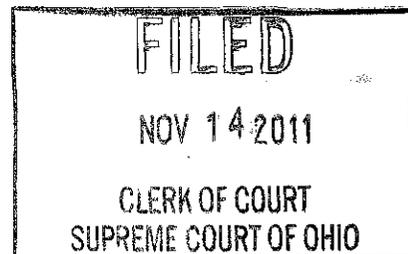


TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. RESPONSE TO DEFENDANT-APPELLANT'S PROPOSITION OF LAW	
A. The Courts Below Were Correct in Disregarding the Department of Labor's Interpretation of the TAA Reform Act of 2002, 19 U.S.C. § 2318, Because that Interpretation Is Contrary to the Plain Language of the Statute.....	2
1. Standard of Review.....	2
2. The ATAA statute requires only that participating individuals must be fifty years of age and reemployed within 26 weeks, and administrative interpretation cannot interpose an added requirement that individuals must be fifty years of age at the time of reemployment.....	3
3. Judicial deference to administrative interpretations under <i>Chevron</i> is inappropriate where TEGL No. 2-03 is a non-regulatory interpretation that is inconsistent with congressional intent in establishing ATAA.	6
B. Any Practical Financial or Administrative Consequences of the Decision Below Would Be Minimal.	9
III. CONCLUSION.....	12
CERTIFICATE OF SERVICE.....	13

I. INTRODUCTION

This is not a case of public and great general interest. The Court of Appeals decision found that the language of 19 U.S.C. § 2318(a)(3)(B) was plain in its intention to provide benefits under the Alternative Trade Adjustment Assistance program (ATAA) if the affected worker is “at least 50 years old of age” by the time an individual finds new employment and then elects to receive ATAA benefits. The Court of Appeals, joined by the Court of Common Pleas and two administrative hearing officers, rejected an additional “age 50 at reemployment” requirement found only in an informal guidance letter issued by the U.S. Department of Labor.

The decision below correctly found that the plain language of the ATAA statute and the legislative intent of Congress expressed by that language required that these three Ohio workers were entitled to receive ATAA benefits because they satisfied **all** of the ATAA statutory requirements. Of particular significance here, Mr. Lang, Mr. Sharp, and Mr. Laibe each found reemployment following their layoff from TAA certified employment within 26 weeks and they were each 50 years of age when they sought ATAA benefits to partially compensate them for lower wages paid in those new jobs. They were not, however, 50 years of age when they found that reemployment. For this sole reason, ODJFS contends their ATAA benefits must be denied.

Further, this case does not, as Appellant claims, present an issue that has “severe consequences” for Ohio or place the Ohio Department of Job and Family Services (ODJFS) in an “impossible position,” but rather presents a well-reasoned case that does not justify exercise of this Court’s jurisdiction. At worst, under the federal TAA statute’s explicit terms (19 U.S.C. Sec. 2312), Ohio’s workers will continue to enjoy federally-financed TAA program services offered directly by the U.S. Department of Labor in the absence of an agreement with ODJFS as agent for the federal government under Section 2311. Indeed, this case involves just three workers who found jobs

within 26 weeks of their layoffs and turned 50 soon after, a factual situation that has not been presented in any other case that has surfaced in Ohio or elsewhere known to counsel for either party. Paying ATAA benefits to those three Ohio workers in conformity with a federal statute does not merit review by this Court.

II. RESPONSE TO DEFENDANT-APPELLANT'S PROPOSITION OF LAW

A. The Courts Below Were Correct in Disregarding the Department of Labor's Interpretation of the TAA Reform Act of 2002, 19 U.S.C. § 2318, Because that Interpretation Is Contrary to the Plain Language of the Statute

1. Standard of Review

Congress has provided that individual state agency decisions regarding TAA eligibility are "subject to review in the same manner and to the same extent as determinations under the applicable State [unemployment compensation] law and only in that manner and to that extent." 19 U.S.C. § 2311(d). The standard of review for unemployment appeals is set forth in Ohio Revised Code, Section 4141.282(H), which provides for judicial review of unemployment compensation cases:

The court shall hear the appeal upon receipt of the certified record provided by the commission. If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

Under this provision, an appellate court has the duty to examine the administrative record to ensure that the UCRC "decision is supported by the evidence in the record," but the court does not have the power to make its own factual findings or determine the credibility of witnesses. *Tzangas, Plakas & Mannos v. Administrator, OBES*, (1985), 73 Ohio St.3d 694, 696, 653 N.E.2d 1207. Questions of statutory construction are matters of law. *Miller v. Dept. of Indus. Relations*, (1985), 17 Ohio St.3d 226, 479 N.E.2d 254; *Clemmer v. Ohio State Racing Comm'n*, (1995), 107 Ohio App.3d 594, 596, 669 N.E.2d 267.

In summary, the Ohio statutory provision providing for judicial review authorizes courts to reverse where that statutory interpretation is “unlawful” or “unreasonable” and Congress has authorized the courts of Ohio to review TAA cases “in the same manner and to the same extent” as when they review unemployment compensation cases. That standard of review was properly applied by the courts below and should not be disturbed by this Court.

2. **The ATAA statute requires only that participating individuals must be fifty years of age and reemployed within 26 weeks, and administrative interpretation cannot interpose an added requirement that individuals must be fifty years of age at the time of reemployment.**

Before this Court, ODJFS assigns a proposition of law that relies upon excessive judicial deference to administrative agency statutory interpretations under its expansive reading of *Chevron U.S.A. v. Natural Resources Defense Council* (1984), 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed2d 694. However, judicial deference to the DOL administrative interpretation is not mandated by *Chevron* in the circumstance of this case because the statute in question is clear. Moreover, the guidance offered in the TEGL was cursory, not provided in a regulation subject to comment, and does not explain why ATAA must include its age 50 at reemployment eligibility requirement.

To begin, the statutory interpretation defended here by the agency does not comport with the requirements of the plain language of Congress. “Ordinarily, courts must give the words used in statutes their plain and ordinary meaning.” *Radcliffe v. Artromick Int’l*, (1987) 31 Ohio St.3d 40, 42, 508 N.E.2d 953, 955. “In ascertaining the legislative intent of a statute, ‘It is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.’” *Bernardini v. Board of Education*, (1979) 58 Ohio St.2d 1, 4, 387 N.E.2d 1222, 1224. As the U.S. Supreme Court has stated, “In expounding a statute, we must not be guided by a single sentence or member of the sentence, but look to the provisions of the whole law, and to its object and policy.” *Philbrook v*

Glodgett, (1975) 421 US 707 at 713; 95 SCt 1893 at 1898; 44 LEd2d 525. *Accord*, *Eastman v. Administrator, OBES*, (1990) 67 Ohio App.3d 318, 323-324.

In its 2002 amendments, Congress established the Alternative Trade Adjustment Assistance program. By its plain terms, ATAA applies to workers at least 50 years old who obtain reemployment within 26 weeks of their separations from affected employment. The ATAA program's statutory eligibility rules are found at 19 U.S.C. § 2318(B), which provides:

(3) A worker in the group that the Secretary [of Labor] has certified as eligible for the alternative trade adjustment assistance program may elect to receive benefits under the alternative trade adjustment assistance program if the worker—

- (i) is covered by a certification under Subpart A of this part;
 - (ii) obtains reemployment not more than 26 weeks after the date of separation from the adversely affected employment;
 - (iii) is at least 50 years of age; and
 - (iv) earns not more than \$50,000 a year in wages from reemployment;
 - (v) is employed on a full-time basis as defined by State law in the State in which the worker is employed: and
 - (vi) does not return to the employment from which the worker was separated.
- (Emphasis added.)

In its informal policy guidance to states concerning ATAA, the Secretary of Labor issued a Training and Employment Guidance Letter (TEGL), No. 2-03 (August 6, 2003). This TEGL stated in Section E (page 7) that “To be eligible for ATAA, an individual must meet the following conditions at the time of reemployment: 1. Be at least age 50 at time of reemployment.” (Emphasis added.) Clearly, as recognized by both lower courts, the TEGL's “age 50 at reemployment” requirement is not found in ATAA's statutory eligibility rules.

This underlined TEGL language above is the sole rationale for denying appellees' applications for ATAA. No further explanation or rationale is offered for this requirement within the TEGL or in ODJFS' brief. In other words, the statutory interpretation issue before this Court is whether appellees must turn 50 prior to reemployment, as required by the TEGL, or whether they

must turn 50 prior to being eligible for ATAA payments so long as each found reemployment within 26 weeks and met all the statutory requirements for ATAA eligibility in Section 2318(B). On this question, the lower courts properly ruled in appellees' favor.

Clearly, Congress drew a line between workers under age 50 and those over age 50 when it created ATAA. Appellees are not trying to step across that statutory line here because they are not seeking ATAA payments for any month prior to when each turned 50 years of age. And, each appellee obtained reemployment within 26 weeks of their layoffs from American Standard.

The TEGL requires that an individual not only be 50 years old and obtain reemployment within 26 weeks of separation, but that he or she also must be 50 at the time of reemployment. The line drawn by the TEGL is not the line drawn by Congress. There is no support in the language of the statute for drawing a stricter regulatory line than the line drawn by Congress and rendering appellees ineligible for ATAA.

Even if, *arguendo*, the ATAA statutory rules were silent or ambiguous as to exactly when an individual must turn 50 to participate in the program, the most reasonable interpretation of the law would be in favor of claimants, since where there are two places to draw the age fifty line, Congress clearly has mandated that the line more beneficial to affected workers is the appropriate line. TAA laws are remedial legislation, and, as such, they are to be construed broadly to effectuate those beneficial purposes. *Former Employees of IBM v. Secretary of Labor*, (2005) 403 F.Supp.2d 1311 (Court of International Trade). With respect to interpreting the TAA program's eligibility rules, courts have recognized that in enacting the Trade Adjustment Assistance program, Congress reflected what the D.C. Court of Appeals called a "mood of largesse," *International Union, UAW v. Brock*, 816 F.2d 761 (D.C. Cir. 1987).

Recently, when enacting its 2009 TAA amendments, Congress reconfirmed its solicitude

for impacted workers by adding a new section to TAA (Section 288, 19 U.S.C. § 2397a) providing that the Secretary of Labor should apply the TAA statute “with the utmost regard for the interests of workers.” Congress did not disturb this provision when it recently reauthorized TAA.

In *Eastman v. Administrator, OBES*, (1990) 67 Ohio App.3d 318, 323-324, the Court of Appeals for Huron County reviewed a case involving Trade Readjustment Allowances under the TAA program. Noting the beneficial intent of Congress in enacting TAA and case law providing for a liberal construction of the law, the *Eastman* court held that a TAA applicant’s permanent layoff should be considered as his “first qualifying separation,” rather than an earlier temporary layoff whose use would have rendered the applicant ineligible for benefits. “As there is obviously room for more than one interpretation of the statute, it should be construed in such a way as to give effect to the general intent of the legislature.” *Eastman v. Administrator, OBES*, 67 Ohio App.3d at 323. Similarly, this Court should give due regard to the generous purpose and intent of Congress in establishing and reauthorizing TAA over the years when applying the statutory language and administrative rulings in this case.

3. Judicial deference to administrative interpretations under *Chevron* is inappropriate where TEGL No. 2-03 is a non-regulatory interpretation that is inconsistent with congressional intent in establishing ATAA.

The main complaint of ODJFS with the lower courts is that they failed to defer to DOL’s administrative interpretation of ATAA as embodied in TEGL No. 2-03’s “age 50 at reemployment” requirement. Citing, *Chevron v. Natural Resources Defense Council*, (1984), 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed2d 694, ODJFS repeatedly states that TEGL No. 2-03 is more authoritative than the lower court’s statutory interpretation and that *Chevron* requires reversal in this case.

As an initial matter, *Chevron* itself notes that “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear

congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Chevron v. Natural Resources Defense Council*, 467 U.S. at 842-843, n. 9. Similarly, in *Eastman v. Administrator, OBES, supra*, the Ohio Court of Appeals cited this *Chevron* footnote for the proposition that “[I]t remains the ultimate responsibility of the judiciary to determine congressional intent, and administrative constructions which are contrary to clear congressional intent must be rejected.” 67 Ohio App.3d at 323 n. 3.

ODJFS also overstates the scope of judicial deference in properly considering administrative interpretations. An administrative agency’s power of interpretation is not unlimited. As a matter of law, the agency is limited to actions falling within its underlying statutory framework. An agency cannot act in contravention of the statute subject to its administration. In 2 American Jurisprudence 2d “Administrative Law,” § 70 discusses administrative agency power to interpret law:

Agencies cannot by interpretation enlarge the scope of or change a properly enacted statute. An agency cannot modify, abridge, or otherwise change the statutory provisions under which it acquires authority unless the statutes expressly grant it that power. (Citations omitted.)

In short, where the lower courts have properly found that the TEG’s “age 50 at reemployment” requirement is not found in the ATAA statute and is inconsistent with Congressional intent and purpose in enacting ATAA, *Chevron* furnishes no proper basis for overturning the lower courts in this appeal. *See, Dept. of Labor and Economic Growth v. Dykstra*, (2009) 283 Mich.App. 212, 771 N.W.2d 423, 429-430.

Deference to an agency’s statutory interpretation is measured by its thoroughness, its consistency, its formality, its relative expertness, and the persuasiveness of its position. Judging the age 50 at reemployment requirement of TEG No. 2-03 on this basis demonstrates that this Court

should not follow this administrative interpretation here.

First, TEGL No. 2-03 lacks formality as a statement of law. Although published in the Federal Register, TEGL No. 2-03 is not found in a regulation, as was the Environmental Protection Agency regulation subject to challenge in *Chevron*. As noted by the Court of Appeals below, in applying *Chevron*, the Supreme Court has stated that “Interpretations such as those in . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.” Quoting *Christensen v. Harris County* (2000), 529 U.S. 576, 587, 120 S.Ct. 1655.

Indeed, TEGL No. 2-03 is entitled by the Labor Department as an “interim” instruction and has been subject to changes since it was issued. In short, TEGLs lack the formality, public input, and care found when agencies are promulgating regulations. Moreover, TEGL No. 2-03 does not identify any statutory gap in ATAA or otherwise to explain why its age-50-at-reemployment interpretation is required to administer the ATAA program. Instead, TEGL No. 2-03 lacks thoroughness because it merely asserts the age-50-at-reemployment requirement as an added eligibility requirement for ATAA beyond those provided by Congress in § 2318(B). TEGL No. 2-03 does not discuss the underlying statute or give an agency rationale for adopting the age 50 requirement. It is simply asserted as administrative fiat. For this reason, TEGL No. 2-03 lacks persuasiveness.

ODJFS relies on cases from other jurisdictions in which state courts deferred to interpretations of federal agencies. None support the argument that *Chevron* deference was due in this case. For instance, in *Kentucky Unemployment Ins. Comm’n v. Wheeler*, (Ky. Ct. App. Feb. 18, 2011), No. 2009-CA-002229-MR, 2011 Ky. App. Unpub. LEXIS 115, the court held the statutory language at issue was unambiguous and held that the statute must be followed. That is

precisely how the lower courts in this case ruled. Similarly, in *Joiner v. Med. Ctr. East, Inc.* (Ala. 1998), 709 So.2d 1209, the court stated, “[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute, that is, whether the agency’s construction is natural and consistent with the statute.” *Id.* at 1218. There, the agency’s construction was consistent with the statute. Here, it is not.

Unlike the instant case, *Metromedia, Inc. v. City of San Diego* (Cal. 1980), 610 P.2d 407 [a decision that was reversed and remanded by the United States Supreme Court, 453 U.S. 490 (1981)], involved a Federal Highway Administration interpretation of an ambiguous statute. It is instructive that when the statute was subsequently amended, the agency withdrew its interpretation. 610 P. 2d at 425, n. 26. Similarly, *Ford v. Unemployment Comp. Bd. of Review*, (Pa. Common, Ct. 2006), 409 A.2d 1209, dealt with a statute that provided no definition of “employment”, so that definition was provided by a duly promulgated federal regulation. Again, that factual situation is not our case.

In summary, when properly considered, *Chevron* deference does not mandate that Ohio courts adopt TEGP No. 2-03 as controlling.

B. Any Practical Financial or Administrative Consequences of the Decision Below Would Be Minimal.

The majority of appellants’ brief is an effort to convince this Court that “severe consequences” will result if this Court does not take jurisdiction and reverse the Court of Appeals. First of all, it is important to again note that Congress has given Ohio’s courts the authority to hear appeals of TAA eligibility matters involving Ohio’s workers “in the same manner and to the same extent” that it hears appeals under Ohio’s unemployment compensation statute. 19 U.S.C. § 2311(e). The Court of Appeals majority properly rejected the claim that Ohio courts must follow

the guidance letter's additional "age 50 at reemployment" requirement here, stating that "ODJFS is essentially asserting that [the U.S.] Department of Labor, via a mere guidance letter, is permitted to unilaterally supersede the role of this State's judiciary in reviewing TAA benefit claims as established by both federal and state law." (Court of Appeals Opinion, p. 19.)

ODJFS essentially asserts that the opinion of the Court of Appeals, if left undisturbed, will have unfavorable practical consequences to ODJFS and Ohio's workers as the financial support of the TAA program is threatened if Ohio does not follow the guidance letter's "age 50 at reemployment" requirement. TAA, unlike some other federal-state programs, however, contains a provision that ensures that TAA will continue in force in Ohio, even if the agreement with Ohio to operate TAA under Section 239 (19 U.S.C. § 2311) is terminated. Congress provides in Section 240 of the Act (19 U.S.C. § 2312) that "In any State where there is no agreement in force between a State or its agency under section 239, the Secretary shall arrange under regulations prescribed by him for performance of all necessary functions under subchapter B of this chapter" By providing for direct federal administration of TAA in Ohio for the eventuality that Ohio is unable or unwilling to operate TAA under a Section 239 agreement, the dire consequences claimed by ODJFS for Ohio is wholly undermined.

Indeed, the Secretary of Labor has issued regulations that provide for direct federal administration of TAA. 20 C.F.R. § 617.59(i). Any federal administrative action against Ohio would include the state's right to a hearing prior to any adverse action. 20 C.F.R. § 617.59(f). If the Secretary of Labor could win a ruling that ODJFS' compliance with an Ohio court ruling was proper grounds for repayment, that ruling would be subject to federal court review. 20 C.F.R. §617.59(f).

The least theoretical consequence of appellees' winning this case is the repayment by Ohio of any ATAA benefits paid to these three Ohio workers. The maximum ATAA benefit is \$10,000 for each worker participating in that program. That means that this case involves no more than \$30,000 in ATAA benefits potentially available to these three appellees. Short of terminating its agreement with ODJFS to operate TAA in Ohio, Ohio could be required to repay no more than that amount if federal authorities persist in finding that appellees' were improperly paid ATAA benefits despite the fact that Ohio's courts held that they were eligible. (It should also be noted that appellees' will be asked to repay their ATAA benefits if this Court reserves the Court of Appeals.)

Significantly, the very federal agreement that Ohio has signed with the Department of Labor to operate TAA provides that Ohio will follow the federal TAA law, and not only apply the Labor Department's informal guidance where it is inconsistent with that statute. Indeed, the federal Financial Agreement (attached to the Director's Memorandum) specifically requires that ODJFS expend TAA funds "... in accordance with all applicable Federal statutes, regulations, and program directives"¹ As a consequence, any argument that ODJFS is not complying with its federal agreement if it follows rulings of Ohio courts is severely undercut by that agreement's incorporation of the federal statute itself as one of its requirements. Certainly, that agreement does not purport to require Ohio to apply any Labor Department administrative guidance that has been held contrary to those federal statutes by state courts of competent jurisdiction.

In short, the federal-state administrative structure does not contemplate that the U.S. Department of Labor will adopt administrative guidelines that are contrary to the TAA statute.

¹ It should be noted that while the statute discussed by all the parties, agencies and courts in this matter, the Trade Adjustment Assistance Reform Act of 2002, codified at 19 U.S.C. § 2318, is specifically referred to in the Financial Agreement, the DOL guidance relied upon by the Director, TEGL No. 2-03, is not included in the list of provisions (at Section 10 at p. 3 of the Financial Agreement) with which ODJFS must comply.

Here, the federal TAA statute also provides for state court jurisdiction over TAA eligibility cases in which Congress evidently assumed that state courts would apply the federal statute as if it were each state's unemployment compensation law. In Ohio, a proper application of those statutory provisions means that appellees should get ATAA in accordance with the decision of the Court of Appeals. For that reason, this Court can refuse jurisdiction over this appeal with assurance that Ohio has further remedies under federal regulations, and that following Congressional statutes cannot properly be considered a violation of federal law.

III. CONCLUSION

For the reasons stated in this memorandum, appellees ask this Court to deny jurisdiction and leave the Court of Appeals' carefully considered decision undisturbed.

Respectfully submitted,



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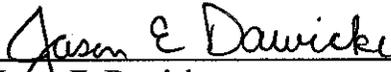
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum In Opposition To Jurisdiction was mailed by U.S. Mail to Michael DeWine, Alexandra T. Schimmer, Michael J. Hendershot and Eric A. Baum, Counsel for Defendant-Appellant Director, ODJFS, in the Office of the Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, this 14th day of November, 2011.



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