ORIGINAL

In the

Supreme Court of Ohio

JAMES A. LANG, TEDDY H. SHARP, AND MARK A. LAIBE,	:	CASE NO. 2011-1740
Appellees,	:	On Appeal from the Seneca County Court of Appeal Third Appellate District
v.	:	
DIRECTOR, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES,	:	Court of Appeals Case Nos. 13-10-33, 13-10-34, 13-10-35
Appellant.	:	

FILED
DEC 03 2012
CLERK OF COURT
SUPREME COURT OF OHIO

APPELLEES' MOTION FOR RECONSIDERATION

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APPELLEES' MOTION FOR RECONSIDERATION

Pursuant to S.Ct. Prac. R. 11.2(B)(4), Plaintiffs-Appellees James A. Lang, Teddy H. Sharp, and Mark A. Laibe, hereby move this Court for reconsideration of its November 21, 2012 merit decision, (*Lang v. Dir., Ohio Dept. of Job & Family Servs.*, Slip Opinion No. 2012-Ohio-5366)(*11/21/2012 Case Announcements*, 2012-Ohio-5388).

Introduction

This case presents a question of statutory interpretation involving the Alternative Trade Adjustment Assistance (ATAA) program as established by Congress. 19 U.S.C. § 2318. ATAA provides a wage subsidy for displaced workers over the age of 50 as an incentive to for them to find reemployment within 26 weeks in order to participate. Here, according to the Ohio Department of Job and Family Services (ODJFS). Plaintiffs-Appellees, in effect, found reemployment too soon because, although they found work within the 26-week statutory time frame, they had not reached 50 years of age as required by Training Employment Guidance Letter 2-03 (TEGL 2-03). Once each appellee reached 50 years of age, each sought ATAA benefits. At the time of their ATAA applications, they each met all statutory ATAA requirements, but, nonetheless, their claims were denied by appellant ODJFS because TEGL 2-03 required that TAA-certified workers must be 50 years of age when they found reemployment.

The majority opinion first holds that the statutory provision in question is ambiguous because it is "subject to more than one reasonable interpretation" (Slip Opinion, p. 7 at ¶13, 14). Next, the majority finds that the agency's interpretation requiring that Appellees must be 50 years of age when they find reemployment "is reasonable and not contrary to law." *Id.*, p. 7-8, ¶ 15. Accordingly, the majority reverses the lower courts' decisions awarding ATAA and remands

the case to the trial court. Three members of this Court did not join in this result. Appellees raise two arguments for reconsideration.

I. THE "AGE 50 AT REEMPLOYMENT REQUIREMENT" IS UNREASONABLE.

Reconsideration is appropriate to "correct decisions which, upon reflection, are deemed to have been made in error." *Buckeye Community Hope Foundation v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 697 N.E.2d 181. In the circumstances presented in this appeal, the majority's determination that TEGL 2-03 is a reasonable interpretation of 19 U.S.C. § 2318(a)(3)(B) should be reconsidered.

The majority opinion summarily concludes that the "age 50 at reemployment" requirement of TEGL 2-03 is reasonable and that ODJFS' decision to follow it is entitled to deference from this Court. Slip Opinion, p. 7-8, ¶ 15, 16, 17. In so holding, the majority does not engage in any analysis demonstrating that TEGL 2-03's interpretation is permissible or reasonable as required by controlling case law. Under the majority's approach, judicial review of agency interpretations is rendered illusory. Rather than deference to reasonable interpretations of administrative agencies, the judicial role is reduced in this case to obedience to administrative agencies. This restrictive approach has important implications for administrative law.

U.S. Supreme Court cases illustrate that the *Lang* majority's approach falls well short of what is expected from courts in determining the reasonableness of an agency's statutory interpretation. In *Christopher v. SmithKline Beecham* (2012), __ U.S. __, 132 S.Ct. 2156, the Supreme Court most recently refused to afford deference to U.S. Department of Labor interpretations of its own regulations applying overtime requirements for individuals working as "pharmaceutical sales representatives." The Labor Department's interpretations of its ambiguous regulations were asserted in *amicus* briefs filed in the underlying cases. Justice Alito's opinion

noted that "[D]eference is . . . unwarranted when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'" 132 S.Ct. at 2166 (Citation and text omitted). Later in his opinion, Justice Alito added:

> [W]hatever the general merits of . . . deference, it is unwarranted here. We instead accord the Department's interpretation a measure of deference proportional to the "'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *United States v. Mead Corp.,* 533 U.S. 218, 228, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). 132 S.Ct. at 2168-2169.
> In *Gonzales v. Oregon* (2006), 546 U.S. 243, Justice Kennedy wrote for the Court:
>
> Executive actors often must interpret the enactments Congress has charged them with enforcing and implementing. . . . Although balancing the necessary respect for an agency's knowledge, expertise, and constitutional office with the courts' role as interpreter of laws can be a delicate matter, familiar principles guide us. An administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation. *Auer v. Robbins*, 519 U.S. 452, 461-463 (1997). An interpretation of an ambiguous statute may also receive substantial deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-845 (1984). Deference in accordance with *Chevron*, however, is warranted only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001). Otherwise, the interpretation is "entitled to respect" only to the extent it has the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Gonzales, 546 U.S. at 255-256 (text omitted). In short, informal agency views "'are entitled to respect' to the extent that they have 'the power to persuade.'" *Kasten v. Saint-Gobain Performance Plastics* (2011), __U.S. __, 131 S.Ct. 1325, 1340 (Scalia, J. *dissenting*)(citations omitted).

Here, TEGL 2-03 is not a promulgated Labor Department regulation. Indeed, it is, by its own terms, an informal, interim guidance. The TEGL provides no explanation of why an "age 50 at reemployment" requirement is needed to operate ATAA. In its briefs to this and other Ohio

courts, ODJFS has failed to explain why TEGL 2-03 falls within ATAA's statutory eligibility rules or how it promotes the purposes of ATAA. More importantly, TEGL 2-03 violates the intent of Congress by denying ATAA to individuals who found work promptly after their layoffs from TAA-certified employment, waited until they reached age 50, only applied to participate in ATAA after each met all statutory eligibility requirements provided by Congress. In short, TEGL 2-03 does not have the power to persuade and is not entitled to deference in this Court.

II. THE COURT HAS DENIED APPELLEES ATAA FOR DIFFERENT REASONS THAN THOSE RELIED UPON BY THE AGENCY BELOW.

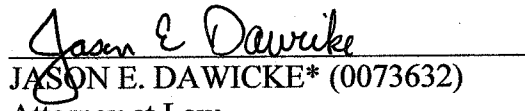
The Court's majority opinion, in its last paragraph, states that the majority does "not hold that ODJFS was bound to follow TEGL 2-03." The Court added "We merely conclude that ODJFS' interpretation is reasonable and entitled to deference given the ambiguity found" in the ATAA statute. *Id.*, p. 8, ¶ 16. In contrast, the Unemployment Compensation Review Commission squarely held that Ohio was bound to follow Labor Department guidance and that TEGL 2-03 required denial of ATAA to appellees.[1] Indeed, the basis of UCRC reversing its initial favorable decision in Mr. Lang's case was the introduction of the contract between Ohio and the U.S. Labor Department. Therefore, the Court's decision affirming the agency is based upon a ground not relied upon by the UCRC. And, for this reason, the Court should reconsider its decision and base its decision upon the grounds presented in this case.

[1] "Ohio has agreed to follow the guidelines established by the US Department of Labor in order to fund this program and one of those guidelines is that an individual must be fifty years of age at the time they are reemployed and at the time the claimant was reemployed with Clinton Township, he was not fifty years of age. Based upon the US Department Training and Employment Guidance Letter #2-03, the Commission finds that the claimant did not meet the qualifications for filing a valid Application for Alternative Trade Adjustment Assistance and the application must be disallowed." UCRC Decision, p. 4, Exhibit E to ODJFS Brief on Merits.

Conclusion

For the reasons stated in this motion, the Court should reconsider its holding that TEGL 2-03 is a reasonable interpretation of the ATAA statute.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this motion for reconsideration was served by first-class mail upon opposing counsel as indicated below:

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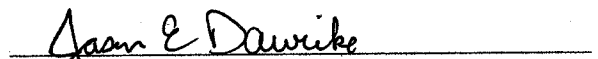
this 3rd day of December, 2012.



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