IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ASOCIACIÓN DE TRABAJADORES FRONTERIZOS, et. al.,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR,
Defendant.

Civil Action No.
EP-04-CA-0400-FM

THE DEPARTMENT OF LABOR'S SUR-REPLY TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

1. The Department maintains that the discretionary actions it has undertaken are properly reviewed under a *Chevron II* analysis. However, even under the *Chevron I* analysis "a court 'may reverse an agency's interpretation of an unambiguous statute only if it does not conform to the plain meaning of the statute.' " El Paso Electric Co. v. FERC, 201 F.3d 667, 670 (5th Cir. 2000) (emphasis added). Plaintiffs have failed to carry their burden of establishing that the Secretary's regulations do not conform to the plain meaning of the Act. In fact, in order to subvert the Act's plain meaning and thwart Departmental regulations, Plaintiffs present a convoluted argument based on incomplete readings of the transcripts submitted, congressional intent, and the Act itself.

2. Plaintiffs' contention that the Department has not put certain facts at bar into dispute is without merit. As a threshold matter, Plaintiffs' citations to the records are merely conjecture and do not accurately restate the testimony elicited during the various

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depositions.[1] As such, they are of no use. Notwithstanding Plaintiffs' failure, however, the Department has presented more than sufficient rebuttal evidence in Appendix A of its Response. Moreover, Plaintiffs have provided no evidence that training was unlawfully denied to any individual. Plaintiffs have not established that there are no material facts in dispute, as is their burden.

3. Plaintiffs believing that their individual training determinations were inadequate have a remedy in State court. See DOL Response at pp. 21-22.

4. With regard to complete training, or the "job ready" requirement found in 20 C.F.R. § 617.22(a)(2)(i), the Department reemphasizes that any exceptions made are limited.

5. Ms. Candelaria's testimony, used by Plaintiffs as evidence that the exception to the job ready requirement is not limited, actually demonstrates that any training an individual requests is considered and is generally only disapproved if the individual does not meet the training provider's enrollment criteria. Ms. Candelaria never agrees that she provided incomplete training to a large number of individuals. See Exhibit A, Candelaria Excerpt, pp. 29-30; 36 (offered a "fasttrack" program for individuals with low English levels); pp. 38-43 (describing individual assessments); pp. 44-45 (describing available jobs for someone with limited English); pp. 48 & 50 (training based on applicant's interest, among other things).

[1] While "mere allegations or denials" of facts may not be enough to pass muster under Rule 56(e), this does not mean that issues of material facts are to be resolved conclusively in favor of the party asserting its existence, but rather, "all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-9 (1986) (quoting First Nat'l Bank of Arizona v. Cities Services Co., 391 U.S. 253, 288-89 (1968)).

Simply because the "exception" is not in a formal regulation or policy does not mean it is not limited, and Mr. Kooser's testimony shows that States are continually given training on all Trade Act training issues. See Exhibit B, Kooser Excerpt, pp. 55-56.

6. With regard to Mr. Gilbert, there is no way to determine, from the one page provided, what training Mr. Gilbert needed or requested. Further, 20 C.F.R. § 617.22(f)(3) states that training must be designed for the individual "to meet a specific occupational goal." There is no requirement that an occupation be named on the State form. The Department contends that the facts surrounding Mr. Gilbert's and Mr. Trejo's training are in dispute, and beyond these two examples, Plaintiffs have not shown that there is a systemic problem.

7. There is no statutory requirement that training lead to wages at 80% of the individual's prior wages, and Plaintiffs agree.[2]

8. Mr. Kooser stated that in regularly conducted regional training, States are given direction regarding all six criteria in 19 U.S.C. § 2296(a). See Exhibit B, pp. 55-56. Ms. Candelaria stated that she always gave individuals the estimated job market pay rate for the occupation the individual was considering. See Exhibit A, p. 25.

9. The Department's regulations on on-the-job training (OJT) are consistent with the statute, despite Plaintiffs' allegations to the contrary. Plaintiffs would like Mr. Kooser to have said something he did not. Mr. Kooser states that OJT is to be a first choice when presenting training to individuals. See Exhibit B, pp. 157-166. Mr. Kooser also states that it is difficult to get employers to offer OJT, and that any training approval is based on

[2] The Department has never agreed that this was a binding Congressional goal.

the individual worker. See Exhibit B, pp. 165-168; pp. 71-74, 90-92 (States must comply with regulations); p. 88 (States required to explore training opportunities).

10. The regulations are consistent with the statute and they are consistent with the legislative history Plaintiffs attempt to distinguish. Plaintiffs ignore the words "insofar as possible" in the statute and "feasible" in the legislative history, instead focusing on "shall" in § 2296(a). The first full sentence of the legislative history Plaintiffs quote reads: "While the bill does not bar the Secretary from providing any type of training which he may find appropriate, it clearly requires that the highest priority be given to developing and placing displaced workers in training on-the-job." Plaintiffs' Reply at 15. The regulations use almost identical language: "Insofar as possible, priority will be given to on-the-job training…" 20 C.F.R. § 617.23(c)(1). Plaintiffs would like the Court to believe this dilutes the meaning in the statute; however this is consistent with Congress' intent. Plaintiffs arguments simply defy logic -- how can making something a priority make it less desirable?

11. The statistics Plaintiffs point to in Exhibit 83 to their Motion for Summary Judgment do not prove that OJT is available nor do they prove that individuals desire and qualify for it. The OJT Contracts List[3] shows some OJT contracts (approximately 40 total), but not all ran concurrently. The contracts were staggered, most lasting a maximum of a few months and all ending between 2000 and 2003. Only 104 individuals were placed in OJT in 3 years - and these placements were under the Workforce Investment Act, not the Trade Act.

[3] Several lists are provided at Exhibit 83; the list entitled "OJT Contracts Between ACS and Companies" is a partial overlap with the other list provided in that Exhibit.

12. Plaintiffs infer that individuals are not given any options for training under the Trade Act. Plaintiffs' Reply at 17 ("…without options there is no balance struck."). However, Plaintiffs have yet to prove that there are no options for training. Testimony from Ms. Bueno and Ms. Candelaria, as previously cited, shows that individuals are individually assessed and are given choices for training.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2005, a true and correct copy of the U.S. Department of Labor's Sur-Reply to Plaintiffs' Motion for Summary Judgment was caused to be delivered electronically and via certified mail, return receipt requested to the following counsel of record in this case:

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