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Laid-off U.S. workers unable to claim statutory benefits while Department of Labor treats similarly situated plaintiffs differently

By Juli Campagna

***Former Employees of Merrill Corp. v. United States*, Ct. Int'l Trade, No. 3-00662, (Slip Op. 07-46), 3/28/07.**

Despite five administrative filings and three remand results denying Plaintiffs, the Former Employees of the Merrill Corporation, certification for Trade Adjustment Assistance (TAA) under the Trade Act, the Department of Labor has still not managed to support its findings with substantial evidence.

Merrill produces SEC documents and other legal, business and financial documents. The plaintiff-claimants are U.S. workers who were part of Merrill's Financial Document Services group. They used to typeset, edit and format the documents after receiving faxed, electronic or hard-copy versions of the requisite information from businesses and law firms. In 2003 plaintiffs lost their jobs when Merrill shifted their work to its facility in India.

Under the TAA, 19 U.S.C. §§2271 et seq., workers who have lost their jobs to shifts in overseas production are entitled to receive employment-related services such as career counseling and workshops; vocational training; job search and relocation allowances; income support payments; and a Health Insurance Coverage Tax Coverage. A key to eligibility for laid-off American workers is that the articles now produced overseas and coming in to the U.S. be "like or directly competitive" with the articles that the displaced workers used to produce. Congress did not define the term "article" in the statute.

In order to pursue their benefits, employees must first apply for and receive a certificate of eligibility from the Department of Labor. Once they receive the DOL certificate, they can apply for specific assistance from the labor offices in their individual states. Each state has its own agreement with the DOL.

The United States Court of International Trade (USCIT) has exclusive jurisdiction over final denials of requests for certificates of TAA eligibility. Although the Court may affirm the DOL's determination, or may set it aside in whole or in part, the USCIT may not certify petitioning workers. Instead, the USCIT must remand the action to the DOL in those instances where it finds, as it did in this case, that the agency's determination "is not supported by substantial evidence on the record."

In the instant case, Labor changed its arguments on each remand. On the most recent (the third), the agency denied plaintiffs' claims arguing that Merrill employees do not produce articles, as required under the statute, but "simply produce articles incident to the provision of a service." The TAA does not protect service workers. Even if the records were articles, the DOL asserted, they were intangible articles, providing further basis for denying the plaintiffs certification. Labor also repeated its earlier argument that because each set of financial records produced by Merrill was "unique," the records now produced by Merrill's Indian facility were not "substantially equivalent for commercial purposes" to those formerly produced by plaintiffs in the U.S. facility, and could not, therefore, meet the statutory standard of "like or directly competitive" articles.

Because the USCIT had established, as a matter of law, that the Merrill employees participated in the production of an article, in *Merrill II*, the court "[did] not appreciate Labor's attempt to reargue the point." The relevant distinction between article and service goes to the worker and the article produced; the employer itself does not have to be a manufacturing facility in order for a "separated" employee to qualify.

The court further held that the distinction between tangible and intangible articles was contrary to the purpose of the Trade Act, which "is to provide assistance to workers who are displaced from their jobs due to increases in 'imports of articles like or directly competitive with articles produced by' the displaced workers or due to a shift in production outside the United States."

In response to Labor's arguments of "uniqueness," the Court reiterated that TAA benefits are not limited to workers engaged in mass-production articles. Neither the statute nor Labor's own regulations set forth such a requirement. What's more, under case law, the DOL's "mass-production requirement for TAA certification eligibility" had already been found "not in accordance with law and contrary to" congressional intent.

Critically, Labor had previously certified two other groups of workers whose circumstances were substantially similar to the Merrill employees.'

Labor certified displaced workers of Lands' End who had produced "digitized embroidery designs from customers' logos." These logos were both unique and intangible. Like the Merrill claimants, the Lands'

End employees created the electronic logos to satisfy a customer need, and the designs were electronically transmitted to Lands' End. "In all functional and material respects," the Court found, the employees at both firms "had the same responsibility: to convert information into a digital format for later use."

Just last year, Labor certified workers at Capital City Press. The Capital City employees also created documents electronically. They lost their jobs when the company shifted production to the Philippines and India, and then imported the publications in electronic format. The Court held that the Capital City employees' and the Plaintiffs' situations were identical in all relevant respects.

On its fourth remand, Labor must explain its reasoning behind denying the Merrill Plaintiffs the TAA certification it granted to the Capital City employees. The unfortunate plaintiffs remain in legal limbo. ■

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