2015

Plaintiff's Response to Defendant's Motion to Dismiss, FEO Drive Sol v. U.S. Sec'y of Labor, U.S. Court of International Trade, No. 15-00172 (2015)

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IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE THE HONORABLE CLAIRE R. KELLY, JUDGE

FORMER EMPLOYEES OF DRIVE SOL GLOBAL STEERING, INC.,	)	
Plaintiff,	)	
v.	)	No. 15-00172
UNITED STATES SECRETARY OF LABOR,	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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Mr. Moorman respectfully requests this Court to deny the motion of the United States Secretary of Labor (the "Department") to dismiss this case for lack of jurisdiction or for failure to state a claim upon which relief can be granted. As detailed below, this Court has jurisdiction over Mr. Moorman's claims, and nothing in federal law restricts, erodes, or limits this Court's jurisdiction.

But if the Court grants the Department's motion, Mr. Moorman respectfully requests this Court to grant the motion without prejudice, so that Mr. Moorman might amend his complaint or re-file this case.

QUESTIONS PRESENTED

1. Whether the United States Court of International Trade has jurisdiction to entertain an action challenging the Department's and the state's mismanagement and misapplication of federal law and their denial of full Trade Readjustment Allowances to the plaintiff?

2. Whether federal law limits this Court's jurisdiction in a case challenging the Department's and the state's mismanagement and misapplication of federal law and their denial of full Trade Readjustment Allowances to the plaintiff?

STATEMENT OF FACTS

I. Statutory Background

The federal Trade Adjustment Assistance ("TAA") program, established under the Trade Act of 1974, 19 U.S.C. § 2271 *et seq*., is designed to compensate workers who have lost their jobs due to the effects of international trade. *See Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 454 F. Supp. 2d 1306, 1316 (Ct. Int'l Trade 2006) (stating that TAA programs "have been—and today continue to be—touted as the *quid pro quo* for U.S. national policies of free trade"). Displaced workers who qualify for TAA can receive income support (cash) benefits, employment services, training, job-search and relocation allowances, and a health insurance tax credit. *See generally* 19 U.S.C. § 2272 *et seq*.

Displaced workers receive TAA benefits through a two-step process. In the first step, displaced workers or their representatives file an application for certification with the Department of Labor. The Department evaluates the application and grants certification if the workers satisfy the statutory criteria. 19 U.S.C. §§ 2272(a)(1) and (a)(2)(A) and (B). This first

step involves some judgment on the part of the Department as to whether the workers in the certification application satisfy the statutory criteria.

In the second step, after the Department certifies a group of workers, individual workers within the group may apply for and receive TAA benefits. 19 U.S.C. § 2291 *et seq*. While the Trade Act includes certain criteria for worker qualification, *see* 19 U.S.C. § 2291, this second step is largely perfunctory: if a worker is covered by a certification in the first step and meets other statutory criteria, he or she qualifies for benefits.

In administering and enforcing the TAA program, the Department may enter into agreements with "cooperating States" and "cooperating State agencies." 19 U.S.C. § 2311(a). Under these agreements, states accept and process individual worker applications (in the second step) and perform certain other functions related to the administration and enforcement of the TAA program. *Id*. Under these agreements, the state acts "as agent of the United States," and, as agent, its roles are strictly and narrowly defined. *Id*. Thus, as relevant here, "the cooperating State agency (1) *as agent of the United States*, shall receive applications for, and *shall provide*, payments on the basis provided in this part . . . ." *Id*. (emphasis added).

II. The Department's Certification

On February 14, 2008, the Department certified a worker group from Drive Sol as eligible to receive benefits under the TAA and Alternative TAA programs, step one of the process described above. *Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assitance*, 73 Fed. Reg. 9,834 (Dep't of Labor Feb. 22, 2008). This certification covered workers who became totally or partially separated from Drive Sol on or after November 29, 2006, through two years from the date of certification. *Id*. It permitted individuals covered by

the certification to apply for and receive benefits under the TAA and Alternative TAA programs. *Id*.

III. Mr. Moorman's Individual Application

The State of Connecticut, a "cooperating state" and "agent of the United States," 19 U.S.C. § 2311(a), and under authority of the United States, notified Mr. Moorman that he was eligible to apply for TAA, complaint at 16, ECF No. 1, and, later, that he qualified for Trade Readjustment Allowances ("TRA"). Complaint at 9, ECF No. 1. The state (again, as agent of the United States) then denied Mr. Moorman TRA benefits, apparently because he failed to meet work-search requirements. Complaint at 13-14, 23-24, ECF No. 1. But this denial was a mistake, based on the state's misunderstanding and misapplication of federal law (which does not require a TAA beneficiary to meet work-search requirements). Complaint at 13-14, 23-24, ECF No. 1.

Mr. Moorman appealed the denial to the Connecticut Employment Security Appeals Division Board of Review and the Connecticut Superior Court. But both the Board and the Court affirmed the state's denial of benefits, based on the same misunderstanding and misapplication of federal law. Complaint at 10, 11, ECF No. 1.

Mr. Moorman spent an extraordinary amount of time, personal resources, and effort to reverse these clearly erroneous decisions and to obtain the TRA benefits to which he was entitled, but most of these efforts proved fruitless. Complaint at 1-7, ECF No. 1 (describing Mr. Moorman's efforts to obtain his TRA benefits). Finally, in early 2014, Mr. Moorman received the attention and support of the Department of Labor and the Justice Department. Thus, on January 6, 2014, Timothy Theberge, Regional Trade Coordinator at the U.S. Department of Labor, wrote to Mr. Moorman that

> we concluded that [the state] had erred in the decision related to your availability for work. Once enrolled in training under Trade, participants are not required to

> seek or accept employment. [The state] had incorrectly looked to state law instead of the Federal one. We provided them our opinion and they began to seek administrative or other avenues to reverse their prior decision.

Complaint at 23-24, ECF No. 1. Then, on February 20, 2014, John Hughes, Assistant United States Attorney, wrote to Mr. Moorman:

> Discussions with [the state] revealed the agency and Board were unaware of the exemption from UI work search requirements for Trade participants enrolled in training. Through a series of emails and conference calls, Mr. Theberge explained to [the state] the errors that had been made. [The state] worked with the Connecticut Attorney General's office to set aside the verdict issued by the Court. [The state] then moved to issue a payment to you for the income support payments you were initially denied. In the opinion of [the Department], you have received all the benefits to which you were entitled under Trade.

Complaint at 13-14, ECF No. 1.

But Mr. Moorman still did not receive the full amount of TRA benefits to which he was entitled. *See, e.g.,* Complaint at 2 ("It includes the non payment of TRA funding while I was in the TRA program"), 3 ("The partial midnight deposit by the State of Connecticut for 2011 monies in 2013 . . ."), 5 ("Understand, I was supposed to receive TRA funding, but didn't[;] but even to get what I did get was shame full [sic] at best."), ECF No. 1.

Mr. Moorman filed his letter and attachments (his complaint) in this Court on June 6, 2015. ECF No. 1. (This Court informed Mr. Moorman that his letter had been accepted as a summons and complaint. ECF No. 3.) Mr. Moorman's complaint details the numerous ways that the state mismanaged and misapplied the TAA program and federal law. For example, he wrote that the state's errors "extend[] well beyond just an error of non payment, but a series of errors of non compliance with the TRA as the U.S. DOL has structure, to comply with the intent of the TRA overview." Complaint at 2, ECF No. 1. He wrote that "[t]here are serious mismanagement issues within [the state]." Complaint at 3, ECF No. 1. He wrote, "When the TRA program contract was signed I was to receive TRA payments, but instead [the state] choose to administer

UI payments. Each of these two funds are for two different circumstances." Complaint at 4, ECF No. 1. And he wrote that "[t]he U.S. DOL issued numerous bulletins that cover all sorts of issues; I uncovered these and provided them to the State. It still fails to address the TRA as a Federal program." Complaint at 4, ECF No. 1.

Mr. Moorman was quite clear throughout his complaint that he seeks an order compelling the Department to direct the state to comply with applicable federal statutes and compelling the Department and the state to provide the full amount of TRA benefits to which he is entitled. *See, e.g.,* Complaint at 6, ECF No. 1 ("I have repeatedly driven home that there are two goals[:] fix my issue and fix the problem for the others that have been harmed.").

SUMMARY OF THE ARGUMENT

This Court should deny the Department's motion to dismiss pursuant to Rule 12(b)(1), because this Court has jurisdiction over Mr. Moorman's case. First, this Court has jurisdiction under the Court's residual jurisdiction statute, because Mr. Moorman's claims relate to the "administration and enforcement" of the Department's certification decision under federal law. 28 U.S.C. §1581(i)(4). Next, this Court has jurisdiction under 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d)(1), because the Department's and the state's actions deprived Mr. Moorman of his full TRA benefits—amounting to an effective denial of certification in the first place. Finally, this Court has jurisdiction under an implied cause of action.

This Court should also deny the Department's motion to dismiss pursuant to Rule 12(b)(6), because 19 U.S.C. § 2311(e) does not limit this Court's jurisdiction. Mr. Moorman is not challenging a "determination by a cooperating State agency with respect to entitlement to program benefits," *id*., because even the state agrees that he was entitled to benefits. In any event, Mr. Moorman claims that the operation of the TAA program by the state, an agent of the

Department, violated federal law. This is exactly the kind of claim that "can nonetheless be brought in federal court." *International Union, UAW v. Brock*, 477 U.S. 274, 285 (1986).

Finally, if the Court dismisses Mr. Moorman's complaint, Mr. Moorman respectfully requests that the Court dismiss the complaint without prejudice, so that Mr. Moorman might amend his complaint or re-file the case.

ARGUMENT

This Court should deny the Department's motion to dismiss pursuant to Rule 12(b)(1), because this Court has jurisdiction over Mr. Moorman's claims that the Department and the state mismanaged the administration and enforcement of the Department's certification and erroneously denied him his full TRA benefits. In contrast to the Department's arguments in support of its motion to dismiss pursuant to Rule 12(b)(1), Mr. Moorman has carried his burden to establish the basis for jurisdiction, *Former Employees of Sonoco Prods. Co. v. U.S. Sec'y of Labor*, 273 F. Supp. 2d 1336, 1338 (Ct. Int'l Trade 2003), and to support his allegations "by competent proof." *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942). This is especially so, given that this Court "assumes that 'all well pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.'" *United States v. Islip*, 18 F. Supp. 2d 1047, 1051 (Ct. Int'l Trade 1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). Mr. Moorman has met these standards and has sufficiently demonstrated that this Court has jurisdiction over his claims.

Moreover, this Court should deny the Department's alternative motion to dismiss pursuant to Rule 12(b)(6), because nothing in the Trade Act restricts this Court's jurisdiction over Mr. Moorman's claims. Mr. Moorman's complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashley Furniture Indus.*

v. United States, 818 F. Supp. 2d 1355, 1364-65 (Ct. Int'l Trade 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Sioux Honey Ass'n v. Hartford Fire Ins.*, 672 F.3d 1041, 1062 (Fed. Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678 (2009)). The determination "whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1063 (quoting *Iqbal*, 556 U.S. at 679). Mr. Moorman's allegations, in context and based on experience and common sense, meet this standard and show that nothing in the Trade Act restricts this Court's jurisdiction over his claims.

This Court's jurisdiction is even clearer when Mr. Moorman's claims are evaluated against the remedial purposes of the Trade Act. As this Court has repeatedly recognized, the TRA program is remedial legislation, and should be "construed broadly to effectuate [its] intended purpose." *Former Employees of Welex, Inc. v. U.S. Sec'y of Labor*, 32 C.I.T. 1460, 1462 (2008) ("The trade adjustment assistance laws are remedial legislation and, as such, are to be construed broadly to effectuate their intended purpose."). That's because the TRA program is designed to assist workers, like Mr. Moorman, who lost their jobs because of increased import competition or from shifts in production to other countries. *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 454 F. Supp. 2d 1306, 1316-1321 (Ct. Int'l Trade 2006); *see also UAW v. Marshall*, 584 F.2d 390, 395 (D.C. Cir. 1978) (stating that trade adjustment assistance laws reflect the recognition "that fairness demand[s] some mechanism whereby the national public, which realizes an overall gain through trade readjustments, can compensate the particular . . . workers who suffer a [job] loss.").

Because Mr. Moorman has met his burdens under Rules 12(b)(1) and 12(b)(6), and because of the remedial purposes and broad construction of the Trade Act in his favor, this Court should deny the Department's motion to dismiss.

I. This Court Has Jurisdiction Over Mr. Moorman's Claims.

This Court has jurisdiction over Mr. Moorman's claims for three reasons. First, this Court has jurisdiction under the Court's residual jurisdiction statute, because Mr. Moorman's claims relate to the "administration and enforcement" of the Department's certification decision under federal law. 28 U.S.C. § 1581(i)(4). Next, this Court has jurisdiction under 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d)(1), because the Department's and the state's actions deprived Mr. Moorman of his full TRA benefits—amounting to an effective denial of certification in the first place. Finally, this Court has jurisdiction under an implied cause of action.

A. This Court Has Jurisdiction Under 28 U.S.C. § 1581(i)(4).

28 U.S.C. § 1581(i)(4) provides this Court with residual jurisdiction, related to the Department's certification of a worker group, to be sure, but also extending beyond certification, to the "administration and enforcement" of the certification decision. This section provides,

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States *providing for administration and enforcement* with respect to the matters referred to in . . . subsections (a)-(h) of this section.

28 U.S.C. § 1581(i)(4) (emphasis added). Subsection (d)(1) says that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act . . . ." 28

U.S.C. § 1581(d)(1). Putting the two sections together, this Court has jurisdiction over any civil action that arises "out of any law of the United States *providing for administration and enforcement*" of the Department's certification decision. 28 U.S.C. § 1581(i)(4) (emphasis added).

Mr. Moorman's case falls squarely within the scope of this subsection, because his case directly challenges the Department's and the state's actions in failing to award his full TRA benefits. Indeed, Mr. Moorman's complaint is rife with allegations over the Department's and the state's failure to administer and enforce the Department's certification decision consistent with federal law. For example, Mr. Moorman wrote on page 4 of his complaint (section (g)): "The U.S. DOL issued numerous bulletins that cover all sorts of issues; I uncovered these and provided them to the State. It still fails to address the TRA as a Federal program." Complaint at 4, ECF No. 1. The Assistant U.S. Attorney for the District of Connecticut, whose letter is part of Mr. Moorman's complaint, at page 13, put an even finer point on it:

> Under Trade, there are certain state unemployment insurance law provisions that are superseded by the rules of Trade. One of these rules involves the work search requirements associated with the receipt of regular UI benefits [20 CFR 617.17(b)(2)].

Complaint at 13, ECF No. 1. (citation in original).

In short, Mr. Moorman's case is *only about* the administration and enforcement of the Department's certification decision under federal law, and how the Department's and the state's mismanagement and misunderstanding of federal law resulted in his denial of all the TRA benefits to which he was entitled. His case therefore falls squarely within this Court's residual jurisdiction in 28 U.S.C. § 1581(i)(4).

B. Alternatively, This Court Has Jurisdiction Under 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d)(1).

This Court has jurisdiction under 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d)(1) to review the Department's decisions on the certification of a worker group. Thus, 19 U.S.C. § 2395(a) says that "[a] worker . . . aggrieved by a final determination of the Secretary of Labor under section 2273 of this title . . . may, within 60 days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination." Similarly, 28 U.S.C. § 1581(d)(1) says that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act . . . ."

These statutes by their plain terms give this Court jurisdiction over a Department decision at the first step of the process, but not the second step, of the TAA process. That makes sense, given that the second step is largely perfunctory and delegated to the state, as the agent of the Department. There is, by design, nothing in the second step for this Court to review. By writing these statutes in this way, Congress apparently intended to grant this Court jurisdiction to review a Department's discretionary decision that might result in the denial of TRA benefits, but not a perfunctory act to grant benefits to a qualified worker. Moreover, Congress apparently thought that the only discretionary decision that might result in the denial of TRA benefits happened at the first step—and with good reason, because that is how the Act is designed to operate. So Congress granted this Court jurisdiction over just the first step.

But in this case, the Department and its agent, the state, made decisions at the second step that were the functional equivalent of a denial of certification at the first step. In particular, the state, as the agent of the Department, erroneously denied Mr. Moorman his rightfully owed TRA

benefits. The Department of Labor and the Department of Justice, after instructing the state on its duties under federal law and paying *some* of the TRA benefits owed to Mr. Moorman, then denied Mr. Moorman the *full amount* of TRA benefits to which he was entitled.

These actions were the functional equivalent of denying certification to the worker group in the first place. That's because these actions produced the exact same effect that a Department's denial of certification would have produced. That is, these actions resulted in denying TRA benefits to members of the certified class, including Mr. Moorman. These actions thus fall squarely within this Court's jurisdiction under 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d)(1), if we understand that jurisdiction to encompass any final Department decision that denies full TRA benefits, consistent with Congress's apparent intent.

But more: the Department's and the state's actions here were even more insidious than simply denying TRA benefits to Mr. Moorman—again, the functional equivalent of the Department denying certification in the first place. The Department's and the state's actions here denied benefits to Mr. Moorman as a *qualified worker* within the certified group. In other words, the Department granted certification to the group that included Mr. Moorman (the first step, which required an exercise of judgment), but then the Department and the state denied full TRA benefits to him at the second step (the perfunctory step).

The effect was a bait-and-switch. The Department baited Mr. Moorman by granting certification, but then switched by denying full TRA benefits. This bait-and-switch meant that under the Department's preferred and strict textual reading of this Court's jurisdiction in 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d)(1), Mr. Moorman would be unable to appeal his denial to this Court. In other words, the Department and the state together effected an end-run around this Court's jurisdiction, so that under the Department's strict textual reading of this

Court's jurisdiction in 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d)(1), the Department could deny Mr. Moorman his full TRA benefits while at the same time ensuring that he could never challenge the denial in this Court.

That result is plainly inconsistent with the intent of these jurisdictional sources and the remedial purpose of the TAA program, and this Court should reject it. Instead, this Court should read 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d)(1) in the context of the entire Trade Act, against the remedial purpose of the TRA program, and in the spirit that Congress apparently intended: to allow this Court to review final Department (and state agent) decisions that deny full TRA benefits to a worker, especially a qualified worker like Mr. Moorman.

C. Alternatively, Mr. Moorman Has an Implied Right of Action.

In determining whether a federal statute includes an implied right of action, the Supreme Court looks to congressional intent in enacting the statute. *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). And in discerning congressional intent, the Court looks to the statute itself, along with the four factors identified in *Cort v. Ash*:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975). The Court explained the process this way:

> Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action. Rather, as an *implied* cause of action doctrine suggests, "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent

> or ambiguous on the question." We therefore have recognized that Congress' "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." The intent of Congress remains the ultimate issue, however, and "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist."

Thompson, 484 U.S. at 179 (citations omitted, emphasis in original).

In this case, for the reasons discussed above, the congressional intent behind the Trade Act suggests an implied cause of action for a person like Mr. Moorman. Again, all parties agree that Mr. Moorman falls squarely within the group certified by the Department, and that he qualifies for TRA. But the Department and the state erroneously denied him his full benefits in administering and enforcing the certification. Given the Trade Act's grant of residual statutory authority to this Court, and given the remedial purpose of the Act, the text and structure of the Act suggest that Congress intended to provide a person like Mr. Moorman a cause of action.

Moreover, the four factors in *Cort*, 422 U.S. at 78, suggest that Mr. Moorman has an implied cause of action. First, Mr. Moorman is certainly within the class that the Trade Act is designed to benefit. Even the Department and the state agree that he is a member of a certified group, and he qualified for TRA benefits. The Trade Act thus created a federal right in his favor.

Second, legislative intent, as reflected in the language and structure of the Act, as described above, indicates that Congress intended to create a cause of action for workers like Mr. Moorman. In particular, between the statutory cause of action for workers to challenge Department actions that deny TRA benefits (as described in part I.B.), the statutory grant of broader-sweeping residual jurisdiction (as described in part I.A.), and the remedial purposes of the Trade Act, the language and structure of the Trade Act suggest that Congress intended to create this kind of cause of action.

Third, Mr. Moorman's action is consistent with the underlying purposes of the Trade Act. The principal purpose of the Act is to ensure that qualified workers obtain their full benefits. As described more fully above, Mr. Moorman's action in this Court appears to be the only way to effect that purpose. Therefore, his action is not only consistent with the underlying purposes, but it actively promotes those purposes.

Finally, Mr. Moorman's cause of action is not one traditionally relegated to state law. Indeed, the Trade Act itself specifies the class of cases that are relegated to state law—those actions challenging "[a] determination by a cooperating State agency with respect to entitlement to program benefits . . . ." 19 U.S.C. § 2311(e). But as described more fully below, Mr. Moorman's case has nothing to do with challenging the state's decision "with respect to entitlement to program benefits." That's because the Department, the state, and Mr. Moorman all agree that Mr. Moorman is entitled to program benefits. Instead, Mr. Moorman's case challenges the Department's and the state's administration and enforcement of the Department's certification as violating federal law.

For these reasons, Mr. Moorman has an implied cause of action against the Department, and this Court has jurisdiction over his case.

II. 19 U.S.C. § 2311(e) Does Not Limit This Court's Jurisdiction.

19 U.S.C. § 2311(e) says that a worker may appeal a state's determination with regard to that worker's "entitlement to program benefits" only through the state courts. That subsection provides in full,

> A determination by a cooperating State agency with respect to *entitlement to program benefits* under an agreement is subject to review in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent.

19 U.S.C. § 2311(e) (emphasis added).

But 19 U.S.C. § 2311(e) does not limit or erode this Court's jurisdiction in this case, whatever its source, because Mr. Moorman is not challenging the state's determination "with respect to entitlement program benefits." Indeed, even the state concedes that Mr. Moorman was entitled to program benefits. *See* Complaint at 9, 18, ECF No. 1. He is not seeking review of that determination.

Instead, Mr. Moorman challenges the Department's and the state's violations of federal law and seeks review of the Department's and the state's denial of his full benefits under federal law. This is precisely the kind of claim that the Supreme Court has authorized under *International Union, UAW v. Brock*, 477 U.S. 274 (1986). In that case, the Court distinguished between two kinds of claims. The first, "review of individual eligibility determinations . . . may be confined by state and federal law to state administrative and judicial processes." *Id*. at 285. This is the kind of claim addressed in 19 U.S.C. § 2311(e). But the second, "claims that a program is being operated in contravention of a federal statute . . . can nonetheless be brought in federal court." *Id.* at 285; *see also Hampe v. Butler*, 364 F.3d 90, 93-94 (3d Cir. 2004) ("Specifically, a federal court can hear statutory challenges that will influence the outcomes of redetermination proceedings, although it cannot hear direct requests for redetermination. The language from *Brock I* . . . explicitly provides for 'claims that *a program is being operated in contravention of a federal statute*.'") (quoting *Brock*, 477 U.S. at 285).

Mr. Moorman's claim falls squarely within this second category. His complaint contains numerous allegations and details related to the Department's and the state's violations of federal law. For example, Mr. Moorman wrote on page 4 of his complaint (section (g)): "The U.S. DOL issued numerous bulletins that cover all sorts of issues; I uncovered these and provided them to the State. It still fails to address the TRA as a Federal program." Complaint at 4, ECF No. 1.

Even the Assistant U.S. Attorney for the District of Connecticut, whose letter is part of Mr. Moorman's complaint, at page 13, recognized that this case is about the program's violations of federal law. Complaint at 13, ECF No. 1 (stating that "[u]nder Trade, there are certain state unemployment insurance law provisions that are superseded by the rules of Trade. One of these rules involves the work search requirements associated with the receipt of regular UI benefits [20 CFR 617.17(b)(2)]."). At the same time, the complaint says nothing about challenging the state's individual eligibility determination. In fact, the complaint only reflects that Mr. Moorman's individual eligibility is not at issue in this case. Complaint at 9 and 18, ECF No. 1.

In short, Mr. Moorman seeks exactly the kind of relief that the United States Court of Appeals for the D.C. Circuit sanctioned on remand in *Brock*, notwithstanding any limitation on federal jurisdiction in 19 U.S.C. § 2311(e): "the District Court's order should focus solely on the Secretary's directives to the state agencies, and to the responsibilities of the state agencies insofar as they act as "agents" of the Secretary in administering the Trade Act." *International Union, UAW v. Brock*, 816 F.2d 761, 769 (D.C. Cir. 1987); *see also Hampe*, 364 F.3d at 93 ("Plaintiffs contend, however, that the federal district court has jurisdiction to hear their claims. They argue that their instant suit against DOL is not for a redetermination of benefits, but for an order declaring that DOL improperly endorsed [the state's policy], which had been implemented in violation of federal law. Plaintiffs are correct."); *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 30 C.I.T. 1315, 1361, n. 68 (2006) (recognizing the distinction between review of individual eligibility determinations and claims that a program or policy violates federal law).

This is very different than the kind of claim that the plaintiff lodged in *Former Employees of ITT v. Sec'y of Labor*, 12 C.I.T. 823 (1988). In that case, the state denied TAA

benefits because the plaintiff failed to qualify under the statutory requirements in step two of the process. *Id.* at 825. The plaintiff apparently raised no allegation in that case that the state violated the Trade Act or other federal law in denying benefits, so the Court easily dismissed the case (as an alternative basis for dismissal) under 19 U.S.C. § 2311(e). This ruling squares with the first kind of claim described in *Brock*—a "review of individual eligibility determinations [which] may be confined by state and federal law to state administrative and judicial processes." *Brock*, 477 U.S. at 285.

But in contrast, Mr. Moorman challenges the actions of the state, as agent of the Department, as violating federal law. Again, this is the second kind of claim described in *Brock*—a "claim[] that a program is being operated in contravention of a federal statute [which] can nonetheless be brought in federal court." *Id*. This Court has jurisdiction over Mr. Moorman's kind of claim.

For these reasons, any limitation on this Court's jurisdiction in 19 U.S.C. § 2311(e) is therefore inapplicable to this case, and this Court has jurisdiction over Mr. Moorman's claims.

CONCLUSION

For the foregoing reasons, Mr. Moorman respectfully requests this Court to deny the Department's motion to dismiss. But if the Court grants the Department's motion, Mr. Moorman respectfully requests that this Court grant the motion without prejudice, so that he may amend his complaint or re-file the case.

Respectfully Submitted,

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December 21, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Standard Chamber Procedure Paragraph 2(B)(2), I hereby certify that this brief complies with the word-count limitation set forth in Standard Chamber Procedure Paragraph 2(B)(1). This Response contains 5,659 words.

/s/ Steven D. Schwinn
Steven D. Schwinn

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 21st day of December 2015, I filed a copy of the foregoing Plaintiff's Response to Defendant's Motion to Dismiss electronically, through the Court's electronic filing system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may gain access to this filing through that system.

/s/ Steven D. Schwinn
Steven D. Schwinn