
**IN THE
SUPREME COURT OF MISSOURI**

No. SC 92682

REVA BILLINGS AND WILLIAM MORRISON,

Appellants,

vs.

DIVISION OF EMPLOYMENT SECURITY,

Respondent.

Appeal from the Labor and Industrial Relations Commission

**SUBSTITUTE BRIEF OF
RESPONDENT DIVISION OF EMPLOYMENT SECURITY**

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STATEMENT OF FACTS

Claimant Reva Billings worked as an international operator for over 19 years at the Bridgeton facility of Western Union Financial Services, Inc. Tr. 1/136.¹ Claimant William Morrison worked at Western Union's Bridgeton facility as a customer service operator for over 17 years. Tr. 1/284. The last day that Ms. Billings and Mr. Morrison physically performed services for Western Union was July 3, 2008. Tr. 1/136; 2/284. Both received "Furlough Force Reduction" notices. The one Ms. Billings received stated, in part:

In accordance with the provision of the contract between Western Union . . . and the Communication Workers of America (CWA) your position . . . is being eliminated. Your last day worked is today, and you will be paid a notice period between 7/5/2008 and 07/19/08. You will be placed on Furlough Force Reduction (FFR) effective on 7/20/2008.

Tr. 2/364. Mr. Morrison's notice was identical, except his stated that he would "be paid a notice period between 7/5/2008 and 08/06/08" and that he would go on Furlough Force Reduction "effective on 8/7/2008". Tr. 2/355.² Neither Ms. Billings nor Mr. Morrison

¹ The number before the "/" is the volume of the transcript. The number after the "/" is the page number of the transcript.

² The notices at Tr. 2/355 and 2/364 are not the ones issued to Ms. Billings and Mr. Morrison, but the evidence is that these notices exemplify the notices they received. Neither Ms. Billings's nor Mr. Morrison's notice were offered into evidence at the

returned to work after July 3, 2008. Tr. 1/138; 2/284. The continuation in pay beyond July 3 appears to have been due to the provision of the collective bargaining agreement between Western Union and CWA that stated:

When reduction of force is necessary, the Company agrees to give fifteen days' written notice of force-reduction furlough to affected employees

Tr. 2/365. *See also* Tr. 2/248-49.

Ms. Billings later requested, and received, a letter signed by a "Sr. HR Generalist" with Western Union, and dated April 15, 2010, stating that Ms. Billings was laid off on July 20, 2008.³ Tr. 2/351. At the time of the Tribunal hearing, Ms. Billings believed she was "still on the payroll" between July 3 and July 20, 2008, based on the wording of this letter. Tr. 1/137.

Mr. Morrison also requested and received a comparable letter from Western Union, dated May 11, 2010, which stated that he had been laid off on August 7, 2008. Tr. 4/655. Mr. Morrison testified that he believed he was not officially laid off until August 7. Tr. 2/285.

Ms. Billings's and Mr. Morrison's job losses were among a series of layoffs in the spring and summer of 2008 at Western Union's call center in Bridgeton, Missouri. Tr.

hearing in this case. Although these notices are dated July 4, 2008, most were signed as received on July 3. *See, e.g.*, Tr. 2/355; 2/375; 2/381; 3/474; 3/477; 3/516; 3/522.

³ Other workers offered similar letters, also dated well after the actual separations occurred, into evidence at the hearing. *See, e.g.*, Tr. 2/354; 2/369; 2/380.

1/170-71; 2/287-88). On July 16, 2009, CWA filed a petition with the United States Department of Labor (USDOL) to certify Western Union's former employees at the Bridgton facility as eligible for benefits under the Trade Act of 1974. Tr. 1/16; 1/35; 2/388. USDOL certified that Western Union's former employees at Bridgton were eligible for Trade Act benefits because Western Union's acquisition from another county of services like those being provided at the Bridgton facility contributed importantly to the job losses at that facility. Tr. 1/16-17; 2/388-89. USDOL issued the certification on January 5, 2010, and designated the impact date as July 15, 2008. Tr. 1/17; 1/35; 2/389.

Once USDOL determines a particular group of employees eligible for Trade Act benefits, state employment security agency officials determine the individual eligibility of individual claimants within that group. Tr. 1/18. Ms. Billings applied to the Missouri Division of Employment Security for Trade Act benefits on February 24, 2010. Tr. 2/391-93. Her application identifies her separation date as July 3, 2008. Tr. 2/391. Mr. Morrison applied for Trade Act benefits on April 21, 2010. Tr. 4/660-62. His application also lists his date of separation as July 3, 2008. Tr. 4/660. The Division denied Trade Act benefits to both Ms. Billings and Mr. Morrison on the ground that their "separation date occurred more than one year before the petition of eligibility to apply was filed." Tr. 2/394; 4/663.

Ms. Billings and Mr. Morrison appealed the Division's denial of Trade Act benefits. L.F. 3-5, 24-29. The Division's Appeals Tribunal consolidated their appeals with those of several similarly situated workers and held a consolidated hearing on July 20, 2010. Tr. 1/1.

At the hearing, the claimants that were notified of their job loss while at work on July 3, 2008 (as opposed to those who were off work on FMLA or sick leave and a few who were laid off on another date) generally testified that the last day they physically performed services for Western Union was July 3, 2008. Tr. 1/136; 1/161; 1/176; 1/195; 2/205; 2/211; 2/226; 2/232; 2/245; 2/259; 2/264; 2/272; 2/284; 2/295; 2/303; 2/316; 2/328. The workers had various understandings of what their status was between July 3 and the dates their pay continued under the collective bargaining agreement (they referred to this time as the “notice period”). Many workers, including Ms. Billings and Mr. Morrison, believed they were “on the payroll” or were “active employees”. Tr. 1/137; 1/161; 1/195-97; 2/232; 2/260; 2/273-74; 2/285; 2/306. One worker testified that she believed she was on “employer authorized leave” during the notice period. Tr. 2/246-47. This same worker added that she believed she was required to comply with “the rules and regulations of the company” during this period, including not getting “on the internet [to] down the company” and not going to work for a competitor. Tr. 2/249. Another worker testified that she was “unemployed” after July 3. Tr. 1/176. Another stated she was denied access to her workspace after July 3. Tr. 2/264-65.

Prior to the separations, the workers received several notices that layoffs would be coming. Tr. 1/170-71. Representatives from both the Division of Employment Security and the Division of Workforce Development (DWD) met with the workers at Western Union’s location to inform them of the assistance that would potentially be available. Tr. 1/170-71; 1/196-97.

One worker testified that she was told not to file for unemployment during the

notice period, but she also stated she was told this by a representative of Western Union, not by a representative of one of the administering state agencies. Tr. 1/161-62; 1/166-68. Another worker testified that persons she believed were from “the Missouri Career Department . . . did say we could apply for unemployment immediately but we would not be able to collect it until we were actually off the payroll . . . and until all of our vacation or personal day time ran out[.]” Tr. 2/227. Another testified that a Division of Employment Security representative told a group of Western Union’s laid off workers that they could apply for unemployment benefits immediately but they might be denied for a few weeks. Tr. 2/255-56.

Although one worker testified she was denied unemployment benefits during the notice period, it is unclear whether that denial was based on a determination that she was still employed or on a determination that she was receiving vacation pay. Tr. 1/197-98. At least some of the workers continued to receive vacation pay after July 20. *E.g.*, Tr. 1/163; 1/197-98; 2/285.

Following the hearing, the Appeals Tribunal issued nearly identical decisions with regard to the claims of Ms. Billings and Mr. Morrison (the only difference between the two decisions reflects a factual difference in the dates of the notice periods). L.F. 6-13, 30-37. The Tribunal found as a fact that each last worked for Western Union on July 3, 2008. L.F. 6, 30. The Tribunal also found that there was no evidence that either could have worked after July 3. L.F. 12, 36. Based on the Trade Act’s provisions, the Tribunal determined that a claimant can be individually eligible for Trade Act benefits only if his or her date of separation occurred after the impact date set in the applicable USDOL

group certification. L.F. 9, 33. Based on federal regulations, the Tribunal concluded that the “date of separation” of a claimant is his or her last day worked. L.F. 11, 35. Because Ms. Billings and Mr. Morrison’s last day worked was July 3, 2008, which is before the impact date of July 15, 2008, that was established in the applicable USDOL certification, the Tribunal concluded that they were not individually eligible for Trade Act benefits. L.F. 11, 35. The Tribunal also concluded that Ms. Billings and Mr. Morrison’s continued receipt of pay for a time after their last day worked did not change their eligibility for benefits because there was no evidence that they worked or could have worked after July 3 while receiving that continued pay. L.F. 12, 36.

Ms. Billings and Mr. Morrison both appealed to the Labor and Industrial Relations Commission. L.F. 14-16, 38-40. The Commission summarily affirmed and adopted both decisions as its own, finding them “fully supported by the competent and substantial evidence on the whole record and . . . in accordance with the relevant provisions of the Missouri Employment Security Law.” L.F. 17, 41.

Ms. Billings and Mr. Morrison then appealed to the Missouri Court of Appeals, Eastern District. L.F. 18-21, 42-45. The Court of Appeals affirmed the Commission’s decision. Thereafter, upon the application of Ms. Billings and Mr. Morrison, this Court granted transfer.

STANDARD OF REVIEW

This case involves the interpretation of the federal Trade Act of 1974, 19 U.S.C. §§ 2101-2497b. Judicial review of a Trade Act claim is the same as for unemployment determinations under state law. 19 U.S.C. § 2311(e). Under this standard, an appellate court may reverse, remand, or set aside a decision of the Labor and Industrial Relations Commission only where the Commission acted without or in excess of its powers, the decision was procured by fraud, the decision is not supported by the facts, or the decision is not supported by sufficient competent evidence in the record. § 288.210, RSMo; *Schultz v. Div. of Emp. Sec.*, 293 S.W.3d 454, 458-59 (Mo. App. E.D. 2008).

In the absence of fraud, the Commission's findings of fact are conclusive if they are supported by substantial and competent evidence. § 288.210; *E.P.M. Inc. v. Buckman*, 300 S.W.3d 510, 512 (Mo. App. W.D. 2009). But with regard to questions of law and the application of the law to the facts, appellate review is *de novo*. *Difatta-Wheaton v. Dolphin Capital Corp.*, 271 S.W.3d 594, 595 (Mo. banc 2008).

Because this case involves statutory interpretation, which is a question of law, this Court's review is *de novo*. *Ochoa v. Ochoa*, 71 S.W.3d 593, 595 (Mo. banc 2002). The interpretation of a statute by the agency charged with its administration, however, "is entitled to great weight." *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 197 (Mo. banc 1972).

Where, as here, the Commission adopted the Appeals Tribunal's findings, this Court examines those findings in its review of the Commission's decision. *Hubbell Mech. Supply Co. v. Lindley*, 351 S.W.3d 799 (Mo. App. S.D. 2011).

ARGUMENT

Claimants here are not eligible for Trade Act benefits because their date of separation from their jobs occurred before the impact date set in the federal certification of eligibility applicable to their former employment.

The claimants here were informed that their jobs had been eliminated on July 3, 2008. They did not actively engage in any services for their employer after that date, nor did the employer have any more work for them to do. The federal government issued a certification of eligibility for Trade Act benefits generally applicable to employees of the claimants' former employer and set the "impact date" at July 15, 2008. A condition for receiving Trade Readjustment Allowances under the Trade Act is that the applicant's date of separation from the covered employment be after the impact date. 19 U.S.C. § 2291(a)(1)(A). The "date of separation" is defined by the applicable federal regulation as "the last day worked" or, if the applicant was on leave at the time of separation, as "the last day the individual would have worked." 20 C.F.R. § 617.3(l)(1). Because the claimants did not do any work for their employer after July 3, 2008, and there was no more work for them after that date, their date of separation under the federal regulation is July 3, 2008. This date of separation is earlier than the federally set impact date of July 15, 2008. Therefore, under 19 U.S.C. § 2291(a)(1)(A), the claimants here are not eligible for Trade Readjustment Allowances.

A. TRADE ACT BENEFITS NOT AVAILABLE TO CLAIMANTS WHOSE LAST DAY OF ACTIVE SERVICE TO EMPLOYER OCCURRED BEFORE IMPACT DATE

The Trade Act and the One-Year Rule. The Trade Act is a “federal law designed to help workers who have lost jobs due to competition from international trade.” *Adams v. Div. of Emp. Sec.*, 353 S.W.3d 668, 670 (Mo. App. E.D. 2011). This Act provides two different types of benefits to eligible workers:

(1) Trade Adjustment Assistance (TAA) – benefits covering training, placement, and other supportive services; and

(2) Trade Readjustment Allowances (TRA) – cash payments to workers in training, once unemployment benefits have been exhausted.

Id. at 670 n.2. In order to activate the availability of Trade Act benefits, a group of workers, a union, an employer, or an authorized employment assistance entity must petition the United States Department of Labor (USDOL) for a certification of eligibility. 19 U.S.C § 2271(a). USDOL will then certify the group of workers as eligible to apply for benefits if they meet the requirements of the statute necessary to establish the group as adversely affected by increased imports. 19 U.S.C. § 2272. States may enter into agreements with USDOL to administer Trade Act programs, but must do so in compliance with federal provisions. 19 U.S.C. § 2311. *See also Schultz v. Div. of Emp. Sec.*, 293 S.W.3d 454, 456 (Mo. App. E.D. 2008). The state of Missouri does administer Trade Act programs. Tr. 1/18-20.

A condition of an individual claimant’s eligibility for TRA (the cash benefit) is

that the claimant's date of separation from employment must have occurred on or after the "impact date" set out in the certification of the USDOL that the group of employees to which the claimant belongs is eligible for Trade Act benefits. 19 U.S.C. § 2291(a)(1)(A). The "impact date" is the date that is specified in the USDOL eligibility certification as the date on which total or partial separations began or threatened to begin at the business to which the certification applies. 20 C.F.R. § 617.3(v). The impact date cannot be more than one year earlier than the date that the petition for eligibility for Trade Act benefits was filed with USDOL. 19 U.S.C. § 2273(b).

The combination of these two sections results in a "one-year rule." In order for a claimant to be eligible for TRA, his or her date of separation from the covered employment must have occurred within the one year before the filing of the petition for eligibility.

The purpose of the one-year rule is to ensure that workers claim and receive the retraining, adjustment, relocation, and other services that are available under the Trade Act promptly after they lose their jobs due to the effect of international trade. *Lloyd v. U.S. Dep't of Labor*, 637 F.2d 1267, 1270 (9th Cir. 1980). It is important that workers affected by foreign competition "receive adjustment assistance promptly when it will do the most good for retraining and relocation." *Id.* at 1271. The cash TRA benefits are intended to assist the claimant while engaged in retraining or in relocating, "not . . . to be merely a supplemental unemployment benefit." *Id.* "Thus, when workers fail to apply timely for benefits and so are not eligible, it is not that they are being penalized for failure to file; rather they simply are no longer within the category Congress intended to aid by

this program.” *Id.*

The Trade Act was amended by the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 1801, to extend coverage to workers at firms that supply services on the same terms as to workers at firms that produce articles. Training and Employment Guidance Letter (TEGL) No. 22-08, pp. 2 and A-5 to A-7.⁴ (Portions of this TEGL are included in the Appendix to this Brief. It is set out in full at: <http://wdr.doleta.gov/directives/attach/tegl/TEGL22-08acc.pdf>). The President signed the Recovery Act on February 17, 2009, and it became effective 90 days later on May 18, 2009. TEGL No. 22-08, p. A-3.

The Issue Here. The application of the Trade Act’s one-year rule in this case turns on what is meant by “date of separation” (the date that must be after the “impact date” for claimants to be eligible for TRA benefits). The Division of Employment Security contends, for the several reasons discussed below, that the “date of separation” is the last day that a claimant actively provided services to the employer. The claimants in this case, Reva Billings and William Morrison, assert that the “date of separation” applicable to them extends to the day that they ceased being entitled to the additional wage payments provided for under their collective bargaining agreement for laid off employees (these additional wage payments made after a layoff will be referred to as “terminal pay”).

⁴ TEGLs set out interpretations by USDOL of laws under its purview. *Adams*, 353 S.W.3d at 673-74.

If the Division is correct, Ms. Billings and Mr. Morrison are not eligible for TRA because the last day they actively worked for their employer was July 3, 2008 (Tr. 1/136, 2/284), which is before the impact date of July 15, 2008, that was established in the eligibility certification issued with regard to their former employment (Tr. 4/658).⁵ If Ms. Billings and Mr. Morrison are correct, they are eligible for TRA because their terminal pay ended, respectively, on July 19, 2008 (Tr. 1/137, 2/364), and August 6, 2008 (Tr. 2/284-85, 2/355), both of which are after the July 15, 2008, impact date.

Regulatory Definition. Under the applicable federal regulation, “date of separation” with respect to a total separation from employment (such as Ms. Billings and Mr. Morrison experienced) means:

- (i) For an individual in employment status, the last day worked; and
- (ii) For an individual on employer-authorized leave, the last day the individual would have worked had the individual been working[.]

20 C.F.R. § 617.3(l)(1).⁶

⁵ As the date one year before the petition was filed (Tr. 4/657), this is the earliest date USDOL could set as the impact date. *See* 19 U.S.C. § 2273(b).

⁶ To whatever extent Ms. Billings and Mr. Morrison contend there is any significance to the date they were laid off, this date is no different than their “date of separation”. Under 20 C.F.R. § 617.3(z), “[l]ay off means a suspension or separation from employment[.]” Because “lay off” is defined as a “separation” from employment,

There is no dispute here that Ms. Billings and Mr. Morrison were in employment status at the time they received notice on July 3, 2008, that their positions were being eliminated, and that, as stated in this notice, July 3, 2008, would be their “last day worked.” Tr. 1/136, 2/284, 2/355, 2/364. They both then left and never returned to work at this employment. Tr. 1/136-38, 2/284. They did continue to receive their contractual terminal pay through July 19 and August 6, 2008, respectively, and were not formally placed by the employer on Furlough Force Reduction (or layoff) Status until these payments ended. Tr. 2/351, 2/355, 2/364, 4/655.

Because they learned of their job loss while at work and thereafter never returned to their jobs, Ms. Billings and Mr. Morrison were “in employment status” when their jobs were eliminated and 20 C.F.R. § 617.3(l)(1)(i) applies. Under this subdivision, their “date of separation” is “the last day worked.”

Natural Meaning of “Last Day Worked”. Despite not returning to work at their jobs after July 3, Ms. Billings and Mr. Morrison argue that they continued “in employment status” through July 19 and August 8, 2008, respectively, and that these dates should be considered their “last day worked” under § 617.3(l)(1)(i) because they received their contractual terminal pay through these dates, were not formally placed by the employer on Furlough Force Reduction Status until these dates, and continued to be subject to recall and employer rules during that time.

the date of a layoff is the same as the “date of separation”, which brings the analysis back to determining the meaning of that term.

But the words “last day worked” themselves most naturally mean the last day an employee actively provided services to the employer. If the employee is not actively providing services, then he or she cannot reasonably be considered to be working. See *Figas v. Labor and Indus. Rels. Comm’n*, 628 S.W.2d 731, 732 (Mo. App. 1982). In *Figas*, the court concluded that the claimant was not eligible for Trade Act benefits where he performed no actual services for employer after Act’s effective date even though he continued to receive accrued vacation pay beyond that impact date. *Id.* The court relied on the still current Missouri statutory definition of “employment” as “service . . . performed for wages[.]” § 288.034.1, RSMo (emphasis added).⁷ As the claimant in *Figas* was performing no service for wages for the employer while receiving vacation pay, “he was not then employed.” 628 S.W.2d at 732. A worker no longer employed is also no longer working. (“Employed” and “working” are synonyms. ROGET’S INTERNATIONAL THESAURUS 557 (4th ed. 1977) (entry 707.21).) Thus, a worker no longer performing active services for an employer has gone past his or her “last day worked.”

Moreover, even though an employee may be subject to recall, the employee is not working if not actually recalled. And, even if the employee is subject to minimal employer restrictions while not actively working, such as refraining from working for a

⁷ Similarly, under the federal regulatory definitions applicable to the Trade Act “[e]mployment means any service performed for an employer by . . . an individual for wages. 20 C.F.R. § 617.3(o).

competitor and not disparaging the employer,⁸ compliance with such negative requirements takes such little effort, that it should not be considered as “working” for the employer. *See Westinghouse Elec. Corp. v. Callahan*, 658 A.2d 1112, 1114 & 1118-20 (Md. App. 1995) (unemployment compensation claimants not considered to be working for employer despite being retained on employer’s active employment roll for 60 days after last day of providing their normal services to employer, during which time they (1) continued to receive wages, (2) were directed to keep their supervisors informed of their whereabouts, and (3) had to report either to work or to the employer’s resource center).

⁸ Ms. Billings and Mr. Morrison did not themselves assert at the hearing that they continued to be subject to any employer imposed non-compete or not disparagement rules (or any other employer direction) after July 3, 2008. Tr. 1/135-43, 2/283-89. Twenty-six claimants testified at the hearing (Tr. 1/2-3), and only one stated that she believed she remained subject to the employer’s work rules after July 3 (Tr. 2/248-49, 2/361). This claimant did not say that any employer representative told her she remained subject to these rules, but only that she thought that to be her obligation. Tr. 2/248-49. The letters giving notice to the employees of the elimination of their jobs say nothing about any further application of work rules. Tr. 2/355, 2/364. In any event, given the close of the employer’s local operations, it is unlikely that any non-compete rule retained any vitality. And to the extent that a non-disparagement rule would have been of any remaining interest to the employer, there is no evidence that the employer could have stopped the terminal pay to anyone breaching the rule or had any other means to enforce it.

Purpose of Trade Act. The natural meaning of “last day worked” as the last day active services are provided is supported by the purpose of the Trade Act and its one-year rule. As discussed above, this purpose is that retraining, relocation, and other services be promptly provided to overcome job losses caused by foreign competition. *Lloyd*, 637 F.2d at 1270-71. To best achieve this purpose, “last day worked” should be interpreted to mean the last day a claimant actively provided services for the employer because that is the day the claimant’s American productivity came to an end. It is this day that America’s production is reduced through the claimant’s loss of a job that is the day that the impact of the foreign competition occurs. And it is this day that those who lose their jobs due to foreign competition must begin the effort to obtain new employment.

The impact of foreign trade does not occur on some date to which terminal contract payments or accrued vacation payments (or some other job benefit or statutory or contractual obligations) might stretch out a continued connection between the claimants and their employer. *See Figas*, 628 S.W2d at 732 (claimant not eligible for Trade Act benefits where he last performed services for employer before effective date of Act, despite his receipt of accrued vacation pay beyond that impact date). If such continued obligations of an employer were to be considered to govern the “date of separation” – despite the apparently clear meaning of the phrase “last day worked” – that would undercut the purpose of the one-year rule by diminishing the incentive to Trade Act claimants to act quickly to take advantage of the support services it provides.

Evolution of Regulation. A review of the evolution of the regulatory definition of “date of separation” is also useful in determining the meaning of that term. Before

1987 “date of separation” was defined in 29 C.F.R. § 91.3(a)(13) (1986) to mean “the date on which the individual was laid off or otherwise totally separated from employment.” Based on this definition, the decisive consideration used by one court in determining “date of separation” was an assessment of when all connections of the employment relationship between a Trade Act claimant and his or her employer ended. *Talberg v. Comm’r of Econ. Sec.*, 370 N.W.2d 686, 690-91 (Minn. App. 1985) (court looked at the general employment relationship and, finding that receipt of vacation pay by a laid off worker extended that relationship, held that “date of separation” was the date the receipt of vacation pay ended). *But see Figas*, 628 S.W.2d at 732 (claimant not eligible for Trade Act benefits where his only connection to employer after impact date was receipt of accrued vacation pay).

But in 1983, USDOL issued proposed amendments to its regulations to implement Trade Act amendments enacted in 1981 in Pub. L. No. 97-35. 48 Fed. Reg. 9444 (1983). In commentary to the proposed regulatory amendments, USDOL emphasized that the 1981 statutory amendments changed the Trade Act program to “strengthen the emphasis of getting workers [adversely affected by foreign trade] reemployed as soon as possible.” *Id.* Among the proposed amendments was the change in the definition of “date of separation” from its then reliance on a total separation from employment to the current definition based on “last day worked.” *Id.* at 9448. The new definition of “date of separation,” which continues without change to the present, became final, with an effective date of January 21, 1987. 51 Fed. Reg. 45840, 45849 (1986) (as amended, the new definition was placed at 20 CFR § 617.3(l)(1), where it remains today).

This current definition of “date of separation” as “last day worked” is more definite than its previous definition as “the date on which the individual was . . . totally separated from employment” and has a plainer connection to the last day an employee actively provided services to the employer. This is particularly so considering USDOL’s emphasis at the time of the proposed amendment on getting workers adversely affected by trade back to work as soon as possible. Interpreting “last day worked” as extending to the last connection of any kind between a TRA claimant and the employer would result in the new regulatory definition having no actual difference in meaning than the earlier version (at least as interpreted by *Talberg*) despite the changed language and would undercut the Trade Act’s goal of getting workers adversely affected by trade to seek the assistance provided by the Act right away.

Structure of Regulation. Ms. Billings and Mr. Morrison would interpret “last day worked” to mean the last day in which any remaining employment connection between the employer and its employees continued, regardless of whether the employee is providing any active services. They urge that their employment connection extended past their last active day of work to the date their terminal pay ended, which, they say, also ended their continuing duties to be on call and to be subject to company rules not to compete and not to disparage the company.

Not only is this interpretation inconsistent with the evolution of the regulation defining “date of separation” just discussed, but it is also inconsistent with the current structure of that definition. As noted earlier, the federal regulatory definition of “date of separation” is divided into two parts – one for persons in “employment status” and one

for persons on “employer-authorized leave.” 20 C.F.R. § 617.3(l)(1).

If “employment status” includes the receipt of any continuing payments from the employer, including, for example, vacation pay, sick pay, or the terminal pay that was received here, or being subject to non-active duties such as being on call, not competing, and not disparaging the company, then “employment status” would encompass times when an employee is on leave.

But the second part of the “date of separation” definition regarding employees on “employer authorized leave” (§ 617.3(l)(1)(ii)) already specifically covers employment leave situations. Under Ms. Billings and Mr. Morrison’s interpretation, all “employer authorized leave” situations would be subsumed within “employment status” as used in the first part of the definition of “date of separation” (§ 617.3(l)(1)(i)) and the second part of the definition regarding leave (§ 617.3(l)(1)(ii)) would be redundant.

A regulation should not be interpreted in such a way as to render a part of the regulation redundant. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 823 (8th Cir. 2009). *See also State ex rel. Evans v. Brown Builders Elec. Co., Inc.*, 254 S.W.3d 31, 35 (Mo. banc 2008) (“same rules of construction are used to interpret regulations as are used to interpret statutes”); *Turner v. State*, 245 S.W.3d 826, 828 (Mo. banc 2008) (it is presumed that statutes do not contain idle verbiage or superfluous language). Because it is presumed that regulations do not contain unnecessary provisions, the first part of the definition of “date of separation” should not be considered to cover leave situations as Ms. Billings and Mr. Morrison suggest. Thus, the “last day worked” as used in § 617.3(l)(1)(i) should not be interpreted to include any days past the day that an

employee engages in active services to the employer.

Application – “Last Day Worked”. The natural meaning of the words “last day worked” themselves, the purpose behind the Trade Act and the one-year rule, the development of the federal definition of “date of separation,” and the structure of that definition all directly point to the conclusion that the term “last day worked” should be interpreted to mean the last day that a TRA claimant actively provided services for the employer. Considering these multiple bases supporting this interpretation, Ms. Billings and Mr. Morrison’s reliance on the federal regulation directing that the Trade Act and the implementing regulations be “construed liberally” – 20 C.F.R. § 617.52(a) – is unavailing. *See State v. Myers*, 248 S.W.3d 19, 27 (Mo. App. E.D. 2008) (even when liberal construction is applied, courts are not required “to dispense with common sense or disregard an evident statutory purpose”); *Dunlop v. Ashy*, 555 F.2d 1228, 1234 (5th Cir. 1977) (even when a statute is to be liberally construed, it must still be applied “with reason and in a common sense fashion”).

In fact, 20 C.F.R. § 617.52(a) itself provides, in full, that:

The Act and the implementing regulations in this Part 617 shall be construed liberally *so as to carry out the purposes of the Act*.

(Emphasis added.) As noted above, the purpose of the Trade Act, as demonstrated by its one-year rule, is to provide reemployment services and other benefits to workers promptly after they lose their jobs. *Lloyd*, 637 F.2d at 1270. *See also Nelson v. U.S. Secretary of Labor*, 936 F. Supp. 1026, 1029-32 (Ct. Int’l Trade 1996) (relying on Trade Act’s history and purpose in ruling that one-year rule bars Act’s application where only

one of the three petitioners has been separated from work for less than one year). Extending “last day worked” out beyond the time that a worker stopped providing active services to the employer defeats this purpose. The interpretation urged by Ms. Billings and Mr. Morrison is also not consistent with the words, development, and structure of the regulatory definition of “date of separation.”

In this case, the last day Ms. Billings and Mr. Morrison actively engaged in services for their employer was July 3, 2008. Tr. 1/136-38, 2/284. In fact, the letters the employer provided to its employees on July 3 expressly informed them that, even though they would be paid for some additional time, “[y]our last day worked is today.” Tr. 2/355, 2/364. The impact date established in the Trade Act eligibility certification covering Ms. Billings and Mr. Morrison’s former employment was July 15, 2008. Tr. 4/658. Because Ms. Billings and Mr. Morrison’s last day worked occurred before the impact date applicable to them, neither Ms. Billings nor Mr. Morrison were eligible for TRA payments. 19 U.S.C. §§ 2273(b) and 2291(a)(1)(A).

This may be a harsh outcome that results simply from the particular timing of the filing of the petition for eligibility and the Trade Act’s one-year rule, but that timing was within the control of Ms. Billings, Mr. Morrison, their fellow employees, and their union. As noted above, the Trade Act became applicable to workers in service industries on May 18, 2009, ninety days after the President signed the American Recovery and Reinvestment Act. A petition for certification of Trade Act benefit eligibility relating to Ms. Billings and Mr. Morrison’s loss of employment in a service industry thus could have been filed as early as May 18, 2009, which followed three months notice of the

Trade Act's expansion to cover them. Therefore, there was about a month and a half to get a petition on file (along with another three months of preparation time) that would have permitted establishment of an impact date that would have reached back to cover Ms. Billings and Mr. Morrison's last day worked of July 3, 2008. As few as three individual workers may file a petition. 29 C.F.R. § 90.11(b). Any harshness of result here could have been avoided if Ms. Billings, Mr. Morrison, and one other fellow employee (or their union) had filed the petition earlier.

Besides, regardless of whether or not a petition could have been filed earlier, the denial of eligibility for Trade Act benefits here based on the conclusion that the "date of separation" is the last day a claimant actively worked with the employer is the outcome, harsh or not, that comports with the Congressional intent manifest from the Trade Act and the applicable regulations. The court in the *Lloyd* case was also faced with a challenge from Trade Act applicants that it was "unfair that they [were] denied adjustment assistance, while others similarly situated [were] eligible, merely because they were laid off before [the date one year prior to the date of their petition]." 637 F.2d at 1270. The court, however, was constrained by the plain language establishing the one-year rule and by the refusal of Congress on two separate occasions to alter that rule (despite considering its potentially harsh effects) to affirm the denial of Trade Act benefits. *Id.* at 1270-71. *See also Former Employees of Westmoreland Mfg. Co. v. U.S.*, 650 F. Supp. 1021, 1025-26 (Ct. Int'l Trade 1986) (one-year rule applies despite failure of USDOL to notify affected workers of Trade Act benefits) (superseded by statute as related to oil workers on a one-time and temporary basis as stated in *Former Employees*

of *NL Indus., Inc. v. U.S. Dep't of Labor*, 715 F. Supp. 1110 (Ct. Int'l Trade 1989)). As the court concluded in *Lloyd*:

Petitioners present a sympathetic argument. But in view of the congressional purpose and history of this provision and its proposed amendments, we must apply the one-year rule as it was enacted. Efforts to ameliorate the rule should be directed to Congress.

637 F.2d at 1271. See also *Westmoreland Mfg. Co.*, 650 F. Supp. at 1026 (“although plaintiffs present a sympathetic argument, the one-year rule must continue to be interpreted rigidly, and cannot be waived for equitable reasons”).

Similarly, in this case, the meaning of the term “last day worked” cannot reasonably be interpreted as Ms. Billings and Mr. Morrison urge. The harsh result is dictated by the language of the statute and its implementing regulations.

B. TRADE ACT CLAIMANTS NOT ELIGIBLE FOR BENEFITS AFTER JOB ELIMINATION UNDER “EMPLOYER AUTHORIZED LEAVE” PROVISION DESPITE RECEIVING CONTRACTUAL TERMINAL PAY FOR A TIME AFTER JOB LOSS

Claimants Not on “Employer Authorized Leave”. Ms. Billings and Mr. Morrison argue alternatively that the second portion of the regulatory definition of “date of separation” applies to bring their date of separation past the impact date established in the Trade Act certification applicable to them. They contend that their time off while receiving contractual terminal pay constitutes “employer authorized leave.” Under 20 C.F.R. § 617.3(l)(1)(ii), the “date of separation for employees on employer authorized

leave is “the last day the individual would have worked had the individual been working[.]”

The period of time that Ms. Billings and Mr. Morrison received terminal pay, however, was not “employer authorized leave.” The only use of the term “employer authorized leave” in the Trade Act is in 19 U.S.C. § 2291(a)(2)(A), which speaks of “employer authorized leave for purposes of vacation, sickness, injury, maternity, or inactive duty or active duty military service for training[.]” There is a comparable use of the term in the regulations at 20 C.F.R. § 617.11(a)(2)(iii)(B)(1)(i).

Each of these examples of leave is of an instance in which it would be generally expected that the employee will be returning to work. These defining examples do not include a period of time, such as the period here during which Ms. Billings and Mr. Morrison received terminal pay, in which the expectation is exactly the opposite – next to no likelihood of a return to work.

Because the period during which Ms. Billings and Mr. Morrison received terminal pay does not fall within the defining examples of “employer authorized leave”, that term cannot reasonably be interpreted to include the terminal pay period. *See Harrison v. MFA Mut. Ins. Co.*, 607 S.W.2d 137, 146 (Mo. banc 1980) (a rule of statutory construction is that the express mention of one thing implies the exclusion of another); *Watt v. GMAC Mortg. Corp.*, 457 F.3d 781, 783 (8th Cir. 2006) (same).

Claimants Not Eligible for Benefits Even If “Employer Authorized Leave”

Provision Applied. Moreover, even if the terminal pay period were to be interpreted as being “employer authorized leave”, 20 C.F.R. § 617.3(l)(1)(ii), as noted above, states that

the “date of separation” is “the last day the [claimant] would have worked[.]” The last day Ms. Billings and Mr. Morrison “would have worked” would still have been July 3, 2008, because the employer had no work for them after that date.⁹

Because the last day Ms. Billings and Mr. Morrison “would have worked” was July 3, 2008, their date of separation occurred before the July 15, 2008 impact date of the Trade Act certification covering their employer. For that reason, even if they were considered to be on “employer authorized leave” while receiving their terminal pay, they would still be ineligible for TRA payments.

C. EQUITABLE TOLLING NOT APPLICABLE

Ms. Billings and Mr. Morrison do not argue that equitable tolling should be

⁹ Even if the analysis set out in *Santo v. Unempl. Comp. Bd. of Review*, 568 A.2d 291, 292-93 (Pa. Commw. Ct. 1989), were a valid application of the Trade Act and its implementing regulations, the case is still inapplicable here. In *Santo*, the employer had a policy that it would impose layoffs only at the end of a scheduled work week. Because the employer’s layoffs were not imposed until a Sunday, the previous Saturday was viewed as a scheduled day off before the layoff. The court determined such normally unworked Saturdays to be “employer authorized leave” occurring before the layoff. Treating a normal day off occurring immediately before a layoff as “employer authorized leave” is not at all comparable to providing such treatment to an extended period of two weeks or more during which employees receive contractual terminal pay instead of working their normal schedule.

applied in this case, and they would have no basis for doing so. They do mention equitable tolling in passing, along with equitable estoppel, at pages 19-20 of their Brief, when describing cases that have relied on the regulation requiring that the Trade Act be liberally construed. But they do not invoke equitable tolling as applicable to themselves.

Equitable tolling is to be applied only sparingly. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14 (2002). Equitable tolling can apply to application of the Trade Act's one-year rule, but such tolling of a statutory deadline is typically extended where a claimant has actively pursued a claim by filing a defective application within the statutory period or the claimant has been misled into allowing the deadline to pass. *Former Employees of Fisher & Co. v. U.S. Dep't of Labor*, 507 F. Supp. 2d 1321, 1328 (Ct. Int'l Trade 2007). There is no argument or evidence in this case that a defective petition applicable to Ms. Billings or Mr. Morrison was filed at a time that would have permitted establishment of an impact date earlier than the one that was established.¹⁰ There is also no argument or evidence here that anyone misled Ms. Billings or Mr. Morrison as to deadlines applicable to petitions for Trade Act benefits.¹¹

¹⁰ An earlier petition was filed, but there is no argument that it was defective. Rather, the earlier petition was filed in 2008, before the Trade Act became applicable to workers providing services (as discussed above). Tr. 1/47.

¹¹ Although Ms. Billings testified that she received conflicting information from Career Centers (Tr. 1/142), she also admits that she was told it was the date she last

A failure to provide notice to an individual of the availability of benefits when there is a statutory requirement that the individual receive such notice has also been held to justify application of equitable tolling. *Williams v. Board of Review*, 948 N.E.2d 561, 572-574 (Ill. 2011); *Truong v. U.S. Secretary of Agriculture*, 461 F. Supp. 2d 1349, 1353-54 (Ct. Int'l Trade 2006). States do have a statutory obligation to advise applicants for unemployment compensation benefits of Trade Act benefits and the procedures and deadlines for applying for such benefits. 19 U.S.C. § 2311(g)(1). But Ms. Billings and Mr. Morrison provided no evidence themselves (Tr. 1/135-43; 2/283-89), and point to no other such evidence, that the state failed to provide them with the required notice.

Additionally, “federal courts generally do not permit late filings where the claimant has failed to exercise due diligence in preserving his or her legal rights.” *Former Employees of Fisher & Co.*, 507 F. Supp. 2d at 1328. As discussed above, the Trade Act began to cover workers in service industries on May 18, 2008. As service providers who lost their jobs through foreign competition, Ms. Billings and Mr. Morrison, along with one other fellow employee (or their union) had about a month and a half (following a previous ninety days between the signing of the new law and its effective date) to file Trade Act eligibility petition that could have reached back to cover their last day worked of July 3, 2008. Because there was an ample opportunity to file a

physically worked for her employer, not her last date on the payroll, that was to be used for her unemployment claims (Tr. 1/141).

Trade Act petition that could have covered Ms. Billings and Mr. Morrison, equitable tolling is inapplicable here.

Finally, Ms. Billings and Mr. Morrison do not include any contention regarding equitable tolling in their Point Relied On, which would be necessary for this Court to reach that issue. *Adams*, 353 S.W.3d at 673 n.6.

CONCLUSION

The Commission's decision should be affirmed because it properly interpreted the law and applied the facts to the law. Ms. Billings and Mr. Morrison's separation date was July 3, 2008, because, as the last day they actively performed services for their employer, this was their last day worked. This separation date is before the impact date of July 15, 2008 (which was set at the earliest date allowed under the Trade Act). Because the last day that Ms. Billings and Mr. Morrison worked was more than one year before the impact date, they are not eligible for Trade Act benefits.

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND OF
COMPLIANCE WITH RULE 84.06(b) AND (c)**

I hereby certify that a true and correct copy of the foregoing brief was served electronically, this 26th day of November, 2012, to:

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I also certify that this brief complies with the limitations contained in Rule 84.06(b), in that the brief contains 8311 words, excluding the cover, signature block, this certificate, and appendix.

I also certify that this brief complies with Rule 55.03.

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