

COMMENTS

VETERANS' REEMPLOYMENT RIGHTS: SEVERANCE PAY

Palmarozzo v. Coca-Cola Bottling Co.,

490 F.2d 586 (2d Cir. 1973)

Plaintiff was employed by defendant over a five-year period, during which he spent four and one-half years on the job and an intervening six months in military service.¹ Plaintiff thereafter voluntarily left the company. Although defendant's employees who accumulated five or more years of service credits qualified for severance pay, plaintiff was denied severance pay because he had not received one-half year's service credits for his military time.² Plaintiff sued to collect severance pay, charging a violation of his right as a veteran to be restored to employment with no loss of seniority under sections 459(b)(B) and (c) of the Military Selective Service Act of 1967.³ The federal district

1. Plaintiff worked from June 4, 1962, until September 21, 1962. He satisfactorily completed military service on March 11, 1963. Restored to his position on March 23, 1963, he worked until June 22, 1967. *Palmarozzo v. Coca-Cola Bottling Co.*, 69 CCH Lab. Cas. 25,492, 25,493 (S.D.N.Y. 1972).

2. A collective bargaining agreement between plaintiff's union and defendant provided that defendant contribute 20 cents to the union's retirement fund for each hour worked by covered employees, up to 40 hours per week. The agreement made no provision for severance pay; rather, this benefit was provided in accordance with fund rules. Severance pay was distributed from the fund to employees terminating employment after accumulating five service credits. An employee received one-quarter service credit for each 400 "hours actually worked," or one credit per year maximum. The fund trustees apparently based service credit determinations on the number of hours for which defendant contributed to the fund. *Id.* at 25,493-94. Although the appellate court stated that plaintiff was denied severance pay because defendant refused to include his military time in its calculation of service credits, *see Palmarozzo v. Coca-Cola Bottling Co.*, 490 F.2d 586, 587 (2d Cir. 1973), more accurately severance pay was denied because defendant refused to contribute to the fund during plaintiff's military absence.

3. Military Selective Service Act of 1967 § 9, 50 U.S.C. App. § 459 (1970), *formerly* Selective Training and Service Act of 1940 § 8, ch. 720, § 8, 54 Stat. 890 [hereinafter cited as Act], provides in relevant part:

(b) Reemployment rights.

In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

court granted summary judgment for plaintiff.⁴ The Second Circuit Court of Appeals affirmed and *held*: Employees are entitled to inclusion of military time for purposes of service credit computation because severance pay that accrues with length of service is a prerogative of seniority and is therefore protected by the Act.⁵

Reemployment provisions of the Act⁶ provide that a veteran who

. . . .
(B) If such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay;

. . . .
unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

. . . .
(c) Service considered as furlough or leave of absence.

(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

The court in *Palmarozzo* referred to the Act by its former name, Universal Military Training and Service Act, which had been substituted in 1951 for the still older name, Selective Service Act of 1948. Act of June 19, 1951, ch. 144, § 1(a), 65 Stat. 75, amending Act of June 24, 1948, ch. 625, § 1(a), 62 Stat. 604.

4. *Palmarozzo v. Coca-Cola Bottling Co.*, 69 CCH Lab. Cas. 25,492, 25,495 (S.D.N.Y. 1972). The district court concluded that, theoretically, defendant should have contributed to the fund "for such number of hours in the period of [plaintiff's] military service as would enable him to accumulate the same Service Credits under the Rules as he would have accumulated had he remained continuously in the employ of Cola." *Id.* The court nevertheless gave judgment against defendant for the entire amount of severance pay as damages. Since the fund's trustees were not parties, the court had no way to compel them to pay if the judgment merely required Cola to contribute. This result is justifiable not only as "damages," but also because, under the fund's rules, any hiatus in employment greater than two years operated to cancel all accrued service credits. *Id.* at 25,494. More than two years had elapsed between plaintiff's departure and the award of judgment.

5. *Palmarozzo v. Coca-Cola Bottling Co.*, 490 F.2d 586 (2d Cir. 1973), *cert. denied*, 94 S. Ct. 3083 (1974). The opinion of the court of appeals contains no reference to the form in which the district court's remedy was framed. *See* note 4 *supra*. *But see* 490 F.2d at 594 n.1 (Friendly, J., dissenting).

6. From the Revolutionary War until World War I, veterans' benefits usually took the form of land grants. *See generally* PRESIDENT'S COMMISSION ON VETERANS' PENSIONS, VETERANS' BENEFITS IN THE UNITED STATES 37 (1956); Comment, *Veterans' Re-employment Rights under Selective Service Interpretations*, 54 YALE L.J. 417 (1945).

leaves civilian employment for military service shall be restored to his civilian employment in the same position or to one of "like seniority, status, and pay."⁷ The employer must restore the veteran "without loss of seniority;"⁸ and, in accordance with the employer's established rules and practices relating to employees on furlough or leave of absence, the veteran is entitled to "insurance or other benefits" as if he had been on employer-sanctioned leave rather than in military service.⁹

Although the language of the Act and its legislative history¹⁰ make clear the intention of Congress that the veteran should be restored to his civilian employment, substantial litigation¹¹ has arisen from Congress' lack of specificity about the veteran's status once his job has been restored.¹² The phrase "without loss of seniority" was partly explained by the Supreme Court when it held, in a rule subsequently tagged the "escalator principle," that the restored veteran not only retains his premilitary seniority, but also accumulates seniority while in military service.¹³ Seniority is meaningful, however, only to the extent

7. Act § 459(b)(B)(i), 50 U.S.C. App. § 459(b)(B)(i) (1970).

8. *Id.* § 459(c)(1), 50 U.S.C. App. § 459(c)(1) (1970).

9. *Id.* The Act generally applies equally to enlistees and inductees, with certain distinctions not here relevant. See *id.* § 459(g), 50 U.S.C. App. § 459(g) (1970).

10. See Haggard, *Veterans' Reemployment Rights and the "Escalator Principle"*, 51 B.U.L. Rev. 539, 540 (1971); Comment, *supra* note 6, at 417-20.

11. See note 14 *infra*.

12. It seems clear that some imprecision is essential in order that the statute be sufficiently flexible to apply to the myriad forms of collective bargaining agreements. But see Haggard, *supra* note 10, at 583. Congress did not intend to create a system of seniority, recognizing that seniority operates as a purely contractual function of collective bargaining and receives both scope and significance from union contracts or from established rules and practices of the employer. *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 526 (1949). But cf. *Blair v. Page Aircraft Maint., Inc.*, 336 F. Supp. 1011 (M.D. Ala. 1971), *rev'd on other grounds*, 467 F.2d 815 (5th Cir. 1972).

13. In *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946), the Court said:

[The veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.

The escalator principle was first incorporated in the Selective Service Act of 1948 § 9(c)(2), ch. 625, § 9(c)(2), 62 Stat. 615 (codified at 50 U.S.C. App. § 459(c)(2) (1970)):

It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

that it qualifies an employee to receive benefits or privileges. Since "seniority" and its perquisite benefits are nowhere defined in the Act, it has fallen upon the courts to delimit the benefits and privileges to which the veteran is entitled by virtue of his escalator accumulation of seniority.

There are wide variations in the use of the seniority concept in collective bargaining agreements and in the benefits which flow from it; consequently, the courts have been unable to settle on a definition of seniority.¹⁴ Instead, for purposes of applying the escalator principle,

14. Some benefits, such as order of layoff and recall and the right to bid on a job vacancy, are traditional prerogatives of seniority to which the escalator principle clearly applies. *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521 (1948); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946). Other examples include right to better job classification, right to better working hours, right of access to examinations, and wage rates within a job classification. See generally UNITED STATES DEP'T OF LABOR, LEGAL GUIDE AND CASE DIGEST, VETERANS' REEMPLOYMENT RIGHTS (1964); M. WORTMAN & G. WITTERFELD, LABOR RELATIONS AND COLLECTIVE BARGAINING (1969); Haggard, *supra* note 10; Note, *Veterans' Re-employment Rights Under the Universal Military Training and Service Act—Seniority Provisions*, 1 GA. L. REV. 293 (1967); Comment, *supra* note 6. The question whether the escalator principle applies to other benefits, such as a right to promotion or paid vacation, has been answered differently in different cases. For examples of cases considering various benefits, see:

Promotion: *Brooks v. Missouri Pac. R.R.*, 376 U.S. 182 (1964) (yes); *Tilton v. Missouri Pac. R.R.*, 376 U.S. 169 (1964) (yes); *McKinney v. Missouri-K.-T.R.R.*, 357 U.S. 265 (1958) (no); *Diehl v. Lehigh Valley R.R.*, 348 U.S. 960 (1955) (yes); *Wood v. Southern Pac. Co.*, 447 F.2d 486 (9th Cir. 1971) (yes); *Wienberg v. United States*, 425 F.2d 1244 (Ct. Cl. 1970) (no).

Paid vacation: *Eagar v. Magma Copper Co.*, 389 U.S. 323 (1967) (yes); *Kasmeier v. Chicago R.I. & Pac. R.R.*, 437 F.2d 151 (10th Cir. 1971) (no); *Morton v. Gulf, M. & O.R.R.*, 405 F.2d 415 (8th Cir. 1969) (yes); *Dugger v. Missouri Pac. R.R.*, 403 F.2d 719 (5th Cir. 1968), *cert. denied*, 395 U.S. 907 (1969) (no); *Mentzel v. Diamond*, 167 F.2d 299 (3d Cir. 1948) (yes); *Fees v. Bethlehem Steel Corp.*, 335 F. Supp. 487 (W.D. Pa. 1971) (no).

Severance pay: *Accardi v. Pennsylvania R.R.*, 383 U.S. 225 (1966) (yes); *Seattle Star, Inc. v. Randolph*, 168 F.2d 274 (9th Cir. 1948) (no); *Taylor v. Southern Pac. Co.*, 308 F. Supp. 606 (N.D. Cal. 1969) (yes).

Wage rate: *Borges v. Art Steel Co.*, 246 F.2d 735 (2d Cir. 1957) (yes); *Moe v. Eastern Air Lines, Inc.*, 246 F.2d 215 (5th Cir. 1957) (yes); *Blair v. Page Aircraft Maint., Inc.*, 336 F. Supp. 1011 (M.D. Ala. 1971), *rev'd on other grounds*, 467 F.2d 815 (5th Cir. 1972) (yes).

Miscellaneous: *Hoffman v. Bethlehem Steel Corp.*, 477 F.2d 860 (3d Cir. 1973) (unemployment benefits) (yes); *Harvey v. Braniff Int'l Airways, Inc.*, 164 F.2d 521 (5th Cir. 1947) (qualifying exam and promotion) (no); *Gentile v. United States Trucking Corp.*, 355 F. Supp. 960 (S.D.N.Y. 1973) (general welfare benefit) (no); *Litwicki v. PPG Indus., Inc.*, 84 L.R.R.M. 2538 (W.D. Pa. 1973) (pension) (yes); *Bradley v. General Motors Corp.*, 283 F. Supp. 481 (E.D. Mo. 1968) (absence credits) (no); *Simons v. Chicago G.W. Ry.*, 262 F. Supp. 334 (N.D. Iowa 1966) (seniority per se) (no); *Hire*

the courts have attempted to define seniority functionally by distinguishing between benefits which are prerequisites of seniority and those which are not. Thus, according to the judicial doctrine of automatic right, a seniority benefit is one which accrues automatically to an employee merely because he is continuously employed. A veteran who would automatically have qualified for such a benefit but for his time in military service is entitled to the benefit on his return because of the escalator principle.¹⁵

In practice, this doctrine was given increasingly liberal interpretation,¹⁶ and employers frequently rejoined in court by relying on other

v. E.I. DuPont DeNemours & Co., 211 F. Supp. 164 (M.D. Tenn. 1962), *rev'd on other grounds*, 324 F.2d 546 (6th Cir. 1963) (layoff benefit) (yes).

15. Although applied in cases of all kinds, the automatic-right doctrine developed primarily from a line of promotion benefit decisions. *See, e.g.*, *Altgens v. Associated Press*, 188 F.2d 727 (5th Cir. 1951); *Nevins v. Curtiss-Wright Corp.*, 172 F.2d 535 (6th Cir. 1949); *Polansky v. Elastic Stop Nut Corp.*, 78 F. Supp. 74 (D.N.J. 1948). *See also* *Wood v. Southern Pac. Co.*, 447 F.2d 486 (9th Cir. 1971); *Wienberg v. United States*, 425 F.2d 1244 (Ct. Cl. 1970); *Hattan v. Tabard Press Corp.*, 406 F.2d 593 (2d Cir. 1969); *Power v. Northern Ill. Gas Co.*, 388 F.2d 427 (7th Cir. 1968). Haggard, *supra* note 10, at 549, concludes:

In this context the escalator principle soon came to stand for the proposition that upon the veteran's return from the military he is immediately entitled to the promotion he would have received if he had not been in the military if that promotion were solely a prerogative of seniority.

A typical statement of the rule may be found in *Hollman v. Pratt & Whitney Aircraft*, 435 F.2d 983, 989 (5th Cir. 1970) (vacation pay), as follows:

[T]he veteran's stake in [seniority benefits] must be protected if they would automatically accrue to him but for induction.

See also Comment, *Seniority Rights of Reemployed Veterans*, 1969 LAW & Soc. O. 445; Note, *supra* note 14.

But if qualification for the particular benefit depends on something more than continuous employment, *e.g.*, increased proficiency, experience, managerial discretion, the benefit is not automatic and not a prerequisite of seniority, nor is the returning veteran entitled to the benefit any more than an employee who had been on leave of absence. *See, e.g.*, *McKinney v. Missouri-K.-T.R.R.*, 357 U.S. 265 (1958); *Addison v. Tennessee Coal, Iron & R.R.*, 204 F.2d 340 (5th Cir. 1953); *Altgens v. Associated Press*, 188 F.2d 727 (5th Cir. 1951); *Rose v. Texas & N.O.R.R.*, 171 F.2d 458 (5th Cir. 1948); *Rauling v. Memphis Union Sta. Co.*, 168 F.2d 466 (6th Cir. 1948); *Spearmon v. Thompson*, 167 F.2d 626 (8th Cir.), *cert. denied*, 335 U.S. 822 (1948). A Fifth Circuit formulation is typical:

Where an employee has no fixed or absolute right to promotion and where his right to promotion depends upon qualifications over and above mere length of service, the employer has fully complied with the terms of the [Act] when he restores the veteran to the same position . . . which he held at the time of his induction into the service.

Harvey v. Braniff Int'l Airways, Inc., 164 F.2d 521, 522 (5th Cir. 1947).

16. Particularly as applied to promotion benefits, the automatic-right doctrine was given increasingly broad interpretation. This trend began essentially with the Supreme

language in the Act. Since the veteran was entitled to "insurance or other benefits" only if he would have been entitled to them under the collective bargaining agreement had he been on leave of absence rather than in the military,¹⁷ it was argued that these "other benefits" were not affected by the escalator principle. Judicial response to this reasoning often was resolution of questions of employer liability by mechanical classification of particular claimed fringe benefits into two categories: "seniority benefit," entitling the veteran to credit for military time, or "other benefit," not so entitling him.¹⁸ Under this second "functional"

Court's decision in *Diehl v. Lehigh Valley R.R.*, 348 U.S. 960, *rev'g per curiam* 211 F.2d 95 (3d Cir. 1954). See also *Oakley v. Louisville & N.R.R.*, 338 U.S. 278 (1949); Note, *Veterans' Reemployment Rights Re-examined*, 22 HASTINGS L.J. 375, 385 (1971). By 1964 the "rule" had become a flexible standard permitting a veteran to qualify for a benefit for which it was reasonably certain he would have qualified but for military service. In that year the Supreme Court, in *Tilton v. Missouri Pac. R.R.*, 376 U.S. 169, 180 (1964), said:

Properly read . . . McKinney [*see note 15 supra*] holds that where advancement depends on an employer's discretionary choice not exercised prior to entry into service, a returning veteran cannot show within the reasonable certainty required by the Act that he would have enjoyed advancement simply by virtue of continuing employment during the time he was in military service.

Thus in a case in which employer's discretionary review was limited to promotion or discharge for obvious incompetence—promotion and pay increases otherwise being based on "experience"—the court concluded that it was reasonably certain that plaintiff's advancement would have occurred and he was therefore entitled to his benefits under the Act. *Hatton v. Tabard Press Corp.*, 406 F.2d 593 (2d Cir. 1969). See also *Brooks v. Missouri Pac. R.R.*, 376 U.S. 182 (1964) (plaintiff's benefits under Act should not be adversely affected by possibility that forces of supply and demand would have prevented his automatic promotion); *Montgomery v. Southern Elec. Steel Co.*, 410 F.2d 611 (5th Cir. 1969); *Collins v. Weirton Steel Co.*, 398 F.2d 305 (4th Cir. 1968); *Power v. Northern Ill. Gas Co.*, 388 F.2d 427 (7th Cir. 1968); *In re Kaiser Aluminum & Chem. Corp.*, 46 Lab. Arb. 624 (1966) (Herbert, Arbitrator); Haggard, *supra* note 10, at 559-67.

17. Act § 459(c)(1), 50 U.S.C. App. § 459(c)(1) (1970).

18. In early cases all fringe benefits were held to fall distinctly into one or the other of these two categories. See, e.g., *Borges v. Art Steel Co.*, 246 F.2d 735 (2d Cir. 1957); *Alvado v. General Motors Corp.*, 229 F.2d 408 (2d Cir. 1955), *cert. denied*, 351 U.S. 983 (1956); *Dwyer v. Crosby Co.*, 167 F.2d 567 (2d Cir. 1948).

In *Siaskiewicz v. General Elec. Co.*, 166 F.2d 463, 465-66 (2d Cir. 1948), the court said:

Since vacation rights are not pay unless they are for work actually done, and since they are not merely a perquisite of seniority, they must fall under the heading of "other benefits."

Thus, under the language of the Act, plaintiff had to be treated as having been on furlough or leave of absence. In *Dwyer v. Crosby Co.*, *supra* at 570, Judge Learned Hand said:

[O]bviously the considerations which might make it proper that service in the

approach, the courts tended to construe "seniority benefits" narrowly and "other benefits" broadly,¹⁹ until this practice was curtailed when the Supreme Court shifted the analytical emphasis in *Accardi v. Pennsylvania Railroad*.²⁰

In *Accardi* the Supreme Court reiterated and seemingly confirmed the automatic-right doctrine.²¹ "Seniority" should be given a liberal construction,²² the Court said, and the "other benefits" clause was intended to increase the veteran's protection rather than diminish it.²³

Army should not affect a man's seniority are utterly different from those which should count in computing vacations.

A further example of the conclusion usually reached under this approach may be found in *Magma Copper Co. v. Eagar*, 380 F.2d 318, 320-21 (9th Cir.), *rev'd per curiam*, 389 U.S. 323 (1967).

A consideration threading all the cases is the uneasy distinction between fringe benefits and pay in the sense of a wage rate directly linked to work performed. Resulting confusion can be seen in the quotation from *Siaskiewicz*, where the court seems to be suggesting three categories, compensation or pay, seniority benefits, and other benefits. *See, e.g.*, *Borges v. Art Steel Co.*, 246 F.2d 735, 738 (2d Cir. 1957) (court spoke explicitly of three categories; "insurance and other benefits" construed to "cover a fairly narrow group of economic advantages" whose common quality is that they are miscellaneous fringe benefits not usually regarded as part of pay, status, or seniority). It is true in a sense that three categories exist, but it is not a very subtle distinction for it is clear that Congress never intended that the veteran receive hourly work compensation, for example, during his military tour of duty. *See* text accompanying notes 23-24 *infra* (discussion of work requirements); note 26 *infra* (same).

19. *See, e.g.*, cases cited note 18 *supra*; Haggard, *supra* note 10, at 569.

20. 383 U.S. 225 (1966).

21. *Id.* at 229-30:

[The intention of the 1940 Act] was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country.

22. *Id.* at 229:

[That] "seniority" is nowhere defined in the Act . . . does not mean . . . that employers and unions are empowered by the use of transparent labels and definitions to deprive a veteran of substantial rights guaranteed by the Act. . . . The term "seniority" is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act.

See O'Haver, Vacation Rights for Returning Veterans: Should Work Requirements Be Waived?, 24 LAB. L.J. 259, 262 (1973); *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 123, 142 (1966); Note, *supra* note 16, at 385.

23. 383 U.S. at 232:

[The "other benefits" language in § 459(c)] was intended to add certain protections to the veteran and not to take away those which are granted him by [§ 459(b)(B)] and the other clauses of [§ 459(c)].

But cf. *Eagar v. Magma Copper Co.*, 389 U.S. 323, 325-26 (1967) (Douglas, J., dissenting).

But more importantly, the Court emphasized analysis of the "real nature" of the benefit. The employer had argued that qualification for severance pay was conditioned on actual work performed and that this work requirement made the benefit's genuine character that of deferred compensation, and not a seniority prerogative. The Court disagreed. The severance payments in issue were "based primarily on the employees' length of service" and the purported work requirement was merely a sham to camouflage the automatic character of the benefit.²⁴ The "real nature" of severance payments that were "based primarily on . . . length of service" was compensation, not for work done in the past, but rather for rights and benefits forfeited by giving up a job. Because these rights and benefits, which increase in proportion to seniority, were protected by the Act, severance pay that was compensation for their loss also must be protected; otherwise, veterans would be given "seniority in some general abstract sense," but would be denied the "perquisites and benefits that flow from it."²⁵ *Accardi* has settled very little. Since the Court held that a sham work requirement could not be used to cover up automatic accrual of a seniority benefit, many lower courts have inferred by negative implication that a *true* work requirement—the legitimacy of which must be determined on a case-by-case basis—would operate to transfer a benefit out of the class of seniority benefits.²⁶

24. According to the collective bargaining agreement, severance pay was computed based on the number of years of "compensated service" with the company. A "year" was defined as at least seven months in each of which the employee had worked at least one day. 383 U.S. at 227-28, 230. Though nominally a work requirement, it was theoretically possible to qualify by working only seven days during the year. Calling this a "bizarre result," the Court concluded that the work requirement was fictional and held that the severance allowance was a seniority perquisite protected by the Act. *Id.* at 230-31.

25. *Id.* at 230-31.

26. That is when the benefit actually represents compensation for work done pursuant to a contractual requirement, it is no longer a perquisite of seniority. Thus, in *Palmarozzo v. Coca-Cola Bottling Co.*, 490 F.2d 586, 590 n.3 (2d Cir. 1973), the court said:

Accardi demands that courts look through "false labels" . . . and determine if the benefits primarily relate to length of service.

See, e.g., Locaynia v. American Airlines, Inc., 457 F.2d 1253 (9th Cir.), *cert. denied*, 409 U.S. 982 (1972); *Kasmeier v. Chicago, R.I. & Pac. R.R.*, 437 F.2d 151 (10th Cir. 1971) (work requirement is not mere facade but legitimate, uniformly applied condition precedent to vacation benefits when contract required that employee have rendered 110 days compensated service in previous year to qualify for vacation benefit); *Tuttle v. U.S. Plywood Corp.*, 293 F. Supp. 401, 403 (D. Ore. 1968) ("In this case, unlike *Accardi*, the collective bargaining agreements contain bona fide work conditions"); *Bradley v.*

In *Palmarozzo*, defendant argued that *Accardi* required the court to investigate the bona fides of the purported work requirement.²⁷ The

General Motors Corp., 283 F. Supp. 481 (E.D. Mo. 1968) (paid vacation benefit goes to those who have earned it by working specified number of pay periods during eligible year). See also O'Haver, *supra* note 22, at 265 (footnote omitted):

The Labor Department reports that *Locaynia* is being interpreted to mean that a veteran is entitled to a full vacation, even in the year of his return, unless there is a direct relationship . . . between the amount of time worked and the amount of vacation.

O'Haver argues that, in the paid vacation benefits context, a true work requirement properly takes the benefit out of the seniority category because the veteran not only has failed to earn the benefit, but also has received paid vacation while in military service. *Id.* at 266. The implication is, of course, that if paid vacation is a seniority prerequisite, the veterans will have received two paid vacations for only one labor.

Most courts state, or at least imply, that a purported seniority benefit which fails the work requirements test must be considered an "other benefit." See, e.g., *Eagar v. Magma Copper Co.*, 389 U.S. 323, 325 (1967) (dissenting opinion); *Kasmeier v. Chicago, R.I. & Pac. R.R.*, 437 F.2d 151 (10th Cir. 1971); *Young v. Southern Pac. Co.*, 84 L.R.R.M. 2546 (C.D. Cal. 1973); *Fees v. Bethlehem Steel Corp.*, 335 F. Supp. 487 (W.D. Pa. 1971); *Connett v. Automatic Elec. Co.*, 323 F. Supp. 1373 (N.D. Ill. 1971); *Tuttle v. U.S. Plywood Corp.*, 293 F. Supp. 401 (D. Ore. 1968); *Bradley v. General Motors Corp.*, 283 F. Supp. 481 (E.D. Mo. 1968); cf. *Hoffman v. Bethlehem Steel Corp.*, 477 F.2d 860 (3d Cir. 1973); *Dugger v. Missouri Pac. R.R.*, 403 F.2d 719 (5th Cir. 1968), cert. denied, 395 U.S. 907 (1969). See also *Dougherty v. General Motors Corp.*, 176 F.2d 561 (3d Cir. 1949), cert. denied, 338 U.S. 956 (1950); *Siaskiewicz v. General Elec. Co.*, 166 F.2d 463 (2d Cir. 1948); *General Tire & Rubber Co. v. Rubber Workers Local 512*, 191 F. Supp. 911 (D.R.I.), aff'd per curiam, 294 F.2d 957 (1st Cir. 1961); Note, *Reemployment Rights: The Veteran and the Vacation Benefit*, 53 B.U.L. REV. 480 (1973). Characterization as an "other benefit," however, is tantamount to denial of the benefit because if the right to a benefit is conditioned upon an actual work requirement, an employee on furlough would also not meet the condition. (The exception occurs if the collective bargaining agreement waives the requirement for furloughed employees.) The courts seem uncertain how to characterize a benefit determined not to be a seniority prerequisite, but continued classification as "other" in order to deny relief is anomalous after *Accardi*. See *Palmarozzo v. Coca-Cola Bottling Co.*, *supra* at 593; text accompanying note 23 *supra*. But see *Palmarozzo v. Coca-Cola Bottling Co.*, *supra* at 593 (dissent). The confusion seems to arise from the obligation apparently felt by many courts to pigeonhole all "benefits" into one or the other of the two fringe benefit categories. It is submitted that if a purported benefit is (a) conditioned on a true work requirement (or conversely, by the "old" test, is nonautomatic), and (b) not one of the "fairly narrow group of economic advantages" to which furloughed employees would be entitled, see *Borges v. Art Steel Co.*, 246 F.2d 735, 738 (2d Cir. 1957), then clarity would be promoted simply by recognizing that the benefit is not a fringe benefit at all; it is merely compensation for increments of work accomplished.

27. See note 2 *supra*. Defendant alleged that the severance benefit, rather than flowing automatically from length of continuous service, was proportionate to hours actually worked and that the requirement was not a sham, but rather produced benefits in the nature of deferred compensation. Defendant invited the court to distinguish *Accardi* on its facts on the ground that the "compensated service" plan there in issue bore no relation to the amount of time actually worked. Cf. *Haggard*, *supra* note 10, at 571:

court of appeals declined. To require such a case-by-case analysis of the relationship between benefits and hours worked would ultimately defeat the Act's usefulness because it would give veterans no firm assurance of protection by a specific plan in force, would cause confusion as to the degree of proportionality sufficient to make a plan compensatory rather than a seniority benefit, and would give employers and union bargainers the power to defeat the Act's purpose merely by changing the manner in which benefits are calculated.²⁸ The court further declined to limit *Accardi* to plans for severance pay bearing no, or only a "bizarre," relation to hours worked; to the contrary, the "bizarre results" of that case only served to illustrate that, no matter how calculated, the real nature²⁹ of severance payments that accrue with length of continuous employment was compensation for lost seniority rights and not for work done in the past.³⁰ Plaintiff's claimed severance

"This is the essence of the *Accardi* decision: to ignore technical, contractual limitations where a benefit is, de facto, a prerogative of seniority."

28. 490 F.2d at 591-92. There is no reason to believe that veterans could foresee whether their rights are based on seniority per se or upon a nominal work requirement plan, sham or real. Were the power delegated, employers and unions could easily and broadly redefine any seniority prerequisite to base it upon actual hours worked rather than seniority. See O'Haver, *supra* note 22, at 266:

Labor unions are frequently not interested in aggressively handling the grievance of a returning veteran, since too often, the veteran is bumping other union members who have been paying dues for the three or four years that the veteran has been on the active duty.

See also *Helton v. Mercury Freight Lines*, 444 F.2d 365 (5th Cir. 1971) (missed promotion case in which veteran's union opposed his reinstatement in a higher-paid position). *Helton* is cited in O'Haver, *supra* note 22, at 266 n.26.

29. 490 F.2d at 589 (analyzing *Accardi*):

[T]he "real nature" of severance benefits which accrue with years of service was not compensation no matter how the benefits were calculated, but rather was payment for loss of seniority rights acquired over years of employment.

See *The Supreme Court, 1965 Term, supra* note 22, at 149:

This emphasis on the "real nature" of the benefit suggests that determinations of what is included in "seniority" will be based on the degree to which the purpose of the benefit is normally thought to be compensation for length of service with the employer, regardless of the standard of measurement used in the individual case.

30. 490 F.2d at 589-90. See *Accardi v. Pennsylvania R.R.*, 383 U.S. 225, 230 (1966):

[T]he cost to an employee of losing his job is not measured by how much work he did in the past . . . but by the rights and benefits he forfeits by giving up his job. Among employees who worked at the same jobs in the same craft and class the number and value of the rights and benefits increase in proportion to the amount of seniority, and it is only natural that those with the most seniority should receive the highest allowances since they were giving up more rights and benefits than those with less seniority.

Although a work requirement could be justification for denying deferred compensation

benefit was produced by length of continuous service rather than by work actually performed,³¹ and his right to be credited with military time "expresse[d] the real nature of severance pay which is based essentially on employment for a particular period of time as *inherently* a part of seniority"³²

Judge Friendly filed a dissenting opinion in which he argued that *Accardi* and the work requirement doctrine mandated a different result in this case.³³ Contrary to the majority, he would find that a case-by-case determination of whether or not the benefit is based primarily on length of service is required by the Act as construed in *Accardi*.³⁴ In this case, severance payments were "gauged, albeit not with precise exactitude, by the amount of work done, not by length of service with the company," and the benefit thus was not a "manifestation of seniority" sufficient to bring it within the Act's protection.³⁵ The escalator principle is inapposite "when the employer or union in good faith conditions benefits on performance rather than mere tenure"³⁶ If the severance benefit was not a perquisite of seniority, it must have been an "other benefit," to which the parties agreed plaintiff was not entitled.³⁷

Judge Friendly's dissent regarding case-by-case analysis focuses attention on what may be an internal inconsistency at a crucial point in the majority's reasoning. Speaking for the majority, Judge Anderson

for work done in the past, paid vacation or profit-sharing benefits, for example, or for determining whether certain pension rights are seniority related, the *Palmarozzo* court thought severance pay distinguishable. 490 F.2d at 592-93. *But see* Litwicki v. PPG Indus., Inc., 84 L.R.R.M. 2538 (W.D. Pa. 1973) (vesting provision of pension plan deals with seniority perquisite).

31. 490 F.2d at 589. In a footnote, the court explained that even if case-by-case analysis were applied, defendant's plan "could not be considered a legitimate work requirement." The severance benefit was "based primarily on length of service" since employees received one credit for each year of continuous service, were denied credit for overtime or work in excess of 1600 hours per year, and accumulated increases in five year increments. *Id.* at 591 n.4.

32. *Id.* at 593 (emphasis added).

33. *Id.*

34. *Id.* at 594.

35. *Id.*

36. *Id.* at 596. Judge Friendly also pointed out the anomaly glossed over by the majority that the severance payments in this plan were made by the union. Calling the fund "wholly a union plan," Judge Friendly concluded that defendant should not be required to make payments into the fund for hours plaintiff did not work, nor should defendant make payments plaintiff claims are due out of the union's own fund. *Id.* at 594 n.1. *See* notes 2 & 4 *supra*. *But see* text accompanying note 28 *supra*.

37. 490 F.2d at 593. *See* note 26 *supra*.

eschewed case-by-case analysis.³⁸ But in order to bring the case within the *Accardi* holding, the court had to give some consideration to the details of the plan to determine if the severance payments were "based primarily on . . . length of service."³⁹ Although it is unclear whether the court disregarded or failed to perceive this problem, a clue is contained in a footnote to the opinion. There the court explained that a "lump sum payment which does not increase in size with length of employment" is not a seniority requisite, regardless of its label.⁴⁰ Ostensibly, the court's reading of *Accardi* is that a benefit is "based primarily on . . . length of service" merely if it *increases* with length of service. The plan in issue thus need only be examined superficially to determine this fact; "case-by-case" analysis of the specific manner in which the benefit is calculated, to determine whether, and how strictly, it is proportional to hours worked, is therefore unnecessary. Whether this conclusion is consonant with, or goes beyond, *Accardi* is problematical.

If the *Palmarozzo* court has read *Accardi* correctly, the result is clearly correct, for severance benefits under defendant's plan obviously increased with length of employment. Although it is equally clear that the result would have been in plaintiff's favor had the court applied the kind of review called for by Judge Friendly,⁴¹ the result would be open in a case in which severance pay is more nearly proportional to exact number of hours worked. The court of appeals may have interpreted *Accardi* too liberally. Even so, it is not inconsistent with *Accardi* to hold that, regardless of the existence of a purported work requirement, severance pay is a requisite of seniority whenever it in-

38. 490 F.2d at 591.

39. This perceived inconsistency appears to stem from Supreme Court language in *Accardi*. On the one hand, the Court said that seniority requisites are those which are "based primarily on . . . length of service." 383 U.S. at 230. On the other hand, the Court also stated:

[A label] cannot obscure the fact that the real nature of these payments was compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much work he did in the past—no matter how calculated—but by the rights and benefits he forfeits by giving up his job.

Id. at 230. And the court of appeals construed this to mean that

the "real nature" of severance benefits which accrue with years of service was not compensation [for work done in the past] no matter how the benefits were calculated, but rather was payment for loss of seniority rights acquired over years of employment.

490 F.2d at 589.

40. 490 F.2d at 590 n.3.

41. See note 31 *supra*.

creases with length of service.⁴² Perhaps sensing that the Act is excessively flexible,⁴³ the court appears to believe that it is proper to classify fringe benefits according to their inherent characteristics and not according to details supplied by the collective bargaining agreement in each individual case. It is submitted that the Second Circuit has concluded that severance pay in the general case is *presumably*⁴⁴ a seniority perquisite protected by the Act.

Given the large number of Viet Nam veterans and the higher incidence of fringe benefits today than at the end of World War II, the courts should attempt to bring a greater degree of certainty and finality to characterization of benefits under the Act, if the already large stock of decided cases is not to be increased substantially in the future. Although its reasoning is somewhat cryptic, the Second Circuit steps in the right direction by emphasizing analysis of the "real nature" of particular benefits. Consonant with the Supreme Court's mandate in *Fishgold v. Sullivan Drydock & Repair Corp.*⁴⁵ that the Act be liberally construed, the result in *Palmarozzo* is correct and should be followed by other courts. It is quite possible, nevertheless, that the court's holding may have limited impact on other fringe benefits disputes, which occur with greater frequency than those involving severance pay.⁴⁶ Even if other courts accept severance benefits as inherently a perquisite of seniority, there are, as both majority and dissenting opinions demonstrate,⁴⁷ ample grounds on which severance pay can be distinguished from vacation pay, promotion benefits, and so forth. Hopefully, other courts will take the "real nature" analysis another step and clarify some of the semantic confusion which now obstructs delineation of veterans' rights under the Act.

42. Moreover, this approach is in harmony with the spirit of *Accardi* insofar as it prevents the method of calculating benefits from affecting the veteran's rights. See 383 U.S. at 229.

43. See note 12 *supra*.

44. The majority recognizes that all benefits denominated "severance payment" are not seniority perquisites and that false labels can cut both ways. 490 F.2d at 590 n.3 (dictum). See text accompanying note 40 *supra*.

45. 328 U.S. 275, 285 (1946). See note 13 *supra*.

46. Severance pay has been infrequently litigated. See *Accardi v. Pennsylvania R.R.*, 383 U.S. 225 (1966); *Hoffman v. Bethlehem Steel Corp.*, 477 F.2d 860 (3d Cir. 1973); *Seattle Star, Inc. v. Randolph*, 168 F.2d 274 (9th Cir. 1948); *Taylor v. Southern Pac. Co.*, 308 F. Supp. 606 (N.D. Cal. 1969); *Hire v. E.I. DuPont DeNemours & Co.*, 211 F. Supp. 164 (M.D. Tenn. 1962), *rev'd on other grounds*, 324 F.2d 546 (6th Cir. 1963).

47. 490 F.2d at 592-93, 595-96.