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Supplemental Unemployment Benefits: Perquisite of Seniority or Deferred Compensation for Returning Veterans

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SUPPLEMENTAL UNEMPLOYMENT BENEFITS: PERQUISITE OF SENIORITY OR DEFERRED COMPENSATION FOR RETURNING VETERANS?

Supplemental unemployment benefits (SUB benefits), which are paid to employees during periods of layoff, have caused much controversy with respect to veterans who claim such benefits after a period of military service. On June 10, 1980, the Supreme Court decided Coffy v. Republic Steel Corp., *and held that SUB benefits are a seniority right which allows a veteran to include time spent in the military in computing the amount of benefits to which he or she is entitled, rather than short-term compensation, in which case his or her period of service would not have been counted. This Note, which begins with a discussion of SUB benefits and the concept of seniority in collective bargaining agreements, reviews the tests traditonally employed by courts to determine when a benefit is a perquisite of seniority or simply a wage substitute. The Note concludes with a discussion of the Court's opinion in* Coffy, *and argues that because SUB benefits are more analogous to short-term compensation, the Court should not have permitted a veteran to include military service time in quantifying his or her right to SUB benefits.*

INTRODUCTION

A RECURRENT DILEMMA FACED by the Supreme Court arises from the integration of returning soldiers into the industrial work force in the context of existing collective bargaining agreements. A veteran's right to be reemployed by his former employer, without suffering losses because of his service in the military, has been guaranteed by Congress since 1940.[1] Employers are required to restore returning veterans to their former positions or to positions of "like seniority, status, and pay."[2]

1. Veterans' reemployment rights were created by the passage of the Selective Training and Service Act of 1940, ch. 720, § 8, Pub. L. No. 76–703, 54 Stat. 885 (codified at 50 U.S.C. §§ 301–318 (1940)). The provisions regarding the reemployment in the Selective Service Act of 1948, Pub. L. No. 80–759, 62 Stat. 604 (codified at 50 U.S.C. App. §§ 451–73 (1964)), *as amended by* Military Selective Service Act of 1967, Pub. L. No. 90–40, 81 Stat. 100. The most recent version, essentially unchanged from earlier statutes for the purposes of this Note, appears in the Vietnam Era Veterans' Readjustment Act of 1974, 38 U.S.C. §§ 2021–26 (1976). The Note will refer to the above provisions as the Veterans' Act.

2. 38 U.S.C. § 2021(a)(B)(i). The Act provides that

> (a) In the the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after

There has been considerable litigation, however, concerning a returning veteran's right to count time spent in the service in calculating the usual incidents of the employment relationship, such as the order of layoff and recall, vacation time, severance pay, pension accrual, and unemployment benefits.[3] These elements of employment may be governed by collective bargaining agreements, the terms of which vary from industry to industry. Unfortunately, Congress has never defined the key terms—"seniority," "status," and "other benefits"—found in successive reenactments of veterans' reemployment legislation,[4] the most recent version being the Vietnam Era Veterans' Readjustment Act of 1974.[5] Consequently, courts have reached inconsistent results when applying the terms of the Veterans' Act to specific benefits claimed by veterans under their respective collective bargaining agreements.[6]

On June 10, 1980, in *Coffy v. Republic Steel Corp.*,[7] the Supreme Court settled a conflict in the circuits concerning supplemental unemployment benefits (SUB benefits).[8] SUB benefits are paid by the employer to workers who are laid off, in addition to available state unemployment insurance payments. In deciding *Coffy*, the Court considered whether SUB benefits are a type of

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such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

. . . .

(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 the employer's successor in interest to such position or to a position of like seniority, status, and pay;

. . . .

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of the clause . . . (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed 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 or reemployment.

3. *See* notes 29–84 *infra* and accompanying text.

4. *See* notes 1–2 *supra.*

5. 38 U.S.C. §§ 2021–26 (1976).

6. *See* notes 118–157 *infra* and accompanying text.

7. 461 F. Supp. 344, *aff'd mem.*, 590 F.2d 334 (6th Cir. 1978), *rev'd*, 48 U.S.L.W. 4683 (1980).

8. The decision by the Northern District of Ohio in *Coffy*, by holding SUB benefits to be short term compensation, conflicted with decisions in the Third and Seventh Circuits and in the Southern District of Ohio, all of which found SUB benefits to be a perquisite of seniority. The conflict is discussed at notes 118–157 *infra* and accompanying text.

seniority right protected by the Veterans' Act, or merely a form of short term compensation outside of its purview. A finding that SUB benefits are a perquisite of seniority[9] allows veterans to include time spent in military service in figuring the amount of SUB benefits to which they are entitled. If SUB benefits were not a perquisite of seniority, military service time could not, however, be counted toward SUB credits. The judicial determination necessarily focused on the formulae set out in each industry's collective bargaining agreements, but it was also made in light of Congressional intent to recognize the contributions and sacrifices by veterans to the nation.[10]

This Note first discusses SUB benefits[11] and the seniority concept in collective bargaining agreements.[12] Next, the Note outlines various tests developed over the past thirty years to determine when a specific benefit is a guaranteed seniority perquisite,[13] culminating in the test developed by the Court in *Alabama Power Co. v. Davis*.[14] The Note compares the conflicting circuit decisions on pension benefits[15] which led to *Alabama Power* with the analogous conflict in decisions on SUB benefits in light of *Alabama Power's* proposed test.[16] The Note concludes that because SUB benefits function more as a form of short term compensation for work actually performed than as an aspect of seniority, such benefits should not have been protected by the Veterans' Act.

I. SUB BENEFITS: THEIR HISTORY AND MECHANICS

SUB benefit plans were originally included in collective bargaining agreements as a result of compromises achieved on the issue of guaranteed annual wages.[17] State unemployment insur-

9. Since seniority is not defined in veterans' reemployment legislation, but is accepted as a catchall concept in industrial practice for a variety of benefits allotted according to longevity of service, courts have resorted to the phrase "perquisite of seniority" as a reference point in the veterans' reemployment rights cases. *E.g.*, Foster v. Dravo Corp., 420 U.S. 92, 95 (1975).

10. *See* Silver, *Operation of the "Escalator Clause" in Fringe Benefits Cases*, 60 MINN. L. REV. 45, 47–48, 55 (1975). The author discusses judicial interpretations of the terms of the 1974 Act, application of those terms to collective bargaining agreements, and the need to look beyond the conventional meaning of seniority found in those agreements given Congress' broad, remedial intentions concerning veterans.

11. *See* notes 11–29 *infra* and accompanying text.

12. *See* notes 30–40 *infra* and accompanying text.

13. *See* notes 41–84 *infra* and accompanying text.

14. 431 U.S. 581 (1977).

15. *See* notes 85–117 *infra* and accompanying text.

16. *See* notes 118–157 *infra* and accompanying text.

17. Although few guaranteed employment plans have ever been in effect in the United

ance benefits were inadequate income security to workers in cyclical industries such as auto and steel in which employees face layoffs during recurring periods of business downturn. Thus, in 1955, the United Auto Workers negotiated the first SUB plan, which provided additional aid to the unemployed work force but stopped short of guaranteeing its wages.[18]

Most SUB plans are activated by the payment of state unemployment compensation benefits. When a covered worker is eligible for state unemployment compensation, he or she becomes eligible for SUB benefits.[19] The plans, funded by employer contributions up to an agreed maximum amount, give the company the benefit of a fixed cost. In the prototypical plan, payment to the workers depends on the availability of money in the trust fund to pay the benefits.[20]

There are two types of plans: funded plans and individual trust account plans.[21] This Note is concerned only with funded plans in which the employee generally receives the difference between his state unemployment compensation plus other earnings and a fixed percentage of his or her weekly after tax earnings. To be eligible, the employee must have been employed for one year and must qualify for state unemployment compensation.[22]

The amount of benefits a laidoff worker may receive depends both on the number of credits accumulated by the worker and the level of the trust fund. Each worker earns a certain number of credits for each week worked up to a maximum number beyond

States, the best known were established at Proctor & Gamble in 1923 and at Hormel and Nunn–Bush in the 1930's. Beginning in 1944, the steel workers' and auto workers' unions began to campaign actively for guaranteed annual wages from their employers. *See* [1955] THE GUARANTEED ANNUAL WAGE 2–4 (BNA).

18. *See* G. REDJA, SOCIAL INSURANCE AND ECONOMIC SECURITY 365 (1976); Eberling, *The Guaranteed Annual Wage and Unemployment Compensation*, 8 VAND. L. REV. 458 (1955).

19. Linking eligibility for SUB benefits and eligibility for unemployment compensation has minimized administrative problems. *See* E. BEAL, E. WICKERSHAM & P. KIENAST, THE PRACTICE OF COLLECTIVE BARGAINING 352 (5th ed. 1976).

20. S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 453 (1960).

21. The individual trust account, first negotiated in the glass industry in 1955, is less widely used than the funded plan. Trust accounts are established in the name of the individual employee and can accumulate to a specified maximum amount. Thereafter, the company contribution is used to increase vacation pay. The employee may draw on such plans when he or she has been laid off for one full pay period or when absent from work for two full pay periods because of injury or sickness. There is no tie-in with state unemployment compensation. Funds in a worker's account are paid to the worker upon termination, retirement, or to the estate at death. *Id.* at 454–55.

22. *Id.*

which no accumulation is possible. The credit units have no established monetary value but are used merely to determine the length of time a worker may draw benefits.[23] When an employee draws a SUB benefit payment a specified number of credits are cancelled. For example, one credit might be cancelled for each week during which SUB benefits are received. If funding for the trust plan is low, credit units will be cancelled at a higher rate.[24]

The following scenario should help to illustrate the way in which a SUB plan works. A collective bargaining agreement may provide for workers to accrue one-half credit for each week during which a worker put in at least thirty-two hours of service. Credits may also be accrued while an employee is taking earned vacations or sick leave. Then, in the event of a four week layoff, an employee who has had eight weeks of association with the employer will have four credits to use for obtaining SUB payments, and will thus be fully covered for the layoff period.[25] Since it is traditional for employers to lay off workers with the shortest length of service first—usually the workers with concomitantly lower pay and fewer skills—SUB benefits are more likely to be paid to these short term personnel.[26] Long term workers are usually insulated from having to take advantage of SUB plans, unless layoffs are extensive.

Employers are aided because the plans help them preserve their labor force during layoffs. The income supplement gives the employee less incentive to look elsewhere for employment while laid off. The cost to employers has not proven overly burdensome because workers essentially fund the accounts by foregoing part of their wage increases.[27]

In the context of these plans, a difficult legal issue arose concerning the reemployment rights of returning veterans. A veteran whose collective bargaining agreement includes a funded SUB plan no doubt wants the period spent in military service to be included in his or her total of accumulated SUB credits. This presumes that SUB credits should have continued to accrue during the entire period of military service just as if private employ-

23. Harvey, *Supplemental Unemployment Benefits Plans*, 96 TR. AND EST. 263 (1957).

24. *Id.*

25. E. BEAL, E. WICKERSHAM & P. KIENAST, *supra* note 19, at 351–52; S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 20, at 453–54.

26. G. REJDA, *supra* note 12.

27. *Id.* at 365–66; J. TURNBULL, C. WILLIAMS & E. CHEIT, ECONOMIC AND SOCIAL SECURITY 297 (3d ed. 1967).

ment had continued uninterrupted.[28] Employers have opposed the accumulation of credits during such periods of absence, contending that the accrual of SUB credits is a substitute for wages and thus is not part of the seniority rights guaranteed to returning veterans. The issue was resolved by the *Coffy* case,[29] in which the Supreme Court decided that SUB benefits are a perquisite of seniority, upholding the veteran's position.

II. SENIORITY: GETTING BACK ON THE ESCALATOR

The "escalator" analogy offered by the Supreme Court to explain veterans' reemployment rights is instructive: a veteran reenters the work force "at the precise point he would have occupied had he kept his position continuously during [his service in the military]."[30] In addition to stepping back into a particular job as if he had never gotten off the escalator—that is, with no loss of seniority—a returning veteran has a strong interest in carrying along certain benefits which he would have acquired but for his absence in the military. Such benefits includes promotions, vacations, and numerous other fringe benefits, which may be tied to employees' seniority status, depending on the particular industry's collective bargaining agreement. Thus, both the definition and scope of the term "seniority" are of critical concern to employees, as well as to employers who bear the cost of benefits.

A. *An Introduction to the Principle of Seniority*

In the absence of legislative guidance, courts have turned to the collective bargaining agreement at issue for the proper interpretation of seniority.[31] The Supreme Court has concluded that

28. Although this argument appears to be based upon the literal language of the statute, *see* note 46 *infra*, the logical extension of such a view would have wages accrue during military service. There is no indication, however, that Congress intended veterans to receive double pay.

29. Coffy v. Republic Steel Corp., 48 U.S.L.W. 4683 (1980). For a discussion of *Coffy*, *see* notes 158–175 *infra* and accompanying text.

30. Fishgold v. Sullivan Drydock & Repair Co., 328 U.S. 275, 284–85 (1946). The Court also noted that the legislation was to be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Id.* at 285.

31. The concept of seniority is a function of collective bargaining agreements. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 375–76 (1960). The Supreme Court has noted that a worker's seniority arises only out of contract or statute, and that a worker does not have an inherent right to seniority in service. Trailmobile v. Whirls, 331 U.S. 40, 53 n.21 (1947). Furthermore, the Court has pointed out that the principle of seniority is used almost exclusively in unionized industry. *Id.* Therefore, when interpreting a veteran's seniority rights, the Court has observed that such rights must be interpreted in light

Congress did not create a system of seniority when it passed the Veterans' Act, "but recogniz[ed] its operation as part of the process of collective bargaining. We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran."[32]

The word seniority generally connotes length of service.[33] Longevity, in turn, is used as the measure of an employee's right to certain benefits.[34] There are two broad types of seniority: competitive status seniority and benefit seniority. Competitive status seniority links length of service to an employee's status relative to other employees. It affects such things as promotions, transfers, and job protection during layoffs. Benefit seniority, as the term suggests, determines the attainment of benefits, rights, and privileges based on the individual worker's length of service, without reference to other employees' job longevity. This type of seniority affects such matters as severance pay, pension payments, length of vacation, and SUB benefits.[35]

Either type of seniority stabilizes the industrial work force by increasing job security, which decreases workers' incentive to move in search of other employment. And, while the operation of the seniority system may appear to restrict management's freedom

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of the applicable union contract. Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521, 526 (1949).

32. There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining.

Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521, 526 (1976).

33. [1978] 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 75:11.

34. Seniority is used most frequently to determine order of employee layoffs, promotions, and transfers. In the vast majority of collective bargaining agreements, the employee's continuous service is the sole determinant of his or her seniority status. *Id.* at 75:1. Various types of seniority exist within a seniority unit. These include companywide, plantwide, departmental, occupational, and combination forms. *Id.* at 75:41. Relative seniority rights are based on three factors: (1) the date on which seniority begins to accumulate, (2) changes in seniority because of changes in work assignments, and (3) seniority changes caused by work interruptions, such as layoffs or sick leave. *Id.* at 75:121, 75:81.

One commentator has argued that the seniority system developed because of worker concern for job security rather than from either the need to protect workers from employer favoritism or from the need for an objective dispute resolution mechanism. She concludes that ". . . the heart of any seniority system is protection against discharge or layoff, particularly for long service employees." Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A. L. REV. 177, 196–97 (1976).

35. S. SLICHTER, J. HEALY & E. LIVERNASH, *supra* note 20, at 106.

in personnel decisions,[36] it also provides an impersonal, objective means for making such decisions.[37]

There are certain limitations inherent in any system of seniority. Seniority is not an absolute employee privilege,[38] and generally is used only in unionized industry.[39] Probationary periods are usually required before workers become entitled to seniority. Workers may be subject to the loss of seniority rights if they quit, are discharged for just cause, are laid off for a very long time, take an unauthorized leave of absence, or retire.[40] Further, some may be excluded from the protection of the seniority principle altogether. This limitation is of special concern to veterans seeking full reemployment rights.

B. *Judicial Interpretations of Seniority Benefits*

The Supreme Court has developed tests to determine when a specific benefit is a guaranteed perquisite of seniority. Early cases construing the Veterans' Act dealt principally with issues of competitive status seniority such as promotion, layoff order, and retention of seniority after a corporate merger.[41] The results were less than consistent.

In *Fishgold v. Sullivan Drydock & Repair Corp.*,[42] the Court faced a difficult problem: reconciling an employer's layoff practices pursuant to a collective bargaining agreement with the guarantee against discharge accorded returned veterans under the Veterans' Act.[43] The veteran claimed that the Veterans' Act insulated him entirely from layoffs which, he argued, were a form of discharge. The Court, in rejecting his claim, established the escalator principle.[44] The Court indicated that the purpose of the Veterans' Act was to prevent a veteran from being penalized because of necessary absence from civilian employment.[45] It was not,

36. *Id.* at 139.

37. E. BEAL, E. WICKERSHAM & P. KIENAST, *supra* note 19, at 381–82.

38. *See* Trailmobile v. Whirls, 331 U.S. 40, 53 n.21 (1947).

39. *Id.*

40. E. BEAL, E. WICKERSHAM & P. KIENAST, *supra* note 19, at 376–77.

41. *See* notes 33–35 *supra* and accompanying text.

42. 328 U.S. 275 (1946).

43. *Id.* at 280. The Selective Training and Service Act of 1940, § 8(c), 50 U.S.C. App. § 301 (1940), provided that a veteran restored to his former position "shall not be discharged from such position without cause within one year of such restoration." *Id.* In *Fishgold*, the employer had taken Fishgold's military service time into account before laying him off. The employee argued a layoff was a form of discharge. 328 U.S. at 285.

44. *Id.* at 284–85. *See* notes 30–31 *supra* and accompanying text.

45. 328 U.S. at 284.

however, designed to grant a veteran priority over nonveterans with higher seniority.[46] Thus, the veteran returns to his or her job at precisely that point at which he or she would have been had not military service intervened.[47]

The escalator principle was incorporated into the Veterans' Act in 1948.[48] It requires courts to decide whether the benefit claimed by the veteran is a perquisite of seniority since, according to *Fishgold*, "[w]hat [Congress] undertook to do was to give the veteran protection within the framework of the seniority system. . . ."[49] Seniority was construed for this purpose in the context of the continuance of the employment relationship.[50] In collective bargaining agreements, however, seniority is also defined in relation to actual work performed.[51] The Supreme Court, in applying the escalator principle, found the veteran's rights complicated by this distinction.[52] In *McKinney v. Missouri-K.-T. Railroad*,[53] the Court considered whether a nonautomatic promotion was an incident of seniority protected by the 1940 Act. In *McKinney*, promotion was contingent not only on longevity, but on a worker's fitness and ability,[54] an evaluation made by the employer. The Court concluded that

> on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the em-

46. *Id.* at 285–86.

47. *Id.* at 284–85.

48. This provision is currently § 2021(b):

> (2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed *if such person had continued in such employment continuously* from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

(current version at 38 U.S.C. § 2021(b) (1976) (emphasis added).

49. 328 U.S. at 288.

50. *Id.* at 287–88.

51. [1978] 2 COLLECTIVE BARGAINING: NEGOTIATION AND CONTRACTS (BNA) 75:1, 75:11. It should be noted that the Court in *Fishgold* did not consider the break in actual work performance occasioned by a layoff to be a break in the continuity of an employee's *position*. 328 U.S. at 286–88.

52. *See* Haggard, *Veterans' Reemployment Rights and the "Escalator Principle"*, 51 B.U.L. REV. 539, 547–48 (1971).

53. 357 U.S. 265 (1958).

54. *Id.* at 266–67.

ployer.[55]

Therefore the rights protected under the Veterans' Act are only those benefits which would accrue by the mere fact that the employee continues in his or her job. If more than simple length of service is required, the benefit is not one of those to which the Veterans' Act applies.

In *Tilton v. Missouri Pacific Railroad*,[56] the veteran had, prior to his military service, begun a probationary period for a discretionary promotion. When he returned, he finished the training period and applied for seniority status which would reflect his time in the military. The Court, concentrating more on the "escalator of terms and conditions" than on the employer's requirement for a specified number of days of work for the company,[57] decided that the veteran's seniority date should have been fixed as of the date he would have finished the probationary period had he not entered military service.[58] The Court distinguished this promotion from the one in *McKinney* because it did not depend on management discretion. The Court also emphasized that *McKinney's* "automatic progression" did not mean that a benefit such as promotion had to be absolutely foreseeable by the employee.[59] The opinion established a "reasonable certainty" test to determine the right to seniority rather than requiring a veteran to show it was "absolutely certain as a matter of foresight" that a certain advancement in status would later occur.[60]

The Court, however, did not in fact conclude that a continuing relationship with the employer before, during, and after military service, would be enough to allow full seniority rights. Rather, the Court stated that existing work requirements would have to be met before the protection of the Veterans' Act was triggered. In spite of the Court's protestations to the contrary, *McKinney* appears to disagree with this view.[61]

Only two years after *Tilton*, the Court, in *Accardi v. Pennsylvania Railroad*,[62] added another gloss to the emerging standard

55. *Id.* at 272.
56. 376 U.S. 169 (1964).
57. *Id.* at 177.
58. *Id.*
59. *Id.* at 179.
60. *Id.* at 179-80.
61. In *McKinney*, the existence of a prerequisite other than length of service was cited by the Court as reason *not* to invoke the Veterans' Act. *See* notes 53-56 *supra* and accompanying text.
62. 383 U.S. 225 (1966).

for determining veteran's seniority rights: if the work requirement did not operate in a consistent, predicatable manner for all employees, then the Court would pierce the requirement to find the "real nature" of the benfits.[63]

In *Accardi*, the amount of severance pay paid to a particular employee was contingent on how much "compensated service" the employee had put in with the railroad, according to the collective bargaining agreement. The Court opined that since a worker could, theoretically, work seven days in one year and receive the same credit toward severance pay as one who had worked every day of the year, the work requirement was a sham.[64] The Court found that the "use of the label 'compensated service' cannot obscure the fact that the real nature of these payments was compensation for loss of jobs" measured by the rights and benefits forfeited, not by actual past work.[65] Thus, since length of service, or seniority, was the only measure of the employee's right to the benefit, military service time had to be counted in the severance pay formula in keeping with Congress's intent.[66]

The *Accardi* decision amplified *Fishgold* as follows: if the prerequisite for a benefit is limited to the length of employment, then the *Fishgold* escalator principle is applied. If the benefit depends on more than the length of employment, then the escalator principle does not necessarily entitle the veteran to the benefit.[67] Further, if the contract requirement is nothing more than a surreptitious means of circumventing veterans' rights, it can be ignored. Conversely, if the contract requirement is genuine compensation for work performed, then the benefit is not a perquisite of seniority.

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63. *Id.* at 230.

64. *Id.*

65. *Id.*

66. The *Accardi* Court noted that Congress intended that veterans "resume their old employment without any loss because of their service to their country." *Id.* at 228.

67. In Eagar v. Magma Copper Co., 389 U.S. 323 (1967), the collective bargaining agreement imposed two conditions upon eligibility for holiday and vacation pay in a given year. The worker had met all work requirements for these benefits, but he had not met either of the conditions—that he be in the company's employment on the one year anniversary date of his starting work for the company and that he be on the payroll for the three months preceding each paid holiday. In a per curiam opinion, the Court reversed a lower court holding for the company and cited *Accardi.*

A commentator has suggested that the Court probably looked at the nature of the benefit in *Eagar* and concluded it was actually compensation for work performed. Since the worker had in fact fulfilled the work requirement, the Court probably felt that further conditions, which really dealt with longevity, should not be allowed to defeat his claim to the benefit. *See* Haggard, *supra* note 35, at 576.

In spite of the guidance offered by the *Accardi* decision, lower courts treated fringe benefit issues in veterans' reemployment cases inconsistently. Several decisions came down on opposite sides of the question of whether vacation rights were a protected perquisite of seniority or an "other benefit" which was subject, according to the Veterans' Act, to the employer's established rules and practices,[68] such as an actual service requirement. One court decided this distinction was not instructive. Rather, the key to veterans' reemployment rights was whether the returned veterans had substantially fulfilled the employer's requirement that employees earn their vacations.[69] That court approved the employer's treatment of the amount of vacation as a perquisite of seniority, but the right to the vacation as an earned benefit.[70]

The Seventh Circuit, in *Ewert v. Wrought Washer Mfg. Co.*,[71] specifically rejected such reasoning. The *Ewert* court refused to treat vacation length separately from the right to vacation. The court decided that according to the *Eagar*[72] application of *Accardi*, the vacation rights under this contract were perquisites of

68. *Compare* Locaynia v. American Airlines, Inc., 457 F.2d 1253 (9th Cir. 1972) *with* Kasmeier v. Chicago, Rock Island & Pac. R.R. Co., 437 F.2d 151 (10th Cir. 1971). The *Locaynia* court interpreted *Accardi* as establishing a test of "automatic accrual" of benefits. 457 F.2d at 1255. *Accardi* had required an analysis of the real nature of the benefit rather than a labelling approach. In light of *Eagar*, the *Locaynia* court decided that if a vacation benefit was not an "other benefit," then it necessarily must be a "perquisite of seniority." In so doing, the court ignored the work requirement in the collective bargaining agreement. The *Locaynia* decision is too terse to be enlightening about the proper application of the *Accardi-Eagar* principle. See Case Comment, *Reemployment Rights: The Veteran and the Vacation Benefit*, 53 B.U.L. REV. 480 (1973) for an analysis of the Ninth Circuit's failure to confront the difference in nature between severance pay and vacation pay.

The collective bargaining agreement at issue in *Kasmeier* required an employee to render 110 days of compensated service in the previous calendar year in order to qualify for vacation rights. The court, distinguishing *Accardi*, decided this work requirement was genuine, since it was uniformly applied. 437 F.2d at 154. Thus, these vacation rights were "other benefits" rather than "perquisites of seniority" in direct

> conflict with the *Locaynia* and *Eagar* decisions. The court insisted that more could be required of workers seeking other benefits than the mere passage of time. Here, the collective bargaining agreement established a legitimate work requirement which the veteran did not meet. *Id.* at 155.

69. One district court, in Connett v. Automatic Elec. Co., 323 F. Supp. 1373 (N.D. Ill. 1971), suggested that the *Kasmeier* test is basically whether the employee "has substantially earned his vacation." *Id.* at 1378 (emphasis added). The court preferred to concentrate on this issue rather than on the arcane debate over whether a benefit is a seniority right or an other benefit. *Id.* at 1375–78. The court accordingly found that the returned veterans were not entitled to vacation pay for the time spent in the military.

70. *Id.* This distinction is an important one which not all courts have recognized. The *Locaynia* court, for example, overlooked the distinction. *See* note 68 *supra.*

71. 477 F.2d 128 (7th Cir. 1973).

72. *See* note 67 *supra.*

seniority.[73]

The Supreme Court finally resolved the conflict in *Foster v. Dravo Corp.*,[74] finding that where a benefit is conditioned on "more than simple continued status as an employee," the protections of the Veterans' Act do not apply.[75] In this case, a veteran had not worked for twenty-five weeks, the minimum amount of time for vacation eligibility. The Court affirmed a lower court opinion holding that the vacation benefit was an earned benefit.[76] The Court noted that "[g]enerally, the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation."[77] That is, when a benefit does not accrue automatically, a returning veteran may not expect to have his time in the military counted toward the amount of the benefit. The decision distinguished this case from *Accardi* on the ground that the work requirement in the case at bar was bona fide. The Court found that these vacation benefits were intended as deferred short term compensation for work already performed.[78] Indeed, the Court seems to have fallen back on what it termed the "common conception of a vacation as a reward for . . . labor,"[79] as a substitute for an analysis of the real nature of the benefits.[80]

The Court has gradually refined the test for determining when a veteran may count his time in the military in calculating fringe benefits. Using the *Fishgold* escalator principle as a starting point, the Court has variously tried a "reasonable certainty" standard,[81] or examined the legitimacy of a work requirement.[82] The Court has also found on the "real nature" of the benefit in question,[83]

73. 477 F.2d 128 (7th Cir. 1973). In Palmarozzo v. Coca-Cola Bottling Co., 490 F.2d 586 (2d Cir. 1973), the court held that the severance pay plan at issue was a "perquisite of seniority," not compensation or "other benefits." The court noted that in *Accardi* and the case at bar, it was the length of continuous service, rather than the nature of the service, which determined the benefits. *Id.* at 589.

74. 420 U.S. 92 (1975).

75. *Id.* at 97.

76. *Id.* at 95–96.

77. *Id.* at 99.

78. *Id.* at 100.

79. *Id.* at 101.

80. For a critique of *Foster*, see *The Right of Returning Veterans to Vacation Benefits*, 1976 ANNUAL SURVEY OF AMERICAN LAW 704, 709, 709 n.148.

81. Tilton v. Missouri Pac. R.R., 376 U.S. 169 (1964). *See* notes 56–61 *supra* and accompanying text. *Cf.* McKinney v. Missouri-K.-T. R.R., 357 U.S. 265 (1968) discussed at notes 53–56 *supra* and accompanying text.

82. Foster v. Dravo Corp., 420 U.S. 92 (1975); Accardi v. Pennsylvania R.R., 383 U.S. 225 (1966). *See* notes 62–67, 74–80 *supra* and accompanying text.

83. 383 U.S. at 230.

and finally, on the existence of conditions precedent to the granting of the benefit.[84] Such a conflicting line of cases, however, provided lower courts with no clear standard. Then, in 1977, the Supreme Court reexamined the issue of a veteran's reemployment rights.

III. ALABAMA POWER: A DEFINITIVE STANDARD FOR SENIORITY RIGHTS OF VETERANS—OR ANOTHER STOPGAP?

In a series of mid–1970's cases, various federal courts applied the *Accardi-Foster*[85] tests to nearly identical pension plans with conflicting results. Three courts decided that pensions were not an incident of seniority under the Veterans' Act,[86] while two other courts found that pension plans rewarded longevity rather than actual work performed, and were thus perquisites of seniority protected by the Veterans' Act.[87]

In *Litwicki v. Pittsburgh Plate Glass Industries, Inc.*,[88] the Third Circuit was confronted with a veteran who had failed to meet a ten year "continuous service" vesting requirement for pension benefits because the employer would not credit the employee for his time in the military. The court found that contrary to the situation in *Accardi*, the continuous service prerequisite here was a true work requirement. Under the collective bargaining agreements, pension benefits were therefore deferred compensation and not an incident of seniority for purposes of the Veterans' Act.[89]

The Tenth Circuit, in *Jackson v. Beech Aircraft*,[90] followed *Litwicki* in finding that the "substantial work requirement" prevented the pension benefits from being considered a perquisite of seniority.[91] Thus the employers were not required to grant the

84. 420 U.S. at 98–99.

85. *See* notes 62–84 *supra* and accompanying text.

86. Jackson v. Beech Aircraft, 517 F.2d 1322 (10th Cir. 1975); Litwicki v. Pittsburgh Plate Glass Indus., Inc., 505 F.2d 189 (3d Cir. 1974); LaPinta v. Ohio Crankshaft, 90 L.R.R.M. 2929 (N.D. Ohio 1975).

87. Smith v. Industrial Employers & Distrib. Ass'n, 385 F. Supp. 1281 (N.D. Cal. 1974), *aff'd*, 546 F.2d 314 (9th Cir. 1976); Davis v. Alabama Power Co., 383 F. Supp. 880 (N.D. Ala. 1974), *aff'd*, 542 F.2d 650 (5th Cir.), *cert. granted*, 429 U.S. 1037 (1976).

88. 505 F.2d 189 (3d Cir. 1974).

89. *Id.* at 193. Ironically, the court allowed the veteran to count his 33 months of military service toward his vesting time because the bargaining agreement expressly provided for this. Nonetheless, the court held that the existence of the work requirement meant, under *Accardi*, that pensions could not ordinarily be considered as a seniority right.

90. 517 F.2d 1322 (10th Cir. 1975).

91. *Id.* at 1326.

veteran credit—for his time in the military—either toward the vesting or the amount of benefits to be given him.

Relying on the "work requirement" language of *Accardi* and *Foster*, another district court in *LaPinta v. Ohio Crankshaft*,[92] found that a minimum "credited service" prerequisite for pension accrual was not a sham.[93] The court reasoned further that giving pension credit for short absences such as illness or union activites did not defeat the essential work-related character of pension rights.[94] Impliedly, then, a long absence, not related to one's job, such as military service, should not count toward a veteran's pension.

The *LaPinta* court also expressly rejected the employee's argument that *Accardi* required an analysis of the "real nature" of the benefit *before* examination of the collective bargaining agreement.[95] Judge Thomas explained that *Foster's* clarification of *Accardi* required courts to focus first on the pension plan's terms in order to shed light on the real nature of the benefit.[96] The conclusion here, as in *Litwicki* and *Jackson*, was that pension benefits could not be classed as a seniority perquisite since they were contingent on a substantial work requirement.[97]

Two other courts had earlier decided that the pension plans at issue rewarded longevity rather than actual work on the job. To arrive at its conclusion, the Ninth Circuit, in *Smith v. Industrial Employers and Distributors Association*,[98] eschewed "labels and definitions" and examined the "true nature of pension benefits."[99] Pensions, said the court, are future rights,[100] governed by length of service.

The court in *Davis v. Alabama Power Co.*[101] found that an accredited service requirement for vesting of pension rights was longevity-related, emphasizing that the Act must be construed lib-

92. 90 L.R.R.M. 2929 (N.D. Ohio 1975).

93. *Id.* at 2932.

94. *Id.* at 2932 n.5.

95. *Id.* at 2931–32. The court acknowledged that the Second Circuit in Palmarozzo v. Coca-Cola Bottling Co., 490 F.2d 586 (2d Cir. 1973), *cert. denied*, 417 U.S. 955 (1974), had used a similar two step analysis to find that severance pay was indeed a perquisite of seniority. 90 L.R.R.M. at 2931 n.4. *See* note 73 *supra.*

96. *Id.* at 2932. The court later had to reverse itself in light of *Alabama Power.* *See* notes 139 and 143 *infra* and accompanying text.

97. *Id.* at 2933.

98. 546 F.2d 314 (9th Cir. 1976).

99. *Id.* at 317–18.

100. *Id.* at 318.

101. 383 F. Supp. 880 (1974), *aff'd per curiam*, 542 F.2d 650 (5th Cir. 1976).

erally under the rule of *Fishgold*.[102] Consequently, no employer could interfere with the protection of a returning veteran's employment status.[103] The court emphasized "the 'real nature' of the pension benefits in the case at bar, and it concludes that the purpose of this retirement benefit is to promote personnel stability by giving employees an incentive to remain with the company."[104] Thus, the returned veteran had to be treated as if he had worked continuously for the employer during his years in the military.

Affirming the lower court's decision, the Supreme Court, in *Alabama Power Co. v. Davis*,[105] noted that when the particular benefit at issue does not lend itself to easy classification as a seniority right, it is necessary to consider the "nature of the benefit itself," as well as the "relative certainty" of the benefit's accrual.[106] The Court distilled the line of veterans' reemployment rights cases, identifying

> two axes of analysis for determining whether a benefit is a right of seniority secured to a veteran by § 9. If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a "perquisite of seniority." If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant contingency, or if the benefit is in the nature of short-term compensation for services rendered, it is not an aspect of seniority within the coverage of § 9.[107]

The first part of the test, an amalgamation of the "reasonable certainty" tests of *McKinney* and *Tilton*,[108] led the Court to conclude that had the veteran "not entered the military, he would *almost certainly* have accumulated accredited service for the period between March 18, 1943, and October 8, 1945."[109] The second part of the standard, combining *Accardi* and *Foster*, allowed the Court to down-play the work requirement, noting that "*Foster* . . . turned on the nature of vacation benefits, not on the particular formula by which those benefits were calculated."[110]

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102. 383 F. Supp. at 887.
103. *Id.* at 888.
104. *Id.*
105. 431 U.S. 581 (1977).
106. *Id.* at 587.
107. *Id.* at 589 (emphasis added).
108. *See* notes 53–61 *supra* and accompanying text.
109. 431 U.S. at 591.
110. *Id.* at 592.

The true nature of the pension plan was a reward for longevity. The Court said:

> The most significant factor pointing to this conclusion is the lengthy period required for pension rights to vest in the employee. It is difficult to maintain that a pension increment is deferred compensation for a year of actual service when it is only the passage of years in the same company's employ, and not the service rendered, that entitles the employee to that increment.[111]

Further, the Court reasoned that the function of pensions on the employment system—an incentive to the development of a stable work force—supports the view that pensions reward length of service. A pension plan allows the employee to trade financial security in his or her old age for long term loyalty to one employer.[112] Such rewards for continuous employment with the same employer serve the purposes of the Veterans' Act and thus should be treated as a perquisite of seniority.

In the pension cases following *Alabama Power*, the courts applied this test without difficulty.[113] Although the "compensated service" requirement varied from case to case, courts felt that differences in pension plans did not warrant a result different from that in *Alabama Power*.[114] Since pension rights per se were within the scope of benefits protected by the Veterans' Act,[115] apparent work requirements in any given pension plan were easily pierced by an inquiry into the essential nature of such benefits.[116]

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111. *Id.* at 593.

The Court noted that pension payments do resemble compensation for work performed, but that any benefit rendered in an employment context could conceivably be viewed in such a manner. *Id.* at 592–93. Therefore, this observation was not helpful in deciding whether a particular benefit "recompenses labor or rewards longevity. . . ." *Id.*

112. *Id.* at 594.

113. The *LaPinta* case, for example, was remanded by the Sixth Circuit in light of *Alabama Power*. On remand, the district court granted summary judgment for the returned veteran, ordering that his period in the service be credited towards his pension benefits. LaPinta v. Ohio Crankshaft, 96 L.R.R.M. 2321 (N.D. Ohio 1977). *See* notes 92–97 *supra* and accompanying text.

114. *E.g.*, Beckley v. Lipe-Rollway Corp., 448 F. Supp. 563 (N.D.N.Y. 1978) ("The differences in the pension plans in this case and in *Alabama Power* do not warrant a different result here. The Supreme Court in *Alabama Power* indicated that the nature of the benefits in question was determinative." *Id.* at 566); Turnington v. Standard Register Co., 97 L.R.R.M. 2877 (S.D. Ohio 1977) (the court stated that although the compensated service requirement varied from the one in *Alabama Power*, the variation did not dictate a different outcome. *Id.* at 2878).

115. *Accord*, Horton v. Armour and Co., 98 L.R.R.M. 2651, 2652 (W.D. Mo. 1978).

116. *See, e.g.*, Beckley v. Lipe-Rollway Corp., 448 F. Supp. 563 (N.D.N.Y. 1978), in which the court said "the existence of the work requirement in the present case [does not change] the essential nature of the pension benefits." *Id.* at 566–67.

In spite of the general tenor of *Alabama Power's* language, the Court's two part test[117] has not proved as workable outside the area of pension benefits. Recently, a flurry of conflicting decisions concerning veterans' supplemental unemployment benefits forced the Supreme Court to reconsider veterans' reemployment rights.

IV. SUB BENEFITS: A CASE STUDY IN THE SHORTCOMINGS OF ALABAMA POWER

SUB benefits, like severance pay, vacations, and pension benefits, have not traditionally been linked to seniority. Although *Alabama Power* seems to establish a test capable of application to more than pensions, SUB benefits have, both before and after *Alabama Power*, created analytical difficulties for the courts.

A. *Pre-*Alabama Power *Cases*

In two cases decided prior to *Alabama Power* the courts found that SUB benefits were entitled to protection under the Veterans' Act. The court held in *Hoffman v. Bethlehem Steel Corp.*[118] that SUB benefits, which accrued with the passage of time, were seniority rights. The court examined the provisions of the SUB plan[119] and concluded that its work requirement was not genuine. Instead, it led to the "bizarre results" condemned in *Accardi*:[120] an employee who worked only one hour in a week would receive the same one-half SUB credit as would an employee who worked forty hours in that week.[121]

Similarly, the court in *Akers v. General Motors Corp.*[122] treated SUB benefits as a seniority right, finding passage of time to be the operative factor for the acquisition of SUB credits. The SUB plan at issue in *Akers* provided that an employee who had been laid off would be entitled to accrue leveling week benefit credits.[123] Because of this provision, "credit units accrue as time passes,

117. *See* note 107 *supra* and accompanying text.

118. 477 F.2d 860 (3d Cir. 1973).

119. The plan at issue here was a funded plan. *See* notes 21–24 *supra* and accompanying text.

120. 477 F.2d at 863.

121. *Id.* at 863–64.

122. 501 F.2d 1042 (7th Cir. 1974).

123. *Id.* at 1044. This type of SUB credit accrues when an employee is laid off by order of seniority. *Id.* at n.4. It appears to represent compensation for temporary deprivation of a right. The steel industry plan in *Hoffman* did not have this leveling week provision. Otherwise the plans were substantially the same.

whether an employee does or does not work."[124] Relying on *Accardi* and *Hoffman*,[125] the court determined that veterans should be given credit units during the period of their military service.

Conversely, in a third pre-*Alabama Power* decision, *Coffy v. Republic Steel Corp.*,[126] a district court decided that a returned veteran was not entitled to the SUB credits which the veteran claimed had accrued during his period of military service. The SUB plan[127] in *Coffy* provided that

> [i]f an employee enters the armed services directly from the employment of the Company, he shall, while in service, be deemed for the purposes of the Plan to be on leave of absence and shall not be entitled to any Benefit. Only the credit units credited to him at the time of his entry into such service shall be credited to him upon his reinstatement as an employee of the Company with unbroken continuous service, except as may otherwise be required by law.[128]

This provision appeared to formalize an agreement between the Union and the Company that the SUB plan was contingent on an actual work requirement.

Judge Thomas stated that "[t]he decision in this case, applying the essence of *Foster*, [*sic*] turns on whether the Plan's SUB credit units are 'designed to measure time on the payroll rather than hours on the job,' "[129] that is, whether the apparent work requirement was bona fide. The court noted that under the Plan, a worker received SUB benefits based upon his number of credit units. More precisely, a worker earned one-half credit unit for each week in which he had (1) hours worked for the company, (2) hours not worked, but paid for, such as vacation, and (3) hours not worked and not paid for, but lost due to union duties or disability.[130]

The court looked closely at the actual work practices in the steel industry to decide whether the above provisions of the Plan met the work requirement test of *Foster*. One witness for the union testified that since no minimum number of hours was specified in the plan, a worker could theoretically receive one-half

124. *Id.* at 1045.

125. *See* notes 62–67 *supra* and accompanying text.

126. 90 L.R.R.M. 2901 (N.D. Ohio 1975).

127. *See Supplemental Unemployment Benefit Plan, for Employees of Republic Steel Corp.*, Established Pursuant to Agreement with United Steelworkers of America (Effective January 1, 1969), [hereinafter cited as *Plan*].

128. *Id.* at § 7.2.

129. 90 L.R.R.M. at 2905.

130. *Plan*, *supra* note 127, at § 2.0.

credit unit for one hour of work in a week. This could be the type of "bizarre result" prohibited by the Court in *Accardi*.[131]

Another witness for the company, who had drafted and enforced the SUB Plan at issue, testified, however, that a worker could not qualify for one-half credit after working only one hour in a week because of industry practice. He stated that it would be very unusual for any employee to work less than thirty-two hours per week both because steelmaking is a round-the-clock process, and because the collective bargaining agreement would make it financially impossible for the employer to employ workers for only one or two days per week.[132]

The court accordingly concluded that the work requirement in this SUB agreement was genuine. "It constitutes a bona fide effort to relate qualification for weekly benefits under the SUB Plan to work actually performed, and is designed to measure 'hours on the job,' rather than 'time on the payroll.' "[133]

The court reasoned that SUB benefits are paid only under conditions in which the steel companies would traditionally have compensated an employee in the form of wages or wage substitutes.[134] Compensation for hours worked for the company, for example, are wages. Compensation for "[h]ours not worked but for which he is paid, such as vacation hours or hours for which he received jury allowance," and "[h]ours not worked and not paid for but which were lost because: (1) he was performing his duties as a member of . . . the Union . . . or (2) he was absent because of disability for which benefits are payable . . ." are, by common industry practice, substitutes.[135]

SUB benefits are awarded only when a valid work requirement is met—not when a worker is on a leave of absence unrelated to his work.[136] Because the minimum work week in the steel industry was, in practice, thirty-two hours, the court found that eligibility for SUB benefits did not depend merely upon the passing of time and was, therefore, not a perquisite of seniority.[137]

131. 420 U.S. 92 (1975). *See* notes 73–79 *supra* and accompanying text.

132. 90 L.R.R.M. at 2903, 2906. Essentially, the union contract required the company to pay for a guaranteed minimum of 32 hours in any week during which the employee works at all. *Id.* at 2904 n.2.

133. *Id.* at 2906.

134. *Id.*

135. *Plan*, *supra* note 127, at § 2.0.

136. 90 L.R.R.M. at 2908.

137. *Id.*

B. *Post-*Alabama Power *Cases: Inconsistent Results as to the "Real Nature" of SUB Benefits*

In 1977, the court of appeals remanded *Coffy v. Republic Steel Corp.*[138] for reconsideration in light of *Alabama Power*. The district court in *Coffy*, however, was unconvinced by the veteran's arguments.[139] Judge Thomas conceded that the first part of the *Alabama Power* test was satisfied: the veteran would have accrued the SUB benefits at issue with reasonable certainty had he been working at Republic Steel rather than being in military service.[140] But, since the real nature of the SUB plan was short-term compensation for services rendered and not simply for length of service,[141] the second part of the *Alabama Power* test had not been met.[142] The decision hinged on the genuine nature of the plan's work requirement, which measured "hours on the job" not "time on the payroll."[143] When unemployed, the worker depleted his SUB credits. When he resumed work, his weekly work hours rebuilt his credit up to the maximum level of fifty-two units. The court therefore concluded that SUB benefits are essentially earned and re-earned, not unlike conventional wages.[144]

The plan in *Coffy* also required that before a worker receives SUB benefits he or she must be employed continuously for two years. The court determined that this provision was an eligibility

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138. 96 L.R.R.M. 2107 (6th Cir. 1977).

139. 461 F. Supp. 344 (N.D. Ohio 1978). It is interesting to note that this is the same court which on remand of LaPinta v. Ohio Crankshaft treated the pension benefit differently in light of *Alabama Power*. *See* note 113 *supra* and accompanying text.

140. 461 F. Supp. at 345.

141. *Id.* at 346.

142. The Supplemental Brief for the Defendant points out that

> the steel industry itself recognized the difference between pension rights and SUB payments. The *Alabama Power* case went to the Supreme Court because the pension plan at issue in that case provided that the employee did not receive service credit for time spent in the military. . . . As the Court will note, the Republic Steel pension plan specifically provides that service is not broken by military leave of absence . . . . Thus the defendant . . . recognized its obligation to credit military service to the employee for purposes of making pension calculations, long before the *Alabama Power* decision was rendered. It also recognized, however, that the nature of SUB payments was very different.

Supplemental Brief of Defendant at 3–4.

143. 461 F. Supp. at 346.

144. *Id.* The opinion cited the decision in Aiello v. Detroit Free Press, Inc., 570 F.2d 145 (6th Cir. 1978). In reviewing a suit to recover vacation pay based on the provisions of the Veterans' Act, the court again used the tests of *Alabama Power*. The *Aiello* court concluded that the returning veteran was not entitled to "benefits requir[ing] more than continued status; [these benefits] were conditioned upon a work requirement demanding actual performance on the job." *Id.* at 148.

requirement, not a test of longevity,[145] because the same minimum period applied equally to all employees.[146] With no other connection to an employee's length of service, the real nature of the SUB benefit plan was short term compensation.

A few months after *Coffy II*, the Southern District Court of Ohio, in *Thornhill v. Ormet Corp.*,[147] rejected the *Coffy* decisions, adopting the reasoning of *Hoffman* and *Akers*.[148] The SUB Plan at issue was the same plan as in *Hoffman* and *Coffy*. The court engaged in a detailed analysis of the character and function of SUB plans in comparison to pension plans, observing that SUB benefits, like other fringe benefits, had elements of both short term compensation and rewards for longevity.[149] Ultimately, the court decided that the resemblance to pensions and other seniority perquisites was too close to allow a supposed work requirement to defeat the veteran's claims.[150]

One significant departure from the *Coffy* opinion was the treatment of the two year continuous service eligibility requirement. The *Thornhill* court characterized the two years as a vesting period. Since vesting periods are designed to induce workers to remain with the employer long enough to gain SUB eligibility, SUB plans must be a reward for longevity. Later, the payment itself is an inducement to sit out a layoff without seeking work elsewhere.[151]

Continuing in this vein, the court noted that

> the amount of the benefit is not strictly a function of the number of hours the employee worked or his hourly wage rate during the period he built up the SUB credits. The weekly benefit is determined by the employee's hourly rate *at the time of layoff* and the number of dependents he has for federal income tax purposes, not on his gross wages for the credit period.[152]

The absence of a correlation between SUB payments and an employee's wage rate suggested that SUB plans resemble other seniority fringe benefits. The opinion conceded, however, that the benefits are linked to wages in the sense that if an employee does not work during the week, the employee does not earn a SUB

145. *Id.* at 346.
146. 461 F. Supp. at 346.
147. 99 L.R.R.M. 2328 (S.D. Ohio 1978).
148. *Id.* at 2332.
149. *Id.* at 2331.
150. *Id.* at 2332.
151. *Id.*
152. *Id.* at 2331 (emphasis in original).

credit.[153]

The court concluded that the SUB benefits did depend on a meaningful work requirement. They were, at the same time, essentially perquisites of seniority, since their purpose and effect was the same as other seniority benefits. Thus the issue was whether the work requirement necessarily removed the benefit from the Veterans' Act's definition of seniority. This court concluded that it did not: "[u]ltimately, the benefit is a function of the employee's relative need and it operates as an inducement to continued employment. Were it otherwise, the benefit would be more closely tied to the employee's total wages during the period he accumulated the credits."[154]

Thus, the lines were drawn. The Supreme Court again had to refine its test for what constitutes seniority. The district court analysis in *Coffy* emphasized the genuineness of the work requirement in the particular circumstances of the steel industry. The frequent accumulation, cancellation, and reaccumulation of credits by workers suggested that these benefits are a form of short term compensation, and thus not protected by the Veterans' Act. Further, *Coffy* treated the two year continous service prerequisite as an eligibility requirement, thus *not* comparable to the vesting period required in pension plans and identified by *Alabama Power* as a critical variable in its finding that pension plans were perquisites of seniority. The *Thornhill* analysis emphasized similarities in function between pension plans and SUB plans, especially the vesting period, and the lack of correlation between the amount of SUB benefits and the number of hours worked.

No appeal was filed in *Thornhill*.[155] The Sixth Circuit affirmed *Coffy* in a memorandum decision dated December 12, 1978.[156] On October 29, 1979, the Supreme Court granted certiorari in the case of *Coffy v. Republic Steel Corp.* in order to decide the SUB issue.[157]

C. *The Supreme Court Decision in* Coffy v. Republic Steel Corp.

On June 10, 1980, the Supreme Court decided *Coffy v. Republic*

153. *Id.*

154. *Id.* at 2332.

155. Telephone call to the Clerk of the United States Court of Appeals for the Sixth Circuit, October 26, 1979.

156. 590 F.2d 334 (6th Cir. 1978).

157. 444 U.S. 924 (1979).

Steel Corp.[158] and held that "SUB payments are perquisites of seniority to which returning veterans are entitled under the Act."[159] The Court began its analysis by reviewing its decisions in *Fishgold*,[160] *Accardi*,[161] *Foster*,[162] and *Alabama Power*[163] to enunciate the principles under which the Veterans' Act is to be construed. Justice Marshall proceeded then to evaluate Republic Steel's SUB plan by applying the two part test set out in *Alabama Power*.[164]

The first prong of the test required "a reasonable certainty that the benefit would have accrued if the employee had not gone into the military service."[165] The Court summarily held that Coffy would have continuously accumulated credits if he had remained continuously employed, and therefore that the first prong was met.[166] The second prong of the test was where the district courts in *Thornhill* and *Coffy* had differed, and was also the focal point of Justice Marshall's analysis.

The second prong of the *Alabama Power* test required that the benefit be "a reward for length of service rather than a form of short-term compensation for services rendered."[167] Justice Marshall first observed that SUB plans were developed in response to labor's demand for a guaranteed annual wage. Therefore, he concluded that from their inception

> the purpose of SUB plans was to provide employment security regardless of the hours worked rather than to afford additional compensation for work actually performed. From the employer's standpoint SUBs, like pension benefits, help to assure a stable work force through periods of short-term layoffs and, like severance payments, may increase management flexibility in implementing technological advances.[168]

The Supreme Court rejected the reasoning of the district court opinion which was based on the specific provisions of Republic Steel's SUB plan and actual steel industry work practices. The district court had held that the plan was genuine compensation for

158. 48 U.S.L.W. 4683 (1980).
159. *Id.* at 4687.
160. *See* notes 42–47 *supra* and accompanying text.
161. *See* notes 62–68 *supra* and accompanying text.
162. *See* notes 74-80 *supra* and accompanying text.
163. *See* note 105–112 *supra* and accompanying text.
164. 48 U.S.L.W. at 4685.
165. *Id.* (citation omitted).
166. *Id.*
167. *Id.* (citation omitted).
168. *Id.* at 4686.

work actually performed. This determination was based on the finding that the steel industry had a *de facto* requirement of a 32-hour minimum workweek. The Supreme Court, however, pointed out that section 2.0 of the SUB plan allowed credits to be "earned for weeks in which the employee is paid for any hours not worked . . . or in which hours are lost because the employee is disabled or performing certain union duties."[169]

Furthermore, Justice Marshall commented that the "short week benefit"[170] is the reason why a worker rarely works less than 32 hours in a week. He noted that "the union's success in effectively achieving a guaranteed 32-hour week through the mechanism of the short week benefit does not logically alter the nature of the weekly benefit negotiated as part of the same plan."[171]

The most important factor in the Court's decision was its analysis of the *true nature* of SUB benefits.

> Even if eligibility for SUB payments were closely related to hours worked, that fact would not, by itself, render them compensation rather than seniority rights. We emphasized in *Alabama Power* that it is the nature of the benefit, not the formula by which it is calculated, that is the crucial factor, for '[e]ven the most traditional kinds of seniority privileges could be as easily tied to a work requirement as to the more usual criterion of time as an employee.' As we have explained, the specific provisions of the steel industry plan support, rather than contradict, our conclusion that SUB benefits are in the nature of a reward for length of service.[172]

The district court had concluded that SUB benefits were not related to an employee's length of service because once a worker has accumulated 52 credits he or she cannot accumulate additional credits, nor will the amount of the worker's credits increase along with his or her length of service. The Supreme Court stated, however, that if a benefit "perform[ed] a function akin to traditional forms of seniority" it was not necessary that the benefit be "meticulously proportioned to longevity of service to constitute a perquisite of seniority."[173] The Court also noted that the provisions of the SUB plan on which the district court had relied in concluding that the benefits were not perquisites of seniority also

169. *Id.*

170. The "short week benefit" in the SUB plan at issue provides SUB benefits for certain workers who work less than 32 hours in a week. The qualified workers who do not work receive the weekly SUB benefit.

171. 48 U.S.L.W. at 4686.

172. *Id.* (citation omitted).

173. 48 U.S.L.W. at 4687.

supported the opposite conclusion. For example, the two-year threshold requirement before credits could be earned was similar to the two-year thresholds of other seniority benefits included in the collective bargaining agreement. Furthermore, the amount of the SUB payment to which an employee is entitled is not calculated on the basis of hours actually worked.[174]

Thus, the Court concluded that the function of supplemental unemployment benefits is to reward length of service rather than to provide short-term compensation for services. Accordingly, the court of appeals decision upholding the district court was reversed, and *Coffy* was remanded.[175]

V. SUB Benefits: Their True Nature in an Industrial Context, or Alabama Power Revisited

Alabama Power demands that courts decipher the "real nature" of a benefit in deciding whether a returned veteran may apply his time in the military toward the benefit. The court in one of the pension decisions[176] identified the problem of veterans' reemployment rights succinctly:

> The statute assumes that there exists a distinct line between rewards for status and compensation for work. In reality many benefits combine the two: they recompense employees for both status and work. These hybrids are out of place in a system which recognizes only purebreds. Hence, we must "unmix" the benefit in a way never foreseen by the contracting parties or the Congress, to determine which characterisitcs trace their lineage to seniority.[177]

In evaluating the Supreme Court's opinion in *Coffy*, its reasoning must be compared with that of the district court.[178] The differences in their analyses illustrates the complexity of the decision whether the true nature of the benefit was a perquisite of seniority or short-term compensation for services rendered.

In order to "unmix" SUB plan benefits, and discover whether they are a perquisite of seniority, the Supreme Court considered what the parties intended to achieve by including SUB plans in their collective bargaining agreements. SUB benefits were origi-

174. *Id.*
175. *Id.*
176. Smith v. Industrial Employers & Distrib. Ass'n, 546 F.2d 314 (9th Cir. 1976).
177. *Id.* at 317.
178. *See* notes 138–46 *supra* and accompanying text.

nally a substitute for the guaranteed annual wage[179] long sought by unions. The plans serve as an income cushion for workers who cease to work because of temporary business slumps. SUB payments have a function similar to vacation, holiday, or sick pay benefits in the employment system. These fringe benefits relate to temporary, usually short term, respites from the job. Credit toward such benefits is accorded only to persons who have actually worked for the employer. One commentator regards these payments, including SUB benefits, as a form of deferred compensation, bargained for by employees as part of a wage package.[180] The employee has in effect already earned the vacation or SUB pay, but rather than receiving it all during actual work time, the employee draws on it from a fund pool, when it is necessary to do so.

Unfortunately, these descriptions could just as easily apply to pensions, eligibility for which the Supreme Court has determined to be a seniority right. Functionally, a pension is the ultimate deferred compensation. It is also an important bargained-for right. As the *Thornhill* court acknowledged, "[a]ll benefits flowing to an employee are compensation for services rendered."[181] Thus, the origin and function of SUB payments as a guaranteed wage substitute are not dispositive.

The true nature of SUB benefits, however, emerges more clearly from an analysis of how they work in practice. To take advantage of a SUB plan, an employee must meet certain common criteria. The worker must (1) be on layoff status, (2) receive a state unemployment benefit, (3) be available to return to work, and (4) work continuously for two years prior to the first application for benefits.[182] This last criterion could be considered simply an eligibility requirement, as the district court in *Coffy* viewed it,[183] or as a vesting period characteristic of a seniority right, as the Supreme Court concluded.[184]

There are two problems with the Court's likening of this two year period to the vesting period of a pension system. First, a one or two year service requirement is common in union contracts

179. Note, *Supplemental Unemployment Benefits and State Unemployment Compensation*, 29 ROCKY MTN. L. REV. 232 (1957).

180. Pierce, *The New Look in Collective Bargaining Agreements: A Study of Supplemental Unemployment Benefit Plans*, 3 HOWARD L.J. 42, 69 (1957).

181. 99 L.R.R.M. at 2330.

182. *Plan*, *supra* note 127, at § 3.0.

183. *See* notes 126–146 *supra* and accompanying text.

184. *See* note 174 *supra* and accompanying text.

before a worker becomes entitled to earn or receive certain benefits.[185] Yet the vesting period in the pension plan at issue in *Alabama Power* was *twenty* years of service, or fifteen years if the worker was fifty or more years old.[186] Further, the pension plan in *Alabama Power* actually covered "all 'full-time regular employee[s]' who have completed one year of continuous service with the company . . . ."[187] Thus, it may be argued that the two year prerequisite under a SUB plan is designed as an entry provision. If so, there is no connection between these two years of service and the total benefits available during a layoff. Conversely, an employee does receive credit for his twenty year vesting period when his pension is later calculated.

The second problem with the Court's analysis is that pensions function as a reward for length of service over an employee's entire career. SUB benefits, on the other hand, function as emergency compensation over a short period of time. Pensions accumulate, while SUB benefits must be earned and reearned as they are used. Thus, an employee who has worked for twenty years obviously has seniority—in the traditional "length of service" sense—over another who has put in three years. Their pension rights will differ accordingly. Yet, at any given moment, these two individuals may each have the same number of credits earned under the SUB plan. They may both hold fifty-two credits (the maximum allowable under most SUB plans) until a layoff occurs. Only then will "seniority" operate to determine which employee must go home. Length of service—three years or twenty—will not determine how much the worker receives in his SUB check.

It appears in fact that there is an inverse relationship between one's years of service and the likelihood one will benefit directly from a SUB plan. When SUB plans were first included in collective bargaining agreements, employees and employers intended that these benefits provide income security to laid off workers. The employees who face layoff most frequently are low seniority workers. High seniority workers have another mechanism to protect themselves: layoff order as determined by longevity of service with the employer.[188] The longer an employee has worked for the

185. E. BEAL, E. WICKERSHAM & P. KIENAST, *supra* note 19, at 376–77; [1979] Basic Patterns in Union Contracts 38–39 (BNA).

186. 431 U.S. at 590.

187. *Id.*

188. [1978] 2 COLLECTIVE BARGAINING: NEGOTATIONS AND CONTRACTS (BNA) 75:1.

same employer, the higher in the layoff order he advances. Thus, in practice, SUB benefits are inherently related to the *lowest* levels of seniority, rather than to the passage of time.

The Supreme Court in *Coffy* refused to let the mechanics of the plan's operation—such as the "short week benefit" and the lack of proportional relationship between benefits and length of service—deter it from focusing on what it considered the nature of this benefit to be. Because SUB plans are a further protection against layoff—after seniority order—the Court did not believe the benefits could a term of compensation for work performed.[189]

It should be noted, however, that there is not necessarily a logically corresponding relationship between a benefit which provides immediate protection against layoffs and a seniority perquisite designed to promote long-term stability in the job force. *Alabama Power* set out a test which is based on whether the benefit at issue is short-term compensation or a reward for length of service. Vacations are a clear example of short-term compensation, and it is not difficult to understand the function of pensions in the seniority system. SUB benefits pose an interesting issue precisely because they combine both elements of the *Alabama Power* test.

Perhaps the key to the "real nature" of SUB benefits lies in the distinction between competitive status seniority and individual benefit seniority.[190] Arguably, Congress intended only to protect returning veterans from losing their competitive status vis-a-vis nonveterans. SUB credits, like vacation time, are only measured relative to an individual's own work record. When a veteran reenters the work force he does so armed with a variety of short term fringe benefits and income security provisions offered by his interim military employer. SUB benefits appear to be just such short term compensation. And, if the collective bargaining agreement subjects SUB benefits to a meaningful work requirement, the Veterans' Act should not protect such benefits. It is true, however, that the decision in *Coffy v. Republic Steel Corp.* both liberally construes the reemployment rights in favor of veterans, a guideline established in *Fishgold*, and arguably satisfies the *Alabama Power* test.

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189. 48 U.S.L.W. at 4686.

190. *See* note 35 *supra* and accompanying text.