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Veterans' Reemployment Rights Expanded (Palmarozzo v. Coca-Cola Bottling Co.)

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LABOR LAW

VETERANS' REEMPLOYMENT RIGHTS EXPANDED

Palmarozzo v. Coca-Cola Bottling Co.

Section 9(b) of the Universal Military Training and Service Act¹ requires employers to either restore veterans to the positions they enjoyed prior to the period of their military service or, alternatively, to place them in other positions of similar "seniority, status and pay."² However, this seemingly clear mandate is obfuscated by the language of section 9(c)(1) of the Act,³ which provides that reemployed veterans are to be considered as having been on "leave of absence" during their military service. Although they are restored without loss of seniority, they are eligible only for "insurance or other benefits"⁴ accruing to employees who have been on leave of absence for an equal amount of time. Thus, section 9(c)(1), instead of conferring upon the returning veteran the benefits resulting from continuous employment, analogizes the status of the veteran to that of a nonveteran employee returning

1 50 U.S.C. § 459(b) (1970):

(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 . . .

•••••
(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 . . . to such position or to a position of like seniority, status and pay

Section 9 is a re-enactment of § 8 of the Selective Training and Service Act of 1940. Act of Sept. 16, 1940, ch. 720, § 8(b), 54 Stat. 890. Since the more recent statute is essentially the same as the original, the cases decided under § 8 can be relied upon as precedent. See S. REP. NO. 1268, 80th Cong., 2d Sess. 15 (1948).

2 50 U.S.C. § 459(b) (1970).

3 *Id.* § 459(c)(1). This section provides in pertinent part:

(c) Service considered as furlough or leave of absence

(1) Any person who is restored to a position in accordance with the provision of paragraph . . . (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

4 *Id.* The "other benefits" provisions, § 8(c) of the 1940 Act, was the subject of a congressional comment by Senator Sheppard. The Senator was vague as to which benefits the provision covered, limiting them to pension, bonus, insurance, and a catchall phrase including "other beneficial programs." 86 CONG. REC. 10095 (1940) (remarks of Senator Sheppard). See also *Borges v. Art Steel Co.*, 246 F.2d 735 (2d Cir. 1957), wherein the Second Circuit defined "other benefits" as a "fairly narrow group of economic advantages" whose common quality was that "they were miscellaneous fringe benefits." *Id.* at 738.

from leave of absence. So interpreted, it appears to conflict not only with the language of section 9(b), but also with the direction in section 9(c)(2)⁵ that veterans be accorded such status as they would have enjoyed had they remained continuously employed.

The Second Circuit recently explored this statutory confusion in *Palmarozzo v. Coca-Cola Bottling Co.*⁶ The majority, in an opinion by Judge Anderson, determined that severance pay qualified as a seniority requisite,⁷ *i.e.*, benefit, preserved by the Act for those whose employment has been interrupted by military service. Judge Friendly, dissenting, contended that the particular severance pay in issue was not a requisite of seniority, but rather one of the "other benefits" within the meaning of section 9(c)(1). Accordingly, the dissent reasoned that no severance benefits should accrue to the employee for the period of his military service.

In *Palmarozzo*, the plaintiff, having worked for Coca-Cola both before and after his military service, sued his former employer for \$200 in severance pay to which he would have been entitled had he remained continuously employed. Furthermore, Palmarozzo sought to compel Coca-Cola to contribute to a union retirement fund for the period of his service in the armed forces. Both claims were based on a collective bargaining agreement under which Coca-Cola was to make payments based on the number of hours of compensated work rendered by an employee.⁸ Under this service credit plan, an employee received one-fourth credit for every four hundred hours worked, with a one credit per year maximum.⁹ As a result of Coca-Cola's refusal to credit Palmarozzo for the period of his military service, he was one-half credit short of the five credits needed to receive severance payments from the union.¹⁰

⁵ 50 U.S.C. § 459(c)(2) (1970):

(c) Service considered as furlough or leave of absence

.....
 (2) 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 . . . (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.

⁶ 490 F.2d 586 (2d Cir. 1973), *cert. denied*, 417 U.S. 955 (1974).

⁷ Perquisites are "[e]moluments or incidental profits attaching to an office or official position, beyond the salary or regular fees." BLACK'S LAW DICTIONARY 1299 (4th ed. rev. 1968).

⁸ The contract between the employer and Local 812 of the International Teamsters Union provided that Coca-Cola would contribute \$.20 to a retirement fund for every hour actually worked by an employee up to a maximum of 40 hours a week or 1600 hours a year. 490 F.2d at 588.

⁹ *Id.*

¹⁰ *Id.*

Coca-Cola contended that severance pay was a benefit conditioned upon a valid work requirement necessitating actual fulfillment in order for the benefit to be awarded the claimant.¹¹ Accordingly, Palmarozzo would have had to work an actual eight thousand hours to receive the five credits necessary for severance pay and would receive no work credits for time spent in the service. Having failed to meet the actual work-hours requirement, Palmarozzo would be limited to those "other benefits" awarded to employees on furlough or leave of absence as governed by section 9(c)(1) of the Act. In response to his former employer's arguments, Palmarozzo maintained that he was entitled to those benefits enjoyed by a nonveteran employee who had never interrupted his employment. In other words, he should be credited for time spent in the military, since such benefits accrued automatically and lay within the ambit of seniority provisions as protected by section 9(b).¹²

Affirming the district court's judgment for the employee,¹³ the Second Circuit awarded Palmarozzo the same benefits as would have been accorded a nonveteran who had remained continuously employed.¹⁴ In so holding, the court relied upon the Supreme Court's decision in *Accardi v. Pennsylvania Railroad*¹⁵ wherein veteran firemen, facing abolition of their positions, sought payment of a separation allowance pursuant to a recently formulated strike settlement. Although the severance pay in *Accardi* was to be determined by the length of an employee's compensated service, an analysis of the plan revealed that a mere seven days of actual work qualified for one year of compensated service.¹⁶ In declaring the plan's work requirement to be a sham, the Supreme Court ascertained that the severance pay was, in fact, based on seniority, or length of service. Moreover, the veterans' right to the payments was deemed to have automatically accrued during the period of their military service.¹⁷

¹¹ *Id.* at 589.

¹² *Id.* at 594-96.

¹³ In an unreported decision, the United States District Court for the Southern District of New York granted summary judgment for the veteran employee.

¹⁴ 490 F.2d at 590-93.

¹⁵ 383 U.S. 225 (1966).

¹⁶ A year of compensated service was defined as any year in which an employee had worked at least seven months, with one day of service sufficient to constitute a month. *Id.* at 228.

¹⁷ *Id.* at 229-30. The Court in *Accardi* stated:

The requirements of the 1940 Act are not satisfied by giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it. We think it clear that the amount of these allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall.

Id. at 230.

It is not essential for the veteran to be physically present at his job in order to be

The *Palmarozzo* majority also placed reliance on a successor to *Accardi*, *Eagar v. Magma Copper Co.*¹⁸ Although the petitioner in *Eagar* had worked the necessary 75 percent of the work shifts during the year, he was denied vacation and holiday pay because, by entering military service, he failed to satisfy the condition that he be on the company's payroll on the first anniversary of the start of his employment. The Ninth Circuit upheld the denial of the benefits on the ground that he had not technically fulfilled the company's work requirements.¹⁹ In a per curiam opinion, the Supreme Court reversed, merely citing to *Accardi*.²⁰

In *Palmarozzo*, Judge Anderson determined that the service credit plan involved therein much resembled *Accardi's* compensated service plan.²¹ The court recognized that the *Accardi* benefits were actually proportionate to length of service and were intended to reward the employee for maintaining a continuing relationship with his employer.²² Moreover, the severance benefits compensated for loss of seniority rights which had accumulated with years of continuous employment, and thus, regardless of how the benefits were determined, they were not compensation for actual work performed.²³ Consequently, the majority in *Palmarozzo* rejected the suggestion that it use a work requirements analysis to review each severance plan individually.²⁴ The

characterized as being continuously employed. See *Altgens v. Associated Press*, 188 F.2d 727 (5th Cir. 1951), wherein the theory is espoused that an employee's seniority begins as soon as he receives his first pay check, and continues for as long as he is employed. Vacation, sickness, and military service do not terminate the legal relationship between employee and employer. *Id.* at 729.

¹⁸ 389 U.S. 323 (1967) (per curiam).

¹⁹ *Magma Copper Co. v. Eagar*, 380 F.2d 318 (9th Cir. 1966), *rev'd*, 389 U.S. 323 (1967).

²⁰ 389 U.S. at 323, *citing* *Accardi v. Pennsylvania R.R.*, 383 U.S. 225 (1966). The dissent was of the view that *Eagar* was not entitled to receive vacation benefits because they were not a seniority right. Justice Douglas, speaking for the dissent, explained that although the length and amount of vacation pay clearly turn on seniority, "eligibility" for vacation is controlled by the "other benefits" provision. Therefore, the applicable collective bargaining agreement must govern eligibility requirements. 389 U.S. at 325.

²¹ 490 F.2d at 588. The questionable validity of the majority's holding stems from this conclusion.

²² *Id.* at 589. In analyzing the seniority system under review in *Accardi*, the Court explained that for employees working at the same type of jobs in the same field and class, the amount and value of seniority increase with the length of seniority. Therefore, since employees with the greatest seniority were forfeiting more rights and benefits than their more recently hired counterparts, they should receive the highest severance pay. See *Accardi v. Pennsylvania R.R.*, 383 U.S. 225, 230 (1966).

²³ Although the severance benefits were not considered as compensation, the Second Circuit noted that such benefits are as valuable a right as any other seniority provision. Severance pay acts as security protection against layoffs and strikes in a large industrial organization and should be awarded to an employee who has rendered continuous service. 490 F.2d at 589, *citing* *M. Wortman & G. Witterfeld, Labor Relations and Collective Bargaining* 228, 256 (1969).

²⁴ 490 F.2d at 591. *But see* *Haggard, Veterans' Reemployment Rights and the "Esca-*

court reasoned that an employee's right to rely on severance pay should not depend on whether severance benefits in a union contract are based on length of service or actual work performed.²⁵ Furthermore, once a benefit has been deemed a seniority right, individual contracts should be liberally construed in favor of the veteran.²⁶

The majority attempted to draw further support for its position by way of the "escalator principle," first enunciated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.*²⁷ Often used to

lator Principle," 51 BOSTON U.L. REV. 539 (1971), wherein the author suggests that courts test union contracts to discover if they contain valid work requirements. A system of analysis is outlined to aid in the determination of whether the claimed benefits depend wholly or partially on seniority accumulated by the employee.

²⁵ 490 F.2d at 591. The court pointed out that the Act's purpose would be defeated if collective bargaining agreements were allowed to reclassify seniority perquisites by making them contingent on actual services rendered. See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946), where the Supreme Court stated: "[N]o practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Id.* at 285. But see *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 337 U.S. 521 (1949), wherein the Court resolved a conflict between the Third and Ninth Circuits as to whether a collective bargaining agreement, negotiated in the veteran's absence, could be controlling. The new contract, in modifying certain seniority provisions, entitled union officials to higher seniority in the event of layoffs. Subsequently, although union officials with less actual seniority were retained, the veteran plaintiff was temporarily laid off. Additionally, the employer refused to compensate the veteran for the period of the layoff. Under similar circumstances, the Third Circuit had held that the agreement governed. See *Payne v. Wright Aeronautical Corp.*, 162 F.2d 549 (3d Cir. 1947); *DiMaggio v. Elastic Stop Nut Corp.*, 162 F.2d 546 (3d Cir. 1947); *Gauweiler v. Elastic Stop Nut Corp.*, 162 F.2d 448 (3d Cir. 1947). The Ninth Circuit held to the contrary. See *Aeronautical Indus. Dist. Lodge 727 v. Campbell*, 169 F.2d 252 (9th Cir. 1948), *rev'd*, 337 U.S. 521 (1949). By reversing the Ninth Circuit in *Aeronautical*, the Supreme Court apparently adopted the view that the contract was binding.

²⁶ 490 F.2d at 592, *citing* *Fishgold v. Sullivan Drydock Corp.*, 328 U.S. 275, 285 (1946). The *Accardi* Court had emphasized that although seniority derives its meaning from private employment contracts, employers and unions will not be allowed to deprive a veteran of rights guaranteed by the Act by using "transparent labels," such as "compensated service," if in fact the benefit is conditioned on seniority. 383 U.S. at 229.

²⁷ 328 U.S. 275 (1946). Although the *Fishgold* decision was mainly concerned with whether the word "discharge," as used in industry, meant the same thing as a layoff, it is cited primarily for the escalator analogy. See Note, *Labor Law—Veterans—Collective Bargaining Agreements and "Superseniority"*, 46 COLUM. L. REV. 1030 (1946), for a discussion of the impact of *Fishgold* on industry.

Under the general escalator principle, the veteran is not to lose any increase in his seniority status due solely to his military absence. However, the *Fishgold* Court warned against giving the veteran a "superseniority" status which he could not have attained had he remained continuously employed. See United States Selective Service, Local Board Mem. No. 190-A, pt. IV, 1(c) (May 20, 1944), for the Director of Selective Service's encouragement of "superseniority." The memorandum stated that under the Act the veteran was to be reinstated to his former position or one of similar status and pay, even though a nonveteran with greater seniority might be replaced as a result. Nonetheless, the Second Circuit denied the veteran the preferential treatment he sought. The Supreme Court affirmed, stating that the Act's provision would be distorted if permitted to grant the veteran a greater seniority increase than he would have received had he not entered the military. 328 U.S. at 285-86.

describe an employee's rise in seniority rank, the escalator analogy provides that the veteran does not return to the same step of the seniority escalator as that which he left. Instead, he returns at the level he would have reached had he remained continuously employed.²⁸ Citing both *Fishgold* and *Taylor v. South Pacific Co.*,²⁹ the *Palmarozzo* court maintained that depriving the petitioner of severance pay would, in essence, amount to removing severance benefits from the seniority escalator.³⁰

In a vigorous dissent,³¹ Judge Friendly perceived that the compensated service plan present in *Accardi* was designed to distinguish between old and new employees, thereby conferring benefits in accordance with length of employment. Thus, he reasoned that the particular terms of the contract constituted the prime motivation for the Court's holding that the severance benefits were based on seniority.³² The *Accardi* decision, he believed, would be binding in *Palmarozzo* only if the plans in both cases were essentially alike. Examining the methods of calculation used in each contract, Judge Friendly concluded that Coca-Cola's service credit plan differed from the *Accardi* plan in that it employed a different standard of computing severance benefits.³³ The Coca-Cola plan was based on actual work and thus was not within the Act's seniority protection. Therefore, it was one of the "other benefits" to be awarded a veteran as if he had been on leave of absence.

Although undisturbed by mere military absence, a veteran's seniority standing may be affected for other reasons. For example, in *Trailmobile Co. v. Whirls*, 331 U.S. 40 (1947), the Supreme Court allowed a veteran's seniority status to be lowered after a parent company had merged with its subsidiary. The suit arose since the seniority of the employees in the subsidiary company was to be computed from the date the merger took place, rather than from the date they first began employment with the subsidiary company. The Court decided this practice was not so arbitrary as to entitle petitioners to legal relief. *Id.* at 59-60.

²⁸ The escalator principle was reaffirmed in *Oakley v. Louisville & Nashville R.R.*, 338 U.S. 278 (1949). In *Oakley*, the Sixth Circuit attempted to narrow the broad scope of seniority rights announced in *Fishgold*. Deciding that the veteran petitioner should be accorded the rights of an employee on leave, the court of appeals figuratively returned him to the seniority escalator at the same level of employment which he left. The Supreme Court reversed, holding that the Act required the veteran to be treated as though continuously employed and therefore entitled to move up to a higher position. *Id.* at 284.

²⁹ 308 F. Supp. 606 (N.D. Cal. 1969). Citing the *Accardi* automatic accrual rule, the *Taylor* court granted severance pay to a veteran who requested it in lieu of reemployment. In so holding, the court noted that severance pay represented a benefit which the veteran would have been automatically qualified to receive had he remained in continuous employment. *Id.* at 610.

³⁰ 490 F.2d at 590.

³¹ *Id.* at 593.

³² In Judge Friendly's opinion, the scope of the *Accardi* decision could be legitimately applied only to those collective bargaining agreements which did not contain work requirements as a condition precedent for receiving severance pay. *Id.* at 594.

³³ *Id.*

Since the contracting parties had previously agreed that time spent on leave of absence would not be considered in computing severance benefits,³⁴ Judge Friendly contended that Palmarozzo should not be credited for work he did not perform and, as a result, could not recover in the present action.³⁵

Responding to the majority's utilization of the escalator principle, Judge Friendly reasoned that its applicability in the present instance was doubtful.³⁶ Use of the principle in *Palmarozzo* would be meaningful only if the benefit in question were based on seniority. Believing, however, that Coca-Cola and the Teamsters Union had conditioned benefits on valid work requirements, not on seniority, Judge Friendly did not feel the escalator principle was applicable. Since severance pay did not automatically accrue to Palmarozzo at the expiration of a specified period of service, the escalator theory should not be used to place the employee in a status which he could only have achieved through his own work efforts.³⁷

Significantly, both the *Accardi* and *Eagar* decisions are consistent with Judge Friendly's dissent in *Palmarozzo*. The *Accardi* Court distinguished between benefits based on an employee's total work service and those benefits dependent on seniority or length of employment, determining that severance payments which automatically accrued by length of service were perquisites of seniority.³⁸ This distinction supports Judge Friendly's proposition that a benefit which does not automatically accrue is not a seniority benefit within the Act's protection. It is some "other benefit" which can be earned only by the employee's

³⁴ *Id.* at 593.

³⁵ *Id.* at 594.

³⁶ *Id.* at 596.

³⁷ *Id.* *McKinney v. Missouri-Kansas-Texas R.R.*, 357 U.S. 265 (1958), supports Judge Friendly's theory that a benefit conditioned on something other than mere length of tenure is not a seniority perquisite. In *McKinney*, the Court considered whether the plaintiff was entitled to an advanced position if such promotion depended on fitness and ability. The Court noted that a promotion would be awarded to a veteran only if that promotion were contingent on seniority or automatic advancement. If, however, the advancement were based on skill or ability, the veteran could not claim it as a seniority benefit. See generally *Bassett v. Texas & Pac. Ry.*, 258 F.2d 819 (5th Cir. 1958) (promotion speculative since advancement from apprentice to car-man was neither based on contract nor automatic but depended upon railroad's discretion); *Palmquist v. Buhl Sons Co.*, 179 F. Supp. 638 (E.D. Mich. 1959) (retroactive advancement denied where promotions from checker to the higher position of order board were not always based on seniority).

But see *Borges v. Art Steel Co.*, 246 F.2d 735 (2d Cir. 1957), where the Second Circuit decided that since plaintiffs were laborers and the only requirement for a pay increase was to be on the job for a certain period, the defendant's contention that the service requirement rewarded skill and experience was not valid. See also *Addison v. Tennessee Coal, Iron & R.R.*, 204 F.2d 340 (5th Cir. 1953).

³⁸ 383 U.S. at 229-30.

satisfying existing valid work requirements. Notably, the *Eagar* Court did not declare the claimed vacation and holiday pay involved therein to be seniority perquisites.³⁹ Thus, it could be argued they were "other benefits" which were awarded to Eagar because he had fulfilled the company-imposed work conditions. This interpretation would fully support Judge Friendly's contention that neither *Accardi* nor *Eagar* supports the proposition that benefits automatically accrue to the veteran employee regardless of actual work requirements.⁴⁰

The distinction between benefits based on seniority and those dependent upon valid work requirements has often been drawn by courts which have examined vacation benefits, an area somewhat analogous to severance pay. In light of *Accardi* and *Eagar*, the circuits have split over the issue whether vacation benefits are seniority perquisites or "other benefits." The more liberal view,⁴¹ embraced by a number of circuits,⁴² sanctions protection of vacation pay as a seniority benefit.⁴³ However, numerous decisions, including early Second Circuit cases,⁴⁴

³⁹ See text accompanying notes 18-20 *supra*.

⁴⁰ 490 F.2d at 593, 595. In *Connett v. Automatic Elec. Co.*, 323 F. Supp. 1373, 1377 (N.D. Ill. 1971), a district court strongly objected to legitimate work requirements being ignored:

If *Eagar* truly represents a conclusion by the Supreme Court that § 9 of the Act grants to returning veterans *everything* to which they would have been entitled had they remained on their civilian jobs, they would be entitled not only to bulk annual vacation pay but, presumably, also to pay for single vacation days granted by the employer . . . even though they did not work at any point in time near those holidays or for even one day during the year. This construction logically would require the employer even to pay the returning veteran such wages for the period of his military service as would have automatically accrued to him had he remained on the job instead of entering the armed forces. We cannot believe that this was the intent of Congress when it passed the Universal Military Training and Service Act and we do not believe that the Supreme Court has so held.

Id. at 1377 (emphasis added).

⁴¹ See 490 F.2d at 593, where the court relied upon the following language from the *Accardi* opinion:

Without attempting in this case to determine the exact scope of this provision of § 8(c) it is enough to say that we consider that it was intended to add certain protections to the veteran and not to take away those which are granted him by § 8(b)(B) and the other clauses of § 8(c).

383 U.S. at 232.

⁴² See *Ewert v. Wrought Washer Mfg. Co.*, 477 F.2d 128 (7th Cir. 1973) (per curiam); *Locaynia v. American Airlines, Inc.*, 457 F.2d 1253 (9th Cir.), cert. denied, 409 U.S. 982 (1972); *Edwards v. Clinchfield R.R.*, 408 F.2d 5 (6th Cir. 1969); *Morton v. Gulf, Mobile & Ohio R.R.*, 405 F.2d 415 (8th Cir. 1969).

⁴³ In *MacLaughlin v. Union Switch & Signal Co.*, 166 F.2d 46, 48 (3d Cir. 1948), the court asserted the proposition that vacation benefits are as valuable as pensions and insurance plans, and that it was Congress' intention, when passing the Act, to protect these other rights.

⁴⁴ See, e.g., *Siaskiewicz v. General Elec. Co.*, 166 F.2d 463 (2d Cir. 1948), wherein General Electric denied vacations to veterans because they had not worked six months as required by contract. The court held that since vacation pay represented compensation for work actually done and was not a seniority benefit, the six-month period was a legitimate work requirement and did not violate the Act's seniority provision. Since a non-

have denied vacation pay to reinstated veterans who have not fulfilled the work requirements in their union contracts.⁴⁵ In *Kasmeier v. Chicago, Rock Island & Pacific Railroad*,⁴⁶ the Tenth Circuit held that an employee who had not worked the 110 days required by the union contract was not entitled to vacation pay. The court found that the vacation benefits were not seniority rights which accrued with the passage of time and therefore determined that time spent in the military should not be counted towards the 110-day requirement.⁴⁷ Moreover, the court found its decision fully consistent with both *Accardi* and *Eagar*, since it interpreted these two cases in the same manner as did Judge Friendly in *Palmarozzo*. Whereas the veteran in *Eagar* had actually met the compensated work requirements and thereby earned his benefits, the veteran in *Kasmeier* had not.⁴⁸ Of similar import is the decision of the Fifth Circuit in *Dugger v. Missouri Pacific Railroad*,⁴⁹ concluding that a veteran's right to vacation pay depended upon the terms of the labor agreement between the railroad and its employees.⁵⁰ In addition, the Seventh Circuit, granting a veteran's claim to vacation pay in *Ewert v. Wrought Washer Manufacturing Co.*,⁵¹ suggested that it might not have allowed recovery if the vacation pay were pure compensation for services rendered and therefore independent of seniority.⁵²

veteran employee who had failed to satisfy the work requirements would not be entitled to vacation pay, the court reasoned that granting pay to the veteran plaintiff would be awarding him the "superseniority" prohibited by *Fishgold. Id.* at 466. In *Dwyer v. Crosby Co.*, 167 F.2d 567 (2d Cir. 1948), the court again denied a veteran's claim for vacation pay. In *Dwyer*, the court considered the plaintiff as having been on a leave of absence. Accordingly, since vacations ordinarily mean a release from work, it was deemed unlikely that the Act entitled a man on leave of absence to a vacation. *Id.* at 569.

⁴⁵ See *Kasmeier v. Chicago, Rock Island & Pac. R.R.*, 437 F.2d 151 (10th Cir. 1971); *Dugger v. Missouri Pac. R.R.*, 403 F.2d 719 (5th Cir. 1968) (per curiam), *cert. denied*, 395 U.S. 907 (1969).

⁴⁶ 437 F.2d 151 (10th Cir. 1971).

⁴⁷ *Id.* at 154, 156. See *Hoffman v. Bethlehem Steel Corp.*, 477 F.2d 860, 863 (3d Cir. 1973). In *Hoffman*, the Third Circuit interpreted *Kasmeier* as containing a valid work requirement since an employee only received benefits when he worked the full period, and not a portion thereof.

⁴⁸ 437 F.2d at 155.

⁴⁹ 403 F.2d 719 (5th Cir. 1968) (per curiam), *aff'g* 276 F. Supp. 496 (S.D. Tex. 1967), *cert. denied*, 395 U.S. 907 (1969).

⁵⁰ See also *Fees v. Bethlehem Corp.*, 335 F. Supp. 487 (W.D. Pa. 1971) (under a union contract requiring six consecutive months of work in the preceding year for vacation eligibility, vacation pay was not a seniority right to which the veteran, who had not met the six months requirement, was automatically entitled); *Tuttle v. United States Plywood Corp.*, 293 F. Supp. 401 (D. Ore. 1968) (reemployed veterans denied recovery where, pursuant to a collective bargaining plan, the right to holiday and vacation pay arose only after the employee had actually worked the required number of hours); *Bradley v. General Motors Corp.*, 283 F. Supp. 481 (E.D. Mo. 1968) (mem.) (a paid absence allowance credit held not to be a seniority benefit since based on actual employee service in a specific number of pay periods).

⁵¹ 477 F.2d 128 (7th Cir. 1973) (per curiam).

⁵² Both *Ewert* and *Locaynia v. American Airlines*, 457 F.2d 1253 (9th Cir.), *cert.*

It would appear that the severance payments in *Palmarozzo* were conditioned upon actual hours worked and not upon seniority. While the so-called work requirement in *Accardi* was a sham and benefits were, in fact, based on seniority, such was not the case in *Palmarozzo*. The five service credits, representing 8000 hours of work necessary for *Palmarozzo* to receive severance pay, certainly met the test of a valid work requirement.⁵³ Since the service credits did not automatically accrue, the severance pay was not a seniority perquisite. Therefore, Judge Friendly correctly concluded that it constituted one of the "other benefits" which the veteran was entitled to receive on the same basis as an employee who had been on leave of absence. Consequently, the time spent by *Palmarozzo* in military service should not have been included in the determination of his right to severance pay.

As evidenced by the conflicting decisions among the circuits, the area of veterans' reemployment rights is extremely uncertain. The source of the trouble can be traced to the very statute which protects these rights. Although in effect for over thirty years, the Act has yet to be definitively interpreted. Additionally, since they are open to several different constructions, the *Accardi* and *Eagar* decisions have only served to increase the confusion. The solution lies in a forceful Supreme Court decision which, in clarifying the apparent contradictions in the Act, will produce a uniform rule regarding seniority benefits for the veteran. Such a ruling may soon be handed down, for *Foster v. Dravo Corp.*,⁵⁴ a vacation benefits case, has been granted

denied, 409 U.S. 982 (1972), were cited by the *Palmarozzo* majority for the proposition that work requirements are no longer valid. Neither case, however, lends support to this proposition. In *Locaynia*, although the veteran was awarded vacation benefits, this in all probability resulted because the collective bargaining agreement contained no express work requirements for vacation eligibility. Significantly, the contract, while requiring one year of continuous service, provided that time spent in the military should be included for purposes of eligibility.

Similarly, the *Ewert* decision was not based on the validity or invalidity of any bargaining agreement condition. Relying on the holding in *Eagar*, the *Ewert* court went no further than to mechanically label the vacation benefits in issue seniority perquisites simply because they were vacation benefits. 477 F.2d at 129.

For a complete analysis of *Locaynia* and the right of the reinstated veteran to vacation pay, see Note, *Reemployment Rights: The Veteran and the Vacation Benefit*, 53 BOSTON U.L. REV. 480 (1973).

⁵³ In a footnote, the *Palmarozzo* majority argued that, even under close scrutiny, Coca-Cola's service credit plan could not be considered a valid work requirement. The argument made was that the company's failure to credit employees with hours worked in excess of 1600 hours illustrated that the plan was meant to reward employees for continuous service. This argument appears tenuous, however, in light of the fact that each service credit had to be earned by 1600 hours of actual work and that the employee was not credited with hours spent on vacation or hours lost due to illness. See 490 F.2d at 591 n.4.

⁵⁴ 490 F.2d 55 (3d Cir. 1973), cert. granted, 43 U.S.L.W. 3187 (U.S. Oct. 15, 1974) (No. 73-1773). In *Dravo*, the veteran plaintiff, returning from service, was held not to be

certiorari. A natural sequel to the *Accardi* automatic accrual rule would be the approval by the Court of the work requirements analysis espoused by Judge Friendly in *Palmarozzo*.*

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entitled to full vacation benefits under the union's collective bargaining contract. The agreement required an employee to work 25 weeks in 12 months preceding December 31 in order to qualify for vacation pay. Since the plaintiff worked for defendant corporation only 9 weeks before entering the military in 1967 and 13 weeks after he resumed employment in 1968, he did not fulfill the contract terms. Interestingly, however, the Third Circuit vacated and remanded, noting that the plaintiff was not prevented from claiming a pro rata share of his vacation benefits. This seems to indicate an effort by the court to achieve a compromise solution between former decisions which awarded full benefits to the veteran and those which denied him any benefits at all.

* *Editor's Note.* While this article was being printed, the Supreme Court decided *Foster v. Dravo*, 43 U.S.L.W. 4227 (U.S. Feb. 18, 1975). See note 54 *supra*. The Court affirmed the lower court rulings that the veteran, Foster, was not entitled to full vacation benefits, utilizing the approach suggested by Judge Friendly in *Palmarozzo*. The Court's approval of the work requirements analysis advanced by Judge Friendly and its applicability to various types of benefits is apparent from the following language of the opinion:

Generally, the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation. Of course, as in the *Accardi* case, the work requirement may be so insubstantial that it appears plainly designed to measure time on the payroll rather than hours on the job; in that event, the Act requires that the benefit be granted to returning veterans. But where the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that it correlates only loosely with the benefit is not enough to invoke the statutory guarantee.

43 U.S.L.W. at 4229.