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### Veterans' Super-Seniority Rights

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## VETERANS' SUPER-SENIORITY RIGHTS

Whether the interests of the veterans of this war will be protected in the judicial construction of the Selective Service and Training Act<sup>1</sup> is a post-war question of vital interest. It is thus necessary to ascertain whether the attitude of the courts will be liberal in order to enable more veterans to take advantage of the Act which provides a one-year guarantee of holding their jobs over non-veterans.

From the few cases thus far decided it can be elicited that despite opposition on the part of labor unions and management, the courts are construing the statute with a beneficent eye toward the veteran and according him "super-seniority".<sup>2</sup>

In enacting Section 8, Congress could have profitably undertaken considerably more research, although in all justice to Congress

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<sup>1</sup> 54 STAT. 890, 50 U. S. C. A. 308 (1940). Section 8(b): In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position in the employ of any employer and who (1) receives such certificate [indicating satisfactory completion of service under Section 3(b) of the Act]; (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within 40 days after he is relieved from such training and service . . . (amended and extended to 90 days after discharge from the armed forces or release from the hospital, provided such hospitalization has not been for more than one year). See Pub. L. No. 473, 78th Cong., 2d Sess. (Dec. 8, 1944).

Section 8(b)(B): If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so . . .

Section 8(c): Any person who is restored to a position . . . shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after restoration.

Section 8(b)(A) extends this protection to employees of the Federal Government. Section 8(b)(C), to State and local government employees but the compulsory provisions do not apply to them. The Service Extension Act of 1941 [55 Stat. 627 (1941), 50 U. S. C. A. § 357 (Supp. III, 1941-43)] extends these benefits to those inductees or volunteers who enter into active duty after May 1, 1940. Members of the Merchant Marine are also covered by similar provisions provided they can show substantially continuous service in the Merchant Marine. The Civilian Reemployment of Members of the Merchant Marine Act of 1943 [57 Stat. 162, 50 U. S. C. A. § 1472 (1943) (Supp. III, 1941-43)].

<sup>2</sup> "Super-Seniority" is a term applied to the veteran's rights under the code. It gives the false impression of overriding the seniority rights of others and is so commonly understood by the bar and laity. Actually, seniority has no relevance to this veteran's right, which is in the nature of a statutory preference of retention of employment for one year. The term "absolute priority" has also been colloquially used in reference to such preference.

it must be remembered that at the time of the passage of the Selective Service and Training Act a more immediate and pressing problem was the raising of a protective army of conscripts in a warring world.<sup>3</sup> Such further research would have facilitated the development of procedures more advantageous to the returning veteran. Nevertheless, the intent of Congress was that the veteran should have the right to be restored to the job he held when he was inducted under the provisions of the Selective Service and Training Act and to hold that job for a period of one year regardless of his relative seniority to a non-veteran performing the same type of work and possessing the same or similar qualifications, provided of course that such job was still in existence. It could not have been the purpose of Congress merely to give him the right upon discharge from the armed forces to have his name placed upon a roster with the privilege of going to work only when and if his name should be reached and his old job be available. The much-debated Memorandum 190-A issued by Selective Service Headquarters is in line with the foregoing reasoning. This memorandum declared that, "A veteran who has been reinstated to his former position cannot within one year be displaced by another on the ground that the latter has greater seniority rights. To permit such displacement would be to nullify the original reinstatement and thus deprive the veteran of his reemployment rights under the act, and would be, in effect, a repeal of an act of Congress."<sup>4</sup>

The question of constitutionality has been raised by those opposed to such a construction, *i.e.*, whether the provisions<sup>5</sup> covering reemployment of servicemen constitute a valid exercise of the war power. In response to this query it can be stated categorically that the "war power"<sup>6</sup> is not restricted to the winning of victories.

In *Hall v. The Union Light, Heat and Power Company*,<sup>7</sup> it was held that the public statutes dealing with the welfare of the people are to have a liberal construction and that the contention that the statute violates the "due process" provision of the Fifth Amendment was without merit. Moreover, since Congressional power to legislate for the public welfare is superior to the rights of contract of

<sup>3</sup> For history of legislative intent, see 76TH CONG. REC. 10107, 10487, 11697 (1940).

<sup>4</sup> Selective Service Headquarters Memorandum 190-A, pt. IV, par. 4(b) (May 20, 1944).

<sup>5</sup> *Supra* note 1.

<sup>6</sup> "The war power of the national government is the power to wage war successfully. . . . It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemies. It embraces every phase of the national defense. . . ." *Hirabayashi v. United States*, 320 U. S. 81, 87 L. ed. 1774 (1943). Also see *Hall v. Union Light, Heat and Power Co.*, 53 F. Supp. 817 (E. D. Ky. 1944).

<sup>7</sup> Cited *supra* note 6.

private parties, there is more than ample precedent to sustain constitutionality when such issue is raised.<sup>8</sup>

The unions and management have brought forth rather gloomy predictions concerning the effect "absolute priority" will have on their interests and the welfare of the country at large. The unions fear that if the veterans are given a one-year guarantee of job tenure outside of the union fold, it will destroy the basic system of job security rights of their members, and thus in turn be a detriment to the veteran himself after this year expires. There is also the apprehension that this one-year immunity will bring elements less amenable to unionization into their midst, thus decimating membership and resulting in the loss of long-fought-for gains. This might be so in cases where, during the absence of the veteran, the plant had become unionized. Management fears drastic reduction in the efficiency of their staffs due to the loss of the right to hire and fire, and rapid turnover of help, if men and women with high seniority are to be supplanted by men and women with far less experience.

These fears, although they find valid basis in fact, thus far have turned out to be grossly over-exaggerated. With the war at an end, hundreds of thousands of soldiers discharged, and thousands more being discharged daily, a very minute percentage of veterans have thus far found it necessary to use legal remedies in order to recover and maintain their jobs. This number does not seem to portend the weakening of the firm foundations upon which unionization is based. Nor, thus far, has management suffered from the enforcement of the veteran's rights.

The courts in each succeeding case have almost uniformly adopted a pro-veteran interpretation of the Act. This has led to a square finding for "super-seniority" in the recently decided *Fishgold v. Sullivan Drydock and Repair Co.* case.<sup>9</sup>

In *Hall v. Union Light, Heat and Power Company*,<sup>10</sup> the plaintiff sued to recover damages in the amount he would have earned had he been promptly reemployed from the time of application for such reemployment which was refused. The court found for the veteran plaintiff and held that the purpose of the statute was to assure the prospective soldiers that their pay and status would be held inviolate.

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<sup>8</sup> In the Gold Clause cases, the Supreme Court said: "... contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. . . ." *Norman v. Baltimore & Ohio R. R.*, 294 U. S. 240, 307, 310, 79 L. ed. 885 (1935).

<sup>9</sup> *Fishgold v. Sullivan Drydock and Repair Corp.*, 62 F. Supp. 25 (E. D. N. Y. 1945).

<sup>10</sup> *Hall v. Union Light, Heat and Power Co.*, 53 F. Supp. 817 (E. D. Ky. 1944).

The Circuit Court of Appeals in *Kay v. General Cable Corp.*<sup>11</sup> gave judgment to the plaintiff when the defendant corporation sought to escape liability by claiming that the plaintiff, a physician previously employed by them, was not in their employ within the meaning of that term in the Act. They defended too on the ground that their circumstances had so changed that it would be "unreasonable" to require them to reemploy the plaintiff.

In the course of interpreting the statute, the court held that, "Of course, the words 'in the employ of' are not applicable to independent contractors, but except for casual or temporary workers, who are expressly excluded, they cover almost any other regular and continuing service to another." The facts were that the doctor had been employed at a salary by the company with an office and facilities at the plant. He nevertheless maintained private offices and patients. Plaintiff also was physician for an Employees' Health Association for illness not connected with employment at the plant.

The defendant argued that the Health Association was closely allied to the plant, and that the Association had neglected to reemploy the plaintiff and that it was therefore far more efficient to employ the same physician for both the Association and the plant.

In answering this contention the court found that even if the reemployment of the veteran might result in additional expense or a loss in efficiency, the term "unreasonable" has other significance than "undesirable or inconvenient."

There was a decision against the plaintiff veteran in *Wright v. Weaver Bros., Inc., of Maryland*.<sup>12</sup> However, the holding merely declared that where the veteran of his own free will had entered into a contract with his employer, the law will not allow him to use the statute to evade obligations and liabilities under his contract. The contract here stipulated that employment would continue ". . . until the expiration of six months after delivery of written notice of termination." The defendant employer had served notice upon the plaintiff while he was in the service. The dictum in this case is damaging to the pro-veteran cause because the court said that "the statute is in derogation of the common law and therefore must be strictly construed and not extended by implication or by liberal interpretation."

Recently in a California state court case,<sup>13</sup> the employer joined the union and veteran employee as party defendants in an action for a declaratory judgment.

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<sup>11</sup> *Kay v. General Corp.*, 144 F. (2d) 653 (C. C. A. 3d, 1944).

<sup>12</sup> *Wright v. Weaver Bros., Inc., of Maryland*, 56 F. Supp. 595 (D. C. Md. 1945).

<sup>13</sup> *Harvey Machine Co., Inc. v. Frank Stolo, Aaron Weiselman, Western Mechanic Local Union No. 700, International Union Mine, Mill and Smelters Workers C. I. L. C. C. H. Manpower Law Service*, par. 60,118 (1945).

The plaintiff had entered into a collective bargaining agreement with the defendant union and the union contended that according to this agreement the defendant employee did not retain his seniority rights over employees hired subsequent to the veteran's induction into the armed forces and that he does not retain his seniority nor did it accrue by reason of his service in the armed forces. In granting the declaratory judgment in favor of the veteran employee, the court found that the Selective Service and Training Act must be construed in a broad sense, as was the intent of Congress, and that the primary concern in such a matter as this must be the reinstatement of the veteran in his civilian job, and that other considerations must be treated as secondary.

In the *Fishgold* case,<sup>14</sup> the plaintiff, a welder, sought damages for those days on which he was denied the right to work. The plaintiff had been a steady employee before his induction into the army and upon discharge complied with all the technical requirements of the statute. He obtained a certificate of satisfactory service, was qualified to perform the duties of the position and made timely application for reinstatement. He was actually reemployed for a time until it became necessary for the defendant to "shape-up"<sup>15</sup> some one, and his name was chosen. There were forty-six other welders and five snappers working on those days and none of these were veterans. There was a declaratory judgment asked here, too, but the court denied this because the one-year period had already expired. The court gave the plaintiff his money judgment and in so doing held that terms "status" and "pay", unless the employer's circumstances had been changed so as to make it impossible or unreasonable to do so, are merely descriptive words which mean that the veteran has to be taken back as a first class welder and not a second class welder and that his pay must remain the same. The court further indicated that Congress intended that he was to be entitled to his job over everybody else but a veteran in his own category and that a returning veteran should have the opportunity of having one year in which to rehabilitate himself, and one year to avoid open competition with his fellow employees, due to the fact that for two, three or four years he was away. There were briefs filed in the case by the C.I.O. as *amicus curiae* and by Local 13 of the International Marine and Shipbuilding Workers Union of America C.I.O. as intervenor. These briefs earnestly advanced the

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<sup>14</sup> *Supra* note 9.

<sup>15</sup> "Shape-up" is a term used in industry almost as a synonym for lay-off to denote a condition in which a slackening of the need for men necessitates one or more men not working during the slack period. Thus, those laid off are considered "shaped-up". Men so "shaped-up" nevertheless retain seniority, vacation and other benefits and need not turn in their tools or badges nor make a new application for reemployment when the necessity for "shape-up" ends.

argument that "shape-up" or lay-off is not in reality a discharge according to the meaning of the statute.<sup>16</sup> This argument is discounted as not within the meaning and intent of the statute. Truly, such an interpretation could lead to fraud and result in nullifying the statute.

The term "seniority" as used, which according to the defendants' interpretation would allow the veteran seniority for the time of his service and nothing more, would subject the veteran to "shape-up" before a non-veteran employee with more seniority. The court held here that in view of its decision such issue need not be discussed because the plaintiff need only prove compliance with the technical requirements of the law in order to establish his *prima facie* case and the burden of proving who is senior among veterans and non-veterans is upon the defendant since it would be an impossibility for the plaintiff to ascertain this himself.

It seems fortunate that this pro-veteran trend is taking shape. Congress has acted to spare the ex-serviceman and woman the bitter disappointments suffered by the veterans of the first World War. As the law now stands, the numerous conditions with which the veteran must comply in order to exercise his reemployment rights will cut down drastically the amount of persons obtaining them. Such a condition as requires a veteran's position to have been other than temporary leaves many thousands who were engaged in seasonal occupations without any remedy.<sup>17</sup> The circumstances of the employer may have so changed as to make it impossible or unreasonable to reemploy them. The veteran must also obtain a certificate of satisfactory service from the armed force in which he served.<sup>18</sup> *Quere*, whether the quality of a person's military service need determine his right to recover and retain his civilian job. There are many who no longer are qualified to perform their duties because of injury or disability incurred in service. Others who are physically fit may not wish to return to their old jobs or if they do so desire, the job itself may no longer exist due to termination of war contracts or other contingencies. Therefore, with so many who necessarily fall outside the law, the cases seem correctly to extend the benefits to as many as possible by a liberal pro-veteran construction. The veteran who has been away from his trade or profession for a

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<sup>16</sup> Dr. Brecht's arbitration award in Local No. 1, Ind. Union of Marine and Shipbuilding Workers of America v. New York Shipbuilding Corp., is quoted, "for a lay-off is not literally a discharge nor when both [employees] are employed does the retention of the employee who has longer service literally displace the other employee who, because of lesser seniority, is properly scheduled for lay-off under the terms [of Collective Bargaining agreement . . .]."

<sup>17</sup> See GRIFFITH, SENIORITY AND REEMPLOYMENT OF WAR VETERANS (National Industrial Conference Board Studies in Personnel Policy, No. 65) (1944).

<sup>18</sup> Excellent treatment given in Note (1942) 17 IND. L. J. 347, 348.

period of one to four years sorely needs an opportunity to refurbish his rusty skills and should be assured that for one year he need not compete in the labor market with those who may have become more proficient in the course of these years. It is, however, significant to note that due to an omission by the legislature to account for World War I veterans, and their widows and dependents, these too can be supplanted by a veteran of World War II. Simple legislation can remedy such defect.

SAUL STEPHAN DAVIS.

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#### VARYING ELEMENTS OF CONSPIRACY UNDER FEDERAL LAW

Two recent cases in the Federal District Court for the District of New Jersey were prosecutions for conspiracy. One was for conspiracy in restraint of trade,<sup>1</sup> the second for conspiracy to violate a regulation or order of the Emergency Price Control Act.<sup>2</sup> In one, the court dealt with the question of reentry into a conspiracy, in the other, whether conspiracy is a crime apart from the Act sought to be violated or a crime under such Act. Both cases show that conspiracy is not a well defined crime, the essentials of which are uniform, but rather one in which they vary somewhat with each charge.

In *United States v. National Wholesale Druggists' Association*,<sup>3</sup> the corporate defendant had participated in agreements for price schedules which allegedly constituted a conspiracy in restraint of trade. The corporation later filed a voluntary petition in bankruptcy. From December 8, 1938 until July 1, 1941, the corporation was in the custody and control of the court, whose trustee was in exclusive possession and management. During this time the corporate officers remained the same but under the control of the court. Throughout this period the purchase and sale of drug products were continued at prices in accord with the schedules established under the agreement or alleged conspiracy. On July 1, 1941 the trusteeship was terminated and the original officers of the defendant corporation were reinstated. The question was whether upon resumption of legal control of the business and assets of the defendant corporation by the same officers and agents, their compliance with the prices previously established constituted a reentry into the conspiracy.

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<sup>1</sup> *United States v. National Wholesale Druggists Association*, 61 F. Supp. 590 (D. C. N. J. 1945).

<sup>2</sup> *United States v. Schenley Distillers Corporation*, 61 F. Supp. 601 (D. C. N. J. 1945).

<sup>3</sup> *United States v. National Wholesale Druggists Association*, 61 F. Supp. 590 (D. C. N. J. 1945), cited *supra* note 1.