December 1981

Military Service and Private Pension Plan Benefits: An Analysis of Veterans' Reemployment Rights

Stephen D. Tandle

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol58/iss1/7

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
MILITARY SERVICE AND PRIVATE PENSION PLAN BENEFITS: AN ANALYSIS OF VETERANS' REEMPLOYMENT RIGHTS

In 1940, Congress enacted the Selective Training and Service Act which created this nation’s first peacetime draft. Not only did the 1940 Act initiate peacetime conscription, but it also differed from previous selective service acts in its careful attention to the disruptive effects to be expected from subsequent demobilization. In order to prevent widespread unemployment like that which had followed World War I, the Act provided for reemployment rights of veterans inducted after May 1, 1940. Specifically, the 1940 Act established a legally enforceable right to full reemployment concomitant with the duty to render compulsory military service.

Section 8(b) of the Act provided that a qualifying veteran was to be restored to the position he had held prior to his military service “or to a position of like seniority, status, and pay.” Any veteran so restored was, under section 8(c), to be “considered as having been on furlough or leave of absence” from his job during the period of his military service; and, he was to be “so restored without loss of seniority” and “entitled to participate in insurance and other benefits offered by the employer” on the same basis as non-veteran employees on fur-

1. Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885 [hereinafter referred to as the Act or the 1940 Act].
6. The Act establishes a civil cause of action and provides for the assistance of a United States attorney who can bring an action on behalf of a veteran against an employer who refuses to comply with the reemployment rights provisions. 1940 Act, ch. 720, § 8(c), 54 Stat. 891. See 28 C.F.R. § 50.45(h) (1980).
7. 1940 Act, ch. 720, § 8, 54 Stat. 890; see DUGGAN, supra note 2, at 100-02.
8. Any veteran who left a permanent position in order to serve in the armed forces and who (i) satisfactorily completed his tour of duty; (ii) was still able to perform the duties of his prior position; and (iii) made application for reemployment within 40 days of discharge was a “qualified” veteran. 1940 Act, ch. 720, § 8(b), 54 Stat. 890. The period required for application for reemployment was later extended to 90 days. Act of Dec. 8, 1944, Pub. L. No. 473, 58 Stat. 798.
lough or leave of absence.\textsuperscript{10} Section 8 thus provided a program for easing previously employed veterans back into civilian life: it insured their reemployment; restored their seniority, job status and level of pay; and preserved their fringe benefits which had accrued prior to military service.

The language of section 8(b) clearly conveys Congress' intent to restore the returning veteran to the same job he held before induction or to one substantially like it.\textsuperscript{11} By contrast, the language of section 8(c)\textsuperscript{12} leaves ambiguous the relative priority of veterans' reemployment rights and of the rights of employers and employees to determine policy pertaining to furlough or leave of absence. For purposes of section 8(c), a veteran who is restored to his prior job in accordance with section 8(b) is deemed to have been on furlough or leave of absence during the time he spent in military service.\textsuperscript{13} Notwithstanding such status, section 8(c) provides that the veteran shall be restored "without loss of seniority."\textsuperscript{14} A conflict arises between these provisions when an employment or collective bargaining agreement defines "seniority" so as to exclude periods of furlough or leave of absence. In such a case, it is clear that the statute restores seniority accumulated prior to induction; however, it is not altogether clear that the statute supersedes em-

\begin{itemize}
  \item \textsuperscript{10} \textit{Id.}
  \item \textsuperscript{11} Section 8(b) provides:
    \begin{itemize}
      \item (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, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—
        \begin{itemize}
          \item (A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;
          \item (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;
          \item (C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.
        \end{itemize}
    \end{itemize}
  \item \textsuperscript{12} Section 8(c) provides:
    \begin{itemize}
      \item (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) 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 such restoration.
    \end{itemize}
\end{itemize}

\begin{itemize}
  \item \textsuperscript{13} \textit{Id.}
  \item \textsuperscript{14} \textit{Id.}
\end{itemize}
ployment or collective bargaining agreements and creates seniority that would not have otherwise accumulated during a furlough or leave of absence. In 1945, the United States Supreme Court settled this "seniority" problem in favor of the veteran, construing section 8(c) as guaranteeing the accumulation of seniority during military service regardless of company or union policy about furlough or leave of absence.15

Section 8(c) further provides that the returning veteran has a right "to participate in insurance and other benefits" offered by his employer on the basis of "established rules and practices relating to employees on furlough or leave of absence."16 Thus, the statute defers to the rules and practices of the employer concerning a veteran's participation in fringe benefit programs.17 That is, the veteran's military service is equated with a furlough or leave of absence and his rights to "insurance and other benefits" are determined by reference to the employer's rules and practices.

Thus, the 1940 Act accords quite different treatment to "seniority" than it does to "insurance and other benefits": an employer must completely restore a reemployed veteran's seniority but it need only provide insurance and other benefits insofar as it does for employees on furlough or leave of absence. This disparate statutory treatment can present problems in determining a returning veteran's fringe benefits which are based on an employee's years of service with an employer. If a particular fringe benefit is characterized as an "incident of seniority," then the Act would require that an employer give the returning veteran full credit for his military service. By contrast, inclusion of a service-related fringe benefit under the classification of "insurance and other benefits" results in a denial of credit for military service and a consequent reduction in benefits if the employer legitimately excludes credit for periods of furlough or leave of absence. In the area of private pension plans, this problem becomes particularly acute because such plans usually calculate benefits using a formula which recognizes an employee's years of continuous service with an employer.18 Unfortunately, the 1940 Act does not specify or characterize the types of


16. 1940 Act, ch. 720, § 8(c), 54 Stat. at 890.

17. See Haggard, supra note 3, at 567-68.

benefits which are to be included under the classification "insurance and other benefits."

The relationship between veterans’ reemployment rights and the crediting of military service toward private pension plan benefits will be the focus of this note. In particular, this note will trace the statutory and case law development of the veteran’s reemployment rights provisions since the 1940 Act and examine how they were applied in two recent United States Supreme Court decisions in the area of private plan benefits. In both Alabama Power Co. v. Davis19 and Coffy v. Republic Steel Corp.,20 the Court characterized the employee benefits21 as incidents or “perquisites of seniority,”22 rather than as a type of “insurance and other benefits.” Consequently, the calculation of each veteran’s benefit accruals had to include periods of military service,23 even though such service was specifically excluded under the terms of the respective plans.24 It will be shown that the issues involved in the area of pension benefits cannot be finally and equitably resolved through the judicial process but will require congressional action.

**IMPACT OF THE SUPREME COURT DECISIONS**

It is not possible to determine exactly how many veterans are affected by the recent United States Supreme Court decisions.25 However, in a news release issued in the wake of Alabama Power Co. v. Davis, the Department of Labor estimated that “hundreds of thousands” of veterans could be affected by the decision.26 With the Supreme Court’s extension of the Alabama Power rationale from pen-
sion benefits to supplemental unemployment benefits in *Coffy v. Republic Steel Corp.*, the rights of even more veterans were affected.

In general, the recent Supreme Court decisions will apply to any veteran inducted after May 1, 1940\(^{27}\) who returns to service with his former employer. The veteran must at some time become covered under a retirement plan which recognizes for purposes of participation, vesting and benefit accruals a period of time encompassing his military service. In other words, the veteran need not be covered under the employer's plan before leaving for the military, nor need the plan even exist at that time.\(^{28}\) The issue is whether the plan extends credit to non-veterans for service rendered during the veteran's period of military service.

**LEGISLATIVE HISTORY OF THE MILITARY SELECTIVE SERVICE ACT**

On September 16, 1940, Congress enacted the Selective Training and Service Act of 1940.\(^{29}\) Section 8 of that Act provided for reemployment rights of veterans inducted into the armed forces after May 1, 1940. The 1940 Act was later re-enacted as the Selective Service Act of 1948.\(^{30}\) The 1948 Act re-designated section 8 of the 1940 Act as section 9 but made no substantive change in its provisions.\(^{31}\) The section 9 reemployment rights provisions again remained unchanged when the 1948 Act was later re-enacted as the Military Selective Service Act of 1967\(^{32}\) and were subsequently re-codified without substantive change in Title IV of the Vietnam Era Veterans Readjustment Assistance Act of 1974.\(^{33}\) Thus, all veterans serving in the armed forces since 1940 have been covered under essentially the same reemployment rights provisions.

---

27. May 1, 1940 is the effective date of the Selected Training and Service Act of 1940. See note 1 *supra*.

28. For example, Alabama Power Co. established its pension plan on July 1, 1944, while Davis was in the military. However, the plan counted "past service," that is, service prior to the July 1, 1944 effective date of the plan, in the determination of "accredited service," upon which plan benefits were based. 431 U.S. at 590.


The Committee Reports and Congressional Debates

Given the revolutionary nature of peacetime conscription, the 1940 Act was hotly debated before both Houses of Congress agreed to adopt a compromise measure.\(^3\) It is not surprising, therefore, that the committee reports and congressional debates relevant to the reemployment rights provisions are, at best, confused. Under pressure for legislation, Congress apparently paid minimal attention to the mechanics of reemployment rights,\(^3\) which is reflected in the lack of coherence and detail in the legislative history.

On August 5, 1940, a preliminary version of section 8 was reported out of committee. The Senate report contained the following statement of congressional intent:

> The Congress, in this bill, has declared as the purpose and intent that every man who leaves his job to participate in this training and service shall be reemployed without loss of seniority or other benefits upon his return to civil life.\(^3\)

On August 9, Senator Sheppard, Chairman of the Senate Military Affairs Committee, presented this analysis of section 8:

> Section 8 attempts to offer a trainee or Reserve officer on active duty as much protection with respect to reemployment and retention of employment benefits as is within reasonable bounds. It attempts to prevent loss of seniority, accrued employment benefits, including participation in insurance, pension, bonus, and other beneficial programs.\(^3\)

At least two points worth noting emerge from these passages. The first is that, as a matter of overriding policy, the reemployment rights provisions of section 8 were intended to preserve or "prevent loss of" seniority and accrued employment benefits. What is lacking, however, is any indication of whether Congress intended to prevent loss of seniority and employment benefits accrued only to the point of induction, or whether it intended that the period of protection would extend through and including the period of military service. The second point is that Senator Sheppard's remarks signal a distinction between the treatment accorded "seniority" as opposed to "other benefits." The latter include "accrued employment benefits" such as "participation in insurance,

---

34. See Duggan, supra note 2, at 95-97.
37. 86 Cong. Rec. 10095 (1940).
pension, bonus" as well as "other beneficial programs." Apparently, the drafters of section 8 thought of pension benefits, along with insurance benefits, under the same general category of "employment benefits" and not as a sub-category of "seniority."

The version of section 8(c) to which Senator Sheppard here refers did not yet contain the troublesome "furlough or leave of absence" clause; it provided merely that any person restored to his prior position was to be "restored without loss of seniority, insurance participation or benefits, or other benefits." Therefore, at this point in the evolution of the bill, section 8(c) treated "seniority" identically with "insurance and other benefits;" both were to be restored fully to the returning veteran.

The different treatment accorded seniority as opposed to insurance and other benefits arose from discussion on the Senate floor. During Senate debate, Senator Danaher asked Senator Sheppard whether, with respect to "insurance participation or benefits," "someone else" was to reimburse the "employer's reserve fund" by the "amount of contribution" that an employee would have paid into the fund had he not been serving in the armed forces. Senator Sheppard replied that section 8(c) referred only to "the benefits" to which the veteran "was entitled up to the time he left his employment," and did not apply "to the time when he was absent in the service." Insofar as insurance was concerned, then, it was intended that the benefits accrued to time of departure for the military would be restored but with no further accruals for time spent in the military. Senator Sheppard then accepted an amend-

38. Id. at 10107.
39. The Senate debate, in relevant part, reads as follows:
   Mr. Danaher. [L]et me ask if it is the understanding of the Senator that, under the clause providing that the conscriptee shall be restored without loss of insurance participation or benefits, that someone else is going to make up somehow to, let us say, the employer's reserve fund the amount of contribution which the particular employee formerly paid into that fund?
   Mr. Sheppard. That provision refers solely to the benefits to which he was entitled up to the time he left his employment. It does not apply to the time when he was absent in the service.
   Mr. Danaher. But when the bill provides that he shall be restored without loss of insurance participation or benefits, or other benefits, is it meant by that that if a man goes out to serve his country under this conscription plan and comes back he assumes his prior status less 1 year's payment?
   Mr. Sheppard. That is what this bill intends, as I understand. That is what the members of the committee thought should be and could be done.
   Mr. Danaher. It is not a case of someone else from some source making up those payments?
   Mr. Sheppard. No.
   Id. at 10107-09.
40. Id. at 10107.
41. Id.
ment to section 8(c) which "would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life."42 Except for some minor changes in language, the Senate version of section 8(c) was complete.

Discussions in the House of Representatives centered on the "job protection" aspects of the bill, focusing on issues of "seniority" almost to the exclusion of those pertaining to the "other benefits" clause.43 Representative May, for example, declared that the "chief purpose" of the final amendment to section 8(c) was to preserve the seniority rights and privileges of railroad workers.44

When the provision relating to participation in insurance was considered, the House, like the Senate, concluded that the employer's practices with respect to furloughed employees would control.45 Section

42. The amendment substituted the following language:

   (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered during the period of service in such forces as on furlough or leave of absence; and shall be so restored without loss of seniority; and 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 of being inducted into such forces; and shall not be discharged from such position without cause within 1 year after such restoration.

Id. at 10914.
43. See generally 2 Selective Service Monograph No. 2, supra note 36, at 567-87. See also Haggard, supra note 3, at 542 n.27.
44. The House debate reads in relevant part:

   Mr. MAY. Mr. Chairman, I offer a committee amendment which is at the desk.
   The Clerk read as follows:

   "(e) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered during the period of service in such forces as on furlough or leave of absence; and shall be so restored without loss of seniority; and 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 of being inducted into such forces; and shall not be discharged from such position without cause within 1 year after such restoration."

   Mr. HARNESS. It certainly is not the intention of the committee that, if this amendment should become law, an employer must continue to pay the social security and other taxes on that employee's wages while he is no longer working?
   Mr. MAY. Mr. Chairman, as a matter of fact, when a man is disconnected from the service of an employer, the employer is no longer charged with social-security taxes. There would be none to pay. His social-security tax rests upon earnings.
   I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in service and they will even be permitted to count this time on the question of retirement.

86 Cong. Rec. 11702 (1940).
45. The House discussion went as follows:

   Mr. MILLER. In reference to insurance, will that apply to group insurance? Many industrial plants, of course, carry group insurance. Under those contracts they continue
8(c), it was determined, would not override contractual restrictions in insurance policies which waived coverage of employees in military service.\textsuperscript{46} It was a matter for the individual employer to decide whether to continue coverage or pay premiums for inductees.

As far as the "other benefits" language is concerned, the floor debates were unenlightening. The term "other benefits" was apparently intended to cover all the "rights" a veteran had by virtue of his employment relationship; that is, all the benefits an employer provided to his employees.\textsuperscript{47} Just what those rights and benefits are cannot be discerned from the recorded material.

In drafting section 8(c), Congress apparently intended to guarantee veterans returning to their prior jobs full reemployment and restoration of seniority. However, it might also be inferred that Congress their participation while a man is on vacation or on furlough. Would they continue those policies in force?

Mr. MAY. This would continue them in force and that is the very purpose of the legislation.

Mr. MILLER. Some of these group-insurance contracts now carry a restriction on occupation and some few carry a restriction on military service. Assuming a man has a group policy with an employee for $5,000, which is not unusual, and that policy carries a restriction or waiver during a period of war service?

Mr. MAY. Military service?

Mr. MILLER. They are writing that into policies and have been for 3 months.

Mr. MAY. I do not think it would protect any employee against that provision, because it is a provision within a contract, but the employer might waive it if he wished to and pay it anyway.

Mr. MILLER. I wanted to get that matter in the RECORD.

The CHAIRMAN. The question is on the committee amendment offered by the gentleman from Kentucky [Mr. MAY].

The committee amendment was agreed to.

\textit{Id.}\textsuperscript{46} \textit{Id.}\textsuperscript{47} In discussing "Amendment No. 15," which provided, in relevant part, for restoration without loss of "seniority, insurance participation or benefits, or other benefits," it became clear that no one knew what the "other benefits" term meant. The pertinent discussion follows:

[MR. HARNESS]. We all know what it means when we say, "Without loss of seniority." We know what it means to say without loss of insurance participation, but what does it mean when it refers to other benefits? Does that mean that the employer during the year that this man is in the service must continue to pay his social security tax, his unemployment compensation tax and so forth?

Mr. MAY. I do not think it means that. You will find that in amendments numbered 12, 13, and 14 the House inserted the word "seniority" relating to a position held by the guardsman. It is inserted in three places, and provides that he shall be restored to his seniority status. In other words, if a man is a Civil Service employee in the Government of the United States and is called into service, he shall be restored on his return to the senior position he held before he left without losing that seniority position. Likewise, with a railroad employee, under a system of seniority rights on the railroad that gives the older men in the service priority over the others, that man when he returns shall be restored to his seniority position.

Mr. HARNESS. There cannot be any objection on the part of anybody to that. It is
intended to preserve “accrued employment benefits,” such as insurance, the other provision which says, “or other benefits.” What do you mean by that? Can anybody interpret just exactly how far that language will go?

Mr. May. The gentleman knows other benefits would cover any of the questions that arose with reference to his rights.

Mr. Harness. His other benefits are social security—

Mr. May. Yes.

Mr. Harness. Unemployment compensation—

Mr. May. Yes.

Mr. Harness. And probably many others in the various States where they are employed by private industry.

Mr. Andrews. Mr. Speaker, so far as I know, those on the minority side have no objection to the conference report covering the first 14 amendments. On amendment number 15 there does seem some question as to the definition of the term “or other benefits,” and what these actually include. It has been brought out in the hearings before the committee that possibly some amendment to the Social Security Act will have to be effected in legislation for the benefit of members of the National Guard; in fact, it has been recommended to the committee by one of the senior National Guard commanding officers. Whether or not it would be worth while to oppose agreement on this amendment number 15 and instruct the conferees to insist upon an amendment providing for the deletion of certain words, I do not know. I would be pleased to yield to any Member in this connection who may care to speak upon it.

Mr. Thomason. Does the gentleman understand that part of subsection (c) “or other benefits” includes social security payments?

Mr. Andrews. I am not certain as to what the expression “other benefits” does comprise.

Mr. Thomason. I do not myself. I am inclined to think it does and I do not know how else you could provide for it, because would not a man’s benefits lapse if somebody did not keep them up? And if a guardsman who has gone off on a year’s training is unable to pay them, then would the employer keep up those social security benefits until his return?

Mr. May. If I recall it correctly, I think the conferees in the discussion of that matter also had in mind a case of this kind. A man goes into training with the guard and he has a house which he bought on the installment plan under the Federal Housing Administration, we will say, at $30 a month. During the 12 months that he has been in training, 12 of those payments have accrued and may be unpaid. When he goes into the court on that question, they can litigate that matter also and determine whether or not that man’s indebtedness might be assumed by the mortgagor or the mortgagee and as between them, whether it should constitute a lien on the house. Those are some of the rights involved in the matter.

Mr. Harness. That matter will be taken care of under the soldiers and sailors’ civil-rights bill?

Mr. May. Certainly.

Mr. Harness. Then why is it necessary to complicate this bill by inserting in the bill these words when nobody knows just what they mean?

Mr. May. Well, the phrase “other rights” means any rights that the soldier has.

Mr. Harness. Of course, nobody wants to deprive him of any of his rights that he had at the time he left.

Mr. May. We intended to broaden it to protect every right he has.

Mr. Harness. By doing that are you not imposing upon industry a burden that you do not intend to impose?

Mr. May. No; we do not think it is a burden upon industry, because they can adjust those things very easily, and it would be a greater burden upon the individual than it would be upon industry.

Id. at 10761-63.

48. See text accompanying note 37 supra.
VETS' REEMPLOYMENT RIGHTS

ance, pension and bonus programs, but only on a limited basis and in deference to an employer's policy and practices. The statute links the terms "insurance" and "other benefits," implying an equal participation in each type of benefit and identical qualification by the "furlough or leave of absence" clause.\(^4\) In both the Senate and the House of Representatives, restoration of insurance was guaranteed for the period preceding induction and did or did not occur for the period of military service depending on actual employer practices. Seemingly, then, the "other benefits" provided by the employer should receive the same treatment.\(^5\) However, because of the dearth of relevant information in the legislative history, administrative agencies and the courts were forced to define the term "other benefits."

**Agency Interpretations of the Statutory Provisions**

Under the 1940 Act, the Director of Selective Service was charged with administering the reemployment rights provisions of the statute.\(^5\) From the beginning, the Director implemented the seniority provisions of section 8 so as to extend the fullest possible range of protections to the veteran. Section 8, the Director advised, provided accumulation of seniority during military service\(^5\) as well as a system for "special preference" or "super-seniority," which guaranteed the veteran his prior job, no matter what the employer's circumstances, for a one-year period following reinstatement.\(^5\) There is no indication, however, that the Director of Selective Service expressed himself concerning the "insurance and other" benefits provisions of section 8.

Administration was subsequently transferred to the Secretary of Labor who, through the newly-created Bureau of Veterans' Reemployment Rights, was to provide assistance to veterans seeking reemployment under the 1948 Act.\(^5\) Prior to the transfer of administration, the Department of Labor had rejected the "super-seniority" treatment of

---

\(^4\) See note 12 supra.

\(^5\) In both the Senate and House discussions of insurance participation and social security taxes, the congressmen were concerned with the funding of these benefits while the inductee was absent. In no case was it suggested that involuntary funding of employee benefits be required. Such an economic burden seemed beyond the limit of the statute's reach. See notes 39, 45 and 47 supra.

\(^5\) 1940 Act, ch. 720, § 8(g), 54 Stat. 892.

\(^5\) U.S. SELECTIVE SERVICE SYSTEM, LOCAL BOARD MEMORANDUM NO. 190-A, Part IV, §§ l(c) and (f), May 20, 1944, quoted in 14 L.R.R.M. 2615, 2616 (1944) [hereinafter referred to as BOARD MEMORANDUM]. See generally Selective Service Interpretations supra note 3. See also Haggard, supra note 3, at 542.

\(^5\) BOARD MEMORANDUM, supra note 52, at §§ l(c), (d), and (e); Selective Service Interpretations, supra note 3; Haggard, supra note 3, at 544-45.

\(^5\) 1948 Act, ch. 625, § 9(h), 62 Stat. 616.
veterans urged by the Director of Selective Service. Subsequently, the Department interpreted the section 9 provisions of the 1948 Act to provide only restoration of seniority to returning veterans, including time spent in military service. As was the case with the Selective Administration, the Department did not then express policy relative to the non-seniority provisions; however, it did identify “pensions, vacation pay, automatic promotions, and step-rate increases” as “reemployment rights.”

In 1964, the Solicitor of the Department of Labor published an extensive “legal guide” to veterans’ reemployment rights in general and the seniority and other benefits provisions in particular. As for seniority rights, the Department reaffirmed its prior position on reinstatement and provided detailed rules to effect compliance. However, for the “insurance and other benefits” provisions of the statute, the Department broke new ground, providing a detailed analysis of the statutory provision and its legislative history while making sweeping policy recommendations.

Without the benefit of either congressional examination of this provision or judicial interpretation of the legislative history, the Department formulated six recommendations for administering the “other benefits” provision. The most important of these pertained to the

55. Veterans’ Rights to Reemployment, 16 L.R.R.M. 2535, 2536 (1945); see Haggard, supra note 3, at 544 n.42.
56. See note 32 and accompanying text supra.
58. QUESTIONS AND ANSWERS, supra note 57, at 66.
59. DOL LEGAL GUIDE supra note 35.
60. Id. at 689-759.
61. Id. at 889-926.
62. The six recommendations are:

1. Since the legislative history indicates that the amendments were intended to provide protection supplementary to that already in the act at the time, in no context should either the first “furlough or leave of absence” clause or that associated with the protection of “insurance and other benefits” or both be treated as excluding protection otherwise afforded by the act or as defining a ceiling on rights; the furlough or leave provisions must be considered further assurance, a floor of protection for “insurance and other benefits.”

2. The specific statutory protections for “seniority,” “status” and “pay” of (b) and (c)(1), as in U.M.T.S.A. specifically defined in (c)(2) afford protection for rights, regardless of their description, to the extent that those rights are conditioned on, measured by or have the character of those components of “position.”

3. Only insurance rights and insurance-type retirement systems should be considered as included in “insurance and other benefits.”

4. The second “furlough or leave of absence” provision can have no application to any right or benefit, the contractual basis of which was created after the employee left for
propositional "furlough or leave of absence" clause, which appears twice in section 8(c). The first "furlough or leave of absence" clause was interpreted as merely descriptive of the status of inductees—that is, as a means of describing the fact that induction does not sever the employment relationship and that inductees do not lose seniority and other benefits. The second clause is, in effect, a limitation on a veteran's participation in insurance and other benefits.

Even though the Department had correctly identified the difference between the two "furlough or leave of absence" clauses, it nevertheless refused to read either of them as "excluding protection" provided elsewhere in the Act or as "defining a ceiling on rights." Consequently, the practical effect of the Department's ruling was that it interpreted away the limiting effect of the second clause in certain circumstances. If, for example, the amount of an insured death benefit is related to years of service performed, then a conflict between the two clauses can arise. The first "furlough or leave of absence" clause requires restoration of seniority with the employer plus accumulation for military service, whereas the second could exclude the military service from seniority provided that it also did so uniformly for employees on furlough or leave of absence. The Department interpretation, however, requires that, because the first clause restores the military service, the second cannot then exclude it. Of course, this problem also arises in the context of pension plans where benefit amounts often depend heavily on the length of service performed.

The Department's view incorrectly assumes that there is but one meaning of "seniority," forever fixed and determined. On the contrary, definitions of the term vary according to the context or the rights involved. What has been called "competitive status seniority" ranks an employee relative to others and applies to such rights as promotion, military service or was inducted, a fortiori to any such right for which the contractual basis was created after his return from service.

The application of either or both "furlough or leave" clauses should be based on some clear interpretation of their statutory purpose and limitations and not in disregard of their differences, and without consideration of their applicability to the facts.

Since the protections were intended to operate as additions and since the statute, liberally interpreted, makes them a floor under rights, it would seem that where lack of uniformity exists in the employer's dealings with employees on furlough and those on leave of absence, ex-servicemen may not receive worse treatment than employees on furlough as a group, or than employees on contractual leaves, viewed as a separate group.

*Id.* at 890-91 (references omitted).

63. *See* note 12 *supra*.
64. *Id.* at 905-06.
65. *Id.* at 906-07.
66. *See* recommendation No. 1 *supra* note 62.
transfer and order of recall. "Benefit seniority," on the other hand, determines each employee's length of service for purposes of determining severance pay allowance, pension benefits and supplemental unemployment benefits. In terms of the Act, the seniority provisions completely restore "competitive status seniority" while allowing for limitations on benefit accruals by employing "benefit seniority." Seen in this light, there is no inconsistency with the statute, and employer practices are given due weight. By contrast, the Department's interpretation effectively creates a new brand of "super-seniority" which overrides the legitimate practices and policies of employers in fashioning an employee benefit program.

JUDICIAL INTERPRETATION OF REEMPLOYMENT RIGHTS PROVISIONS

In interpreting and applying reemployment rights provisions, the United States Supreme Court has confronted two kinds of issues: whether an alleged seniority right or privilege falls within the purview of the Act and whether a specific right or benefit should be characterized as an instance of "seniority" or as a type of "insurance and other benefit." Each issue requires a different method of analysis for its resolution. In the first type of issue, the Court has focused on aspects of seniority and has explored the breadth of the statutory protections. In the second and more difficult type of case, the Court has had to start with the right or benefit, fit it within the suitable category of "seniority" or "insurance and other benefits" and then apply the appropriate statutory guarantee.

Fishgold and Its Progeny: Seniority and the "Escalator Principle"

The Supreme Court first considered the seniority provisions of the 1940 Act in the landmark case of Fishgold v. Sullivan Drydock & Repair Corp. Fishgold worked as a welder with Sullivan Drydock until he was inducted into the army. Upon his discharge after a year of service, Fishgold was still able to perform the duties of a welder. He reapplied within the statutory period and was reemployed as a welder. When work slowed early the next year, Fishgold was laid off while non-veterans with more seniority were allowed to work. The non-veterans were retained because, according to the collective bargaining agree-

68. 328 U.S. 275 (1946).
69. Id. at 277-78.
70. Id. at 279.
ment, shop seniority was to be the controlling factor in lay-off decisions when, as here, employees had the same or similar skills.\textsuperscript{71}

Fishgold's shop seniority was not an issue because the collective bargaining agreement required inclusion of Fishgold's military service in his seniority "as if he were actually and continuously employed by the company."\textsuperscript{72} Instead, Fishgold claimed that the company had violated section 8(c) of the Act when it "discharged" him within one year of reemployment.\textsuperscript{73} The Court concluded, however, that, for purposes of the Act, Fishgold's lay-off was more like a "furlough" than it was a "discharge"\textsuperscript{74} and nowhere did the Act guarantee a veteran the "right to work."\textsuperscript{75}

Despite the benefit of a liberal construction, the Court could not find Fishgold's lay-off to be a discharge in violation of section 8(c). A lay-off, like the statutory "furlough" or "leave of absence," implies a continuing employment relationship with the right to return to work under specified conditions. A discharge, on the other hand, implies a complete termination or cessation of the employment relationship.\textsuperscript{76} In the face of contrary administrative rulings,\textsuperscript{77} the Court construed "lay-off" as akin to a "furlough" or "leave of absence."\textsuperscript{78} Finding no "discharge," the Court decided that no section 8(c) violation had occurred.\textsuperscript{79}

The narrow holding in Fishgold belies the central importance of the case. In dicta, the Court established three principles that have set the tone and structured the issues in all subsequent reemployment rights cases. The first principle—and the one closest to the holding in the case—is that the Act does not provide a right to "super-seniority"

71. The collective bargaining agreement provided that:
Promotions and reclassifications and increases or decreases in the working force shall be based upon length of service and ability to do the job. Wherever between two or more men, ability is fairly equal, length of service shall be the controlling factor.

72. \textit{Id.} at 279 n.2.
73. \textit{Id.} at 280, 285. \textit{See note 78 infra.}
74. \textit{Id.} at 287.
75. \textit{Id.} at 289.
76. \textit{Id.} at 287. The Director of Selective Service had ruled that the Act required reinstatement of a veteran even though a non-veteran might have to be discharged. \textit{Board Memorandum, supra} note 52, at \$ 1(c). \textit{See} notes 52-53 and accompanying text \textit{supra.}
77. 328 U.S. at 287.
78. The Court noted the Selective Service's interpretation of \$ 8 in its Local Board Memorandum No. 190-A which, in effect, gave the veteran a right to "super-seniority." \textit{See} notes 51 & 52 and accompanying text \textit{supra.} Such a right would have guaranteed Fishgold his welder's job for one year despite his shop seniority. The Court, however, declined to follow the Service's interpretation in the absence of a clearer indication by Congress of its acceptance of such interpretation. 328 U.S. at 289-91. \textit{See also} Haggard, \textit{supra} note 3, at 544-45.
79. 328 U.S. at 287.
for the statutory one-year period following a veteran’s reinstatement. Justice Douglas, writing for the majority, noted that the Act guarantees that the veteran will not be penalized by his military service, but it does not give him an increase in seniority over what he would have accumulated had he been continuously employed. The Act, he said, sought to protect the veteran within the framework of existing seniority systems, but it did not mean to give the veteran preferential treatment over and above that accorded by his “restored” shop seniority. Simply put, the Act does not guarantee the veteran a “right to work.”

The second major principle is that the Act is to be construed liberally for the benefit of the returning veteran. A liberal construction of the Act requires that practices of employers or agreements between employers and unions cannot operate so as to reduce the benefits guaranteed veterans by the Act.

The most famous of the three Fishgold principles is Justice Douglas’ “escalator principle” which interprets the section 8(c) provision that a returning veteran shall be restored to his former position “without loss of seniority.” Clearing up inconsistencies between provisions

81. 328 U.S. at 284.
82. Id. at 285-86.
83. Id. at 288.
84. Id. at 289.
85. Id. at 285.
86. Justice Douglas expressed the “escalator principle” in three ways:

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

Thus, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed forces is counted as service in the plant so that he does not lose ground by reason of his absence.

The “position” to which the veteran is restored is the “position” which he left plus cumulated seniority.

Id. at 284-85.

Id. at 285.

Id. at 287.

Accord, Trailmobile Co. v. Whirls, 331 U.S. 40, 55-56 (1947). See Sherman, Seniority and Promotion Rights of Reemployed Veterans, 17 U. PITT. L. REV. 20, 21-22 (1955). See also Oakley v. Louisville & N.R.R., 338 U.S. 278, 283 (1949) where the Court said that the returning veteran is entitled to “a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment.”

87. 328 U.S. at 284.
in the statute,\(^8\) Douglas stated that the veteran steps back on the seniority escalator at the point he would have occupied had he kept his position continuously during the war, not at the point he stepped off when he went to war.\(^9\) The section 8(c) provision therefore serves to protect the veteran against loss of position or loss of seniority by counting his time in the service as time in the plant. Thus, the veteran is guaranteed his seniority accrued prior to induction plus accumulated seniority for his period of military service.\(^10\)

In *McKinney v. Missouri-Kansas-Texas Railroad*,\(^9\) the Court limited the application of the escalator principle to incidents of seniority that accrue automatically and on the basis of seniority alone. Striking a tone similar to that in *Fishgold*, the Court in *McKinney* noted that the Act does not give the returning veteran a job status above what he could have achieved merely by continuing his civilian employment. The Act's purpose, the Court said, is limited to preserving those "changes and advancements in status that would necessarily have accrued simply by virtue of continued employment. . . ."\(^9\) The reemployment rights provisions do not guarantee a "perfect reproduction" of civilian employment, especially when advancement requires discretionary action on the part of the employer.\(^9\)

In *McKinney*, promotion under the collective bargaining agreement depended not only on seniority, but also on "fitness and ability" and the exercise of "discriminating managerial choice."\(^9\) The Court reasoned that the element of employer discretion coupled with the requirement of "fitness and ability" tied a contingency to the act of promotion that prevented automatic progression from one job level to another.\(^9\) Thus, if McKinney had remained continuously employed during the period of his military service, he still might not have been promoted. Because promotion did not follow necessarily from McKinney's restored seniority, he was not entitled to the higher position as an incident of seniority protected by the seniority rights provisions of the Act.\(^9\)

The Court in *Tilton v. Missouri Pacific Railroad*\(^9\) developed a
"reasonable certainty" test for determining whether a "contingency" would completely defeat a veteran's claim for incidental seniority rights. Under this test, a veteran's claim will be supported "if, as a matter of foresight, it was reasonably certain that advancement would have occurred, and if, as a matter of hindsight, it did in fact occur."\(^98\)

The petitioners in *Tilton* were inducted before having completed the requisite probationary period for an upgraded position. Upon discharge, petitioners were restored to the upgraded position and were allowed to complete the probationary period. Because seniority was measured from the date of completion of the probationary period, petitioners were junior to non-veterans who had been upgraded after them, but who had been able to complete the probationary period while petitioners were in military service.\(^99\)

The *Tilton* Court found untenable the lower court's view that petitioners' promotion was not "automatic."\(^100\) The Court reasoned that petitioners could have completed their probationary period merely by remaining continuously employed during their period of military service. In the absence of employer discretion to deny the promotion once the requisite probationary period had been completed, the Court found that the promotion was sufficiently automatic.\(^101\)

The element of employer discretion distinguishes the decision in *Tilton* from that in *McKinney v. Missouri-Kansas-Texas Railroad*.\(^102\) In *McKinney*, because advancement depended on the employer's discretionary choice,\(^103\) McKinney could not, as a matter of law, show with reasonable certainty that he would have been promoted merely by his continued employment.\(^104\) In *Tilton*, on the other hand, it was reasonably foreseeable that, but for their military service, petitioners would have completed their probationary period merely by virtue of contin-

---

98. Id. at 181.
100. 376 U.S. at 177. The lower court concluded that promotion was not "automatic" because it was subject to such variable factors as: "(1) lay offs due to illness or reductions in force, (2) the continuing unavailability of enough qualified carmen to fill carman's positions, (3) continued satisfactory work by the carman helper in the upgraded position." *Tilton v. Missouri Pac. R.R.*, 306 F.2d 870, 877 (8th Cir. 1962).
101. 376 U.S. at 177-78. The *Tilton* Court also found persuasive the fact that under almost identical circumstances, the veteran's right to promotion was upheld in Diehl v. Lehigh Valley R.R., 211 F.2d 95 (1954), rev'd per curiam, 348 U.S. 960 (1955). 376 U.S. at 178.
103. Id. at 272.
104. 376 U.S. at 180.
VETS' REEMPLOYMENT RIGHTS

ued employment.105

Fishgold106 put the returning veteran on the seniority escalator
where, for purposes of seniority, he was treated as having been continu-
ously employed during the period of his military service. In McKin-
ney107 and Tilton,108 the Court broadened the scope of the escalator
principle, applying it not only to "seniority" but also to the rights or
incidents of seniority which accrue to the veteran's credit merely
by virtue of such continuous employment. The "reasonable certainty" test
of Tilton, coupled with the "automatic progression" prerequisite of Mc-
Kinney, has served as the analytic foundation for a number of decisions
concerning the seniority provisions of the Act.109

The Accardi Case: A Test for Finding "Seniority" or "Other Benefits"

In applying the reemployment rights provisions, the courts have
sometimes been confronted with the preliminary problem of character-
izing a given right or benefit. As the early decisions demonstrate, the
courts had not used a clear-cut test for determining whether a contested
benefit was an element of "seniority" or a type of "other benefit." For
guidance, the courts looked to the legislative history110 or simply classi-
fied a benefit as "other" only if it could not be regarded as a type of

105. Id. at 181. The Tilton Court concluded that such "variables" as were deemed significant
by the court of appeals were too tenuous to defeat the veteran's claim:
In every veteran seniority case the possibility exists that work of the particular type
might not have been available; that the veteran would not have worked satisfactorily
during the period of his absence; that he might not have elected to accept the higher
position, or that sickness might have prevented him from continuing his employment. In
light of the purpose and history of this statute, however, we cannot assume that Congress
intended possibilities of this sort to defeat the veteran's seniority rights.
Id. at 180-81. The test is one of "reasonable certainty," not "absolute certainty." Id. See note 100
supra.

109. See, e.g., Pomrening v. United Air Lines, Inc., 448 F.2d 609 (7th Cir. 1971) (retroactive
pilot's seniority); Montgomery v. Southern Elec. Steel Co., 410 F.2d 611 (5th Cir. 1969) (retroac-
tive departmental seniority); Hatton v. Tabard Press Corp., 406 F.2d 593 (2d Cir. 1969) (pro-
motion); Collins v. Weirton Steel Co., 398 F.2d 305 (4th Cir. 1968) (advancement); Thomas v. Pacific
N.W. Bell Tel. Co., 434 F. Supp. 741 (D. Or. 1977) (advancement); Chernoff v. Pandick Press,
110. One court included vacation benefits under Senator Sheppard's category "accrued em-
ployment benefits" rather than his category "seniority":
Vacation advantages accorded employees are certainly no less to be prized than
such benefits as pensions, bonuses, and participation in insurance programs; and the
Congressional history of the... Act of 1940 makes it clear that the statute was intended
to protect these other rights.
MacLaughlin v. Union Switch & Signal Co., 166 F.2d 46, 48 (3d Cir. 1948). See note 37 and
accompanying text supra for discussion of Senator Sheppard's remarks.
"seniority," "status," or "pay." Generally, the courts had treated fringe benefits such as vacation or severance pay as "other benefits" and limited their application to veterans in accordance with employer regulations and practices with respect to employees on furlough or leave of absence.

The Supreme Court, in *Accardi v. Pennsylvania Railroad*, rejected the distinction between "seniority" and "other benefits" that had been developing in the lower courts. Instead, the *Accardi* Court expanded the reach of the *Fishgold* escalator principle to include fringe benefits and thus terminated the use of the "other benefits" clause as a limitation on the benefits of returning veterans.

Petitioners in *Accardi* worked as tugboat firemen for the railroad prior to entering the armed services during World War II. Upon discharge, each of the petitioners was restored to his former position of fireman and received credit toward his seniority for the period of his military service. Subsequently, the company abolished the position of "fireman" and discharged petitioners in accordance with an agreement worked out with the unions involved. The petitioners each received a

111. Another court put vacation pay in the category of "other benefits" because it did not fit elsewhere:

While the problem of construction is difficult, it seems most likely that the expression "insurance or other benefits" was meant to cover a fairly narrow group of economic advantages whose common quality was that they were miscellaneous fringe benefits not usually regarded as part of "pay," "status," or "seniority." Vacation pay is of this fringe character.

Borges v. Art Steel Co., 246 F.2d 735, 738 (2d Cir. 1957).


113. *Fishgold* v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946) signaled a difference in treatment accorded seniority as opposed to other benefits. The Court stated that the veteran "shall be 'restored without loss of seniority'" but that "insurance and other benefits may continue to accrue to an employee on furlough or leave of absence." *Id.* at 284, 287 (emphasis added). *See Note, Veterans' Reemployment Rights Reexamined—New Labels or a New Approach,* 22 HASTINGS L.J. 375, 385-86 (1971) [hereinafter referred to as *Reemployment Rights Reexamined*]; *Note, The Supreme Court, 1965 Term,* 80 HARV. L. REV. 142 (1966) [hereinafter referred to as *The Supreme Court, 1965 Term*].


115. *See note 112 supra* and cases cited therein. *See also The Supreme Court, 1965 Term, supra* note 113, at 148.
severance or separation allowance which was based on a formula set out in the collective bargaining agreement. In computing the amount of severance allowance, the company excluded the period of time that petitioners had spent in the military because it was not "compensated service." Petitioners brought suit claiming a violation of section 8 of the 1940 Act.\textsuperscript{116}

The railroad claimed that the severance allowances were based not on "seniority" but on "compensated service" and that, therefore, section 8 of the Act was "wholly inapplicable."\textsuperscript{117} In response, the \textit{Accardi} Court formulated a standard for construing the term "seniority" that transcends the "narrow, technical definition" of the collective bargaining agreement\textsuperscript{118} and, perhaps, the other provisions of the Act as well.\textsuperscript{119} The Court noted that, while seniority derives its common meaning from private employment practices, employers and unions cannot by the use of labels deprive a veteran of his rights under the Act;\textsuperscript{120} the generally accepted meaning of "seniority" must yield to the intention of Congress as expressed in the 1940 Act. That intention, the Court said, is "to preserve for the returning veteran the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country."\textsuperscript{121} Thus, the Court reasoned that had the petitioners not entered the military, they would have completed the appropriate amount of "compensated service" upon which their severance allowance was based. The Court found that the "real nature" of the severance allowance was "compensation for loss of jobs" and that the use of labels such as "compensated service" cannot be used to deprive veterans of a right that Congress clearly intended to preserve.\textsuperscript{122}

In determining the "real nature" of the severance allowances, the Court looked to what an employee forfeits by losing his job. Because rights and benefits accrue to an employee by virtue of his seniority, the

\begin{itemize}
  \item \textsuperscript{116} 383 U.S. at 227-28.
  \item \textsuperscript{117} Id. at 229.
  \item \textsuperscript{118} Haggard, \textit{supra} note 3, at 569-71.
  \item \textsuperscript{119} \textit{The Supreme Court, 1965 Term, supra} note 113, at 148.
  \item \textsuperscript{120} 383 U.S. at 229. \textit{Accord}, Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1945).
  \item \textsuperscript{121} 383 U.S. at 229-30. Note the similarity between the Court's language here and that of the Court in McKinney v. Missouri-Kan.-Tex. R.R., 357 U.S. 265, 272 (1958). It is not clear from \textit{Accardi}, however, whether the Court intended to apply the escalator principle only to those fringe benefits which would "automatically accrue" or to those which are "reasonably certain" to accrue. Tilton v. Missouri Pac. R.R., 376 U.S. 169 (1964). For a discussion of this issue, see \textit{Reemployment Rights Reexamined, supra} note 113, at 388; Comment, \textit{Veterans Re-employment Rights Under the Universal Military Training and Service Act—Seniority Privileges, 1 G.A. L. REV. 293 (1967)}.
  \item \textsuperscript{122} 383 U.S. at 230.
\end{itemize}
more seniority an employee has, the higher the value of his rights and benefits and the more he sacrifices when he loses his job. The Court concluded, therefore, that those employees who terminate their service with the most seniority give up the most in rights and benefits; thus, they should get the highest severance allowances. Furthermore, the requirements of the 1940 Act could only be fulfilled by restoring a veteran's seniority as well as the perquisites and benefits that flow from it. The severance allowances, the Court said, are "as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall." The Court held, therefore, that failure to credit "compensated service" for the period of military service denied petitioners' right under the Act to be "restored without loss of seniority."

Consistent with its interpretation of congressional intent, the Accardi Court construed the "other benefits" clause as "adding certain protections to the veteran" rather than as limiting participation in certain fringe benefit programs. In looking to the legislative history, the Court approved the government's contention that the clause was added to the bill "for the express purpose of entitling employees to receive, while in service, such benefits as their employers accorded employees on leave of absence." Nevertheless, the Court refused to read the "other benefits" clause as a limitation on rights granted the veteran by the seniority provisions of the Act. In the Court's view, an expanded escalator principle preserves, as a minimum, the rights and benefits of seniority that would have "automatically accrued" had the veteran remained in continuous employment during his military service. In order to identify such "perquisites of seniority," a court must, after Accardi, look to the "real nature" of the benefit rather than to the "narrow, technical" meaning given it in the context of the collective bargaining agreement.

In a subsequent per curiam opinion, the U.S. Supreme Court ex-

123. Id.
124. Id. at 230-31.
125. Id. at 231-32.
126. See notes 110-13 and accompanying text supra. See also The Supreme Court, 1965 Term, supra note 113, at 148.
128. The Department of Labor has adopted this position in dealing with the "other benefits" language of the statute. See the DOL recommendations at note 62 supra. See generally DOL Legal Guide, supra note 33, at 889-91, 905-09, 917-20; U.S. Department of Labor, Veterans' Reemployment Rights Handbook 59-69, 83-104 (1970) [hereinafter referred to as Veterans' Handbook].
129. See Haggard, supra note 3, at 570-71.
tended the rationale of Accardi further into the area of “other benefits.” In Magma Copper Co. v. Eagar, petitioner sued for vacation and holiday pay denied them because they were not in service with the company at the requisite time due to their period of military service. The Ninth Circuit Court of Appeals easily classified the vacation pay as a “fringe benefit” which, because it was not an incident of “seniority,” “status,” or “pay,” falls under the category of “other benefits.” The Supreme Court denied a petition for rehearing, distinguishing Accardi on the grounds that it did not involve a “‘fringe benefit’ type of claim” as did petitioners’ claim for vacation pay. The Supreme Court reversed in a per curiam opinion which cited only Accardi.

The Court’s failure to write an opinion at this important juncture is curious. Accardi had revolutionized the approach to reemployment rights cases which had developed in the lower courts by broadening the scope of the escalator principle and fashioning the “real nature” test for classifying veterans’ rights. Severance pay, and now vacation benefits, had been re-classified as “perquisites of seniority” and were thus made subject to the full protections of section 8. After Eagar, then, the Supreme Court had yet to flesh out the bones of the “real nature” of the benefit test and determine the application, if any, of the “other benefits” clause.

In his dissent to the denial for rehearing at the appellate level in Eagar, Judge Madden had astutely noted that, after Accardi, the distinction between “‘seniority, status and pay’ on the one hand and ‘fringe benefits’ on the other does not seem very vital to the Supreme Court.” Nevertheless, Justice Douglas, in his dissent to Eagar, balked at the Accardi rule that a court must inquire into the “real nature” of the contested benefit in order to determine its proper classification. Instead, Douglas applied the sort of analysis that had been developed by the lower courts in the reemployment rights cases prior to Accardi: he concluded simply that Accardi was inapposite because it involved a “seniority problem” whereas Eagar involved a fringe benefit problem under the “other benefits” clause.

130. 380 F.2d 318 (9th Cir. 1966), rev’d per curiam, 389 U.S. 323 (1967).
131. 380 F.2d at 320-21. See Borges v. Art Steel Co., 246 F.2d 735 (2d Cir. 1957); Dougherty v. General Motors Corp., 176 F.2d 561 (3d Cir. 1949); Siaskiewicz v. General Elec. Co., 166 F.2d 463 (2d Cir. 1948). See also notes 110-12 and accompanying text supra.
132. 380 F.2d at 321-22.
133. 389 U.S. 323 (1967). See generally Haggard, supra note 3, at 572-76.
134. 380 F.2d at 322 (Madden, J., dissenting).
136. Id. at 325-26.
The Supreme Court resolved the brewing conflict in vacation-benefit cases in *Foster v. Dravo Corp.* Foster took a military leave of absence after he had been employed for almost a year and a half. He worked the first seven weeks of 1967, spent eighteen months in the military and returned to his job, working the last thirteen weeks of 1968. The collective bargaining agreement required that employees work a minimum of twenty-five weeks in each calendar year in order to earn full vacation benefits. Accordingly, Foster did not receive vacation for either year.

Foster claimed that he would have earned the vacation had he been continuously employed during the period of his military service. Therefore, he felt that he was entitled to vacation benefits for each year even though he did not fulfill the twenty-five-week work requirement specified in the collective bargaining agreement.

The *Foster* Court distinguished the vacation benefits from the severance allowance in *Accardi* because the vacation benefits involve a substantial work requirement. "Generally," the Court said, "the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation." In *Accardi*, however, the use of "compensated service" as a measure of severance pay resulted in a reward for time spent on the payroll instead of as compensation for work actually performed. Because the "real nature" of the severance allowance was akin to such "perquisites of seniority" as "work preference" and "order of lay-off and recall," it was protected by the seniority provisions of the Act. Foster's vacation benefits, however, more nearly coincided with a form of short-term compensation for work actually performed. Because Foster did not fulfill the bona fide work requirement, he was not entitled to the protection of the statute.

*Foster* did little to resolve the uncertainties in the reemployment...
VETS' REEMPLOYMENT RIGHTS

rights cases that had followed the decision in Accardi. The escalator principle, established in Fishgold and refined by the "automatic progression" requirement of McKinney and the "reasonable certainty" test of Tilton, provided a consistent and workable model for issues of seniority and its incidents. Accardi, and later Eagar, blurred the distinction between "seniority" and "other benefits," substituting the "real nature" of the benefit test for the "fringe benefit" approach that had been developing in the lower courts. Unfortunately, Foster failed to settle this controversy when it made no mention of the "other benefits" clause while holding that vacation pay was not subject to the protections of section 8. In addition, the Foster Court seemed to deliberately avoid a "real nature" of the benefit analysis, looking instead to the "common conception" of vacation as a "reward for and respite from a lengthy period of labor."

REEMPLOYMENT RIGHTS AND PENSION BENEFITS

When veterans began litigating the status of private pension plan benefits under the reemployment rights provisions of the Act, there was no generally accepted standard for classifying benefits which were not clearly related to seniority. It is not surprising, therefore, that in the first five cases to raise the issue there was no uniform result: three courts classified pensions as deferred wages—which are not incidents of seniority—while two courts classified such benefits as "perquisites of seniority."

Deferred Wages or Perquisite of Seniority?

In concluding that pension benefits are, in essence, a form of deferred compensation, three courts have looked to the presence of a

149. Magma Copper Co. v. Eagar, 380 F.2d 318 (9th Cir. 1966), rev'd per curiam, 389 U.S. 323 (1967).
152. Id. at 101.
“substantial work requirement” as negating the idea of pensions as a reward for length of service. For example, in *Litwicki v. Pittsburgh Plate Glass Industries, Inc.*,\(^{155}\) benefits under the pension plan were based on “continuous service” as defined in the pension agreement. The pension plan credited continuous service at the rate of one month for every 135 hours of work. With limited exceptions,\(^{156}\) the crediting of continuous service required actual hours of work performed in the plant. Accordingly, the company withheld credit for Litwicki’s voluntary tour of duty which was not included in the list of exceptions.\(^{157}\)

The *Litwicki* court concluded that the “real nature” of the pension benefits was deferred compensation. It reasoned that continuous service under the pension plan was based on a substantial number of hours of actual work rather than on mere length of time in continuous employment with the company.\(^{158}\) The court distinguished *Accardi*\(^ {159}\) because the severance pay at issue in that case had essentially measured longevity in employment, not actual work performed.\(^ {160}\) Given the substantial work requirement for continuous service, coupled with the traditional notion of pension benefits as deferred wages,\(^ {161}\) the *Litwicki* court held that pensions were not “perquisites of seniority.”\(^ {162}\)

In *Jackson v. Beech Aircraft Corp.*,\(^ {163}\) the Tenth Circuit Court of Appeals relied on *Litwicki* in deciding that pension benefits were not “perquisites of seniority” because they were tied to “actual work time.”\(^ {164}\) Pension benefits in *Jackson* were based on “credited service” which, under the plan, meant “active employment” which, in turn, was defined as “actual work.”\(^ {165}\) Accordingly, the court concluded that the plan benefits were based on a “substantial work requirement” and, as such, were not a form of seniority like lay-off, recall and promotion.\(^ {166}\)

The court was persuaded by *Litwicki* that pension benefits are in fact a

---

155. 505 F.2d 189 (3d Cir. 1974).
156. Exceptions included “certain military service, union activity, temporary service in a supervisory or salaried position and, after 1954, jury duty and absence caused by work-related injury or disease.” Id. at 191.
157. Id. at 190-91.
158. Id. at 192-93.
160. In *Accardi*, an employee could receive credit for a full year of compensated service by working only one day a month for seven months. Id. at 230.
162. 505 F.2d at 192-93.
163. 517 F.2d 1322 (10th Cir. 1975).
164. Id. at 1324-26.
165. Id. at 1323.
166. Id. at 1326.
form of deferred wages and therefore held that the pensions were not a "perquisite of seniority."167

Finally, the court in *LaPinta v. Ohio Crankshaft*168 found that credited service under the pension plan was based on a "substantial work requirement." In order to accrue one year of credited service, an employee had to work 1,700 hours, or approximately eighty percent of a normal work year. Such a requirement, the court reasoned, was a bona fide effort to compensate an employee for work actually performed rather than a device to disguise, by the use of a label, a reward for length of service.169

The plaintiff in *LaPinta* had proposed use of a two-tiered test to analyze whether the "real nature" of the pension benefit was a "perquisite of seniority."170 Under the plaintiff's test, the pension benefit, like the severance allowance in *Accardi*, is "innherently" a perquisite of seniority and there is therefore no need to look to the collective bargaining agreement. The court rejected such an approach, reading *Foster* as requiring an inquiry into the provisions of the agreement in order to determine whether the "true nature" of the benefit is a reward for length of service or a form of compensation for work performed. The *LaPinta* court, like the courts in *Litwicki* and *Jackson*, found the presence of a "substantial work requirement" under the plan which negated the court's consideration of pension benefits as a "perquisite of seniority."171

On the other hand, two courts concluded that pension benefits rewarded longevity in employment rather than actual work performed on the job. In reaching that conclusion, the Ninth Circuit Court of Appeals in *Smith v. Industrial Employers and Distributors Association*172 followed *Accardi* in looking beyond the "labels and definitions" to the "true nature of pension benefits."173 That nature, the court determined, was a right to future benefits governed by the length of an em-

167. *Id.*
169. *Id.* at 2932.
170. The test, supposedly designed by the United States Supreme Court, is:

The first step is to determine the "real nature" of the benefit. If the benefit by its real nature inherently is a seniority right, then the inquiry is concluded since the benefit in question is protected by the Act. On the other hand, if the employee benefit is not inherently a seniority right, then the focus shifts to the particular formula of the collective bargaining agreement to determine whether it creates a right based primarily on the passage of time.

*Id.* at 2931.
171. *Id.* at 2934.
172. 546 F.2d 314 (9th Cir. 1976).
173. *Id.* at 317-18.
ployee's service with his employer.\textsuperscript{174}

The district court in \textit{Davis v. Alabama Power Co.}\textsuperscript{175} employed a "real nature" analysis of pension benefits and concluded that such benefits "promote personnel stability by giving employees an incentive to remain with the company."\textsuperscript{176} The court reasoned that as a reward for long service, pension benefits should be based on seniority because seniority is the broad measure by which an employee’s other major rights and benefits are determined. Seen in the light of a seniority right, pension benefits for veterans must include credit for military service to insure "equal competitive status" with non-veterans.\textsuperscript{177}

In reaching the conclusion that the pension benefit was a reward for length of service, the \textit{Davis} court had already determined that pension benefits under the plan were not based on "units of work."\textsuperscript{178} Pension benefits were computed using "accredited service," which is based on total time of employment as a full-time regular employee of the company.\textsuperscript{179} The court reasoned that pension benefits were therefore based on "total time of employment," rather than on "units of work" performed during such "total time of employment."\textsuperscript{180} Looking beyond the labels, the court thus concluded that the computation of pension benefits was based essentially on seniority which the Act guaranteed fully to the returning veteran.

The circuits were thus split over the essential characterization of pension plan benefits. The \textit{Accardi} case had required an inquiry into the "real nature" of pension benefits but the courts had not yet settled on the effect of a "substantial work requirement" on the "real nature" test. With a split in the circuits and conflicting results in reviews of essentially similar pension plan provisions, the United States Supreme Court granted certiorari in \textit{Alabama Power Co. v. Davis}.\textsuperscript{181}

\begin{itemize}
  \item \textsuperscript{174} \textit{Id.} at 318.
  \item \textsuperscript{175} 383 F. Supp. 880 (N.D. Ala. 1974), aff'd per curiam, 542 F.2d 650 (5th Cir. 1976), aff'd, 431 U.S. 581 (1977).
  \item \textsuperscript{176} 383 F. Supp. at 888.
  \item \textsuperscript{177} \textit{Id.} However, the court could have insured Davis' "equal competitive status" merely by requiring that his military service be counted toward eligibility for and vesting of his pension benefits. In fact, the court went beyond keeping Davis in "equal competitive status" with non-veterans by requiring that Davis be credited with additional "benefit seniority" as well. \textit{See} note 67 and accompanying text \textit{supra}.
  \item \textsuperscript{178} 383 F. Supp. at 887.
  \item \textsuperscript{179} \textit{Id.} at 884, 887.
  \item \textsuperscript{180} \textit{Id.} at 887.
  \item \textsuperscript{181} 429 U.S. 1037 (1976).
\end{itemize}
Alabama Power Co. v. Davis

In Alabama Power Co. v. Davis, respondent Davis became a full-time, permanent employee of Alabama Power Co. on August 16, 1936. He continued to work for the company until March 18, 1943, when he left to enter the military. After serving thirty months, Davis resumed his employment with the company on October 8, 1945.

Alabama Power Co. had established a defined benefit pension plan on July 1, 1944, during the time that Davis was in the military. The plan covers "full-time regular employee[s]" who have completed one year of continuous service with the company and who have attained age twenty-five. Normal retirement age under the plan is sixty-five, but a covered employee who has both attained age fifty-five and completed at least twenty years of "accredited service" may choose early retirement. In addition, covered employees become fully vested in their accrued benefits upon either completing at least twenty years of service or attaining age fifty and completing at least fifteen years of service. Time spent in military service is included in "service" for purposes of determining a covered employee's vested benefit under the plan. The plan is funded entirely by Alabama Power Co. and no contributions are required of employees.

Pension benefits under the plan are computed according to a formula which takes into account a covered employee's "monthly earnings" at retirement date and his "accredited service." Accredited service is the sum of future service, defined as the period of service from the later of July 1, 1944 and an employee's coverage date under the plan, and past service, defined as the period of service prior to July 1, 1944, the effective date of the plan. Specifically excluded from accredited service by the plan are periods of non-compensated leaves of

183. Id. at 582.
184. Id. at 582, 591.
185. A "defined benefit pension plan" is one in which the benefits provided under the plan are determined in advance by a formula and the contributions to the plan are the variable factor. See generally McGill, supra note 18, at 101-09.
186. "Vesting" refers to the nonforfeitable right of a participant under a qualified retirement plan to receive his accrued benefits whether or not he remains in service with the employer. Id. at 135-39.
187. 431 U.S. at 590.
188. Id. at 591 n.15.
189. Id. at 590.
190. Id. Accredited service was apparently credited for periods of service rendered to the company as a full-time regular employee. Id. at 591. The district court noted that there was no "unit of work" requirement in the crediting of service. 383 F. Supp. at 884-85, 887.
absence and military service.\textsuperscript{191}

Davis selected the early retirement feature and he retired on June 1, 1971. He received accredited service from August 16, 1937, the date he completed the one-year eligibility requirement for participation under the plan, to June 1, 1971, his early retirement date. Davis did not receive credit for the thirty months he spent in military service, in keeping with the plan’s definition of accredited service. Accordingly, Davis brought suit, claiming that section 9 of the Military Selective Service Act of 1967\textsuperscript{192} required that Alabama Power Co. count his military service toward the determination of his pension benefit.\textsuperscript{193}

In reviewing the applicable case law, the United States Supreme Court found two “axes of analysis” used to determine whether a benefit is a “right of seniority” secured to the veteran by section 9. In the first of these, a benefit is a “perquisite of seniority” if the benefit would have accrued with reasonable certainty had the veteran been continuously employed during the period of his military service and if its “true nature” is a reward for length of service. In the second analysis, if the benefit is subject to a significant contingency or if it is in the nature of short-term compensation for services rendered, it is not an incident of seniority protected by section 9.\textsuperscript{194}

In order to determine whether Davis’ pension benefit was an incident of seniority, the Court looked to the two criteria of the first “axis of analysis.” Applying the reasonable certainty standard from \textit{McKinney} and \textit{Tilton},\textsuperscript{195} the Court concluded that, given his work record, Davis would almost certainly have accumulated the additional thirty months of accredited service denied him by reason of his absence in the military.\textsuperscript{196}

As for the second criterion, Alabama Power Co. argued that the pension benefit more nearly resembled the vacation benefits in \textit{Foster}\textsuperscript{197} than it did the severance allowance of \textit{Accardi}.\textsuperscript{198} The company reasoned that accredited service was defined in terms of “full-time employment” with the company; therefore, the pension benefits were

\textsuperscript{191} 431 U.S. at 591.
\textsuperscript{193} 431 U.S. at 582.
\textsuperscript{194} \textit{Id}. at 584-89.
\textsuperscript{195} McKinney v. Missouri-Kan.-Tex. R.R., 357 U.S. 265 (1958); Tilton v. Missouri Pac. R.R., 376 U.S. 169 (1964). The reasonable certainty standard is met “if, as a matter of foresight, it was reasonably certain that advancement would have occurred, and if, as a matter of hindsight, it did in fact occur.” \textit{Id}. at 181.
\textsuperscript{196} 431 U.S. at 591.
\textsuperscript{197} Foster v. Dravo Corp., 420 U.S. 92 (1975).
based on a substantial work requirement which evidenced the nature of
the benefits as a form of compensation.199

The Court looked beyond the "overly simplistic analysis" of Alaba-
ma Power Co., finding that the "true nature" of the pension benefit
was a reward for length of service. In reaching that result, the Court
made several observations. First, the Court noted that the lengthy pe-
riod of service required for the vesting of pension benefits indicated
that what mattered was not the service actually performed but the pas-
sage of years in the company's employ. In other words, it would be
difficult to maintain that a pension increment is deferred compensation
for the year in which it was earned if the employee becomes entitled to
that increment only after meeting the lengthy vesting requirement.
Second, the benefit formula that determined the pension benefit was
based on earnings and accredited service as at actual retirement date;
therefore, the amount of the employee's benefit and the cost to the em-
ployer of funding that benefit depended directly on the length of time
that the employee continued to work for the employer. Third, a pen-
sion program promotes long service with an employer by guaranteeing
the employee a measure of financial security. This financial security, in
turn, permits older, less efficient workers to retire, thus opening up jobs
for younger workers. Therefore, the Court concluded, pension pay-
ments are rewards for continuous employment with the same employer.
As such, they are "perquisites of seniority" which warrant the full pro-
tections of the reemployment rights provisions of section 9.200

Analysis of the Decision

With a sweeping generalization, the United States Supreme Court
in Alabama Power Co. v. Davis concluded that "pension payments are
predominantly rewards for continuous employment with the same em-
ployer."201 Nevertheless, the facts and circumstances of the case will
not support such a broad conclusion because the Court did not, in fact,
show that the "true nature" of all pension payments is necessarily a
"reward for length of service" with a single employer. In particular,
the criteria used by the Court in deciding that pension payments re-
ward "continuous employment" do not apply to pension plans gener-
ally, and the Court's "dual axis" analysis202 will not serve well outside
the realm of collectively bargained seniority systems. In essence, then,

199. 431 U.S. at 592.
200. Id. at 593-94.
201. Id. at 594.
202. Id. at 589.
Alabama Power has little precedential value: the case provides almost no guidance for resolving problems of veterans' reemployment rights that might arise in the area of private pension plan benefits, particularly those pertaining to non-union employees.

The Alabama Power Court noted that the long period required for vesting of pension benefits under the Alabama Power Co. pension plan was the most significant factor leading to its conclusion that pension payments are predominantly a reward for length of service.\textsuperscript{203} The Court reasoned that a pension accrual is not deferred compensation for the year in which service is actually rendered if, as here, the right to receive that pension accrual vests only after a substantial period of continuous employment. Thus, the Court concluded that the presence of a substantial vesting requirement implies a reward for continuous employment with a single employer.\textsuperscript{204}

By deciding the case on that basis, the Court has necessarily limited the "most significant factor" in its decision to actions for private pension plan benefits commenced prior to 1976. The Employee Retirement Income Security Act of 1974\textsuperscript{205}—which was enacted subsequent to respondent Davis' retirement—established minimum vesting standards for private pension plans effective for the first plan year beginning after December 31, 1975.\textsuperscript{206} Generally speaking, ERISA requires vesting of accrued benefits within five to fifteen years of service.\textsuperscript{207} In attempting to discuss the effect of ERISA, the Court noted that the law was inapplicable to Davis' claim for benefits and, "insofar as is relevant in this case, does not alter the nature of pension plans."\textsuperscript{208} If, as the Court presumed, that nature is a "reward for length of service," then, as a codification of public policy, ERISA does, in fact, alter the nature of pension plans.

Throughout the legislative history of ERISA, the committee reports identified inadequate vesting as a major problem for retirement income security.\textsuperscript{209} As the reports note, substantial vesting require-

\textsuperscript{203} \textit{Id.} at 593.

\textsuperscript{204} \textit{Id.} at 593-94. The Alabama Power Co. pension plan provided for vesting of accrued benefits either after completing 20 years of service or after both attaining age 50 and completing 15 years of service. \textit{Id.} at 590.

\textsuperscript{205} 29 U.S.C. §§ 1001-1381 (1976) [hereinafter referred to as \textit{ERISA}].


\textsuperscript{207} 29 U.S.C. § 1053 (1976). \textit{See generally} \textit{McGill}, supra note 18, at 139-42. Comparing the Alabama Power Co. pension plan's vesting provision with the minimum vesting standards of \textit{ERISA}, it is clear that the plan's vesting schedule would not qualify under \textit{ERISA}.

\textsuperscript{208} 431 U.S. at 590 n.13.

ments have often resulted in forfeiture of accrued pension benefits despite long periods of service and have interfered with the mobility of labor to the detriment of the economy.\textsuperscript{210} Thus, ERISA mandates minimum vesting standards\textsuperscript{211} and provides for some portability\textsuperscript{212} of pension benefits in order to insure retirement income security for an increasingly mobile workforce.\textsuperscript{213}

Therefore, the Court's focus on the presence of a substantial vesting requirement and its analysis of the function of pension plans as a reward for length of service\textsuperscript{214} run counter to public policy. The trend to shorten vesting requirements and provide some measure of retirement income security to short service employees undermines the basis for the Court's conclusion that the "true nature" of pension payments is a reward for length of service with a single employer. In light of recommendations by commentators\textsuperscript{215} and the President's Commission on Pension Policy,\textsuperscript{216} the trend toward even shorter vesting requirements and more portability of pension benefits should continue beyond the minimum standards set by ERISA. Such a trend reveals that, contrary to the Court's conclusion, the "true nature" of pension benefits is a

\begin{itemize}
\item \textit{Id.} See also McGill, supra note 18, at 139-43; W. Greenough \& F. King, Pension Plans and Public Policy 151-75 (1976) [hereinafter referred to as Greenough \& King].
\item 213. Greenough \& King, supra note 210, at 157. The authors contend that a mobile labor force is beneficial to the economy and that delayed vesting tends to hold those employees to a job that an employer least wants to keep while having little effect on retaining the best or most highly qualified employees. \textit{Id.} at 155-58. \textit{But see} McGill, supra note 18, at 21-23, 140-41; Alabama Power Co. v. Davis, 431 U.S. 581, 594 (1977).
\item 214. 431 U.S. at 593-94.
\item 215. Greenough \& King, supra note 210, at 172-75.
\item 216. President's Commission on Pension Policy, Coming of Age: Toward a National Retirement Income Policy, Pension and Profit-Sharing (P-H), Report Bulletin 25, \textsection 2, at 52 (March 6, 1981) [hereinafter referred to as President's Commission on Pension Policy].
\end{itemize}
form of "deferred compensation" for socially useful and productive work, regardless of the length of time spent in the employ of any one company.

In focusing on vesting requirements, the Court lost sight of the fundamental issue in the case: whether section 9 of the Military Selective Service Act requires inclusion of Davis' military service in his "accredited service" for benefit accrual purposes. Vesting was never at issue in the case because the Alabama Power Co. pension plan counted military service toward the vesting of accrued benefits. Nor is it persuasive to use a substantial vesting requirement as justification for additional benefit accruals because there is neither abstract nor practical reason why the two need bear any relationship at all. Vesting service is a measure of the period used to determine an employee's nonforfeitable right to his accrued benefit; benefit service is a measure of the accrued benefit itself. The analysis of vesting and benefit accruals in terms of the Act should involve quite different considerations.

The vesting of pension rights determines eligibility for a pension benefit in much the same way that shop seniority does for promotion and for order of lay-off or recall. Viewed this way, vesting is a function of longevity of employment and, in terms of the Act, approximates "seniority" or its judicially-created incidents. Therefore, vesting should be subject to the full protections of the Act and fully guaranteed to a returning veteran. Vesting enjoys similar legislative protection under ERISA which, for purposes of minimum vesting standards, requires that vesting service include all "years of service" with an employer, subject only to certain specified exceptions.


218. Seven years after enactment of ERISA, the President's Commission has identified the same problem areas that gave rise to the minimum vesting standards and portability features of ERISA. President's Commission on Pension Policy, supra note 216, at 32-44. See also notes 209-12 and accompanying text supra. The Commission is recommending even shorter vesting schedules and more portability of benefits.


220. 431 U.S. at 590.

221. See notes 8-18 and accompanying text supra.

222. See notes 91-152 and accompanying text supra.

223. ERISA broadly defines "vesting service" to include all years of service with an employer with the following specified exclusions:

(b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:
On the other hand, benefit accruals, like insurance coverage, vacation pay and other fringe benefits, compensate an employee for his productive work. As an element of compensation, benefit accruals, like wages, can be suspended for periods of absence from the job. The legislative history of the 1940 Act reveals an attempt to preserve accrued fringe benefits at the point of induction but to require additional accruals only upon reemployment. At no point in the debates was it ever suggested that the Act required an employer to pay wages, provide insurance coverage or pension accrual during the period of military service. In terms of the Act, therefore, pension benefit accruals fall under the category of "insurance and other benefits," which are subject to employer practices concerning employees on furlough or leave of absence. Similarly, ERISA defers to employer practices in the area of accrued benefits which, the committee reports indicate, are to be determined under the individual plan, subject only to rules for preventing discrimination. Benefit service, unlike vesting service, is not defined in ERISA, and the committee reports note that any reasonable and consistent basis for its determination will be allowed.

Applying a "true nature" of the benefit analysis, the Alabama Power Court next looked to the benefit formula under the pension plan and found that it rewarded length of service. Pension benefits under the plan are determined by using an employee's "monthly earnings" and "accredited service" as at the date of his retirement. Thus, the

(A) years of service before age 22, except that in case of a plan which does not satisfy subparagraph (A) or (B) of subsection (a)(2) of this section, the plan may not disregard any such year of service during which the employee was a participant;
(B) years of service during a period for which the employee declined to contribute to a plan requiring employee contributions;
(C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury;
(D) service not required to be taken into account under paragraph (3);
(E) years of service before January 1, 1971, unless the employee has had at least 3 years of service after December 31, 1970; and
(F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date.


224. McGill suggests that pension benefits are a form of "deferred wages" which, like wages, hospitalization benefits and working conditions, increase employee morale, improve productivity and enable an employer to keep and attract qualified executives. McGill, supra note 18, at 16-23.
225. See notes 36, 37, 39, 45, 47, 50 and accompanying text supra.
226. See notes 8-18 and accompanying text supra.
229. 431 U.S. at 591 n.15, 594.
Court reasoned, the benefit formula rewards continuous employment rather than work actually performed.\textsuperscript{230} While the Court's analysis is not incorrect, it is not at all instructive and results in a misleading conclusion.

With only slight variations, this same line of reasoning can be pursued to a contrary conclusion: the "true nature" of a pension plan can be a form of short-term compensation rather than a reward for length of service. In other words, the "final average pay" formula\textsuperscript{231} of the Alabama Power Co. pension plan could be restated as a "career average pay" formula\textsuperscript{232} and the true nature of the plan would not be a reward for length of service. Under the career average pay approach, the pension accrual is determined each year as a percentage of that year's pay.\textsuperscript{233} An employee's accrued benefit at any point in time is simply the sum of all past one-year accruals. Such a formula would tie the pension benefit to actual work because the amount of annual accrual would depend on actual pay and service performed that year. Besides, the employee would enjoy no particular advantage in remaining with an employer, except for the additional one-year accruals. This "annual compensation" is then deferred so that the employee will enjoy a retirement income when he is no longer able to work.

Thus, the Court's analysis leads to the curious result that the "true nature" of a pension plan will vary depending on the statement of its benefit formula.\textsuperscript{234} Of course, it is not possible to analyze the individual features of any one pension plan and thereby determine the "true nature" of all pension payments. Nevertheless, by incorporating the "real nature" test\textsuperscript{235} of Accardi v. Pennsylvania Railroad\textsuperscript{236} into its own "dual axis" analysis,\textsuperscript{237} the Alabama Power Court required just that. The "true nature" analysis formulated by the Court is an unworkable

\textsuperscript{230} \textit{Id.} at 594.
\textsuperscript{231} \textit{See generally} McGill, \textit{supra} note 18, at 102-03.
\textsuperscript{232} \textit{Id.} at 102.
\textsuperscript{233} The final average formula under the Alabama Power Co. pension plan was 1\% of monthly earnings at retirement date times years of accredited service at such date. The formula could be expressed in a career average format as 1\% of annual earnings for each year of coverage under the plan.
\textsuperscript{234} Another kind of defined benefit pension plan formula is the "flat benefit" plan which is based on the philosophy that, beyond a certain minimum period of service, "retirement benefits should not be related to service." McGill, \textit{supra} note 18, at 104-05. Impliedly, such a plan would not qualify as a "perquisite of seniority," because the benefit does not depend on the passage of time in the company's employ. The flat benefit approach further strains at the Court's conclusion that all pension payments are predominantly rewards for length of service.
\textsuperscript{235} \textit{See} notes 110-29 and accompanying text \textit{supra}.
\textsuperscript{236} 383 U.S. 225 (1966).
\textsuperscript{237} 431 U.S. at 589.
solution to problems of veterans' reemployment rights because it requires a case-by-case determination of a subjective standard that can lead to conflicting results.238 The decision provides very little guidance because it is based on the individual characteristics of the Alabama Power Co. pension plan and it obscures any notion of how pension plan benefits fit within the statutory scheme of the 1940 Act.

BEYOND ALABAMA POWER CO. V. DAVIS

The “dual axis” analysis formulated by the Supreme Court in Alabama Power Co. v. Davis239 has not yet proven itself a dependable and workable model for deciding issues of veterans' reemployment rights. In the first major application of the Alabama Power rationale outside the realm of pension benefits, two district courts produced conflicting results,240 necessitating further refinement by the Supreme Court of the “true nature” prong of the analysis.241

The Lower Court Decisions

In claims for pension benefits, the district courts that have relied on Alabama Power start with the premise that the true nature of pension benefits is a reward for length of service and then proceed to harmonize the facts of the case with Alabama Power. It is not surprising, then, that each court has found Alabama Power determinative of the issues presented and has ordered credit toward pension plan benefits for time spent in military service.

In Beckley v. Lipe-Rollway Corp.,242 the plaintiff was denied “credited service” for both vesting and benefit accrual purposes because he failed to complete the requisite 1,750 straight time hours during his two-year tour of military duty.243 The defendant argued that the hour of service approach credits service for work actually performed; thus, the presence of an actual work requirement distinguished

---

238. The Court thus continues the muddle that arose in the veterans' reemployment rights cases following the decision in Accardi by preserving the "real nature" test. See notes 145-52 and accompanying text supra.
243. Id. at 564-65.
the case from *Alabama Power* where the district court found that "accredited service" did not take into account work actually performed by an employee.244

The *Beckley* court found, however, that the "true nature" of the benefit takes precedence over the formula by which such benefit is calculated. And, since the Supreme Court decision in *Alabama Power*, the "true nature of pension payments is a reward for length of service rather than compensation for services rendered."245 In the *Beckley* court's view, the service requirement does not affect the "essential nature" of pension benefits which, as a reward for length of service are rights of seniority protected by the Act, however calculated.246

The *Beckley* court found additional support for its decision247 in *LaPinta v. Ohio Crankshaft*.248 In *LaPinta*, the district court had granted summary judgment to the veteran in a set of facts almost identical to those in *Beckley*. Prior to *Alabama Power*, the *LaPinta* district court had found that a 1,700 hours of service approach to crediting service was a bona fide work requirement and, therefore, that the "true nature" of the pension benefit was a form of compensation.249 The Sixth Circuit Court of Appeals vacated and remanded for reconsideration in light of *Alabama Power* and, on remand, the district court granted the veteran's motion for summary judgment, ordering credit for military service.

Similarly, two other district courts have found that a compensated service approach is not so substantive a difference as to defeat a veteran's claim for additional pension credit. The courts in both *Turnington v. Standard Register Co.*250 and *Horton v. Armour & Co.*251 held that a 1,700 hours of service requirement does not sufficiently distin-


The argument that an hours-of-service approach constitutes a "substantial work requirement" which thus negates the idea of pension benefits as rewards for length of service was successful in three lower court cases before the Supreme Court decided *Alabama Power*. Jackson v. Beech Aircraft Corp., 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), vacated and remanded, 559 F.2d 1220 (6th Cir. 1977). Of course, because of the district court's finding in *Alabama Power*, the issue of a substantial work requirement had not been resolved by the Supreme Court opinion. *See also* notes 153-81 and accompanying text *supra*.

245. 448 F. Supp. at 566.
246. *Id.* at 566-67.
247. *Id.* at 567.
248. 96 L.R.R.M. 2321 (N.D. Ohio), vacated and remanded, 559 F.2d 1220 (6th Cir. 1977).
251. 84 Lab. Cas. ¶ 10,640 (W.D. Mo. 1978).
guish a pension plan from the one in *Alabama Power* to warrant a different result.

It seems by now fairly well established that collectively bargained pension benefits are by their nature a perquisite of seniority\(^\text{252}\) for purposes of the Military Selective Service Act. Thus, in applying the “dual axis” analysis of *Alabama Power*, the lower courts have simply relied on the Supreme Court’s determination of the “true nature” of pension benefits. When it came time for the lower courts to make independent determinations of the “true nature” of supplemental unemployment benefits [SUB], however, the results were less than consistent.\(^\text{253}\)

On remand from the Sixth Circuit Court of Appeals,\(^\text{254}\) the United States District Court for the Northern District of Ohio reconsidered *Coffy v. Republic Steel Corp.*\(^\text{255}\) in light of *Alabama Power*. Using a real nature of the benefit analysis, the *Coffy* district court could not harmonize SUB payments with pension benefits according to the guidelines established by *Alabama Power*.

SUB payments, the court found, essentially provide a “wage substitute” for up to a maximum of fifty-two weeks of unemployment, supplementing state system unemployment benefits.\(^\text{256}\) In addition, the court said, the work requirement is a bona fide effort to relate the SUB benefits to work actually performed. An employee would build up his SUB plan credit over a two-year period to provide compensation in the event of unemployment.\(^\text{257}\) The maximum of fifty-two weeks’ benefits is based on hours actually worked, not time on the payroll, because the accrual of SUB payments requires more than mere “continued status.”\(^\text{258}\) Furthermore, the two-year eligibility period for receiving SUB

\(^{252}\) *See* Bunnell v. New England Teamsters & Trucking Indus. Pension Fund, 486 F. Supp. 714, 718 (D. Mass. 1980). In *Bunnell*, the issue was whether a union trust fund was an “employer” and therefore subject to a district court’s jurisdiction under the Act; however, the court first established plaintiff’s right to receive credit for his military service. *Accord*, Miller v. White Engines, Inc., 89 Lab. Cas. ¶ 12,192 (6th Cir. 1980), aff’d per curiam, 85 Lab. Cas. ¶ 10,947 (N.D. Ohio 1978).

\(^{253}\) The discussion of supplemental unemployment benefits (hereinafter referred to as SUB) and the cases to follow will be limited to the problems encountered in expanding the “dual axis” analysis of *Alabama Power* Co. v. Davis beyond the area of pension benefits. For a full discussion of the topic of veterans’ reemployment rights under SUB plans, see *SUB Benefits for Returning Veterans, supra* note 137.


\(^{256}\) 461 F. Supp. at 346.

\(^{257}\) *Id.*

\(^{258}\) *Id.*, (quoting Aiello v. Detroit Free Press, Inc., 570 F.2d 145, 150 (6th Cir. 1978) (vacation pay is a form of short-term compensation for services rendered)).
payments does not relate the benefits to seniority because the same minimum applies to all employees; therefore, no advantage results from long service. Thus, the court concluded, the “true nature” of the SUB payments sought by plaintiff is a form of “short term compensation for services rendered” rather than “an aspect of seniority.”

On the other hand, the district court in *Thornhill v. Ormet Corp.* came to the opposite conclusion as to the “true nature” of SUB payments. Although finding a substantial work requirement, the *Thornhill* court nevertheless saw a sufficient resemblance between SUB payments and pension benefits to bring the case within the ambit of *Alabama Power*. The *Thornhill* court reasoned that the two-year eligibility requirement for SUB payments, like the vesting period in a pension plan, was an inducement to remain in the employ of the company until eligible for benefits. In addition, the payment of SUB benefits induces an employee to wait for recall rather than seek employment elsewhere. Furthermore, because SUB payments are based on an employee’s hourly rate at the time of lay-off, they resemble other seniority-related fringe benefits like the pension benefit in *Alabama Power*.

Thus, in its first major application after *Alabama Power*, the “true nature” of the benefit test produced contrary results in almost identical factual settings. In what seems the better decision, the *Coffy* district court applied the test to SUB payments but found that the benefits had no real relationship to longevity of employment. In light of controlling precedent, it therefore necessarily follows that SUB benefits are a form of short-term compensation for work performed and, therefore, are not within the purview of the Act. Yet, the *Thornhill* court found a strong enough resemblance between SUB payments and pension benefits to invoke the full protection of the seniority provisions of the Act. With this split in the decisions, the Supreme Court granted certiorari in *Coffy v. Republic Steel Corp.* in order to consider the status of SUB payments.

259. 461 F. Supp. at 346.
261. Id. at 2332.
262. Id. at 2331-32.
263. The *Alabama Power* rationale was applied to vacation pay in *Aiello v. Detroit Free Press, Inc.*, 570 F.2d 145 (6th Cir. 1978).
Coffy v. Republic Steel Corp.

The Supreme Court in *Coffy v. Republic Steel Corp.* further refined the “true nature” of the benefit test that it had formulated in *Alabama Power*. According to this refinement, a benefit need not be “meticulously proportioned” to longevity of service to constitute a “perquisite of seniority” so long as the benefit “performs a function akin to traditional forms of seniority.” In other words, a benefit can be a perquisite of seniority under the Court’s analysis even though it is not based on longevity of service and even though it does not necessarily reward length of service. Such a benefit need only provide some right traditionally associated with seniority. Applying this sort of analysis, the Court concluded that:

the purpose and function of the steel industry SUB plan is to provide economic security during periods of layoff to employees who have been in the service of the employer for a significant period. Thus, the benefits are in the nature of a reward for length of service, and do not represent deferred short-term compensation for services actually rendered. Accordingly, SUB payments are perquisites of seniority to which returning veterans are entitled under the Act.

Under the Court’s analysis, SUB payments essentially provide economic security in the event of layoff. Traditionally, as one of its main attributes, seniority also provides protection against layoff. SUB payments, therefore, resemble seniority because they provide a “second-level protection” against layoff. In this sense, the Court reasoned, SUB payments, like the severance pay in *Accardi*, compensate an employee for the loss of his job.

On the contrary, it can be argued that SUB payments bear an inverse relationship to seniority: the need for SUB payments decreases as seniority increases. In fact, SUB payments may often provide protection for those employees who have the lowest seniority because they are the first employees to be placed on layoff status. It is only in the most superficial sense that SUB payments resemble the severance pay of *Accardi*. In *Accardi*, severance pay was tied to longevity of service because the more seniority one had, the more he would forfeit by way of accrued rights and benefits. In addition, the severance pay

---

266. 447 U.S. 191 (1980).
267. *Id.* at 205.
268. *Id.* at 205-06.
269. *Id.* at 200.
271. *See* *SUB Benefits for Returning Veterans*, supra note 137, at 521-22.
272. *See* notes 122-24 and accompanying text supra.
formula in Accardi was a function of "compensated service" and produced the greatest amount of severance pay for the most senior employees. It would hardly seem that, in any meaningful sense, SUB payments are "analogous" to severance pay.

The Coffy Court disagreed with the district court's finding of a substantial work requirement for SUB plan payments and its determination that the fifty-two week maximum on SUB payments negated the notion of reward for length of service. The Court responded by showing that each argument raised by the district court could also support its contrary conclusion that SUB payments are not short-term compensation for services rendered. Far from invalidating the district court's reasoning, such an admission by the Supreme Court merely underscores the ineffectiveness of a mode of analysis which will not produce logically consistent results when applied in new situations. It does not seem reasonable that a weekly supplement to state unemployment compensation that accrues fully in just two years and produces a maximum of fifty-two payments is the type of seniority right that Congress intended to guarantee a veteran inducted into the armed forces. Nevertheless, the "true nature" of the benefit analysis, formulated by the Court in Alabama Power and refined by the Court in Coffy, will produce just such a result.

The Future of the Alabama Power Rationale

The Supreme Court's wide-ranging conclusion in Alabama Power Co. v. Davis belies the potentially limited field of its application. Fundamental to the Alabama Power decision, and indeed to each major veterans' reemployment rights decision, is the presence of a collectively bargained seniority system that brings a veteran's claim for additional pension credit directly within the purview of the Act. The

274. 447 U.S. at 202-05.
275. Id. at 205.
276. The Court "concludes . . . that pension payments are predominantly rewards for continuous employment with the same employer." 431 U.S. at 594.
277. Although decided factually on the basis of seniority and seniority systems, the decisions leave open their possible application in non-bargained situations: Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook was to give the veteran protection within the framework of the seniority system. . . .
Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 288 (1946); However, § 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the
"dual axis" analysis of *Alabama Power*, as refined by *Coffy*, must presuppose a system of seniority in order to determine whether a right or benefit is a perquisite of seniority.\(^{278}\) Thus, the question arises whether *Alabama Power* and *Coffy* have any application to those situations in which no bargained-for system of seniority exists. In this sense, at least, it surely cannot be said with any degree of certainty that all pension payments are perquisites of seniority.

Moreover, the *Alabama Power* Court expressly declined to comment on the issue of whether defined contribution plans would be treated differently from defined benefit plans under the Military Selective Service Act.\(^ {279}\) Under a defined contribution plan, an employer (either alone or in conjunction with an employee) makes annual contributions to the employee's individual account under the plan on the basis of a certain percentage of the employee's annual compensation.\(^ {280}\) Such contributions receive favorable, tax-deductible treatment under the Internal Revenue Code only if they are based on "compensation otherwise paid or accrued."\(^ {281}\) Thus, even if an employer desired to

\(^{278}\) Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service.

\(^{279}\) Under a defined contribution plan, an employer (either alone or in conjunction with an employee) makes annual contributions to the employee's individual account under the plan on the basis of a certain percentage of the employee's annual compensation.\(^ {280}\) Such contributions receive favorable, tax-deductible treatment under the Internal Revenue Code only if they are based on "compensation otherwise paid or accrued."\(^ {281}\) Thus, even if an employer desired to

\(^{278}\) McKinney v. Missouri-Kan.-Tex. R.R., 357 U.S. 265, 273 (1958);

So construed, we conclude that Congress intended a reemployed veteran, who, upon returning from military service, satisfactorily completes his interrupted training, to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service.

\(^{279}\) Tilton v. Missouri Pac. R.R., 376 U.S. 169, 181 (1964);

The term "seniority" is nowhere defined in the Act, but it derives its content from private employment practices and agreements . . . . The term "seniority" is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intent of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veteran the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country.


In light of what the Court has said in the above-quoted passages, "continuous employment" might serve as a substitute for "seniority" in contexts where there is no collectively bargained definition of seniority; however, "continuous employment" has neither the import nor statutory proportions of the term "seniority."

\(^{278}\) The "dual axis" analysis is nothing more than an amalgamation of the "reasonable certainty" standard of *McKinney* and *Tilton* with the "real nature" test of *Accardi* and *Foster*. *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 584-89 (1977); see notes 69-152 and accompanying text supra.

\(^{279}\) 431 U.S. at 594 n.18.


\(^{281}\) See generally McGill, *supra* note 18, at 23-26, 584-85.
continue making contributions to an employee's individual account during his period of military service, such contributions would not qualify for tax-deductibility and could jeopardize the "qualified" status of the defined contribution plan unless the employee had "compensation otherwise paid or accrued." In other words, such contributions could not be made on the basis of imputed compensation at the inductee's last regular rate. Therefore, at least in the case of defined contribution plans, the courts find themselves on the horns of a dilemma: they are to construe the Act liberally for the benefit of the returning veteran and yet such a liberal construction could run afoul of the provisions of the Internal Revenue Code.

CONCLUSION

Notwithstanding the sweeping language of the Alabama Power Court, the current state of the law concerning veterans' reemployment rights to retirement benefits is far from settled. During the 1980's, the vast majority of veterans of World War II will attain normal or early retirement age under private sector retirement plans. At present, only that class of veterans covered under defined benefit plans operated

282. Generally speaking, a "qualified" plan is one which meets the requirements of §§ 401, 410 and 411 of the Internal Revenue Code. 26 U.S.C. §§ 401, 410 and 411 (1976). Qualified status carries with it certain tax advantages and, in the words of McGill, "is highly prized and earnestly sought." McGill, supra note 18, at 25. The tax advantages of "qualified" plans include the following: (i) employer contributions are deductible within certain limits for federal income tax purposes as ordinary and necessary business expense, 26 U.S.C. §§ 404(a), 404(a)(1), (3) and (7) (1976); (ii) employer contributions to a qualified plan are not includible in the taxable income of participants until actually received, 26 U.S.C. § 402(a)(1) (1976); (iii) investment earnings on plan assets held by a qualified trust—including realized gains and losses—are not taxable for federal income tax purposes until disbursed to participants in the form of plan benefits, 26 U.S.C. §§ 501, 511-514 (1976); (iv) "lump-sum distributions" to plan participants qualify for favorable capital gains treatment and "Special 10-year Averaging" for federal income tax purposes, 26 U.S.C. §§ 402(a)(2) and (e) (1976); (v) the amount of plan benefits payable to beneficiaries other than the deceased participant's probate estate which are attributable to employer contributions are excluded from the deceased participant's gross estate for federal estate tax purposes, 26 U.S.C. § 2039(c) (1976); and (vi) a plan participant's election or exercise of an option to make a plan benefit payable to a beneficiary after his death is not deemed to be a "transfer" for federal gift tax purposes, 26 U.S.C. § 2517 (1976). See generally McGill, supra note 18, at 25-26, 584-601.

283. But see Veterans' Handbook, supra note 128, at 95-104.


285. A similar problem might arise in the defined benefit area under a career average pay plan because such plan bases benefit accruals on a certain percentage of each year's pay. In that case, however, the use of last regular rate of pay as a basis for determining benefits of inductees can be justified on analogy with providing "past service benefits"—that is, benefits for the period prior to the plan's inception—by using last regular rate of pay. In the defined benefit area, there is no similar requirement that benefits be based on "compensation otherwise paid or accrued" as there is in the defined contribution area. See McGill, supra note 18, at 101-02; 26 U.S.C. §§ 404(a)(1) and (a)(3) (1976).

286. See McGill, supra note 18, at 113-19.
within a collectively bargained seniority system are guaranteed pension credit for military service. In this sense, at least, *Alabama Power* becomes important for what it does not hold because the limit of its holding determines the classes of veterans who do not have a guaranteed claim under the Act.

Of course, it is not equitable to deny a veteran’s claim for additional pension credit merely because he happened to work a white collar job or because his employer happened to maintain a defined contribution plan. Such a veteran served his country no less than a veteran covered by a collective bargaining agreement. However, in the absence of legislative action, the courts would have to expand in piece-meal fashion the rationale of *Alabama Power* to include, first, non-bargained plans and, then, defined contribution plans. As for the latter, the courts would have no small difficulty side-stepping the limitations of the Internal Revenue Code.

Recognizing the inherent limitations of the judicial process which decides issues on a case-by-case basis, Congress must act to insure equal and equitable treatment of veterans’ claims. Pension benefits should be identified either as an instance of “other benefits,” guaranteed only to the extent of employer practices pertaining to leave of absence, or elevated to the same status as “seniority.” At least then, veterans, employers and the courts will know how to proceed in this now unsettled area.

*Stephen D. Tandle*