In the

Supreme Court of the United States

ALABAMA POWER COMPANY,

Petitioner,

v.

RAYMOND E. DAVIS,

Respondent.

No. 76-451

Washington, D.C.
April 25, 1977

Pages 1 thru 48

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ALABAMA POWER COMPANY, Petitioner,	:	
v.	:	No. 76-451
RAYMOND E. DAVIS, Respondent.	:	

Washington, D. C.

Monday, April 25, 1977

The above-entitled matter came on for argument at 3:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

H. HAMPTON BOLES, ESQ., 600 North 18th Street, Birmingham, Alabama, 35203, for the Petitioner.

ALLAN A. RYAN, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-451, Alabama Power Company against Raymond E. Davis.

If it will assist you in making your plans, gentlemen, we will hear the Petitioner's argument this afternoon and the Respondent's in the morning.

Mr. Boles.

ORAL ARGUMENT OF H. HAMPTON BOLES, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BOLES: Mr. Chief Justice, and may it please the Court:

I represent Alabama Power Company in this cause who is the Appellant. Alabama Power Company is an electric public utility engaged in the service of electricity to consumers in portions of the State of Alabama.

Except for a two and one-half year period of time in the military and a period off for a union strike, Mr. Davis was employed by Alabama Power Company from 1936 until his retirement in 1971.

According to the provisions of the pension plan of Alabama Power Company, Mr. Davis' time in the military was not considered as a credit in computing the amount of Mr. Davis' retirement income.

Mr. Davis instituted litigation, through the U.S. Attorney's office, alleging that Alabama Power Company,

notwithstanding the contrary provisions of the pension plan, was required to count the two and one-half year period as accredited service with the company in computing the amount of retirement income under the pension plan.

The District Court in Alabama ruled in favor of Mr. Davis, reasoning that since Alabama Power Company's plan did not have a precise matching of units of work to units of benefits under the plan, that the benefit was like seniority and, therefore, his military time must be counted as accredited service under the plan.

The Court of Appeals for the Fifth Circuit affirmed per curiam, with one dissenting opinion, and this Court accepted cert.

Although the monthly monetary amount involved in Mr. Davis' claim is not very great, this case presents to this Court for the first time the precise issue of the proper treatment of military service time under the reemployment provisions of the Military Selective Service Act.

The facts below would not dispute it and I set forth as agreed statement of facts, beginning at about page 15, in the Appendix.

Now, we believe that this case is in a posture to be decided upon three fundamental propositions which we believe to exist with respect to the reemployment provisions of the Military Selective Service Act.

Now, first of all, we don't contest, nor dispute, that the Military Selective Service Act, that is, the reemployment provisions of that Act, were enacted to benefit the veteran.

Primarily, they were enacted and dictate that a veteran, that a qualified veteran, upon his return to private employment, must be employed without loss of seniority, and must be entitled to participate in insurance and other benefits that exist in accordance with established rules of the employer as they relate to employees on leave or furlough of absence.

Now, the second proposition, which we have no contest about and we do not question it, is if there is an employee benefit or any type of employee advancement which accrues automatically by virtue of continued association with an employer, alone, by virtue of that time period, then the veteran must have his military service time count towards accruing that benefit.

The third proposition which we say is well founded in law and applies to this case is that if the employer agreement has in it a work requirement that is a condition to that benefit, then that work requirement must be satisfied by the employee, regardless of whether he is a returned veteran or just a returning employee from leave of absence, before the employee can -- becomes entitled to that benefit.

Now, it is the Alabama Power Company's position in

this case that accredited service under its pension plan can only be earned when one of its employees works for the company. It is our position that that work requirement is real. It requires the employee to be present on the job, earning regular pay.

QUESTION: Mr. Boles, is the plan clear in its application to employees who are on furlough or leave of absence? I should think if it were then this would be open and shut, wouldn't it?

MR. BOLES: Mr. Justice Stewart, I agree that it should be open and shut. It is our position that the case should be very simple. It is clear that an employee on leave of absence, without regular pay, receives no benefit under the pension plan. He gets no credit for accredited service under the minimum pay provisions of computed income. He gets absolutely not one day of earnings.

As I want to go into, there are two provisions in the plan for computing pension pay and they are set forth in Section 5 of the pension plan, beginning at about page 60.

QUESTION: Is that set aside every month, every quarter or annually?

MR. BOLES: Mr. Chief Justice, it would be set aside on an actuarial basis, and I don't proclaim to understand when it is done, but it is set aside on an actuarial basis and there is no segregation of the fund per employee.

If that answers your question --

QUESTION: It must be at fairly frequent intervals to take into account people who either leave or take long-term sick leave; must it not?

MR. BOLES: Yes, sir.

Now, I would like to point out -- You may have -- Yes, sir. I cannot answer that question with any degree of certainty, but I do know that it is done as frequent as is necessary through accounting procedures to maintain the plan on a sound actuarial basis. And they do take this into account.

QUESTION: There would be tax problems involved there, too, would there not?

MR. BOLES: If you are speaking about Section 404 of the Internal Revenue Code which states that payments into the pension fund are deductible in the year in which they are made, it is my understanding, under the theory that they are a type of compensation to the employee and then the employee gets them as deferred compensation and they become taxable to him in the year received, taxable to the employer in the year it is given.

Yes, sir.

QUESTION: Now, when he is on military leave, does this record show whether the company made any contributions for this particular man?

MR. BOLES: I believe in the agreed statement of facts it does, Your Honor. It states that the fund was not funded to account for periods of absence for military leave.

Yes, sir.

QUESTION: One reason for that, I suppose, among many others, is that there is no certainty that the particular employee is going to come back.

MR. BOLES: Absolutely not. There is no certainty. When an employee leaves to go in the military, he does not have any type of contract which binds him to return to the employer. That is his free election. If he returns within the time-period that's specified in the statute -- I believe ninety days -- the employer has to accept him. There is, further, no requirement that once he returns that he stay any length of time. I mean, he can return, stay a day --

QUESTION: That's true of someone on leave of absence, too. Lumney (?) v. Wagner forbids the specific performance of contracts for personal service. No employee is ever bound by contract to come back to his employer in the sense of an enforceable obligation.

MR. BOLES: That is correct. If a person goes on leave of absence, say, to take his own time, without pay, to go two years of college, we do not fund the plan, there, either, for him.

QUESTION: Now, do you give him seniority for the

two years that he has gone to college?

MR. BOLES: Now, that's -- Under the collective bargaining agreement, as straight seniority for time, I cannot state exactly whether the union allows him to collect seniority. I can state that with respect to the pension plan he doesn't earn a red cent.

QUESTION: But, clearly, an employee who left to go in the military was entitled to have seniority in the sense of job-bidding preference. If your leave of absence man got seniority but nothing else, I would think your man returning from the military would -- rather, if your leave of absence man got -- Now, I've lost my train of thought. Go ahead.

MR. BOLES: But, just for the record, I can state that the record refers to the collective bargaining agreement. It is absolutely clear in those agreements that military service time does count toward seniority for those types of things, such as layoff and job preference.

QUESTION: What about a sick leave? Let us say an employee has tuberulosis and has a one-year leave of absence and he is not being paid, is there any contribution paid to him -- paid into the fund for his account?

MR. BOLES: It is my understanding, Chief Justice Burger, that it is not funded to account for prolonged leaves of absence. Now, you don't get credit for leaves of absence for sickness, under the pension plan, in excess of thirty days,

except for the one occasion that's mentioned in the stipulated facts, where, if an individual has over twenty years' service and he faces that situation that the company can, in its discretion, grant extended sick-leave. In that case, if he is granted sick-leave with pay, it is funded.

QUESTION: That's a matter of contract, though, is it?

QUESTION: This is a non-contributory plan.

MR. BOLES: It is a non-contributory plan, but --

QUESTION: Do I correctly understand that this really gets down to the computation of, quote, "accredited" service, upon the basis of which you compute the amount of the pension? Is that right, according to the plan?

MR. BOLES: In Mr. Davis' case --

QUESTION: Under the plan, is it the basic thing?

MR. BOLES: No, sir, I don't think so.

Under Section 5, the basic normal retirement income computation is a percent of earnings, totally a percent of earnings. There is nothing else in there, but it is an extremely long and complicated formula. They take 1% of earnings up to a certain step and then a greater percent of earnings.

QUESTION: In that formula, don't you apply a multiplier of the total years of accredited service?

MR. BOLES: You do not unless -- That is a minimum pay

formula.

Let me try to explain that because that is important to my case.

QUESTION: I'd like to ask a question.

The plan does not include military service and accredited service; is that right?

MR. BOLES: That is correct.

QUESTION: And that's why we've got the case, isn't it?

MR. BOLES: That is one reason. You could get it even under --

We don't count it for earnings. The basic provision, under the plan, in Section 5, is that for computing the amount of retirement income you take a percent of earnings and add them up. That is all. Then you have a minimum retirement pay section which is also in Section 5 that was introduced by amendment in 1966 that does take into account accredited service. Basically, that section says you take a percent of his earnings on retirement and multiply it times his accredited service.

QUESTION: And you do not include, in that last element, military?

MR. BOLES: That is absolutely correct.

QUESTION: You may not include other things, but in any event you don't include military, and that's why we have

the case isn't it?

MR. BOLES: That's why you have this specific case.

QUESTION: I understand the case depends upon the statute and the statute appears on page 3 of the brief for the Respondent. And C-1, B, capital B, in parentheses -- No, just C-1 equates this thing to what happens to employees who are on furlough or leave of absence. And that's the critical issue in this case. And what does happen to employees under your plan who are on furlough or leave of absence? That's dispositive of this statutory question.

MR. BOLES: I agree. And those persons do not get credit under the pension plan, not by the way of accredited service nor by way of earnings under the first section.

QUESTION: Do they get credit for lost seniority?

MR. BOLES: Are you speaking of a veteran?

QUESTION: Two years to go to college.

MR. BOLES: If it is non-union related, it is my understanding that they do not. But the veteran does. It is specific that the veteran does.

QUESTION: So that's why you can't necessarily say that because you treat other leaves of absence the way you treat military leaves the same, you are following the statute, because the statute requires different treatment in some situations.

MR. BOLES: Exactly. With regard to seniority it

does require -- It can require purpose.

QUESTION: If a certain benefit is a function of seniority, you have to give it to them.

MR. BOLES: I don't deny that if a benefit is a function of seniority that you have to give it to the returned veteran.

QUESTION: Even though you don't to people who are on leave.

MR. BOLES: We are in complete agreement.

QUESTION: But your position, I take it, is that the function of seniority is not to be equated with contributions by the employer into a fund, during a period when the person is not present in the establishment.

MR. BOLES: And earning regular pay, and that is present under a full-time regular -- As a full-time regular employee. That's one who works 40 hours a week for an indefinite period of time.

QUESTION: The statute entitles the returning veteran to three separate guarantees. He shall be restored without loss of seniority. He 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. And he shall not be discharged from such position without cause within one year after such restoration.

Those are three separate guarantees. I take it we are now considering the second one that I read. The test there is what the plan provides for employees on leave of absence. It seems to me relatively simple.

MR. BOLES: The plan provides that they will not receive accredited service when they are on furlough or leave of absence.

QUESTION: Mr. Boles, isn't there another qualification in that language? It's "in accordance with rules in effect at the time he went in the service." And wasn't this plan adopted after this man went into service?

MR. BOLES: This plan was adopted after he went into the service.

As far as the pension benefits that Mr. Davis has gotten, we have bestowed those upon him, I say, by virtue of the desire on the part of the company and not by virtue of what the Act said. The pension plan was established in 1944. He left for the service in '43. That's right. It was in effect when he came back.

QUESTION: You said you had bestowed them on him. Does he have his benefits, then?

MR. BOLES: He absolutely does, except for the two and one-half year period that he was gone. He has gotten just the same amount of benefits, under the pension plan, as if he had never left.

QUESTION: Well, if the pension plan was adopted after he went into service, then the language Mr. Justice Stewart read really doesn't apply, does it?

MR. BOLES: According to the reading of the statute, it does not apply.

QUESTION: Well, then --

MR. BOLES: -- situated to give him rights under that statute. I think it is his duty to fit himself within that statute.

Now, what the Government is claiming is that they go through the first section and they talk about seniority and they claim that pension benefits, in some sort of a general or generic sense, constitute seniority. And that's where we have a widely divergent view of what the law is.

We say that it is not seniority, that it should fit within the other benefits section that Mr. Justice Stewart read. Yes, sir.

I would like to take a few minutes, if I could, to look at the Government's position --

QUESTION: Is there a $17 difference, as suggested, between what he has been getting and what he would get if he were credited with the two and one-half years of military service?

MR. BOLES: That's right, sir.

QUESTION: $17.11 a month.

MR. BOLES: I don't want to leave the impression that the accredited service under that particular section, where Mr. Davis' retirement plan was computed, is not directly related to work and directly related to earnings.

You can only get accredited service if you are a full-time regular employee, not on leave of absence.

By leave of absence, I don't include the two-week vacation or the ten days sick leave. I mean leave of absence when you are away, other than those that are listed in the agreed statement of facts.

QUESTION: Mr. Boles, would you give me one other factual bit of information, I am confused on?

In order to qualify for the first dollar of benefits, is there a minimum service requirement?

MR. BOLES: One year. And a veteran --

QUESTION: Anything over a year?

MR. BOLES: Yes, sir.

And I would point out here the distinction is that with that one-year qualifying period under the plan, we do not have a work requirement. You just have to maintain the status of an employee for one year. If a person, or an employee, leaves the service of the company after six months, and returns, he gets his six months toward that qualifying year.

Another comparison type example is in the vested section, Section 7, of the plan which requires a certain number

of years of employment prior to retirement you get vested in order to obtain benefits when you leave.

Recently amended by ERISA, but under the plan -- that also, specifically, under the plan related only to a time requirement, the maintenance of an association with the company for that many years.

There, again, the veteran and the person on leave of absence can get that time requirement. It specifically states in that section that the veteran can accumulate that particular credit.

QUESTION: Does what you are saying add up to the fact that the dispute over the right of the veteran never affects eligibility? It may sometimes affect the dollar he receives, and that is all.

MR. BOLES: It would affect the dollars received and would not affect his eligibility. It affects the amount.

QUESTION: It is assumed that he would get the service, but it is not assumed that he earned any wages during that time.

MR. BOLES: That's correct, sir.

It is assumed that he did the service in those instances in the plan which depend on -- which is conditioned on an element of time.

I reserve some time for the morning. I see that I am out of today's time.

Thank you.

QUESTION: May I ask you one question?

Do you characterize the payments under the plan as deferred compensation?

MR. BOLES: I do, sir. Yes, sir.

QUESTION: Well, then, how do you account for taking into the plan services rendered prior to July 1944?

Certainly those services were paid for, the books were closed. And now you talk about deferred compensation for those services.

MR. BOLES: I think you can look at it -- You are talking about past service under the plan. In that particular section, it also has an accredited service, part of the former.

I think that if you look at it from the point of view of the employee, that it is deferred compensation, although it is retroactive. He is given something on the date of the pension plan that is for past service, but it is still there. It is still, in our plan, related and conditioned upon individuals, having been with the company, working and earning earnings, during that past service.

QUESTION: Well, it is really a gift, isn't it?

He had no claim, no legal claim, before the plan.

MR. BOLES: He had no legal claim before the plan and his only claim is by virtue of the plan. That's right, sir.

QUESTION: Of course, he had no claim to any pension plan, did he?

MR. BOLES: That's one of the points here that I think we've got to look at the plan to determine what benefits there are that Mr. Davis may have been entitled to.

It is our contention that he got everything that he earned and we properly excluded his military service time.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Ryan, we will let you get started in view of the time factor.

ORAL ARGUMENT OF ALLAN A. RYAN, JR., ESQ.,

FOR THE RESPONDENTS

MR. RYAN: Mr. Chief Justice, and may it please the Court:

I think it is important to put into some perspective both the statute and the plan.

Congress, over the years, has provided the veteran with a number of benefits in return for his service to his country.

These have been diverse benefits, such things as educational assistance, under the G.I. Bill, job counseling and the rights that we have here, in this case, which are rights to reemployment .

This statute --

QUESTION: This is more than right to reemployment.

MR. RYAN: It is, Mr. Chief Justice. There are, actually, three rights or four rights, depending on how you parse them.

They apply, in the first place, only to employees who leave the job, serve in the military, are honorably discharged and return to the same employer as they had before their military service.

QUESTION: What would you say with respect to a pension plan that, as to this man, had been established in 1960, long after the war, long after he had returned? Would you think that he should get nunc pro tunc --

MR. RYAN: I would say you would have to look at the plan. If the plan says we will start credit only in 1960, then he would not get credit for his wartime service.

If the plan said we will start counting time in 1940, then he would.

If the plan said we will count time from the day you came on the job or from one year from the day you came on the job, then, in Mr. Davis' case, he would.

The date that the plan is adopted is not the critical factor. It is how the plan treats the veteran, vis-a-vis how it treats the non-veteran who was on the job at the same time.

QUESTION: How do you interpret the last part of the

Section C-1 on page 3 of your brief, where you are talking about participating insurance or other benefits offered by the employer pursuant to established rules and practice relating to employees on furlough or leave of absence, in effect with the employer at the time such person was inducted into such forces?

What meaning do you give to that language I just quoted?

MR. RYAN: That language means that while the employee is in uniform, while he is serving in the military, the employer is obligated during that time to provide him with the same benefits as the employer provides to employees who are on non-military leave of absence.

And the Court, in Accardi, supports that reasoning. Although it could, perhaps, be said to be dicta in Accardi, this Court said that it was persuaded by that interpretation that that clause speaks only to the time that the employee is actually serving. And it is quite a distinction --

QUESTION: Well, if it is dicta in Accardi, how do you reconcile it with the actual language itself?

MR. RYAN: It is a very difficult job to reconcile it with --

QUESTION: It is impossible, is it not?

MR. RYAN: --with the language of the statute, itself.

The statute speaks of persons who are restored. And the argument, I would think, is that while an employee is in uniform, he has not yet been restored.

But the Court, in Accardi, looking at the legislative history, was persuaded by that interpretation.

QUESTION: Was persuaded to render that dicta.

MR. RYAN: Yes.

I think it is important also in that respect --

QUESTION: Well, is it your position, then, that this case isn't to be judged under that provision?

MR. RYAN: That is absolutely our position, Mr. Justice.

Our case does not depend on that clause at all and this case would be in no different posture if that clause were entirely absent from the statute.

I think it is important to distinguish, and this refers to a remark, I think, that Mr. Justice Stewart made -- And I would like to clarify the Government's position on it, that this case cannot be disposed of by saying, "We will look only at what the Alabama Power Company granted its employees on leave of absence in the way of pension benefits."

The statute commands that first you must look to seniority. The employer is obligated to restore the veteran without loss of seniority. That's the first place that the Court must look, we submit.

If it is determined that the right is not one of seniority, then the inquiry goes to the second stage. But, we contend that the second stage is not necessary in this case.

QUESTION: The second stage being very explicit with respect to, what you call it, insurance or other benefits, would be the one that would control if it were applicable. But it has been pointed out there was no plan in effect at the time this person was inducted into the Armed Forces, so I suppose in this case it is not applicable. If so, I should think it would be the controlling one, because it's the specific one.

MR. RYAN: Well, I think we agree that it is not applicable in this case.

QUESTION: It doesn't seem to be applicable because there was no plan at the time he was inducted into the Armed Forces.

QUESTION: Well, then, if you are right, the guy gets a much better break if his employer adopts a plan in 1960 than if he adopted one in 1940.

MR. RYAN: He gets no better break than his counterpart who never went into the Army, and that's what Congress intended.

QUESTION: But he gets a better -- The man who went into the Army in 1940 and his employer had a pension plan then is limited to the terms of the pension plan that was in effect

in 1940. Whereas, the man who went in in 1940 and the pension plan isn't adopted until 1960 gets better treatment, even though he -- presumably there was no element of reliance there.

MR. RYAN: The veteran whose employer adopts a plan in 1960 is to be treated in exactly the same way as any other employee who has been with the company for an equal length of time who did not go into the Army. Now, whether all employees are better off if the plan was adopted in 1960, rather than 1940, that may well be true, but for purposes of this statute what Congress is saying is, "Don't discriminate between the veteran and the non-veteran, regardless of what you -- "

QUESTION: But your reason for the inapplicability of that provision we have been talking about is a different reason, isn't it? I mean, there is more than one reason --

MR. RYAN: As Justice Stewart suggests, yes, sir.

I won't quarrel with that reason, Mr. Justice, but I think, in this case, it is not necessary to reach that point.

I think if I may also clarify a point raised in a question by Mr. Justice Stevens, it is necessary under this plan for an employee to work for fifteen years or twenty years before he is eligible for that first dollar of benefit. He works one year and then enters the plan. Having entered the plan, he still must work up to twenty years before he is eligible for anything. And this is one of the reasons that we submit is graphic evidence that this plan is not a form of

deferred compensation. It is very definitely based on length of service.

QUESTION: And must be, what, at least 60 years old?

MR. RYAN: He must work twenty years or fifteen years, having reached the age of 50. In other words, if he is over 50, he can retire with fifteen years of service, otherwise, he must have twenty years' service.

QUESTION: And then it is compulsory retirement at age 65?

MR. RYAN: At 65, unless it is waived.

QUESTION: And this Petitioner voluntarily retired at age 61.

MR. RYAN: He took an early retirement at 61, that's correct.

I think that the essential question that the Court must focus on in this case is whether the plan rewards actual work performed for the company or whether it rewards length of service with the company.

MR. CHIEF JUSTICE BURGER: You can develop that beginning at 10:00 o'clock tomorrow morning.

(Whereupon, at 3:30 o'clock, p.m., the Court adjourned, to reconvene at 10:00 o'clock, a.m., Tuesday, April 26, 1977.)