IN THE SUPREME COURT OF THE UNITED STATES

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

Washington, D. C.

Tuesday, April 26, 1977

The above-entitled matter came on for continuation of argument at 10:09 o'clock, a.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.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Alabama Power against Davis.

Mr. Ryan, you may continue.

ORAL ARGUMENT OF ALLAN A. RYAN, JR., ESQ., (Resumed)

FOR THE RESPONDENTS

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

There is really just one issue in this case: Is the credit for pension plan purposes a credit -- and I quote now from Accardi -- "which would have automatically accrued to the veteran had he remained in private employment rather than responding to the call of his country"?

If so, then Mr. Davis is entitled to that credit and I do not understand my opponent to disagree with that proposition.

On the other hand, if the Court should find that this credit is based on the performance of actual work, then the credit is not a function of seniority and Alabama Power Company is obligated to provide such credit only if it does so for employees on leave of absence.

QUESTION: Would it be equally accurate to cast that in terms of whether there has been compensation paid during the period, rather than work was performed?

MR. RYAN: Do I understand, Mr. Chief Justice, the

issue of whether the power company paid Mr. Davis while he was in the service?

I don't think that that is an equivalent proposition. I think that the fact that the company did not pay him compensation is nothing more than a reflection of the fact that he did not perform any work for the company during that time.

Compensation, in that sense, is a fundamentally different aspect of the employment relationship and the pension plan.

QUESTION: Then you do not think that if the employer paid the employee during all the period he was in the service, as some employers did, that the contributions to the pension fund would follow automatically?

MR. RYAN: If the employer did pay the employee while he was in the service, I would assume that they would continue the pension plan, but I would not say that it would have to follow automatically.

I think that had the power company paid Mr. Davis for the time he was in the service and not extended him credit for the pension plan,that this case would be no different than it is.

I don't think that the pension plan is tied to whether the company decides to pay him compensation or not. I think the Court's inquiry is whether the pension plan, as such, is a different aspect of the employment relationship than

compensation.

We believe that it is. We believe that the pension is based on longevity of service and is not based on the amount of work that the employee actually performs for the company.

And, therefore, we believe the decision below should be affirmed.

Under Accardi, the Court must look to the real nature of the pension benefit. It cannot be bound by narrow definitions or the industrial practice, as it said it would not be in Accardi.

And, we think, that under that analysis, pension plans are aspects of seniority. First, pension plans require an employee to work for many years before he receives any benefit at all.

Typically, an employee under this plan, as under others, must work to age 65 to receive full benefits, and he must work fifteen or more years to receive any benefits at all.

And, we submit that when it is possible for an employee to work ten or fifteen or even more years and not receive any pension at all, it is difficult to conceive of the pension as simply being a form of deferred compensation.

Moreover, pension plans fill needs of the employer that other aspects of the employment relationship do not.

And the District Court based its decision, we feel,

on this ground.

Employers, naturally, want a stable and experienced work force. And the promise of a pension, after years of service, encourages employees to stay with the company throughout their career, and this serves the need of the employer to develop that stable work force.

QUESTION: Mr. Ryan, let me go back a minute to the provisions of C-1, which Mr. Justice Stewart and I were asking you about yesterday afternoon.

That provision, after the talk about "restored without loss of seniority, and they shall be entitled to participate in insurance or other benefits offered by the employer or person that established rules," wouldn't it be a perfectly orthodox statutory construction to say that that portion of the statute grants all that is to be granted in the way of participation in insurance or other benefits?

In other words, they cover what they wanted to give the ex-servicemen in the way of insurance and other benefits in that portion, and, therefore, you can't go back and read seniority as covering the grant of pension plan.

MR. RYAN: I would say, Mr. Justice Rehnquist, that that inquiry, as you have put it, is reversed, that what the Court should look at first, as was established in Accardi, is whether the benefit at issue is a function of seniority.

If the Court finds that it is such, then it has no

need to go to the second clause.

QUESTION: Well, how about the expressio unius rule, where the statute has, in so many words, covered what a returned serviceman shall get in the way of pension plan? You don't go to some broader phrase and include it under that.

MR. RYAN: Well, the statute, in its words, of course, does not mention pension plans. And the question is whether the plan is an aspect of seniority, or not.

The Court said in --

QUESTION: Why shouldn't the question be whether it is closer to participation in insurance or other benefits?

MR. RYAN: Because the Court, in Accardi, said that the other benefits clause was intended to add certain benefits to the veteran and not take away any that were established by the seniority clause.

QUESTION: And we agreed yesterday that was dicta.

MR. RYAN: I don't believe that point is dicta, Mr. Justice. I believe the dicta point was the part of Accardi which discussed the rationale of Congress and whether that other benefits clause looks only to the time when the serviceman is in uniform.

But, I think it was necessary to the decision in Accardi that it first construe whether the benefit was an aspect of seniority and then, as the District Court had done -- The District Court -- Or, rather, the Court of Appeals in

Accardi said yes, we find it is an aspect of seniority, but we find it is taken away by the other benefits clause.

And the court in Accardi said, "We find it is a benefit of seniority and we find that once that conclusion is reached the other benefits clause cannot come in and carve out an exception."

The other benefits clause is intended only to add things, not to take away things.

So, in that sense, I submit it was not dicta, and the Court's inquiry must first be to the seniority clause.

We believe, in this case, that having made that inquiry that the Court should conclude that the pension plan is an aspect of seniority.

We recognize that, if the Court finds it necessary to fall back on that second clause, Mr. Davis loses, because the company does not extend pension benefits to employees on leave of absence. But it is very definitely a -- the first inquiry must be to the seniority clause.

QUESTION: Except, I thought we agreed yesterday that the second clause doesn't literally apply in this case because there was no plan in effect at the time that Mr. Davis was inducted into the Armed Forces.

MR. RYAN: That is one way of reading that statute, Mr. Justice.

QUESTION: Well, isn't that the only way to read it?

MR. RYAN: Well, I think, that if the phrase is read in that sense, it essentially discriminates against the veterans who went into the service prior to the time that their employer adopted a pension plan.

In other words, if this pension plan in this case had been adopted in 1940, instead of in 1944, the reading that I understand you to advance would not grant him the benefit of pension.

QUESTION: No. My question was simply directed to the proposition that if there was no plan in effect at the time he went in the Armed Forces, then this second section is wholly inapplicable and you have to look to the other sections.

MR. RYAN: I would say if there was no plan in effect when he went into the Armed Forces --

QUESTION: Then this second protection doesn't,by its terms, apply?

MR. RYAN: I would say that's an acceptable -- That's a consistent reading with the statute, yes.

I think there are other benefits to the employer that accrue from a pension plan which we discuss in our brief. One is the incentive that it gives to older workers to retire with some measure of financial security. This, in turn, opens up the channels of advancement within the organization for younger workers to advance. That, in itself, is an attractive aspect of the job to younger employees, in addition to the substantive

benefits of the pension plan.

QUESTION: What if today, for the first time, the employer developed a pension plan that was contributory, not a fund of the kind we have here, with four parts paid by the employer and one part by the employee. And it would be voluntary in the sense that those employees who did not want to make the back payments would not be required to do so, and for simplicity $100 a year from this employee would be required for each year he was employed. Would you say he would be exempt from payment of that money for the three years he was in the service?

MR. RYAN: No, Mr. Chief Justice, he would not be exempt from paying that.

What the statute commands is only that he be restored without loss of seniority. It does not grant him any benefits that his counterpart in the job does not have.

QUESTION: But you are arguing for a result that would give him monetary benefits for these three years, are you not?

MR. RYAN: I am --

QUESTION: Not just status on the payroll, in terms of seniority, but money in the fund to his credit.

MR. RYAN: Money in the fund is exactly what we are asking for, but it is not money that his civilian counterpart does not have.

The Court in Accardi said that there is no point in awarding a man seniority if you then deny him the prerequisites that flow from it. So, all we are asking is that he stand in the same shoes as his civilian counterpart who stayed on the job while Mr. Davis went off to serve in the Military.

We are not asking that he get any benefit that his civilian counterpart does not have.

And, so, under that rationale, it is only fair that he pay his $100 a year, just like his civilian counterpart. That's the essential command of the statute, that it apply evenly to -- that the benefits flow evenly both to veteran and non-veteran, alike. So, in a contributory plan, he would be entitled to pay his fair share.

QUESTION: Mr. Ryan, does the record tell us how contributions to this plan are computed or made, or what?

MR. RYAN: I don't believe it does, Mr. Justice Stevens. I don't think that is a part of the plan, itself. I may be mistaken in that, but I don't think that it does.

QUESTION: It is a contributory plan?

MR. RYAN: It is a non-contributory plan.

QUESTION: It's non-contributory.

MR. RYAN: Yes.

QUESTION: Mr. Ryan, does your argument for coverage get any support out of C-2, the declaration by Congress that on his restoration he is restored in such manner as to give him

such status in his employment as he would have enjoyed if he had continued in such employment?

MR. RYAN: I think our argument does get support from that statute, although the Court has mentioned on several occasions that C-2 is a codification of the escalator principle that the Court announced in Fishgold in 1945 or 1946.

Congress effectively approved Fishgold by enacting C-2, but that escalator principle is, of course, the guts of our argument, that under Fishgold he does not step back on the escalator at the point he stepped off. He steps back on at the point he would have been at had he not gone into the service.

I think, in looking at the pension plan as one which benefits employer as well as employee, it becomes clear that the plan is an incentive to maintain a continuing employment relationship with the company. The worker is paid wages and vacations and other short-term benefits for the work that he does from day to day, but the pension is over and above this. It is an incentive for him to return to the job day after day. And the pension is withheld from him unless he stays on the job until age 65. The full pension, at any rate, is withheld until he is at age 65.

And it is this unique aspect, we submit to the Court, that sets the pension apart from other incidents of the employment relationship, from other collectively bargained

benefits,and demonstrates that what counts is the simple and continued status as an employee.

And, therefore, under the principles of Accardi and Foster and, indeed, all cases which this Court has decided, construing this statute, the time spent in the military must be credited to the veteran or else he loses ground as compared to his civilian counterpart.

QUESTION: Mr. Ryan, suppose under a collective bargaining contract, a person who has been a machine operator for ten years gets paid more than when he had worked for five years, that the pay is dependent upon length of service, to some extent anyway. Have we decided that the returning veteran gets back on the escalator at the higher rate of pay?

MR. RYAN: Yes, Mr. Justice White, the Court has decided that, assuming that the pay raise is automatic.

I think that Tilton and other cases along that line have held that. They have held that if there is some managerial discretion involved then it is not as clear a question, but the automatic promotion has been held to be an incident of seniority.

Under this plan, I think, what I have said about pensions is quite clearly illustrated, because under this plan if you are on the payroll you are accumulating accredited service, whether you are working or not.

If you are not on the payroll, you are not

accumulating accredited service, except under circumstances that were stipulated below as being brief, infrequent and exceptional.

So what is required is the simple status of being on the payroll and not, as Petitioner argues, the actual performance of work. It is the continuing employment relationship with the company that counts here and that is what seniority is all about.

Let me illustrate with two examples. There is accredited service accumulated for the employee for those times when he is on vacation, when he is on sick leave, when he is on holiday, even despite the fact that during those periods he is performing no actual work.

On the other side of the coin, there is no additional accredited service for the time that he is working in an overtime capacity, even though, of course, he is performing work during those hours.

And if this were truly a form of deferred compensation, as my opponent argues, both of these features would be absent. And in both cases the work performed is divorced from the credit received.

Let me put this example, if I may. Two workers born on the same day, each goes to work for the company on his 18th birthday. Each retires at his 65th birthday, having performed an equal amount of work for the company. Each starts

to receive a pension at age 65 which, of course, is exactly equal for both workers.

Worker A dies after one year. Worker B lives for twenty years after his retirement. Worker B receives twenty times as much in pension benefits over the course of his life as worker A did, despite the fact that each of them performed the same work for the company.

I am not referring to military service at all in this hypothetical. My point is to illustrate that it is very difficult to conceive of this plan as simply deferred compensation when Worker B receives twenty times as much in the way of benefits simply because of the fact that he lives longer, more than twenty times as much as Worker A, despite having performed exactly the same amount of work.

QUESTION: That could still be compensation, because the compensation would be that you get benefits for the remainder of your life, however long it, is and that's rather standard.

MR. RYAN: I have no quarrel with that, and we are not attacking the plan, in any sense, in that respect, but I think it illustrates --

QUESTION: Compensation would be that you get benefits -- retirement benefits -- for the remainder of your life, and some people live longer than others. It is the same basic compensation. It is the assurance of benefits for the remainder

of your life.

MR. RYAN: Except that in one case the worker is receiving twenty times more.

QUESTION: Well, that's --

MR. RYAN: Let me stress one other point, because I think there was a suggestion by the Petitioner that extending credit to Mr. Davis, at this late date, would prejudice the company because the company could not foresee, in 1943 and '44 and '45, that these payments would be required.

As we point out in our brief, there is no evidence on this point, but even the argument, itself, fails to hold water, because --

QUESTION: Isn't the evidence there, in the sense that there was no plan in effect? Isn't that some evidence of foreseeability?

There was no plan in effect when he left, was there?

MR. RYAN: That's correct, Mr. Chief Justice.

But, their argument, as I understand it, is that it would be unfair now to tax the company for contributions due in 1944 and 1945.

QUESTION: Is that argument not based on the proposition that at the time they put the plan in effect, whatever year that was --

MR. RYAN: 1944.

QUESTION: Actuaries looked at the number of employees

and the precise age of those employees, and their years of service, and out of that amalgam constructed an actuarial basis for the plan.

But they could not, they claim, include him, and if there were ten others like him, could not include those in the same category simply because he was not an employee at the time.

MR. RYAN: Well, he was an employee at the time that the pension plan was instituted. He started employment in 1936, and he was an employee even though he was off in uniform at the time.

QUESTION: With no knowledge on the part of the company whether he would ever come back at all.

MR. RYAN: Well, the amendment in 1966, which is now Section 3-A of Roman Numeral III of the plan, and that's on page 61 and 62 of the Appendix, under this amendment -- and this, I stress, was passed in 1966 -- an employee is given retroactive credit for his military service during World War II and Korea, less one year, if he worked for the company prior to his 25th birthday.

In other words, the company said, in 1966, "We will allow you to fill the gap in credit caused by military service by taking the time you worked for us before you entered the plan, your 25th birthday, and using that to fill the gap, less one year."

The only reason that did not apply to Mr. Davis is because he didn't go to work for the company until he was 26. But the point is this, that the company cannot be heard to complain now, I think, as a practical matter, that affirming the judgment below would cause it a great hardship, when in 1966 the fund was apparently solvent enough to grant retroactive military credit to some employees.

I think that the Court should not consider this a very tightly correlated fund when it has the possibility to do that.

I thank the Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Ryan.

Mr. Boles, you have some time left.

REBUTTAL ORAL ARGUMENT OF H. HAMPTON BOLES, ESQ.,

ON BEHALF OF THE PETITIONER

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

What I would like to do in reply, in my remaining time, is to place our case in perspective in view of the Government's argument.

Now, the Government has basically argued that this case -- that pension rights should be determined to be seniority in a sort of a general sense, without depending upon the provisions of our pension plan.

We say that you cannot divorce the amount of pension

paid, which is in dispute here, from the provisions of the very agreement from which that right arises.

The Government, in its brief, apparently, realizing the fallacy of its argument, says that you can have a pension plan which is not dependent upon seniority if you have a precise, 100%, correlation between units of work to units of benefit.

We say that this Court in Foster said that although the work requirement correlates only loosely with the benefit, if it is a work requirement, which our plan very definitely has, that that is not sufficient to invoke the statutory guarantee.

Now, with reference to some of the questions that have been raised, I will point out that on page 17 of the agreed statement of facts -- that's 17 of the Appendix -- it explains, somewhat, how the pension plan is funded and it says the amount of contribution is determined annually.

And, also, in response to a question yesterday, we have stipulated, as counsel for the Government has said, that the employees of Alabama Power Company on leave of absence were treated exactly the same as employees on leave of absence for military service, with respect to determining the amount of pay due under the pension plan.

There has been no discrimination against the veteran under our plan. He has been paid for everything that he earned.

And what is important here is, we go back to Mr. Justice Stewart's analysis of the section yesterday. The section says three things, that you be given your seniority when you return, that you be given other benefits and insurance when you return, in accordance with the rules of the employee in effect when you left, relating to other employees on leave of absence, and that you will not be terminated within one year.

And, Mr. Davis was not fired. Mr. Davis -- although the statute, literally, didn't say that he has to be given rights -- we don't have to rely there, may it please you, Mr. Justice Stewart, on that section.

If you take it out -- take his rights out, by virtue of the fact that we didn't have a plan in 1943, he doesn't gain any other rights.

But, even if he did -- even if we accept the argument that we have to give him the rights equal to other employees, this we have stipulated we have done.

So I say that he cannot get any rights there.

Now, the Government criticizes us for not having a precise correlation between units of work and units of benefit.

If we say the law does not require that, we do not give credit for overtime as earnings. We also do not count an hourly credit under the plan as accredited service for

overtime.

We say that we don't have to do that, that even though we don't do that, it doesn't, somehow, create seniority out of a plan that is founded upon work.

All the time that my opposing counsel was up here we were talking about actual work and automatic benefits. When you speak of seniority -- and I am not saying you have to take the most narrow view of seniority -- to determine this case in our favor, you generally have to have two things, and that is names of employees and dates that they were with the company. Then you can start paring down to make your decision. You don't have to have the earnings of that employee. You don't have to say that that employee had to be a full-time regular employee, working 40 hours a week. It is simply a matter of time.

Now, it is not true, absolutely not true, that all our plan requires is that you have a status as an employee in order to gain benefits. Certainly, you do gain some benefits, and we described those yesterday. You get time for vesting, because that's only time-related. You get time for the one-year qualification, but there is no way, simply by being on the payroll, unless -- if payroll is described as the status of an employee to the employer, that you can gain one cent under the plan without being a full-time regular employee, working 40 hours a week on a full-time basis.

So, we say that we have followed the Act. We followed it in 1937. It is good now. Our pension plan requires a work requirement and it should be upheld by the Court.

Now, for some reason or another, there seems to be some criticism because in '66 we granted a veteran something over and above the normal employee. This is exactly what the Government has done in some of its own retirement plans that it has drawn up.

Specifically, I am talking about the Railroad Retirement Act. It also excludes military service from years of service under that Act, except those portions which were very narrowly defined as wartime service.

And, I say, not only if the Government had intended to define seniority in a broad way for purposes of the Military Selective Service Act, it certainly should have abided by it in the Railroad Retirement Act, which it did not, and that is in 45 U.S.C., Section 231, I think.

With that, Your Honor, we say that our pension plan embodies a very distinct, very apparent work requirement. You have to be on the payroll. You also have to be earning, and it should not be assumed by the Court that a utility or any other corporation can have employees that are gaining benefits as a full-time regular employee and being paid without doing their work. That simply is not practical. It is not what

happens, and there is no evidence in this record that that is what happens. You have to work to be paid except, of course, for the normal things, like vacations, but we say he has earned that. We say Mr. Davis earned his pension plan -- Excuse me. He earned his pension pay that was computed in exactly the way the plan calls for and he is not entitled to have any extra pay imputed or required because of his two and one-half years in the military.

QUESTION: You have to work to get benefits, normally, apart from the problem in this case, but the payment doesn't depend upon -- in any way, upon how much you work. If you are a full-time regular employee, you are not given any more credit for overtime, or any less. You'd get the same. It's a 40-hour week and it's the same contribution, even if you work 40 hours overtime, isn't it?

MR. BOLES: Your analysis is exactly correct, Mr. Justice Stewart. We admit that. That's evident in the plan, but all we are saying is that there is nothing in the law, and no case before this Court that requires the type of precision between units of work and units of benefits that is being asked and asserted by the Government.

I don't know that it would be administerable. I suppose you could do it with computers to keep up with the minute by minute, hour by hour --

We say that we have a very practical, logical,

realistic plan and it's dependent upon work, and we ask that the lower judgment be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:38 o'clock, a.m., the case in the above-entitled matter was submitted.)