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In the

Supreme Court of the United States

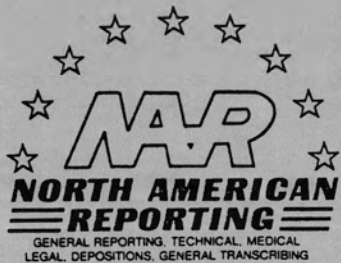
ROGER D. MONROE,)
)
) PETITIONER,)
)
) V.)
)
) THE STANDARD OIL COMPANY)

No. 80-298

Washington, D.C.
March 4, 1981

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ORIGINAL



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IN THE SUPREME COURT OF THE UNITED STATES

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ROGER D. MONROE,	:	
	:	
Petitioner,	:	
	:	No. 80-298
v.	:	
	:	
THE STANDARD OIL COMPANY	:	
	:	
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Washington, D. C.
Wednesday, March 4, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:18 o'clock p.m.

APPEARANCES:

ALAN I. HOROWITZ, ESQ., Assistant to the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner.

PAUL S. McAULIFFE, 1725 Midland Building, Cleveland, Ohio 44115; on behalf of the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

ALAN I. HOROWITZ, ESQ.,
on behalf of the Petitioner

3

PAUL S. McAULIFFE, ESQ.,
on behalf of the Respondent

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ALAN I. HOROWITZ, ESQ.,
on behalf of the Petitioner -- Rebuttal

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- - -

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We'll hear arguments
3 next in Monroe v. Standard Oil.

4 Mr. Horowitz, I think you may proceed when you are
5 ready.

6 ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,
7 ON BEHALF OF THE PETITIONER

8 MR. HOROWITZ: Mr. Chief Justice, and may it please
9 the Court:

10 This case is here on a writ of certiorari to the
11 United States Court of Appeals for the 6th Circuit. The is-
12 sue involves the construction of Section 38 U.S.C. 2021(b)(3),
13 a section of what are commonly known as the veterans's reem-
14 ployment rights provisions. This section, enacted in 1968,
15 provides that reservists "shall not be denied retention in
16 employment, or any promotion or other incident or advantage
17 of employment because of any obligation as a member of a
18 reserve component of the armed forces."

19 The facts of this case are as follows. Petitioner
20 is employed at respondent's refinery in Lima, Ohio. This
21 refinery operates around the clock, seven days a week, three
22 eight-hour shifts per day. Each employee works five days
23 per week for a total of 40 hours, according to a rotating
24 shift schedule that is established by the respondent.

25 During 1975 and 1976 petitioner was a member of

1 a reserve component of the armed forces, which entailed cer-
2 tain training obligations. As a general rule he was required
3 to train with his unit on one weekend per month. In estab-
4 lishing the shift schedule, respondent took no cognizance of
5 petitioner's training obligations and therefore petitioner was
6 frequently scheduled to work on weekend days that conflicted
7 with his training obligations. Thus, unless he was able to
8 arrange a voluntary exchange of shifts with a fellow employee,
9 petitioner was unable to work 40 hours during those weeks,
10 and respondent made other arrangements for other employees
11 to substitute for him.

12 As a result, petitioner lost 192 hours of work and
13 salary over a 15-month period.

14 Now, the parties entered into a stipulation in the
15 district court and stipulated that respondent took no steps
16 to provide petitioner with any work hours during these weeks
17 to substitute for those lost as a result of his military
18 obligations.

19 Petitioner brought this suit in the United States
20 District Court for the Northern District of Ohio, alleging
21 that Respondent's failure to attempt to accommodate his re-
22 serve obligations violated his statutory rights guaranteed
23 by Section 2021(b)(3). Based upon a stipulated set of facts
24 the district court granted petitioner's motion for summary
25 judgment. The court held that respondent had denied the

1 petitioner the right to a 40-hour week, an incident or advan-
2 tage of employment under the Act by refusing to take account
3 of his reserve obligations in its scheduling.

4 On appeal the Court of Appeals reversed. The Court
5 of Appeals agreed that the right to be scheduled for a 40-hour
6 work week at respondent's refinery was an incident or advan-
7 tage of employment within the meaning of the statute. How-
8 ever, the Court of Appeals disagreed with the district court
9 and with other courts of appeals as to the scope of the pro-
10 tection that the statute provides such a benefit.

11 The Court of Appeals held that Section 2021(b)(3)
12 protects reservists only against intentional unequal treatment
13 or on-the-job bias by their employers. However, if a reser-
14 vist is denied an employment benefit because of the operation
15 of "a facially neutral rule" that is applied uniformly to
16 all employees, in that case, the court held that the statute
17 is not violated.

18 Applying these principles to this case, the court
19 held that respondent had not violated the Act. Petitioner's
20 work schedule was established without regard to his training
21 obligations and his training-related absences were treated
22 just as other nonmilitary absences of another employee would
23 have been treated. Thus, in the view of the Court of Appeals,
24 neutral treatment, not bias, was shown.

25 It is our contention that the principles on which

1 the court based its decision stem from an erroneous interpre-
2 tation of the statute. Congress did not intend that employers
3 would be permitted blindly to follow rules that, although
4 neutral on their face, have an inevitable adverse effect on
5 reservists not in situations where that adverse impact can be
6 completely eliminated if the employer seeks to accommodate
7 rather than simply ignore the fact of petitioner's reserve
8 obligations.

9 QUESTION: Do you have suggestions, Mr. Horowitz,
10 how do you think the employer should accommodate to satisfy his
11 obligation under the statute?

12 MR. HOROWITZ: You mean, on these specific facts?
13 It depends, on a case by case basis.

14 QUESTION: All right, let's start with these.

15 MR. HOROWITZ: Okay, well, first of all, we don't
16 think the actual means of accommodation is really an issue in
17 this case because the record reveals that the employer made no
18 effort to make any arrangements. Often it can be arranged
19 simply by exchanging shifts. For example, in this case, other
20 employees had to take respondent's shift, employees that
21 work on a so-called extra board, and there's nothing in the
22 record that indicates why petitioner couldn't then have taken
23 shifts caused by the extra board employees.

24 QUESTION: Suppose that's tried and that doesn't
25 work, then what? What should the employer do?

1 MR. HOROWITZ: In other words, it's impossible for
2 the employer to accommodate in that sense?

3 QUESTION: At least by that method he can't accommo-
4 date him.

5 MR. HOROWITZ: Well, we would also suggest that he
6 should have taken account of these obligations in the schedule
7 itself. In other words, first, have a schedule for peti-
8 tioner's off weekends, on those weekends when he had military
9 obligations, and then fill in his schedule around that.

10 QUESTION: So that he works five days other than
11 the weekend?

12 MR. HOROWITZ: Only in the week that he has the
13 reserve obligations. He would still work the same number of
14 weekends over the course of the year, as everyone else.

15 QUESTION: But under your theory, every time that a
16 worker is dissatisfied with the employer's effort to accommo-
17 date, it would be a question that would have to be resolved
18 in court, whether there had been good faith effort to
19 accommodate him.

20 MR. HOROWITZ: Well, it's not a question of whether
21 he's dissatisfied with the accommodation. It's a question
22 of whether the benefit is denied to him. Now, if the employer
23 didn't give him a 40-hour work week, for example.

24 QUESTION: But you say that it's a very flexible
25 type of thing, that the employer does not have to --

1 MR. HOROWITZ: I don't mean to suggest that the
2 courts -- the courts are not going to be overrun by cases now
3 deciding what's reasonable accommodation. There's been a lot
4 of litigation in this area already, and it's always been a
5 dispute over what the meaning of the statute is. There's
6 never been any question in these other cases that the employer
7 couldn't accommodate. In most situations it's no trouble at
8 all. For example, in the 5th Circuit case, in the West case,
9 which we've asserted as directly in conflict with this one,
10 the employer conceded that it was no trouble to arrange the
11 schedule that way.

12 Now, the facts of this case may raise a slightly
13 more difficult question because you have a small plant and
14 it's making --

15 QUESTION: And you've also got seven days a week,
16 24 hours a day, scheduling.

17 MR. HOROWITZ: Yes, but the reservist is going to
18 be there for five days, so it's not clear that there's any
19 difficulty in scheduling him for those five days.

20 QUESTION: Well, did the employer treat this re-
21 servist like he treated other employees who wanted to be
22 away?

23 MR. HOROWITZ: That's right. He treated his re-
24 serve absences just as if they were personal leaves of absence
25 for whatever reason --

1 QUESTION: So your submission is that he's not en-
2 titled to do that, that he -- that the statute puts a --

3 MR. HOROWITZ: That's right. Congress has enacted
4 a special statute that provides for special treatment of
5 reservists --

6 QUESTION: It requires him to treat the reservists
7 more favorably than others, including more favorably with
8 respect to absences?

9 MR. HOROWITZ: I don't think it's a question of
10 treating the reservist more favorably. The end result --

11 QUESTION: That's what I just asked you.

12 MR. HOROWITZ: What we contend is that the employer
13 has to give special treatment to the absences. The statute's
14 not satisfied simply by --

15 QUESTION: All right. He is to give more favorable
16 treatment to these absences than to other?

17 MR. HOROWITZ: It's not permitted to treat an ab-
18 sence for reserve duty as if it was any other sort of absence.
19 Now, the bottom line is not more favorable treatment for the
20 reservist. He ends up with the same benefits that all the
21 other employees have. It's just the recognition by Congress
22 that these are absences that the reservists have no control
23 over.

24 QUESTION: Are you saying that this statute is com-
25 parable to what some states have, with special provisions

1 made for people called for jury service? Is military service
2 in the same ball park as jury service?

3 MR. HOROWITZ: I think it's in the same ball park.
4 Congress has specifically put it in a special category.
5 They've asked employers to take certain steps so that people
6 are not, do not automatically lose benefits in their civilian em-
7 ployment because they have to enter into this military ser-
8 vice. This is a recognition that military service is impor-
9 tant for this country and they want to encourage people to do
10 it, not be discouraged.

11 QUESTION: Are the problems of accommodation,
12 Mr. Horowitz, any different under this statute than under
13 those statutes that the Congress has enacted requiring accom-
14 modation of religious preferences?

15 MR. HOROWITZ: Well, I think it's quite different
16 than under Title VII, because the situation under Title VII,
17 it's a complete anti-discrimination statute that intends to
18 prohibit discrimination against all groups of employees, reli-
19 gious being one. But here there is a specific statute
20 directed at military absences. So I think that there may be
21 some more accommodation required here than there is in the
22 Title VII problem.

23 QUESTION: More required here? Even though that's
24 rather constitutionally based, isn't it, under Title VII?

25 MR. HOROWITZ: Well, I think the accommodation is

1 just statutorily based.

2 QUESTION: Is that why you don't see TWA v. Hardison
3 as being in your way?

4 MR. HOROWITZ: Well, we think that TWA v. Hardison
5 really has very little to do with this case. First of all --

6 QUESTION: Is that the reason?

7 MR. HOROWITZ: Well, for several reasons. One, the
8 statute is completely different. The purposes of the statute
9 are quite different. I mean, here you have a specific statute
10 aimed at a particular group of employees. There you have
11 complete anti-discrimination. Now, you have to recognize,
12 in Hardison the employee himself was asking for preferential
13 treatment. He didn't want to work on any Saturdays at all,
14 so he was asking for a schedule that was better than what
15 the other employees were entitled to, even though those
16 employees had greater seniority. Now, here, the respondent's
17 just asking for an opportunity to work. And the schedule is
18 going to end up being the same, in the final analysis.

19 QUESTION: The statute doesn't say anything about
20 rescheduling, does it? ~~It does~~

21 MR. HOROWITZ: No.

22 QUESTION: It does give him, certainly, something
23 other employees don't have. He can be away for reserve duty
24 and still maintain his seniority and other things, so cer-
25 tainly there is a statute here directed to reservists, but --

1 It specifically says what the employer may not deprive him
2 of, but it doesn't say anything about his having to change
3 his shifts or anything.

4 MR. HOROWITZ: Well, there are two different sec-
5 tions that apply to reservists. One is Section 2024(d),
6 first enacted in 1960. that says that a reservist has a
7 right to a leave of absence when he has reserve duty and when
8 he returns from that leave of absence he's entitled to be
9 restored to his employment with the same seniority, vacation,
10 et cetera.

11 QUESTION: No question about that being violated?

12 MR. HOROWITZ: No question about that being violated
13 here. But Congress had enacted an additional section, several
14 years later, to increase the protection for reservists, and in
15 that section the statutory language is that "the reservist
16 may not be denied retention of employment" et cetera "or
17 other incident or advantages of employment because of his re-
18 serve obligations."

19 Now, in its literal terms, that statute has been
20 violated here. Both courts found that the right to a 40-hour
21 work week at the refinery was an incident or advantage of em-
22 ployment within the meaning of the statute.

23 QUESTION: The right to work 40 hours?

24 MR. HOROWITZ: Yes. Right to work.

25 QUESTION: Where is the right, where's that in, the

1 source of any right to work 40 hours a week?

2 MR. HOROWITZ: The right to work 40 hours a week is
3 based on the employer's practice at this particular refinery.

4 QUESTION: Well, that's what he was employed for.

5 QUESTION: The employer would have been glad to have
6 him, if he had worked the 40 hours he wanted him to work.

7 MR. HOROWITZ: This is a right that is granted to
8 employees. Employees want to be able to depend upon a cer-
9 tain amount of guaranteed income. I mean, the right to a
10 40-hour work week is not a benefit for employers, it's a
11 benefit for employees.

12 QUESTION: Yes, but who guaranteed him the right to
13 work 40 hours a week?

14 MR. HOROWITZ: The right is guaranteed by the
15 employer. It was not a guarantee of --

16 QUESTION: Where was that guaranteed him?

17 MR. HOROWITZ: By custom and practice at the
18 refinery. That's a factual finding by both courts below.

19 QUESTION: Well, is it a question of a guarantee,
20 counsel? Or is it simply that, were it not for his reservist
21 status, he would work 40 hours a week, and it's because of
22 his reservist status that he's put in what you regard as a
23 position of discrimination.

24 MR. HOROWITZ: He's denied meaningful right to work
25 40 hours a week because of his reserve status. Now, it's true

1 that they scheduled him, on schedule, for 40 hours, but they
2 scheduled him at times that they knew he could not work. I'm not pro-
3 bably responsive to the questions but that's not a meaningful --

4 QUESTION: May I ask you a question about your dis-
5 tinction of the Hardison case now? Supposing here -- and I
6 don't think the record tells us whether this is true or not,
7 but suppose it was here, in order to accommodate his desire
8 to be off on the days where he had reserve obligations, one
9 out of every four weekends, the schedule would require some
10 other employee to work more weekends than he wanted.

11 Now, let's assume it's undesirable to work weekends. Does
12 your position apply even if the rescheduling would impose,
13 may give him a preference at times of desirable work? Or
14 does it only relate to the cases where, given the requirement
15 of meeting his demands, everybody still has the same employ-
16 ment obligation?

17 MR. HOROWITZ: Okay, we're not asking for the re-
18 servist to be given a preference. It's hard to answer com-
19 pletely in the abstract as to what is reasonable or not.

20 I mean, if the fact that other employees would have to work
21 more weekends, or if it might interfere with some seniority
22 system, there is certainly strong evidence that it's an
23 unreasonable accommodation. Because, I'm just reluctant to
24 admit that there might be some --

25 QUESTION: Well, he's getting more than equal

1 treatment, if other employees have to take some undesirable
2 work. That seems to be rather clear in that case. I don't
3 know whether this fellow's in that category or not.

4 MR. HOROWITZ: No, we absolutely concede that he's
5 not entitled to work fewer weekends than the other employees,
6 although it has to be recognized that he is --

7 QUESTION: So your point is that if the company could re-
8 arrange the schedules in a way that didn't put any other em-
9 ployee in any worse position than they're in under the normal
10 scheduling, that then he has the right to reschedule?

11 MR. HOROWITZ: Yes, that's clear, as far as it
12 goes; I'm not sure. ~~What~~

13 QUESTION: What if there are two employees; this
14 man goes off to reserve duty and the employer says, fine,
15 I'll reschedule, I'll try to work it out, and he does, and
16 then a man comes to him and says, I understand so and so is
17 getting off for reserve duty and gets rescheduled. Every time
18 he goes to reserve duty I want to go fishing, for the same
19 amount of time and please reschedule me, just the same sche-
20 dule. And the employer says, you must be out of your mind.
21 You can't; or, I will not do it.

22 Now, you say that the employer certainly could say
23 that in the latter case, but he couldn't say that to the
24 reservist?

25 MR. HOROWITZ: Well, I think you've put your finger

1 on it.

2 QUESTION: He certainly is being favored, isn't he?

3 QUESTION: Well, has Congress made any provision for
4 going fishing?

5 MR. HOROWITZ: Well, he's not being favored, because
6 he doesn't have the right to go fishing either. I mean, this
7 is just a special treatment of this particular category of
8 absences that Congress has mandated.

9 QUESTION: Well, all right, so you do say that it
10 is a special treatment, that the Act does give him special
11 treatment.

12 MR. HOROWITZ: It requires the employer to treat
13 his absences differently.

14 QUESTION: The statute is not satisfied by treating
15 the reservist like everyone else?

16 MR. HOROWITZ: Not satisfied by treating his ab-
17 sences like other absences. I still maintain that
18 the bottom line as to what the reservist gets is the same.
19 He works the same number of weekends, the same number of
20 hours.

21 QUESTION: Is it fundamentally different from the
22 situation of a man who's gone to Korea or Vietnam or wherever?
23 He comes back and is given "special treatment" by getting
24 seniority for service he did not perform for the employer?

25 MR. HOROWITZ: No, that's the precise analogy.

1 And this Court has said many times that under the seniority
2 provisions of the reemployment rights statutes the employer
3 is not entitled to treat a veteran's absences the same as he
4 treats absences of --

5 QUESTION: There's no argument about that. The
6 only question is whether the Congress intended to give him
7 preference for his being away. What if the statute had been

8 in effect? QUESTION: What if this statute had been in effect
9 at the time of the Korean War when, let's say, someone like
10 Ted Williams was called back into the service? Do you think
11 after a two-year tour of duty in Korea the veteran could come
12 back and say, I want to be paid for all the time I was away?

13 MR. HOROWITZ: Clearly not. Our contention here is
14 that he has a right to work 40 hours during the week when he's
15 present at work. Now, on these weekends that he misses, he's
16 there at work, during the week, for five days of the week, and
17 we're just asking that he be entitled to work on those five
18 days. Now, if he's gone for two years, he's not at the plant.
19 He can't work 40 hours for any of those weeks. So he's not
20 been denied that right.

21 QUESTION: Mr. Horowitz, is there any --

22 MR. HOROWITZ: Excuse me, Justice Blackmun.
23 There's no way they can accommodate him. I'm sorry; go ahead.

24 QUESTION: Is there any union presence in this
25 case, in the background?

1 MR. HOROWITZ: Well, there's no official union
2 presence. I mean, I think union employers are often reluctant
3 to give these benefits, or to give this treatment to reser-
4 vists unless they're required to do so by the courts, because
5 they're a little concerned that the unions will complain.
6 I mean, I think that perhaps explains why even though it may
7 not have been very difficult for them to accommodate the re-
8 servists, they chose not to and chose to litigate it.

9 QUESTION: Maybe I should ask my question of your
10 opposition.

11 QUESTION: Wouldn't -- can I assume that Standard
12 Oil has a union?

13 MR. HOROWITZ: That Standard Oil is unionized?

14 QUESTION: Yes.

15 MR. HOROWITZ: I think we can assume that; yes.
16 There is a collective bargaining agreement involved.

17 Now, this case is basically one of statutory con-
18 struction. Apart from the plain language of the statute that
19 I've already alluded to, there are several principles of
20 statutory construction this Court has established under the
21 veterans provisions, and each of these points towards peti-
22 tioner's construction of the statute.

23 First, it's always been recognized that the provi-
24 sions ought to be given liberal construction in favor of the
25 veteran or, as in this case, the reservist. Now, despite this

1 command, the Court of Appeals adopted a very narrow view of
2 the protection here because there was no clear and unam-
3 biguous legislative mandate to the contrary. This rejection
4 of what the Court of Appeals recognized to be a plausible
5 interpretation is completely contrary to what this Court has
6 established as the rule for construing the statute.

7 Secondly, this Court has repeatedly recognized the
8 underlying purpose of these provisions, and that is that
9 servicemen not be disadvantaged by serving their country, to
10 the extent possible. In Alabama Power this Court stated
11 this principle thusly: "The provisions evidence Congress's
12 desire to minimize the destruction in individuals' lives re-
13 sulting from military needs."

14 QUESTION: Mr. Horowitz, supposing that this man had
15 a two-week summer duty and when he came back from it he gets
16 paid so much for being in the reserves, he couldn't claim the
17 complete wages that he would have received, but he made a
18 claim against the employer for the difference between what he
19 got paid by the Government for his reserve duty and what he
20 would have made had he stayed at the plant and worked?

21 MR. HOROWITZ: We said in our brief, there is no
22 basis for such a claim, unless there is some other employment
23 benefit I'm not aware of. But on this benefit we're talking
24 about in this case, the right to a 40-hour work week, he was
25 not denied that right, if he's gone for two weeks. If he's

1 gone for a whole week, there's no way the employer can sched-
2 ule him for 40 hours of work that week, so he's not entitled
3 to anything. We're not -- he's just asking for the right to
4 work, he's not asking to be paid for hours that he does not
5 work.

6 QUESTION: And if it's seasonal employment and his
7 reserve duty occurs during the season, he has no claim?
8 A cannery-type thing?

9 MR. HOROWITZ: I'm not sure exactly what situation
10 you're talking about. If there's a way that they can work it
11 out, that he can work the hours, then he has a claim. If
12 there isn't, there isn't.

13 Now, Congress enacted this statute against the
14 background of these principles of construction that I've dis-
15 cussed. They deliberately enacted the statute using broad
16 language. They used the words, "any incident or advantage
17 of employment," and they used the words, "that the reservist
18 shall not be denied these benefits."

19 Congress did not intend that the statute be inter-
20 preted as narrowly as it has been. Now, I think the waters in
21 this case have been muddied a little bit by the facts, which
22 as I pointed out to Mr. Justice Stevens, are not really at
23 issue in this case. Perhaps I could focus the issue a little
24 better by giving you different examples.

25 Let's suppose the reservist worked at a store where

1 each employee was entitled to two weekends of work in a given
2 month at double pay, and the employer has historically divided
3 the weekends on an alphabetical basis. Those employees in
4 the first half of the alphabet work on the first and third
5 weekends of each month, those in the second half of the alpha-
6 bet worked on the second and fourth weekends of each month.
7 Now, Mr. Andrews, who works at the store, joins the reserves
8 and now has an obligation to attend reserve duty on the third
9 weekend of those months. Now, our position is that the
10 employer has a duty, since it is no trouble for him at all,
11 to schedule Andrews on the second and the fourth weekend of
12 those months and schedule someone else on the first and the
13 third weekends, even though that violates his long-established
14 rule of how he allocates the weekends.

15 The Court of Appeals position is that the employer
16 is entitled to rely on his rule. The rule is facially neu-
17 tral, does not discriminate against reservists, and therefore
18 they don't have to do anything for him.

19 QUESTION: What if the rule were that there's a one-
20 month vacation for all employees, and the vacation for A-to-M
21 employees is July and the vacation for N-to-Z employees is
22 August, and some have scheduled, say, refresher teaching
23 courses, some have scheduled vacations with their families,
24 some have scheduled any number of things. Would you say that
25 the reservist has a right to insist that he get the vacation

1 time contrary to policy because of his one-month reserve
2 duty?

3 MR. HOROWITZ: You're suggesting this one month
4 reserve duty falls in July, for example, and that's when he's
5 scheduled for vacation?

6 QUESTION: Yes.

7 MR. HOROWITZ: I'm not sure what employment benefit he's
8 being denied if his reserve duty comes out on his vacation.
9 I mean, that's the optimum situation, that's the idea that
10 Congress had in mind.

11 QUESTION: Well, supposing his reserve duty comes
12 in August, and he wants a vacation, but he's also a member of
13 the reserves?

14 MR. HOROWITZ: Well, he can't -- well, let me back-
15 track. I think he --

16 QUESTION: You wouldn't regard the reserve duty
17 as vacation?

18 MR. HOROWITZ: That doesn't even really raise the
19 issue, I think, that's presented here, because Section 2024(d)
20 guarantees him a leave of absence and guarantees that he can
21 come back with his vacation intact.

22 QUESTION: But it doesn't guarantee that he will be
23 paid during that time?

24 MR. HOROWITZ: No, that's right; it doesn't guaran-
25 tee that he'll be paid. But if he comes back at the end of

1 July he will still be entitled to vacation.

2 QUESTION: Well, your question would be comparable
3 if he wanted to work during August when they scheduled him for
4 vacation; and he had to go to the reserves in July. Then it
5 would be like your first and third, and second and fourth.
6 I understand you to be arguing, yes, he has a right to have
7 his vacation in the month in which the reserve obligation
8 falls.

9 MR. HOROWITZ: All right, assuming that it can be
10 accommodated, now --

11 QUESTION: And how do you tell whether it can be
12 accommodated? There's always a little extra work if they stop
13 using the A-M schedule. What is the test?

14 MR. HOROWITZ: Well, I think that's right. It's
15 just a reasonableness test. It's hard to identify in the
16 abstract. I mean, certainly the fact that they had to do a
17 little extra work, change from A-to-M to N-to-Z.

18 QUESTION: But isn't it true, as Justice White sug-
19 gests, that the statute is therefore giving him something that
20 no other employee has?

21 MR. HOROWITZ: Right.

22 QUESTION: He's got a right to some kind of special
23 consideration at the time the work schedule is prepared?

24 MR. HOROWITZ: He just has a right to the same bene-
25 fit --

1 QUESTION: I'm saying that he's the only one in the
2 store who can say, I want to take my vacation in July, or
3 I'm the only one in the store who says, even though my name
4 begins with A, I want to have my first and third with the
5 N -- ?

6 MR. HOROWITZ: He can't say that I want to have my
7 first and third -- the same as any other employee. If he
8 has any reason that he wants his vacation in July, it's too
9 bad. But if it conflicts, if it's because it conflicts with
10 his reserve obligation, then he does have a right not to
11 have the benefit denied to him.

12 QUESTION: He says it's not that he wants to have,
13 he's entitled to have; that's your argument.

14 MR. HOROWITZ: Congress has guaranteed him these
15 employment benefits to the extent that if they can be accommo-
16 dated. I'd like to reserve the remainder of my time.

17 MR. CHIEF JUSTICE BURGER: Very well. Mr. McAuliffe,
18 you may proceed.

19 ORAL ARGUMENT OF PAUL S. McAULIFFE, ESQ.,

20 ON BEHALF OF THE RESPONDENT

21 MR. McAULIFFE: Mr. Chief Justice, and may it please
22 the Court:

23 During the course of an average year each hourly
24 employee at Sohio's petroleum refinery in Lima, Ohio, will
25 have seven weekends scheduled off from work, during that year.

1 For the other 45 weekends of the calendar year, that employee
2 will be scheduled to work: on 30 of those weekends working
3 both Saturday and Sunday; on the other 15 working one or the
4 other.

5 There is a reason why life appears to be so draco-
6 nian at the refinery, and that is because, like most petro-
7 leum refineries and like many other workplaces in this
8 country, the refinery operates seven days a week, 24 hours a
9 day, 365 days a year. That means that on every weekend a
10 full operating work force is required to run that refinery.
11 If weekends were staffed on a voluntary basis, in most cases
12 there would be serious practical problems getting a full staff
13 on a weekend. For that reason Sohio has developed at this
14 refinery, subject to the collective bargaining agreement that
15 exists with the Oil, Chemical, and Atomic Workers, a system
16 of routine rotating scheduling of weekend work on an involun-
17 tary basis. Under this system, which is set forth in the
18 record, every employee will have on the average seven week-
19 ends off per year, that I have mentioned.

20 In this case we're dealing with one of these
21 employees who was a member at the time in question of the
22 Ohio National Guard.

23 QUESTION: Mr. McAuliffe, could I interrupt with a
24 question, because it affects the argument right here?

25 I didn't know from the record that there were seven weekends

1 off and 45 on, but I'm sure that's correct if you tell us
2 that. Are you also telling us that you could not schedule
3 this man so he'd have 12 weekends off but still work the same
4 number of Saturdays and Sundays? In other words, he'd have
5 to work both days on more weekends, to work the same number of
6 total weekend days? Are you saying you couldn't do that, be-
7 cause of the schedule? There's my question to you.

8 MR. McAULIFFE: Well, first, in response to the
9 first part of your question, this schedule itself is set forth
10 in the joint appendix and was part of the stipulation, and
11 you can --

12 QUESTION: Is this the one at page 29?

13 MR. McAULIFFE: Pages 29 through 39. If you go --

14 QUESTION: Oh, I see.

15 MR. McAULIFFE: If you go through the rotation
16 scheme in there, you will find it works out on the average to
17 seven weekends off per year. But the difficulty is in
18 rescheduling is the fact that even to just shift one day
19 at a time on a weekend, you are requiring another employee
20 who would otherwise have had, say, the Saturday off, to work
21 on that Saturday. And then --

22 QUESTION: But against his will?

23 MR. McAULIFFE: That's correct. And we --

24 QUESTION: All voluntary trades have been exhausted
25 in this case, haven't they?

1 MR. McAULIFFE: That's correct, Mr. Justice White.
2 There is a provision in the collective bargaining agreement
3 that provides, whenever the regular work schedule, whenever
4 an employee has a conflict, he can change voluntarily.

5 QUESTION: He can change -- I still don't think
6 you've answered my question. My question is whether he could
7 be scheduled with the number of days off he needs, the number
8 of Saturdays and Sundays off to accommodate his reserve
9 obligation, without requiring any other other employee in the
10 plant to work any more Saturdays or Sundays than they now
11 have to work under the regular routine?

12 MR. McAULIFFE: Given the facts we have in this
13 case, that could be done, Mr. Justice Stevens. The number
14 of days, if we're talking about, 12 months, 24 days, the
15 total number of weekend days off he would normally have would
16 be 29, so we're talking about a redistribution of his weekend
17 days as well as the days of the other employees. As a prac-
18 tical matter, in most cases, we'll be talking about more than
19 the 24 days, because the reservist will also be gone for
20 two weeks for the summer training camp obligation.

21 QUESTION: Right, and you may have more than one re-
22 servist, too.

23 MR. McAULIFFE: So you might be able to accomplish
24 it by juggling the days around. You're still --

25 QUESTION: Which would mean other employees would

1 have to work fewer weekend days?

2 MR. McAULIFFE: No, no, I wasn't suggesting that
3 at all.

4 QUESTION: Well, if he works more weekend days than
5 would be normal and the company only needs a total of X week-
6 end days, I'm not saying that other employees wouldn't wel-
7 come the opportunity to work fewer weekend days?

8 MR. McAULIFFE: Mr. Justice White, I do not mean to
9 say he'd be working more days. Their distribution would be
10 different.

11 QUESTION: There might be two in January and none
12 in February, instead of one in each month?

13 MR. McAULIFFE: The total number during the course
14 of the year could be set up so that the number of days,
15 enough days, would be the same. That's correct.

16 QUESTION: But in your admissions you say that the
17 Government took no steps to provide plaintiff with substituted
18 work hours. No effort, no steps, rather; no -- none. Not
19 even one.

20 MR. McAULIFFE: That's correct, Mr. Justice
21 Marshall.

22 QUESTION: Do you think that's in keeping with the
23 statute, to make no effort?

24 MR. McAULIFFE: I think it's in keeping with the
25 statute when you look at the provisions of the statute and at

1 the workplaces of this facility. First of all, we're talking
2 about Sohio having taken the specific steps that were re-
3 quired by the statute to grant a --

4 QUESTION: This is the admission, "They had made no steps
5 to provide plaintiff with sixteen substituted working hours
6 to make up for his lost work." That's all that it says.

7 MR. McAULIFFE: That's correct, Mr. Justice Marshall.

8 QUESTION: And no means no.

9 MR. McAULIFFE: And we contend that that --

10 QUESTION: Did you even ask if somebody wanted to
11 take this man's place?

12 MR. McAULIFFE: The steps that were taken were the
13 steps taken under the collective bargaining agreement calling
14 for voluntary exchanges. Other than that, no steps were
15 taken to rearrange the schedule.

16 QUESTION: Well, under the collective agreement the
17 man has to take the steps, the worker has to make the steps.

18 MR. McAULIFFE: Yes, that's correct.

19 QUESTION: So it still means that the defendant
20 did nothing.

21 MR. McAULIFFE: That's true, Mr. Justice Marshall,
22 and we contend that there was no obligation.

23 QUESTION: And I would assume, I could assume there
24 were ten million people waiting there to do it, if they'd
25 just ask.

1 MR. McAULIFFE: I missed -- I'm sorry.

2 QUESTION: Well, you can't dispute it. I mean,
3 that word "no" is awfully -- .

4 MR. McAULIFFE: What we see at issue in this case
5 is the problem of reconciling the problems of somebody who
6 is in effect holding two different jobs. The petitioner in
7 this case is a full-time employee at Sohio's Lima, Ohio,
8 refinery, and has certain rights and obligations that go
9 with that status of being an employee.

10 QUESTION: Are you suggesting that a reservist in
11 this setting is just like some fellow who is moonlighting,
12 working for a Seven-Eleven store or -- ?

13 MR. McAULIFFE: Not at all, Mr. Chief Justice.

14 QUESTION: Congress singled out this one category
15 of people, didn't it?

16 MR. McAULIFFE: Congress has and Congress has
17 enacted very specific accommodation requirements that --

18 QUESTION: They did that to encourage people to go
19 into the military reserve, did they not? Do you doubt this
20 then?

21 MR. McAULIFFE: I assume that they did, Mr. Chief
22 Justice.

23 QUESTION: You assume it. Is there any doubt about
24 it in the legislative history?

25 MR. McAULIFFE: No, I don't think so. But what

1 Congress has done with regard to the reserves is to create
2 very specific special rights to accommodation that do not
3 exist for other employees.

4 QUESTION: And you suggest that this isn't one
5 of them?

6 MR. McAULIFFE: That's correct, Mr. Justice White.
7 The right that Congress has created is, first, the right when
8 there is a conflict to relieve this employee of his obligation
9 to work his regular schedule and to grant that employee a
10 leave of absence, to reinstate that employee at the termina-
11 tion of that, and to protect his seniority, his status,
12 just as you would have to do for someone who was in the regu-
13 lar military.

14 QUESTION: Well, Mr. McAuliffe, when you grant him
15 a leave of absence, which you agree you have to do without
16 firing him -- he can be away from work, and he won't be paid
17 under your submission, but he can't be fired for being away?

18 MR. McAULIFFE: That's correct, Mr. Justice White.

19 QUESTION: Well, what do you do when he's away?

20 MR. McAULIFFE: When he is away -- ?

21 QUESTION: Under your position. You certainly need
22 to fill the job while he's away. So what do you do? Require
23 other employees to work?

24 MR. McAULIFFE: While he's away, you fill the job
25 on a temporary basis and that can be done --

1 QUESTION: How do you do it? Do you assign people
2 who should be off on the weekend to -- ?

3 MR. McAULIFFE: There are two methods that were
4 used at this workplace. One would be to assign an employee
5 if one is available from a floating crew called "the extra
6 board" at the facility who would not have a regular schedule
7 and who would be available to fill temporary vacancies. That
8 person would then work that day or two days, as the --

9 QUESTION: And you're paying him but not the fellow
10 who's away?

11 MR. McAULIFFE: That's correct. If no one were
12 available from that crew, then you would fill it as an over-
13 time job. Under this agreement it has to be voluntary.

14 QUESTION: And that would cost you money?

15 MR. McAULIFFE: That would cost premium pay; time
16 and a half. The rearrangement of schedules that the Govern-
17 ment is suggesting in this case would require us to take an
18 employee in the same classification as petitioner, require
19 him to work that particular weekend instead, still at his
20 regular pay, no premium pay, because everybody is still just
21 working a 40-hour week under this theory. But the fact is
22 that the vacancy is filled now under the provisions of --
23 collective bargaining agreement.

24 QUESTION: So, you have a way of it not costing you
25 any money to accommodate yourself to the leave of absence?

1 You could let him be away and not fire him, and still get
2 the work done by your extra crew?

3 MR. McAULIFFE: That's correct. In some cases there
4 may be some premium pay involved but that wasn't done in this
5 case.

6 QUESTION: But in any event, Mr. McAuliffe, as I
7 understand your submission, it is that all that Congress re-
8 quired you to do was (a) let him have a leave of absence, and
9 (b) on his return give him what the statute expressly iden-
10 tifies, namely, restore seniority, status, pay, and vacation.
11 And that's all you have to do because Congress didn't say you
12 had to do any more?

13 MR. McAULIFFE: Well, that's correct, Mr. Justice
14 Brennan, because the right to seniority that is protected is
15 a very broad right.

16 QUESTION: Yes, I know, you have to -- but that
17 isn't involved here?

18 MR. McAULIFFE: There's no contention here.

19 QUESTION: He comes back with the same seniority
20 as if he'd not taken a leave of absence, under the statute,
21 doesn't he?

22 MR. McAULIFFE: Yes, that's correct, and --

23 QUESTION: Incidentally, that's the same wording
24 that's appeared in some of these veterans return statutes.

25 MR. McAULIFFE: The wording is precisely the same

1 with one difference, and that is that provisions relating to
2 reservists also use the word "vacation," because there's a
3 specific protection for the reservist that he cannot be
4 charged any vacation time --

5 QUESTION: Well, my question was going to be, haven't
6 we had some of our cases under the veterans return statutes
7 that have interpreted this wording a little more broadly
8 than you submit? You don't think so?

9 MR. McAULIFFE: I don't believe so. The cases under
10 the Veterans Reemployment Act apply to veterans; have said that
11 the seniority that's protected can and should be interpreted
12 when you're talking about seniority to protect the veteran,
13 or in this case the reservist, protect that absence, give
14 them protections that may not exist elsewhere. The difference
15 between our position and the Government's position in this
16 case is that we freely concede that the leave of absence is
17 to be treated better, and, in fact, it is, because of the
18 leave of absence, because of the seniority protection.

19 The Government's argument is that there is an obli-
20 gation of reasonable accommodation out there that requires
21 even more. What it requires is that the work schedule be
22 changed so that there is no absence at all. What we're talk-
23 ing about is not better treatment, should there be an absence.
24 We freely concede that that is required by this Court's deci-
25 sions and we have in fact done that in this case; there is

1 no dispute that we have done that.

2 QUESTION: And the Court of Appeals said that all
3 that was required was that he be treated exactly like every-
4 body else.

5 MR. McAULIFFE: That's correct.

6 QUESTION: That's what they said over and over
7 again.

8 QUESTION: Well, not for this purpose; for this
9 particular purpose. They didn't say you had to treat him the
10 same for seniority.

11 MR. McAULIFFE: No, the Court of Appeals, the pas-
12 sage to which Mr. Justice Marshall was reciting refers to
13 the version of the statute upon which the Government relies,
14 and the Court of Appeals reads that as requiring neutral
15 treatment.

16 QUESTION: Why did Congress pass the most recent
17 amendment to the Veterans Reemployment Act?

18 MR. McAULIFFE: Congress passed this because when
19 they first enacted the reinstatement protection for reservists
20 in 1960 they left a gap in protection, when you compare that
21 to the protection they had already provided for the regular
22 military. The statutes that apply to the regular military
23 create two kinds of statutory protection. The first is a
24 reinstatement right with protection of seniority and status.
25 Congress enacted that for reservists in 24(d) in 1960.

1 There is a second provision of the statute that
2 relates to the regular military that protects them against
3 discharge without cause for a fixed period after their return
4 to work. The reasons for that being to prevent the case where
5 a veteran would be reinstated, given full seniority protec-
6 tion, and then once that had been done, a few weeks down the
7 road that person would be released from employment.

8 In 1960, when Congress specifically extended the
9 statute to the reservists, they provided no comparable protec-
10 tion, and if you look at the legislative history that led to
11 the passage of 21(b)(3), the specific concern of the Depart-
12 ment of Labor in proposing the legislation, or the Department
13 of Defense in supporting it, was that there were instances of
14 employees being reinstated after having exercised their reser-
15 vist rights and then being discharged from employment or
16 denied promotions or suffering other adverse treatment.

17 QUESTION: Dumped, in effect, after a pro forma
18 compliance with the statute?

19 MR. McAULIFFE: That's correct. Absent 21(b)(3),
20 there would be no protection under the statute in that case,
21 and that's the reason Congress enacted it. And that is --
22 it's clear from the legislative history that that was their
23 purpose and this becomes clear as well if you look at the
24 interpretations that have been issued under the statute by
25 the Department of Labor from that time to this date, which

1 has specifically described 21(b)(3) as a section designed to
2 protect against discharges, protect against denials of promo-
3 tion or other discrimination.

4 QUESTION: If you must do what the Government says,
5 I take it you'll be doing more than the collective bargaining
6 agreement calls for?

7 MR. McAULIFFE: That's correct, Mr. Justice White.

8 QUESTION: But would it violate the collective
9 bargaining agreement for you to do what the Government says?

10 MR. McAULIFFE: I think the best answer I can give
11 you to that question is that it probably would and I answer --

12 QUESTION: At least the union will probably say so.

13 MR. McAULIFFE: The facts are that the scheduling
14 practice that has been followed under the agreement is the
15 one that's set forth in the record. There never has been any
16 attempt to follow a different practice. The agreement, while
17 it may be silent on this specific work schedules, the agree-
18 ment does have a specific mechanism for resolving schedule
19 conflicts --

20 QUESTION: And is the union in here?

21 MR. McAULIFFE: Yes, sir. There is a union at
22 this facility. It is Local --

23 QUESTION: No, but is the union in the litigation?
24 Have they taken a position at all? At all?

25 MR. McAULIFFE: No, they are not. The union has --

1 QUESTION: They're not very concerned about it then?

2 QUESTION: It's in all the findings.

3 MR. McAULIFFE: Well, there is -- the union is not
4 a party to this litigation.

5 QUESTION: Not a party, but it's in the findings.

6 MR. McAULIFFE: I suspect that --

7 QUESTION: Well, if you paid a union worker a
8 single salary for a double salary job, wouldn't it be a vio-
9 lation of the union contract?

10 MR. McAULIFFE: It certainly would be.

11 QUESTION: I should think so. I wouldn't advise
12 trying it.

13 QUESTION: Well, couldn't the company have at least
14 undertaken on its own to have solicited other employees to
15 see if they wanted to take this man's place while he was at
16 camp, rather than leaving it totally up to him?

17 MR. McAULIFFE: It could have been done. I am sure
18 it would not be impossible to do that, but we're facing facts
19 where we know that solicitation was already done by the
20 employee affected and there was no one willing to exchange on
21 a voluntary basis. We could -- as we read the collective
22 bargaining agreement in place here, we would not have the
23 right to force somebody to make the shift.

24 QUESTION: Mr. McAuliffe, does the record show how
25 many persons are employed at the Lima plant?

1 MR. McAULIFFE: At the time in question, approxi-
2 mately, I think it's 561 employees at this time.

3 QUESTION: Does it show how many reservists are
4 employed?

5 MR. McAULIFFE: The record is silent on that ques-
6 tion other than to note this one petitioner involved is a
7 member of the reserves.

8 QUESTION: If it had been 100, for example, wouldn't
9 it be reasonable to assume that someone would put that in
10 evidence as distinguished from five or ten?

11 MR. McAULIFFE: Yes, it certainly would be.

12 QUESTION: To try to accommodate 100 reservists
13 would be perhaps a bit of a problem, wouldn't it?

14 MR. McAULIFFE: Well, you run into the answer I gave
15 to Mr. Justice Stevens before, what will work in the case of
16 one employee won't work as you get, get more and more, perhaps,
17 more and more employees involved. We don't have any specific
18 knowledge in the record of this case, how many employees are
19 affected. I think in terms of reading --

20 MR. CHIEF JUSTICE BURGER: Excuse me. I think
21 Mr. Justice Stevens had a question for you.

22 MR. McAULIFFE: Yes, sir.

23 QUESTION: I was just going to ask you this one
24 question. Maybe you were going to address it. In your
25 brief you say, "This case presents a radically different

1 issue from that presented in the Safeway case in the 5th
2 Circuit." Do you think the 5th Circuit case was correctly
3 decided?

4 MR. McAULIFFE: No, I do not, Mr. Justice Stevens.

5 QUESTION: Seems to me your position really is
6 inconsistent with the 5th Circuit's holding.

7 MR. McAULIFFE: I think the 5th Circuit holding
8 was incorrect and also that the logic that it followed in
9 getting to that holding was incorrect. That's what I'll --

10 QUESTION: It's different.

11 MR. McAULIFFE: I think this case reflects in a
12 way that the West case in the 5th Circuit does not, some of
13 the difficulties with trying to develop an accommodation
14 scheme, because you do have a fixed schedule, you do have a
15 collective bargaining agreement that limits flexibility in
16 changing that schedule, which was not, at least not in the
17 record, as far as we know in the --

18 QUESTION: Another way to put the question, I sup-
19 pose, would you think this case would be different if instead,
20 if the agreement, instead of giving the employees a right to
21 be scheduled for 40 hours, had said they have a right to work
22 40 hours? It seems to me your argument would still be that
23 that wouldn't make any difference.

24 MR. McAULIFFE: It would not. It would -- the
25 answer to that question would depend somewhat upon how the

1 collective bargaining agreement was construed and whether
2 that was actually construed as a guarantee of 40 hours per
3 week, a guarantee that the employer would assure on a regular
4 basis for the right --

5 QUESTION: Seems to me you'd still argue they've
6 got to show up for work to get -- if you offer them the job
7 for 40 hours, that satisfies your requirement under the
8 agreement and it also would meet the statute.

9 MR. McAULIFFE: That's precisely our argument,
10 Mr. Justice Stevens. The principal difference in reading,
11 in our reading of the statute and the reading that the
12 petitioner urges, does come down to the question of whether
13 or not there is a reasonable accommodation requirement that
14 applies. It's our position that there is not, and that, first,
15 if you look at the statute, there's nothing in the language
16 of Section 21(b)(3) which even hints at there being a reason-
17 able accommodation requirement. You also have the fact that
18 in another section of the same statute Congress spoke very
19 specifically to what types of accommodation should be pro-
20 vided when you have a conflict between a reservist schedule
21 and a regular work schedule. I'm referring to Section 24(d).

22 You also have a very clear legislative history of
23 Section 21(b)(3) which shows that its purpose was to protect
24 against discriminatory treatment. We submit that there's no
25 basis in the statute or the legislative history to support

1 the interpretation that the Government has urged upon you in
2 this case. We believe that the reading that we think is the
3 proper reading of 21(b)(3) is the only reading that is con-
4 sistent with the structure of the statute, with the legisla-
5 tive history, with the administrative guidance that employers
6 have gotten for ten years from the Department of Labor on
7 what their obligations are, as well as the best reading con-
8 sistent with the use of judicial resources to reconcile
9 claims of what may or may not, within a particular set of
10 facts, be reasonable accommodation. In our view.

11 In our view the Congress in 24(d) specifically ad-
12 dressed this question, and gave very detailed, specific, and
13 workable rules for employers to follow. And our contention
14 is that the facts in this case show that Sohio has met all of
15 its obligations with regard to the reserve absence, with re-
16 gard to the need to provide reinstatement rights, and with
17 regard to 21(b)(3) and its protection against discriminatory
18 treatment. I thank the Court.

19 MR. CHIEF JUSTICE BURGER: Very well. Do you have
20 anything further, Mr. Horowitz?

21 MR. HOROWITZ: I have a couple of points.

22 ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,

23 ON BEHALF OF THE PETITIONER -- REBUTTAL

24 QUESTION: Mr. Horowitz, the Government's position
25 is that only reasonable efforts to accommodate the needs of a

1 reservist are required under the statute. The statute itself
2 is rather positive, isn't it? 2021(b)(3) provides in effect
3 that any person who holds a position described in the statute
4 shall not be denied other incident or advantage. Do you in-
5 terpret that to require only reasonable effort?

6 MR. HOROWITZ: That's correct. The plain language
7 of the statute is that reservists cannot be denied these bene-
8 fits. Now, we are willing to admit that Congress did not intend
9 that employers need to take unreasonable measures in order to
10 assure employees these benefits --

11 QUESTION: Well, it seems to me your argument as
12 suggested by my brother Powell is a little bit inconsistent
13 with the statute. The statute doesn't impose a duty upon an
14 employer to make reasonable efforts, but it says --

15 MR. HOROWITZ: No, the statute imposed a duty on
16 the employer.

17 QUESTION: It seems to give absolute entitlements.

18 MR. HOROWITZ: An absolute duty; that's right.

19 QUESTION: And therefore the requirement is an
20 absolute duty.

21 MR. HOROWITZ: There's an absolute duty.

22 QUESTION: If the statute means what you say it
23 means.

24 MR. HOROWITZ: Well, in another portion of the
25 statute the Congress made clear in 2021(a) that it did not

1 require the employer to take unreasonable measures. That's
2 in connection with reinstating veterans.

3 QUESTION: Well, no, it doesn't --

4 QUESTION: Where is that found in 2021(a)?

5 MR. HOROWITZ: This is at the end. Well, it's not
6 reprinted, because it's not germane to this case, but
7 in fact, there's a specific statement in the statute that
8 employers are not required to reinstate veterans where it
9 will be unreasonable or unduly burdensome to do so, and we --

10 QUESTION: But here, if the petitioner is entitled
11 to 40 hours a week, he's entitled to 40 hours a week, and
12 not entitled simply to his employer's making reasonable
13 efforts to see to it that he has 40 hours.

14 MR. HOROWITZ: He's entitled to 40 hours a week, to
15 work 40 hours a week. But if it's impossible for him to work
16 40 hours that week, it's recognized that Congress wouldn't
17 haven't intended it.

18 QUESTION: Is there anybody else in that plant
19 entitled to 40 hours a week?

20 MR. HOROWITZ: Everybody's entitled to 40 hours a
21 week.

22 QUESTION: Well, it isn't impossible, it isn't im-
23 possible to give him his 40 hours.

24 MR. HOROWITZ: Not in this case, it's not impossible.

25 QUESTION: Well, I know, but it wouldn't be in any

1 case, would it?

2 MR. HOROWITZ: Sure, it's impossible --

3 QUESTION: All the employer would have to do is to
4 pay overtime.

5 MR. HOROWITZ: No, if he's gone for the whole week,
6 it's impossible to schedule him to work 40 hours during that
7 week.

8 QUESTION: I know, but if he's gone on weekends,
9 you can assign somebody else to work for him.

10 QUESTION: Or pay him even though he's not there.

11 MR. HOROWITZ: But that's not giving him -- the
12 employment benefit is the right to work, not the right to be
13 paid for not working. We're just saying that he's entitled
14 to be given the employment benefit at issue, which is working
15 for 40 hours.

16 QUESTION: So, if he has the right to work 40 hours
17 and not just the right to a leave?

18 MR. HOROWITZ: That's right. And I think a lot of
19 discussion here has completely ignored the fact that Congress
20 passed this statute, 2021(b)(3). In response to Mr. Justice
21 Brennan's question, the respondent indicated that the reser-
22 vist has only certain limited rights, and those are the
23 rights that are guaranteed by 2024(d). There is another
24 statute here and respondent will either have us ignore this
25 statute or restrict it to discharges, which is plain from

1 the face of the statute that it's not restricted to discharges
2 or, as the Court of Appeals so narrowly construed the statute,
3 as to make it almost meaningless. And they did that by --

4 QUESTION: Aren't you yourself, as my brother
5 Stewart suggested, construing it more narrowly than it's
6 literally written?

7 MR. HOROWITZ: The statute has to be construed in
8 line with what we think Congress's intent would be. Now,
9 this Court has said many times that this entire statute is to
10 be read together as one piece. Now, there is this unreason-
11 ability requirement in another part of the statute. They
12 didn't specifically repeat it in this particular amendment,
13 but it's reasonable to assume the Congress would have thought
14 the same thing; the same policies applied. The policy, as to
15 reservists -- inequality in employment be minimized.

16 QUESTION: Mr. Horowitz, may I ask you one question?
17 I'm not entirely clear as to what the duty is with respect to
18 the two weeks' summer training for reservists. Does the
19 reservist have a right not only to be absent for those two
20 weeks but in addition to have his two weeks vacation with
21 pay, so he's away four weeks in the summer?

22 MR. HOROWITZ: In other words, if he has a two-week
23 vacation with pay, generally, and then he takes these two
24 weeks off on reserve duty. He's not required to count those
25 two weeks as his two weeks' vacation. He takes the two weeks

1 off, he's not paid for those two weeks. And then later he
2 could take his vacation.

3 QUESTION: Let me see if I understand you. He's
4 entitled, I suppose, under this union bargaining contract,
5 as in most, to a period off with pay?

6 MR. HOROWITZ: Yes; assuming that.

7 QUESTION: Is a reservist entitled, in addition
8 to that, to take off two additional weeks to fulfill his re-
9 serve requirementz?

10 MR. HOROWITZ: Yes. Without pay.

11 QUESTION: Without pay.

12 QUESTION: Well, he gets paid as a reservist.

13 MR. HOROWITZ: Some pay.

14 QUESTION: He gets pay on his weekends as a reser-
15 vist, but not from this --

16 MR. HOROWITZ: He doesn't get -- it doesn't go; it's
17 not the same pay.

18 QUESTION: The result is he may be away a month?

19 MR. HOROWITZ: He may be away a total of a month,
20 yes. He's entitled to take the --

21 QUESTION: Mr. Horiwitz, when Congress enacted this
22 statute and its amendments, did it confide its administration
23 to the Department of Defense or Department of Labor, or did
24 it not confide it to any of the administrative departments?

25 MR. HOROWITZ: Well, I mean, the veterans

COTTON CONTENT

1 reemployment or the statutes in general are administered by
2 the Department of Labor.

3 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
4 The case is submitted.

5 (Whereupon, at 2:14 o'clock p.m., the case in the
6 above-entitled matter was submitted.)

CERTIFICATE

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-298

ROGER D. MONROE

V.

THE STANDARD OIL COMPANY

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Gill J. Wilson

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