In the

Supreme Court of the United States

ARMY AND AIR FORCE EXCHANGE SERVICE Petitioner	)	
v.	)	NO. 80-1437
ARTHUR EDWARD SHEEHAN	)	

Washington, D. C.

February 23, 1982

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ALDERSON REPORTING

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IN THE SUPREME COURT OF THE UNITED STATES

ARMY AND AIR FORCE EXCHANGE SERVICE,

Petitioner,

v. No. 80-1437

ARTHUR EDWARD SHEEHAN

Washington, D. C.

Tuesday, February 23, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 o'clock a.m.

APPEARANCES:

SAMUEL A. ALITO, JR., ESQ., Assistant to the Solicitor General, U.S. Department of Justice, Washington, D.C.; on behalf of Petitioner.

IRA E. TOBOLOWSKY, ESQ., Tobolowsky & Friedman, 600 Carillon Tower West, 13601 Preston Road, Dallas, Texas 75240; on behalf of Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Army and Air Force Exchange against Sheehan. I think you may proceed whenever you're ready, Mr. Alito.

ORAL ARGUMENT OF SAMUEL A. ALITO, JR., ESQ.

ON BEHALF OF PETITIONER

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

This case is here on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. The issue in this case is where a former employee of a military exchange who was appointed to his position and subsequently discharged may sue for money damages under the Tucker Act based upon an alleged contract, the existence of which is inferred solely from personnel regulations in effect at the time of his separation.

The basic facts in this case are as follows. In 1962 the respondent, Arthur Sheehan, was appointed to a position with the Army and Air Force Exchange Service, an instrumentality of the United States. The regulations governing Mr. Sheehan's employment by the Army and Air Force Exchange Service, AAFES as it is called, were the very same regulations considered by this Court in United States versus Hopkins in 1976.

In 1967, five years after his initial

employment, Mr. Sheehan was designated by the Commander of AAFES for participation in a special program for AAFES executives, called the Executive Management Program. Under that program, he obtained certain special benefits, but also incurred certain special obligations; principally, the possibility of transfer to any AAFES facility. He was required to sign a written acknowledgement of the special conditions of Executive Management Program participation.

By 1975, the respondent had achieved an AAFES rank equivalent to a Lieutenant Colonel. In November of that year he was arrested on drug charges and subsequently pleaded guilty. The Service then began administrative proceedings which resulted in his discharge.

He appealed the discharge but the appellate authority, the Commander of AAFES, denied the appeal. Mr. Sheehan then sought reconsideration claiming that he had been denied a fair appeal because the Commander of AAFES who acted as the appellate authority had given prior approval for the initial discharge notice.

As a result of that complaint, Mr. Sheehas was, in effect, granted a new appeal to the next higher authority in the Service, the Chairman of the Board of Directors of AAFES. His appeal, however, was once again

denied.

In the meantime, he had initiated suit in the Northern District of Texas seeking reinstatement as well as compensatory and punitive damages. He claimed that AAFES had violated its own regulations because of the dual role played by the Commander. He also claimed that his discharge was arbitrary and capricious, an abuse of discretion, unwarranted by the facts and in violation of various, unspecified statutory and constitutional provisions.

Notably, his complaint did not allege that he had ever been employed pursuant to any contract with AAFES, whether express or implied. He invoked the court's jurisdiction under the Tucker Act and various other statutes not now at issue.

The Service moved to dismiss his complaint noting that he had been an appointed, non-contract employee. In response, he did not seek to amend his complaint to allege the existence of a contractual relationship, nor did he adduce any proof whatsoever that he had ever been employed pursuant to contract.

The district court granted the motion to dismiss but the court of appeals reversed. The court held that jurisdiction existed with respect to his claims for monetary relief under the Tucker Act because

AAFES personnel regulations in effect at the time of his discharge were by themselves sufficient to give rise to what the court called a collateral implied-in-fact contract between the Service and respondent.

The court also held that there was jurisdiction with respect to his claims for non-monetary relief, but that question is not at issue here.

In our view, the decision of the court of appeals with respect to respondent's claims for monetary relief is clearly wrong. It is inconsistent with this Court's decisions in Hopkins and Testan. It is a patent attempt to circumvent the decision of Congress excluding employees of AAFES and the military exchanges from the coverage of the Back Pay Act, which is, of course, the provision of federal law providing a waiver of sovereign immunity for back pay claims by regular federal officials -- federal employees, I should say.

The decision of the court of appeals is also contrary to basic principles of contract law, and if the court's reasoning were widely accepted it would have far-reaching and clearly unacceptable consequences.

The basic principles governing this case are well-established and I don't believe they are disputed by respondent. The United States is immune from suit unless Congress consents. A waiver of sovereign

immunity must be expressed rather than implied. Therefore, a valid waiver may be found only in a constitutional provision, statute or valid regulation that confers the substantive right to recover money damages from the United States, or in a lawful contract, obligating the United States to pay money.

QUESTION: What theory do you think -- which of those two do you think the court of appeals proceeded on here?

MR. ALITO: I think the court clearly proceeded on the contract theory, although it relied purely upon regulations. It did so because the regulations at issue do not create the right to recover money damages in court, nor do the statutes. And the statutes and regulations involved are the very ones that were before this Court in Hopkins. And in that case, they were not found to supply a waiver of sovereign immunity.

So, the court was relegated to the contract theory. But in finding the existence of a contract, it relied solely on regulations. And for that reason, we think the court was wrong.

The decision in this case, though, as Justice Rehnquist's question points out, is whether or not Mr. Sheehan was ever employed pursuant to contract. And as

I said, the court of appeals found what it termed a collateral implied-in-fact contract. But that simply cannot be correct.

First, it is squarely inconsistent with Hopkins. In Hopkins, as here, an employee of AAFES brought suit under the Tucker Act for money damages, claiming among other things that his discharge violated AAFES regulations and the due process clause.

This Court carefully analyzed the regulations governing employment by AAFES and concluded not that all AAFES employees work under a collateral implied-in-fact contract; on the contrary, the Court concluded that most AAFES employees -- in fact, almost all AAFES employees -- are appointed to their positions, just like regular federal employees. Thus, Hopkins cannot be reconciled with the court of appeals' decision.

The court of appeals' decision is also inconsistent with AAFES' own regulations, even though the court relied solely on those regulations in reaching its conclusion. AAFES' regulations -- again, as noted in Hopkins, expressly prohibit the Service from entering into an employment contract with one of its employees. Yet, the court of appeals' theory was that even if the commencement of Mr. Sheehan's employment was pursuant to appointment, he subsequently or simultaneously entered

into a collateral implied-in-fact contract embodying AAFES discharge regulations. That simply can't be squared with the AAFES regulations as interpreted in Hopkins.

Third, the court of appeals' decision is contrary to elementary principles of contract law. The court purported to find the existence of a contract implied in fact. But it is clear that the obligation it identified was, at best, a contract implied in law, or a quasi-contract. A contract implied in fact is, of course, a real contract; it is an agreement between the parties, it is based upon a meeting of the minds. It differs from other contracts only in that its existence is inferred from the parties' conduct rather than being expressed in words.

A contract implied in law, on the other hand, is not a true agreement between the parties; it is merely a legal obligation imposed by a court for the purpose of doing justice, and without reference to the parties' intent.

Here, the court of appeals purported to find a contract implied in fact, but looked to no facts particular to this case. It looked solely to provisions of law, AAFES' regulations. The court did not look to anything the parties had said or done or thought in 1962

when Mr. Sheehan became an AAFES employee, or in 1967 when he entered this Executive Management Program, or at anytime during his 14 years' tenure with the Service.

And in fact, there were no facts, there are no facts, concerning any of those matters in the record because Mr. Sheehan failed to allege or even to attempt to prove the existence of a contract when this case was in district court.

Thus, since the court of appeals looked solely to provisions of law and not to any facts particular to this case, it must follow that the obligation it identified was a contract implied in law. And there is no Tucker Act jurisdiction for such obligations.

Fourth, the implications of the court of appeals' decision are far-reaching, and would clearly be unacceptable. Because the court looked solely to the existence of personnel regulations in effect at the time of Mr. Sheehan's employment and discharge, I think it is fair to say that the court of appeals' decision stands for the proposition that the mere existence of personnel regulations at the time of a government employee's appointment or during his tenure is sufficient to give rise to a contractual relationship between the employee and his governmental employer.

There is nothing in the court of appeals'

decision confining its logic to Mr. Sheehan's case, as opposed to that of any other AAFES employee. There is nothing in the decision confining its reasoning to regulations concerning discharge procedures, as opposed to any other personnel regulations. There is nothing in the opinion confining its reasoning to AAFES or the military exchanges or the non-appropriated fund instrumentalities as opposed to any federal department or agency.

And thus, under the court of appeals' logic, whenever any federal employee believes that any federal personnel regulation has been violated, he or she may bring suit for damages under the Tucker Act, claiming a violation of a so-called collateral implied-in-fact contract.

That result, of course, would be inconsistent with Hopkins, it would be inconsistent with Testan, it would render the Back Pay Act superfluous, and it would eliminate large chunks of the federal government's sovereign immunity without Congress' consent.

Mr. Sheehan's briefs, I believe, ask this Court to affirm the decision of the court of appeals on alternative grounds, if the Court concludes that the court of appeals' reasoning was unsound. Mr. Sheehan asks this Court to find that he entered into an express

or an implied contract when he entered the Executive Management Program.

However, as I noted, he failed to allege or even to attempt to prove the existence of this express or implied contract when the case was in district court. In addition, AAFES regulations, as I noted, forbid the agency from entering into an employment contract with one of its own employees.

Now, since executives, senior executives, entering the Executive Management Program are already AAFES employees, it must follow that a contractual relationship is not formed upon entry into that program or the regulation would be routinely violated.

Third, it is apparent from the fact of the regulations concerning the Executive Management Program, that a contractual relationship is not created. Those regulations specify that one enters the program by nomination, selection and designation rather than through the formation of a contract.

QUESTION: Mr. Alito, if we were to agree with you, do we have to remand the case so that a hearing can be held on whether there was an appointment or a contract?

MR. ALITO: No, I don't think so. It was -- the burden was on respondent, who was the plaintiff

below, to prove the existence of Tucker Act jurisdiction when the case was in district court, and he simply failed to do that. He did not allege that a contract existed, and he did not adduce any facts to prove the existence of a contract.

Now, he argues that a remand should be ordered because one was given in Hopkins, but the situation in Hopkins was significantly different. There, the employee had alleged the existence of a contractual relationship. The Court of Claims held that he was a contract employee because under that court's prior precedence, he was not a regular federal employee. And thus, it held that he was a contract employee almost as a matter of law.

Hopkins, for that reason, had no occasion to introduce in the court of claims whatever proof he might have had that he was a contract employee, in a more conventional sense. And thus, when this Court reversed the Court of Claims and rejected its reasoning that he was a contract employee simply because he was not a regular federal employee, it was appropriate to remand the case to the Court of Claims so that Hopkins could adduce whatever proof he might have.

Here, Mr. Sheehand did not allege the existence of a contract, he did not introduce any

evidence establishing the existence of a contract, and he had the clear need to do so, to substantiate Tucker Act jurisdiction which was what he claimed in the district court.

QUESTION: You say introduced evidence to show that he was employed by contract. Didn't this case go off on a motion to dismiss for want of jurisdiction, or was it actually tried?

MR. ALITO: No, it was not tried, Your Honor, it went off on a motion to dismiss for lack of jurisdiction.

QUESTION: Well then you don't ordinarily introduce evidence until you get to at least a motion for summary judgment where you would file affidavits and so forth, or unless you get to trial.

MR. ALITO: Well, that's correct, Your Honor, but I believe that when jurisdiction is challenged by the defendant in a case and a basis -- a reasonable basis for the challenge is established -- and that was done here because I think Mr. Sheehan will not dispute the fact, and his own complaint suggests, that he was an appointed employee under this Court's analysis of the regulations in Hopkins. Once jurisdiction is properly challenged by the defendant, the burden shifts to the plaintiff to establish a prima facie case of those facts

necessary to establish the court's jurisdiction. He cannot simply rest on mere conclusory allegations.

And here, there were not even --

QUESTION: Well, he may regret it if he does.

MR. ALITO: And here there were not even conclusory allegations. There was not even an allegation that he was employed pursuant to contract.

QUESTION: There is in this case, as I remember, isn't there a claim also for reinstatement on a different theory than the Tucker Act, which is pending in the district court?

MR. ALITO: That's correct, Your Honor, that is alive and upon remand, the district court may order his reinstatement if it feels that it's appropriate.

QUESTION: And in that -- under your view of the equitable relief that could be granted in connection with the reinstatement case, could that include back pay or not?

MR. ALITO: It could not include back pay because there has not been a waiver of sovereign immunity with respect to that.

The theory of the Fifth Circuit was that sovereign immunity with respect to claims other than money damages was waived by the 1976 amendment to the Administrative Procedure Act. And since his claim for

back pay would be a claim for monetary relief, that waiver of sovereign immunity would not cover those -- would not cover that claim.

I would like to reserve the rest of my time, thank you.

CHIEF JUSTICE BURGER: Very well. Mr. Tobolowsky?

ORAL ARGUMENT OF IRA E. TOBOLOWSKY, ESQ.

ON BEHALF OF THE PETITIONER

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

The ultimate issue to be decided by this Court is, do the regulations of the Army-Air Force Exchange Service, AAFES, as they apply to the termination of employment of respondent, constitute part of an implied-in-fact contract between AAFES and respondent, to confer jurisdiction under the Tucker Act, and a breach of which implied-in-fact contract waives sovereign immunity in the district court.

The allegations in plaintiff's complaint -- in the respondent's complaint now -- on file is critical to the facts and determinations by this Court. The respondent alleges that he was first hired in 1962 as a computer programmer; that subsequent, some five years later, he was accepted into a program known as the

Executive Management Program, commonly called EMP.

The EMP program had special benefits and special burdens, and these are all alleged in the complaint. Included within the special benefits are retention priority, longer notice requirements for separation, which is the procedure for termination of employment, greater insurance benefits and supplemental retirement benefits.

The EMP program also provided for special obligations including the obligation to develop certain abilities, the obligation to accept worldwide transfer, and the obligation to accept terms of fully EMP retirement.

Respondent was required to and acknowledged these obligations and benefits in writing pursuant to the regulations of AAFES.

For the next eight years, respondent served as an EMP employee. In late 1975 respondent was arrested off duty, away from the premises of AAFES, for violations of the state drug law, and in early 1976, he pled guilty to four misdemeanors for violations of state drug laws.

As a result, the Commander of AAFES set forth an investigation pursuant to the regulations and pursuant to these very regulations, the Commander gave

the respondent advanced notice of separation. An investigation was then commenced, pursuant to the regulations and as required by the regulations, and a final decision to terminate the employment of respondent was reached in April of 1976.

Notice was then given to respondent, pursuant to these regulations. Respondent contested his termination and appealed it, pursuant to these regulations. The appeal was then perfected and taken in accordance with the regulations. A hearing examiner was then appointed pursuant to the regulations.

QUESTION: Well, how does this relate to the legal question we have before us?

MR. TOBOLOWSKY: Your Honor, it is in fact the implied contract arises from the understanding between the parties, a tacit understanding, that the regulations would be the basis for the termination of respondent, and further, the tacit understanding that the regulations would control the separation --

QUESTION: Where do you allege that in your complaint?

MR. TOBOLOWSKY: Your Honor, according to the Rule 8 of the Federal Rules of Civil Procedure, Your Honor, the obligations and benefits are set out in the pleadings, and there is a pleading, Your Honor, to the

effect that AAFES has violated respondent's rights and violated the regulations in the termination of respondent from his job.

QUESTION: That's a conclusion, is it not?

MR. TOBOLOWSKY: Your Honor, that is -- yes, Your Honor. There are pleadings, though, that substantiate what his rights are and that the AAFES Commander acted as both the separation authority and the termination authority, which is in clear violation of AAFES regulations.

QUESTION: Well, in paragraph 18 you allege that the actions of the Commander violated AAFES regulations and plaintiff's right to a free and impartial appeal. And then, they violated due process. Now, that doesn't sound to me like an allegation of an implied-in-fact contract.

MR. TOBOLOWSKY: Well, Your Honor, under the notice provisions of Rule 8, the Fifth Circuit so construed that as a breach of an implied contract. And, Your Honor, respondent would submit to this Court that the totality of the pleadings would then constitute sufficient pleadings to allege a violation of an implied-in-fact contract. That is a determination made by the Fifth Circuit, and that's a determination that this Court will ultimately have to make in this case.

QUESTION: Well, are you suggesting that because he may have been given more procedural safeguards and protection than he would have been entitled to as an appointee, that that somehow alters the relationship?

MR. TOBOLOWSKY: I am suggesting, Your Honor, to this Court that the EMP status may very well be a contract between the AAFES and the respondent, as in the Hopkins case, which must be remanded back to the court for further determination of the facts. Yes, Your Honor.

During the appellate --

QUESTION: Counsel, if the court of appeals' reasoning is correct, then apparently, the district court or the Court of Claims would have jurisdiction over any personnel matter covered by the regulations. Is that right?

MR. TOBOLOWSKY: Your Honor, in the facts in this case, respondent is alleging that there was an implied-in-fact contract arising out of the regulations solely governing the termination of employment. So, yes, Your Honor, to the extent that there are regulations, then the government agency would be required to follow its regulations.

QUESTION: Would you limit your theory just to discharge procedures or to all phases of employment by

these people?

MR. TOBOLOWSKY: Your Honor, the discharge procedures at at -- what is issue before this Court. The Court could limit it to the facts of this particular case, although counsel would argue an overall policy that any regulations that are in effect could be alleged to be breached, and therefore give rise to jurisdiction in district court or the Court of Claims.

QUESTION: Well, to the extent that you're relying on use of the federal regulations as creating this implied contract, isn't it really an implied-in-law contract, if there be a contract at all?

MR. TOBOLOWSKY: No, Your Honor, I am not. I am suggesting that the Court of Appeals for the Fifth Circuit is correct in its conclusion that it was an implied-in-fact contract. The tacit understanding that existed between AAFES and the respondent, that the regulations would be the basis of termination and that they would be followed, constitutes an implied-in-fact contract.

QUESTION: But there's no way of distinguishing then your client's case from the case of any other federal employee, is there? Because there are no allegations in the complaint that he had some special understanding with respect to the regulations, that

other employees don't have.

MR. TOBOLOWSKY: Your Honor, there is allegations to the effect that there was special obligations and benefit in the EMP program. But in regards to termination, Your Honor, the Court may very well construe this decision broadly, as would the government have the Court do so.

In response, Your Honor, Justice O'Connor, that in furtherance of your answer, the law is well settled and as stated by Justice Blackmun in the Court's decision in Morton v. Ruiz, where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is even where the internal procedures are possibly more rigorous than otherwise would be required.

So in addition, Your Honor, to there being this tacit understanding, there is also well-established law which says that federal agencies are obligated and bound to follow their own regulations.

QUESTION: What conduct do you rely on for the implied-in-fact contract?

MR. TOBOLOWSKY: All right. Your Honor, as I was stating in response to Chief Justice Burger's questions concerning why does all of the procedures and regulations, what do they have to do with this matter.

Your Honor, the parties followed the regulations. There, it is the position and contentions of the respondent in this case that the government, that AAFES, made an offer by setting out regulations which control the rights and protections of the respondent in the termination procedure.

That in fact, this offer was accepted in three parts. It was accepted when he entered into the employment with the understanding that the government would follow its regulations; when he continued his employment after he acknowledged in writing that he understood these regulations; and thirdly, by following the regulations himself in the appellate process. That all three of these constitute the acceptance of the offer by the government in its regulations.

And then the final element, the sine qua non, the consideration, is actually the benefits and the burdens which are accepted by both parties in the employment relationship.

Now, there is case law in which a number of cases have held that regulations of federal agencies do, in fact, support the contention that there is an implied-in-fact contract arising out of the regulations. Such cases include Augusta Aviation, Incorporated versus United States, Aycock-Lindsey

Corporation versus the United States, --

QUESTION: Are those cases decided by this Court?

MR. TOBOLOWSKY: No, Your Honor, none of these cases have been decided thus far by this Court.

QUESTION: Where were they decided?

MR. TOBOLOWSKY: Your Honor, there was a -- the Aycock-Lindsey Corporation was a Fifth Circuit decision which is cited in the brief -- excuse me, in the decision of the Fifth Circuit in the present case. The Bodek versus Department of Treasury case was, I believe, a Ninth Circuit decision. Griffin versus United States was a Court of Claims decision, 1978. New York Airways, Inc. versus United States was a Court of Claims decision in 1966. Radium Mines, Inc. versus United States was a Court of Claims decision in 1957. Spicer versus the United States was a district court case out of Kansas which was affirmed by the Tenth Circuit. And Wolak versus the United States was a District Court of Connecticut.

All of these cases have held that there was, in fact, an implied-in-fact contract arising out of regulations with a federal government agency.

QUESTION: Counsel, if your theory is correct, aren't you, in effect, providing then that the discharge

regulations of the agency, in effect, have overruled the congressional Back Pay Act?

MR. TOBOLOWSKY: No, Your Honor. If I understand Your Honor's question, that perhaps what I am trying to do is get in through the back door which I couldn't get in through the front door --

QUESTION: Precisely.

MR. TOBOLOWSKY: Your Honor, that question was addressed by this Court itself in the Hatzlachh decision, Hatzlachh versus United States, whereby this same argument was made and the Court said that you should look to the theory presented by the respondent in this case, and that it is no concern of this Court, front door or back door. If there is a valid contention by the respondent the court should address that issue.

And I believe that Justice Blackmun in his concurring opinion, as I recall, in that case, he discussed the implied-in-law versus implied-in-fact theory. And I would submit to the court that the Hatzlachh versus United States decision, which is 440 United States 460, may very well answer the concerns of Your Honor in her question to me.

QUESTION: Well, wouldn't your theory that anytime there are regulations it means there's an implied contract really have made the decision in Testan

quite beside the point, because there were regulations there. And if they had simply sought to proceed on an implied contract theory, presumably they would have everything going for them that your client has in this case.

MR. TOBOLOWSKY: The Testan decision, Your Honor, is totally -- the petitioner's contentions that Testan is applicable is totally erroneous to the facts of this case.

Your Honor, in Testan, this was an action brought by two government lawyers seeking reclassification from GS-13's to GS-14's, and for back pay during the period of misclassification. They sought jurisdiction of this Court under the Tucker Act, but they did not seek waiver of immunity based upon implied contract or contract.

QUESTION: But if they had recast their complaint without changing any of the facts, simply to say that we also have an implied contract because there were personnel regulations involved, should Testan have gone the other way if they'd done that?

MR. TOBOLOWSKY: I believe Justice Blackmun gave the hint to that in his decision when he said -- and if I may quote from two parts of that, Justice Blackmun stated, "The respondent did not rest their

claim upon contract." That's at 424 U.S. 399.

"In addition," Justice Blackmun wrote, "the present action, of course, is not one concerning a wrongful discharge or a wrongful suspension." I submit to the Court that those are clear indications that had the respondent -- that those are clear indications had the respondent so represented or so rested his case upon contract or implied contract, that the decision may have very well been differently. Or, the opinion may have gone for the respondent in that case.

I think that those two statements not only distinguish Testan but clearly support the position of respondent before this Court today.

I would also like to take a few minutes of the Court's time and direct remarks to U.S. versus Hopkins, which the attorney for petitioner contends is controlling. It is the position of the respondent that U.S. versus Hopkins is not contrary to the holding of the Fifth Circuit in the case presently before this Court.

In Hopkins, this case granted certiorari to resolve a conflict between the Court of Claims decision, the lower case, the lower court in Hopkins, and a recent decision of the Fifth Circuit in Young versus United States. The conflict resulted in that the Court of

Claims in Hopkins had held that the jurisdiction under the Tucker Act was sufficient to hear claims against AAFES by an employer on a breach of the implied contract.

Whereas, the Fifth Circuit, in Young versus the United States, had concluded that the Tucker Act did not extend jurisdiction to those particular claims.

The Court of Claims in its lower court holding held that, or relied upon its earlier decision of Keetz versus the United States. In Keetz, the Court of Claims had held that AAFES employees were not federal employees, and therefore, did not serve by appointment but served by contract.

The Keetz decision was a pre-1970 amendment case, and it's interesting to note that in Keetz the United States government was vigorously contending that AAFES employees serve by contract. However, after the 1970 amendment, the goverment has taken a contrary position and now argues that he serves by appointment.

Hopkins could have answered the question. This Court remanded the case for the determination, did Hopkins serve by appointment, or did he serve by a contract? The case was settled prior to the determination by the Court of Claims, and therefore, that question still remains unanswered.

I would submit to this Court that even if

Hopkins had been decided that in fact he served by appointment, which I do not and am not willing to concede in my argument today before this Court, but even if it had decided that Hopkins served by appointment, it would not be controlling in this case because in the instant case, Mr. Sheehan, the respondent, was an EMP employee. And if you use the logic of the Hopkins decision, then this court should remand the case for a determination as to whether or not an EMP employee serves by contract or, in fact, is also an appointed employee.

I think the language in Hopkins is clear that this Court should not make that decision without, as the court says, a development of a fuller record.

I received last Thursday afternoon in the mail a reply brief from the government, -- and I would not, or I would object to such late filing -- whereby the respondent appears to be pleading that, or stating that my pleadings were deficient. I would point out --

QUESTION: Did you mean the petitioner?

MR. TOBOLOWSKY: Pardon me, Your Honor?

QUESTION: The petitioner is stating your pleadings are deficient?

MR. TOBOLOWSKY: Yes, Your Honor, that the petitioner has contended that respondent's pleadings

were deficient.

I would ask the Court to consider Siegelman versus Canard-Whitestar wherein Judge, later Justice, Harlan stated under Rule 8, a pleading must contain a short and plain statement of the claim, showing the pleader is entitled to relief. It is not necessary to set out legal theories on which the claim is based.

In a more recent case, --

QUESTION: What about the present Rule 8?

MR. TOBOLOWSKY: Yes, Your Honor. In a more recent decision, --

QUESTION: I mean, I don't think we're bound by Rule 8 in the time of Justice Holmes.

MR. TOBOLOWSKY: Yes, Your Honor, that is correct.

QUESTION: We've had amendments since.

MR. TOBOLOWSKY: Yes, Your Honor, you are correct, but the recent cases still support and still quote from this language. In Speed Auto Sales versus AMC, which is a 1979 decision, granted it's out of the District Court for the Eastern District of New York, it said, under federal notice pleadings, it is unnecessary to set out the legal theory upon which a claim is based. Thus, while it is desirable that the pleadings give notice of some theory supporting recovery, it is

unnecessary for the pleader to delineate the theories or choose among alternate theories of relief.

QUESTION: I suppose you ought to give us the cites rather than just the names.

MR. TOBOLOWSKY: Yes, Your Honor, I do. In Speed Auto Sales, Inc. versus American Motor Corporation it's 477 Fed Sup 1193. In addition, Your Honor, I would submit to the Court that 2(a) Moore's Federal Practice, Section 8.14 is relevant. And Bouffers versus United States, 194 Fed 2d 145, which is a court of appeals decision, is also relevant. And lastly, --

QUESTION: Is that Judge Harlan's?

MR. TOBOLOWSKY: No, Your Honor, the --

QUESTION: You still haven't given us the cite for Judge Harlan.

MR. TOBOLOWSKY: For Judge Harlan, it is -- for Justice Harlan's decision it is Siegelman versus Canard-Whitestar, 221 Fed 2d 189. And I would also submit to this court that Powers versus Troy Mills, Inc., 303 Fed Sup 1377 would also be controlling under the present status of Rule 8.

In conclusion, the respondent would submit to this Court that the regulations of AAFES, as they apply to the termination of employment of respondent, constitutes a part of an implied-in-fact contract, which

allegations of alleged breach of the contract would waive sovereign immunity, and jurisdiction would rest upon the Tucker Act.

Respondent would further submit that this Court -- to this Court that the holdings in Hopkins should be controlling and this case should be remanded to the court for further determination as to the status of the Executive Management Program, and that this Court should not decide the case without a development of the full record.

QUESTION: May I ask you just one question? Do you agree with the government that in your reinstatement case you may not get back pay?

MR. TOBOLOWSKY: Yes, Your Honor, that is correct. Thank you, Your Honor.

CHIEF JUSTICE BURGER: Do you have anything further, counsel?

ORAL ARGUMENT OF SAMUEL A. ALITO, JR., ESQ.

ON BEHALF OF THE PETITIONER -- Rebuttal

MR. ALITO: I have a very short reply. Your Honor, first of all, the procedural deficiencies we pointed out in our Reply Brief are not so much that the respondent failed to utter the magic word "contract." The real deficiency is that he failed to allege any facts from which the existence of a contract could be

inferred.

And when the government properly challenged his invocation of Tucker Act jurisdiction, he failed to allege or present in any way whatsoever any facts which would show the existence of a contract.

To send this case back now for an evidentiary hearing as to whether or not he entered into a contract would be an empty exercise.

QUESTION: May I ask a question on that? Supposing in the next case that comes along, the plaintiff alleges the facts that are in this case, and then in addition has a paragraph in which he says, the day I was hired, I asked the hiring officer if they followed their regulations and the man said yes, I do. And he said fine, I'll be glad to work for you then. Would that be a different case?

MR. ALITO: I don't think that would be sufficient, Your Honor. It is expected that the government will follow its regulations with respect to all of its appointees, and the mere acknowledgement that it will abide by the law is not sufficient to give rise to a contractual relationship.

The other point I would like to make concerns the Executive Management Program that respondent has stressed. He claims that he entered into a contract

because he was required to sign a written acknowledgement of the conditions of entry into that program. And as I mentioned in my opening argument, there are certain special benefits having to do with life insurance and other matters of that type, and also, certain special obligations. Principally, the possibility of transfer.

First of all, simply signing such an acknowledgement is not proof of a contract. Many other federal employees who certainly do not work under contract are required to sign similar acknowledgements. Personnel in the military, for example, must sign enlistment papers, and sometimes agree to incur special obligations such as an extended term of enlistment in exchange for special benefits such as a preferred assignment or training. The fact that they sign that acknowledgement doesn't mean they have entered into a contract with the Army.

And second, even if those special conditions of the Executive Management Program were a contract, they have nothing whatsoever to do with respondent's claim that his discharge was arbitrary and capricious or an abuse of discretion, et cetera.

We would therefore ask the Court to reverse the decision of the court of appeals with respect to

respondent's claims for monetary relief.

CHIEF JUSTICE BURGER: Very well, thank you, gentlemen, the case is submitted.

(Whereupon, at 11:50 a.m., the oral argument in the above-entitled matter was concluded.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

ARMY AND AIR FORCE EXCHANGE SERVICE v. ARTHUR WDWARD SHEEHAN
#80-1437

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BY Sharon Ryan Connelly