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10th Supreme Court Case Relating to Reemployment Statute
Accardi v. Pennsylvania Railroad Co., 383 U.S. 225 (1966)

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1.3.2.2—Continuous Accumulation of Seniority—Escalator Principal
1.3.2.10—Furlough or Leave of Absence Clause
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10.1—Supreme Court Case on Reemployment

Pasquale J. Accardi, Jacob Grubesick, Alfred J. Seevers, Anthony J. Vassallo, Abraham S. Hoffman, and Frank D. Pryor (the plaintiffs) were hired as tugboat firemen by the Pennsylvania Railroad in 1941 and 1942 and left their jobs to enter active duty during World War II. All were honorably discharged at the end of the war and reemployed by the railroad as tugboat firemen. In accordance with the "escalator principle" enunciated by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.,* each returning veteran received the seniority he had before he

[1]I invite the reader's attention to https://www.roa.org/page/LawCenter. You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

[2]BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

was called to the colors plus the additional seniority he would have received had he remained continuously employed.

In the 1950s, diesel tugboats replaced steam-powered tugboats, and the position of fireman (the man who shoveled coal onto the fire) became obsolete. The railroad sought to abolish the position of fireman, and a strike ensued in 1959. In 1960, the union and the railroad settled the strike. The settlement agreement provided for firemen with more than 20 years of seniority to remain employed if they wished. Firemen with less than 20 years of seniority, and those with more than 20 years of seniority who wished to leave, were given a severance payment as compensation for the loss of employment.

Under the agreement, a formula determined the amount of each employee's severance payment. The formula credited months of "compensated service" for the railroad. Mr. Accardi and the other five plaintiffs were not given credit for the time (approximately three years) when they were away from work for World War II active duty. As a result, each plaintiff's severance payment was $1,242.60 less than it would have been if the military service time had been credited. The parties stipulated that if it were held that these plaintiffs were entitled to that military service credit, the amount of the judgment for each should be $1,242.60.

The District Court held that the plaintiffs were entitled to have their military service time included in computing the amount of "compensated service" in the severance pay formula. The Court of Appeals reversed, holding that the severance pay did not come within the concepts of "seniority, status, and pay" protected by the reemployment statute. *Accardi v. Pennsylvania Railroad Co.,* 341 F.2d 72 (2d Cir. 1965). The Supreme Court granted *certiorari* and reversed the Court of Appeals.

Congress enacted the reemployment statute in 1940, as part of the Selective Training and Service Act (STSA). In its first case construing the STSA's reemployment chapter, the Supreme Court enunciated the "escalator principle" when it held, "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946).

Congress then amended the STSA to codify the escalator principle. At the time the Supreme Court decided *Accardi,* section 9(c)(2) of the STSA read as follows: "It is hereby declared to be the sense of Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." *Accardi,* 383 U.S. at 229.

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), a complete recodification of the 1940 reemployment statute. Section 4316(a) of

USERRA now codifies the "escalator principle" as follows: "A person who is reemployed under this chapter is entitled to the seniority and other rights

and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed." 38 U.S.C. 4316(a).

In *Accardi,* the Supreme Court stressed the breadth of the escalator principle, as follows: "The term 'seniority' is nowhere defined in the Act, but it derives its content from private employment practices and agreements. This does not mean, however, that employers and unions are empowered by the use of transparent labels and definitions to deprive a veteran of substantial rights guaranteed by the act. As we said in *Fishgold v. Sullivan Corp., supra,* 'No practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act.' At 285. The term 'seniority' is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 act. That intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country. In this case there can be no doubt that the amounts of the severance payments were based primarily on the employees' length of service with the railroad." Accardi, 383 U.S. at 229-30.

In addition to the "escalator principle" codified in section 9(c)(2) of the Act at the time the Supreme Court decided *Accardi,* there is another pertinent section. At the time the Court of Appeals and the Supreme Court decided *Accardi,* section 8(c) of the STSA provided as follows: "Any person who is restored to a position in accordance with the [reemployment statute]... shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces." *Accardi,* 341 F.2d at 74.

Section 4316(b)(1) of USERRA (the current reemployment statute) includes similar language: "Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be-- (A) deemed to be on furlough or leave of absence while performing such service; and (B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service." 38 U.S.C. 4316(b)(1). I address this "furlough or leave of absence clause" in detail in Law Reviews 41, 58, and 158.

In its decision, the Court of Appeals relied on the furlough or leave of absence clause in finding that Mr. Accardi and the other plaintiffs were not entitled to credit for their military service time in computing the amount of their severance payments. Other employees who had been away from work on furlough or leave of absence at some time during their careers as tugboat

firemen did not get credit for those months in their 1960 severance payments, so these plaintiffs were not entitled to severance payment credit for the months that they were away from work for military service, so the Court of Appeals held.

The Supreme Court rejected this argument, holding that benefits under the furlough or leave of absence clause are *in addition to* not instead of benefits under the escalator principle. Accardi, 338 U.S. at 231. This principle remains important today, in the post-Sept. 11, 2001, world. I have seen many examples of employers arguing, "We are not required to give Mr. Smith (the returning veteran) seniority and pension credit for the time that he was away for service because we do not give such credit to employees who are away from work for other kinds of leaves of absence." The *Accardi* precedent clearly shows that these employer arguments are without merit.

Finally, the Supreme Court forcefully rejected the railroad's argument that the veteran's seniority rights expire one year after reemployment: "Since the Court of Appeals held that the provisions of § 8 (b)(B) did not apply to separation allowances it found it unnecessary to decide an alternative ground which the railroad contended should cause reversal. That contention was that since the agreement between the railroad and the union was entered into more than one year after petitioners were restored to their employment, the act has no application to any rights created by the agreement. This argument rested on that part of § 8 (c) which provides that a veteran who is restored to employment 'shall not be discharged from such position without cause within one year after such restoration.' The District Court rejected the contention as having no merit. We agree with the District Court and believe this contention to be so wholly without merit that the case need not be remanded to the Court of Appeals for its decision on the point. In *Oakley v. Louisville & N. R. Co.,* 338 U.S. 278, 284, we said: 'The expiration of the year did not terminate the veteran's right to the seniority to which he was entitled by virtue of the act's treatment of him as though he had remained continuously in his civilian employment; nor did it open the door to discrimination against him, as a veteran. . . . His seniority status . . . continues beyond the first year of his reemployment . . . .' What we said there governs this case. The District Court was correct in rejecting this contention of the railroad." *Accardi,* 383 U.S. at 232-33.

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